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

GLICKENHAUS & COMPANY, et al.,

Plaintiffs,

v.

HOUSEHOLD INTERNATIONAL, INC., et al.,

Defendants.

No. 02-C-5893 (Consolidated)

Judge Ronald A. Guzman

Magistrate Judge: Nan R. Nolan

MOTION TO DISMISS THE CORRECTED AMENDED CONSOLIDATED CLASS ACTION COMPLAINT BY DEFENDANTS GOLDMAN SACHS AND MERRILL LYNCH

Defendants Goldman Sachs & Co. and Merril Lynch, Pierce, Fenner & Smith, Inc. ("Defendants") respectfully move this Court pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss with prejudice all counts in the corrected amended consolidated class action complaint filed by plaintiffs on March 13, 2003. In support thereof, Defendants respectfully refer to their Memorandum of Law in Support of Their Motion to Dismiss the Corrected Amended Consolidated Class Action Complaint, which is filed herewith.

Respectfully submitted,

Dated: May 13, 2003

By: _____

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CERTIFICATE OF SERVICE

Julie K. Zeglis, an attorney, hereby certifies that on Tuesday, May 13, 2003, she caused a copy of the foregoing MOTION TO DISMISS THE CORRECTED AMENDED CONSOLIDATED CLASS ACTION COMPLAINT BY DEFENDANTS GOLDMAN SACHS AND MERRIL LYNCH to be served on the persons listed below:

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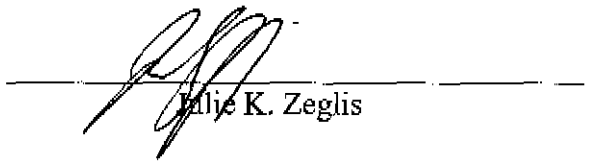

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, on behalf of itself and all others similarly situated, Plaintiff,	No. 02-C-5893 (Consolidated)
vs.	Judge Ronald A. Guzman
HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	Magistrate Judge: Nan R. Nolan

MEMORANDUM OF LAW OF DEFENDANTS GOLDMAN SACHS AND MERRILL LYNCH IN SUPPORT OF THEIR MOTION TO DISMISS THE CORRECTED AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

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Defendants Goldman, Sachs & Co. ("Goldman Sachs") and Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") join in and incorporate Point IV of the Memorandum of Law in Support of the Household Defendants' Motion to Dismiss (the "Household Defendants' Brief"). Goldman Sachs and Merrill Lynch respectfully submit this memorandum to present additional and independent reasons why the Complaint should be dismissed as to them.

PRELIMINARY STATEMENT

Plaintiffs in this action originally asserted several claims under the federal securities laws against Household International, Inc. ("Household"), certain of its officers and directors, and its former auditor, Arthur Anderson. Some of those claims relate to the sufficiency of Household's Registration Statement filed in connection with the stock it issued as consideration in its June 1998 share-exchange merger with Beneficial Corporation ("Beneficial") (the "Merger"). Seven months later, and almost five full years after the Merger, Plaintiffs amended their complaint and, in an apparent afterthought, included claims against Goldman Sachs and Merrill Lynch based on the fairness opinions (the "Fairness Opinions") provided by those firms to Beneficial with respect to the Merger and included in the Registration Statement. Such claims are brought only on behalf of a discreet "subclass"—Beneficial shareholders who became Household shareholders as a result of the Merger. These claims are utterly baseless and fall far short of stating valid claims under Sections 11, 12 or 15 of the Securities Act of 1933.

First and foremost, a dispositive, incurable procedural flaw is fatal to all of Plaintiffs' claims against Goldman Sachs and Merrill Lynch: Plaintiffs filed these claims well after the expiration of the one-year/three-year statute of limitations period which applies to non-fraud based securities claims of the type alleged here. Accordingly, these claims must be dismissed in their entirety as time-barred.

Each of Plaintiffs' claims also fails for additional and independent reasons addressed in this memorandum. First, both the Section 11 and Section 12(a)(2) claims fail because the Fairness Opinions are exactly that —opinions—and Plaintiffs do not allege, as the Supreme Court has required to give rise to a securities claim based on an opinion, that Goldman Sachs and Merrill Lynch did not hold their stated opinions. (Nor, for that matter, do they adequately allege that the Opinions are false and misleading in any other respect.) Instead, despite the Opinions' disclaimers that they had *assumed* the accuracy and completeness of such statements and that neither firm had performed an independent evaluation or appraisal of either

Merger partner, Plaintiffs improperly attempt to characterize the Opinions as something that they *expressly* are not—opinions regarding the accuracy of Household's financial statements. Accordingly, Plaintiffs have failed to adequately allege that the Opinions are actionable.

