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19 UNITED STATES DISTRICT COURT

20 FOR THE CENTRAL DISTRICT OF CALIFORNIA

21 WESTERN DIVISION

22 In re HOMESTORE.COM
23 SECURITIES LITIGATION

24 Master File No. 01-CV-11115 RSWL
(CWx)

25 This Document Relates To:
26 ALL ACTIONS.

27 **RICHARD A. SMITH'S
28 MEMORANDUM OF POINTS
AND AUTHORITIES IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR LEAVE TO FILE
THIRD AMENDED
CONSOLIDATED COMPLAINT**

Date: June 17, 2008

Time: 11:00 A.M.

Judge: Hon. Ronald S. W. Lew

312 N. Spring Street, 5th Floor
Los Angeles, CA 90012

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12	35 F.3d 1407 (9th Cir. 1994)	8

1 Richard A. Smith ("Smith") respectfully submits this Memorandum of Points
2 and Authorities in Opposition to Plaintiff's Motion for Leave to File Third Amended
3 Consolidated Complaint ("TAC").

4 **PRELIMINARY STATEMENT**

5 Leave to amend should be denied as futile because each of the claims
6 contained in the proposed TAC against Smith is legally defective.

7 Plaintiff's claim under Section 10(b) of the Securities Exchange Act of 1934
8 ("the Exchange Act") is defective because the proposed TAC fails to allege – much
9 less allege with the particularity required by Rule 9(b) and the Private Securities
10 Litigation Reform Act of 1995 ("the PSLRA") – that (i) Smith ever made a false
11 statement or material omission, (ii) the alleged fraudulent conduct of Smith was
12 revealed to the market and that such disclosure negatively affected the price of
13 Homestore stock, and (iii) Cendant or Smith acted with scienter – i.e., "a mental state
14 embracing an intent to deceive, manipulate, or defraud." (See Point I, below.)

15 The TAC's "control person" claim under Section 20(a) of the Exchange Act
16 against Smith – which is virtually identical to its claim in the previous two dismissed
17 complaints – also fails as a matter of law because Plaintiff fails to allege one of the
18 necessary elements for a prima facie claim of "control person" liability under Section
19 20(a) – i.e., "that the defendant exercised actual power or control over the primary
20 violator." (See Point II, below.)

21 Finally, even if the TAC stated a viable claim against Smith, leave to amend
22 should still be denied because each of the claims proposed to be asserted against him
23 in the TAC was released in Plaintiff's settlement agreement with Homestore, which
24 was approved by this Court in May 2004. (See Point III, below.)

25 **BACKGROUND**

26 At all relevant times, Smith was the Chairman and Chief Executive Officer of
27 Cendant's Real Estate Division. (TAC ¶ 18.) For the sake of brevity, Smith adopts
28

1 the procedural history and statement of the facts set forth in the Memorandum of
2 Points and Authorities simultaneously filed in opposition to Plaintiff's motion by
3 Cendant ("CD Opp.").

4 ARGUMENT

5 LEAVE TO AMEND SHOULD BE DENIED

6 Plaintiff's motion should be denied on the grounds of futility because the TAC
7 fails to state a claim against Smith and, thus, would not survive a motion to dismiss.
8 See Deveraturda v. Globe Aviation Sec. Servs., 454 F.3d 1043, 1049-50 (9th Cir.
9 2006) (leave to amend properly denied where "the proffered amendment would be
10 futile"); see also Robinson v. Cal. Bd. of Prison Terms, 997 F. Supp. 1303, 1308
11 (C.D. Cal. 1998) (Lew, J.) (dismissing complaint without leave to amend because
12 "any amendment would be futile"); Konica Bus. Machs. v. The Sea-Land Consumer,
13 No. CV-91-6401-RSWL, 1992 WL 471306, at *1 (C.D. Cal. Aug. 10, 1992) (Lew,
14 J.) (proposed amendment properly denied as futile "if the amended . . . [complaint]
15 would not survive a 12(b)(6) motion").¹

16 I. THE TAC FAILS TO STATE A 17 SECTION 10(b) CLAIM AGAINST SMITH

18 In Count I of the TAC, Plaintiff attempts to allege a violation of Section 10(b)
19 against Smith. This attempt fails for at least four separate and independent reasons.

20 A. The Proposed TAC Fails to Allege That Smith 21 Ever Made a False Statement or a Material Omission

22 As was the case with Cendant, the proposed TAC fails to allege – much less
23 allege with the particularity required by Rule 9(b) and the PSLRA – that Cendant or
24 Smith ever made a false statement or a material omission. (See CD Opp. 15-19.)
25 Smith hereby adopts the arguments in Cendant's Opposition on this point and
26 incorporates them by reference herein.

