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 Honorable Jorge L. Alonso

PLAINTIFFS' OPPOSITION TO DEFENDANT HOUSEHOLD INTERNATIONAL INC.'S MOTION FOR AN AWARD OF COSTS PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 39(e)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

Page

Page

STATUTES, RULES AND REGULATIONS

Page

SECONDARY AUTHORITIES

I. INTRODUCTION

After a 26-day trial, a jury of defendants' peers found that defendants violated §10(b) and Rule 10b-5 of the Securities Exchange Act of 1934. Following years of post-trial proceedings, on October 17, 2013, the district court entered a partial, final judgment against defendants in the amount of $2,462,899,616.21. In their subsequent appeal to the United States Court of Appeals for the Seventh Circuit, defendants raised a host of purported district court failings and numerous arguments challenging three elements of plaintiffs' Rule 10b-5 claim: loss causation; the district court's jury instruction on what it means to "make" a false statement; and reliance. Defendants sought judgment in their favor and, alternatively, a new trial. The Seventh Circuit rejected outright defendants' bid for judgment. And, although the Seventh Circuit reversed the district court's judgment and remanded for a new trial, it did so based on two narrow issues: the specificity of plaintiffs' expert's opinion with respect to price declines caused by company-specific non-fraud factors and the district court's jury instruction regarding making a statement in light of the Supreme Court's intervening decision in *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011). The Seventh Circuit rejected "all other claims of error," and left undisturbed the jury's findings with respect to falsity, materiality and scienter, as well as the district court's Phase II rulings. Put simply, the Seventh Circuit's opinion was not a clear victory for defendants.

Nevertheless, defendant Household International, Inc. ("Household") seeks an award of $13,281,282.00 in taxable costs. Under Rule 39(e) and controlling Seventh Circuit authority, however, this Court has discretion to deny Household's request for costs, and should do so for a number of reasons. ***First***, Household has provided no evidentiary support that these costs were reasonable and necessary. *See Trading Techs. Int'l, Inc. v. eSpeed, Inc.*, 750 F. Supp. 2d 962, 969 (N.D. Ill. 2010) (holding that party seeking costs must prove with evidence the reasonableness of its request). In fact, there were much less costly alternatives available, which Household refused

without explanation. ***Second***, the Seventh Circuit's decision rejecting the vast majority of defendants' arguments and, as to Household, crediting only a "modest claim," weighs in favor of denying Household's request for costs. ***Third***, the complex issues of fact and law raised in this close and difficult case also weigh in favor of denying the request. ***Finally***, requiring plaintiffs or their lawyers to pay millions of dollars in costs – far more than the value of their individual claims under the judgment – would lead to the inequitable result of punishing plaintiffs while rewarding Household and would have a chilling effect on future securities class action litigation. Because defendants have not met their burden, and because the circumstances and equities of this case justify a denial of Household's request for costs, plaintiffs respectfully request that this Court deny Household's motion in its entirety.

II. ARGUMENT

A. This Court Should Exercise Its Discretion and Deny Household's Motion for an Award of Costs

Rule 39(e) enumerates the costs on appeal that "are taxable in the district court." Fed. R. App. P. 39(e). Under well-established Seventh Circuit authority, this Court has discretion to deny costs under the Rule. In *Guse v. J.C. Penney Co.*, 570 F.2d 679 (7th Cir. 1978), the Seventh Circuit held that a district court has discretion ***not*** to award a party costs under Rule 39(e), despite an order by the appellate court awarding costs to that same party, reasoning that the district court "is in a better position than [the Court of Appeals] to make this determination with regard to the costs to be taxed against the losing party in that court." *See id.* at 681; *see also Republic Tobacco Co. v. N. Atl. Trading Co.*, 481 F.3d 442, 449 (7th Cir. 2007) (reiterating that *Guse* "confirms that a district court may, in its sound discretion, depart from the default awards set out in Rule 39(a)(1)-(3) when assessing costs under Rule 39(e)"); *Lerman v. Flynt Distrib. Co.*, 789 F.2d 164, 166 (2d Cir. 1986) ("[a]s a rule, a district court has broad discretion in awarding costs" under Rule 39).

The Seventh Circuit's mandate in this case that the judgment of the district court is reversed "with costs" (*see, e.g.*, Dkt. No. 2019) does not require the district court to award costs under Rule 39(e).[1] To the contrary, it is up to the district court to award or deny costs under Rule 39(e). As the *Republic Tobacco* court explained, when the "[Seventh Circuit] awarded costs, its ruling ***only*** referred to those costs taxable in the appellate court under Rule 39(c) and did not preclude the district court from awarding (or declining to award), in its discretion, costs taxable under Rule 39(e)." *Republic Tobacco*, 481 F.3d at 448;[2] *see also Jentz v. ConAgra Foods, Inc.*, No. 10-cv-0474-MJR-PMF, 2015 WL 2330232, at *2 (S.D. Ill. May 14, 2015) (rejecting argument that "the appellate courts' cursory language –'ConAgra recovers its costs'"– supports the notion that the district court was "stripped of any discretion regarding the instant Bill of Costs" as "[t]hat position is untenable under Seventh Circuit precedent").

