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, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT WITH ARTHUR ANDERSEN LLP

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STATUTES, RULES AND REGULATIONS

I. INTRODUCTION

Lead Plaintiffs respectfully submit this memorandum of law in support of their motion for final approval of a proposed settlement of this action with Arthur Andersen LLP ("Andersen") for cash consideration of $1,500,000 and Andersen's agreement to cooperate with Lead Plaintiffs in providing certain document discovery and witnesses for deposition and/or trial.

Lead Plaintiffs filed suit against Household International, Inc. ("Household"), Household Finance Corporation, certain officers and directors of Household and Household's outside auditor, Andersen alleging violations of the securities laws in connection with Household's reported financial results between October 1997 and October 2002. An overview of Lead Plaintiffs' claims and a brief history of the litigation, including the negotiations leading to the settlement with Andersen, are detailed in the Declaration of Azra Z. Mehdi in Support of Final Approval of the Proposed Settlement with Auditor Defendant Arthur Andersen LLP ("Mehdi Declaration") filed herewith. The Court is respectfully referred to the Mehdi Declaration for a discussion of the factual and procedural history of the litigation and settlement with Andersen.

The compromise reached between Lead Plaintiffs and Andersen is the result of arm's-length and mediator-assisted negotiations and was agreed to only after extensive factual investigation, an evaluation of Andersen's potential liability and the level of provable damages, discussions with accounting, damages and materiality consultants, and consideration of Andersen's financial condition and lack of available insurance coverage.

For the reasons discussed herein and in the Mehdi Declaration, Lead Counsel believe that this settlement with Andersen is fair, reasonable and adequate and recommend that it be approved.

II. STANDARD FOR JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENT

Settlement of class action litigation is favored by federal courts. *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996); *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 888-89 (7th Cir. 1985); *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1013 (7th Cir. 1980).

In deciding whether a class action settlement should be approved, courts must determine whether the proposed settlement is fair, reasonable and adequate. *Isby*, 75 F.3d at 1196; *Hiram Walker*, 768 F.2d at 889; *Gautreaux v. Pierce*, 690 F.2d 616, 631 (7th Cir. 1982). Courts in this Circuit consider the following factors in evaluating the fairness of a class action settlement:

1. the strength of plaintiffs' case compared to the amount of settlement;
2. settling defendant's ability to pay;
3. complexity, length and expense of further litigation;
4. the amount of opposition to the settlement;
5. evidence of collusion;
6. opinions of counsel; and
7. the stage of the proceedings and amount of discovery completed.

Isby, 75 F.3d at 1199; *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 314 (7th Cir. 1980); *Abrams v. Van Kampen Funds, Inc.*, No. 01 C 7538, 2006 U.S. Dist. LEXIS 2129 (N.D. Ill. Jan 18, 2006).

Moreover, the settlement must be viewed in its entirety rather than focusing on any individual component. *Armstrong*, 616 F.2d at 315. It must also be considered in the light most favorable to the settlement. *Id*.

In addition, proceedings to approve a settlement should not be transformed into an abbreviated trial on the merits. *See, e.g., Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 684 (7th Cir. 1987); *Armstrong*, 616 F.2d at 314-15.

Finally, the court must decide whether the proposed settlement falls within the range of reasonableness, taking into account the fact that a settlement is a compromise reflecting subjective judgments concerning the risks and possible outcome of ongoing litigation. *See, e.g.*, *Mars Steel*, 834 F.2d at 682.

As explained below and in the Mehdi Declaration, application of the appropriate standard demonstrates that the proposed settlement with Andersen is fair, reasonable and adequate, and should be approved.

III. The Settlement with Andersen Meets the Seventh Circuit Standard for Approval

A. The Strength of Lead Plaintiffs' Case Against Andersen Supports Approval of the Settlement

In order to prevail on their §10(b) claim against Andersen, Lead Plaintiffs would have the burden of establishing Andersen's liability to the satisfaction of the jury and the court. Lead Plaintiffs would have to prove, *inter alia*, that Andersen made false statements or omissions that were material, *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976), and that Andersen acted with scienter, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S. Ct. 1375, 47 L. Ed. 2d 688 (1976).