27
28 ¹ Further, leave to amend should also be denied because of Plaintiff's undue delay. (See CD Opp. at 24-25.) Smith hereby adopts the arguments in Cendant's Opposition on this point and incorporates them by reference herein.

1 Indeed, the only allegation of a misstatement or omission unique to Smith is
2 Plaintiff's allegation – which is taken almost verbatim from the previous two
3 dismissed complaints – that Smith can be liable under the "group published" doctrine
4 based on his mere attendance at a single meeting where it was allegedly decided that
5 the "company's woes" would be blamed on the "September 11 tragedy and a
6 declining Internet advertising market." (Compare TAC ¶ 128 with FAC ¶ 507; SAC
7 ¶ 573.) This unparticularized and conclusory allegation – which was already
8 necessarily rejected by Judge Pechman, the Ninth Circuit, and this Court – fails as a
9 matter of law.

10 As a preliminary matter, the "group published" doctrine upon which Plaintiff
11 relies – i.e., the presumption that false and misleading information conveyed in
12 documents issued by a corporation are made by the collective action of its officers
13 and directors – is no longer good law. Indeed, the overwhelming majority of district
14 courts in the Ninth Circuit – as well as every other Circuit Court to consider the issue
15 – has held that the "group published" doctrine did not survive the enactment of the
16 PSLRA. See, e.g., In re Amgen Inc. Sec. Litig., 544 F. Supp. 2d 1009, 1036 (C.D.
17 Cal. 2008) (joining "the Third, Fifth and Seventh Circuits" in holding "that group
18 pleading presumption no longer applies since the passage of the PSLRA"); In re
19 Impac Mortgage Holdings, Inc. Sec. Litig., No. SACV 06-00031-CJC, 2008 WL
20 2104208, at *6 (C.D. Cal. May 19, 2008) ("[T]he 'group published' exception has not
21 survived the PSLRA."); In re Hansen Natural Corp. Sec. Litig., 527 F. Supp. 2d
22 1142, 1153-54 (C.D. Cal. 2007) ("Based on the Supreme Court's refusal to overturn
23 the Seventh Circuit's determination in Makor Issues & Rights, Ltd. v. Tellabs, Inc.,
24 437 F.3d 588, 602-03 (7th Cir. 2006), that the group pleading doctrine did not
25 survive the PSLRA, this Court concludes that the group pleading doctrine can no
26 longer be used in pleading cases under the PSLRA."); In re Lockheed Martin Corp.
27 Sec. Litig., 272 F. Supp. 2d 928, 936 (C.D. Cal. 2002) ("The group-published
28 information doctrine is inconsistent with the PSLRA because it requires courts to

1 accept a plaintiff's belief regarding the individual liability of a corporate officer even
2 when the belief is based on the officer's job title alone."); Alaska Elec. Pension Fund
3 v. Adecco S.A., 371 F. Supp. 2d 1203, 1220-21 (S.D. Cal. 2005) ("Recognition of
4 the group pleading doctrine would be at odds with the PSLRA's pleading
5 requirements regarding scienter . . ."); see also Winer Family Trust v. Queen, 503
6 F.3d 319, 335 (3d Cir. 2007) ("the group pleading doctrine did not survive the
7 specific pleading requirements of the PSLRA"); Fin. Acquisition Partners LP v.
8 Blackwell, 440 F.3d 278, 287 (5th Cir. 2006) (same); Makor Issues & Rights, Ltd. v.
9 Tellabs, Inc., 437 F.3d 588, 603 (7th Cir. 2006) ("[p]laintiffs must create [a strong]
10 inference [of scienter] with respect to each individual defendant in multiple
11 defendant cases."), vacated on other grounds, 127 S. Ct. 2499 (2007).

12 Further, even if the "group published" doctrine did survive the PSLRA (which
13 it did not), it has never been applied to outside directors, like Smith, who were not
14 involved in the day-to-day operations of the company. See Atlas v. Accredited
15 Home Lenders Holding Co., No. 07-CV-488 H, 2008 WL 80949, at *8-9 (S.D. Cal.
16 Jan. 4, 2008). As the Ninth Circuit held prior to the enactment of the PSLRA: "To
17 rely upon the 'group published information' presumption, Plaintiffs' complaint must
18 contain allegations that an outside director either participated in the day-to-day
19 corporate activities, or had a special relationship with the corporation, such as
20 participation in preparing or communicating group information at particular times."
21 In re GlenFed, Inc. Sec. Litig., 60 F.3d 591, 593 (9th Cir. 1995).

