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 DEFENDANTS' MOTION *IN LIMINE* NO. 2 TO PRECLUDE REFERENCE TO PRIOR PROCEEDINGS

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I. INTRODUCTION

The jury at the first trial determined that defendants are liable for securities fraud, having made materially false statements, with scienter, in order to conceal the fact that Household's apparently impressive growth was in fact due to predatory lending and improper accounting practices. After defendants were found liable, they convinced the Seventh Circuit to remand the action for a partial new trial on loss causation and damages on the grounds that Fischel's opinion that the inflation in Household's stock price was caused by fraud, as opposed to company-specific, non-fraud-related factors, was too conclusory. Now, having obtained a partial retrial, defendants improperly attempt to whitewash the earlier proceedings by precluding reference to their prior expert's opinions, limiting reference to the liability findings to the verdict itself, and prohibiting reference to or use of the Seventh Circuit's opinion and this Court's February 1, 2016 order. *See* Defendants' Motion *In Limine* No. 2 to Preclude Reference to Prior Proceedings ("Defs' MIL No. 2") (Dkt. No. 2147). For the following reasons, defendants' motion should be denied.

First, the testimony of defendants' former expert on loss causation and damages, Dr. Mukesh Bajaj, is available for use by both parties. Bajaj's testimony is probative of facts to be decided in the second trial and presents no risk of unfair prejudice, jury confusion or waste of time.

Second, while plaintiffs do not intend to refer to the first jury's acceptance of the leakage model or the amount of the partial judgment and prejudgment interest awarded, they should be permitted to do so in the event that defendants open the door to such evidence, so as to ensure that the jury is given a full and fair picture of earlier events.

Third, defendants' request to preclude plaintiffs or their experts from "characterizing the first jury's findings" is fatally ambiguous and seeks unreasonable relief. Further, both of defendants' requests concerning the first jury's fraud findings improperly attempt to constrain the presentation of relevant evidence that the jury will need to determine whether loss causation has been proven.

Lastly, defendants put both the Seventh Circuit's opinion and this Court's February 1, 2016 Order at issue by proffering expert testimony from witnesses who concededly relied on the Seventh Circuit opinion in forming their own opinions and questioning plaintiffs' expert about this Court's

rulings. Plaintiffs are entitled to cross-examine defendants' experts with their reliance materials. Moreover, to the extent defendants open the door, plaintiffs and their experts must be permitted to reply in kind.

A. Testimony or Other Evidence From or About Dr. Mukesh Bajaj Is Relevant and Admissible

1. Bajaj's Testimony Is Available for Use by Either Party

As detailed in plaintiffs' Motion *in Limine* No. 9 ("MIL No. 9"), courts have regularly determined that once an expert has given testimony at deposition, the expert's opinions do not "belong" to anyone and are available for all parties to use at trial. *See* Dkt. No. 2141;[1] *SEC v. Koenig*, 557 F.3d 736, 744 (7th Cir. 2009).[2] This is the case regardless of whether the party originally proffering the expert's testimony later chooses to withdraw or substitute the expert. *See Bone Care Int'l v. Pentech Pharms.*, No. 08-cv-1083, 2010 WL 3894444, at *9-*10 (N.D. Ill. Sept. 30, 2010) ("*Bone Care*") (defendants' decision not to call formerly retained testifying experts at trial does not preclude plaintiffs from calling them as expert witnesses); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1016 (9th Cir. 2008) ("*Hanford*") (finding that the trial court properly admitted plaintiff's expert's testimony from first bellwether trial at the second trial, even though it was not proffered by plaintiff); *De Lage Landen Operational Servs., LLC v. Third Pillar Systems, Inc.*, 851 F. Supp. 2d 850, 853 (E.D. Pa. 2012) ("*DLL*") (either party may introduce the

