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-C5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman

DEFENDANTS' OPPOSITION TO PRESENTMENT OF LEAD PLAINTIFFS' PREMATURE AND DEFECTIVE IN LIMINE MOTION ON A COLLATERAL ISSUE

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Defendants respectfully submit this memorandum, in advance of the December 2, 2008 presentment of Plaintiffs' Motion Requesting Evidentiary Sanctions for Household Defendants' Destruction of Evidence, to explain why the motion is premature, procedurally improper, and should not be briefed or heard except in conjunction with related, higher priority *in limine* motions that are due to be filed on January 30, 2009 in accordance with the schedule issued by this Court. (*See* Transcript of Proceedings Before the Honorable Ronald A. Guzman, June 30, 2008, at 11.)[1]

Putting aside the merits, and resisting the temptation to correct Plaintiffs' gross distortions of the record (for this is as far from a motion on uncontested facts as can be imagined), Plaintiffs' motion and voluminous supporting papers (including a brief nearly three times longer than the brief supporting Defendants' dispositive summary judgment motion) should not be accepted by the Court at this time for each of the following reasons:

- Plaintiffs purport to complain of what they call "spoliation" that occurred entirely before the initiation of this lawsuit, with respect to documents that have no ostensible bearing on alleged securities fraud because they pertained solely to Household's consumer lending practices and unauthorized departures from Household's lending policies. There is no plausible reason for addressing this motion on a priority basis -- especially when doing so will rob Defendants of time and resources needed to comply with the Court's deadlines for perfecting the Pretrial Order and preparing *in limine* motions by the January 30, 2009 deadline.

- There are compelling substantive reasons ***not*** to accelerate briefing and consideration of this collateral motion. As noted, all of the supposed

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[1] This avoidance of piecemeal motions on an incomplete record is the same course adopted by this Court, at Plaintiffs' vigorous urging, when Defendants made what the Court considered a premature motion for summary judgment before the conclusion of expert discovery. (*See* Transcript of Proceedings Before the Honorable Ronald A. Guzman, September 4, 2007 at 4&7, denying as premature Defendants' Motion for Implementation of This Court's February 28, 2006 Order.)

"spoliation" (like Plaintiffs' voluminous anecdotal showing on this motion) relates to Household's dealings and alleged dealings with borrowers -- not shareholders. The relevance of such material -- even if any had been improperly destroyed, which Defendants vigorously deny -- is the subject of a core dispute between the parties about the proper scope of the upcoming trial. This dispute will be the focus of an anticipated series of *Daubert* and *in limine* motions that will squarely contest Plaintiffs' persistent focus on an anecdotal and unduly prejudicial *consumer* fraud case -- and their related refusal to specify the alleged misstatements of fact and fraudulent omissions they intend to introduce at trial in connection with their claims of *securities* fraud. The "spoliation" motion, which assumes the relevance of random, untested hearsay about alleged consumer abuses, should not be resolved in a vacuum and without the benefit of the Court's input on the overall admissibility, if any, of such evidence.

- Plaintiffs' motion is based in large part on hearsay declarations of witnesses whose existence Plaintiffs concealed until October 31, 2008 (when the parties exchanged certain Pretrial Order disclosures and these declarants were listed as "will call" trial witnesses), even though Plaintiffs had raised the same spoliation issues frequently (and unsuccessfully) before Magistrate Judge Nolan during fact discovery, and had obtained a declaration from at least one of these undisclosed witnesses as early as 2007 -- and notwithstanding Plaintiffs' obligation under the Federal Rules to supplement their initial Rule 26 disclosures and answers to interrogatories expressly calling for identification of such individuals. These previously-concealed witnesses, who make up one-third of Plaintiffs' list of live "will call" trial witnesses, have never been deposed in this matter, and when Defendants complained about this attempted trial by ambush in a recent meet and confer, Plaintiffs argued that Defendants were not entitled even to depose the new witnesses before trial. Defendants will shortly ask the Court to strike any testimony of these witnesses as a mandatory sanction under Rule 37. The

disposition of that priority motion may disqualify a large part of Plaintiffs' alleged support for the collateral "spoliation" motion. For the Court to address the latter motion now, prior to considering the motion to strike, could prove to be a considerable waste of judicial resources.

- Even if testimony of the previously-concealed new witnesses were not stricken as a Rule 37 sanction and/or as classic hearsay, resolution of this motion as framed by Plaintiffs would call for extensive fact-finding by the Court on hotly-contested issues of dubious relevance. To cite one of many examples, Plaintiffs argue that a Household program to confiscate unauthorized training and sales material was "spoliation" (albeit years before Plaintiffs' asserted any claim relating to alleged predatory lending), based on their argument that the materials were in fact "authorized." If that distinction mattered at all to the securities fraud claims, it plainly cannot be resolved by the Court as a matter of fact based on the contested and inadmissible declarations of stealth witnesses. Even if (or perhaps especially if) any relevant fact disputes raised by Plaintiffs' motion are deferred for the jury's consideration at trial, Defendants would be justified in seeking leave to depose these newly disclosed witnesses and otherwise follow up on their supposed revelations, and adjust Defendants' own trial preparations accordingly. There is no justification for imposing such wasteful detours on Defendants and the Court so long after the cut-off of fact discovery and when so much needs to be accomplished on mainstream trial preparation and timely completion of the Pretrial Order.

To put all of the above concerns into perspective, the Court should be aware that Defendants may find it necessary to seek the Court's assistance in requiring Plaintiffs to articulate -- at long last -- for purposes of the Pretrial Order exactly what fraudulent statements and/or omissions they will try to prove at trial. Plaintiffs' draft proposed description of the case to prospective jurors, draft jury instructions, draft verdict form and other Pretrial Order components are unbelievably -- and impermissibly -- silent on this central aspect of the case, and their list of 3200 supposed exhibits, over 50 supposed "will call" witnesses and 2000 pages of

supposed deposition designations are (perhaps deliberately) too voluminous and wide-ranging to provide any meaningful guidance as to the intended scope of Plaintiffs' issues for trial. Whether this core impasse can be resolved through further meet and confer sessions or will require the Court's intervention, it makes no sense to impose on Defendants and this Court the substantial burden of even reading Plaintiffs' prolix and collateral "spoliation" motion -- with its 64-page brief and 104 exhibits -- until after Plaintiffs have at long last defined the securities fraud case they intend to try.

In an effort to avoid subjecting the Court to an unnecessary presentment this week, Defendants asked Plaintiffs to withdraw their motion at this time so that it could be addressed in conjunction with the related *in limine* and *Daubert* motions that this Court scheduled for filing on January 30, 2009. Plaintiffs declined, without providing any explanation why this motion should be afforded priority treatment.

CONCLUSION

For all of the foregoing reasons, and in the interests of judicial efficiency, the avoidance of piecemeal motion practice on related issues, and the orderly resolution of priority scope-of-trial and admissibility issues rather than addressing collateral issues in a vacuum, Defendants respectfully urge the Court to deny, strike or defer briefing and consideration of Plaintiffs' "spoliation" motion as premature.

Dated: December 1, 2008
Chicago, Illinois

Respectfully submitted,
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