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,	)	Lead Case No. 02-C-5893 (Consolidated)
Plaintiffs,	)	
v.	)	**Hon. Ronald A. Guzman** Magistrate Judge Nan R. Nolan
HOUSEHOLD INTERNATIONAL, INC., et al.,	)	
Defendants.	)	

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

Submitted by:

Stanley J. Parzen
Lucia Nale
Bradley J. Andreozzi
Susan Charles
MAYER, BROWN, ROWE & MAW LLP
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600 (Phone)
(312) 701-7711 (Facsimile)

Attorneys for Defendant Arthur Andersen LLP

Dated: March 7, 2005

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Defendant Arthur Andersen LLP ("Andersen") respectfully submits this memorandum in support of its motion, 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, 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, as time-barred, 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.

Introduction and Summary of Argument

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 which purports to assert Section 10(b) claims against Andersen, and it purports to state such claims against Andersen on behalf of the class of investors who allegedly purchased Household securities from October 27, 1997 to October 11, 2002. Cmplt. ¶ 1.

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, in part, on purchases that were completed more than three years before suit was filed. There is no dispute that such claims are time-barred under

[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.

the three-year statue 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).

Although the Sarbanes-Oxley statute[2] 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 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, as "persuasive," the reasoning of a detailed and scholarly decision issued by the Second Circuit in December 2004, that likewise held that enactment of Sarbanes-Oxley did not revive already time-barred claims. See *Foss*, 394 F.3d at 542, citing *In re Enterprise Mortgage Acceptance Co.*, 391 F.3d 401 (2d Cir. 2004). The Second Circuit opinion, in turn, was based on a reading of the language of Sarbanes-Oxley itself, the interplay of its various provisions, its legislative history, and consideration as well of decades of Supreme Court and appellate court precedent disfavoring the retroactive application of statutes of limitation to revive moribund claims.[3] Thus, as the Seventh Circuit has now ruled in a

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[2] 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).

[3] The Seventh and Second Circuit decisions follow a litany of decisions to the same effect in the district courts, both within and outside those circuits, including a recent decision from the Northern District of Illinois, *Zurich Capital Markets, Inc. v. Coglianese*, 2004 U.S. Dist. LEXIS 19432 (N.D. Ill. Sept. 23, 2004). See also *Zouras v. Hallman*, 2004 U.S. Dist. LEXIS 19684 (D.N.H. Sept. 30, 2004); *L-3 Communications Corp. v. Clevenger*, 2004 U.S. Dist. LEXIS 17845 (E.D. Pa. Aug. 31, 2004); *Lieberman* (cont'd)

controlling decision, and as the Second Circuit and nearly all the district courts have agreed, passage of Sarbanes-Oxley did not revive claims that were already time-barred under *Lampf's* three-year statute of repose.

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. The only remaining issue is determining which of plaintiffs' claims arose by July 30, 1999.

Under *Lampf*, Section 10(b) claims must be filed "within three years after [the] violation." See *Lampf*, 501 U.S. at 364. Nearly all courts within this District agree that the date of the "violation," for purposes of triggering the statute of repose, is when the defendant makes the alleged misrepresentation, not the date of plaintiff's purchase of securities. See, e.g., *Waldock v. M.J. Select Global, Ltd.*, 2004 WL 2278549, at * 4 (N.D. Ill. Oct. 7, 2004) (Judge St. Eve); *Wafra Leasing Corp. v. Prime Capital Corp.*, 192 F. Supp. 2d 852, 864 (N.D. Ill. 2002) (Judge Bucklo); *Stauffer v. Westmoreland Obstetric and Gynecologic Associates,* 2001 WL 585510, at *5 (N.D. Ill. May 25, 2001) (Judge Moran); *Antell v. Arthur Andersen LLP*, 1998 WL 245878, at * 5-6 (N.D. Ill. May 4, 1998) (Judge Andersen). The only statements by Andersen alleged in the Complaint to violate § 10(b) are Andersen's audit opinions concerning Household's year-end financial statements. See Cmplt. ¶¶ 173-75. The Complaint alleges that Andersen's audit opinion concerning Household's 1997 year-end financial statements was issued

