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' MOTION *IN LIMINE* TO (1) PRECLUDE DEFENDANTS FROM RELITIGATING FALSITY, MATERIALITY, SCIENTER AND RELIANCE; (2) DEEM THE FINDINGS FROM THE PRIOR PROCEEDINGS UNCONTESTED; AND (3) PRECLUDE REFERENCE TO DISMISSED STATEMENTS

PLAINTIFFS' MOTION *IN LIMINE* NO. 2

I. INTRODUCTION

On appeal to the Seventh Circuit, defendants raised challenges with respect to three elements of plaintiffs' Rule 10b-5 claim: loss causation, the court's instruction on what it means to "make" a false statement, and reliance. *See Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 414 (7th Cir. 2015) ("The issues on appeal cluster around three elements."). Ultimately, the Court of Appeals reversed the judgment and remanded the case for a new trial limited to two elements: loss causation and whether the three executives "made" certain of the false statements in light of *Janus*. *Glickenhaus*, 787 F.3d at 433.[1] The Court also observed that "[w]ith a proper instruction on what it means to 'make' a false statement, the jury might allocate responsibility differently." *Id*. at 428. Accordingly, the Court held that "[t]he new jury will also have to reallocate responsibility between the four defendants." *Id*. at 429.

In remanding on just two elements of plaintiffs' Rule 10b-5 claim, the Seventh Circuit explicitly held that "the defendants may not relitigate whether any of the 17 statements were false or material" and that "[t]he jury's secondary liability findings also remain undisturbed" as "[t]hose issues were not challenged on appeal and do not need to be retried." *Id*.; *see also id.* at 424 ("The defendants do not challenge the jury's misrepresentation findings . . . ."). The Court further "reject[ed] all other claims of error," including defendants' arguments with respect to reliance and Phase II proceedings and their broad attacks on the leakage model. *Id*. at 433; *see also id.* at 413 ("The remaining challenges fail."). In connection with these holdings, the Seventh Circuit also credited the jury's factual findings, including its rejection of defendants' truth-on-the-market defense, and made a number of factual findings of its own.

[1] As to loss causation, the Court of Appeals held, "[a] new trial is warranted on the loss-causation issue consistent with the approach we've sketched in this opinion." *Id.* at 423. Specifically, the Court of Appeals credited defendants' "modest claim that [Fischel's] testimony did not adequately address whether firm-specific, nonfraud factors contributed to the collapse in Household's stock price during the relevant time period," and, along with the *Janus* error, held that, "[a] new trial is warranted on these two issues only." *Id*. at 413.

This Court subsequently confirmed that "the existence-of-scienter findings from the first trial stand."[2] *See* 9/8/15 Order at 5 (Dkt. No. 2042). In short, following the Seventh Circuit's mandate and this Court's ruling, the only issues that remain to be retried are loss causation, "the amount of per share damages, if any, to which plaintiffs are entitled" and defendants' proportionate responsibility for plaintiffs' economic loss. *See* 9/8/15 Order at 1-2. Defendants should be precluded at trial from relitigating the elements of falsity, materiality, scienter and reliance, as plaintiffs have conclusively established those elements, which "do not need to be retried."[3] Additionally, the factual findings made by the prior jury and the Seventh Circuit should be deemed uncontested and admitted at trial, and plaintiffs should be permitted to use them for any purpose. Finally, defendants and their witnesses should be precluded from referring in any way to the prior jury's findings that 23 of the 40 alleged statements were not actionable.

II. ARGUMENT

A. Defendants Should Be Precluded from Relitigating the Elements of Falsity, Materiality, Scienter and Reliance

The Seventh Circuit's opinion enumerates the elements plaintiffs must prove to prevail on their claim under Rule 10b-5:

> The plaintiffs ha[ve] to prove "(1) a material misrepresentation or omission by the defendant[s]; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation."

Glickenhaus, 787 F.3d at 414 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407, 189 L. Ed. 2d 339 (2014)).

As the Seventh Circuit explained, "[i]n Phase I the jury addressed all issues that were appropriate for class-wide resolution – e.g., whether any of the 40 possible false statements were

[2] This Court also clarified that "[i]f the second jury finds that one of the individual defendants 'made' one of the identified statements, then the only scienter finding the jury must make is the specific state of mind – knowledge or recklessness – with which the defendant made the statement." 9/8/15 Order at 5. The parties subsequently entered into a stipulation regarding whether defendants Schoenholz, Gilmer and Aldinger "made" certain of the false statements under *Janus* and whether they did so recklessly or knowingly. *See* Dkt. No. 2122. As a result, the element of scienter is also no longer at issue at the retrial.

