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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT PURSUANT TO FED. R. CIV. P. 54(b) AND FOR AN AWARD OF PREJUDGMENT INTEREST

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I. INTRODUCTION

The Special Master has determined that there are class members with 10,902 claims valued at $1,476,490,844 who, pending post-trial motions, are entitled to judgment as to liability. Assuming this Court denies defendants' post-trial motions, plaintiffs ask this Court to enter a final judgment in favor of these claimants pursuant to Federal Rule of Civil Procedure 54(b). The entry of judgment in favor of these class members is appropriate because the judgment as to these parties will unquestionably be final and there is no just reason to delay it.

Lead Plaintiffs also request that the Court award prejudgment interest to the Class that will be calculated at the prime rate compounded monthly from October 1, 2002 to the date judgment is entered. Courts have the discretion and routinely award prejudgment interest to investors that are the victims of federal law violations. In securities fraud cases like this one, prejudgment interest is presumptively available to the defrauded plaintiffs. The purpose of prejudgment interest is to put the plaintiff in the same position absent the defendants' fraud, and provide compensation for the interest lost on the money of which plaintiff was deprived by defendants' conduct. The factors that sometimes mitigate against awarding prejudgment interest (delay in bringing suit by plaintiffs or a relatively innocent defendant) do not exist in this case. Plaintiffs have been diligent in prosecuting this action from the filing of the complaint to present, and the jury found the defendants knowingly or recklessly violated the federal securities laws.

The Court should calculate prejudgment interest using the prime rate charged by banks, which is the default measure under Seventh Circuit law and the rate necessary to compensate plaintiffs. Interest should be compounded monthly and calculated from the last day of loss for the Class Period (October 1, 2002) to the date judgment is entered. Plaintiffs are submitting the Declaration of Bjorn I. Steinholt, CFA ("Steinholt Decl.") which provides support for the calculation of prejudgment interest. The current multiplier (1.67) of prejudgment interest to be applied to the

initial judgment of $1,476,490,844 in favor of the List 1 Plaintiffs for whom judgment is sought can be updated by plaintiffs at the time judgment is entered by the Court to calculate the total amount of prejudgment interest to award these claimants. Steinholt Decl., ¶6.

II. STATUS OF THE CASE

Plaintiffs obtained a jury verdict in favor of the Class on May 7, 2009. Docket No. 1611. Since that time, notice was sent to the Class and the Court resolved issues related to reliance. Docket Nos. 1721 and 1822. On December 22, 2011, the claims administrator filed its report identifying 45,921 claims with an allowed loss of $2,225,884,588.31, which were valid in the claims administrator's view. Docket No. 1790. The Court allowed defendants to lodge objections to those claims and plaintiffs responded to those objections. Docket Nos. 1800, 1802-1807, 1817 and 1820. On September 21, 2012, the Court referred the outstanding objections to Special Master Stenger for resolution. Docket Nos. 1822 and 1831.

On July 11, 2013, Special Master Stenger submitted a Report and Recommendation (Docket No. 1860) that broke the claims down into five distinct categories:

(a) List 1 (Exhibit A to the July 11, 2013 Report and Recommendation) identifies the 10,902 claims, valued at $1,476,490,844 resolved to date, which pending post-trial motions, are entitled to judgment as to liability and sets forth the amount of damages each such claimant should receive pursuant to the Court's prior rulings;

(b) List 2 (Exhibit B to the July 11, 2013 Report and Recommendation) identifies the 133 claims, valued at $58,061,621 received to date, which must be resolved at trial (*i.e.*, those who responded "yes" to the claim form question, submitted duplicate claims with conflicting answers to the claim form question or submitted multiple claims with different answers to the claim form question);

(c) List 3 (Exhibit C to the July 11, 2013 Report and Recommendation) identifies the 2,476 claims, valued at $60,344,054 resolved to date, which will be rejected under the Court's prior rulings for failing to answer the claim form question and/or supplemental interrogatory;

(d) List 4 identifies the 9,720 claims, valued at $449,510,370 to which defendants objected either on February 27, 2012 (as required) or January 16, 2013, and as to which defendants' objections must be resolved; and

