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

LEAD PLAINTIFFS' MEMORANDUM IN OPPOSITION TO HOUSEHOLD DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSING ALL REMAINING CLAIMS OF THE CLASS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Lead Plaintiffs respectfully submit this memorandum in opposition to the Motion for Summary Judgment Dismissing All Remaining Claims of the Class ("Motion" or "Defs' Mot.") filed by defendants Household International, Inc. ("Household"), William Aldinger ("Aldinger"), David Schoenholz ("Schoenholz") and Gary Gilmer. The Motion should be denied in its entirety since there clearly are triable issues of fact regarding the element of loss causation and their statute of repose affirmative defense.

Defendants' Motion is limited to arguments that plaintiffs, as a matter of law, cannot show loss causation. However, the two extensive reports of plaintiffs' economic expert Professor Daniel Fischel (57 pages with 75 exhibits) and his deposition testimony refute all of defendants' arguments. Contrary to defendants' argument, Professor Fischel opines ***both*** that defendants' Class Period misrepresentations independently caused artificial inflation to exist on each day of the Class Period ***and*** that the value of Household's stock declined when the market learned of the deception from November 14, 2001 through October 11, 2002. Lead Plaintiffs' Rule 56.1 Statement of Additional Facts in Opposition to Summary Judgment ("PSOF"), ¶¶1-2; *see also* Lead Plaintiffs' Response to Defendants' Rule 56.1 Statement in Support of Their Motion for Summary Judgment ("PResp."), ¶¶38-39. Professor Fischel identifies the partial disclosures of the truth about Household's business from November 14, 2001 to October 11, 2002 that removed the inflation in Household's stock that was caused by false statements and omissions made previously by defendants during the Class Period. PSOF, ¶¶1-4. Additionally, defendants' own documents – their Investor Relations Reports – which tracked events impacting Household's stock price support plaintiffs' loss causation theory. PSOF, ¶¶32-35.

Contrary to defendants' blanket statements that summary judgment is "inevitable" because the downturn in Household's stock was caused by factors other than alleged fraud, Professor Fischel quantifies the amount of fraud related inflation in Household's stock that was removed due to those stock price drops from November 14, 2001 to October 11, 2002 by removing any portion of the drops resulting from market or industry factors by the use of a widely accepted event study and regression analysis. PSOF, ¶¶4, 15, 30. Although Household's stock price declined by over $32 during the partial disclosure period of November 14, 2001 to October 11, 2002, Professor Fischel identifies only $7.97 of that decline as being related to the fraud under his quantification using specific disclosures and up to $23.94 of that decline under his quantification using leakage. PSOF, ¶¶15, 30. This evidence is fully in conformance with the loss causation law set forth by the Supreme

Court in *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005), and by the Seventh Circuit in *Bastian v. Petren Resources Corp.*, 892 F.2d 680 (7th Cir. 1990), *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645 (7th Cir. 1997) and *Ray v. Citigroup Global Mkts.*, 482 F.3d 991 (7th Cir. 2007).

Professor Fischel opines that each misrepresentation during the Class Period ***independently*** caused Household's stock price to be inflated and correctly only "assumes" that plaintiffs can prove the falsity of such statements. PSOF, ¶¶1-2, 8-11. Defendants argue erroneously (and contrary to Professor Fischel's testimony) that the absence of any statistically significant price increase in response to ***each of*** defendants' misrepresentations during the time period July 30, 1999 (the start of the Class Period) to November 14, 2001 (the date of the first partial disclosure) somehow is an admission barring plaintiffs from establishing loss causation. *See* PSOF, ¶14. The law does not require that Household's stock price increase each time a false statement is made – only that the false statement inflates the stock price above its true value. In his Rebuttal Report and deposition testimony, Professor Fischel already responded to this argument by clearly opining (as supported by academic literature from recognized experts in the field), that inflationary events occur where the statement at issue maintains the stock price that would have otherwise dropped if there had been a revelation of the truth, and that there is no need for a statistically significant price increase to occur each time the defendants make false statements for the statements to cause inflation. PSOF, ¶¶12-14.

Defendants also claim that plaintiffs' loss causation theory is not valid by pointing to three days during the Class Period where they claim Household's stock price increased upon a disclosure. Yet, Professor Fischel opined in detail in his Rebuttal Report (¶¶7-17) why defendants' arguments were not valid. One of the dates (April 9, 2002) is actually ***not*** a partial disclosure but rather another false statement. PResp., ¶55. Another date (August 14, 2002) is a relative price decline in Household stock as compared to the market, thus causing an economic loss to investors. PSOF, ¶22; PResp., ¶56.1. As to the third date (October 10-11, 2002), Professor Fischel explains in detail why the increase supports his opinion on loss causation. PSOF, ¶¶27-28.

Defendants also contend that the entire case should be dismissed because they claim plaintiffs are allegedly relying on pre-Class Period inflation time-barred under this Court's *Foss v. Bear, Sterns & Co.*, 394 F.3d 540 (7th Cir. 2005) ruling, which shortened the commencement of the Class Period from October 23, 1997 to July 30, 1999 due to the applicable three year statute of repose. Contrary to defendants' theory, however, the Class Period inflation is in no way related to any pre-Class Period inflation. Each false and/or misleading statement made by defendants gives rise to a claim under §10(b). In this case, the evidence shows that defendants' statements made during the Class Period maintained Household's artificially inflated stock price by preventing it from falling to its true value. PSOF, ¶¶11-12; *see also* PResp., ¶¶38-39. Thus, the inflation on Day 1 of the Class Period is identified by calculating the fraud-related decline that took place when the truth was disclosed from November 14, 2001 to October 11, 2002. As Professor Fischel opined: "[t]he amount of artificial inflation on a particular day during the Class Period equals the sum of the ***subsequent*** residual price changes."[1] PSOF, ¶29. There is also no requirement that the inflation in Household's stock ***increase*** each time defendants spoke from July 30, 1999 through November 14, 2001 in order for those subsequent statements to be actionable. PSOF, ¶¶12-14. In fact, under the "constant dollar" approach used by Professor Fischel (and other defense experts), the amount of dollar inflation is always constant from the beginning of the Class Period to the first partial disclosure. Professor Fischel's leakage theory is a combination of the constant dollar and constant percentage method and, as a result, the amount of inflation varies on each day of the Class Period, but this result is ***not*** dependent on each of defendants' false statements increasing inflation each time. Accordingly, inflation of each day of the Class Period has nothing to do with any pre-Class Period inflation.

The anomaly in this case is that as a result of the Court's order (and at defendants' request), the first day of the current Class Period begins on a date when there is no public statement by the defendants. The first public statement during the Class Period is Household's Form 10-Q for 2Q99 issued two weeks later on August 16, 1999. PSOF, ¶38. The only real issue is whether the defendants' pre-Class Period statement of its second quarter results on July 22, 1999 can be used by those purchasers of Household stock in the two week period of July 30, 1999 through August 16, 1999. If the failure of defendants on July 30, 1999 to correct the July 22, 1999 statement is not actionable (which plaintiffs dispute), then the Class Period would begin with the August 16, 1999 statement. The August 16, 1999 statement and each later false statement or omission by defendants is actionable on its own and according to Professor Fischel, caused inflation in Household's stock price. PSOF, ¶¶1-2, 11-12; PResp., ¶41.

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[1] Unless indicated otherwise, all emphasis has been added, and citations and internal quotations omitted.

In addition, the start date of the class period in securities class actions are shortened all the time due to court orders dismissing statements from a case for reasons such as the statute of repose or the failure to show falsity or scienter, to name a few. The first statement of any modified class period does ***not*** have to cause Household's stock price to increase in a statistically significant manner. Rather if the disclosure defects had been corrected on August 14, 1999 or in January 2000, or for any other Class Period statement, Household's stock price would have declined to its true value (by $7.97 per Professor Fischel's "specific disclosures" approach). PSOF, ¶11. Contrary to defendants' arguments, the only assumption made by Professor Fischel is that defendants made false statements or omissions – a liability issue, on which defendants have not moved for summary judgment and therefore concede for purposes of this motion, that economic experts never should opine on and something plaintiffs will prove at trial. PSOF, ¶¶9-10; PResp., ¶¶41, 45.