[3] The "in connection with" element of Rule 10b-5 also has been conclusively established, but has never been the subject of dispute, either at trial or on appeal.

actionable misrepresentations, whether they were material, who was liable for which misrepresentations, and how much inflation the actionable misrepresentations caused in the stock price." *Glickenhaus*, 787 F.3d at 430. On the verdict form, the jury was asked to determine whether plaintiffs prevailed on their §10(b) and Rule 10b-5 claims, *i.e.* whether plaintiffs established falsity, materiality, scienter, "in connection with," and loss causation. *See, e.g.*, Dkt. No. 1614 at 25-32; 9/18/15 Order at 4 (discussing the task the jury faced at the first trial).[4] The jury ultimately found that plaintiffs had prevailed on their Rule 10b-5 claim on 17 of the statements at issue, rejecting defendants' truth-on-the-market defense. *Glickenhaus*, 787 F.3d at 414. "In Phase II, the parties addressed reliance issues and calculated damages for individual class members."

On appeal, defendants challenged only the elements of loss causation, what it means to "make" a statement, and reliance. *Id*. Although the Seventh Circuit reversed and remanded on issues related to loss causation and what it means to "make" a statement under *Janus*, it rejected "all other claims of error," including defendants' challenges to reliance and the district court's Phase II proceedings. *Id*. at 413, 433. Additionally, the Court of Appeals left "undisturbed" the jury's findings on falsity and materiality, and the existence of scienter. *See id.* at 429; 9/18/05 Order at 5. Because the Seventh Circuit's findings on falsity, materiality, scienter and reliance apply on remand as the law of the case, defendants may not relitigate them at the retrial. 787 F.3d at 429 (emphasizing that "defendants may not relitigate whether any of the 17 statements were false or material"); *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991) (observing that the law of the case doctrine applies to issues decided either expressly or impliedly); *Roboserve, Inc. v. Kato Kagaku Co.*, 121 F.3d 1027, 1031 (7th Cir. 1997) ("'the most elementary application of the doctrine of law

[4] "Jurors were given 40 separate statements that the plaintiffs claimed were actionable misrepresentations. For each statement they were asked to determine: (1) whether the statement was actionable (that is, was it false or misleading, material, and caused loss); (2) who among the four defendants was liable for it; (3) which of the three bad practices the statement related to; and (4) whether the particular statement was made knowingly or recklessly by each defendant." *Glickenhaus*, 787 F.3d at 413-14.

of the case'" requires the district court to "'comply with the rulings of the appellate court'") (citation omitted).[5]

Accordingly, defendants should be precluded from making arguments or introducing evidence that contradicts the first jury's and the Seventh Circuit's findings with respect to the elements of falsity, materiality, scienter and reliance, or from otherwise suggesting that plaintiffs have not proven these elements. *Campbell v. Miller*, No. 1:03-cv-180-DFH-JMS, 2008 WL 54909, at *1 (S.D. Ind. Jan. 3, 2008) (precluding plaintiff from seeking an award of punitive damages in a second trial where the issue was resolved conclusively at the first trial and plaintiff did not challenge that decision on appeal); *cf. Waid v. Merrill Area Pub. Sch.*, 130 F.3d 1268 (7th Cir. 1997) (affirming district court's refusal to rule that intent had been determined when Seventh Circuit's mandate expressly ruled that plaintiff did not prove intent, as such ruling would have run afoul of the law of the case). Consistent with the Seventh Circuit's findings, defendants should also be precluded from adducing exhibits, testimony, or making arguments concerning the truth on the market, as the jury rejected defendants' truth-on-the-market defense at the last trial. *Glickenhaus*, 787 F.3d at 430 (discussing defendants' truth-on-the-market defense, which was "rejected by the jury in Phase I"); *Conn. Ret. Plans & Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1177 (9th Cir. 2011) (observing that "the truth-on-the-market defense is a method of refuting an alleged misrepresentation's ***materiality***") (citing *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097-98 (1991) (emphasis in original)).