(e) In addition to the claimants on Lists 1-4, there are approximately 22,000 claims which do not appear on Lists 1-4 that are (i) valued at less than $250,000 according to Gilardi's December 22, 2011 report; (ii) were filed by a custodian or other third-party filer; and (iii) were timely objected to by the defendants on February 27, 2012. These claimants were recently sent the supplemental interrogatory, as required by this Court on December 6, 2012. Docket No. 1836. The Special Master, pursuant to the parties' agreement, has not resolved any objections to these claims pending the claimants' responses to the interrogatory on June 30, 2013. Special Master's July 11, 2013 Report and Recommendation (Docket No. 1860, at 3).

Therefore, the only outstanding issues with respect to the List 1 claims are defendants' post-trial motions, which are due to be filed on July 30, 2013. Docket No. 1856.

III. FINAL JUDGMENT SHOULD BE ENTERED IN FAVOR OF LIST 1 CLAIMANTS PURSUANT TO FED. R. CIV. P. 54(b)

Where, as here, multiple parties are involved or more than one claim for relief is presented, Rule 54(b) permits a district court to enter a final judgment as to fewer than all parties or claims if the court determines that there is "no just reason for delay." Fed. R. Civ. P. 54(b). For the reasons set forth below, a final judgment should be entered in favor of the List 1 claimants under Rule 54(b) if defendants' post-trial motions pursuant to Rule 50(b) and Rule 59 ("Post-Trial Motions") are denied.

A. An Order Entering Judgment for the List 1 Claimants Would Be Final as to Those Plaintiffs and Their Claims

The entry of judgment under Rule 54(b) requires a district court to make two determinations: first, "that it is dealing with a final judgment," and second, that there is no just reason for delay. *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7 (1980); *accord Lincolnwood v. Federal Leasing, Inc.*, 622 F.2d 944, 947 (7th Cir. 1980). A "final judgment" under Rule 54(b) is "a final decision by the district court as to at least one claim or the rights and liabilities of at least one of the parties." *Lincolnwood*, 622 F.2d at 947. *See also* 10 James Wm. Moore, et al., Moore's Federal Practice §54.22[2][a][i], at 54-37 (3d ed. 2013) (Rule 54(b) does not relax the "final decision" requirement of 28 U.S.C. §1291).

Rule 54(b) expressly permits final judgment as to ***either*** parties ***or*** claims, and does not require finality as to both in an action involving multiple claims and parties. *See* Rule 54(b) ("the court may direct entry of a final judgment as to one or more, but fewer than all, claims ***or*** parties").[1] "The fact that two claims have one party in common is not enough to defeat the application of the separate-parties ground of Rule 54(b)." *Walker v. Maccabees Mutual Life Ins. Co.*, 753 F.2d 599, 601 (7th Cir. 1985).[2]

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[1] *See also Lawyers Title Ins. Co. v. Dearborn Title Corp.*, 118 F.3d 1157, 1162 (7th Cir. 1997) (district judge has power to enter appealable judgment as to "separate parties whether or not their claims are separate . . . to minimize uncertainty about who is in and who is out of the case"); *National Metalcrafters v. McNeil*, 784 F.2d 817, 821 (7th Cir. 1986) ("An order that disposes finally of a claim against one party to the suit can be certified for an immediate appeal under the rule [54(b)] even if identical claims remain pending between the remaining parties."); *Parks v. Pavkovic*, 753 F.2d 1397, 1402 (7th Cir. 1985) (a Rule 54(b) "order must finally dispose of a separate claim or a separate party"); Moore, et al., *supra*, §54.22[2][c], at 54-54 ("Rule 54(b) may be applied not only in the context of multiple claims, but also 'when multiple parties are involved' and the court has made a final adjudication as to one or more of those multiple parties.").

