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,

Plaintiff,

v.

HOUSEHOLD INTERNATIONAL, INC., et al.

Defendants.

Lead Case No. 02-C-5893
(Consolidated)

CLASS ACTION

Judge Ronald A. Guzman
Magistrate Judge Nan R. Nolan

NOTICE OF FILING

PLEASE TAKE NOTICE that, on September 16, 2005, we filed with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, a Reply Memorandum of Law in Support of the Household Defendants' Motion Pursuant to the Seventh Circuit's Recent Decision in *Foss v. Bear, Stearns Co.* to Dismiss the Complaint in Part, a copy of which is attached hereto.

Respectfully submitted,

By: _____

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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-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

REPLY MEMORANDUM OF LAW IN SUPPORT OF THE HOUSEHOLD DEFENDANTS' MOTION PURSUANT TO THE SEVENTH CIRCUIT'S RECENT DECISION IN *FOSS* v. *BEAR, STEARNS CO.* TO DISMISS THE COMPLAINT IN PART

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PRELIMINARY STATEMENT

Adopting the position proffered by Plaintiffs in response to the Household Defendants' motion to dismiss claims based on alleged violations that expired prior to the implementation of a longer limitations period under the Sarbanes-Oxley Act ("Sarbanes-Oxley")[1] would abrogate the main holding of the Court of Appeals in *Foss* v. *Bear, Stearns Co.*, 394 F.3d 540 (7th Cir. 2005). *Foss* unambiguously holds that the enactment of Sarbanes-Oxley's extended limitations period for securities fraud violations did not revive claims that were time-barred as of July 30, 2002, the date Sarbanes-Oxley went into effect. Under *Foss*, a claim that had expired on July 30, 2002 under the old limitations regime remained expired on July 31. Notice and accrual, the twin pillars of Plaintiffs' flawed response motion, both have important implications for statutes of *limitations*, a period which lasted one year for 10(b) claims prior to Sarbanes-Oxley and two years after Sarbanes-Oxley. Neither concept, however, is relevant to the statute of *repose* at issue in the current motion. Securities fraud claims are subject to a statute of repose that acts as an outer limit for the date upon which suit can be brought. Prior to Sarbanes-Oxley, that period of repose lasted three years[2] and began to run from the date of the alleged violation, as Plaintiffs admit (Pls.' Mem. at 7). Applying that period of repose to the facts of this case in light of *Foss*, any claim based on an alleged violation that occurred prior to July 30, 1999 expired before July 30, 2002 — and remains expired today.

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1 Public Company Accounting Reform and Investor Protection Act of 2002 ("Sarbanes-Oxley"), Pub. L. No. 107-204, § 804, 116 State 745, 801 (2002), codified in part at 28 U.S.C. § 1658(b).

2 Under Sarbanes-Oxley, the repose period has been extended to five years. 28 U.S.C. § 1658(b).

ARGUMENT

PLAINTIFFS' RESPONSE IGNORES THE LAW OF THE SEVENTH CIRCUIT AND EVINCES A FUNDAMENTAL MISUNDERSTANDING ABOUT PERIODS OF REPOSE

Plaintiffs argue that *Foss*, along with *In re Enterprise Mortgage Acceptance Co.*, 391 F.3d 401 (2d Cir. 2004), and the litany of other cases holding that Sarbanes-Oxley does not revive stale claims,[3] is inapplicable because Plaintiffs' claims against the Household Defendants had not "arisen and expired" prior to Sarbanes-Oxley's effective date of July 30, 2002. Plaintiffs are mistaken — the claims for which the Defendants seek dismissal had in fact both arisen and expired prior to July 30, 2002. Under the regime established by the Supreme Court in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 364 (1991), and in effect until replaced by Congress in Sarbanes-Oxley, claims brought under Section 10(b) were subject to a one-year statute of limitations and a *three-year period of repose.* The longer three-year period began to run from the date of the violation, a date that depends neither on the accrual of the claim nor on whether the prospective plaintiffs were on notice of the claim. Thus, claims based on alleged violations occurring prior to July 30, 1999 (*i.e.*, during the reign of *Lampf*) expired on July 30, 2002. Under *Foss*, such claims remain extinguished.