Defendants should also be precluded from relitigating the elements of falsity, materiality, scienter and reliance because any argument or evidence that attempts to disprove those elements would contradict the prior jury's and the Seventh Circuit's findings, and would only serve to confuse the second jury at the retrial. Indeed, even relevant evidence must be excluded if its probative value

[5] The law of the case doctrine also gives "preclusive effect to rulings or findings that a party could have appealed, but did not appeal." *Heller Int'l Corp. v. Sharp*, 85 C 3381, 1994 WL 386421, at *4 (N.D. Ill. July 19, 1994) (precluding defendants from reasserting affirmative defenses where "the jury unquestionably resolved the facts against Defendants on their affirmative defenses" at the first trial and defendants did not challenge the jury's findings on appeal). Here, defendants did not appeal the jury's findings on falsity, materiality (including the fraud-on-the-market defense) or scienter and are, therefore, precluded from relitigating those elements at the retrial. *See* 9/8/15 Order at 3 ("Defendants did not appeal the first jury's findings on scienter . . . and the Seventh Circuit did not explicitly identify it as an issue to be tried."); *see also Glickenhaus*, 787 F.3d at 424 ("The defendants do not challenge the jury's misrepresentation findings . . . .").

is substantially outweighed by "unfair prejudice, confusing the issues [or] misleading the jury." *See* Fed. R. Evid. 403; *Thompson v. City of Chicago*, 722 F.3d 963, 971 (7th Cir. 2013) (observing that the trial court has discretion to exclude relevant evidence if it will result in confusion of the issues). If defendants were permitted to argue or introduce evidence that they never made the false and misleading statements and omissions at issue, or did not act knowingly or recklessly in doing so (a fact to which they have now stipulated), the jury could easily be confused or misled into believing that plaintiffs have not established those elements, or make a finding inconsistent with the Seventh Circuit's rulings. Indeed, some of the exhibits listed on defendants' trial exhibit list indicate that they do intend to contest liability, despite the prior jury's findings to the contrary. *See, e.g.*, DX104, 109-111, 115-132, 134-145, 147-150, 152-157, 159, 161-175, 177-184, 186-188, 190-97, 199, 201-204, 206-210, 215-17. To avoid jury confusion and potential prejudice to plaintiffs, defendants should be precluded from relitigating, either by evidence or argument, the elements of falsity, materiality, scienter and reliance.

B. The Findings From the Prior Proceedings Should Be Deemed Uncontested and Plaintiffs Should Be Permitted to Rely on Them for Any Purpose at the Retrial

In rejecting the majority of defendants' "broad[] attack[s] on the expert's loss-causation model" and upholding the validity of the leakage model used by plaintiffs in this case, the Seventh Circuit made a number of express and implied factual and legal findings. *Glickenhaus*, 787 F.3d at 414 (observing that defendants' loss causation argument "has several layers"). Defendants now seek to erase those findings from the record and conceal them from the jury at the retrial.[6] They should not be permitted to do so.

Specifically, in rendering its opinion on the element of loss causation, the Seventh Circuit made the following findings of fact and law:[7]

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[6] As an example, defendants have objected to the inclusion of these findings in the parties' Statement of Uncontested Facts.

[7] Many of these findings were made in response to defendants' attacks on the leakage model in general and as part of the Seventh Circuit's efforts to clarify defendants' "fundamental misconception[s] about the leakage model." *Glickenhaus*, 787 F.3d at 417.

1. The best way to determine the impact of a false statement is to observe what happens when the truth is finally disclosed and use that to work backward. *Glickenhaus*, 787 F.3d at 415.

2. A stock can be inflated even if the price remains the same or declines after a false statement because the price might have fallen even more if the truth was disclosed (*e.g.*, "we only lost $100 million this year," when actually losses were $200 million). So the movement of a stock price immediately after a false statement often tells us very little about how much inflation the false statement caused. *Id*.

3. At a prior proceeding, plaintiffs proved that defendants' false statements caused the stock price to remain higher than it would have been had the statements been truthful. Professor Fischel's models calculated the effect of the truth, once it was fully revealed, and plaintiffs proved that defendants concealed the truth through false statements. *Id*. at 420.

4. Every false statement after March 28, 2001 caused the full amount of inflation to remain in the stock price, even if the price did not change at all, because had the truth become known, the price would have fallen then. *Id*. at 418.

5. How the stock became inflated in the first place is irrelevant because each subsequent false statement prevented the price from falling to its true value and therefore caused the price to remain elevated. *Id*.

6. Fraud-induced inflation can go from zero to a very large number, even if the stock price does not change at all. *Id*.