22 Here, Plaintiff has not pled any factual allegations – much less particularized
23 allegations – demonstrating Smith's participation in Homestore's decision to "put a
24 'spin' on the company's declining revenues." (TAC ¶ 128.) Rather, the proposed
25 TAC – just like the previous two dismissed complaints – merely alleges that Smith
26 attended a single meeting where this subject was discussed. Notably, in dismissing
27 the FAC, Judge Pechman explicitly considered this exact same allegation (among
28 other allegations of much more direct involvement) against David Rosenblatt,

1 Homestore's General Counsel, and Allan Merrill, an officer of Homestore, and held
2 that Plaintiff's allegations that these officers attended multiple meetings where the
3 decision to "spin" Homestore's revenue was discussed (and that they were "directly
4 involved" in such decision) were insufficient to establish primary liability under
5 Section 10(b) – even under the "group pleading" doctrine. Accordingly, this same
6 allegation obviously fails as to Smith, whose alleged involvement consisted solely of
7 his mere attendance at a single meeting.

8 **B. Smith Owed No Duty of Disclosure to Homestore Shareholders**

9 Plaintiff's Section 10(b) claim fails against Smith for the additional and
10 independent reason that the TAC fails to allege any facts demonstrating that Smith
11 owed any duty of disclosure to Homestore shareholders, a necessary element of any
12 Section 10(b) claim based on an omission. (See CD Opp. at 19-20.) It is well-settled
13 that Smith's mere status as an outside director is insufficient, as a matter of law, to
14 establish that he owed any duty to Homestore shareholders. See, e.g., In re Apple
15 Computer Sec. Litigation, 696 F. Supp. 490, 495 (N.D. Cal. 1987) ("A directorship
16 in itself does not impose a duty to insure that all material adverse information [is]
17 conveyed to prospective purchasers of [the company's] stock.") (citing Decker v.
18 Massey-Ferguson, Ltd., 681 F.2d 111, 119 (2d Cir. 1982); Lanza v. Drexel, 479 F.2d
19 1277, 1289 (2d Cir. 1973) (en banc)), aff'd in part, rev'd in part on other grounds,
20 886 F.2d 1109 (9th Cir. 1989); JHW Greentree Capital, L.P. v. Whittier Trust Co.,
21 No. 05 Civ. 2985, 2005 U.S. Dist. LEXIS 27156, at *24 (S.D.N.Y. Nov. 10, 2005)
22 ("A director [who is a] non-participant in the transaction[] owes no duty to insure
23 that all material, adverse information is conveyed to prospective purchasers of the
24 stock of the corporation on whose board he sits.") (quoting Lanza, 479 F.2d at
25 1289)); In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig., 666 F. Supp.
26 547, 563 (S.D.N.Y. 1987) ("in the absence of direct participation in a securities
27 violation, an outside director of a corporation has no duty to disclose adverse
28 material facts or information to . . . prospective purchasers").

1 Because the proposed TAC fails to allege any facts demonstrating that Smith
2 owed any duty to Homestore shareholders with respect to the transactions at issue,
3 Plaintiff's Section 10(b) claim based on Smith's alleged material omissions fails as a
4 matter of law.

5 **C. The TAC Fails to Allege Loss Causation as Against Smith**

6 Amendment would also be futile because the proposed TAC fails to
7 adequately allege "loss causation," a critical element of any Section 10(b) claim, as
8 against Smith, for the reasons set forth in Cendant's Opposition. (See CD Opp. at
9 21-24.) Smith hereby adopts the arguments in Cendant's Opposition on this point
10 and incorporates them by reference herein.

11 **D. The Proposed TAC Fails to Plead**
12 **Particularized Facts Giving Rise to a Strong**
13 **Inference That Cendant or Smith Acted With Scienter**

14 Finally, the proposed TAC also fails to allege that Cendant or Smith acted
15 with scienter – i.e., "a mental state embracing intent to deceive, manipulate, or
16 defraud" – which is an essential element for any Section 10(b) claim. Tellabs, Inc.
17 v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2507 (2007) (citation omitted). In
18 Tellabs, the Supreme Court held that in order to satisfy the PSLRA's requirement
19 that a Section 10(b) plaintiff plead particularized facts giving rise to a "strong
20 inference" that defendant acted with scienter, the inference of wrongdoing "must be
21 more than merely 'reasonable' or 'permissible' – it must be cogent and compelling,
22 thus strong in light of other explanations." Id. at 2510. The Court went on to state
23 that "[a] complaint will survive . . . only if a reasonable person would deem the
24 inference of scienter cogent and at least as compelling as any plausible opposing
25 inference one could draw from the facts alleged." Id.