Second, although Section 12(a)(2) mandates that only a defendant who offers or sells a security may be held liable under Section 12, Plaintiffs do not even attempt to allege that Goldman Sachs or Merrill Lynch either transferred title of Household shares to Plaintiffs or solicited the sales of shares to Plaintiffs. Therefore, the Section 12(a)(2) claim against them must be dismissed.

Third, the Section 11 claim fails because Goldman Sachs and Merrill Lynch were plainly not "experts" with respect to the Registration Statement, and, therefore, do not fall within the narrow group of persons to whom Section 11 liability may attach. Significantly, the Registration Statement's "Experts" section, which specifically discloses to shareholders those entities acting as experts for 1933 Act purposes, does *not* name either Goldman Sachs or Merrill Lynch. Moreover, Goldman Sachs and Merrill Lynch did not "expertise" the allegedly false financial information that formed the basis for the Fairness Opinions. To the contrary, they issued limited opinions to Beneficial as to the fairness of the proposed exchange of shares, specifically *assuming* the accuracy of the financial information they were provided, without independent evaluation or appraisal. Furthermore, unlike the accountants and auditors who *were* named as the only experts in the "Experts" section of the Registration Statement, Goldman Sachs and Merrill Lynch did not consent to having their opinions relied on as those of an "expert."

Finally, Plaintiffs' Section 15 control person claim must be dismissed because Plaintiffs do not allege even one fact to support the conclusory and clearly untrue claim that Goldman Sachs or Merrill Lynch "controlled" a person who violated Sections 11 or 12(a)(2).

In short, in their quest for additional deep pocket defendants, Plaintiffs have cast their net unparalleled distances that cannot be supported under existing law or any reasonable extension thereof. Plaintiffs purport to drag Goldman Sachs and Merrill Lynch into this litigation based on opinions rendered five years ago (long beyond the statute of limitations), premise liability on the opinions without any allegation that those opinions were not truly held, and then attempt to rewrite the opinions altogether contradicting their express terms. Plaintiffs would convert every financial advisor into an "expert" for purposes of Section 11 notwithstanding the nature, scope, and express disclaimers of the advisor's opinion, and the

express identity of the actual experts in the registration statement. Goldman Sachs and Merrill Lynch should not have been joined as defendants, and they should be dismissed from this action forthwith.

SUMMARY OF THE ALLEGATIONS

On June 30, 1998, Household acquired Beneficial in a stock-for-stock transaction valued at over $8 billion. Compl. ¶ 207. Goldman Sachs and Merrill Lynch were retained by Beneficial and provided separate Fairness Opinions addressed to Beneficial's Board of Directors. *Id.* ¶¶ 371, 372. The Fairness Opinions state that based on the financial and other documents that had been provided to them, the Exchange Ratio (the number of Household shares that Beneficial shareholders would receive in exchange for their Beneficial shares) was "fair" from a financial point of view. *Id.* Both Fairness Opinions contained specific disclaimers clearly stating that Goldman Sachs and Merrill Lynch had each: (1) *relied* on the accuracy and completeness of all financial and other information provided to them; (2) *assumed* that the financial forecasts were reasonably prepared on a basis reflecting the best currently available judgments and estimates; and (3) *not made* an independent evaluation or appraisal of the assets and liabilities of Beneficial or Household. *Id.* ¶ 372. The Fairness Opinions specifically warned that no shareholder should view them as a "recommendation" to vote for the Merger. *Id.*

The Fairness Opinions were included in the Registration Statement as exhibits to the Joint Proxy Statement-Prospectus. The Registration Statement includes a customary "Experts" section in which Household and Beneficial disclosed to shareholders those entities who served as experts with respect to the Registration Statement, and who provided reports to them on their authority as experts. *See* Registration Statement, at Joint Proxy Statement-Prospectus, p. 85 (attached hereto as Exhibit A).[1] The only entities named as "experts" the term customarily used as a short-hand for persons falling within the scope of 15 U.S.C. §77k(a)(4)— are Arthur Anderson LLP and Deloitte & Touche LLP, who audited the consolidated financial statements of Household and Beneficial, respectively. *Id.* Goldman Sachs

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[1] The Registration Statement and its exhibits are properly considered on this motion to dismiss. *See Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1248 (7th Cir. 1994) ("Documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to his claim.") (citation omitted). The full Registration Statement is available on the U.S. Securities and Exchange Commission website at http://www.sec.gov/Archives/edgar/data/354964/0000950130-98-002884.txt.

and Merrill Lynch are *not* named as experts. *Id.* Fittingly, Goldman Sachs's and Merrill Lynch's consents to the inclusion of their Fairness Opinions in the Registration Statement specifically provided that they were not acting as "experts" under the securities laws. *See* Registration Statement, Consents of Goldman Sachs and Merrill Lynch, Exhibits 23.03 and 23.04 (attached hereto as Exhibit B).