The district court's discretion under Rule 39(e) is analogous to the broad discretion conferred on the district courts with respect to costs under Rule 54(d). *See, e.g.*, *Winniczek v. Nagelberg*, 400 F.3d 503, 504 (7th Cir. 2005) (observing that Rule 39 is "[t]he counterpart to Rule 54(d) of the civil rules"). As such, the factors a district court considers when using its discretion to deny costs under Rule 54(d), such as "the amount of costs, the good faith of the losing party, and the closeness and difficulty of the issues raised by a case," are instructive here, as are cases construing Rule 54(d). *Rivera v. City of Chi.*, 469 F.3d 631, 635-36 (7th Cir. 2006) ("No one factor is determinative, but the district court should provide an explanation for its decision to award or deny costs."); *see also Johnson v. Pac. Lighting Land Co.*, 878 F.2d 297, 298 (9th Cir. 1989) (citing discretion under Rule 54(d) in reviewing Rule 39(e) costs); *In re JTS Corp.*, No. C 05-4709 JF, 2011 U.S. Dist. LEXIS

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[1] *See* Dkt. No. 2047, ¶¶8-9 (contending that Household is entitled to recover the costs of appeal enumerated in Rule 39(e) solely "[o]n account of the reversal of the judgment, ***with costs***") (emphasis in original).

[2] Emphasis is added and citations are omitted unless otherwise noted.

105408, at *6-*7 (N.D. Cal. Sept. 16, 2011) (recognizing courts may weigh factors in determining whether to award costs under Rule 39(e), including that the party "acted in good faith, the issues were close and difficult to decide, the issues involved are of substantial importance, . . . and [the party] has limited resources"); *Jentz*, 2015 WL 2330232, at *2 (same).

Further, "[i]n keeping with the discretionary character of [Rule 54(d)], the federal courts are free to pursue a case-by-case approach and to make their decisions on the basis of the circumstances and equities of each case." *See* 10 Charles Alan Wright & Arthur R. Miller, *et al*., *Federal Practice and Procedure* §2668, at 235 (3d ed. 2014); *Coyne-Delany Co. v. Capital Dev. Bd.*, 717 F.2d 385, 390 (7th Cir. 1983) ("the district court has unquestioned power in an appropriate case not to award costs to the prevailing party"). The circumstances and equities of this securities fraud class action weigh in favor of denying Household's request for an award of costs.

1. Household Failed to Meet Its Burden of Proving that the Bond Costs Were Reasonable and Necessary

Although Household seeks more than $13 million in costs, it has not even attempted to meet its burden of "prov[ing] – with evidence and not merely with *ipse dixit* statements – that the costs were actually incurred, were reasonable in amount, and were necessary." *See Trading Techs.*, 750 F. Supp. 2d at 969 (observing that "the burden of proof is not a mere formality"); *see also* LR 54.1(c) (allowing as a cost the "***reasonable*** premiums or expenses paid on all bonds or stipulations or other security"); *Majeske v. City of Chi.*, 218 F.3d 816, 824 (7th Cir. 2000) ("Taxing costs against a losing party requires two inquiries: (1) whether the cost imposed on the losing party is recoverable and (2) if so, whether the amount assessed for that item was reasonable."); *Republic Tobacco*, 481 F.3d at 450-51 (applying reasonableness inquiry to Rule 39(e) request for costs); *BASF AG v. Great Am.*

Assur. Co., 595 F. Supp. 2d 899, 903 (N.D. Ill. 2009) (same).[3] After all, Household failed to provide any competent evidence whatsoever, such as an affidavit, in support of its skeletal four-page motion.[4] Consequently, Household has failed to meet its burden of proving that the supersedeas bond costs were reasonable and necessary.[5]

In fact, a less expensive alternative to a supersedeas bond – an escrow account – was available but defendants refused to provide a parent guarantee of the funds.[6] For nearly a year prior to the court's entry of judgment, the parties discussed an escrow account in lieu of a supersedeas bond. Defendants claimed that an escrow account was a more inexpensive alternative to posting a supersedeas bond. *See, e.g.*, Declaration of Michael J. Dowd, filed herewith ("Dowd Decl."), Exs. 1 & 2. Lead Counsel indicated that they would agree to the escrow account if HSBC would guarantee the escrow funds in the event that HSBC Finance went bankrupt. *Id*. Without any explanation, defendants refused this request. *Id*.

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[3] Household has provided no evidence at all that the bond "costs were actually incurred" by Household. *Trading Techs.*, 750 F. Supp. 2d at 969. In fact, Household's motion asserts that "Household's parent[,] HSBC North America Holdings, Inc." paid the bond premiums. Dkt. No. 2047 at 3. But Household was the entity that posted the bond on behalf of itself and the Individual Defendants, and is the entity that seeks to collect for premium payments. The motion offers no explanation as to why Household is entitled to recoup premiums paid by another entity, and no case law supporting its claim.