26 In addition, according to the Ninth Circuit, mere recklessness does not satisfy
27 the element of scienter. Rather, plaintiff must allege facts that will support a strong
28 inference that the defendant's actions reflected some degree of intentional or
conscious misconduct, or "deliberate recklessness." See In re Silicon Graphics Inc.

1 Sec. Litig., 183 F.3d 970, 977 (9th Cir. 1999) ("[R]ecklessness only satisfies scienter
2 under § 10(b) to the extent that it reflects some degree of intentional or conscious
3 misconduct."); In re Vantive Corp. Sec. Litig., 283 F.3d 1079, 1085 (9th Cir. 2002)
4 (Section 10(b) requires a showing "that the defendant made false or misleading
5 statements either intentionally or with deliberate recklessness").

6 Further, "[i]n order to show a strong inference of deliberate recklessness,
7 plaintiffs must state facts that come closer to demonstrating intent, as opposed to
8 mere motive and opportunity." Silicon Graphics, 183 F.3d at 974; accord DSAM
9 Global Value Fund v. Altris Software, Inc., 288 F.3d 385, 389 (9th Cir. 2002).

10 Here, the proposed TAC utterly fails to satisfy these standards. Plaintiff fails
11 even to allege – much less allege with the requisite factual specificity – any legally-
12 viable motive or opportunity for Cendant or Smith to engage in the alleged "scheme
13 to defraud" with Homestore. Rather, Plaintiff summarily asserts that "Cendant,
14 because of its substantial ownership stake in Homestore, needed Homestore to meet
15 its revenue numbers." (TAC ¶ 124.) But given that every Homestore stockholder –
16 not just Cendant – had an interest in the value of Homestore's stock, this allegation is
17 nothing more than a universally-shared "motive," which is an insufficient basis on
18 which to allege scienter. See, e.g., Lipton v. PathoGenesis Corp., 284 F.3d 1027,
19 1038 (9th Cir. 2002) ("If scienter could be pleaded merely by alleging that officers
20 and directors possess motive and opportunity to enhance a company's business
21 prospects, 'virtually every company in the United States that experiences a downturn
22 in stock price could be forced to defend securities fraud actions.'") (citation omitted);
23 Kalnit v. Eichler, 264 F.3d 131, 139-40 (2d Cir. 2001) (generalized motives, such as
24 a desire to keep stock price high, are insufficient to demonstrate scienter); Goplen v.
25 51job Inc., 453 F. Supp. 2d 759, 772 (S.D.N.Y. 2006) ("mere ownership of company
26 stock is insufficient to show motive").

27 In addition, the stockholders agreement between Cendant and Homestore
28 generally restricted Cendant from selling its Homestore shares (see Ex. A at 7), and

1 there is no allegation in the proposed TAC that Cendant actually sold any Homestore
2 shares during the Class Period. There also is no allegation in the proposed TAC that
3 Smith himself sold any Homestore shares during the Class Period. Plaintiff's motive
4 theory fails for this additional reason. See, e.g., Shields v. Citytrust Bancorp, Inc.,
5 25 F.3d 1124, 1131 (2d Cir. 1994) ("Absent [allegations comparable to insider
6 trading] to explain how a defendant benefits from an inflated stock price, stock
7 ownership does not provide sufficient motive to sustain [plaintiff's] pleading burden .
8 ...").

9 In fact, the absence of allegations of stock sales not only fails to support a
10 strong inference of scienter, it actually negates any inference of scienter. See, e.g.,
11 In re Worlds of Wonder Sec. Litig., 35 F.3d 1407, 1425 (9th Cir. 1994) ("Officers'
12 minimal sales of stock . . . negates an inference of scienter."); In re FVC.com Sec.
13 Litig., 136 F. Supp. 2d 1031, 1039-40 (N.D. Cal. 2000) (the fact that officer did not
14 sell stock negated any inference of scienter), aff'd, 32 F. App'x 338 (9th Cir. 2002);
15 In re Advanta Corp. Sec. Litig., 180 F.3d 525, 540-41 (3d Cir. 1999) (the fact that
16 the insiders sold little or no stock undermines an inference of scienter).

17 Similarly, the proposed TAC does not contain any facts – let alone
18 particularized facts – showing that Cendant or Smith had the opportunity to cause
19 Homestore to effectuate the alleged "scheme to defraud" by improperly accounting
20 for certain transactions on its financial statements. The proposed TAC does not
21 allege that Cendant or Smith played any role in Homestore's accounting decisions
22 either generally or specifically in respect of the Move.com deal, the Top Presenter
23 transaction, or the iPIX transaction.