[2] Rule 54(b) originally applied only to multiple claims, but was amended in 1961 to apply also to multiple parties "to ensure that the disposition of the entire interest of one of those parties was treated in the same fashion . . . irrespective of the joint or distinct nature of the liability asserted." Moore, et al., *supra*, §54.22[2][c], at 54-55. As the Advisory Committee noted in 1961, "[t]he danger of hardship through delay of

Here, if this Court denies defendants' Post-Trial Motions, all outstanding issues as to the List 1 claimants will be resolved. Their rights and liabilities will be finally adjudicated by this Court and all that will remain to be done with respect to their claims is entry of judgment and execution. A judgment in their favor would therefore meet Rule 54(b)'s requirement of a final judgment as to fewer than all parties. *Lincolnwood*, 622 F.2d at 947; *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 518 F.3d 459, 463 (7th Cir. 2008) (Rule 54(b) authorizes entry of judgment "when everything having to do with a particular party is wrapped up").

While a final judgment as to parties is sufficient under Rule 54(b), judgment in favor of the List 1 claimants would also satisfy the claims prong of Rule 54(b), in that it would be a final judgment as to the List 1 plaintiffs' claims. *See, e.g.*, Moore, et al., *supra*, §54.22[2][b][i], at 54-48 ("When relief is sought on behalf of different parties, each of those parties generally possesses its own claim for relief, so factual overlap does not compel the conclusion that there is only one 'claim for relief.'"). A judgment for the List 1 claimants would be "an ultimate disposition of those claims – one that leaves nothing further for this court to do with them," and thus a final judgment as to fewer than all claims for purposes of Rule 54(b). *Continental Datalabel, Inc. v. Avery Dennison Corp.*, No. 09 C 5980, 2012 U.S. Dist. LEXIS 173722, at *4 (N.D. Ill. Dec. 7, 2012).

B. There is No Just Reason to Delay Entering Judgment in Favor of the List 1 Claimants if Defendants' Post-Trial Motions Are Denied

The determination of whether there is "no just reason" to delay entry of a Rule 54(b) judgment is within the sound discretion of the district court and requires consideration of "judicial administrative interests as well as the equities involved." *Curtiss-Wright*, 446 U.S. at 8. "[T]he district court may properly consider all of the consequences of a final judgment or the lack thereof

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an appeal until the whole action is concluded may be at least as serious in the multiple-parties situations as in multiple-claims cases." Rule 54(b), Notes of Advisory Committee on 1961 amendments.

and balance the competing interests of the parties in the context of the particular case." *Lincolnwood*, 622 F.2d at 949 n.7. *See also id.* at 949 ("'[T]he district court should feel free to consider any factor that seems relevant to a particular action, keeping in mind the policies the rule intends to promote.'");[3] Moore, et al., *supra*, §54.23[1][b], at 54-65 (district court "may look to all the facts and circumstances of the case in determining whether there is any just reason for delaying the entry of judgment under Rule 54(b)").

Because the equities and judicial administrative interests favor immediate entry of a Rule 54(b) judgment, there is no just reason to delay entry of a Rule 54(b) judgment on the List 1 claims if defendants' Post-Trial Motions are denied.

1. Equitable Considerations Favor Immediate Entry of a Rule 54(b) Judgment for the List 1 Claimants if Post-Trial Motions Are Denied

This case presents several equitable reasons to enter a Rule 54(b) judgment for the List 1 claimants if defendants' Post-Trial Motions are denied. First and foremost, this case has been pending since 2002. A jury verdict in favor of the Class was rendered in May 2009. The jury found that defendants defrauded the Class. As this Court recently noted: "This litigation is taking years and years and years and it's got to come to an end." June 20, 2013 Tr. at 15. There is simply "no substantial reason" why the List 1 claimants should not be entitled to judgment immediately. *Lincolnwood*, 622 F.2d at 951.

Second, the ability of the List 1 claimants to collect from the Household defendants is a factor that weighs in favor of entering judgment in their favor now. The Court put it best at the June 20, 2013 status conference:

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[3] Citations are omitted and emphasis is added unless otherwise noted.

> Given the report of the special master, I . . . I'm trying to accelerate this case to some sort of conclusion. I have a defendant facing a possible draconian judgment and plaintiffs facing the possibility of a worthless draconian judgment the longer this case stretches out. So I'm trying to get it to a final conclusion as soon as possible.