[4] Household's failure to demonstrate that the bond costs were reasonable and necessary is especially puzzling given that it objected to plaintiffs' motion for taxable costs on these precise grounds. *See* Dkt. No. 1954 at 5-6. Ultimately, plaintiffs were denied recovery of certain costs for failure to establish that such costs were the "'most economical rate reasonably available.'" Dkt. No. 1992 at 6-7.

[5] The Seventh Circuit has made clear that undeveloped and merely perfunctory arguments like Household's are waived. *See United States v. Beavers*, 756 F.3d 1044, 1059 (7th Cir. 2014) (finding that arguments "'without discussion or citation to pertinent legal authority'" in opening brief were waived); *United States v. Hassebrock*, 663 F.3d 906, 914 (7th Cir. 2011) (finding the argument was "decidedly underdeveloped and therefore waived"); *United States v. Foster*, 652 F.3d 776, 792 (7th Cir. 2011) ("'As we have said numerous times, undeveloped arguments are deemed waived . . . .'"); *Citizens Against Ruining the Env't v. EPA*, 535 F.3d 670, 675 (7th Cir. 2008) ("It is improper for a party to raise new arguments in a reply because it does not give an adversary adequate opportunity to respond.").

[6] On November 14, 2002, Household International, Inc. and HSBC Holdings plc ("HSBC plc") announced a merger. Following shareholder approval of the transaction on March 28, 2003, Household became a wholly owned subsidiary of HSBC plc by way of a stock-for-stock merger. In 2004, HSBC plc reorganized some of its subsidiaries, including Household. As a result, HSBC plc became the owner of HSBC North America Holdings Inc., which became the owner of Household, which was renamed HSBC Finance.

Plaintiffs' request for a parent guarantee was justified since HSBC Finance's financial condition was not stable. Since early 2009, when HSBC announced it was abandoning its main business, shutting down almost all of Household's consumer lending operations, and closing all 800 Household branch offices, HSBC Finance had been transferring billions in assets to other HSBC affiliates or subsidiaries and selling off assets in a "wind-down" mode, leaving HSBC Finance in a precarious financial condition. *See* Dkt. No. 1672 at 2-5 (detailing HSBC Finance's deteriorating financial condition in 2009 and 2010). At the time of the trial (April 2009), HSBC Finance had $111.2 billion in assets and $96.5 billion in liabilities. *See* Dowd Decl., Ex. 3 at 4. A year later, HSBC Finance had $94 billion in assets and $86 billion in liabilities. Dkt. No. 1072 at 4 n.3. From 2010 to the quarters preceding the bond's posting in 2013, HSBC Finance accelerated its liquidation process. *See* Dowd Decl., Ex. 4 at 20 (announcing that the Company had shifted its strategy from a standard portfolio runoff to a "formal program to initiate sale activities for real estate secured receivables in our held for investment portfolio").

HSBC Finance's balance sheet, and its dependence on HSBC plc for solvency, added to the concerns and uncertainty arising out of the accelerated wind-down process. In its Form 10-Q for 3Q13, the Company stated that "lower cash flow as a result of declining receivable balances ***will not provide sufficient cash to fully repay maturing debt over the next four to five years***." *Id.* at 56. At that point, HSBC Finance's liabilities ($34.2 billion in total, including $32.7 billion in debt) exceeded the fair value of its saleable assets ($32.5 billion). Investors were told "***HSBC [plc]'s continued support will be required to properly manage our business operations and maintain appropriate levels of capital***." *Id.* Although HSBC Finance indicated HSBC plc was at that point committed to providing the support required to operate Household as a going concern (*id.* at 9), it also warned that HSBC plc could pull its support at any point. *Id.* at 56.

Given the risk that HSBC could try to evade the judgment by putting its subsidiary into bankruptcy, Lead Counsel had concerns about whether the escrow account could be used to satisfy the judgment. Based on Lead Counsel's analysis, in the event that HSBC Finance filed for bankruptcy protection, it was likely that a bankruptcy trustee would assert that the escrow account was property of the estate. *See, e.g.*, Dowd Decl., Ex. 1.[7] Because the law on this issue is unclear, Lead Counsel asked defendants whether HSBC Finance's parent company would provide a guarantee of the amounts in the escrow account. *See* Dowd Decl., Exs. 1 & 2. While defendants claimed that the escrow account would be "fully-funded," they refused to provide this guarantee. *Id*. Had defendants simply agreed to provide a parent guarantee, nearly all of the bond costs would have been avoided.[8]