Plaintiffs assert a claim under Section 11 against Goldman Sachs and Merrill Lynch on the basis that the Fairness Opinions allegedly "were each false and misleading when issued, as the Exchange Ratio was ***not*** 'fair' to Beneficial shareholders." Compl. ¶ 373. This claim is based on Plaintiffs' contention that Goldman Sachs and Merrill Lynch *should have* conducted an investigation (despite the agreement that there would be no such investigation) and *should have* known that the information provided to them (the accuracy and completeness of which they expressly relied on) was false and misleading. *Id.* ¶¶ 372, 373, 378. But, the Complaint makes no effort to allege that either firm did not genuinely hold the opinions expressed, or that they were otherwise knowingly "false." In fact, the Complaint "*expressly exclude[s]*" any allegations of "intentional or reckless conduct." *Id.* ¶ 354 (emphasis added).

Plaintiffs also nominally assert claims against Goldman Sachs and Merrill Lynch for violations of Sections 12 and 15. *Id.* ¶¶ 356, 379, 382. Yet, nowhere in the 154-page Complaint do they even try to allege any factual bases for these claims, including that either firm was a "seller" of any securities or "controlled" any person who violated Sections 11 or 12.

ARGUMENT

"While federal notice-pleading allows for a generous reading of a complaint, in order to resist a motion to dismiss, the complaint must at least set out facts sufficient to outline or adumbrate the basis of the claim." *Chicago School Reform Bd. of Trustees v. Substance, Inc.*, 79 F. Supp. 2d 919, 924 (N.D. Ill. 2000) (quotations and citation omitted). Merely "conclusory allegations that are unsupported by factual assertions" in the complaint are insufficient. *Palda v. General Dynamics Corp.*, 47 F.3d 872, 875 (7th Cir. 1995). A complaint that does not contain "allegations respecting all the material elements" of a claim must be dismissed. *Pollastrini v. Patternmakers' Pension Trust Fund*, 34 F. Supp. 2d 701, 704 (N.D. Ill. 1999) (quotations and citation omitted).

I. PLAINTIFFS' CLAIMS ARE TIME-BARRED

Each of the claims asserted against Goldman Sachs and Merrill Lynch must be dismissed because Plaintiffs failed to file them within the applicable statute of limitations period. Plaintiffs premise their claims on alleged false and misleading statements in the Fairness Opinions. Therefore, under the applicable one-year/three-year statute of limitations, any possible claims arising from the Fairness Opinions must have been asserted no later than June 30, 2001. *See* 15 U.S.C. §77m (1997). Nevertheless, Plaintiffs did not file the original complaint in this action until August 19, 2002, and did not assert any claims against Goldman Sachs or Merrill Lynch until March 7, 2003.

Despite Plaintiffs' apparent attempt to invoke the Sarbanes-Oxley Act's enlarged two-year/five-year statute of limitations period for securities fraud claims, that statute of limitations only applies to claims that require proof of scienter and are based on fraud. *See* 28 U.S.C. § 1658(b) (1994), *amended by* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (statute of limitations only applies to claims of "fraud, deceit, manipulation or contrivance"); *see also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n. 12 (1976) ("'[S]cienter' refers to a mental state embracing intent to deceive, manipulate, or defraud."). Thus, the Sarbanes-Oxley Act's statute of limitations does not apply to Plaintiffs' Section 11, 12 or 15 claims because they are not styled as fraud claims. *See also Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 513 (7th Cir. 1989) ("Liability under § 11 does not depend on 'fraud.'"); *In re Newell Rubbermaid Sec. Litig.*, No. 99 C 6853, 2000 WL 1705279, at *7 (N.D. Ill. Nov. 14, 2000) (fraud is not an element of a Section 12(a)(2) claim)[2]; *Abrams v. Van Kampen Funds, Inc.*, No. 01 C 7538, 2002 WL 1160171, at *7 (N.D. Ill. May 30, 2002) ("[S]ection 11, 12 and 15 claims...do not require proof of scienter."). Indeed, Plaintiffs expressly exclude any allegations of fraud against Goldman Sachs and Merrill Lynch, and therefore cannot take advantage of a statute of limitations that expressly applies only to claims involving fraud.

Accordingly, as further detailed in Point IV.A of the Household Defendants' Brief, and incorporated herein, the claims against Goldman Sachs and Merrill Lynch must be dismissed in their entirety as time-barred.

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[2] This and other unpublished cases cited herein are submitted in alphabetical order in the Compendium of Authorities filed herewith.