In order to prove scienter, Lead Plaintiffs would need to establish that Andersen acted with an intent to deceive or with recklessness. *Barker v. Hendersen, Franklin, Starnes & Holt*, 797 F.2d 490, 495 (7th Cir. 1986) (citing *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1040 (7th Cir. 1977)). Consequently, merely establishing GAAP violations is not sufficient and Lead Plaintiffs would need to show that Andersen made material misrepresentations or engaged in intentional or willful conduct designed to deceive or defraud investors by controlling or artificially inflating the price of Household stock. *See Ernst*, 425 U.S. at 199. Further, in order to establish intentional deception in this Circuit, Lead Plaintiffs must do more than show that Andersen had knowledge of

undisclosed facts. *Schlifke v. Seafirst Corp.*, 866 F.2d 935, 946 (7th Cir. 1989). Courts in this District have held that in order to meet the recklessness standard for auditors, plaintiffs must produce evidence that the accounting practices amounted to no audit at all, or to an egregious refusal to see the obvious, or to investigate the doubtful, or that accounting judgments made were such that no reasonable accountant would have made the same decision. *See Danis v. USN Commc'ns, Inc.*, 121 F. Supp. 2d 1183, 1194 (N.D. Ill. 2000); *Chu v. Sabratek Corp.*, 100 F. Supp. 2d 815, 823-24 (N.D. Ill. 2000).

Moreover, in *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 191, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994), the Supreme Court held that §10(b) does not impose liability on those who aid and abet a primary violator. Therefore, auditor defendants, who are generally viewed by courts as secondary actors can be held liable only if they are primary violators. *Id*.

Evidence obtained by Lead Plaintiffs supports Lead Plaintiffs' claims against Andersen. For example, Andersen's audit workpapers reveal that it may have violated auditing standards by relying on Household's internal audits instead of conducting its own examination and review of Household's internal controls. Mehdi Decl., ¶44. Evidence obtained also suggests that: Andersen recognized that Household had failed to establish any standard criteria for reages and that monitoring controls for the reaging process were only partially effective; Andersen knew of the accounting manipulation that required Household to restate its financial statements for 1993-2Q02; and Andersen knew that accounting on the AFL-CIO "Union Privilege" affinity card portfolio and the credit card marketing agreement with Kessler Financial Services were in violation of GAAP. Mehdi Decl., at ¶¶45-47. Although Lead Plaintiffs believe their §10(b) claims against Andersen are meritorious, establishing liability under current case law with the evidence obtained to date would have been challenging and thus posed significant risks that Lead Plaintiffs would obtain no recovery from Andersen.

The reasonableness of this settlement is also supported by the potential limitation of Andersen's liability under the proportionate liability provisions enacted in the Private Securities Litigation Reform Act of 1995 ("PSLRA"). A defendant can be held jointly and severally liable "only if the trier of fact specifically determines that such covered person knowingly committed a violation of the securities laws." 15 U.S.C. §78u-4(f)(2)(A). On the other hand, if Lead Plaintiffs proved that Andersen was reckless but that its conduct did not rise to the level of a knowing violation, Andersen would be "liable solely for the portion of the judgment that corresponds to the percentage of responsibility of that covered person." 15 U.S.C. §78u-4(f)(2)(B)(i). The measure on which the jury would be instructed is "the percentage of responsibility of such person, measured as a percentage of the total fault of all persons who caused or contributed to the loss incurred by the plaintiff." 15 U.S.C. §78u-4(f)(3)(A)(ii). Under the law established by the PSLRA, a jury could find that Andersen's share of the liability for the overall fraud alleged was minimal when compared to the Household defendants' conduct during the Class Period.