In sum, it is not even a close call on defendants' Motion. The evidence on loss causation is sufficient to present to a jury. Lead Plaintiffs respectfully request that defendants' Motion be denied in its entirety.

II. LEGAL ARGUMENT

A. Defendants Have Failed to Meet Their Heavy Burden in this Motion

Defendants' discussion of the applicable standard fails to accurately set forth their burden on summary judgment – no doubt because it represents a threshold they cannot meet. Defendants suggest plaintiffs bear the burden here – but that is backward. "Summary judgment is appropriate only if the ***movant*** demonstrates that no genuine issue of material fact exists . . . and the ***movant*** under that view of the record is entitled to judgment as a matter of law." *Schacht v. Wisconsin Dep't of Corrections*, 175 F.3d 497, 501 (7th Cir. 1999); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

The Seventh Circuit in *Caremark* described the burden on defendants' loss causation argument as follows: "At summary judgment, this burden usually is met by establishing that the decline in the value of the security is attributable ***in total to some other factor***. To defeat Caremark's claim at summary judgment, therefore, Coram would have to establish that, as a matter of undisputed fact, the depreciation in the value of the notes could not have resulted from the alleged false statement or omission of the defendant." 113 F.3d at 649-50; *see also In re Motorola Sec. Litig.*, 505 F. Supp. 2d 501, 550-51 (N.D. Ill. 2007), applying the *Caremark* test after *Dura*: "[N]othing in *Dura* indicates that *Caremark* is no longer good law." *Motorola*, 505 F. Supp. 2d at 550.

The Court's analysis in *Motorola* is instructive, yet defendants have failed to cite this case, or for that matter even challenge plaintiffs' ability to establish loss causation by demonstrating materialization of risk in addition to fraud on the market. *Ray*, 482 F.3d 991. Defendants in *Motorola*, like the defendants here, contended that "a securities fraud plaintiff bears the burden, even as the nonmoving party on summary judgment, of proving that its loss was caused by the claimed fraud, and not by the 'tangle of other factors' affecting share price." *Motorola*, 505 F. Supp. 2d at 549. The court disagreed: "Following *Caremark*, the burden in this case rests with Defendants, on summary judgment, to show that a decline in Motorola's share price, identified by Lead Plaintiff as occurring following the disclosure of Telsim-related information, did ***not*** result from that disclosure. . . . [T]he burden does not, in the Seventh Circuit, rest with Lead Plaintiff, at either the pleading or summary judgment stages, to apportion and quantify which part of its loss is attributable to disclosures of Telsim-related information, and which part might [be] attributable to other factors. *Id.* at 551 (emphasis in the original). Defendants have failed to carry their burden.

Defendants' burden with respect to the statute of repose is even higher. Because the statute of repose is an affirmative defense, at summary judgment, defendants must establish that on the evidentiary record, the application of the statute of repose requires that they prevail as a matter of law. *Havoco of Am. v. Freeman, Atkins & Coleman*, 58 F.3d 303, 306 (7th Cir. 1995). This includes establishing each element of the statute of repose, including that the inflation identified by Professor Fischel results solely from pre-Class Period (or time-barred) misrepresentations. *Id.* at 308. Significantly, defendants in their Rule 56.1 Statement[2] do not set forth evidentiary support for each element and thus, have forfeited the right to proceed on this argument. *Servin v. GATX Logistics, Inc.*, 187 F.R.D. 561, 562-63 (N.D. Ill. 1999) (referencing prior Rule 12(m)). Their argument is also factually incorrect.

In reviewing the evidentiary record on summary judgment, the Court does not weigh the evidence and construes the evidence in the light most favorable to the nonmoving party, drawing all inferences in non-movant's favor. *Payne v. Pauley*, 337 F.3d 767, 771 (7th Cir. 2003); *Gillis v. Litscher*, 468 F.3d 488, 492 (7th Cir. 2006). Notably, disputes about loss causation are primarily "questions of fact." *Roth v. Aon Corp.*, 238 F.R.D. 603, 608 (N.D. Ill. 2006) (quoting *In re Tyco*

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[2] "Rule 56.1 Statement" refers to Defendants' Statement Pursuant to Local Rule 56.1(a)(3) in Support of Their Motion for Summary Judgment. Dkt. No. 1228.

Int'l, Ltd. MDL, 236 F.R.D. 62, 71 (D.N.H. 2006)) (ruling on class certification); *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 840-41 (1996) ("The issues of proximate causation and superseding cause involve application of law to fact, which is left to the factfinder.").

Application of these standards requires denial of defendants' Motion.

1. Defendants' Mischaracterization of the Analysis and Testimony of Plaintiffs' Expert Daniel R. Fischel Packaged as Plaintiffs' "Admissions" Does Not Satisfy Their Burden on Summary Judgment

The core of defendants' loss causation argument, which they claim entitles them to summary judgment, is plaintiffs' supposed admission that none of the affirmative misrepresentations made during the Class Period were inflationary events. Defs' Mot. at 2,15. Professor Fischel analyzed the artificial inflation caused by defendants' ***false statements made during the Class Period***, not before. The admission defendants attempt to concoct simply does not exist.

As Professor Fischel explained in his Rebuttal Report, defendants' misrepresentations during the July 30, 1999 to November 14, 2001 period, whether characterized as affirmative misrepresentations or omissions,[3] were inflationary events because they caused inflation to exist in the stock price and prevented the stock price from falling to its true value. PSOF, ¶¶1-2, 11-12. Further, Professor Fischel rejected as "incorrect and misleading" the contention that his analysis "explicitly assumes that no inflationary events occurred prior to November 15, 2001 (and after July 30, 1999, the first day of the Class Period)" and that "[t]his assumption contradicts the Plaintiffs' claim that HI's stock became inflated through various alleged misrepresentations and/or omissions ('inflationary events') during the Class Period prior to November 15, 2001." PSOF, ¶6. Put another way, Professor Fischel has explicitly denied – several times – the concocted "admission" on which defendants pin all their hopes. As Professor Fischel explained:

> Plaintiffs claim that the alleged omissions [during this time period] were inflationary events because they prevented the price from falling to its true, uninflated value. Under this theory, the Company's stock price did not have to

[3] Defendants question whether plaintiffs' alleged misstatements are "affirmative misrepresentations" or "omissions," claiming that plaintiffs have flip-flopped between the two as convenience dictates. Defs' Mot. at 20-22. That is not true. In responding to defendants' interrogatories about "affirmative misrepresentations," plaintiffs objected on the grounds of vagueness, listed a number of misrepresentations and additionally, incorporated by reference the responses to other interrogatories concerning what information was "omitted" from defendants' public statements. PResp, ¶¶22, 24, 26-27. This alone precludes the "gotcha" tactic defendants now seek to employ.

> increase upon Defendants allegedly false statements (*e.g.*, quarterly financial results) in order to become inflated. Consequently, the fact that I did not identify statistically significant price increases that resulted in the inflation increasing between the beginning of the Class Period and November 15, 2001 does not contradict Plaintiffs' allegations.

PSOF, ¶12; *see also* PResp., ¶¶38-39. Professor Fischel noted support for this proposition from another well-known defense expert, Brad Cornell, who wrote "the observed market price can become inflated even if it remains basically constant because, had adverse information been disclosed, the market price would have declined." PSOF, ¶12. Defendants questioned Professor Fischel about this very language in the Rebuttal Report at his deposition and his response was direct: "[I]t would be an ***incorrect interpretation*** of regression analysis to conclude that because there is no statistically significant price reaction to a statement, that necessarily means that the statement did not produce artificial inflation." PSOF, ¶14; *see also* PSOF, ¶13.

