UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiffs, v. HOUSEHOLD INTERNATIONAL, INC., ET AL., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman

DEFENDANTS' RESPONSE TO 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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Defendants Household International, Inc., William F. Aldinger, David A. Schoenholz, and Gary Gilmer (collectively "Defendants") respectfully submit this response to Plaintiffs' Motion For Entry Of Judgment Pursuant To Fed. R. Civ. P. 54(b) And For An Award Of Prejudgment Interest (Doc. 1868).

PRELIMINARY STATEMENT

Plaintiffs seek entry of judgment, pursuant to Rule 54(b), with respect to 10,902 claims valued at $1,476,490,844. Doc. 1870 at 1. These claims are set forth on List 1, which is attached as Exhibit A to the Special Master's July 11, 2013 Report and Recommendation. Doc. 1860-1. List 1 identifies those claims as to which the claimants answered "No" to the claim form or supplemental claim form's reliance question, and as to which Defendants have no further ministerial claim form objections requiring determination by the Special Master. *Id.* at 2. Plaintiffs also seek an award of prejudgment interest on the List 1 claims, which they seek to have calculated at the prime rate, compounded monthly. Doc. 1870 at 1-2, 13-16. Use of Plaintiffs' proposed methodology would result in the application of a multiplier of 1.67593 (calculated through July 31, 2013), to be used in determining the total amount—claims plus prejudgment interest—to be awarded to Plaintiffs. *Id.* at 1-2; Declaration of Bjorn I. Steinholt, CFA (Doc. 1871) ¶ 6. As of July 31, 2013, prejudgment interest calculated according to Plaintiffs' proposed methodology would be nearly one *billion* dollars—specifically, $998,000,783. Steinholt Decl. ¶ 6.

For the reasons set forth in Defendants' Renewed Motion for Judgment as a Matter of Law, or, in the Alternative, a New Trial (Doc. 1866), and Defendants' supporting memorandum of law (Doc. 1867), Plaintiffs are not entitled to judgment on *any* claims and judgment should be entered on behalf of Defendants or, at a minimum, a new trial should be ordered. If, however, the Court denies Defendants' post-trial motions, Defendants do not oppose entry of judgment

with respect to List 1 claimants so that prompt appellate review may be obtained; provided the Court is satisfied that the requirements for entry of partial judgment under Rule 54(b) are satisfied. In this respect, Defendants note that Plaintiffs' Motion does not set forth fully the determinations that must be made by the Court in order to render an appropriate finding under Rule 54(b). Those requisite standards are set forth below in Section I.

As to prejudgment interest, Defendants object to Plaintiffs' Motion, and in particular to the assertion that prejudgment interest related to these securities fraud claims should be calculated at the prime rate, compounded monthly. Plaintiffs' proposed methodology would confer an improper windfall on Plaintiffs and grossly overcompensate them for any loss of funds during the intervening period of market turmoil in which this case was proceeding. Indeed, Plaintiffs seek *more than twice* the amount of prejudgment interest to which they would be entitled if interest were calculated in accordance with the methodology defined by Congress, *more than twice* the amount they would receive under the "refined rate-setting" methodology directed by the Seventh Circuit, and *more than twice* the return Plaintiffs would have realized over the period for investments in the same financial sector. Such gross overcompensation of Plaintiffs, and imposition of excessive, punitive costs on Defendants, is inconsistent with the underlying purposes of prejudgment interest and would constitute an abuse of discretion.

The proper measure of prejudgment interest in this case is the rate prescribed by Congress for calculating civil judgment interest, as set forth in 28 U.S.C. § 1961 (defining the methodology for the calculation of postjudgment interest). Calculating interest in accordance with this statutory methodology results in the application of a multiplier of 1.22311, yielding an award of prejudgment interest (calculated through July 31, 2013) of $329,418,924. Declaration of Alexander Barnett ("Barnett Decl.") ¶ 3.b. Calculating prejudgment interest in this manner

not only accords with Congress' view of the proper methodology to assess interest to be applied to a civil judgment, but also accords with a rate of return roughly equivalent to what Plaintiffs would have received had they continued to invest in the financial sector during the period at issue. Such a rate is also consistent with the recent ruling of the Southern District of New York in another securities fraud class action that proceeded to trial and judgment. *See In re Vivendi Universal, S.A. Sec. Litig.*, 284 F.R.D. 144 (S.D.N.Y. 2012).

Regardless, in no event should the interest rate exceed the "more precise" refined rate-setting methodology directed by the Seventh Circuit—namely, "the interest rate paid by the defendant for unsecured loans." *Gorenstein Enters., Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 437 (7th Cir. 1989); *see also In re Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978*, 954 F.2d 1279, 1332 (7th Cir. 1992). The average interest rate that Household paid during the period 2002 through 2012 on its commercial paper was 2.13636%. Compounding interest annually at this rate would result in a multiplier of 1.25657567, and an award of prejudgment interest of $378,831,771. Barnett Decl. ¶ 4.b.