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(... cont'd)

v. Cambridge Partners LLC, 2004 U.S. Dist. LEXIS 11553 (E.D. Pa. June 21, 2004); *In re ADC Telecommunications, Inc. Sec. Litig.*, 331 F. Supp. 2d 799 (D. Minn. 2004); *In re Worldcom, Inc. Sec. Litig.*, 2004 U.S. Dist. 11696 (S.D.N.Y. June 29, 2004); *Newby v. Enron Corp.*, 2004 U.S. Dist. LEXIS 8158 (S.D. Tex. Feb. 25, 2004); *Glaser v. Enzo Biochem, Inc.*, 303 F. Supp. 2d 724 (E.D. Va. 2003); *In re Heritage Bond Litig.*, 289 F. Supp. 2d 1132 (C.D. Cal. 2003). Copies of all unreported cases cited in support of Andersen's motion are included in Appendix A.

on January 21, 1998, and Andersen's audit opinion concerning Household's 1998 year-end financial statements was issued on January 20, 1999. Cmplt. ¶¶ 175, 202, 227. Any Section 10(b) claims based on those audit opinions were therefore 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.

Where, as here, the allegations of the complaint show on their face that a claim is time-barred, dismissal under Fed. R. Civ. P. 12(b)(6) is the appropriate remedy. See *Tregenza v. Great Am. Communications Co.*, 12 F.3d 717, 718-19 (7th Cir. 1993). Plaintiffs' time-barred Section 10(b) claims—including all claims based on Andersen's 1997 and 1998 audit opinions—should be dismissed with prejudice. In the alternative, if the Court is disinclined to consider a second motion to dismiss,[4] the Court can and should treat this motion as a motion for judgment

[4] Because Andersen's motion 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 second 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) ("[A] court might properly entertain a second motion to dismiss if convinced that it is not interposed for delay and that the disposition of the case on the merits can be expedited by doing so."); *Donnelli v. Peters Securities Co.*, 2002 U.S. Dist. LEXIS 16305, at * 11 (N. D. Ill. Aug. 29, 2002) (same); *Strandell v. Jackson County, Illinois*, 648 F. Supp. 126, 129 (S.D. Ill. 1986) (same). Consideration of Andersen's motion now will not delay proceedings, but instead will narrow the issues before the Court, streamline discovery, and increase the chances of settlement.

on the pleadings, pursuant to Fed. R. Civ. P. 12(c),[5] and grant judgment to Andersen on such time-barred claims. Either way, granting Andersen's motion now will streamline this case in discovery, shorten any trial, and increase the odds of a settlement. There is simply no point in expending valuable resources on matters which are patently time-barred under the law of this Circuit.

Argument

I. UNDER *LAMPF*, MANY OF PLAINTIFFS' SECTION 10(b) CLAIMS ARE TIME-BARRED, AND SARBANES-OXLEY'S PASSAGE DID NOT REVIVE THOSE EXPIRED CLAIMS.

The Supreme Court held in *Lampf* that Section 10(b) claims must be brought within three years of the alleged violation, or be forever barred. See *Lampf*, 501 U.S. at 364 ("[L]itigation instituted pursuant to § 10(b) and Rule 10b-5 * * * must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation."). The Court emphasized that "[t]he 3-year limit is a period of repose" that is absolute and not subject to tolling. *Id.* at 363.

There is no dispute that plaintiffs and the class delayed more than three years before asserting many of the Section 10(b) claims alleged in the Complaint. See Cmplt. ¶ 1 (asserting claims for purchases of Household securities dating back to October 23, 1997); 3/19/04 Mem. Op. & Order, p. 27 (Complaint deemed to have been filed on August 19, 2002). Such claims are

[5] There is no doubt that Andersen's argument, which was preserved in its Answer and Affirmative Defenses, filed July 2, 2004 (see Twenty-First Defense, p. 253) could be considered in a motion for judgment on the pleadings. See Fed. R. Civ. P. 12(h)(2); 12(c); *Schy v. Susquehanna Corp.*, 419 F.2d 1112, 1115 (7th Cir. 1970) ("[a] motion to dismiss made after the filing of an answer serves the same function as a motion for judgment on the pleadings and may be regarded as one."); *Merk v. Jewel Food Stores Division, Jewel Companies, Inc.*, 702 F. Supp. 1391, 1396 (N.D. Ill. 1988) ("we may view Jewel's [second] motion [to dismiss] as a motion for judgment on the pleadings and accordingly assess its merits.").

time-barred—and are not revived by retroactive application of Sarbanes-Oxley's enlarged statute of limitations.