II. PLAINTIFFS FAIL TO ALLEGE THAT THE FAIRNESS OPINIONS CONTAINED ANY UNTRUE STATEMENTS OF MATERIAL FACT

Plaintiffs' Section 11 and Section 12(a)(2) claims must be dismissed because they do not adequately allege that the Fairness Opinions included an untrue statement of material fact.[3] *See In re Newell Rubbermaid Sec. Litig.*, 2000 WL 1705279, at *7 (to state a claim under either Section 11 or Section 12(a)(2), "plaintiffs must allege that defendant made untrue statements of material fact"). The only challenged statements made by Goldman Sachs or Merrill Lynch were statements of *opinion*—that each believed the Exchange Ratio was fair based upon facts given to them and assumed to be accurate. Plaintiffs' claims fail because they do not allege that Goldman Sachs and Merrill Lynch did not genuinely believe that the Exchange Ratio was fair, or that the Fairness Opinions otherwise were false.

The Complaint does not plead that the Fairness Opinions contained an untrue statement of material fact because it lacks any allegations that Goldman Sachs or Merrill Lynch did not hold their stated opinions. "A fairness 'opinion' is just that—an opinion." *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1265 (N.D. Cal. 2000). And, a statement of opinion is only false, and therefore actionable, when the speaker does not in fact hold that opinion. *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1090-92 (1991) (statement of opinion is false if it was made "with knowledge that the [defendants] did not hold the beliefs or opinions expressed"); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d at 1265 ("[S]tatements of opinion are false only if the opinion was not sincerely held."); *cf. Virginia Bankshares*, 501 U.S. at 1108-09 (Scalia, J., concurring) ("[T]he statement 'In the opinion of the Directors, this is a high value for the shares' would...not produce liability if in fact it was not a high value but the directors honestly believed otherwise.").

Thus, to state a Section 11 or Section 12 claim based on the Fairness Opinions' alleged falsity, Plaintiffs must allege that Goldman Sachs and Merrill Lynch did not genuinely hold the belief that the Exchange Ratio was fair, as expressed in the Opinions. *See Virginia*

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[3] Section 11 provides, in relevant part: "In case any part of the registration statement... contained an untrue statement of a material fact..., any person acquiring such security... may... sue [certain enumerated persons]." 15 U.S.C. § 77k(a) (1997). Section 12(a)(2) creates a remedy against any person who "offers or sells a security... by means of a prospectus... which includes an untrue statement of a material fact... to the person purchasing such security from him." 15 U.S.C. § 77l(a)(2) (1997).

Bankshares, 501 U.S. at 1090-92; *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d at 1265 (dismissing Section 14(a) claim against investment advisor who provided fairness opinion that the exchange ratio for a merger was "fair," despite allegation that company's revenues, earnings and assets had been improperly stated, where complaint did not allege "why the fairness opinion was knowingly false"); *Flake v. Hoskins*, 55 F. Supp. 2d 1196, 1227 (D. Kan. 1999) ("statements of opinion are actionable [under Sections 11, 12, and 14] when the speaker knows that the statement is false or misleading;" plaintiff must allege defendants stated an opinion "even though they knew that th[e] statement was false"); *Kahn v. Wein*, 842 F. Supp. 667, 677 (E.D.N.Y. 1994) (Section 14(a) claim failed because "[a]lthough an opinion as to the fairness of a proposed course of action may be actionable if it is knowingly false when made, plaintiff makes no such allegation in the Complaint, and neither the facts as pleaded nor the available evidence would support such an inference") (citing *Virginia Bankshares*, 501 U.S. 1083), *aff'd*, 41 F.3d 1501 (2d Cir. 1994).

Plaintiffs do not plead *any* facts that Goldman Sachs and Merrill Lynch issued the Fairness Opinions secretly believing that the Exchange Ratio was unfair. In fact, Plaintiffs allege exactly to the contrary by "*expressly exclud[ing]*" from their claims against Goldman Sachs and Merrill Lynch any allegations of intentional conduct. Compl. ¶ 354 (emphasis added). As a result, Plaintiffs have effectively "plc[]d [themselves] out of court by alleging facts which show that [they have] no claim" under Section 11 or Section 12. *Soo Line R. R. Co. v. St. Louis S. W. Ry. Co.*, 125 F.3d 481, 483 (7th Cir. 1997) (quotations and citation omitted).[4]

While the failure to plead that the Opinions were not truly held is alone fatal under *Virginia Bankshares*, it is noteworthy that Plaintiffs have not even attempted to identify

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[4] Some lower courts have suggested that an opinion can be actionable if the speaker acted in reckless disregard as to whether the statement was false. *See Freedman v. Value Health, Inc. (Freedman II)*, 135 F. Supp. 2d 317, 337 (D. Conn. 2001) (to show that a fairness opinion was untrue, "the plaintiffs must show that the terms of the merger were unfair and that the [] defendants were at least reckless in believing that the merger was fair"), *aff'd*, 34 Fed. Appx. 408 (2d Cir. 2002); *In re Reliance Sec. Litig.*, 135 F. Supp. 2d at 515 (for fairness opinion to be actionable under Section 14(a), plaintiffs must allege that "the [f]inancial [a]dvisors made their statements in reckless disregard as to whether they were false"); *accord Perlman v. Zell*, 938 F. Supp. 1327, 1340 (N.D. Ill. 1996) (opinions only actionable under securities laws if defendants knew their opinion was false or recklessly omitted certain facts contradicting the opinion), *aff'd*, 185 F.3d 850 (7th Cir. 1999). While the issuance of an opinion that was not truly held suggests a standard of actual knowledge, Plaintiffs have in any event expressly disclaimed any allegations of reckless conduct. Compl. ¶ 354.