Awarding Plaintiffs prejudgment interest at the prime rate, compounded monthly, would confer on Plaintiffs an unwarranted windfall and impose an improper and unfair penalty on Defendants. Because "prejudgment interest is not awarded as a penalty," but rather "is merely an element of just compensation," *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189, 197 (1995), Plaintiffs' request for a windfall award of prejudgment interest should be denied.

ARGUMENT

I. IF THIS COURT DENIES DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, A NEW TRIAL, DEFENDANTS DO NOT OPPOSE PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT PURSUANT TO FED. R. CIV. P. 54(B).

On July 30, 2013, Defendants filed a renewed motion for judgment as a matter of law or, in the alternative, a new trial. *See* Doc. 1866. As explained in that motion and the accompanying memorandum, *see* Doc. 1867, Defendants are entitled to judgment in their favor as a matter of law pursuant to Rule 50(b) on multiple grounds or, in the alternative, to a new trial pursuant to Rule 59. Those motions should be granted for the reasons set forth. However, in the event the Court denies Defendants' motion for judgment as a matter of law or a new trial, Defendants do not oppose Plaintiffs' motion for entry of judgment pursuant to Fed. R. Civ. P. 54(b) with respect to List 1 claimants so that appellate review can be obtained expeditiously. Were the Court to grant Plaintiffs' Motion, it is necessary that the Court render appropriate findings in accordance with the Rule 54(b) standards defined by Supreme Court and Seventh Circuit precedent. Those standards are set forth below.

Rule 54(b) authorizes this Court to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties" when "an action presents more than one claim for relief . . . or when multiple parties are involved," "if the court expressly determines that there is no just reason for delay." In other words, the Court may enter judgment under Rule 54(b) in "an action involving multiple claims for relief or multiple parties" if there is "a final decision . . . as to at least one claim or the rights and liabilities of at least one of the parties," and "'there is no just

reason for delay.'" *Bank of Lincolnwood v. Fed. Leasing, Inc.*, 622 F.2d 944, 947 (7th Cir. 1980).[1]

As to the first requirement, the "multiple parties" prong provides a valid basis for the exercise of Rule 54(b) here.[2]

As to the second requirement, to evaluate whether "there is any just reason" to delay entering judgment under Rule 54(b), the Court must consider both "judicial administrative interests" and "the equities involved." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980). The Court must "weigh the virtues of accelerated judgment against the possible drawbacks of piecemeal review." *Local P-171, Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Thompson Farms Co.*, 642 F.2d 1065, 1072 (7th Cir. 1981). As long as it does so, the Court's judgment is reviewed only for an abuse of discretion. *Lincolnwood*, 622 F.2d at 947-48. While the Court may "'consider any factor that seems relevant to a particular action,'" *id.* at 949, it should—at a minimum—consider the impact of a Rule 54(b) judgment on judicial resources, *see Cooper Power Sys., Inc. v. Union Carbide Chems. & Plastics Co.*, 123 F.3d 675, 678 n.1 (7th Cir. 1997), the possibility that a series of factually and legally overlapping appeals will result, *Sandwiches, Inc. v. Wendy's Int'l, Inc.*, 822 F.2d 707, 709 (7th Cir. 1987), and

[1] "[T]he most common application" of Rule 54(b) "to multi-party actions is dismissal, summary judgment, or other adjudication of all of the claims asserted against one of multiple defendants." 10 James Wm. Moore, et al. *Moore's Federal Practice* § 54.22[2][c], at 54-55 (3d ed. 2013). That said, "[a]lthough less frequently encountered, a judgment disposing of the interests of one or more of multiple plaintiffs may also be entered under the rule." *Id.* at 55-56.

[2] Plaintiffs contend that "judgment in favor of the List 1 claimants would also satisfy the" multiple "claims prong of Rule 54(b), in that it would be a final judgment as to the List 1 plaintiffs' claims." Doc. 1870 at 5. That position is in tension with Seventh Circuit precedent. The Seventh Circuit has refused to review cases where judgment was entered pursuant to Rule 54(b) "when there was too much factual or legal overlap between the claims retained by the district court and those appealed under a Rule 54(b) judgment." *Horwitz v. Alloy Auto. Co.*, 957 F.2d 1431, 1434 (7th Cir. 1992); *see F.D.I.C. v. Elefant*, 790 F.2d 661, 664 (7th Cir. 1986) (a dispute is not a separate claim for Rule 54(b) purposes "if it has a legal or factual overlap with matters remaining in the district court"). This court need not decide whether judgment is appropriate under Rule 54(b)'s "multiple claims" prong if it concludes that such judgment is warranted under the "multiple parties" prong. *See* Doc. 1870 at 5.

whether an appeal from the judgment "will be mooted by future events," *Lincolnwood*, 622 F.2d at 951.[3]