Defendants also claim that Professor Fischel "assumed" artificial inflation existed on the first day of the Class Period – July 30, 1999 – and this is fatal to plaintiffs' loss causation argument. Defs' Mot. at 3, 7, 10, 24. Again, defendants embellish. Professor Fischel's testimony was that he assumed a disclosure defect on the first day of the Class Period, not that he assumed artificial inflation was present in the stock as of the first day: "I'm assuming the existence of actionable disclosure defects. Based on that assumption, I have attempted, using two different methods, to calculate the amount of inflation resulting from those disclosure defects." PSOF, ¶9; PResp., ¶41. Professor Fischel specifically testified that the "analysis of inflation" was "not just an assumption, it's also based on our analysis performed under my direction of stock price reactions to particular disclosures." PSOF, ¶9 (citing Fischel Depo Tr. at 122:13-18). Additional deposition testimony makes it clear that Professor Fischel did not, as defendants claim, simply assume artificial inflation was in place in Household's stock:

- Q. Okay. Well, you said you assumed that it [artificial inflation] exists on the first day of the class period?

  A: I assumed that there were disclosure defects on the first day of the class period, without having an opinion about whether there were or there were not.

- My understanding is that the plaintiffs allege that all public statements from the beginning of the class period contained material nondisclosures relating to the three different areas that I discuss in my report.

  And what I've attempted to do is, based on that assumption, attempt to quantify the amount of inflation that resulted, and how that inflation varied over time as different disclosures occurred, which either increased or decreased inflation during the class period.

- [M]y opinion assumes that Household's disclosures with respect to its lending practices were deficient in the sense that Household did not provide full disclosure of the extent to which it was involved in predatory lending, and the various practices that market participants concluded constituted predatory lending which could have possible adverse legal consequences and adverse consequences for the value of Household stock.

PResp., ¶¶41, 45 (citing to Fischel deposition testimony).

By failing to note these portions of Professor Fischel's testimony and his Rebuttal Report in their Rule 56.1 statement defendants "present[] a seriously distorted picture" contrary to their duty to provide a "fair presentation of the facts."[4] *The Prudential Ins. Co. of America v. Tomaszek*, 90 C 6892, 1992 U.S. Dist. LEXIS 1534, at *7 (N.D. Ill. Feb. 5, 1992) (concluding, if counsel "were selling securities rather than legal possessions, they would be liable under Section 10(b)"). Even setting aside defendants' failure to include relevant and dispositive facts and testimony, the facts defendants assert and rely on in their brief do not match up with and are not supported by the facts identified in their Rule 56.1 Statement and, consequently, should be ignored. *Anderson v. Foster Group*, 521 F. Supp. 2d 758, 781 n.34 (N.D. Ill. 2008) ("the court declines to consider facts not set forth in the parties' statements of material facts and supported by record evidence").

2. Defendants Have Not Presented Any Evidence that the Decline in Household's Stock Price Was Attributable to Non-Fraud Factors

To prevail on summary judgment, the defendant must "establish that, as a matter of undisputed fact, the depreciation in the value of the [security] could not have resulted from the alleged false statement or omission of the defendant." *Motorola*, 505 F. Supp. 2d at 536 (alternation in original) (citing *Caremark*, 113 F.3d at 649-50). Defendants pay no more than lip service to their burden to present evidence that the decline in Household's stock price was attributable to market forces, rather than fraud. In contrast, the defendants in *Ray*, which defendants here rely on, introduced expert evidence that the defendant company's stock lost its value because of market forces, while "plaintiffs have offered ***nothing*** to rebut that theory – no expert testimony suggesting

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[4] Defendants' misleading presentation is particularly troubling as it follows the September 4, 2007 colloquy where the Court repeatedly challenged defendants' mischaracterization of Professor Fischel's initial report. *See* September 4, 2007 Hearing Tr. at 6-7 (Court repeatedly questioning Mr. Kavaler as to whether asserted statement was what Professor Fischel said or what defendants concluded). A true and correct copy of relevant excerpts to the September 4, 2007 Hearing Transcript is attached to the Appendix of Exhibits in Support of Lead Plaintiffs' Rule 56.1 Statement of Additional Facts in Opposition to Summary Judgment as Exhibit H, filed herewith.

that the collapse was caused by the lack of the fraudulently promised contracts and financing, no evidence that companies similar to SSOL that had firm contracts survived." 482 F.3d at 995. This case is the exact opposite. Here, plaintiffs have presented expert evidence and defendants, despite having hired an expert, have not met their burden.

Although defendants erroneously advance certain index and competitor price information as undisputed facts, they have presented no evidence, expert or otherwise, as to why the Dow Jones Industrial Average ("DJIA"), the Standard & Poors ("S&P") Supercomposite 1500 Consumer Finance Index or stocks in that index are relevant to the analysis here. Indeed, defendants and their expert used ***different*** indices to measure Household's comparable performance. Defendants' own SEC filings and Investor Relations reports compared the performance of Household's stock to the S&P 500 and the S&P Financial indices rather than the DJIA or the S&P Supercomposite 1500 Consumer Finance Index. PSOF, ¶¶32-35, 40. Moreover, defendants' selection of dates for purposes of comparison is arbitrary – bearing no relationship to plaintiffs' allegations, Professor Fischel's analysis or their own expert's event study. In these circumstances, defendants' citation to market indices or the stock price movements of Household's competitors have no evidentiary significance. *Ray v. Citigroup Global Mkts.*, Case No. 03 C 3157, 2005 U.S. Dist. LEXIS 24419, at *11 (N.D. Ill. Oct. 18, 2005) (plaintiffs could not rely on competitor's better stock performance without expert opinion or other evidence explaining why poorer performance of defendants' stock attributable to the subject matter of the fraud); *see also Gebhardt v. ConAgra Foods, Inc.*, 335 F.3d 824, 831-32 (8th Cir. 2003) (rejecting defendants' loss causation argument based on stock price increase where defendant offered no expert opinion).

In stark contrast to *Ray*, plaintiffs have introduced expert evidence and testimony demonstrating the causal link between Household's stock price decline and defendants' fraud. Professor Fischel devoted 12 pages of his initial report (18 paragraphs) on a section entitled "The Relationship Between Plaintiffs' Allegations And Investors' Losses," which links disclosure related to each prong of defendants' fraudulent scheme – predatory lending, reaging and the restatement – to the decline in Household's stock price. PSOF, ¶3. Additionally, Professor Fischel's regression analysis removed the impact of market and industry factors and found a statistically significant decline in Household's stock due to partial revelations of the fraud, rendering arbitrary the market data defendants seek to rely upon. PSOF, ¶¶4, 15, 30. Significantly, Professor Fischel in his Rebuttal Report did an analysis using the Consumer Index promoted by defendants' damage expert and found that it did not change his analysis. PSOF, ¶5; Fischel Rebuttal Report, ¶31 ("[defendants' expert] ignores the fact that Household's stock underperformed his Consumer Finance Index during the period from November 15, 2001 to October 11, 2002 – the stock fell 53.2% while his index declined 29.6% adjusted for dividends").

B. Plaintiffs' Loss Causation Evidence Creates a Triable Issue of Fact Precluding Summary Judgment

In this Circuit, if and only if, defendants meet their initial burden discussed above, does any burden shift to plaintiffs. Assuming *arguendo* that defendants had met their burden, "Lead Plaintiff's burden is to present sufficient evidence from which a reasonable jury could conclude that [] price declines [in a stock] resulted from a [fraud-related] disclosure. Should Lead Plaintiff meet this burden, *Caremark* instructs that 'the trier of fact can determine the damages attributable to the fraudulent conduct.'" *Motorola*, 505 F. Supp. 2d at 551 (citing *Caremark*, 113 F.3d at 649). Lead Plaintiffs' evidence fully satisfies their burden on loss causation at trial and creates a triable issue of fact here.