After refusing to provide a parent guarantee for the less expensive (nearly free) escrow option (Dowd Decl., Exs. 1 & 2), HSBC did an about-face and provided a parent guarantee on the surety bond. Dowd Decl., Ex. 5 at 72 ("To reduce costs associated with posting cash collateral with the insurance companies, the surety bond has been guaranteed by HSBC North America."). Household has never explained why it was unwilling to obtain a guarantee either from Household's direct parent, HSBC North America, even though that entity ultimately guaranteed the bond, or from HSBC plc, which was providing the support required to "properly manage" Household's business and "maintain appropriate levels of capital." *Id*. at 71. In light of the fact that such a guarantee was

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[7] There are conflicting decisions concerning whether the funds in an escrow account are property of the bankruptcy estate. On one hand, some courts have held that, "[a]s a general rule, money held in an escrow account is not property of a debtor's bankruptcy estate." *In re Raymond Prof'l Grp., Inc.*, 408 B.R. 711, 743 (Bankr. N.D. Ill. 2009). On the other hand, some courts applying Illinois escrow law have found that funds in escrow were property of the estate. *See In re BNT Terminals, Inc.*, 125 B.R. 963, 970 (Bankr. N.D. Ill. 1990); *In re Alwan Bros. Co.*, 105 B.R. 886, 895 (Bankr. C.D. Ill. 1989) (allowing a portion of the pledged real estate to become part of the bankruptcy estate).

[8] Lead Counsel and Lead Plaintiffs could not accept defendants' proposal to use an escrow account without a parent guarantee, as they could not place the class's judgment at risk.

plainly available, Household cannot establish that the supersedeas bond was the least expensive alternative available. This defect is fatal to their request.[9]

2. The Seventh Circuit Rejected the Primary Relief Household Sought and the Vast Majority of Its Claims of Error

The Court should deny Household's request for bond costs for the additional reason that it was not the clear victor on appeal. Examined against the litany of issues and purported district court failings identified by defendants on appeal, it is clear that the Seventh Circuit's decision was not a victory for defendants. *See*, *e.g.*, Defs' Appellant Brf. at 2-7 (Dkt. No. 52). Even with respect to loss causation, the issue that ultimately resulted in a reversal, the Seventh Circuit rejected the vast majority of arguments Household made, including the primary relief sought – judgment for defendants.[10] This weighs heavily in favor of denying Household's request for costs.

Household raised numerous grounds for why plaintiffs purportedly failed to prove loss causation at trial, "broadly attack[ing] the expert's loss causation" leakage model as legally insufficient.[11] Op. at 2, 17; *see also* Dkt. No. 2035 at 3-7. Rather than reject the leakage model outright and enter judgment for defendants – as Household urged the court to do – the Seventh Circuit adopted a "middle ground," concluding only that plaintiffs' expert's "conclusory" testimony

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[9] After defendants refused the requested guarantee of an escrow account, Lead Counsel suggested a letter of credit (which plaintiffs understood was a less expensive alternative) in lieu of a supersedeas bond. Defendants declined Lead Counsel's offer. *See* Dowd Decl., Ex. 1. The existence of this additional less expensive alternative also defeats any attempt by Household to establish reasonableness.

[10] Although the Seventh Circuit also concluded the district court's instruction was in error following *Janus*, the *Janus* issue is limited to whether the three Individual Defendants "made" certain statements. Seventh Circuit's Opinion dated May 21, 2015 ("Op.") at 2 (Dkt. No. 2020). Importantly, the Seventh Circuit found "Household itself 'made' all the false statements, as *Janus* defined that term." *See id.* Since Household is the only defendant seeking costs and Household lost its *Janus* appeal in every respect, the *Janus* decision undermines, rather than supports, Household's motion for costs.

[11] The Court of Appeals also rejected the following loss causation arguments advanced by defendants on appeal: (i) that loss causation was not proven because the stock price inflation changed only slightly, or sometimes went down after a false statement (Op. at 12-14); (ii) that the leakage model was legally insufficient because plaintiffs made no attempt to prove "how Household's stock price became inflated in the first instance" (*id*. at 14-15); and (iii) that plaintiffs needed to choose between "inflation maintenance" and "inflation introduction" (*id*. at 15-17).

at trial did not "adequately account for the possibility that firm-specific, nonfraud related information may have affected the decline in Household's stock price during the relevant time period." Op. at 24-25.

The Seventh Circuit also explicitly "reject[ed] all other claims of error" and left undisturbed the district court's Phase II rulings. *See* Op. at 40-47. Similarly, the jury's findings that the statements at issue were material, false and misleading remain undisturbed, as does the jury's finding that defendants acted with scienter. *See* Sept. 8, 2015 Order at 5 (Dkt. No. 2042) ("the existence-of-scienter findings from the first trial stand"). Put simply, the Seventh Circuit's decision was not a clear victory for Household. Because "it is obvious that the final result of [defendants' appeal] gave each of the parties something," Household's request for an award of costs should be denied. *See Wal-Mart Stores, Inc. v. Crist*, 123 F.R.D. 590, 593, 595 (W.D. Ark. 1988) (exercising its discretion under Rule 39(e) to deny Wal-Mart's request to recover its supersedeas bond cost because there was an "'absence of clear victory'" in the case);[12] *Howell Petroleum Corp. v. Samson Res. Co.*, 903 F.2d 778, 783 (10th Cir. 1990) ("The court was within its discretion to refuse to award costs to a party which was only partially successful."); *Allen & O'Hara, Inc. v. Barrett Wrecking, Inc.*, 898 F.2d 512, 517 (7th Cir. 1990) (same).