As an initial matter, "judicial administrative interests" unique to class actions do not foreclose 54(b) judgment. To be sure, the Seventh Circuit has expressed doubts about the wisdom of entering judgment under Rule 54(b) with respect to only some parties to a class action. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456, 457-58 (7th Cir. 1997) ("[T]o allow [a subset of plaintiffs in a class action] to appeal would be an even worse affront to intelligent judicial administration because it would fragment the control of the class action."); *id.* ("If class members can file their own appeals, the coherence of the class is destroyed, the scope of the class action becomes unclear, and the control over the action becomes divided and confused."); *Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 160 (7th Cir. 1988) (while the district court "could have entered a final judgment to the extent that [the] order disposed of one of the parties to the case, it was far more sensible to wind up the litigation in the district court before involving this court in it"). But that logic does not squarely apply here, and the Seventh Circuit has certainly not adopted a bright-line rule foreclosing use of Rule 54(b) in class actions. To the contrary, the Seventh Circuit has held that entering judgment under Rule 54(b) with respect to specific class members is "proper." *Bishop v. Gainer*, 272 F.3d 1009, 1013 (7th Cir. 2001); *see also Evans v. City of Chicago*, 689 F.2d 1286, 1292 (7th Cir. 1982) ("The entry of a final judgment under Fed. R. Civ. P. 54(b) allows this court to review the determination of the class found entitled to relief."); *cf. Curtis-Universal, Inc. v. Sheboygan Emergency Med. Servs., Inc.*, 43 F.3d 1119, 1121 (7th Cir. 1994) ("The appeal is proper because,

[3] The Seventh Circuit strongly encourages district courts to provide an explanation of the reasoning behind the entry of a Rule 54(b) judgment. *See, e.g., United States v. Ettrick Wood Prods., Inc.*, 916 F.2d 1211, 1218 (7th Cir. 1990) ("Explaining her reasons for deciding forces a judge to think about and reconcile the pros and cons of alternative actions before deciding which to take, thus ensuring a reasoned exercise of discretion. Explanation also better enables this court to review the district judge's decision to be sure it was based on appropriate factors.").

although litigation remains pending in the district court, the judge's order completely disposes of one party (First National) and the judge entered the order as a final judgment under Fed. R. Civ. P. 54(b)."). And a Rule 54(b) judgment in this case does not appear to threaten the "coherence of the class" or make it likely that "control over the action" will "become[] divided and confused." *In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d at 458.

This is not a situation where entering judgment is likely to result in "judicial resources be[ing] wasted at the appellate level," *Cooper Power Sys.*, 123 F.3d at 678 n.1, or to create a "substantial risk that the issues would return on a later appeal" involving other class members, *Sandwiches, Inc.*, 822 F.2d at 710. It is undisputed that the issues presented in an appeal from a judgment regarding List 1 claimants will involve legal issues that are "dispositive as to the claims of the ***entire class***." Doc. 1870 at 9 (emphasis in original). Accordingly, an appeal from the judgment Plaintiffs seek will be decisive as to the issues raised in that appeal.

Moreover, "[t]here is little reason to believe" that the issues involved in an appeal in this case "will be mooted by future events." *Lincolnwood*, 622 F.2d at 951; *see Parks v. Pavkovic*, 753 F.2d 1397, 1401-02 (7th Cir. 1985) ("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"). While there is substantial factual overlap between the claims of the class members on the various Lists, it is highly unlikely that the process of disposing of the claims of List 2, 3, and 4 claimants will moot the issues raised in an appeal involving List 1 claimants.

II. PREJUDGMENT INTEREST SHOULD BE CALCULATED HERE IN ACCORDANCE WITH THE METHODOLOGY DEFINED BY CONGRESS IN 28 U.S.C. § 1961, AND, IN ANY EVENT, SHOULD NOT EXCEED THE "MORE PRECISE ESTIMATE" METHODOLOGY DIRECTED BY THE SEVENTH CIRCUIT.

As Plaintiffs acknowledge, "'the decision to award prejudgment interest rests in the sound discretion of the district court'" and "'involves a balancing of the equities between the parties under the circumstances of the particular case.'" Doc. 1870 at 10-11 (citing and quoting Seventh Circuit decisions).

"When awarded, prejudgment interest should not be a windfall, but instead, put a party in the position it would have been in if paid immediately." *Stephanie J. v. Bd. of Educ. of City of Chi.*, No. 10 C 1359, 2010 U.S. Dist. LEXIS 77562, at *13-14 (N.D. Ill. July 30, 2010) (citing *Am. Nat'l Fire Ins. Co. ex rel. Tabacelera Contreras Cigar Co. v. Yellow Freight Sys., Inc.*, 325 F.3d 924, 935 (7th Cir. 2003)). Here, if this Court were to deny Defendants' motion for judgment as a matter of law or a new trial, prejudgment interest should not be calculated under the methodology proposed by Plaintiffs, but rather, should be calculated in accordance with the methodology specified by Congress for the computation of interest for a civil judgment. Regardless, in no event should prejudgment interest be awarded in an amount greater than the "more precise" methodology directed by Seventh Circuit based upon the rate Household itself paid on its unsecured, short-term debt during the period. To do otherwise would provide an improper "windfall" to Plaintiffs and impose an impermissibly "punitive" cost on Defendants.