any facts in the Fairness Opinions that were false or misleading. Nor could they. As Plaintiffs implicitly acknowledge, Goldman Sachs and Merrill Lynch expressly disclosed that: (1) they had relied on the accuracy and completeness of all financial and other information provided to them; (2) they had assumed that the financial forecasts were reasonably prepared on a basis reflecting the best currently available judgments and estimates; and (3) they had not made an independent evaluation or appraisal of the assets and liabilities of Beneficial or Household. Compl. ¶ 372. With Beneficial's consent (and as fully disclosed to shareholders), Goldman Sachs and Merrill Lynch provided opinions that, based solely on the information provided and assumed to be accurate and complete, the Exchange Ratio was fair. *Id.* Where a fairness opinion discloses the assumptions and limitations on which it is based, these limitations are part of the opinion and supply the context for evaluating its truthfulness. *See, e.g. Minzer v. Keegan*, 218 F.3d 144, 151 (2d Cir. 2000), cert. denied, 531 U.S. 1192 (2001) (fairness opinion was not false and misleading, in light of express disclaimers as to the limited scope of the opinion); *Ince & Co. v. Silgan Corp.*, Civ. A. No. 10941, 1991 WL 17171, at *6 (Del. Ch. Feb. 7, 1991) (same); *see also Nielsen v. Greenwood*, 849 F. Supp. 1233, 1242 (N.D. Ill. 1994) (statements must be reviewed in context). Thus, Plaintiffs have not alleged, and could not possibly allege, that the Opinions regarding the fairness of the Exchange Ratio, based solely on the information that Household and Beneficial provided to Goldman Sachs and Merrill Lynch, were false or misleading in any respect.

III. GOLDMAN SACHS AND MERRILL LYNCH ARE NOT STATUTORY SELLERS UNDER SECTION 12(a)(2)

Plaintiffs' Section 12(a)(2) claim must also be dismissed as a matter of law because Plaintiffs have not alleged that either Goldman Sachs or Merrill Lynch is a statutory seller. Section 12(a)(2) explicitly states that only a defendant who "offers or sells" a security can be liable under Section 12 to the person who purchased the security from him. 15 U.S.C. §

77l(a)(2). Yet Plaintiffs do not – and cannot – allege anywhere in their 154-page Complaint that Goldman Sachs or Merrill Lynch "offered" or "sold" Household shares, much less that Plaintiffs purchased shares from Goldman Sachs or Merrill Lynch.

Under clear Supreme Court and Seventh Circuit precedent, only a person who either (i) owned a security and passed title to a plaintiff, or (ii) successfully solicited the purchase of a security by a plaintiff while motivated by his own financial interest can "offer" or "sell" a security in violation of Section 12. *See Pinter v. Dahl*, 486 U.S. 622, 642, 647 (1988) (interpreting Section 12(1)); *Ackerman v. Schwartz*, 947 F.2d 841, 844-45 (7th Cir. 1991) (the term "seller" is defined the same way for both Section 12(1) and Section 12(2) claims); *see also Wheaten v. Mathews Holmquist & Assoc.*, No. 94 C 1134, 1996 WL 494245, at *13 (N.D. Ill. Aug. 28, 1996) (same).

First, Plaintiffs absolutely do not allege that Goldman Sachs or Merrill Lynch owned or passed title to Household securities to Plaintiffs. *See Danis v. USN Communications, Inc.*, 73 F. Supp. 2d 923, 936 (N.D. Ill. 1999) (plaintiffs failed to state a Section 12(a)(2) claim because defendants "did not sell or pass title of [the company's] stock" or solicit its sale); *Scholes v. Stone, McGuire & Benjamin*, 786 F. Supp. 1385, 1399 (N.D. Ill. 1992) (dismissing with prejudice Section 12(a)(2) claim where plaintiffs failed to adequately allege that defendant "pass[ed] title to securities [or] solicit[ed] the purchase of securities").