A. Sarbanes-Oxley's New Statute of Limitations

On July 30, 2002, Congress passed Sarbanes-Oxley. Section 804(l) amends 28 U.S.C. § 1658(b) to provide:

> (a) * * * [A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought no later than the earlier of –
>
> (1) 2 years after the discovery of the facts constituting the violation; or
>
> (2) 5 years after such violation.
>
> (b) EFFECTIVE DATE. – The limitations period provided by section 1658(b) of title 28, United States Code, as added by this section, shall apply to all proceedings addressed by this section that are commenced on or after the date of enactment of this Act.
>
> (c) NO CREATION OF ACTIONS. – Nothing in this section shall create a new, private right of action.

As this Court has already held, this suit is deemed to have been filed on August 19, 2002, when the earliest of the now-consolidated suits was filed. 3/19/04 Mem. Op. & Order, p. 27. Thus, this suit was commenced *after* the passage of Sarbanes-Oxley, and under § 804(b) of the statute, Sarbanes-Oxley's new statute of limitations applies to the securities fraud claims asserted in the Complaint—at least to the extent that those claims had not already been extinguished by operation of the old statute of repose under *Lampf*. The precise issue raised by this motion is whether Sarbanes-Oxley operates retroactively to revive claims that were already time-barred on July 30, 2002, when Sarbanes-Oxley was passed. As the Seventh Circuit recently concluded, it does not.

B. The Controlling Law: Sarbanes-Oxley Does Not Revive Moribund Claims

In *Foss*, the Seventh Circuit considered a securities suit that was filed more than three years after the alleged violation. The Court noted that the suit was "doomed" unless Sarbanes-Oxley retroactively revives expired claims. 394 F.3d at 542. In an opinion written by Judge Easterbrook, the Seventh Circuit concluded that it does not. The Seventh Circuit adopted the Second Circuit's analysis in *Enterprise Mortgage Acceptance Co.*, stating that "[w]e find it persuasive and have nothing to add to the Second Circuit's explanation." *Ibid.*, citing *Enterprise Mortgage Acceptance Co.*, 391 F.3d 401 (2d Cir. 2004).

The Second Circuit's conclusion (that Sarbanes-Oxley does not revive claims that were already time-barred prior to the Act's passage) rests on the strong presumption of American jurisprudence against retroactive application of legislation to take away vested rights acquired under existing laws or to attach new legal consequences to events completed before the enactment. As the Supreme Court said in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988), "[r]etroactivity is not favored in the law." Indeed, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994).[6]

Within constitutional limits, Congress has the power to enact laws with retroactive effect. "A statute may not be applied retroactively, however, absent a clear indication from Congress that it intended such a result." *St. Cyr*, 533 U.S. at 316. Moreover, "[t]he standard for finding

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6 "Retroactive statutes raise special concerns," *INS v. St. Cyr*, 533 U.S. 289, 315 (2001), because "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf*, 511 U.S. at 266. Accordingly, "congressional enactments * * * will not be construed to have retroactive effect unless their language *requires* this result." *Bowen*, 488 U.S. at 208 (emphasis added).

such unambiguous direction is a demanding one." *Ibid.* "Cases where th[e Supreme] Court has found truly 'retroactive' effect adequately authorized by a statute have involved statutory language that was *so clear that it could sustain only one interpretation.*" *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997) (emphasis added).

In recognition of the special concerns raised by retroactive application of law to disturb settled expectations, the Supreme Court in *Landgraf*, 511 U.S. at 280, set out a two-part test for determining whether a statute applies retroactively:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

The first part of the *Landgraf* test is to look at the plain language of the statute to see whether it contains a "express command" for retroactivity. *Ibid.* As mentioned above, the statutory language must be "so clear that it could sustain only one interpretation." *Lindh*, 521 U.S. at 328 n.4.

In *Foss*, the Seventh Circuit adopted the Second Circuit's conclusion that the statutory language of Sarbanes-Oxley fails this stringent threshold test. See *In re Enterprise Mortgage Acceptance Co.*, 391 F.3d at 406 ("the language of Section 804 does not unambiguously revive previously stale securities fraud claims"). Sarbanes-Oxley "contains none of the unambiguous language that the Supreme Court has asserted would amount to an express retroactivity command." *Id.* at * 407. The statute states that the revised limitations period "shall apply to *all proceedings* * * * that are commenced on or after the date of enactment of this Act." § 804(b)