7. Professor Fischel's Leakage and Specific Disclosure Models controlled for market and industry factors and general trends in the economy – his regression analysis took care of that. *Id*. at 421.

Further, in leaving "undisturbed" the jury's findings on falsity, materiality and scienter, and in rejecting defendants' arguments on reliance and the district court's Phase II proceedings, the Seventh Circuit affirmed the following findings made by the jury in the first trial:

1. Collectively, defendants made 17 false statements of material fact or omitted material facts necessary under the circumstances to keep the statements that were made from being misleading. *See* Dkt. No. 1611 (verdict form).

2. In making the 17 false statements, defendants acted either knowingly or recklessly. *See* Dkt. No. 1611 (verdict form).

3. Plaintiffs relied on defendants' false statements of material facts. *See Glickenhaus*, 787 F.3d at 430-32.

4. Defendants used, or caused the use of, an instrumentality of interstate commerce – such as the mails, a telephone, or any facility of a national securities exchange – in connection with the purchase or sale of securities. *See* Dkt. No. 1611 (verdict form).

Finally, in denying defendants' motion to exclude Fischel and concluding that defendants failed to identify "significant, firm-specific, nonfraud related information that could have affected [Household's] stock price," this Court made the following factual finding:

There was no firm-specific, non-fraud related information that significantly distorted Professor Fischel's Leakage or Specific Disclosure Model. 2/1/16 Order at 22 (Dkt. No. 2102).

Defendants should not be permitted to dispute the foregoing findings, this Court should deem them uncontested at the retrial, and plaintiffs should be permitted to rely on them for any purpose. *Key*, 925 F.2d at 1060 (recognizing that under the law of the case doctrine, "once an appellate court either expressly or by necessary implication decides an issue, the decision will be binding upon all subsequent proceedings in the same case"); *United States v. Adams*, 746 F.3d 734, 744 (7th Cir. 2014) ("'The law of the case doctrine . . . prohibits a lower court from reconsidering on remand an issue ***expressly or impliedly decided*** by a higher court absent certain circumstances.'") (emphasis added, citation omitted); *United States v. Barnes*, 660 F.3d 1000, 1006 (7th Cir. 2011) (under the law of the case doctrine, "[i]f this Court remands to correct a 'discrete, particular error that can be corrected . . . without . . . a redetermination of other issues, the district court is limited to correcting that error'") (quoting *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996)).

C. Defendants and Their Experts Should Be Barred from Referencing the Fact that the Prior Jury Did Not Find Liability on Certain Statements

Although defendants are clearly precluded from relitigating the elements of falsity, materiality, scienter and reliance, they apparently intend to take a second bite at liability at the retrial. Specifically, defendants want to tell the jury that plaintiffs' allegations regarding 23 of the 40 statements were rejected. *See, e.g.*, Defs' Proposed Statement of Uncontested Facts ("In those earlier proceedings, Plaintiffs' allegations regarding the other 23 statements were rejected."); Defs' Proposed Description of the Case ("Plaintiffs' allegations regarding the other 23 statements were rejected."). At the retrial, the jury will be asked to determine loss causation, damages and proportionate liability for the 17 actionable misstatements still at issue. Thus, the first jury's findings with regard to the other 23 statements have no bearing on the jury's task at the retrial, and

as such, are irrelevant. Further, any reference to the 23 statements that are no longer at issue will likely confuse the jury and unfairly prejudice plaintiffs. Accordingly, defendants and their witnesses – including defendants' experts – should be barred from introducing evidence of, asking questions about, or making any reference to the prior jury's finding of no liability for the 23 statements that are no longer at issue in the case.[8]

The fact that the prior jury found plaintiffs failed to establish all of the elements of §10(b) for 23 misstatements has no relevance to any issue remaining in this litigation, which will solely address the 17 misstatements for which defendants were found liable. It is clear that the only purpose defendants or their witnesses could have for referring to the first jury's findings on the 23 non-actionable statements is to improperly suggest to the jury that if some claims were insufficient, then others may be suspect as well.[9] Similarly, any attempt to engender doubt from the jury regarding the soundness of the 17 violations found by the prior jury by reference to the 23 dismissed statements would be inappropriate under the Rules of Evidence and would run afoul of the Seventh Circuit's ruling "that the defendants may not relitigate whether any of the 17 statements were false or material." *Glickenhaus*, 787 F.3d at 429.[10]

Even if the Court concludes that the jury's verdict on the 23 statements no longer at issue is somehow relevant, however, the probative value of such evidence is substantially outweighed by the unfair prejudice to plaintiffs and the risk that the jury would be misled, or the issues of the case that

[8] Thirteen of the 23 statements predate the first false statement on March 23, 2001. The other 10 statements are quotes from Household spokespersons in media articles, even though the first jury found defendants liable for statements made in Household's own documents (*i.e.*, SEC filings, press releases) and statements at Household Financial conferences during the same period. The first jury's "no liability" finding on the 23 statements could have been for failure to meet just one of the six elements plaintiffs were required to prove.