1. Professor Fischel's Two Event Studies Present Evidence of Loss Causation

Lead Plaintiffs' expert Professor Fischel conducted two separate analyses to determine the existence and amount of artificial inflation in Household's stock price and the causal link to the economic losses suffered by Class members as a result of the gradual revelation of defendants' alleged fraud. PSOF, ¶¶4, 15, 30. The first analysis (the "specific disclosures" model) was an event study that via regression analysis found statistically significant declines caused by 11 individual fraud-related disclosures.[5] PSOF, ¶15. These 11 disclosures commenced on November 14, 2001 and ran through October 4, 2002 and each revealed yet more information about defendants' fraud pertaining to predatory lending, reaging and accounting manipulations. PSOF, ¶¶15-17, 19, 21-27. As each bit of information came out, the artificial inflation was gradually removed from the stock. *Id.* For example, as a result of the first disclosure on November 14, 2001 relating to predatory

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[5] In this motion, defendants do not dispute that disclosures identified in Professor Fischel's report are in fact fraud-related. *See, e.g.*, Defendants' Statement Pursuant to Local Rule 56.1(a)(3) in support of Their Motion for Summary Judgment. In any event, courts in this District apply a flexible approach in determining whether a disclosure is fraud-related, recognizing that a corrective disclosure does not, on its face, have to specifically identify or explicitly correct a previous representation, or expressly disclose the particular fraudulent scheme the plaintiff alleges. *Greater Pa. Carpenters Pension Fund v. Whitehall Jewellers, Inc.*, No. 04 C 1107, 2005 U.S. Dist. LEXIS 376, at *12-*14 (N.D. Ill. Jan. 7, 2005) (holding disclosures of insider sales, lower guidance and lower than expected quarterly financial results were partial disclosures of adverse information pertaining to the alleged fraud.); *see also Motorola*, 505 F. Supp. 2d at 546.

lending, the artificial inflation declined $1.86 per share. PSOF, ¶16. Using the specific disclosure analysis, Professor Fischel identified a collective decline of artificial inflation of $7.97. PSOF, ¶15.

The second analysis, also an event study, utilized a leakage model developed by two other damage experts, B. Cornell and R.G. Morgan, to address situations "in which fraud was revealed slowly over time, including one in which 'a slow flow of increasingly negative news fueled a rising tide of doubts and rumors' with the result that 'only a few dramatic announcements were associated with [statistically significant declines]'" and using residual price changes in those cases "only on disclosure days will understate damages." PSOF, ¶30; Fischel Report, ¶38 n.22 (quoting B. Cornell and R.G. Morgan, "Using Finance Theory to Measure Damages in Fraud on the Market Cases," 37 UCLA L. Rev. 905, 905-06 (1990)). Professor Fischel opined that the leakage model "more accurately reflects the effects of the alleged disclosure defects on stock prices than the [specific disclosure model]" (Fischel Depo. Tr. at 165:11-13) because of the similar fact pattern presented in this case, *i.e.*, "a steady stream and extensive amount of incomplete information related to Defendants alleged fraud [] beginning at least as early as November 15, 2001 . . . but only some of these disclosures [] associated with statistically significant residual returns," as well as the overall decline of 53% in Household's stock price and its underperformance compared to the market and industry indices over that same period. PSOF, ¶31. The leakage model, which also employed a regression analysis, quantified a cumulative drop in artificial inflation of up to $23.94 over the disclosure period of November 15, 2001 through October 11, 2002. PSOF, ¶30.

Professor Fischel's analysis under both the specific disclosure and leakage models confirm that defendants' Class Period misrepresentations and omissions were inflationary events. PSOF, ¶¶1-2, 8-14. Partial disclosures during the time period, November 14, 2001 through October 11, 2002, resulted in statistically significant stock price declines. *See generally*, PSOF, ¶¶15-27. This evidence of market reaction to disclosures during the later time period demonstrates that earlier disclosure of the truth would have resulted in similar dissipation of the artificial inflation. Professor Fischel testified at his deposition:

> Q: You identify inflation on [the first day of the Class Period] though?
>
> A: I do, that's correct.
>
> Q: And you don't have an opinion about how [Household] could have eliminated that inflation on the first day of the class period?
>
> A: I have the opinion that I stated earlier; by having disclosures on that day and subsequent days which eliminated the alleged disclosure defects with respect to its lending practices.

PSOF, ¶11. Professor Fischel noted, "As new information becomes available, that changes investors' assessment of the firm's prospects, traders buy and sell the stock until its price reaches a level that reflects the new consensus view of the firm's prospects. Fischel Report, ¶31.

2. Defendants' Investor Relations Reports Also Support Plaintiffs' Loss Causation Analysis

While Professor Fischel's reports and deposition testimony are enough to create a triable issue of fact, plaintiffs have additional loss causation evidence in the form of defendants' own internal Investor Relations reports. This evidence is complementary to that contained in the Fischel reports as Professor Fischel did not rely upon these reports for his opinions. Defendants' Investor Relations reports, which were provided to Household's Board of Directors and reviewed by senior management, including defendants Aldinger and Schoenholz, are particularly probative as party admissions that contemporaneously attribute particular stock price declines to partial disclosures relating to the fraud. PSOF, ¶¶32-35. Below are some examples:

- The November-December 2001 Investor Relations report provides in relevant part: "On December 3rd, the stock dropped $2.69, or 4.6 percent to $56.30 following articles in *Barron's* and *Business Week* that alleged Household's strong results were in part driven by aggressive chargeoff policies. On December 11th and 12th, the analyst from Legg Mason issued a series of research notes downgrading the stock from 'Strong Buy' to 'Market Performer' based on his view that Household's assert quality policies were lenient and aggressive. The stock lost $4.25, or 7.4 percent, over the course of the week." PSOF, ¶33.
- The May-August 2002 Investor Relations report describes a steady stream of fraud-related disclosures, noting that "for the four-month period, Household stock dropped $22.18 or 38%" and "underperformed the S&P 500 and the S&P Financial indices." PSOF, ¶34.
- The September-October 2002 Investor Relations report stated "On September 3rd . . . [c]oncerning Household specifically, Howard Mason of Sanford Bernstein issued a report in which he restated his concerns about the sustainability of Household's business model [and] cut the long-run growth estimates on Household based on his estimate of the sales practice reforms due to regulatory pressure." *Id.* at 1. The report also compared the "performance of Household's stock, the S&P 500 and the S&P Financial indices during 2002" finding "Household has underperformed these indices thus far in 2002." PSOF, ¶35.

Defendants' admissions are consistent with Professor Fischel's conclusions. *See* PSOF, ¶¶17, 19, 25.

3. Professor Fischel's Reports and Defendants' Investor Relations Reports Preclude Summary Judgment on the Issue of Loss Causation

In the analyses discussed above, Professor Fischel isolates inflation and damages due ***only*** to defendants' fraud via use of an event study and regression analysis and demonstrates how those misrepresentations, omissions, subsequent disclosures and leakage of information resulted in losses to class members, including the specific amounts attributable to the specific disclosures and leakage. PSOF, ¶5. Via Professor Fischel's reports, which defendants do not challenge but "embrace," plaintiffs have presented sufficient evidence on the loss causation element consistent with *Dura* and *Caremark*. *See* September 4, 2007 Hearing Tr. at 8:9-10, Ex. H.