(emphasis added). That language *could* mean that the new limitations period also applies to *all claims* in any case filed after the effective date of the Act, regardless of whether they were already time-barred, but it need not. Moreover, the argument that Sarbanes-Oxley unambiguously revived previously time-barred claims is undercut by Section 804(c) of the Act, which states that "[n]othing in this section shall create a new, private right of action." With this language, Congress *might* have been merely indicating that Section 804 was only lengthening the limitations period and not expanding the existing types of securities claims, but, as the Second Circuit noted, "the issue is not free from doubt." 391 F.3d at 407. After all, "[w]here a plaintiff is empowered by a new statute to bring a cause of action that previously had no basis in law, a new cause of action has, in some sense of the word, been created." *Ibid.* Thus, Section 804(c) could easily be read to confirm that the expanded limitations period should *not* be applied to revive already time-barred claims. As the Second Circuit concluded, in an opinion adopted by the Seventh Circuit in *Foss*, the "tension" between Sections 804(b) and 804(c) illustrates a fundamental "lack of clarity" about whether Congress intended to revive moribund claims. *Enterprise Mortgage Acceptance Co.*, 391 F.3d at 407.

Moreover, "[i]f Congress had intended to revive such claims, it could have used unambiguous language to do so." *ADC Telecommunications, Inc. Sec. Litig.*, 331 F. Supp. 2d at 803. After all, Congress has done so before. Compare, Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, 12 U.S.C. § 1821(d)(14)(C)(i) (1994) (amending the Act to provide that "the Corporation may bring an action * * * on such claim without regard to the expiration of the statute of limitations under State law"); Higher Education Technical Amendments of 1991, 20 U.S.C. § 1091a(a)(2) (eliminating statute of limitations with regard to recovery on defaulted student loans by stating "no limitation shall terminate the period within

which suit may be filed.").[7] Because Sarbanes-Oxley lacks statutory language commanding retroactivity that is "so clear that it could sustain only one interpretation," *Lindh*, 521 U.S. at 328 n.4, the statute fails to pass the first part of the *Landgraf* test.

Moreover, the ambiguity in the statutory language is not cured by resort to Sarbanes-Oxley's legislative history. The Seventh Circuit in *Foss* agreed with the Second Circuit's conclusion that "the legislative history of Section 804 does not clearly indicate that Congress intended that Section 804 apply retroactively to revive expired securities fraud claims." *Enterprise Mortgage Acceptance Co.*, 391 F.3d at 408. Indeed, the legislative history "does not even seem to contemplate" the retroactive application of Sarbanes-Oxley's expanded statute of limitations to revive expired claims. *Id.* at 408.

Because there is no clear evidence that Congress intended for Sarbanes-Oxley's expanded statute of limitations to apply retroactively to revive time-barred claims, one must move to the second part of the *Landgraf* test, and determine whether retroactive application of Section 804 would implicate the concerns that motivate the presumption against retroactivity. The answer here is clear. As the Second Circuit held, and the Seventh Circuit agreed, "the resurrection of previously time-barred claims has an impermissible retroactive effect." *Enterprise Mortgage Acceptance Co.*, 391 F.3d at 410.

> Extending the statute of limitations retroactively increases a defendant's liability for past conduct, by increasing the period of time during which a defendant can be sued. This effect is particularly prevalent in the context of claims that have already expired. Resurrection of such claims puts defendants back at risk at a

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[7] Indeed, the fact that a statute of repose is at issue here, rather than a mere statute of limitations, "makes the need for Congressional clarity even greater." *ADC Telecommunications, Inc. Sec. Litig.*, 331 F. Supp. 2d at 803. As the Seventh Circuit has noted, "[a] statute of repose is essentially different from a statute of limitations, in that a limitations statute is procedural, giving a time limit for bringing a cause of action, with the time beginning when the action has ripened or accrued; while a repose statute is a substantive statute, extinguishing any right of bringing the cause of action, regardless of whether it has accrued." *Kaplan v. Shure Bros., Inc.*, 153 F.3d 413, 422 (7th Cir. 1998) (internal citation omitted).

> point when defendants reasonably believe they are immune from litigation, stripping them of a complete affirmative defense they previously possessed and may have reasonably relied upon. * * * Such characteristics fall within the class of 'retroactive effects' against which the *Landgraf* Court cautioned * * *.

Id. at 410 (quotations and citations omitted). Thus, as the Second Circuit held, and as the Seventh Circuit agreed in *Foss*, because neither the statutory language of Section 804 nor its legislative history clearly demonstrate that Congress intended such retroactive application, Section 804 may not be applied retroactively to revive plaintiffs' time-barred claims.