3. This Was a Close and Difficult Case Involving Complex Issues of Fact and Law

In exercising its discretion, the Court should also consider the complex issues of fact and law raised in this close and difficult case. *See White & White, Inc. v. Am. Hosp. Supply Corp.*, 786 F.2d 728, 732 (6th Cir. 1986) (finding that the district court in an antitrust case acted properly in considering the length and difficulty of the case as a factor in denying costs to the prevailing party).

[12] Noting the "dearth of opinions construing the court's discretion under Rule 39," the *Wal-Mart* court looked to cases construing Rule 54(d) for guidance before concluding that "'absence of clear victory'" was a factor weighing in favor of denying Rule 39 costs. *Wal-Mart*, 123 F.R.D. at 594-95.

The closeness of a case is evidenced by "the refinement of perception required to recognize, sift through and organize relevant evidence, and by the difficulty of discerning the law of the case." *Id.* at 732-33. Without a doubt, and as the Seventh Circuit recognized, this case was a close, competitive, and vigorously litigated one, which justifies the denial of defendants' costs. *See* Op. at 24 n.8 (this was a "complex and difficult case").

The Seventh Circuit expressly acknowledged that the appeal raised novel and complex issues of first impression: "To our knowledge, no court has either upheld or rejected the use of a leakage model in circumstances similar to this case – probably because these cases rarely make it to trial." Op. at 22; *see also* Op. at 24 ("Because this case is one of the few to make it to trial on a leakage theory, the process of submitting the loss-causation issue to the jury was understandably ad hoc."). Ultimately, the Court rejected defendants' proposed interpretation of the law (*see id.* at 21-22), and their contention that judgment should issue in defendants' favor, and crafted a "middle ground" for the district court to apply on remand.

Accordingly, "the facts and legal issues that comprised this action make it a close case warranting the denial of Defendant's costs." *United States ex rel. Pickens v. GLR Constructors, Inc.*, 196 F.R.D. 69, 76 (S.D. Ohio 2000) (denying costs where the parties were required to "recognize, sift through, organize and discern the relevant facts, issues, and law of a complicated" False Claims Act case); *see also Everglades v. S. Fla. Water Mgmt. Dist.*, 865 F. Supp. 2d 1159, 1167-68 (S.D. Fla. 2011) (close, difficult, and complex case weighed in favor of reducing the costs sought by defendant under Rule 54(d) and Rule 39), *aff'd*, 678 F.3d 1199 (11th Cir. 2012); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, MDL No. 1532, 2010 WL 1568455, at *1 (D. Me. Apr. 16, 2010) (denying defendants' request for costs in a "difficult" antitrust case involving "exceedingly difficult" class action questions).

4. Plaintiffs Brought This Securities Class Action in Good Faith and Taxing Lead Plaintiffs Millions of Dollars in Costs Would Chill Future Securities Class Action Litigation

The public importance of securities fraud class actions, plaintiffs' good faith in bringing this case, and the potential chilling effect on future securities class action litigation are additional factors that militate against Household's request for more than $13 million under Rule 39(e). *Coyne-Delany*, 717 F.2d at 392 (stating that good faith alone cannot justify a denial of costs to the prevailing party, but a factor the district court "might in an appropriate case" consider is "the plaintiff's good faith"); *Pickens*, 196 F.R.D. at 75-77 (considering the "chilling effect" on future litigation in determining whether to award costs). Courts consistently have recognized the importance of securities class actions, which "serve as private enforcement tools when the Securities and Exchange Commission or other regulatory entities fail to adequately protect investors from securities fraud." *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 515 (S.D.N.Y. 2009).[13] Indeed, the Supreme Court has emphasized that private securities actions provide "'a most effective weapon in the enforcement'" of the securities laws and are "'a necessary supplement to [SEC] action.'" *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 318-19 (2007) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345 (2005).