At the outset, it bears note that this is not a circumstance in which Defendants have held in their possession during the prejudgment period property wrongfully taken from Plaintiffs. Under the "fraud-on-the-market" premise upon which this case is founded, the persons and entities who purportedly "profited" from the alleged artificial inflation of the stock price during the Class Period were those participants in the market who sold shares to claimants during the

Class Period. Defendants were not the recipients of the class members' funds and thus have not possessed those funds during the prejudgment period. Thus, unlike *In the Matter of Milwaukee Cheese Wisconsin, Inc.*, 112 F.3d 845 (7th Cir. 1997), and similar precedent relied upon by Plaintiffs, this is not a circumstance in which Defendants wrongfully obtained, and were in possession of, Plaintiffs' property during the prejudgment phase and thus could "invest the funds while the litigation proceeds, then use the interest they receive to satisfy the obligation." *Id.* at 849.

A. The Methodology Specified By Congress To Compute Interest On A Civil Judgment Is Appropriate And Provides Plaintiffs With Fair Compensation Without Imposing An Improper Penalty On Defendants.

When Congress enacted the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, it amended the postjudgment interest statute, 28 U.S.C. § 1961. "The purpose of the amendment was to craft a uniform federal rate to supersede the various state law rates then being applied." *Blevins v. United States*, 769 F.2d 175, 180 (4th Cir. 1985) (citing S. Rep. No. 97-275 (1981), *reprinted in* 1982 U.S. Code Cong. & Ad. News, 11, 21). Congress was concerned that the state-law interest rates "frequently f[e]ll[] below the contemporary cost of money." S. Rep. No. 97-275, at 40. Congress, therefore, amended 28 U.S.C. § 1961 by "setting a realistic and nationally [sic] rate of interest on judgments in the federal courts." *Id.* The rate Congress chose as the appropriate rate for postjudgment interest was "a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." 28 U.S.C. § 1961. In adopting this rate, "Congress intended to remove the economic incentives to delay that exist when judicially-awarded interest rates are less than the contemporary cost of money." *W. Pac. Fisheries, Inc. v. S.S. President Grant*, 730 F.2d 1280, 1289 (9th Cir. 1984).

Awards of prejudgment and postjudgment interest serve an identical function—to

compensate a plaintiff for the loss of the use of its funds. *See, e.g.*, *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835-36 (1990) ("[T]he purpose of postjudgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant." (internal quotations omitted)); *Overbeek v. Heimbecker*, 101 F.3d 1225, 1228 (7th Cir. 1996) ("The purpose of postjudgment interest is not to punish a defendant but to encourage prompt payment and compensate a plaintiff for another party's use of its money."). Many circuits, therefore, use the statutory postjudgment interest rates when determining prejudgment interest, or at least consider the statutory postjudgment rates as a relevant guidepost.[4]

There is no valid reason here to depart from the methodology specified by Congress as the appropriate measure of interest to apply to a civil judgment. Importantly, the reasoning applied by the Seventh Circuit in *Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431 (7th Cir. 1989), wherein the Court stated in *dictum* that the statutory rate would have been too low under the facts of that case, supports use of the methodology set forth in 28 U.S.C. § 1961 in this case. *Gorenstein* focused its analysis on "convenien[t]," "readily ascertainable" measures that fall in general accord with "the average interest rate for 'securities' comparable in riskiness" to those at issue in the litigation. *Id.* at 436-37. In *Gorenstein*, the Seventh Circuit

[4] *See, e.g.*, *Goldman Sachs Execution & Clearing, L.P. v. Official Unsecured Creditors' Comm. of Bayou Grp., LLC*, 491 F. App'x 201, 206 (2d Cir. 2012) ("We have recognized that while there is 'no federal statute that purports to control the rate of prejudgment interest,' the post-judgment rate set forth in Section 1961 may be suitable for an award of prejudgment interest 'depend[ing] on the circumstances of the individual case.'" (quoting *Jones v. UNUM Life Ins. Co. of Am.*, 223 F.3d 130, 139 (2d Cir. 2000)); *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 63 (3d Cir. 1986) (explaining that, in exercising its discretion to determine an appropriate rate of prejudgment interest, "the court may be guided by the rate set out in 28 U.S.C. § 1961"); *Ford v. Uniroyal Pension Plan*, 154 F.3d 613, 619 (6th Cir. 1998) ("[W]e have held previously that the statutory postjudgment framework set forth in 28 U.S.C. § 1961 is a reasonable method for calculating prejudgment interest awards." (citing *EEOC v. Wooster Brush Co. Employees Relief Ass'n*, 727 F.2d 566, 579 (6th Cir. 1984); *Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322, 1331 (8th Cir. 1995) (stating that "U.S.C. § 1961 provides the proper measure for determining rates of both prejudgment and postjudgment interest"); *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1099 (9th Cir. 2010) ("Ordinarily, 28 U.S.C. § 1961 'is to be used for the calculation of prejudgment interest unless the equities of a particular case demand a different rate.'" (quoting *In re Nucorp Energy, Inc.*, 902 F.2d 729, 734 (9th Cir. 1990).)

affirmed a prejudgment interest rate of 9%, holding that the rate could not reasonably be objected to by Defendants given that the 9% figure was "well below the average interest rate for 'securities' comparable in riskiness" during the period in question. *Id.* at 436 (noting that "there were times while this suit was pending when the prime rate exceeded 20 percent").[5] Here, given the significantly different investment and market conditions than those existing during the time period at issue in *Gorenstein*, the return on one-year constant maturity Treasury bills during this prejudgment interest period is, in fact, roughly equivalent to the return "for 'securities' comparable in riskiness" to Plaintiffs' investment in financial sector stocks.