Second, Plaintiffs do not allege that Goldman Sachs or Merrill Lynch "solicited" their purchases of Household shares. To plead "solicitation," a plaintiff must plead facts demonstrating direct and active participation by the defendant in the solicitation, such as direct contact with sales personnel or the buyer itself. *See Pinter*, 486 U.S. at 644-46 (describing solicitors as individuals who actively "urged the buyer to purchase"); *Schlifke v. Seafirst Corp.*, 866 F.2d 935, 940-41 (7th Cir. 1989) (no liability under Section 12(a)(2) where "the Bank did not actively participate in the solicitation of investors" and "had no contact with [] sales personnel, nor did it otherwise actively promote the investment program"); *Endo v. Albertine (Endo II)*, No. 88 C 1815, 1995 WL 170030, at *3 (N.D. Ill. Apr. 7, 1995) ("Absent direct contact of any kind between the [] defendants and the plaintiff-purchasers, the court finds that as a matter of law the [] defendants are not sellers under § 12(2).").

Here, the Complaint is completely devoid of factual allegations that Goldman Sachs or Merrill Lynch participated in the sale of Household stock to anyone at anytime. At

most, it alleges only that they "participated in drafting, revising or approving the Beneficial Registration Statement" by providing the Fairness Opinions, and that the Beneficial Registration Statement was "designed to sell and offered to sell Household shares." Compl. ¶ 376. Courts routinely find such allegations insufficient as a matter of law because Goldman Sachs and Merrill Lynch, just like any bank, accounting firm or law firm, merely assist sellers by providing professional services to them, and therefore are not statutory sellers themselves under Section 12(a)(2). *See Ackerman*, 947 F.2d at 845 (attorney who drafted an allegedly false *opinion letter* used by promoters was not a statutory seller); *Schlifke*, 866 F.2d at 940-41 (bank that drafted loan documents attached to the Registration Statement was not "seller"); *Endo v. Albertine (Endo I)*, 812 F. Supp. 1479, 1494 (N.D. Ill. 1993) ("assisting or participating in the preparation" of a registration statement not sufficient for Section 12(a)(2) liability); *Scholes*, 786 F. Supp. at 1399 (law firm was not a statutory seller where it merely "contribut[ed] to the selling momentum"); *see also Pinter*, 486 U.S. at 651 n. 27 (Section 12 liability cannot be imposed upon "those who merely assist in another's solicitation efforts"); *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 536-37 (9th Cir. 1989) (lawyers and accountants who participated in preparation of prospectus and *drafted opinions* played no role in soliciting the purchases under Section 12, but rather performed professional services). Accordingly, Plaintiffs' Section 12(a)(2) claim against Goldman Sachs and Merrill Lynch must be dismissed.

IV. PLAINTIFFS FAIL TO ALLEGE THE NECESSARY ELEMENTS OF A SECTION 11 CLAIM

Plaintiffs allege that Goldman Sachs and Merrill Lynch are also liable to the Beneficial Subclass under Section 11 because the Fairness Opinions falsely stated that the Exchange Ratio was fair. In addition to the reasons set out in Point II, the Complaint fails to state a Section 11 claim for three additional reasons. First, Goldman Sachs and Merrill Lynch were not named in the Registration Statement as "experts" within the meaning of Section 11. Second, Goldman Sachs and Merrill Lynch did not "expertise" any of the financial information that formed the basis for their opinions. Finally, Goldman Sachs and Merrill Lynch did not consent that their opinions could be relied on as those of an "expert."

A. Goldman Sachs And Merrill Lynch Were Not Named In The Registration Statement As "Experts"

Plaintiffs allege that Goldman Sachs and Merrill Lynch acted as "experts within the meaning of § 11, concerning the fairness 'from a financial point of view' of the [Exchange Ratio]." Compl. ¶ 371. Plaintiffs make this claim in an attempt to bring them within Section 11(a)(4), which provides that an "accountant, engineer, or appraiser," or similar person "whose profession gives authority to a statement made by him," can be held liable for any false statements made in a "report or valuation" that the "expert" prepared. *See* 15 U.S.C. § 77k(a)(4) (1997).[5] But, the mere talismanic incantation that Goldman Sachs and Merrill Lynch are "experts" is insufficient to bring them within the reach of Section 11(a)(4). *See In re Flight Transp. Corp. Sec. Litig.*, 593 F. Supp. 612, 616 (D. Minn. 1984) (allegation that defendant is an "expert" is insufficient since plaintiff could prove no fact in support); *cf. MacFarland v. Memorex Corp.*, 493 F. Supp. 631, 643 (N.D. Cal. 1980) ("[S]ection 11(a)(4) limits liabilities.").