Professor Fischel's analysis shows that "but for" defendants' early Class Period misrepresentations and omissions, there would have been no inflation in the stock at the time Class members acquired the stock and no dissipation of that inflation as a result of the disclosures identified by Professor Fischel. PSOF, ¶¶1-2, 11-12.; *id.* (applying "but for" causation test and quoting *Caremark, supra*, 113 F.3d at 648-49). This satisfies the requirement under *Dura* and *Ray* of showing that defendants' statements "artificially inflated the price of the stock." *Id.* (describing the *Dura* holding). Certainly, neither case holds that plaintiffs must show a statistically significant price increase following the misrepresentation in question, which is the proposition defendants urge here. Defendants, thus, advance no legal authority in support of their position. Before Magistrate Judge Nolan, defendants challenged Professor Fischel's reports as inadequate under *Dura* and *Ray*, which challenges were rejected.[6]

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[6] Via a series of motions commencing in October 5, 2007, defendants attacked Professor Fischel's initial report and later Rebuttal Report as not compliant with Rule 26(a)(1)(A)(iii) for various reasons, including a purported failure to comply with the *Dura* standard of loss causation. Magistrate Judge Nolan first rejected defendants' *Dura* argument in an Order dated October 17, 2007. October 17, 2007 Order, Dkt. No. 1144 at 2-3. Magistrate Judge Nolan reaffirmed this ruling in a subsequent Order dated November 20, 2007. November 20, 2007 Order, Dkt. No. 1159 at 1-2 ("Indeed, the court expressly rejected Defendants' objection that Plaintiffs had not made a showing of a causal connection between economic loss and the alleged misrepresentations."). Unsatisfied, defendants renewed their attack on Professor Fischel's reports, filing a motion to compel Plaintiffs to identify the pre-Class Period date on which there was zero inflation in the stock price. February 27, 2008 Order at 2. Defendants contended this information was necessary "in order to (1) establish that Plaintiffs' claims are time-barred by the statute of repose; and (2) to rebut Plaintiffs' claim that alleged artificial inflation can be attributed to particular frauds." *Id.* Via Order dated February 27, 2008, Magistrate Judge Nolan rejected defendants' arguments. In her Order, Magistrate Judge Nolan noted that "Plaintiffs allege that the two misrepresentations [one on July 22, 1999 and the other on August 16, 1999] each independently caused Household's stock price to be inflated by the full amount." *Id.* at 2 (citing to *Ray*, 482 F.3d at 995). Magistrate Judge Nolan then rejected defendants' motion in its entirety. *Id.* at 3.

Defendants' reliance upon *Ray* and *Tricontinental Indus. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824 (7th Cir. 2007) is misplaced since plaintiffs' evidence is in accord with these cases. In *Ray*, plaintiffs did not offer any expert evidence or cite to evidence supporting their assertion that "when the truth about SSOL became known in late May 2002, SSOL began to collapse like the house of cards that it was." *Ray*, 2005 U.S. Dist. LEXIS 24419, at *11 (quoting plaintiffs' brief). The District Court acknowledged, "[i]f this allegation were supported by evidence, it might allow a jury reasonably to infer loss causation." *Id.* On appeal, the *Ray* plaintiffs could not salvage their claims by citing to evidence of transaction causation. 482 F.3d at 995.

Plaintiffs' evidence comports with the test enunciated in *Ray* by presenting expert testimony and other evidence showing how defendants' alleged Class Period misrepresentations and omissions caused the inflation and how "the value of [Household's] stock declined just when the alleged misrepresentations were revealed." *Ray*, 482 F.3d at 995.

Tricontinental does not help defendants either. *Tricontinental* based its claim on misrepresentations made by PwC in a 1997 audit statement. 475 F.3d at 842. Thus, *Tricontinental* had to show that it suffered a loss when the alleged 1997 misrepresentations became known. *Id.* at 843. *Tricontinental's* identification of two disclosures concerning the 1998 and 1999 financial statements was insufficient since both were issued after *Tricontinental's* acquisition of the securities in question. *Id.* at 843-44. Because there was no disclosure related to the 1997 audit, the plaintiffs in *Tricontinental* could not establish loss causation. *Id.*; *see also Motorola*, 505 F. Supp. 2d at 541 (discussing holding of *Tricontinental*).

Defendants also rely on an out of circuit case, *In re Northern Telecom Ltd. Sec. Litig.*, 116 F. Supp. 2d 446 (S.D.N.Y. 2000), which actually supports plaintiffs. In that case, the court described plaintiffs' loss causation burden as the "burden of coming forward with evidence creating a triable issue of fact on whether the statements or omissions at issue inflated or ***maintained*** Nortel's stock price." *Id.* at 461. Through the use of an event study and regression analysis, Professor Fischel's testimony demonstrates the misrepresentations inflated or maintained Household's stock at an artificial price under the *Northern Telecom* standard.[7]

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[7] In *Northern Telecom*, plaintiffs could not meet this test because the court excluded the testimony of plaintiffs' damage expert as "fatally deficient in that he did not perform an ***event study*** or similar analysis to remove the effects on stock price of market and industry information and he did not challenge the event study performed by defendants' expert." *Northern Telecom*, 116 F. Supp. 2d at 460.

Defendants also cite another out of circuit decision, *In re Credit Suisse First Boston Corp. Analyst Sec. Litig.*, 03 Civ. 2467 (LAP), 2008 U.S. Dist. LEXIS 14198 (S.D.N.Y. Feb. 26, 2008), where the false statements at issue were made by analysts. At class certification, the court expressly weighed the evidence and concluded plaintiffs' "modest" evidence on loss causation was outweighed by that of defendants. *Id.* at *21 n.11. However, at summary judgment, this Court does not engage in any weighing of the evidence. *Payne*, 337 F.3d at 771 ("[W]e have warned before of falling for the trap of weighing conflicting evidence during a summary judgment proceeding."). Additionally, in that case, plaintiffs' expert conceded that: (i) there was no way to test her assertion that the alleged misleading analyst reports served to "stave off a decline in the price"; and (ii) that research reports by analysts affiliated with an underwriter of a security, such as those at issue, and confirmatory analyst statements do not have any impact on the stock prices. *Credit Suisse*, 2008 U.S. Dist. LEXIS 14198, at *26-*27. The present case differs in all respects since plaintiffs have shown the impact of Household's statements on its own stock price and the fraud-related declines in Household's stock price. PSOF, ¶¶1-6, 8-15, 30.

Putting aside defendants' failure to meet their initial burden on this Motion, plaintiffs have presented this Court with ample evidence of loss causation, such that there is at very least a triable issue of fact.

C. Defendants' Factual Arguments Also Raise a Triable Issue of Fact Precluding Summary Judgment

We now turn to defendants' three remaining factual arguments on the issue of loss causation: (1) that there is "indisputable evidence" that the stock price had declined prior to revelation of the alleged fraud; (2) that there is "indisputable" evidence that the price of the stock increased following each revelation alleged in the [Corrected] Amended Consolidated Class Action Complaint for Violation of the Federal Securities Laws ("Complaint"); and (3) that plaintiffs cannot argue there are disclosures at the same time defendants are trying to conceal the fraud. Defs' Mot. at 13. As a general proposition, these factual arguments "need not detain the court" as the *Motorola* court put it. 505 F. Supp. 2d at 557. Professor Fischel's reports, which are based on a methodology defendants do not dispute, create "a dispute of fact inappropriate for resolution on summary judgment." *Id.* at 557-58 (citing *Vollmert v. Wisconsin Dep't of Transp.*, 197 F.3d 293, 298 (7th Cir. 1999)).

1. There Is No "Indisputable Evidence" that Household Stock Price Declined Prior to Revelation of the Alleged Fraud

Defendants suggest erroneously that the only disclosure alleged in the Complaint is the October 11, 2002 announcement of the AG settlement and Household's stock price had declined by the time of this disclosure. Defs' Mot. at 17. In truth, the Complaint references numerous negative disclosures and the decline in Household stock commencing in January, 2002. PSOF, ¶37. Further, defendants cannot limit evaluation of plaintiffs' loss causation analysis to the Complaint which was filed prior to discovery. That plaintiffs have specifically identified certain corrective disclosures in the Complaint does not preclude them from later identifying additional disclosures. *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 236 F.R.D. 62, 71 (D.N.H. 2006). Instead, the Court should focus its analysis on Professor Fischel's reports and the Investor Relations reports, both of which demonstrate that it was fraud-related disclosures that caused the stock price declines prior to October 11, 2002.

Even though plaintiffs' Complaint was filed prior to fact and expert discovery, it affirmatively notes the substantial stock price drop from the first quarter of 2002 through the end of the Class Period – roughly the same disclosure period noted by Professor Fischel. "The cumulative effect of the revelation of defendants' scheme or wrongful course of business decimated the price of Household shares. While Household shares traded as high as $63.25 at the beginning of 1Q02, they traded in the $20s – marking a record seven-year low for Household shares – as the truth about Household's illegal operations and accounting fraud was publicly revealed." PSOF, ¶36.