Approval of this settlement will mean a certain recovery as well as discovery cooperation from Andersen and will eliminate the risk of no recovery several years from now. Lead Counsel's experience has taught them that the above-mentioned factors can make the outcome of a case extremely uncertain. For example, in a securities case tried in the Middle District of Florida, the district court denied Deloitte & Touche's Fed. R. Civ. P. 50(a) motion and entered a jury verdict for approximately $81 million in favor of the shareholder class. The Eleventh Circuit reversed and rendered a judgment in favor of Deloitte & Touche leaving the shareholder class with nothing after 7 years of litigation. *Robbins v. Koger Props.*, 116 F.3d 1441 (11th Cir. 1997). *See also Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (the class won a large jury verdict and a motion for j.n.o.v. was denied, but on appeal the judgment was reversed and the case dismissed); *W. Va. v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970) ("[i]t is known from past experience

that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced"), *aff'd*, 440 F.2d 1079 (2d Cir. 1971); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) (reversing $87 million judgment after trial); *Trans World Airlines, Inc. v. Hughes*, 312 F. Supp. 478 (S.D.N.Y. 1970), *modified*, 449 F.2d 51 (2d Cir. 1971), *rev'd*, 409 U.S. 363 (1973) (overturning $145 million judgment after years of appeals).

B. Anderson's Ability to Pay Is Severely Limited

The reasonableness of the proposed settlement cannot be determined by the application of a mathematical formula. Rather, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972); *Fickinger v. C.I. Planning Corp.*, 646 F. Supp. 622, 630 (E.D. Pa. 1986). "It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not ***per se*** render the settlement inadequate or unfair." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982) (emphasis in original). The Second Circuit has observed:

> The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.
>
> * * *
>
> ***In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.***

Detroit v. Grinnell Corp., 495 F.2d 448, 455 & n.2 (2d Cir. 1974) (emphasis added).

Here, there is a very substantial risk that, absent this settlement, Lead Plaintiffs may not be able to collect any judgment they may have obtained against Andersen. First, in its Rule 26 disclosures Andersen informed Lead Counsel that no insurance was available to cover the claims in this litigation. Mehdi Decl., ¶4(e). Second, it is well known that in August 2002, Andersen ceased its auditing operations and surrendered its firm licenses to practice as certified public accountants in

the United States. Throughout 2001 and 2002, the front pages of this country's major newspapers were filled with the Enron story and the role Andersen played in that debacle. As recognized by the Seventh Circuit, Andersen had over 27,000 employees in 80 locations throughout the country in early 2002 and following its indictment on March 14, 2002, Andersen lost $300 million in business between March 15 and March 31, 2002 alone and laid off most of its employees. *Roquet v. Arthur Andersen LLP*, 398 F.3d 585, 587-88 (7th Cir. 2005). Moreover, Andersen's counsel informed Lead Plaintiffs that Andersen has retained only small revenue-generating assets and that this case is just one of many other ongoing litigations with significant claims against Andersen's very limited remaining assets. Mehdi Decl., ¶52. Additionally, Lead Counsel and Andersen's counsel have informally exchanged information relating to Andersen's financial condition and ability to pay.

Numerous courts have held that uncertainty with regard to a defendant's financial condition and the plaintiffs' ability to collect a future judgment strongly supports approval of a proposed settlement. *See, e.g., Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) (impaired financial condition of defendant predominated over all other factors in favor of settlement); *In re IKON Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 183 (E.D. Pa. 2000) (defendant's inability to pay a greater sum supports approval of settlement); *Chatelain v. Prudential-Bache Sec.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992) (stating that the defendant's lack of significant assets and insurance coverage made collection of a judgment uncertain and was "a significant factor in approving the settlement"); *S.C. Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1424-25 (D.S.C. 1990) (to the same effect). Given the very considerable risk that Andersen will likely be judgment-proof within the next few years and that Lead Plaintiffs would be unable to collect any future judgment obtained against Andersen, the proposed settlement is eminently reasonable.

C. The Complexity, Length and Expense of Further Litigation Supports Approval of the Settlement with Andersen

This case is a complex one that will likely continue against the Household defendants for several more years. However, settlement with Andersen will not only provide Lead Plaintiffs with valuable documents and testimony, but will allow Lead Plaintiffs to better focus their efforts on proving the liability of the primary violators, the Household defendants. Prolonged litigation against Andersen, where it has demonstrated a commitment to defend itself through trial, if necessary, would further deplete Andersen's limited remaining assets – the very assets that Lead Plaintiffs would necessarily look to in the event of a plaintiffs' verdict several years from now.