The relevant benchmark by which to assess securities "comparable" to those at issue in this case is the S&P Financials Index, which provides the return during the period for stocks in the financial sector. Indeed, Plaintiffs' expert, Daniel R. Fischel, used the return on the S&P Financials Index as the proxy for the returns earned by companies in the financial sector when conducting his loss causation analysis. *See* Report of Daniel R. Fischel (Doc. 1361-2), Ex. 1 ¶ 29 & n.10 (describing the S&P Financials Index as an index of stocks "comparable" to Household's stock and noting that, as of October 11, 2002, there were 81 stocks in the S&P Financials Index).[6]

[5] Given the economic environment at the time of the *Gorenstein* decision, the Seventh Circuit "suggest[ed] that district judges use the prime rate for fixing prejudgment interest," but noted that this was simply a matter of "convenience" that served as a "readily ascertainable figure which provide[d] a reasonable although rough estimate" of the "interest rate for 'securities' comparable in riskiness." 874 F.2d at 436-37. Here, as set forth above, the Treasury bill rate used in 28 U.S.C. § 1961, provides a more accurate "reasonable although rough estimate" of the interest rate during the prejudgment period "for 'securities' comparable in riskiness" to Plaintiffs' investment in Household stock. Moreover, as discussed more fully in Section II(B), the *Gorenstein* Court expressly cautioned: "We have chosen the prime rate for convenience; a more precise estimate would be the interest rate paid by the defendant for unsecured loans." *Id.* at 437.

[6] Plaintiffs acknowledge that it is appropriate to look to the return on an investment in a relevant financial index as a proxy for the rate of return a plaintiff would have earned had the plaintiff been able to invest its funds during the prejudgment interest period. Doc. 1870 at 13 n.4. Plaintiffs, however, cherry-pick the S&P 500 Index, rather than the Financials Index that more accurately reflects the return on investments in the sector at issue. Given Plaintiffs demonstrated desire to invest in the financial services sector, the return on the S&P Financials Index provides a better approximation of the rate of return that Plaintiffs likely would have earned had they had use of the funds at issue to invest during this prejudgment period.

The rate of return on investments in the financial sector during the period from October 11, 2002 (the end of the Class Period), through July 31, 2013, as measured by the rate of return on the S&P Financials Index (assuming reinvestment of dividends) was 27.45%, the equivalent to a multiplier of 1.2745. Barnett Decl. ¶ 5. Prejudgment interest calculated in accordance with the methodology specified by Congress in 28 U.S.C. § 1961, based on the rates paid on one-year constant maturity Treasury bills during that same period, yields a multiplier of 1.22311 (prejudgment interest of $329,418,924). Barnett Decl. ¶ 3.b

Under the rationale of *Gorenstein*, the Treasury bill rate specified in 28 U.S.C. § 1961 is thus an appropriate measure given the relative performance of securities in the financial sector during the same period. *See also, e.g., Sanders v. John Nuveen & Co.*, 524 F.2d 1064, 1075-76 (7th Cir. 1975), *vacated and remanded on other grounds*, 425 U.S. 929 (1976) ("In line with the underlying principle of compensation, the rate allowed should be chosen to reflect the rate which the money would have earned for the plaintiffs had defendants not breached their duty."); *Myron v. Chicoine*, 678 F.2d 727, 734 (7th Cir. 1982) (observing that, by entering into an investment transaction, "the investor has manifested his intention to utilize the funds for the production of income," and stating that the purpose of an award of prejudgment interest is to "afford a rough approximation of this interest"). The Supreme Court likewise has acknowledged that "the availability of alternative investment opportunities to the plaintiff" is a factor to be considered in determining the amount of prejudgment interest that is necessary to fully compensate a plaintiff for its injuries. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 176 (1989). Against this backdrop, application of the methodology deemed by Congress to best serve the underlying purposes of an assessment of interest on a civil judgment is particularly appropriate here, given

its close relationship to the estimated rate of return that Plaintiffs might have earned had they continued to invest in the financial sector.[7]

The recent decision in *In re Vivendi Universal, S.A. Securities Litigation*, 284 F.R.D. 144 (S.D.N.Y. 2012)—one of the few other securities cases that proceeded to the post-verdict stage where prejudgment interest rates were considered—further supports use of the rate specified in 28 U.S.C. § 1961 under the facts presented here. In *Vivendi*, plaintiffs argued that prejudgment interest should be awarded at the rate charged by the Internal Revenue Service on delinquent tax payments (an intentionally punitive rate) that would have resulted in an award of prejudgment interest of 81 cents for each dollar in damages. *Id.* at 163. Defendants, in turn, argued that the court should use the statutory postjudgment interest rate, which would result in prejudgment interest of 21 cents for each dollar of damages, based on annual compounding. *Id.* In response to defendants' argument, the *Vivendi* plaintiffs, like the plaintiffs in *Gorenstein*, asserted that "applying the Treasury rate is inappropriate, because plaintiffs were pursuing risky investments, not an investment generating a low or risk-free return." *Id.* Judge Scheindlin rejected this argument, stating: "I cannot conclude that plaintiffs, by investing in equally risky investments, would have received a 81% return over a decade, especially in light of the turmoil in the financial markets." *Id.* at 164. In particular, the court noted that, had plaintiffs invested their funds in the "CAC 40" index, the main benchmark index of blue chip stocks listed on the Paris Bourse (the exchange on which Vivendi stock was listed), plaintiffs likely would not have received a return on their investments greater than the yield on a one-year Treasury bill. *Id*. at