Additionally, the Complaint discusses many of the disclosures that Professor Fischel ultimately found to be tied to statistically significant price declines, including:

- the California Department of Corporations lawsuit, whose announcement on November 14, 2001 was the first negative disclosure found by Professor Fischel;
- the *Forbes* "Home Wrecker" article, whose publication Professor Fischel found was a negative disclosure;
- the August 2002 release of the Washington State DFI report, which Professor Fischel found to be a negative disclosure;
- the July 26, 2002 disclosure where Household admitted some misrepresentations to customers in Washington;
- the August 14, 2002 announcement of the restatement of prior financial statements due to accounting errors; and
- the early 10/02 rumors in the market about a pending settlement that would require a $500+ million payment.

PSOF, ¶37. This evidence shows that defendants are dead wrong on their assertion that plaintiffs alleged the price decline in Household stock occurred due to only one disclosure of the alleged fraud on October 11, 2002. Indeed, the Complaint, Professor Fischel and defendants themselves all link the Household stock price declines at issue directly to adverse fraud-related disclosures during the time period November 14, 2001 to October 4, 2002.

2. There Is No "Indisputable" Evidence that the Price of the Stock Increased Following Each Revelation of the Fraud

Defendants contend that plaintiffs cannot show loss causation because on three days alleged in the Complaint, the stock price increased. Defs' Mot. at 15-17. This argument is misplaced since Professor Fischel has explained how the stock price reaction on these three dates is consistent with loss causation, and identified other dates where fraud-related declines took place. PResp., ¶¶55, 56.1, 57-58; *see also* PSOF, ¶¶22, 27-28.

Plaintiffs address the August 14, 2002 restatement disclosure first because it illustrates a general fallacy in defendants' assertion that an absolute price increase means no disclosure of adverse news and no dissipation of artificial inflation. Just as plaintiffs cannot rely simply on an absolute price decline to show loss causation under *Dura*, defendants cannot rely simply upon an absolute price increase to negate loss causation under *Dura*. "Whatever the truth of the matter is, isolating the myriad causal factors that affect stock price is a factual question that should be decided at trial, with the help of qualified experts." *In re Credit Suisse-AOL Sec. Litig.*, Civ. Action No. 02-12146-NG, 2006 U.S. Dist. LEXIS 86363 (D. Mass. Nov. 30, 2006). Loss causation depends on relative price movements determined via regression analysis to exclude market factors. Using just such an analysis, Professor Fischel found that there was a statistically significant stock price *decline* on August 14, 2002. PSOF, ¶22 (citing Fischel Report at n.16 ("the residual return on August 14, 2002, the date the restatement was announced was – 2.5% and the T statistic was 1.77; the residual price was – $0.94"). *Dura* itself notes this very situation, "a claim that a share's higher price is lower than it would otherwise have been." 544 U.S. at 343. Significantly, Professor Fischel's conclusion as to this relative decline is supported by defendants' expert, whose analysis reached the same conclusion, and the conclusions of market participants. PSOF, ¶22. *Cf. In re Loewen Group Inc. Sec. Litig.*, 395 F. Supp. 2d 211, 218 (E.D. Pa. 2005) (denying summary judgment on loss causation even where the stock price did not change since disclosure dates and market reaction were disputed).

As to the stock price increase ($.19 or .32%) following the April 9, 2002 reaging disclosure, plaintiffs do not assert that this was a "revelation" of the truth but rather a further false statement by defendants. PResp., ¶55. As the result of discovery, plaintiffs now know that the reaging information disclosed on that date was false. *Id.* Plaintiffs have disclosed this to defendants in discovery. *Id.* Also, Professor Fischel identified other dates where disclosures regarding reaging resulted in fraud-related declines. *See, e.g.*, PSOF, ¶26.

Defendants are also wrong about the stock price increase following the October 11, 2002 announcement of the AG settlement. As Professor Fischel explains in his report, "[t]he fact that the stock increased in value upon disclosure of such negative information is evidence that it had declined earlier by at least as much in anticipation of a larger payment and/or changes in Household's business practices that would have had a worse impact on the Company's future prospects." PResp., ¶¶57-58; s*ee also* Fischel Rebuttal Report, ¶16 (explaining that in light of concerns that no deal would be reached or that fines could be higher, "it is not surprising that when a settlement was reached, Household's stock price reacted positively."). The stock increase on this date is also used to reduce artificial inflation claimed by plaintiffs, and is consistent with loss causation. Fischel Rebuttal Report, ¶¶15-17. PSOF, ¶28.

In sum, defendants' arguments about the price increases in Household stock on three discrete days have no merit and certainly do not entitle them to summary judgment.

3. The Truth About Defendants' Fraud Gradually Became Known Despite Defendants' Efforts to Conceal It

Defendants contend that plaintiffs are improperly arguing that the truth was revealed and concealed at the same time. Defs' Mot. at 26-28. To support their contention, defendants cite two motions to dismiss cases from outside this Circuit.[8] This Court has already upheld the adequacy of the loss causation allegations in the Complaint over defendants' *Dura* arguments. In any event, plaintiffs' allegations are consistent with the facts of this case and with decisions reached in this Court.

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[8] Defendants' main case on this point, *In re Redback Networks, Inc. Secs. Litig.*, Case No. C 03-5642 JF (HRL), 2007 U.S. Dist. LEXIS 91042 (N.D. Cal. Dec. 4, 2007), was designated not for publication. Further, the principal defect in *Redback* was plaintiffs' attempt to link a March 11, 2002 press release regarding an SEC investigation into a different company (Qwest) that didn't mention **Redback** to a stock price drop eighteen months later on Oct. 10, 2003. 2007 U.S. Dist. LEXIS 91042, at *16-*20. In defendants' other case, *Powell v. Idacorp, Inc.*, No. Civ 04-249-S-EJL, 2007 U.S. Dist. LEXIS 36834 (D. Idaho May 21, 2007), the court found a failure to plead loss causation because "any market reaction was not caused by knowledge of the improper activity." *Id.* at *14. This decision is inconsistent with the Ninth Circuit Court's decisions in *Berson v. Applied Signal Tech., Inc.*, No. 06-15454, 2008 U.S. App. LEXIS 11982 (9th Cir. June 5, 2008) and in *In re Daou Sys., Inc., Sec. Litig.*, 411 F.3d 1006 (9th Cir. 2005), which generally hold that disclosures need only reveal the company's "true financial condition," and not the engagement in fraud. *Berson*, 2008 U.S. App. LEXIS 11982, at *19; *Daou*, 411 F.3d at 1026. It is also inconsistent with this Court's decision in *Whitehall*, *supra*, 2005 U.S. Dist. LEXIS 376, at *13-*14 (treating press release re reduced earnings as disclosure). Putting all this aside, defendants do not dispute that the disclosures identified in Professor Fischel's report reveal partial truths about the fraud.

The truth about Household's fraud did not come out in a single disclosure, but leaked out over the course of a year through a series of partial disclosures. *See Motorola*, 505 F. Supp. 2d at 544 (holding that "precluding a plaintiff from establishing loss causation merely because of the absence of the kind of explicit corrective disclosure . . . where the market in fact learned and absorbed the relevant truth anyway . . . would provide an expedient mechanism for wrongdoers to avoid securities fraud liability. . . . [T]he loss causation requirement should not allow securities fraud defendants to 'immunize themselves with a protracted series of partial disclosures.'").[9] Moreover, loss causation need not "take the form of a single, unitary disclosure, but [can] occur[] through a series of disclosing events." *In re Bradley Pharms., Inc. Secs. Litig.*, 421 F. Supp. 2d 822, 828-29 (D.N.J. 2006) (citing *Whitehall*, 2005 U.S. Dist. LEXIS 376). The *Motorola* court stated in language applicable here:

> As a practical matter, however, the truth that a misrepresentation or omission conceals can make its way into the market, resulting in dissipation of a fraudulently inflated share price, long before a company issues a formal "corrective" announcement, and by a variety of other ways. As one commentator points out: "Prior to an unambiguous public announcement, the operation of one or more phenomena may lead to complete market realization of the truth. One way is a series of earlier, smaller disclosures by the issuer ***or others*** that gradually leads market participants whose actions set price to conclude that the misstatement was false."