[9] At their depositions, defendants' experts Ferrell and James went out of their way to point out the jury's finding of no liability on the 23 statements even though they were not asked about it. Ferrell Tr. at 51:9-24, 104:20-105:9, attached as Ex. 1 to the Declaration of Luke O. Brooks in Support of Plaintiffs' Motions *in Limine*, filed herewith; James Tr. at 272:10-19 (Dkt. No. 2130-9).

[10] This Court's September 8, 2015 Order confirmed that "the existence-of-scienter findings from the first trial stand" for all 17 statements at issue, and the parties' Stipulation of the Parties Regarding Individual Defendants' Motions for Partial Summary Judgment settled all questions of whether the 17 false and misleading statements were made recklessly or knowingly. Dkt. No. 2122.

they are being asked to determine confused. *See* Fed. R. Evid. 403. In light of the lack of relevance and prejudicial impact of such evidence, courts have not hesitated to preclude references to dismissed claims at trial. As one court in this circuit put it, "[f]rankly, under Federal Rule of Evidence 402, the fact that [plaintiff] brought a claim . . . that has since been dismissed is irrelevant; furthermore, its prejudicial effect (that is, that the jury may consider the [dismissed claims] regardless of their dismissal or confuse the [dismissed claims] with the terms of the [remaining claims]) outweighs any probative value under Federal Rule of Evidence 403." *Iron Dynamics v. Alstom Power, Inc.*, No. 06-C-357, 2008 WL 2078621, at *8 (N.D. Ind. May 15, 2008). *See also Paltalk Holdings, Inc. v. Microsoft Corp.*, No. 06-cv-367, 2009 U.S. Dist. LEXIS 131090, at *6-*8 (E.D. Tex. Feb. 25, 2009) ("Reference to any prior patent claims, causes of action, or forms of relief that have been dismissed or abandoned during this lawsuit would have little relevance and be highly prejudicial."); *Fallon v. Potter*, No. 04-cv-526, 2008 WL 5395984, at *2 (M.D. La. Dec. 23, 2008) (reference to "dismissed and abandoned claims would potentially confuse and prejudice the jury"). Indeed, "shielding such matters from the jury is common practice." *Bryce v. Trace, Inc.*, No. 06-cv-775-D, 2008 WL 906142, at *3 (W.D. Okla. Mar. 31, 2008) (granting plaintiff's motion to prohibit references to her dismissed and abandoned claims); *Moore v. Bannon*, No. 10-12801, 2012 WL 2154274, at *7 (E.D. Mich. June 13, 2012) ("the practice of shielding claims and issues dismissed on summary judgment and other pretrial rulings are common practice, and motions requesting such exclusions should be granted"). Defendants and their witnesses should be barred from referring in any way to the prior jury's finding that 23 of the 40 alleged misstatements were not actionable.

III. CONCLUSION

In reversing and remanding on just two elements, and "reject[ing] all other claims of error," the Seventh Circuit expressly upheld the first jury's findings on the elements of falsity, materiality and reliance and impliedly upheld the "existence-of-scienter findings from the first trial." *Glickenhaus*, 787 F.3d at 429 ("For clarity's sake, we add that the defendants may not relitigate whether any of the 17 statements were false or material."); 9/8/15 Order at 5 (agreeing that the scienter findings from the first trial stand). Defendants should be precluded from relitigating these

elements at the retrial, including their truth-on-the-market defense. Further, in connection with its holdings, and in rejecting the majority of defendants' broad attacks on the leakage model, the Seventh Circuit made a number of factual and legal findings which should be deemed uncontested and admitted at the retrial. Finally, defendants should be barred from referring in any way to the prior jury's findings that 23 of the 40 alleged misstatements were not actionable. Plaintiffs' motion should be granted in its entirety.

DATED: April 22, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2016, 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 for counsel of record denoted on the attached Service 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 April 22, 2016.

s/ Luke O. Brooks

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