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[3] *See, e.g., In re ADC Telecommunications, Inc. Securities Litig.*, 409 F.3d 974, 978 (8th Cir. June 06, 2005). *Glaser* v. *Enzo Biochem, Inc.*, No. 03-2188, 2005 WL 647745, at *4 (4th Cir. Mar. 21, 2005) (unpublished); *Lieberman* v. *Cambridge Partners, L.L.C.*, No.Civ.A. 03-2317, 2004 WL 1396750, at *3 n.12 (E.D. Pa. June 21, 2004); *In re Heritage Bond Litig.*, 289 F.Supp. 2d 1132 (C.D. Cal. 2003).

I. IN THE SEVENTH CIRCUIT, SARBANES-OXLEY DOES NOT REVIVE CLAIMS THAT WERE PREVIOUSLY TIME-BARRED

As the Defendants set forth in their opening brief on this motion, the Seventh Circuit in *Foss* held that Sarbanes-Oxley's statute of limitations did not revive claims that were time-barred as of July 30, 2002. *See Foss*, 394 F.3d at 542 (citing *In re Enterprise Mortgage Acceptance Co.*, 391 F.3d 401 (2d Cir. 2004)). Defendants therefore need only identify those claims which were time-barred as of July 30, 2002 to warrant dismissal of those claims. Plaintiffs' labored discussion of notice and accrual ignores this fundamental tenet of Seventh Circuit law, arguing instead that Defendants must prove when Plaintiffs' claims accrued and when Plaintiffs were on notice of those claims. *Foss* itself belies this argument. In order for the *Foss* plaintiff to save his claim, the Seventh Circuit wrote that he would have had to show that "some of the improper transactions occurred within three years of the suit, or at least within three years" before Sarbanes-Oxley went into effect. *Foss*, 394 F.3d at 542. Anything else would require retroactive application of Sarbanes-Oxley's extended limitations period — which the Court of Appeals declined to extend. *Id.* Defendants' motion to dismiss comes squarely within this analysis — all claims based on alleged violations occurring more than three years before July 30, 2002 expired no later than July 30, 2002 absent retroactive application of Sarbanes-Oxley. Because such retroactive implementation is prohibited by *Foss*, these claims must be dismissed.

II. THE PRE-SARBANES-OXLEY LIMITATIONS PERIOD FOR A SECTION 10(b) CLAIM INCLUDED A THREE-YEAR STATUTE OF REPOSE

Prior to Sarbanes-Oxley, the federal securities laws included "not only a one-year statute of limitations, but also a three-year statute of repose." *Whitlock Corp.* v. *Deloitte & Touche, L.L.P.*, 233 F.3d 1063, 1065 (7th Cir. 2000) (citing *Lampf*, 501 U.S. 350). "The

one-year period, by its terms, begins after discovery of the facts constituting the violation." *Lampf*, 501 U.S. at 363. The three-year period, on the other hand, "imposes an outside limit" impervious to tolling provisions. *Id.* (internal citations omitted). The "purpose of the 3-year limitation is clearly to serve as a cutoff" to any claims not brought by the end of the period. *Lampf*, 501 U.S. at 363.