June 20, 2013 Tr. at 16. Such circumstances favor a finding that there is no reason for delay under Rule 54(b). *See Curtis-Wright*, 446 U.S. at 12-13 (no just reason to delay where plaintiff's ability to collect would be potentially impaired by defendant's financial status); *Lincolnwood*, 622 F.2d at 949, 951 (delay and economic and solvency considerations support finding of no just reason for delay); *Manthey v. Kruse, Inc.*, No. 1:10-CV-51-TS, 2010 U.S. Dist. LEXIS 114484, at *4-*5 (N.D. Ind. Oct. 27, 2010) ("The Defendants would not be prejudiced by being required to satisfy a judgment entered upon these claims, but the Plaintiff would be exposed to risk related to the potential dissipation of assets if an enforceable judgment is not entered. The Defendants' financial stability is a concern and the effects of the delay may be harsh. The just economic interest of Plaintiff in the prompt entry of a final enforceable judgment weighs in favor of [Rule 54(b)] certification.").

Moreover, the List 1 claimants' substantial financial interest in a $1.477 billion judgment – and potentially more if this Court awards prejudgment interest – combined with the amount of time that will likely be needed to adjudicate defendants' unresolved objections to the List 2 claims, the List 4 claims and defendants' objections to over 20,000 additional claims that appear on neither list compel the immediate entry of judgment under Rule 54(b). *See Curtis-Wright*, 446 U.S. at 11 (Rule 54(b) judgment upheld where recovery was large and, absent Rule 54(b) certification, "would not be paid for 'many months, if not years' because the rest of the litigation could be expected to continue for that period of time"); *Lincolnwood*, 622 F.2d at 951 (plaintiff had "just economic interest" in prompt entry of final judgment where length of time needed to resolve remaining claims "promised to be considerable"); *Continental Datalabel*, 2012 U.S. Dist. LEXIS 173722, at *11-*12 (prevailing

party's substantial recovery of $35.2 million, and fact that ancillary claims might not be adjudicated until a "very distant date," supported finding of no just reason for delay).

It is reasonable to anticipate that the claims that do not currently appear on List 1 will not be finally adjudicated for many months – if then. As discussed below, there is no reason why this Court's anticipated rulings denying the Post-Trial Motions should not be appealed now, eliminating further delay of the List 1 claimants' recovery. As the *Continental Datalabel* court held, "[i]t would be inequitable to force Avery to endure the uncertain status of its victory on those claims [] until the perhaps very distant date at which the [ancillary] claims can at least be adjudicated. The prevailing party's financial interests are pertinent to the Rule 54(b) analysis, and here support entry of a Rule 54(b) judgment." *Id*. at *11-*12.

The inequity of delaying judgment for List 1 is highlighted by the disparity in class members and damages represented by List 1 claimants and the remaining claimants. List 1 currently includes 10,902 claims valued at $1,476,490,844 before interest, while the remaining claims that remain to be resolved are valued at less than half that amount. Requiring the claimants with the vast majority of damages to await the adjudication of issues that have no impact on their claims is precisely the type of scenario Rule 54(b) was designed to avoid. *See Lincolnwood*, 622 F.2d at 947 (Rule 54(b) was promulgated to address "'the danger of hardship and denial of justice through delay if each issue must await the determination of all issues as to all parties before a final judgment can be had'") (quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511-12 (1950)); Rule 54(b), Notes of Advisory Committee on 1961 amendments (rule was amended to explicitly permit judgment as to fewer than all parties because "[t]he danger of hardship through delay of appeal until the whole action is concluded may be at least as serious in the multiple-parties situations as in multiple-claims cases").