[7] The Seventh Circuit has held that it is appropriate to apply the *average* of the relevant rates during the prejudgment interest period. *See, e.g., First Nat'l Bank of Chi. v. Standard Bank & Trust*, 172 F.3d 472, 481 n.9 (7th Cir. 1999).

164. Consistent with 28 U.S.C. § 1961, the court, therefore, held that the appropriate rate of interest was the yield on a one-year Treasury bill, compounded annually. *Id.*[8]

In sum, the methodology directed by Congress for the proper determination of interest to be applied to a civil judgment, 28 U.S.C. § 1961, provides the most appropriate measure of interest here. The rate comports with Congress' determination of "a realistic . . . rate of interest on judgments in the federal courts," S. Rep. No. 97-275, at 40, appropriately approximates the return on "'securities' comparable in riskiness," 874 F.2d at 436-37, and accords with the recent decision in the *Vivendi* case.

B. In No Event Should The Prejudgment Interest Rate Exceed The Rate Household Paid On Its Short-Term Unsecured Debt.

The Seventh Circuit repeatedly has indicated that the rate the defendant paid on its short-term unsecured debt during the prejudgment interest period provides a "more precise" measure for the calculation of prejudgment interest, and can serve as a preferred "refined rate-making" methodology where available. *See Gorenstein*, 874 F.3d at 437 ("We have chosen the prime rate for convenience; a more precise estimate would be the interest rate paid by the defendant for unsecured loans."); *In re Oil Spill by the Amoco Cadiz*, 954 F.2d at 1332 (opining that the "best estimate" of an appropriate rate for prejudgment interest is "the amount *the defendant* must pay for money, which reflects variables specific to that entity," and observing: "Amoco has publicly traded notes and debentures; a court could draw an interest rate directly from them."); *Cement Div., Nat'l Gypsum Co. v. City of Milwaukee*, 31 F.3d 581, 587 (7th Cir. 1994) ("As pointed out

[8] The district court in *Vivendi* also noted that, in arguing that prejudgment interest should be awarded at the rate of 81 cents per dollar of damages, plaintiffs' expert "consider[ed] the returns over the past decade on Vivendi ordinary shares, the Dow Jones Industrial Average, the S&P 500, the Fidelity Magellan Fund, and the Dow Jones Euro STOXX Media Index, but ignore[ed] the most on point comparison for what an investor in Vivendi might have alternatively invested in, had she not invested in Vivendi—an index fund for the CAC-40." *Id.* (footnote omitted). Likewise here, Plaintiffs point to the return on the S&P 500 Index but ignore that they have previously taken the position that the most on-point comparison is the return on the S&P Financials Index.

by *Amoco Cadiz* and *Gorenstein*, one of the factors used in determining the rate of prejudgment interest is the creditworthiness of the judgment debtor. Thus, the district court could, in its discretion, set the rate of interest to match that which lenders would charge the City for short-term, unsecured loans."). The rationale for using the defendants' cost of borrowing is that "[t]he plaintiff is an unsecured, uninsured creditor, and the risk of default must be considered in deciding what a compensatory rate of interest would be." *Gorenstein*, 874 F.2d at 436.[9]

Where, as here, a company was financially strong and able to borrow at rates below prime, using the prime rate to determine prejudgment interest will overcompensate the plaintiff. *See* Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 Tex. L. Rev. 293, 323 (1996) ("The prime rate will be too low when the defendant's unsecured debt has a relatively high probability of default. . . . The prime rate will be too high when that default probability is relatively low. This is most likely to occur for well-established companies with little leverage.").

At all times during the prejudgment interest period, Household (now known as HSBC Finance Corporation), was a financially stable company with excellent credit ratings and, therefore, was able to borrow on a short-term unsecured basis at rates well below the prime rate, as reflected in the interest rates on its commercial paper.[10] As set forth in HSBC Finance's Forms 10-K, filed with the United States Securities and Exchange Commission, the average interest rate that Household paid during the period 2002 through 2012 on its commercial paper

[9] Setting the prejudgment rate equal to the amount the defendant paid on its short-term unsecured debt during the prejudgment interest period is known as the "coerced loan theory." *See* Michael S. Knoll and Jeffrey M. Colon, *The Calculation of Prejudgment Interest*, 8 (Faculty Scholarship, Paper 114, 2005), *available at* http://scholarship.law.upenn.edu/faculty_scholarship/114. The coerced loan theory is based on the premise that "[t]he interest rate that reflects the risk that the defendant does not pay its debts is the defendant's own borrowing rate." *Id.* Under the coerced loan theory, "prejudgment interest should be granted at the interest rate the defendant would pay for unsecured debt in order to compensate the plaintiff for the risk of default." *Id.* at 18.