II. ALL CLAIMS BASED ON ANY ALLEGED "VIOLATION" PRIOR TO JULY 30, 1999 SHOULD BE DISMISSED AS TIME-BARRED.

We demonstrated above that Sarbanes-Oxley did not revive plaintiffs' claims that were already time-barred, under *Lampf*'s three-year statute of repose, when Sarbanes-Oxley was enacted on July 30, 2002. It remains to determine which claims were time-barred under the *Lampf* analysis as of July 30, 2002.

As mentioned earlier, *Lampf* adopted Section 9(e) of the Exchange Act, 15 U.S.C. § 78i(e), as the statute of limitations for Section 10(b) claims.[8] See *Lampf*, 501 U.S. at 364. Thus, under *Lampf*, Section 10(b) claims must be filed "within three years after [the] violation." *Ibid.* The Supreme Court in *Lampf* seemed of the view that "the violation" occurred when the alleged misrepresentation was made, rather than when the plaintiff purchased securities in reliance on the alleged misrepresentation. *Ibid.* ("As there is no dispute that the earliest of plaintiff-respondents' complaints was filed more than three years *after petitioner's alleged misrepresentations*, plaintiff-respondents' claims were untimely.") (emphasis added). And, indeed, almost all courts within this District agree that the date of the "violation," for purposes of

[8] Section 9(e) provides that "No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years *after such violation*." 15 U.S.C. § 78i(e) (emphasis added).

triggering the statute of repose, is when the defendant makes the alleged misrepresentation, not the date of plaintiff's purchase of securities. See, e.g., *Waldock v. M.J. Select Global, Ltd.*, 2004 WL 2278549, at * 4 (N.D. Ill. Oct. 7, 2004) ("This Court agrees with the reasoning of those cases holding that the statute of repose is triggered for a Section 10(b) and Rule 10b-5 violation when the defendant makes the misrepresentation or omission in connection with the sale or purchase of a security to a particular plaintiff."); *Wafra Leasing Corp. v. Prime Capital Corp.*, 192 F. Supp. 2d 852, 864 (N.D. Ill. 2002) ("[T]he 'violation' for the purposes of the Rule 10b-5 statute of repose occurs when the defendant makes a misrepresentation in connection with the sale or purchase of securities; the sale itself need not have occurred to start the running of the repose period."); *Stauffer v. Westmoreland Obstetric and Gynecologic Associates*, 2001 WL 585510, at *5 (N.D. Ill. May 25, 2001) (holding that claims based on misrepresentations made outside of the statute of repose are time-barred); *Antell v. Arthur Andersen LLP*, 1998 WL 245878, at * 6 (N.D. Ill. May 4, 1998) ("[T]he three-year repose period for Section 10(b) and Rule 10b-5 claims begins to run when a defendant makes an affirmative misrepresentation"). Nevertheless, in contrast to the four recent decisions in this District cited above, there is one twelve year-old opinion holding that the "violation" occurs when the plaintiff purchases the stock, rather than when the alleged misrepresentation is made. See *Otto v. Variable Annuity Life Ins. Co.*, 816 F. Supp. 458, 461 n.3 (N.D. Ill. 1992).

Although the Seventh Circuit has not decided the issue, the series of recent opinions cited above clearly shows that the Northern District of Illinois has moved to the conclusion that a Section 10(b) violation occurs on the date of the alleged misrepresentation. Indeed, in *Wafra*, Judge Bucklo changed position and renounced her earlier ruling in *Kleban v. S.Y.S. Restaurant*

Management, Inc., 912 F. Supp. 361 (N.D. Ill. 1995) that a violation may occur at the time of plaintiff's purchase of the security:

> I reconsider my opinion in *Kleban* and hold that the 'violation' for the purposes of the Rule 10b-5 statute of repose occurs when the defendant makes a misrepresentation in connection with the sale or purchase of securities; the sale itself need not have occurred to start the running of the repose period.

Wafra Leasing Corp., 192 F.Supp.2d at 864 (citations omitted).