505 F. Supp. 2d at 543 (quoting Merrit B. Fox, *After Dura: Causation in Fraud-on-the-Market Actions*, 31 J. Corp. L. 829, 851 (2006)); *compare Tricontinental, supra*, 475 F.3d at 843 (truth must become "generally known").

Additionally, the majority of the fraud-related disclosures cited by Professor Fischel and alleged by plaintiffs are not company disclosures, but information provided from third parties, such

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[9] As the *Dura* author Justice Breyer noted at the oral argument, the truth "might come out in many different ways," not simply through an announcement by a corporate executive that "I'm a liar." *Dura Pharms., Inc. v. Broudo*, No. 03-932, 2005 U.S. TRANS LEXIS 4, at *37 (Jan. 12, 2005). In addition, Justice Stevens asked *Dura* counsel:

> What if the information leaks out and there's no specific one disclosure that does it all and the stock gradually declines over a period of 6 months? . . . [M]aybe [plaintiffs] don't know the leaks. The only thing they can prove is that there was a gross false statement at the time they bought the stock and they don't know what happened to the decline. Later on they find out that it gradually leaked out.

Id. at *12-*13.

as newspapers and analysts. PSOF, ¶¶16-27, 33-35, 37. Defendants forcefully tried to rebut these disclosures and thus, lengthened the period of time over which the truth became known.

For example, on December 1, 2001, *Barron's* published an article critical of defendants' accounting policies, including its reaging and charge-off practices. PSOF, ¶17. *BusinessWeek* published a similar article on the same topics on or about this date. PSOF, ¶3. Professor Fischel found a statistically significant price decline relating to these fraud-related disclosures. PSOF, ¶17. Defendants' Investor Relations report for that period also attributed stock price declines to these articles. PSOF, ¶33.

To counter this partial disclosure of the fraud, defendants Aldinger, Schoenholz and others at Household made presentations at an industry conference on December 4, 2001 that caused Household's stock to increase. PSOF, ¶18. The Investor Relations report attributed a stock price increase to these presentations, noting "On December 4th, Bill Aldinger and Dave Schoenholz spoke at the Goldman Sachs Bank CEO Conference and effectively addressed many of the issues raised in the articles. The stock rebounded nearly $2 on the 4th and another $2.77 on the 5th." PSOF, ¶33.

At least one analyst remained unconvinced and on December 11, 2001, a Legg Mason analyst issued a negative report, finding the "lenient reaging policy disturbing" and noting "many unanswered questions." PSOF, ¶19; Fischel Report, Ex. 38. There was a statistically significant price decline associated with the December 11, 2001 analyst report. PSOF, ¶19. Defendants in their Investor Relations report attributed a stock decline to this analyst report. PSOF, ¶33.

The reage portion of the story continues with more partial disclosures and more defendant responses, such as the April 9, 2002 investor's conference presentation. PSOF, ¶¶3, 26, 61-62; PResp., ¶55. There was a similar pattern with respect to the predatory lending prong. PSOF, ¶31. Throughout the Class Period, including calendar year 2002, defendants affirmatively denied engaging in predatory lending. *See, e.g.*, Fischel Report, ¶17 (identifying some of defendants' denials of predatory lending).

Significantly, Professor Fischel continued to find statistically significant price declines relating to negative fraud-related disclosures up to October 4, 2002. PSOF, ¶27. This means that the market continued to react negatively to these disclosures. If, as defendants suggest, the truth was fully on the market at the time, there would have been no price reaction because the market does not react to old news. Fischel Report, ¶31. Defendants concede this. Defs' Mot. at 22 (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 246 & n.24 (1988)). In any event, the question of whether "the disclosures revealed information already known to the market, and thus could not have negatively affected the market" "remains a factual determination to be decided by the jury. *See, e.g.*, *Freeland v. Iridium World Commc'ns. Ltd.*, Civil Action No. 99-1002 (consolidated), 2008 U.S. Dist. LEXIS 27152 (D.D.C. Apr. 3, 2008) (loss causation is a fact-intensive inquiry precluding summary judgment).

In sum, plaintiffs' contentions respecting partial market disclosures and defendants' efforts to conceal the truth are: (1) internally consistent; (2) consistent with the market reactions analyzed by Professor Fischel; and (3) consistent with this Court's prior decisions.

D. Defendants Cannot Prevail on Their Statute of Repose Affirmative Defense

As an alternative ground for summary judgment, defendants contend that the element of loss causation for each false statement made during the Class Period is somehow precluded by the statute of repose applicable to statements made ***prior*** to July 30, 1999. However, as set forth in more detail below, each false or misleading Class Period statement or omission – all of which occurred on or after July 30, 1999 – independently caused the inflation in Household's stock. PResp., ¶41. Plaintiffs' claims are not dependent on any pre-Class Period statements or inflation. Thus, any shortening of the beginning of the Class Period does not mean the remaining Class Period false statements are not actionable.

1. Plaintiffs' Loss Causation Theory Is Not Dependent on Pre-Class Period Inflation

Pursuant to defendants' request, this Court's statute of repose order established July 30, 1999 as the first day of the Class Period. There were no public statements by defendants on that date. The first alleged public statements after that date were made on August 16, 1999, when defendants filed Household's Form 10-Q for the second quarter. PSOF, ¶38. In light of the Court's ruling, plaintiffs could have dismissed claims of Class members from July 30, 1999 to August 15, 1999. Of course, even that action would not have stopped defendants from claiming the dismissal of a portion of the start of the Class Period means all later statements are not actionable. Defendants' failure on July 30, 1999 to correct misrepresentations from July 22, 1999 can be used by purchasers from July 30, 1999 through August 15, 1999. Plaintiffs contend that on July 30, 1999, defendants had a duty to correct Household's false statements made on July 22, 1999. Accepting that this Court might find no duty to correct on that date, the Class Period would instead start with defendants' August 16, 1999 statements that caused Household's stock to be inflated on that day. Plaintiffs do not assert that the inflation in Household's stock on August 16, 1999 or any later date was caused by pre-Class

Period statements. PResp., ¶¶42-44, 47. Rather, the inflation on August 16, 1999 and any later dates was caused by the false statements on those dates.

As noted above, Defendants argue that since the inflation on Day 1 of the current Class Period (July 30, 1999) is $7.97 and remains constant from that date until the first partial disclosure on November 14, 2001, the later statements are all not actionable since they did not cause any "new" inflation. Defs' Mot. at 15, 20, 22. Professor Fischel lays out in detail in his Rebuttal Report and deposition testimony why defendants' theory is wrong. First, there is no pre-Class Period inflation that permeates throughout the Class Period. There is only inflation on the first day of the Class Period – July 30, 1999. The inflation on that date is due to defendants' failure to speak on that day to correct the July 22, 1999 false statement. PSOF, ¶¶10-11. According to Professor Fischel, the amount of inflation on July 30, 1999 is $7.97 pursuant to his specific disclosures model (and $17.81 for his leakage model). PSOF, ¶¶15, 30.

The amount of inflation on July 30, 1999 is determined by Professor Fischel by quantifying the total amount of fraud-related only declines in Household's stock price from November 14, 2001 to October 11, 2002 when the truth about Household's business was disclosed. PSOF, ¶1. Professor Fischel uses an event study to isolate and calculate the fraud-related declines. PSOF, ¶¶5, 15-30. Professor Fischel then applies the total amount of the fraud-related declines back to Day 1 of the Class Period and each day thereafter, assuming there is an actionable misstatement or omission at that time. PSOF, ¶¶8-11; *see also* PResp., ¶41. The July 22, 1999 statement is only used by purchasers of Household stock from July 30, 1999 to August 15, 1999 on the basis that this statement was "alive" in the market and relied upon by investors.