There can be little dispute that this securities class action in particular served (and continues to serve) an important public purpose. At the time this action was initiated in 2002, Household was the nation's largest subprime lender, targeting low-income, high-risk borrowers. Defendants' wrongful and fraudulent scheme allowed Household to report "record" financial results throughout

[13] Congress has also recognized that "[p]rivate securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action. Such private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing . . . ." H.R. Conf. Rep. No. 104-369, at 31 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730.

the Class Period by, among other things: (i) engaging in widespread abuse of Household's customers through a variety of improper and illegal predatory lending techniques; (ii) arbitrarily "reaging" or "restructuring" delinquent accounts to conceal true levels of defaults and delinquencies in order to manipulate and delay charging them off; and (iii) manipulating the amount of expenses associated with various credit card partnership agreements in violation of Generally Accepted Accounting Principles. Op. at 3. Plaintiffs' good faith in bringing this lawsuit was vindicated by the jury's verdict, which found that (i) Household and the Individual Defendants violated §10(b) and Rule 10b-5 with respect to 17 of the 40 statements at issue in this case; and (ii) Household, Aldinger and Schoenholz violated §20(a). Dkt. No. 1611. The jury's verdict and subsequent judgment in this case affected ***10,920*** class members (with thousands more in the pipeline) and, but for the Seventh Circuit's reversal on two narrow, technical legal issues, those class members would have recovered all of their allowed losses, as well as prejudgment interest.

The jury found that Household made material, false and misleading statements with fraudulent intent. This finding remains undisturbed. In light of this finding and the reversal's extremely limited scope, awarding the extraordinarily high costs Household seeks would have a chilling effect on future securities class action litigation. There can be no doubt that if this Court requires plaintiffs or their counsel to pay Household more than $13 million after beating them at trial and winning the vast majority of the issues on appeal, defendants and their lawyers in securities cases will use the Court's order as a cudgel to reduce settlements and scare litigants into avoiding trial. Furthermore, very few institutional investors, who are commonly state and municipal retirement funds or Taft-Hartley Multi-Employer Funds, would be willing to pursue even the most egregious violations of the federal securities laws if there was even a remote likelihood that they would later be required to shoulder the burden of a multi-million dollar award of costs, even ***after*** prevailing at a jury trial. Under that scenario, the important function of securities class actions

would be eviscerated and they would cease to be a most effective weapon in the enforcement of the securities laws. *See Bledsoe v. Emery Worldwide Airlines*, No. 3:02-cv-69, 2012 WL 3647181, at *3 (S.D. Ohio Aug. 23, 2012) ("The remedial purpose of the statute is thwarted if the financial risk of filing suit outweighs the potential benefits.").[14]

Given the public importance of the securities class action device, plaintiffs' good faith, and the potential chilling effect from an award of costs of this magnitude, this Court should decline to award costs to Household. *See Ass'n of Mexican-Am. Educators v. Cal.*, 231 F.3d 572, 593 (9th Cir. 2000) (finding the district court did not abuse its discretion in refusing to award costs to defendants under Rule 54(d) where imposing costs "might have the regrettable effect of discouraging potential plaintiffs from bringing such cases at all"); *Schaulis v. CTB/McGraw-Hill, Inc.*, 496 F. Supp. 666, 680-81 (N.D. Cal. 1980) (denying defendant's motion for costs under Rule 54(d) where awarding costs would "chill individual litigants of modest means seeking to vindicate their individual and class rights under the civil rights laws"); *Everglades*, 865 F. Supp. 2d at 1169 (awarding full costs could have a chilling effect on future plaintiffs bringing claims for enforcement of the Clear Water Act in good faith); *Pickens*, 196 F.R.D. at 77 (denying request for costs where there would be a "significant 'chilling effect' on future relators"); *Bledsoe*, 2012 WL 3647181, at *3 (concluding it would be inequitable to award any costs against plaintiffs because "any award of costs would have a substantial chilling effect").

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[14] In *Keach v. U.S. Tr. Co., N.A.*, 338 F. Supp. 2d 931 (C.D. Ill. 2004), the court denied costs under 29 U.S.C. §1132(g)(1):

> [I]t is not difficult to see that an award of the substantial costs sought in this case would likely have a chilling effect on participants in other ERISA plans who reasonably believe that they have meritorious claims and deter them from bringing challenges where the defendants' liability is not a foregone conclusion because they would be reluctant to risk the imposition of attorney's fees and costs; such an effect would not be in the public interest.

Id. at 935 (discussing the standards for assessing costs in ERISA cases).

5. Awarding Costs to Household Would Lead to the Inequitable Result of Punishing Lead Plaintiffs While Rewarding Household