24 **II. THE SECTION 20(a) CLAIM ALSO FAILS AS A MATTER OF LAW**

25 Plaintiff's Section 20(a) claim in the proposed TAC – which is virtually
26 identical to its claim in the previous two dismissed complaints – suffers from the
27 same legal defects that it possessed in those complaints. More specifically, the
28 proposed TAC fails to allege one of the necessary elements for a prima facie claim of

1 "control person" liability under Section 20(a) – i.e., "that the defendant exercised
2 actual power or control over the primary violator." In re Peerless Sys. Corp. Sec.
3 Litig., 182 F. Supp. 2d 982, 996 (S.D. Cal. 2002). In order to adequately plead that
4 an outside director or corporate shareholder "exercised actual power or control" over
5 a corporation such as Homestore, a plaintiff must allege, with the particularity
6 required by the PSLRA,² that the director or shareholder actively participated in the
7 day-to-day affairs of the corporation. See Oak Tech., 1997 WL 448168, at *14.

8 Here, Plaintiff has failed to allege in the TAC – much less allege with the
9 legally required particularity – that Smith, an outside director, or his employer
10 Cendant, exercised actual power or control over Homestore's management, policies,
11 or financial statements or that Smith or Cendant ever had any such power. The TAC
12 does not even allege that Smith – or anyone else affiliated with Cendant –
13 participated in Homestore's day-to-day affairs. Under such circumstances, Plaintiff's
14 Section 20(a) claim fails as a matter of law.³

15 Cendant's status as a 20% Homestore shareholder does nothing to change this
16 result. Although stock ownership may evidence control under certain instances,
17 Cendant's inability to vote its Homestore shares independently of its fellow
18 stockholders or to buy more shares – both of which are conceded in the TAC – fully
19 negates any such inference of control on the part of Cendant or its employee, Smith.
20 (See SAC ¶ 435.); Laven v. Flanagan, 695 F. Supp. 800, 803, 807 (D.N.J. 1988)
21 (dismissing "control person" claim against corporate shareholder who, as a result of a
22 standstill agreement, was prohibited from acquiring more than 25% of outstanding
23 shares). In fact, the same stockholder agreement that sterilizes Cendant's shares, to
24 which reference is made in the TAC (TAC ¶ 73), specifically prohibits Cendant, and

25 ² The heightened pleading requirements enacted by the PSLRA apply to claims under Section 20(a). See In Re
26 Ramp Networks, Inc. Sec. Litig., 201 F. Supp. 2d 1051, 1063 (N.D. Cal. 2002); In re Splash Tech. Holdings, Inc.
Sec. Litig., No. C 99-00109 SBA, 2000 WL 1727405, at *15 (N.D. Cal. Sept. 29, 2000); In re Oak Tech. Sec.
Litig., No. 96-20552 SW, 1997 WL 448168, at *14 (N.D. Cal. Aug. 1, 2007).

27 ³ See Splash Tech. Holdings, 2000 WL 1727405, at *16 ("The mere fact that an individual is a director of a firm is
28 not sufficient to show he is a control person of the firm . . ."). Nor does the combination of Cendant and Smith
lead to a contrary conclusion. See In re Gupta Corp. Sec. Litig., 900 F. Supp. 1217, 1243 (N.D. Cal. 1994)
(dismissing Section 20(a) claim against shareholder with agent on the corporation's board because shareholder
status, even when combined with an agent on the Board, does not establish control person liability).

1 thus Smith, from "seeking to control Homestore's management, board of directors or
2 policies." (Ex. A at 7.)

3 **III. PLAINTIFF RELEASED ITS PROPOSED CLAIMS AGAINST SMITH**

4 **A. Background**

5 On August 12, 2003, Plaintiff entered into a Settlement Agreement with
6 Homestore. (Ex. B.) The Release of Claims clause of the Settlement Agreement
7 ("Release"), ¶ 3B, states that Plaintiff and each member of the class, "releases and
8 forever discharges each and every one of the Settled Claims [which included the
9 claims in the FAC]⁴ against the Released Homestore Parties, and shall ever be barred
10 and enjoined from commencing, instituting or maintaining any of the Settled Claims
11 against any of the Released Homestore Parties." (Ex. B at 6.)