D. There Is No Opposition to the Settlement

Individual notices were mailed to over 389,500 potential Class Members. In addition the notice was posted on the Claims Administrator's website and a summary notice was published in *USA Today* on February 14, 2006. *See* Declaration of Carole K. Sylvester Re: A) Mailing of the Notice of Pendency and Proposed Partial Settlement of Class Action, and B) Publication of the Summary Notice, ¶¶3-8, filed herewith. The time period for objecting to the settlement expired on March 20, 2006. No Class Member has objected to the settlement.[1] The absence of any objections supports approval of the settlement with Andersen.

E. The Settling Parties Negotiated the Settlement Terms at Arm's Length

The compromise reached between Lead Plaintiffs and Andersen is the result of arms' length and mediator-assisted negotiations. Mehdi Decl., ¶2, 4(j) and 49. A number of courts have held that a settlement is ***presumed fair*** where, as here, it is the product of arm's-length negotiations between

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[1] However, non-settling Household defendants filed a memorandum commenting on the settlement even though they have no standing to do so. Lead Plaintiffs address their lack of standing and the lack of merits of the Household defendants' submission in a separate memorandum filed herewith.

competent and experienced counsel. *See Susquehanna Corp. v. Korholz*, 84 F.R.D. 316, 321 (N.D. Ill. 1979); *Boggess v. Hogan*, 410 F. Supp. 433, 438 (N.D. Ill. 1975); *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 822 (D. Mass. 1987) ("Where, as here, a proposed class settlement has been reached after meaningful discovery, after arm's length negotiation conducted by capable counsel, it is presumptively fair."); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979) ("The recommendations of plaintiffs' counsel should be given a presumption of reasonableness."). Thus, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625.

The presumption of reasonableness in this action is fully warranted because this settlement is the product of extensive arm's-length negotiations with the assistance of the Honorable Layn R. Phillips (Ret.).

F. Counsel for the Settling Parties Endorse the Settlement

The views of the attorneys who engaged in the settlement negotiations are entitled to considerable weight. *See McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 426-27 (7th Cir. 1977); *Susquehanna Corp. v. Korholz*, 84 F.R.D. 316, 321 (N.D. Ill. 1979); *Fisher Bros. v. Cambridge-Lee Indus., Inc.*, 630 F. Supp. 482, 488 (E.D. Pa. 1985); *Ellis v. Naval Air Newark Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981).

Experienced counsel, negotiating at arm's length, have weighed the relevant available information, have determined that the settlement is a fair resolution of the claims against Andersen, and endorse the settlement. *See* Mehdi Decl., at ¶50-55. The action against Andersen has been litigated and settled by experienced and competent counsel representing the Class and Andersen.

Lead Counsel are well known for their experience and success in complex class action litigation. Likewise, Andersen's counsel is from a firm with an abundance of experience in this type of litigation. That such qualified and well-informed counsel endorse the settlement with Andersen as fair, reasonable, and adequate to the Class heavily favors the Court's approval of the settlement.

G. The Evidence Developed to Date Supports Approval of the Settlement with Andersen

Lead Counsel have conducted extensive investigation and discovery in this case. *See* Mehdi Decl., ¶¶4, 16-19, 28-30, 32-39 and 43-47. Lead Counsel have reviewed Andersen's audit work papers, which Lead Counsel believe show that Andersen violated certain auditing standards with respect to the Household engagement and that Andersen knew about the accounting manipulations that required Household to restate its 1993-2Q02 financials. However, as discussed above, Lead Counsel are aware of the difficulties related to proof of Andersen's liability at trial and the resulting uncertainty of prevailing against Andersen through trial and the subsequent appeals.

IV. CONCLUSION

The proposed settlement with Andersen is a fair and reasonable result given Andersen's limited assets, the risk of proving Andersen's liability and any significant damages, the value of Andersen's cooperation in discovery, the risk Andersen would be judgment-proof by the time of trial, and the arm's-length and mediator-assisted settlement negotiations. For the reasons discussed

herein and in the Mehdi Declaration, Lead Plaintiffs respectfully request this Court to approve the settlement with Andersen.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

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