2. Judicial Administrative Interests Favor Immediate Entry of a Rule 54(b) Judgment for List 1 Claimants if Post-Trial Motions are Denied

Here, sound judicial administration also requires entry of final judgment for the List 1 claimants if defendants' Post-Trial Motions are denied because the motions will be dispositive as to the claims of the ***entire class***, not only those of the List 1 claimants. An immediate appeal of post-trial issues that will ultimately impact all claimants serves judicial administrative interests because an appellate ruling may affect other class members that are still litigating in this Court. For example, if the Seventh Circuit reverses and remands the case for a new trial for some reason, it would be preferable to retry the entire case before proceeding with appeals that flow from issues regarding defendants' objections to individualized claims that currently appear on Lists 2 and 4. Such circumstances weigh in favor of entering a Rule 54(b) judgment. *See Cooper Power Systems, Inc. v. Union Carbide Chemicals & Plastics Co.*, 123 F.3d 675, 678-79 n.1 (7th Cir. 1997) (Rule 54(b) judgment was appropriate where "[a]ffirmance would terminate the participation of one party in this litigation and permit the remainder of the litigation to be resolved in a far more focused manner").

As the Seventh Circuit has held, "if the further proceedings in the trial court are quite unlikely to make the appeal moot or even affect the issues on appeal, there is no reason to delay the appeal while they are resolved; and the delay may be a source of cost." *Parks*, 753 F.2d at 1401-02. *See also Lincolnwood*, 622 F.2d at 951 (judicial economy considerations favored immediate judgment where there was "little reason to believe" it would be mooted by future events in the district court). Here, not only are the claim objections and reliance proceedings unlikely to affect any issues on appeal, but the reverse is true: the appeal could impact other proceedings in the case. Judicial administrative interests thus weigh in favor of entering a judgment now for the List 1 claimants and allowing the order denying Post-Trial Motions to be appealed.

For the reasons set forth herein, final judgment under Rule 54(b) should be entered in favor of List 1 claimants if this Court denies defendants' Post-Trial Motions in their entirety.

IV. THE COURT HAS THE DISCRETION TO AWARD PREJUDGMENT INTEREST AND SHOULD IN THIS CASE

This Court has discretion to award prejudgment interest to plaintiffs. "Prejudgment interest is a form of compensation and the decision to award prejudgment interest rests in the sound discretion of the district court." *Michaels v. Michaels*, 767 F.2d 1185, 1204 (7th Cir. 1985); *see also Myron v. Chicoine*, 678 F.2d 727, 733-34 (7th Cir. 1982); *Lincoln Nat'l Life Ins. Co. v. Silver*, 966 F. Supp. 587, 620-21 (N.D. Ill. 1995), *aff'd*, 114 F.3d 1191 (7th Cir. 1997).

The rationale behind awarding prejudgment interest is to compensate the plaintiffs for being deprived of the monetary value of their loss. *City of Milwaukee v. Cement Division, National Gypsum Company*, 515 U.S. 189, 194 (1995). The Seventh Circuit recognizes securities-fraud victims as particularly deserving of prejudgment interest: "'If a defendant has deprived the plaintiff of a specific sum of money, he has also deprived the plaintiff of the interest which the money would have earned in the absence of defendant's breach of duty; unless the plaintiff is paid interest for the entire time that he is deprived of the use of his money, he will not receive full compensation.'" *Myron*, 678 F.2d at 734. "This rationale is persuasive in cases involving investments because by entering into such a transaction, the investor has manifested his intention to utilize the funds for the production of income." *Id.*

The Seventh Circuit has consistently held in favor of awarding prejudgment interest to plaintiffs: "The time has come, we think, to generalize, and to announce a rule that prejudgment interest should be presumptively available to victims of federal law violations. Without it, compensation of the plaintiff is incomplete and the defendant has an incentive to delay." *Gorenstein Enters., Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436 (7th Cir. 1989). "The growing

recognition of the time value of money has led this court to rule that 'prejudgment interest should be ***presumptively*** available to victims of federal law violations.'" *Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 692, 696 (7th Cir. 1991) (emphasis in original) (citing to *Gorenstein*). Courts in the Seventh Circuit have held that any discretion to deny prejudgment interest is extremely limited. *See Hutchison v. Amateur Elec. Supply, Inc.*, 42 F.3d 1037, 1046 (7th Cir. 1994), and *Harrison v. Dean Witter Reynolds, Inc.*, No. 86 C 8003, 1995 U.S. Dist. LEXIS 3571 (N.D. Ill. Mar. 22, 1995). Nevertheless, the decision to award prejudgment interest "involves a balancing of the equities between the parties under the circumstances of the particular case." *Myron*, 678 F.2d at 734. *See also Michaels*, 767 F.2d at 1204, and *Lincoln Nat'l Life*, 966 F. Supp. at 620-21.