As the Registration Statement itself conclusively demonstrates, Goldman Sachs and Merrill Lynch were not, as a matter of law, acting as "experts" with respect to the Registration Statement. The Registration Statement contains a typical "Experts" section. *See* Ex. A, Registration Statement, at Joint Proxy Statement-Prospectus, p. 85. That section identifies for the shareholders those persons or entities who have prepared reports or valuations that can be relied on as those of an expert. *See id.*

Significantly, neither Goldman Sachs nor Merrill Lynch is named as an expert in that Section, or anywhere else in the Registration Statement. *Id.* Rather, consistent with the strictures of Section 11(a)(4), Household and Beneficial named as experts only Arthur Anderson LLP and Deloitte & Touche LLP, the firms that audited Household's and Beneficial's consolidated financial statements, respectively. *Id.* Goldman Sachs's and Merrill Lynch's absence from this Section, while others are named, demonstrates that Household and Beneficial recognized that neither was acting as an expert in connection with the Registration Statement, and informed their shareholders of such. Accordingly, Goldman Sachs and Merrill Lynch cannot be held liable as experts under Section 11(a)(4).

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[5] Plaintiffs do not allege that Goldman Sachs or Merrill Lynch fall within Sections 11(a)(1)-(3) or (5), the only other enumerated categories of proper Section 11 defendants.

B. Goldman Sachs And Merrill Lynch Did Not "Expertise" The Financial Information That Formed The Basis For The Fairness Opinions

As the Supreme Court has noted, an "expert" is liable only for that portion of a registration statement that it "expertised," and Goldman Sachs and Merrill Lynch—beyond not acting as experts at all—certainly did not "expertise" the allegedly false financial information referred to in the Complaint. *Herman & MacLean v. Huddleston*, 495 U.S. 375, 381 n.11 (1983); *see also In re Jiffy Lube Sec. Litig.*, No. Civ. Y-89-1939, 1990 WL 10010982, at *1 (D. Md. Oct. 31, 1990) ("[E]ven if part of a registration statement is misleading, there is no [Section 11(a)(4)] liability unless the misleading data can be expressly attributed to the [professional].").

Plaintiffs claim that Goldman Sachs and Merrill Lynch falsely opined that the Merger was "'fair'... notwithstanding the fact that the strength of Household's historical performance, its prospects and its financial statements were overstated based upon the improper practices detailed in the Complaint and/or the accounting improprieties detailed [elsewhere in the Complaint]." Compl. ¶ 373. But Beneficial hired Goldman Sachs and Merrill Lynch solely to give an opinion on the fairness of the Exchange Ratio *based on the assumption that the information provided to them was accurate and complete*. *Id.* ¶ 372. Consistent with this mandate, Goldman Sachs and Merrill Lynch performed a variety of analyses on the facts provided to them and stated an opinion based on that information. *See* Registration Statement, at Joint Proxy Statement-Prospectus, p. 38-42 (attached hereto as Exhibit C) (summarizing the financial analyses used by Goldman Sachs and Merrill Lynch).

Goldman Sachs and Merrill Lynch were not asked to and did not investigate the accuracy of the financial information provided to them, and specifically disclosed that they did "not purport to... apprais[e]" the financial information that formed the basis for the Fairness Opinions. *Id.*, p. 41. Both firms specifically declined further investigation, *see* Compl. ¶ 372, consistent with their compensation structure and general investment banking practice. *See* 11 Simon M. Lorne and Joy Marlene Bryan, *Acquisitions & Mergers: Negotiated and Contested Transactions*, App. Q1 (2003) (model fairness opinion, revealing that an investment bank issuing a fairness opinion typically assumes and relies upon the accuracy and completeness of the information supplied to it without independent verification). Thus, as Plaintiffs' implicitly acknowledge, Goldman Sachs and Merrill Lynch did not "expertise" *any* of the information that

provided the assumed basis for their opinions and, therefore, cannot be held liable under Section 11(a)(4).

C. Goldman Sachs And Merrill Lynch Did Not Consent To Have The Fairness Opinions Relied On As Those Of An "Expert"

Even if Goldman Sachs and Merrill Lynch could in the abstract be considered "experts" under Section 11(a)(4), Plaintiffs still fail to state a claim against them. An expert under Section 11(a)(4) may be liable only for those statements that are included in a registration statement with the expert's express consent. *See* 15 U.S.C. § 77k(a)(4).

Here, Goldman Sachs and Merrill Lynch expressly stated that they did not consent to having the Fairness Opinions included in the Registration Statement as the opinion of an "expert" under Section 11(a)(4). *See* Ex. B, Goldman Sachs's Consent ("In giving such consent, we do not...admit that we are experts with respect to any part of such Registration Statement within the meaning of the term 'experts' as used in the Securities Act of 1933, as amended, or the rules and regulations of the Securities and Exchange Commission thereunder."); Ex. B, Merrill Lynch's Consent (substantially similar). Their limited consents reflect that neither Goldman Sachs nor Merrill Lynch agreed to include their fairness opinions in the Registration Statement as "expert" reports. Moreover, as discussed in Point IV.A., Household and Beneficial did not purport to hold them out as such.