A. Statutes of Repose Provide an Outer Limit for a Claim and Begin to Run When a Violation Occurs

While Plaintiffs go to great lengths to argue that their claims had not yet accrued on July 30, 2002 because they lacked inquiry notice, such knowledge of the potential claim *is irrelevant to the running and expiring of the repose period.* "[A] statute of repose [] limits the time within which an action may be brought and is not related to the accrual of any cause of action." *Hinkle* v. *Henderson*, 85 F.3d 298, 301 (7th Cir. 1996) (internal citations omitted). The "injury need not have *occurred*, much less have been discovered for the period to run." *Id.* (emphasis added). *See also Beard* v. *J.I. Case Co.*, 823 F.2d 1095, 1096 n.1 (7th Cir. 1987) ("[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"); *Dohra* v. *Alcon (Puerto Rico), Inc.*, No. 92 C 2624, 1994 WL 71449, at *2 (N.D.Ill. Mar 03, 1994) ("[a] period of repose is intended to terminate the possibility of liability after a defined period of time, regardless of a potential plaintiff's lack of knowledge")[4]. *Accord Albillo-De Leon* v. *Gonzalez*, 410 F.3d 1090, 1097 n.5 (9th Cir. 2005) (adopting the concept from 51 Am.Jur.2d *Limitation of Actions* § 12 (2004) that "[a] statute of repose 'extinguishes a cause of action after a

[4] Unreported cases not previously cited in either the Defendants' opening brief or the Plaintiffs' Response are attached in an "Appendix of Unpublished Authorities."

fixed period of time . . . regardless of when the cause of action accrued'"); *P. Stolz Family Partnership, L.P.* v. *Daum*, 355 F.3d 92, 102-03 (2d Cir. 2004) ("a statute of repose begins to run without interruption . . . even if equitable tolling considerations would warrant tolling or even if the plaintiff has not yet, or could not yet have, discovered that she has a cause of action").

Lampf itself makes clear that the statute of repose for a 10(b) claim is a fixed, statutory cutoff date independent of any variable such as the plaintiff's awareness of the violation. *Lampf*, 501 U.S. at 363. As the Seventh Circuit has long recognized of the repose period for securities violations, "the three year rule was to be absolute." *Ferguson* v. *Roberts*, 11 F.3d 696, 705 (7th Cir. 1993) (internal quotation omitted).

Thus, the Plaintiffs are correct that the Household Defendants "have not even attempted to argue that plaintiffs were on inquiry notice of defendants' [alleged] fraud prior to July 30, 2002." (Pls.' Mem. at 4) This is because inquiry notice is irrelevant to determining whether claims had expired as of that date under the existing statute of repose. The triggering event for the period of repose is the occurrence of the violation. *Lampf*, 501 U.S. at 364.[5] Plaintiffs of course allege that the Household Defendants' violations of the securities laws began in October 1997. *See, e.g.*, Amended Complaint ¶¶ 192-233. Thus, all claims of viola-

[5] As Defendants acknowledged in their opening papers, a dispute exists among Seventh Circuit district courts concerning what constitutes a violation, with most courts holding that the violation occurs when the misrepresentation is made and a small minority of courts holding that the violation occurs upon the sale of the security. Defendants' Mem. at 6-7. This dispute does not alter the fact that the repose period begins to run from the violation, however defined. *See Lampf*, 501 U.S. at 364. As Defendants made clear, adopting the view most favorable to Plaintiffs — *i.e.*, that a violation has occurred upon the sale of the security rather than upon the defendants' alleged misrepresentation — still mandates dismissal of all claims based on the sales of securities prior to July 30, 1999.

tions occurring between October 1997 and July 30, 1999 are stale claims that are not revived by Sarbanes-Oxley under the ruling in *Foss*.

B. Plaintiffs Admit That Statutes of Repose Begin to Run From the Date of the Defendants' Alleged Violation

Plaintiffs correctly state in their response that "the date of defendants' violation is relevant to determine when the effective statute of repose begins to run." Plaintiffs' Mem. at 7. As the Supreme Court stated in *Lampf*, and as Defendants have articulated both above and in their opening brief, the relevant concept under which Defendants seek partial dismissal is precisely that --- a statute of repose. *Lampf*, 501 U.S. at 363 ("The three-year limit is a period of repose . . .").