Courts within the Seventh Circuit have routinely awarded prejudgment interest in successful securities fraud cases. *See Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033 (7th Cir. Ill. 1977); *Michaels*, 767 F.2d at 1204; *Rowe v. Maremont Corp.*, 850 F.2d 1226 (7th Cir. 1988); *Sanders v. John Nuveen & Co.*, 524 F.2d 1064, 1075 (7th Cir. 1975), *vacated and remanded on other grounds*, 425 U.S. 929 (1976); *SEC v. Koenig*, 557 F.3d 736, 745 (7th Cir. 2009); *Rk Co. v. Harvard Sci. Corp.*, No. 99 C 4261, 2007 U.S. Dist. LEXIS 85212, at *9 n.2. (N.D. Ill. Nov. 16, 2007). In fact, this Court has awarded prejudgment interest in a number of cases. *See Dominick L. v. Bd. of Educ.*, No. 12 C 665, 2012 U.S. Dist. LEXIS 136650 (N.D. Ill. Sept. 25, 2012) (Guzman, J.); *see also SEC v. Homa,* No. 99 C 6895, 2004 U.S. Dist. LEXIS 12226, at *17-*18 (N.D. Ill. June 25, 2004); *SEC v. Lipson*, 129 F. Supp. 2d 1148 (N.D. Ill. 2011), *aff'd*, 278 F.3d 656 (7th Cir. 2002).

In the few cases where courts have declined to impose prejudgment interest in whole or in part, the courts focused on whether the plaintiffs caused "substantial unexplained delay in filing suit." *In re the Oil Spill by The Amoco Cadiz*, 954 F.2d 1279, 1334 (7th Cir. 1992) (quoting *Williamson v. Handy Button Mach. Co.*, 817 F.2d 1290, 1298 (7th Cir. 1987)). *See also Sanders*, 524 F.2d at 1075; *Am. Nat'l Fire Ins. Co. v. Yellow Freight Sys.*, 325 F.3d 924, 938 (7th Cir. 2003).

In the present case, plaintiffs have not caused undue delay in the proceedings. The initial complaint was filed on August 19, 2002, shortly after Household announced a restatement of its financial results. The action was prosecuted vigorously from that time until the present.

Another potential consideration is "if the interest would in effect act as a penalty on a relatively innocent defendant, the court has discretion to refuse to award interest." *Sanders*, 524 F.2d at 1075. The defendants are far from innocent actors. The verdict rendered by the jury on May 7, 2009, found defendants Household International, Inc. and William Aldinger acted knowingly in violation of SEC Rule 10b-5 and David Schoenholz and Gary Gilmer acted recklessly in violation of SEC Rule 10b-5. Therefore, this is not a case of mere negligence or "relatively innocent" defendants. Even if it were found that defendants acted in good faith, it does not "'mitigate a losing party's obligation to pay the appropriate measure of prejudgment interest.'" *Dominick L.*, 2012 U.S. Dist. LEXIS 136650, at *13 (citing *First Nat'l Bank of Chicago v. Standard Bank & Trust*, 172 F.3d 472, 480 (7th Cir. 1999)).

The passage of a considerable amount of time and the consequent growth of the prejudgment interest is not a legitimate limiting factor and is not within the bounds of judicial discretion. *See Strauss v. Milwaukee Cheese Wis.* (*In re Milwaukee Cheese Wis.*), 112 F.3d 845 (7th Cir. 1997). As the court stated:

> Discretion is not, however, authorization to decide who deserves the money more . . . . The only reason appellants give why discretion should have been exercised in their favor is that the case has lasted a long time, so interest has mounted; an award now, they say, would be "punitive." This misunderstands why courts award prejudgment interest. Compensation deferred is compensation reduced by the time value of money; if the proceeds had been returned to Milwaukee Cheese's estate and distributed to the creditors, they would have been able to earn interest on it during the last decade. That is why prejudgment interest is an ingredient of full compensation. It is also why an award, no matter how large, cannot be called "punitive": defendants

> can invest the funds while the litigation proceeds, then use the interest they receive to satisfy the obligation.[4]

Id. at 849. In sum, there are no factors present that weigh against awarding prejudgment interest.