The consents of Goldman Sachs and Merrill Lynch contrast markedly from the consents of the accountants and auditors who Household and Beneficial did name as experts in the "Expert" section of the Registration Statement. For example, the consent of Deloitte & Touche LLP states that they "consent...to the reference to us under the heading 'Experts' in the Joint Proxy Statement-Prospectus, which is part of this Registration Statement." *See* Registration Statement, Independent Auditors' Consent, Exhibit 23.06 (attached hereto as Exhibit D). Similarly, the consent of Arthur Anderson LLP states that they "consent...to all references to our Firm included in this registration statement" (implicitly including the "Experts" section). *See* Ex. D, Consent of Independent Public Accountants, Exhibit 23.05. The consents of the named experts conclusively demonstrate that neither Goldman Sachs nor Merrill Lynch consented to have their opinions relied on as experts. Therefore, the Section 11 claim fails.

V. PLAINTIFFS' CONTROL PERSON LIABILITY CLAIM AGAINST GOLDMAN SACHS AND MERRILL LYNCH MUST BE DISMISSED

To plead a valid claim for control person liability under Section 15, Plaintiffs must allege: (1) a primary violation of the Act by a third party; and (2) control of the third party by the defendant.[6] *See Harrison v. Dean Witter Reynolds, Inc.*, 79 F.3d 609, 614 (7th Cir. 1996), *cert. denied*, 519 U.S. 825 (1996). Plaintiffs have failed to adequately plead either.[7]

First, the Section 15 claim against Goldman Sachs and Merrill Lynch fails because, as detailed in Section IV of the Household Defendants' Brief, Plaintiffs have not adequately alleged an underlying Section 11 or 12 claim by a primary violator. It is axiomatic that there can be no control person liability absent a valid primary violation of Section 11 or 12. *See Donohoe v. Consolidated Operating & Prod. Corp.*, 30 F.3d 907, 911-12 (7th Cir. 1994).

Second, even if Plaintiffs alleged a viable underlying claim, Plaintiffs have not—and cannot—plead that Goldman Sachs and Merrill Lynch "controlled" a primary violator. Here, Plaintiffs do not even identify *whom* Goldman Sachs and Merrill Lynch allegedly controlled, let alone *how* they supposedly controlled this unnamed person or entity. *See* Compl. ¶ 379; *see, e.g., Donohoe*, 30 F. 3d at 911-12 (To plead "control," plaintiff must allege that the control person: (1) "*actually* exercised general control over the operations of the wrongdoer;" and (2) "had the power or ability... to control the specific transaction or activity that is alleged to give rise to liability"); *Mancini v. Prudential-Bache/Fogelman Harbour Town Props., L.P.*, No. 90 C 5213, 1991 WL 171966, at *8 (N.D. Ill. Sept. 3, 1991) (conclusory allegation of control is insufficient; claimant must allege the "nature of the control that each defendant wielded over the transaction at issue"). Plaintiffs merely allege that Goldman Sachs and Merrill Lynch acted as *financial advisors* to Beneficial. Compl. ¶ 371. It is therefore unsurprising that the Complaint does not allege that they either "actually" exercised general control, or were in a "position" to exercise control over Beneficial, let alone Household or any other defendant, none of whom were even clients of Goldman Sachs or Merrill Lynch with respect to the Merger. *See, e.g., Schlifke*,

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[6] Section 15 imposes joint and several liability on "[e]very person who... controls any person liable under sections 77k or 77l of this title...." 15 U.S.C. § 77o (1997).

[7] To the extent that a plaintiff must plead "culpable participation" in order to state a claim under Section 15, *see Kaufman v. Motorola, Inc.*, No. 95 CV 1069, 1999 WL 688780, at *16 (N.D. Ill. Apr. 16, 1999), the claim also fails because it lacks any allegations that Goldman Sachs and Merrill Lynch "culpably participated" in a primary violation of Section 11 or 12.

866 F.2d at 949 (bank whose loan documents were included in partnership prospectus did not qualify as "controlling person"); *In re VMS Sec. Litig.*, 752 F. Supp. 1373, 1399 (N.D. Ill. 1990) ("[I]t is clear that the underwriters, guarantors, advisors and appraisers cannot be liable [] as controlling persons."). Plaintiffs' conclusory allegation of control is nonsensical, and, as a result, the Section 15 claim must be dismissed.

CONCLUSION

For all of the foregoing reasons, Goldman Sachs and Merrill Lynch respectfully request their motion to dismiss be granted in its entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

Julie K. Zeglis, an attorney, hereby certifies that on Tuesday, May 13, 2003, she caused a copy of the foregoing MEMORANDUM OF LAW OF DEFENDANTS GOLDMAN SACHS AND MERRILL LYNCH IN SUPPORT OF THEIR MOTION TO DISMISS THE CORRECTED AMENDED CONSOLIDATED CLASS ACTION COMPLAINT to be served on the persons listed below:

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SEE CASE FILE FOR EXHIBITS