12 The Settlement Agreement defined "Released Homestore Parties" as
13 "Homestore, its present and former assigns, affiliates, administrators, executors,
14 successors, subsidiaries, attorneys, accountants and auditors (except
15 PricewaterhouseCoopers), experts, parents, predecessors, or related companies, and
16 any of its present or former officers and directors, shareholders, employees, agents or
17 representatives, excluding the Individual Defendants, Other Settling Defendants and
18 Dismissed Defendants." (See Ex. B at 4-5, Definition (y) (emphasis added).)

19 On March 8, 2004, the District Court entered Judgment and dismissed with
20 prejudice all claims against Smith, Cendant and other defendants. (Ex. C.)

21 On April 7, 2004, Plaintiffs filed a Notice of Appeal from the March 7, 2003
22 Dismissal Order and from the March 8, 2004 Judgment. (Ex. D.)

23 On May 14, 2004, this Court entered the Final Judgment and Order of
24 Dismissal with prejudice as to Homestore, approving the terms of the settlement set
25

26 ⁴ "Settled Claims' means any and all claims, rights, demands, obligations, controversies, debts, damages, losses,
27 causes of action and liabilities of any kind or nature whatsoever in law or equity, including both known and
28 unknown claims, suspected or unsuspected, held at any point from the beginning of time to the date of the
execution of this Stipulation, arising out of, connected with, or in any way relating to, the acquisition of
Homestore common stock or which have been or could have been asserted by any of the Plaintiffs or Class
Members in the Action against any of the Released Homestore Parties." (Ex. B at 5, Definition (z).)

1 forth in the Settlement Agreement. (Ex. E.) The Final Judgment and Order
2 confirmed that:

3 The Released Homestore Parties are hereby and forever released and
4 discharged with respect to any and all claims or causes of action the
5 lead Plaintiff and Members of the Class had or have arising out of or
6 related to any of the Settled Claims as defined in this Stipulation.

7 (Ex. E ¶ 4.)

8 On June 14, 2004, Smith filed a motion to dismiss the appeal pending in the
9 Ninth Circuit, arguing that since Plaintiff released all claims against Smith, the
10 appeal was moot as to him.

11 On June 18, 2004, Plaintiff filed its opposition to Smith's motion to dismiss
12 the appeal, contending that even though the plain language of the release clearly
13 covered Smith, Plaintiff did not intend to release Smith.

14 On August 2, 2004, the Ninth Circuit denied Smith's motion to dismiss
15 without prejudice and instructed Smith to renew his arguments in the answering brief
16 to Plaintiff's appeal, which he did.

17 On June 30, 2006, in its decision resolving Plaintiff's appeal, the Ninth Circuit
18 stated that Smith's argument that Plaintiff had released its claims against him was left
19 "for consideration by the district court." Simpson V. AOL Time Warner Inc., 452
20 F.3d 1040, 1055 n.9 (9th Cir. 2006).

21 **B. Amendment Would Be Futile Because**
22 **Plaintiff Has Released All Claims Against Smith**

23 Granting Plaintiff leave to amend as against Smith would be futile because the
24 TAC does not contain any claim that would overcome the Release Plaintiff and the
25 class granted Smith. In fact, the claims proposed to be asserted against Smith in the
26 TAC are virtually identical to the released claims in the FAC. (Compare FAC ¶¶
27 671-84, with TAC ¶¶ 307-320.)

1 Plaintiff and the class clearly released Smith from any and all claims it wishes
2 to assert against him in this action:

3 As of the Effective Date, Lead Plaintiff CalSTRS and each member of
4 the Class, on behalf of themselves, and each of their respective
5 predecessors, successors, parents, subsidiaries, affiliates, heirs,
6 executors, trustees, administrators and representatives, releases and
7 forever discharges each and every one of the Settled Claims against the
8 Released Homestore Parties, and shall forever be barred and enjoined
9 from commencing, instituting or maintaining any of the Settled Claims
10 against any of the Released Homestore Parties.

11 (Ex. B at 6 (emphasis added).)

12 The Settlement Agreement defines "Settled Claims" very broadly, to include
13 the claims sought to be asserted against Smith in the TAC (see pp. 10-12, n.4,
14 above), and defines "Released Homestore Parties" as:

15 Homestore, its present and former assigns, affiliates, administrators,
16 executors, successors, subsidiaries, attorneys, accountants and auditors
17 (except PricewaterhouseCoopers), experts, parents, predecessors, or
18 related companies, and any of its present or former officers and
19 directors, shareholders, employees, agents or representatives, excluding
20 the Individual Defendants, Other Settling Defendants and Dismissed
21 Defendants.

22 (Ex. B at 4-5, Definition (y) (emphasis added).)