[10] "Commercial paper is short-term, unsecured promissory notes. Because the commercial paper market is more restrictive than the market for bank loans at prime, the interest rate on commercial paper is regularly 200 to 300 basis points below the prime rate. As a result, only the most creditworthy borrowers can issue commercial paper." Knoll & Colon, *supra* note 9, at 19.

was 2.13636%. Barnett Decl. ¶ 4.a. Compounding interest annually at this rate would result in a multiplier of 1.25657567, and an award of prejudgment interest of $378,831,771. The $998,007,783 of prejudgment interest that Plaintiffs are seeking based on the prime rate, compounded monthly, exceeds this amount *by more than 2.6 times*. Therefore, an award of interest at the prime rate, compounded monthly, would grossly overcompensate Plaintiffs.

For the reasons set forth above, an award of interest based on the methodology set forth in 28 U.S.C. § 1961 provides the proper measure for the calculation of prejudgment interest in this case. However, in no event should prejudgment interest be set at a rate higher than the "more precise" measure identified by the Seventh Circuit based on the average rate Household paid on its short-term unsecured debt during the prejudgment interest period.

C. Prejudgment Interest Should Not Be Compounded More Frequently Than Annually.

"As a general rule, the decision whether to award compound or simple prejudgment interest is left to the discretion of the trial court." *Yellow Freight*, 325 F.3d at 937 (citing *Gorenstein*, 874 F.2d at 437). In an effort to further increase the windfall award of prejudgment interest they are seeking, Plaintiffs ask the Court to compound any award of prejudgment interest on a monthly basis. Doc. 1870 at 14-15. That request also should be denied. Prejudgment interest, if awarded, should be compounded annually.[11]

When Congress amended the postjudgment interest statute in 1982, it determined that annual compounding would fairly compensate a plaintiff for the loss of the use of its funds. *See* 28 U.S.C. § 1961. The compounding period chosen by Congress "furnishes a useful guidepost" in determining how frequently prejudgment interest should be compounded. *R.E.I. Transport*

[11] For various reasons, including Plaintiffs' scorched-earth approach to discovery before the Phase I trial, this, as the Court recently put it, is an "eleven-year-old case." Doc. 1874 at 3. Thus, the impermissible "windfall" effect of the monthly compounding Plaintiffs seek would be particularly pronounced here.

Inc. v. C.H. Robinson Worldwide, Inc., Civ. No. 05-57, 2007 U.S. Dist. LEXIS 89817, *2 (S.D. Ill. July 10, 2007). Notably, in the *Amoco Cadiz* case, which involved a large award of prejudgment interest, the Seventh Circuit held the prejudgment interest should be compounded annually.[12] Likewise in the *Vivendi* securities fraud case, the court held that prejudgment interest should be compounded annually. *Vivendi*, 284 F.R.D. at 164. Here, too, annual compounding would provide fair compensation to Plaintiffs. *See, e,g., Dominick L. v. Bd. of Educ. of City of Chi.*, No. 12 C 665, 2012 U.S. Dist. LEXIS 136650, at *14 (N.D. Ill. Sept. 25, 2012) ("[P]rejudgment interest is an element of complete compensation. . . . Thus, the Court awards prejudgment interest to be compounded annually." (Guzmán, J.) (internal quotations omitted)).

D. The Appropriate Period For Calculating Prejudgment Interest Is October 11, 2002 Through The Date Of Entry Of Judgment.

Plaintiffs contend that prejudgment interest should begin to accrue from October 1, 2002. Doc. 1870 at 15-16. As Plaintiffs admit, however, prejudgment interest does not begin to run until the date on which a plaintiff's claim accrues. *Id.* at 15 (citing Seventh Circuit cases); *see also West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987) ("Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered."). As the *Vivendi* decision shows, Plaintiffs' claims in this case did not accrue until October 11, 2002, the date on which the Class Period ends and, according to the jury verdict, inflation of the stock price returned to zero.

In *Vivendi*, the plaintiffs contended that the "truth" about Vivendi's financial situation was revealed to the market through a series of corrective disclosures beginning on January 7, 2002, and ending on August 14, 2002. *See Gamco Investors, Inc. v. Vivendi, S.A.*, Nos. 03 Civ. 5911(SAS), 09 Civ. 7962(SAS), 2013 U.S. Dist. LEXIS 28506, at *6-7 (S.D.N.Y. Feb. 28,

[12] In *Amoco Cadiz*, the Seventh Circuit awarded prejudgment interest at the prime rate, noting that Amoco "does not suggest that it paid a lower rate on its own debt." 954 F.2d at 1335.

2013). The *Vivendi* plaintiffs themselves acknowledged that "[p]rejudgment interest should be calculated starting on August 14, 2002, the last day of the Class Period and the date of the final corrective disclosure and full removal of inflation in Vivendi's share price caused by the company's fraud." *Vivendi* Doc. 1019 at 5. The district court agreed and awarded prejudgment interest beginning from August 14, 2002. *See Vivendi*, 284 F.R.D. at 163. Accordingly, prejudgment interest in this case should begin to accrue from October 11, 2002.