The court should also decline to award costs to Household because requiring Lead Plaintiffs (or their counsel) to pay $13,281,282.00 in costs – roughly ***8.5 times*** the amount of their recovery in this case – would lead to the inequitable result of punishing them while rewarding the same defendant that a jury found violated the federal securities laws. *See Medcom Holding Co. v. Baxter Travenol Lab.*, No. 87 C 9853, 1994 WL 649970, at *3-*4 (N.D. Ill. Nov. 16, 1994) (plaintiff's victory in the first two trials, in which the jury found defendant liable for securities fraud under Rule 10b-5, rendered an award of costs to defendant inequitable, even though defendant prevailed at the third trial, because the jury's verdicts in the first two cases were vacated for reasons other than insufficient evidence of defendant's liability). Under the district court's judgment in this case, IUOE would have recovered $1,013,686.73, Glickenhaus would have recovered $540,101.47, and PACE would have recovered nothing.[15] *See* Dkt. No. 1898 (Claim No. 119604 (IUOE); Claim Nos. 109588, 109773 and 109774 (Glickenhaus)). Even combined, their recovery represents ***approximately 0.06%*** of the $2.46 billion judgment and is far less than the $13,280,827.00 in supersedeas bond premiums Household seeks to recover. Defendants have cited no authority whatsoever, and plaintiffs are unaware of any, for the contention that lead plaintiffs in a class action can be taxed costs for bond premiums that are more than eight times greater than their interest in the litigation. Because it would be inequitable under these circumstances, this Court should deny Household's request for an award of costs. *See Pickens*, 196 F.R.D. at 73 ("Rule 54(d) was intended to take care of a situation where, 'it would be inequitable under all of the circumstances in the case

[15] Under the district court's method for calculating damages (*see* Dkt. No. 1703), PACE was deemed not to have suffered any losses and, as a result, was not eligible for recovery under the district court's judgment.

to put the burden of costs upon the losing party.'") (quoting *Lichter Found., Inc. v. Welch*, 269 F.2d 142, 146 (6th Cir. 1959)).

B. Alternatively, Lead Plaintiffs Should Not Be Taxed the Full Amount of Household's Costs

Should the Court decline to deny Household's motion for an award of taxable costs in its entirety, Lead Plaintiffs should only be required to pay 0.06% of the $13,281,282.00 in costs, and Household's award of costs should be reduced accordingly. *See, e.g.*, *JTS*, 2011 U.S. Dist. LEXIS 105408, at *7 (reducing by half the cost incurred in maintaining the letter of credit); *Everglades*, 865 F. Supp. 2d at 1165-67 (reducing the prevailing party's request for costs under Rule 54(d)); *Rand v. Monsanto Co.*, 926 F.2d 596, 601 (7th Cir. 1991) (holding that a "district court may not establish a *per se* rule that the representative plaintiff must be willing to bear all (as opposed to a pro rata share) of the costs of the action"). Because Lead Plaintiffs received no benefit from the bond beyond the security it provided on their recoveries under the judgment, their costs should be capped at that amount.

III. CONCLUSION

Plaintiffs respectfully request that this Court exercise its discretion under Rule 39(e) and deny Household's Motion for an Award of Costs in its entirety. Alternatively, plaintiffs should only be required to pay 0.06% of Household's taxable costs.

DATED: October 7, 2015

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
MICHAEL J. DOWD (135628)
SPENCER A. BURKHOLZ (147029)
DANIEL S. DROSMAN (200643)
LUKE O. BROOKS (90785469)
LAWRENCE A. ABEL (129596)

/s/ MICHAEL J. DOWD
MICHAEL J. DOWD

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
JASON C. DAVIS (253370)
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545
415/288-4534 (fax)

Lead Counsel for Plaintiffs

MILLER LAW LLC
MARVIN A. MILLER
LORI A. FANNING
115 S. LaSalle Street, Suite 2910
Chicago, IL 60603
Telephone: 312/332-3400
312/676-2676 (fax)

Liaison Counsel

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2015, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 7, 2015.

/s/ MICHAEL J. DOWD
MICHAEL J. DOWD

ROBBINS GELLER RUDMAN
& DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101-8498
Telephone: 619/231-1058
619/231-7423 (fax)

E-mail: MikeD@rgrdlaw.com

Mailing Information for a Case 1:02-cv-05893 Jaffe v. Household Intl Inc, et al

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Landis C Best**
  lbest@cahill.com,JHall@cahill.com,MCremins@cahill.com,LPerlgut@cahill.com
- **Debra L Bogo-Ernst**
  dernst@mayerbrown.com,courtnotification@mayerbrown.com
- **Luke O Brooks**
  lukeb@rgrdlaw.com,e_file_sd@rgrdlaw.com
- **Mark Douglas Brookstein**
  mbrookstein@gouldratner.com,mwalstra@gouldratner.com
- **Susan Buckley**
  SBuckley@cahill.com
- **Spencer A Burkholz**
  spenceb@rgrdlaw.com
- **Dawn Marie Canty**
  dawn.canty@kattenlaw.com,jacqueline.vanfossan@kattenlaw.com,ecfdocket@kattenlaw.com
- **Paul D. Clement**
  pclement@bancroftpllc.com
- **Yafit Cohn**
  YCohn@cahill.com
- **Jason C. Davis**
  jdavis@rgrdlaw.com,e_file_sf@rgrdlaw.com
- **Luke DeGrand**
  ldegrand@degrandwolfe.com
- **George Robert Dougherty**
  docket@shb.com,ourdocket@gmail.com,gdougherty@shb.com
- **Michael J. Dowd**
  miked@rgrdlaw.com,debg@rgrdlaw.com,e_file_sd@rgrdlaw.com
- **Daniel S. Drosman**
  Dand@rgrdlaw.com,tholindrake@rgrdlaw.com,kcook@rgrdlaw.com,e_file_sd@rgrdlaw.com
- **Laura Dawn Duston**
  laura@stengerlaw.com
- **Nathan P. Eimer**
  neimer@eimerstahl.com,erogers@eimerstahl.com,fharvey@eimerstahl.com
- **Patricia Farren**
  pfarren@cahill.com,MMcLoughlin@cahill.com,NMarcantonio@cahill.com
- **Sheila Marie Finnegan**
  courtnotification@mayerbrown.com
- **Andrew J Fuchs**
  afuchs@skadden.com,chdocket@skadden.com
- **Jason M. Hall**
  jhall@cahill.com
- **Kay Griffith Hammond**
  kay@stengerlaw.com
- **Christine M. Johnson**
  cjohnson@eimerstahl.com,erogers@eimerstahl.com