III. PLAINTIFFS' FOCUS ON NOTICE AND ACCRUAL IS INCORRECT AS A MATTER OF LAW

A. Notice and Accrual Are Irrelevant to Statutes of Repose

Plaintiffs argue that, as of July 30, 2002, they were not on notice of the claims for which dismissal is sought and that those claims had not yet accrued. But this argument is without force, as neither accrual nor notice is relevant to statutes of repose. "A period of limitations 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 accrues. In contrast, a period of repose bars a suit a fixed number of years after an action by the defendants, even if this period ends before the plaintiff suffers injury." *Wafra Leasing Corp.* v. *Prime Capital Corp.*, 192 F.Supp. 2d 852, 864 (N.D.Ill. 2002) (internal citations omitted) (holding that the violation that triggers the running of the statute of repose is the defendant's alleged misrepresentation). *See also Kaplan* v. *Shure Bros., Inc.*, 153 F.3d 413, 422 (7th Cir. 1998) (applying Illinois law) ("[a]s a general proposition . . . the time the action accrued is immaterial to the application of a statute of repose").

Thus, "a 'violation' under Rule 10b-5 is distinct from a 'cause of action' under that rule." *Wafra Leasing*, 192 F.Supp. 2d at 864. As a result, the "statute of repose for a federal securities claim may expire before the plaintiff discovers the fraud." *Stone* v. *Doerge*, No. 02 C 1450, 2004 WL 3019173, at *3 (N.D.Ill. Dec. 28, 2004) (internal quotation omitted). Once the violation occurs, the repose period begins to run without regard to notice or accrual.

Every Seventh Circuit case Plaintiffs cite in their Response to support their attenuated inquiry notice/accrual argument involves interpreting the one-year statute of limitations rather than the three-year statute of repose. *See Fujisawa Pharmaceutical Co., Ltd.* v. *Kapoor*, 115 F.3d 1332, 1334, 1337 (7th Cir. 1997) (analyzing the date plaintiffs were on inquiry notice for the one-year statute of limitations); *Law* v. *Medco Research, Inc.*, 113 F.3d 781, 782-86 (7th Cir. 1997) (investigating inquiry notice for purposes of analyzing the one-year statute of limitations); *Lennon* v. *Christoph*, No. 94 C 6152, 1996 U.S. Dist. LEXIS 9943, at *27 (N.D.Ill. July 12, 1996) (stating that plaintiffs "must file their complaint within one year from the time that their cause of action accrues"), *accepted in part, rejected in part*, 1997 U.S. Dist. LEXIS 1231 (N.D. Ill. Feb. 4, 1997). [6] All this learning is simply irrelevant because such an analysis does not impact the applicability of the statute of repose, as *Medco*

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[6] It is precisely for this reason that Plaintiffs' reliance on the Eighth Circuit's language in *ADC Telecommunications* is also flawed. Plaintiffs attempt to use the language in *ADC Telecommunications* to demonstrate the importance of accrual and notice to the revival issue. Plaintiffs' Mem. at 5-6. In so doing, Plaintiffs once again reveal their failure to grasp the difference between a period of repose and a statute of limitations. The plaintiffs in *ADC Telecommunications* tried to use Sarbanes-Oxley to revive claims under the one-year statute of limitations rather than the three year period of repose. *ADC Telecommunications*, 409 F.3d at 976. The common stock purchases at issue in *ADC Telecommunications* took place between November of 2000 and March of 2001, clearly within the repose period. *Id.* Plaintiffs' claims were nevertheless barred under *Lampf* because the one-year statute of limitations had expired prior to Sarbanes-Oxley's enactment on July 30, 2002. *Id.* at 978.

Research recognized: "the three-year statute of repose gives defendants a definite limit beyond which they needn't fear being sued." *Medco Research*, 113 F.3d at 786.[7]