As Judge Bucklo recognized, the better-reasoned view, and the nearly uniform view in this District, is that the period of repose starts to run from the date of the alleged misrepresentation, rather than the date of plaintiff's stock purchase. As the *Wafra* court concluded, treating the date of the alleged misrepresentation as the triggering event for the three-year statute of repose, is consistent with the traditional rule that "it is the offending act itself that starts the repose clock," regardless of whether the plaintiff has yet suffered any injury. *Wafra*, 192 F. Supp. 2d at 864, citing *Hinkle v. Henderson*, 85 F.3d 298, 301 (7th Cir. 1996) ("[A] period of limitation bars an action if the plaintiff does not file suit within a set period of time from the date on which the cause of action accrued. In contrast, a period of repose bars a suit a fixed number of years *after an action by the defendant* * * * even if this period ends before the plaintiff suffers any injury.") (emphasis added) and *Kaplan v. Shure Bros, Inc.*, 153 F.3d 413, 422 (7th Cir. 1998) ("As a general proposition * * * the time the action accrued is immaterial to the application of a statute of repose.").[9]

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[9] In addition, the plain language of Section 10(b) simply cannot be read to establish a "violation" based on the plaintiffs' purchase of securities. Indeed, by its terms, Section 10(b) only prohibits certain actions taken "in connection with" the purchase or sale of securities – it plainly does not prohibit the "purchase" of any securities. In contrast, where Congress intended to create a securities violation based on the purchase of securities, it clearly and expressly did so. For example, Section 13 of the 1933 Act provides that "it shall be unlawful * * * to purchase any equity security" where the purchase would violate applicable rules and regulations. See 15 U.S.C. § 78m.

The only statements by Andersen alleged in the Complaint to violate § 10(b) are Andersen's audit opinions concerning Household's year-end financial statements. See Cmplt. ¶¶ 173-75. Andersen's audit opinion for each fiscal year was issued in January of the following year. Thus, as the Complaint alleges, Andersen's audit opinion concerning Household's 1997 year-end financial statements was issued on January 21, 1998, and Andersen's audit opinion concerning Household's 1998 year-end financial statements was issued on January 20, 1999. Cmplt. ¶¶ 175, 202, 227. Any Section 10(b) claims based on those audit opinions were therefore 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). As we have shown above, those time-barred claims were not revived when Sarbanes-Oxley became law. Thus, all claims based on Andersen's 1997 and 1998 audit opinions are time-barred. See *Wafra*, 192 F. Supp. 2d at 864-65 (determining "violation" to occur for purposes of statute of limitations on the date KPMG issued its audit opinion, and dismissing as time-barred any claims brought more than three years after that date).

Given that Andersen is not alleged to have made another statement 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), there are no timely Section 10(b) claims against Andersen based on any representation made prior to March 28, 2000.

Even if this Court were to conclude (against the weight of authority) that the "violation" occurs at the time the stock is purchased, many of the Section 10(b) claims alleged in Count I

would still be time-barred.[10] Any claims based on purchases more than three years before Sarbanes-Oxley was enacted were already time-barred under *Lampf*, and not revived, when Sarbanes-Oxley became effective on July 30, 2002. Thus, at a minimum, any claims based on purchases of Household securities before July 30, 1999 are time-barred.

Named plaintiffs The Archdiocese of Milwaukee Supporting Fund, Inc. and The West Virginia Laborers' Trust Fund have both attempted to assert claims based on securities transactions that occurred prior to July 30, 1999. See Cmplt ¶¶ 36(d), 36(e) and incorporated Certifications. Andersen is entitled to dismissal of those stale claims, along with the time-barred Section 10(b) claims of all class members.

Conclusion

For all of the foregoing reasons, the Court should grant Andersen's motion to dismiss, as time-barred, all Section 10(b) claims of the class that are based on alleged representations made by Andersen prior to March 28, 2000, or, at a minimum, all such claims that are based on purchases of Household securities before July 30, 1999. In the alternative, the Court should grant Andersen judgment on the pleadings on such time-barred claims.

Dated: March 7, 2005

Respectfully Submitted,

ARTHUR ANDERSEN LLP

By: Stanley Parzen sc
One of the Attorneys for Arthur Andersen LLP

[10] At a minimum, the "violation" must be complete by the time plaintiff purchased the stock with alleged reliance on the purported misrepresentation. See *Northwestern Human Services, Inc. v. Panaccio*, 2004 U.S. Dist LEXIS 19147, at * 66 (E.D. Pa. Sept. 24, 2004) (holding that the "violation" occurs at the time of the alleged misrepresentation, and noting that "[a]s a matter of simple logic, any misrepresentation or omission must have occurred on or before the date of sale.").