V. THE COURT SHOULD USE THE PRIME RATE TO CALCULATE THE PREJUDGMENT INTEREST

The rate to use to calculate prejudgment interest to be awarded to plaintiffs is appropriately left to the discretion of the district court. However, the Seventh Circuit has consistently held that an interest rate equal to the prime rate is appropriate: "[W]e suggest that district judges use the prime rate for fixing prejudgment interest where there is no statutory interest rate. That is a readily ascertainable figure which provides a reasonable although rough estimate of the interest rate necessary to compensate plaintiffs not only for the loss of the use of their money but also for the risk of default." *See Gorenstein*, 874 F.2d at 436; *Amoco Cadiz*, 954 F.2d at 1332 ("As we suggested in *Gorenstein*, 874 F.2d at 437, unless it engages in such refined rate-setting, a court should use the 'prime rate' – that is, the rate banks charge for short-term unsecured loans to credit-worthy customers. This rate may miss the mark for any particular party, but it is a market-based estimate."); *First Nat'l Bank*, 172 F.3d at 480; *SEC v. Kirch*, 263 F. Supp. 2d 1144 (N.D. Ill. 2003).[5]

The prime rate to be used is the average prime rate for the time period in question. *See Amoco Cadiz*, 954 F.2d at 1332 ("[a]lthough Gorenstein did not elaborate on this, it should be plain

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[4] It should be noted that if plaintiffs had the use of their funds during the time period in question and had invested it in the S&P 500, it would have increased 158% (2.58 multiplier), which is far in excess of the 67% (1.67 multiplier) being requested for prejudgment interest. *See* Steinholt Decl., at 1 n.2.

[5] The Court should not engage in so-called "refined rate setting" and use Household's cost of borrowing instead of the prime rate. As the United States Supreme Court has held, "the essential rationale for awarding prejudgment interest is to ensure that an injured party is fully compensated for its loss." *City of Milwaukee*, 515 U.S. at 195. In fact, the court has the discretion ***not*** to engage in "refined rate-setting," when it will not provide full compensation to the plaintiffs. *Cement Div. Nat'l Gypsum Co. v. City of Milwaukee*, 144 F.3d 1111, 1114 (7th Cir. 1998) (upholding district court's rejection of defendant's argument to use lower municipality borrowing rate instead of prime rate, or "refined rate setting," on the basis that it did not provide full compensation to plaintiffs).

that the market rate in question is the one during the litigation – when the defendant had the use of money that the court has decided belongs to the plaintiff – not the going rate at the end of the case") (citing *Ohio River Co. v. Peavey Co.*, 731 F.2d 547, 549-50 (8th Cir. 1984)); *see also Cement Div. v. City of Milwaukee*, 31 F.3d 581, 587 (7th Cir. 1994) ("But we have said on previous occasions that the best starting point is to award interest at the market rate, which means an average of the prime rate for the years in question."). Based on the above, plaintiffs request an award of prejudgment interest at the average monthly prime rate.

VI. THE COURT SHOULD USE COMPOUND INTEREST

As a general rule, the decision as to whether to award compound or simple prejudgment interest is left to the discretion of the trial court. However, the Seventh Circuit has consistently awarded compound prejudgment interest: "So we reiterate the holding of *Gorenstein* . . . that compound prejudgment interest is the norm in federal litigation." *See Amoco Cadiz*, 954 F.2d at 1332; *American Nat'l Fire*, 325 F.3d 924. "We do believe, that at least in a federal question case, a district court must explain why it believes it appropriate to deviate from the norm of compound interest, the measure that most completely fulfills the purpose of prejudgment interest of ensuring 'complete compensation.'" *American Nat'l Fire*, 325 F.3d at 938; *see also Dominick L.*, 2012 U.S. District LEXIS 136652, at *13-*14 (Guzman, J.). This case is no exception – compounded interest is necessary to ensure that the defrauded plaintiffs receive "complete compensation." *Id.* at *14.