23 There is no dispute that Smith is a former director of Homestore. As the TAC
24 itself alleges, "[i]n 2001 . . . Smith became a voting member of Homestore's Board
25 of Directors." (TAC ¶ 18.) Since Smith was not listed among those persons
26 excluded from the Release – i.e., the persons listed under the categories "Individual
27 Defendants," "Other Settling Defendants," and "Dismissed Defendants" – Plaintiff
28 has relinquished any and all claims it wishes to assert against him. (See Ex. B at 3-4,

1 Definition (t) ("Other Settling Defendants"), Definition (m) ("Individual
2 Defendants") and Definition (i) ("Dismissed Defendants").)

3 Plaintiff argued in the Ninth Circuit that Smith is not covered by the Release
4 because he is a "Business Partner Defendant" and those Defendants were excluded
5 from the Release. However, to accept this contention would be to rewrite the
6 Settlement Agreement. The Settlement Agreement only excludes the specifically
7 named "Business Partner Defendants," not all of them, and Smith is not one of those
8 named:

9 "Dismissed Defendants" means the following "Business Partner
10 Defendants" and "Third Party Vendors" named by Plaintiff as
11 defendants in the First Amended Consolidated Class Action Complaint
12 in this Action, whose motions to dismiss were granted by the Court in
13 its March 7, 2003 Order Regarding Motion to Dismiss: AOL Time
14 Warner, Eric Keller, David Colburn, Cendant Corporation, L90,
15 Akonix, CityRealty, Classmates Online, CornerHardware, Globe
16 Explorer, Internet Pictures, Promise Mark, RevBox, Dorado
17 Corporation, SmartHome and WizShop.

18 (Ex. B at 3, Definition (i) (emphasis added).)

19 Plaintiff also argued in the Ninth Circuit that by listing Cendant as a
20 "Dismissed Defendant" not covered by the Release, the Settlement Agreement
21 intended to include all of Cendant's employees as persons excluded from the Release.
22 However, the plain language of the Release does not say this. This argument is also
23 belied by the fact that Eric Keller and David Colburn, employees of Defendant AOL
24 Time Warner, were listed as "Dismissed Defendants" excluded from the Release
25 even though their employer was also listed. Under Plaintiff's reasoning, there would
26 have been no need to name either one of them, yet they both were listed.

27 Plaintiff well knew how to exclude from the Release other former Homestore
28 officers and directors – Stuart Wolff and Peter Tafeen – by listing them as Individual

1 Defendants and thereby excluding them from the Released Homestore Parties. (Ex.
2 B at 3-5, Definitions (h), (y).) Plaintiff could have done the same with Smith, but
3 chose not to do so.

4 This is confirmed by Michael Long, the CEO of Homestore when this matter
5 was settled and the person in charge of settlement negotiations for Homestore. In his
6 accompanying declaration, Mr. Long confirms what is obvious from the settlement
7 documents – that Smith was certainly meant to be included in the Release and that
8 Plaintiff was well aware of it:

9 At the time the Settlement Agreement was entered into by the parties, I
10 understood that it included a Release of all of Plaintiff's claims
11 ("Release"), and the Release included all present and former officers
12 and directors of the Company, including Richard Smith who was a
13 former director of the Company, with certain exceptions. Richard
14 Smith's inclusion in the Release was not a mistake on the part of the
15 Company but was something that I understood was part of the
16 Settlement Agreement. I understood at the time that the Settlement
17 Agreement and the Release were drafted to include all former officers
18 and directors of the Company with the exception of certain individuals,
19 such as Stuart Wolff and Peter Tafeen, who Plaintiff negotiated to
20 exclude from the Release.

21 (Decl. of Michael Long ¶ 2 (emphasis added); Ex. F.) Accordingly, Plaintiff's
22 assertion has no merit.⁵

23 Plaintiff's assertion that including Smith in the Release was in error is also
24 belied by the extraordinary review of the Release by all concerned. Smith, therefore,

25 _____
26 ⁵ If Plaintiff again argues, as it did in the Ninth Circuit, that Smith is only a third party beneficiary of the Settlement
27 Agreement and must, therefore, prove that he was an intended beneficiary, the Long Declaration eliminates any
28 doubt that he was intended to be included in the Release. Plaintiff also argued in the Ninth Circuit that because
Smith was not an active participant in the settlement negotiations, he is not covered by the Release. In addition to
former directors, the Release also covers Homestore's assigns, affiliates, administrators, executors, successors,
subsidiaries, attorneys, accountants, auditors, experts, parents, predecessors, related companies, shareholders,
employees, agents or representatives. (Ex. B at 4-5, Definition (y).) None of these persons were involved in the
settlement negotiations either. Yet, Plaintiff does not claim that they are not covered.