- **Thomas J Kavaler**
  tkavaler@cahill.com,SWatnik@cahill.com,SBuckley@cahill.com,MWernke@cahill.com,JNewville@cahill.com
- **Craig S. Kesch**
  ckesch@cahill.com,MMcLoughlin@cahill.com,NMarcantonio@cahill.com
- **John F. Kloecker**
  jkloecker@lockelord.com,krichardson@lockelord.com,chicagodocket@lockelord.com
- **Stewart Theodore Kusper**
  stewart.kusper@kusperlaw.com,paul.mallon@kusperlaw.com,renee.kusper@kusperlaw.com
- **Tim S. Leonard**
  tleonard@jw.com,tlreed@jw.com
- **Donna L. McDevitt**
  dmcdevit@skadden.com,chdocket@skadden.com
- **Paul Millen**
  pmillen@cahill.com
- **Marvin Alan Miller**
  Mmiller@millerlawllc.com,ajewell@millerlawllc.com,LFanning@millerlawllc.com,drobinson@millerlawlllc.com,JRamirez@millerlawllc.com
- **Sally Weiss Mimms**
  smimms@lockelord.com,jastaton@lockelord.com,chicagodocket@lockelord.com
- **Maureen E. Mueller**
  mmueller@rgrdlaw.com,e_file_sd@rgrdlaw.com
- **Lucia Nale**
  LNale@mayerbrown.com,courtnotification@mayerbrown.com
- **David R. Owen**
  dowen@cahill.com,KSmith@cahill.com,JBeer@cahill.com
- **Eric S. Palles**
  epalles@ravitzpalles.com
- **Keith F. Park**
  keithp@rgrdlaw.com
- **Stanley J. Parzen**
  courtnotification@mayerbrown.com
- **Lauren Perlgut**
  lperlgut@cahill.com
- **Mark Edward Rakoczy**
  mrakoczy@skadden.com,kzydron@skadden.com,chdocket@skadden.com
- **Gary Jay Ravitz**
  gravitz@ravitzpalles.com
- **Robert Lee Schnell , Jr**
  rschnell@faegre.com
- **Kim Smith**
  ksmith@cahill.com
- **Gil M. Soffer**
  gil.soffer@kattenlaw.com,ecfdocket@kattenlaw.com
- **Gary L. Specks**
  gspecks@kaplanfox.com
- **R. Ryan Stoll**
  rstoll@skadden.com,karen.zydron@skadden.com,chdocket@skadden.com
- **John Kenneth Theis**
  john.k.theis@usdoj.gov,erogers@eimerstahl.com,jlipinski@eimerstahl.com,fharvey@eimerstahl.com,achardon@eimerstahl.com,abrown@eime

- **Craig Allen Varga**
  cvarga@vblhc.com,jkoronkiew@vblhc.com
- **Scott Watnik**
  swatnik@cahill.com
- **Michael Wernke**
  mwernke@cahill.com
- **Tracey L. Wolfe**
  twolfe@degrandwolfe.com,kdamptz@degrandwolfe.com,lfranklin@degrandwolfe.com

Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

Brudget C. Asay
109 State Street
Montpelier, VT 05609-1001

Janet A. Beer
Cahill Gordon & Reindel, LLP
80 Pine Street
New York, NY 10005

Patrick J Coughlin
Robbins Geller Rudman & Dowd LLP
655 West Broadway
#1900
San Diego, CA 92101

Frederic S. Fox
Kaplan Fox and Kilsheimer
850 Third Avenue
14th Floor
New York, NY 10022

Laura C. Fraher
Cahill Gordon & Reindel LLP
80 Pine Street
New York, NY 10005

Joshua M. Newville
Cahill Gordon & Reindel LLP
80 Pine Street
New York, NY 10005

Jason A. Otto
Cahill Gordon & Reindel LLP
80 Pine Street
New York, NY 10005

Howard G. Sloane
Cahill, Gordon & Reindel
80 Pine Street
New York, NY 10005