VII. THE COURT SHOULD COMPOUND THE INTEREST AT A MONTHLY RATE

The issue of how often to compound is also left to the discretion of the district court. In *Harrison*, which granted prejudgment interest in a case based on control person liability under §20(a) of the Securities Exchange Act of 1934, the Court recognized that "[a]s for how often to compound, annually, monthly, daily, etc., there appears to be support in the law for each approach.

This Court will adopt the approach taken by Judge Easterbrook, sitting by designation in a patent case, and will calculate the interest due by applying the average prime rate compounded ***monthly***." 1995 U.S. Dist. LEXIS 3571, at *38 (citing to *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 831 F. Supp. 1354, 1395 (N.D. Ill. 1993)). *See also Mendenhall v. Barber-Greene Co.*, No. 80 C 6747, 1990 WL 156519, at *3 (N.D. Ill. Oct. 5, 1990). In *Cabernoch v. Union Labor Life Ins. Co.*, No. 06 C 1515, 2009 U.S. Dist. LEXIS 71793, at *11 (N.D. Ill. Aug. 14, 2009), the Court awarded prejudgment interest to be compounded monthly, reasoning that:

> [D]uring the time of the litigation, Plaintiff was deprived of the use of her money, and Defendant profited, either by investing the money and earning interest on interest, or using it in lieu of loans upon which it would have had to pay interest. Because monthly compounding of interest is standard on everything from mortgages to credit cards to car loans, such compounding is appropriate here. By compounding the interest at a lesser frequency, Defendants would be profiting from their wrong and Plaintiff would not be compensated fully for the lost value of her money in the marketplace.

Id. at *11.

The Court should apply the same reasoning here and compound the interest monthly.

VIII. THE COURT SHOULD USE THE TIME PERIOD OF OCTOBER 1, 2002 TO THE DATE OF ENTRY OF JUDGMENT TO CALCULATE PREJUDGMENT INTEREST

In *Premium Plus Partners, L.P. v. Goldman, Sachs & Co.*, 648 F.3d 533, 538-39 (7th Cir. 2011), Judge Easterbrook posited that "the norm in federal litigation, when prejudgment interest is authorized, is compound interest from the date of the injury" (citing *Amoco Cadiz*, 954 F.2d at 1331); *see American Nat'l Fire*, 325 F.3d at 935 ("prejudgment interest typically accrues from the date of the loss or from the date on which the claim accrued"). The inflation in Household's stock

was dissipated by October 1, 2002, which is when the total loss was incurred.[6] Thus, the time period of October 1, 2002 to the date of judgment is appropriate to calculate prejudgment interest.

IX. CONCLUSION

By reason of the foregoing, assuming defendants' post-trial motions are denied, this Court should enter judgment in favor of the class members with claims set forth on List 1. The Court should also award prejudgment interest on those claims calculated at the prime rate compounded monthly from October 1, 2002 to the date judgment is entered.

DATED: July 30, 2013

Respectfully submitted,

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[6] Plaintiffs' request that interest run from October 1, 2002 is conservative. The jury found that class members began to suffer losses as early as the first partial disclosure on November 14, 2001.

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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 Diego, State of California, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 W. Broadway, Suite 1900, San Diego, California 92101.

2. That on July 30, 3013, declarant served by electronic mail and by U.S. Mail to the parties the following documents:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT PURSUANT TO FED. R. CIV. P. 54(b) AND FOR AN AWARD OF PREJUDGMENT INTEREST

The parties' e-mail addresses are as follows:

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and by U.S. Mail to:

Lawrence G. Soicher, Esq.
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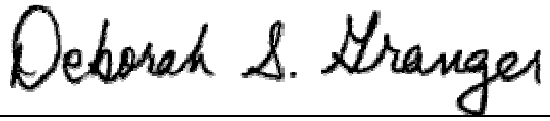
New York, NY 10022

I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of July, 2013, at San Diego, California.



DEBORAH S. GRANGER