Plaintiffs' position is in accord with the elements of a §10(b) claim, this Court's statute of repose order and case law. Moreover, plaintiffs' position does not disturb the repose accord by this Court's statute of repose ruling to pre-July 30, 1999 statements. To be sure, it is defendants' construction of the statute of repose that makes no sense and that would inappropriately create a safe-haven for ongoing fraud.

As defendants acknowledge, each Class Period statement or omission forms a separate actionable claim under §10(b). Defs' Mot. at 20. Defendants do not seriously dispute this and do not cite any law for the contrary position. Nor could they. One of the elements of a §10(b) claim, which defendants recite on page 12 of their Motion, is a false statement. This Court's statute of repose order relies on this proposition to hold the statute of repose commences when the actual statement (or omission) is made. February 28, 2006 Memorandum Opinion and Order at 5, Dkt. No.

434; Defs' Mot. at 19; *see also Quaak v. Dexia, S.A.*, 357 F. Supp. 2d 330, 337 (D. Mass. 2005) ("Most courts have held that the statute of limitations for Section 10(b) claims begins to run when the alleged misrepresentation is made.") (citing, *inter alia*, *Waldock v. M.J. Select Global, Ltd.*, No. 03 C 5293, 2004 U.S. Dist. LEXIS 23844, at *4 (N.D. Ill. Oct. 7, 2004)). From these points, it follows that plaintiffs may assert claims predicated upon the August 16, 1999 statements and later public statements such as Household's quarterly reports throughout 2000 and 2001.

Contrary to defendants' argument, plaintiffs do not rely upon the "concept of a continuing wrong."[10] Defs' Mot. at 23. Plaintiffs do not assert that defendants' misrepresentations on August 16, 1999 permit them to resuscitate claims predicated upon misrepresentations made by defendants prior to July 30, 1999. Consistent with this Court's statute of repose order, plaintiffs assert that the August 16, 1999 misrepresentations and subsequent misrepresentations by defendants constitute independent and actionable claims.

Defendants cite one case, *Green v. Fund Asset Mgmt., L.P.*, 19 F. Supp. 2d 227 (D.N.J. 1998), respecting the duty to correct. With respect to the August 16, 1999 statements and all thereafter, plaintiffs do not use the duty to correct as a means to revive claims as to time-barred statements. The duty to correct only applies to determine whether purchasers from July 30, 1999 through August 15, 1999 have a valid claim. Plaintiffs have pursued this small portion of the Class Period based on the obligation to protect Class interests as certified by this Court and recognize that the Court may dismiss the claims of Class members who purchased during this limited time period since it is unclear from the statute of repose order whether these purchasers shall have valid claims. For the reasons discussed above, starting the Class Period on August 16, 1999 instead of July 30, 1999 would have no bearing on the losses caused by the remaining false statements.

Accepting defendants' position would violate public policy and would lead to absurd results. Defendants' position is that a party may continue to misrepresent with impunity once the statute of repose has run. The statement of repose is not a license to lie. As Justice Calabrese noted in a recent concurring opinion, this would inappropriately "give repose to a defendant who continued his

[10] The continuing wrong theory "relieves a plaintiff of establishing that all of the complained-of conduct occurred within the actionable period if the plaintiff can show a series of related acts, one or more of which falls within the limitations period." *Messer v. Meno*, 130 F.3d 130, 134-35 (5th Cir. 1997), *cert. denied sub nom. Texas Educ. Agency v. Messer*, 525 U.S. 1067 (1999). Plaintiffs do not need this theory because the specific acts they complain of, *i.e.* the disclosure defects on July 30, 1999 and thereafter, occurred within the actionable period.

wrongful conduct." *P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 107 (2d Cir. 2004) (Calabrese, J. concurring).

2. Defendants Have No Evidence to Show that Class Period Inflation Was Caused Solely by Pre-Class Period Statements

Defendants' burden requires them to show that all inflation in the stock price in the Class Period resulted solely from pre-Class Period misrepresentations. However, defendants' only cited support for this proposition is the mischaracterization of Professor Fischel's analysis discussed above and certain statements from plaintiffs' counsel regarding the company's public statement on July 22, 1999. Defs' Mot. at 19-20. This is insufficient. Because plaintiffs have addressed the import of Professor Fischel's analysis above, we focus our comments here on defendants' reliance upon statements of counsel.

First, defendants may not rely upon such counsel's statements absent some form of judicial estoppel, which is not applicable here. PResp., ¶¶42-44, 47. Magistrate Judge Nolan's ruling that plaintiffs did not need to augment their initial disclosures was not predicated upon the cited statements, but on Magistrate Judge Nolan's conclusion that plaintiffs had no duty under the initial disclosure provisions of Fed. R. Civ. P. 26 to develop evidence supporting defendants' statute of repose defense.[11] February 27, 2008 Order.

Second, as is clear from the actual language of the cited statements, while plaintiffs acknowledge that inflation on July 30, 1999 resulted from the failure on July 30, 1999 to correct the July 22, 1999 statements, they do not concede that the inflation in the stock price on August 16, 1999 was caused by the July 22, 1999 statement. PResp., ¶¶42-44, 47. To the contrary, plaintiffs' position is that this inflation results from the August 16, 1999 statements and indeed, that is what Professor Fischel concluded. *Id.*; PSOF, ¶¶1-2. All the cited statements of counsel are consistent with this position (as is the Court Order defendants cite).

Thus, defendants failed to identify during discovery the factual basis for their statute-of-repose defense. Plaintiffs propounded an interrogatory requesting that defendants identify all facts, etc., supporting their affirmative defenses, including the statute of repose. Notwithstanding this

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[11] Defendants attempt to convert this ruling and plaintiffs' resistance to identifying any pre-Class Period inflation and the origin thereof into some sort of evidentiary bar. *See* Defs' Mot. at 24-26. However, as Magistrate Judge Nolan observed, plaintiffs had no duty under the initial disclosure obligations to provide the pre-Class Period information defendants sought. February 27, 2008 Order at 2. Without a duty, there can be no evidentiary bar.

Court's June 25, 2007 Order, defendants have not supplemented this response to include reference to either (1) Professor Fischel's reports and deposition testimony or (2) Dr. Bajaj's reports and deposition testimony. Indeed, defendants' interrogatory response does not mention any of the facts that they assert in the Rule 56.1 statement. PSOF, ¶39.

Significantly, Magistrate Nolan permitted the parties to supplement their responses during expert discovery. However, defendants refused to supplement the response to this interrogatory. "Having 'strategically chosen not to' disclose essential elements of their claim in discovery," defendants cannot now present "new" evidence to support their statute of repose claim either now at summary judgment or later at trial. *See* Defs' Mot. at 25 n.14 (citing *Kemper/Prime Industrial Partners v. Montgomery Watson Americas, Inc.*, 97 C 4278, 2004 U.S. Dist. LEXIS 5543, at *14 (N.D. Ill. March 31, 2004) (Guzman, J.)). Accordingly, defendants have failed to and cannot meet their burden at summary judgment on their affirmative defense as well.

III. CONCLUSION

For the foregoing reasons, this Court should deny defendants' Motion in its entirety.

DATED: June 12, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY ELECTRONIC MAIL AND BY U.S. MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 100 Pine Street, Suite 2600, San Francisco, California 94111.

2. That on June 12, 2008, declarant served by electronic mail and by U.S. Mail to the parties the: **LEAD PLAINTIFFS' MEMORANDUM IN OPPOSITION TO HOUSEHOLD DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSING ALL REMAINING CLAIMS OF THE CLASS**. The parties' email addresses are as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th day of June, 2008, at San Francisco, California.

/s/ Marcy Medeiros
MARCY MEDEIROS