CONCLUSION

For the reasons set forth above, in the event Defendants' post-trial motions are not granted, Defendants do not oppose entry of judgment with respect to the List 1 claims, provided the Court is satisfied that the requirements for entry of partial judgment under Rule 54(b) are satisfied. Any award of prejudgment interest, however, should be calculated in accordance with the methodology set forth in 28 U.S.C. § 1961 for the correct prejudgment interest period (October 11, 2002, through the date of entry of judgment), compounded annually.

Dated: August 30, 2013

/s/ Paul D. Clement

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiffs, v. HOUSEHOLD INTERNATIONAL, INC., ET AL., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman

DECLARATION OF ALEXANDER BARNETT

I, Alexander Barnett, submit this declaration in support of Defendants' Response to Plaintiffs' Motion for an Award of Prejudgment Interest.

1. I am a Consulting Associate employed in the Chicago office of Charles River Associates ("CRA"), located at One South Wacker Drive Chicago, Illinois 60606. CRA is a global consulting firm that provides economic, financial, and business management expertise to major law firms, corporations, accounting firms, and governments around the world. CRA has been retained as consultants by Defendants in the above-captioned case. In performing the tasks described below, I was assisted by Jeremy Phipps, who also is a Consulting Associate at CRA.

2. For the purposes of generating the data set forth in this declaration, Defendants asked CRA to determine the following:

a. the multiplier that would result if prejudgment interest were calculated for the period October 11, 2002 through July 31, 2013 using the statutory rates applicable to awards of postjudgment interest, as prescribed by Congress in 28 U.S.C. §1961, with interest compounded annually;

b. the multiplier that would result if prejudgment interest were based on the average of the annual average yearly interest rates that Defendant Household International Inc. ("Household") paid on its commercial paper during 2002 through 2012, as reported in Household's Forms 10-K filed with the Securities and Exchange Commission, with interest compounded annually; and

c. the rate of return on the S&P Financials Index during the period from October 11, 2002 through July 31, 2013, assuming reinvestment of dividends, and what the multiplier would be if interest were based on the rate of return on the S&P Financials Index.

3. For the first calculation:

a. CRA determined the interest rate on one-year constant maturity Treasury bills as of October 11 of each year and used that rate to calculate interest for the following 12-month period. For the period from October 11, 2012 through July 31, 2013 (9.6 months), we used a prorated rate of 0.145% (the 0.18% statutory postjudgment interest rate as of October 11, 2012 prorated at 9.6/12). The interest rates on one-year constant maturity Treasury bills are published by the Board of Governors of the Federal Reserve System and are available at www.federalreserve.gov/releases/h15/. These interest rates also may be obtained from Bloomberg.

b. Using the one-year constant maturity Treasury bill rates, and compounding interest annually, results in a multiplier of 1.22311. We have been told that

Plaintiffs are seeking entry of partial judgment in the amount of $1,476,490,844. Based on a 1.22311 multiplier, prejudgment interest on this amount would be $329,418,924.

4. For the second calculation:

a. We determined the weighted-average interest rate that Household paid on its commercial paper for each year from 2002 through 2012, as reported in the "Commercial Paper" note to the financial statements included in the Forms 10-K that HSBC Finance Corporation (the successor to Household) filed with the United States Securities and Exchange Commission. According to the Forms 10-K, which are available at www.sec.gov, the weighted average interest rates paid by Household on its commercial paper during this period were:

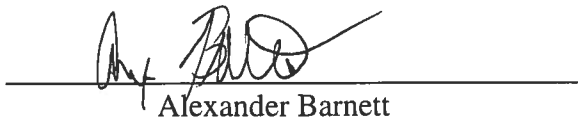
Year	**Yearly Weighted Average Interest Rates**
2002	1.9%
2003	1.6%
2004	1.8%
2005	3.4%
2006	5.0%
2007	5.5%
2008	2.6%
2009	0.9%
2010	0.3%
2011	0.2%
2012	0.3%
Average	**2.13636%**

b. Using the average of the weighted average annual rates for each year during the period 2002 to 2012, with annual compounding, translates to a multiplier of 1.25657567. Based on this multiplier, prejudgment interest on $1,476,490,844 would be $378,831,771.

5. For the third calculation, we determined that the rate of return on the S&P Financials Index for the period October 11, 2002 through July 13, 2013, assuming reinvestment of dividends, was 27.45%, which translates to a multiplier of 1.2745. If a multiplier of 1.2745 were used to determine prejudgment interest, prejudgment interest on $1,476,490,844 would be $405,296,737.

I declare under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct.

Dated: August 29, 2013



Alexander Barnett

CERTIFICATE OF SERVICE

Paul D. Clement, an attorney, hereby certifies that on August 30, 2013, he caused true and correct copies of the foregoing Defendants' Response to Plaintiffs' Motion for Entry of Judgment Pursuant to Fed. R. Civ. P. 54(b) and for an Award of Prejudgment Interest to be served via the Court's ECF filing system on the following counsel of record in this action:

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