B. Plaintiffs' Reliance on *Tello* Is Also Misplaced

Plaintiffs' almost exclusive reliance on *Tello* v. *Dean Witter Reynolds, Inc.*, 410 F.3d 1275 (11th Cir. 2005), is misplaced. Because *Tello* was decided by the Eleventh Circuit, it is not binding on this Court. Just as importantly, the *Tello* court's explicit refusal to reach the legal question at issue in *Foss* and *Enterprise Mortgage* makes it inapplicable. The *Tello* court first recognized that both the Second and Seventh Circuit have held that claims that were time-barred on July 30, 2002 under the pre-Sarbanes-Oxley limitations period remain so thereafter. *Id.* at 1294 n.19. The court then stated that "it is premature to make that legal determination" under the law of the Eleventh Circuit. *Id.* That is, litigants in the Eleventh Circuit litigate today in a legal world in which the question of whether Sarbanes-Oxley revived previously expired claims remains open. Litigants in this Circuit do not. Here, the law is clear: claims that were time-barred prior to Sarbanes-Oxley's implementation remain time-barred thereafter.

Plaintiffs' claim that *Tello* is the only circuit court decision on point is patently absurd. Plaintiffs attempt to distinguish the facts in *Enterprise Mortgage* and *Foss* from those

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[7] A court in the this District engaged in an inquiry notice analysis to determine if a claim was still viable when Sarbanes-Oxley went into effect on July 30, 2002. *Wachovia Securities, L.L.C.* v. *Neuhauser*, No. 04 C 3082, 2004 WL 2526390, at *5 (N.D.Ill. Nov. 5, 2004). Because the one-year notice period had not expired on July 30, 2002, the extended Sarbanes-Oxley provisions applied. Had the one-year statute of limitations run, however, the claim would have been untimely. *Id. See also Zurich Capital Markets, Inc.* v. *Coglianese*, No. 03 C 7960, 2004 WL 2191596, at *10 (N.D.Ill. Sept. 23, 2004) (holding that claims that accrued on August 14, 2001 had not expired under the one-year limitations period when Sarbanes-Oxley went into effect). The same analysis applies to the three-year repose period: if that period expired prior to July 30, 2002, without suit being commenced, the claims are forever barred.

in this case, which they analogize to the facts in *Tello* based solely on the fact that Plaintiffs first filed their claim after Sarbanes-Oxley became effective. While it is true that both sets of claims at issue in *Enterprise Mortgage*, along with those in *Foss*, were initially filed prior to July 30, 2002, with subsequently amended pleadings filed to take advantage of the Sarbanes-Oxley expansion,[8] this fact does not remove the present case from the rule of *Foss*. Under *Foss*, expired securities fraud claims — such as those extinguished by the statute of repose — were not revived by Sarbanes-Oxley. *Foss*, 394 F.3d at 542. Attempting to distinguish the cases based on the filing date of the action is a distinction without a difference. Claims filed prior to July 30, 2002 are obviously controlled by the pre-Sarbanes-Oxley statute of limitations. The revival question can only arise for claims filed after July 30, 2002, but for which the plaintiffs seek the longer Sarbanes-Oxley limitation and repose periods. That is the situation upon which *Foss* ruled and that is the situation here.

CONCLUSION

For the foregoing reasons, all of the Class's Section 10(b) claims based on violations that occurred prior to July 30, 1999 are time-barred and should be dismissed with prejudice pursuant to Rule 12(b)(6). In the alternative, the Court should grant Defendants judgment on the pleadings pursuant to Rule 12(c) dismissing such time-barred claims. An Order should be entered dismissing the claims of all Class members who purchased Household securities before July 30, 1999 insofar as they assert a claim based on such a purchase.

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[8] *In re Enterprise Mortgage Acceptance Co.*, 391 F.3d at 403-04.

Dated: September 16, 2005
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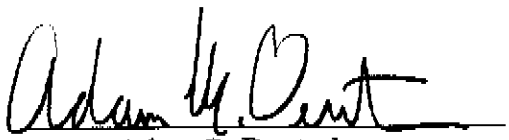
CERTIFICATE OF SERVICE

Adam B. Deutsch, an attorney, certifies that on September 16, 2005, he served copies of a Reply Memorandum of Law in Support of the Household Defendants' Motion Pursuant to the Seventh Circuit's Recent Decision in *Foss v. Bear, Stearns Co.* to Dismiss the Complaint in Part, to the parties listed below via the manner stated.



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