1 could not have just been inadvertently slipped in. The motion by plaintiff for
2 preliminary approval of the Settlement was filed on August 26, 2003. The motion
3 was thoroughly briefed and preliminarily approved by this Court on October 14,
4 2003. Objections were then filed. On February 5, 2004, this Court ordered further
5 briefing. This Court then held a hearing on the proposed settlement on February 9,
6 2004. Supplemental briefs followed. After this thorough review, this Court entered
7 a Judgment approving the Settlement on March 16, 2004, nearly seven months after
8 the initial motion for approval was filed.

9 It is disingenuous for Plaintiff to now argue that a settlement so thoroughly
10 examined by the parties and this Court, where no objection was raised that Smith
11 should not be included among the released parties, nevertheless means something
12 contrary to its plain language.

13 The law is well settled that unless a release has been obtained by fraud,
14 deception, duress or undue influence, a party is bound by its plain language:

15 The general rule is that when a person with the capacity of reading and
16 understanding an instrument signs it, he is, in the absence of fraud and
17 imposition, bound by its contents, and is estopped from saying that its
18 provisions are contrary to his intention or understanding.

19 Smith v. Occidental & Oriental S.S. Co., 99 Cal. 462, 470-71, 34 P. 84, 86-87
20 (1893), cited with approval in Skrbina v. Fleming Cos., 45 Cal. App. 4th 1353, 1366,
21 53 Cal. Rptr. 2d 481, 489 (1996).

22 The parties in this case were represented by distinguished counsel. The
23 settlement was approved by this Court only after many months of arm's-length
24 negotiations and review. Plaintiff should be estopped from asking this Court to
25 disregard the terms of the Settlement Agreement it voluntarily entered into. See
26 Winet v. Price, 4 Cal. App. 4th 1159, 1168, 1170, 6 Cal. Rptr. 2d 554, 559, 560-61
27 (1992) ("Under these circumstances we may not give credence to a claim that a party
28 did not intend clear and direct language to be effective. . . . To the contrary, Winet

1 appears to be a sophisticated businessman who, with the benefit of counsel,
2 specifically negotiated the subject release in an arms-length transaction."); see also
3 Sionix Corp. v. Moorehead, 56 F. App'x 314, 315 (9th Cir. 2003) ("California law
4 clearly states that it is the outward manifestation or expression of assent – not
5 unexpressed intentions or understanding – that determines the existence of a
6 contract.").

7 In sum, Plaintiff and the class released Smith from any and all liability for the
8 claims Plaintiff is now attempting to assert against him in the TAC. Accordingly,
9 Plaintiff's motion for leave to file the TAC against Smith should be denied as futile
10 for this additional reason.

11 CONCLUSION

12 For all of the foregoing reasons, Plaintiff's Motion for Leave to File Proposed
13 Third Amended Consolidated Complaint should be denied in all respects.

14 Dated: July 3, 2008
15

16 Respectfully submitted,

17 STERN & KILCULLEN

18 By: Jeffery Speiser / RF
19 Herbert J. Stern
20 Jeffrey Speiser

21 *Attorneys for Richard A. Smith*

22 SKADDEN, ARPS, SLATE,
23 MEAGHER & FLOM LLP

24 By: Peter B. Morrison / RF
25 Peter B. Morrison

26 *Local Counsel for Richard A. Smith*
27
28

1 **CERTIFICATE OF SERVICE**

2 *In re: HOMESTORE.COM SECURITIES LITIGATION*

3 Case No.: 2:01-CV-11115-RSWL

4 I, the undersigned, state that I am employed in the City and County of Los
5 Angeles, State of California; that I am over the age of eighteen (18) years and not a party to the
6 within action; that I am employed at Skadden, Arps, Slate, Meagher & Flom LLP, 300 South
Grand Avenue, 34th Floor, Los Angeles, California 90071; and that on **July 3, 2008**, I served a
true copy of:

7 **RICHARD A. SMITH'S MEMORANDUM OF POINTS AND AUTHORITIES**
8 **IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE THIRD**
9 **AMENDED CONSOLIDATED COMPLAINT**

by the following means of service:

10 **BY E-FILE & SERVE:** I electronically filed the foregoing with the Clerk of the Court using the
11 CM/ECF system and I hereby certify that I have e-served the foregoing documents.

12 I declare under penalty of perjury under the laws of the State of California that the
13 above is true and correct.

14 Executed on **July 3, 2008**, at Los Angeles, California.

15 /s/ Dwight Hines
16 DWIGHT HINES
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