[1] As discussed further in Plaintiffs' MIL No. 9, Bajaj's testimony is admissible as both a statement by a party opponent under Fed. R. Evid. 801 (d)(2) and under the "former testimony" exception provided by Fed. R. Evid. 804(b)(1). *See* Dkt. No. 2141. *See also Glendale Fed. Bank, FSB v. United States*, 39 Fed. Cl. 422, 424-45 (Fed. Cl. 1997) (once an expert has testified at trial, that testimony constitutes a party admission); *United States v. Ala. Power Co.*, 773 F. Supp. 2d 1250, 1258 n.10 (N.D. Ala. 2011) (same). *See also* Pre-Trial Conf. Tr. at 850:15-851:6 (admitting statements from operative complaint as party admissions even though plaintiffs' later interrogatory responses superseded them, and noting that "[t]he fact that [the evidence has] been superseded by whatever doesn't change the fact that it was said . . if it shows a contradiction or is somehow otherwise probative . . . it's admissible"), attached as Ex. 3 to the Declaration of Luke O. Brooks in Support of Plaintiffs' Oppositions to Defendants' Motions *in Limine*, filed herewith ("Brooks Decl.").

[2] *See also NetAirus Techs., LLC v. Apple, Inc.*, No. LA CV 10-03257 JAK (Ex), 2013 WL 9570686, at *3 (C.D. Cal. Nov. 11, 2013) (defendant does not have "'absolute, exclusive dominion to control the circumstances and manner through which'" their retained expert's testimony reaches the jury) (citation omitted); *Kerns v. Pro-Foam of S. Ala.*, 572 F. Supp. 2d 1303 (S.D. Ala. 2007) (same).

deposition of an opposing party's expert if the expert is identified as someone who may testify at trial). Tellingly, defendants do not cite a ***single case*** to the contrary.[3]

Further, this Court's February 1, 2016 Order does not preclude plaintiffs from offering Bajaj's testimony, asking defendants' new experts if they considered it in formulating their opinions, or cross-examining defendants' experts about inconsistencies between their opinions and Bajaj's opinions. The Order simply denied plaintiffs' motion to prohibit defendants from offering new testimony from additional experts. *See* February 1, 2016 Memorandum Opinion and Order at 1 (Dkt. No. 2102). The Court reasoned that the Seventh Circuit's opinion anticipated additional expert testimony, and so agreed with defendants' argument that they should be able to use additional experts to respond to Fischel's new opinions. *See id.* at 1-2.[4] The Court did not, as defendants suggest, hold that defendants' selection of new experts also effected a wholesale erasure of their earlier litigation decisions or evidence from earlier phases of this case. *See Watts v. Laurent*, 774 F.2d 168, 181 (7th Cir. 1985) ("the parties shall have an opportunity to present to the second jury whatever evidence . . . from the [first] phase of the trial may be regarded as relevant in any way to the question of [the second stage]"). Simply put, nothing in the Court's first order precludes plaintiffs from using Dr. Bajaj's prior testimony.

2. Bajaj's Testimony Is Relevant

Bajaj's testimony is unquestionably relevant to the issues in the second trial. Evidence is relevant under Rules 401 and 402 if it tends to make a fact of consequence more likely (or not) than it would be without the evidence. Fed. R. Evid. 402. In the earlier stages of this litigation, Bajaj submitted a 92-page expert report, a 24-page sur-rebuttal report, was deposed and testified at trial on

[3] Defendants' claim that plaintiffs must have "retained" Bajaj in order to proffer him as an expert witness misses the mark. Defendants retained Bajaj to testify in the first trial, disclosed him as a Rule 26(a)(2) witness, and presented his testimony at trial. Having done so, they cannot now claim the admissibility of his testimony should be analyzed as if he were a fact witness. *See Koenig*, 577 F.3d at 744 ("A witness identified as a testimonial expert is available to either side; such a person can't be transformed after the report has been disclosed, and a deposition conducted . . . .").

[4] *See also* Response to Plaintiffs' Motion to Preclude Defendants From Substituting New Experts at 8-9 (Dkt. No. 2072) (arguing that "Defendants' new experts were retained to respond to Fischel's *new* testimony" and that defendants "should be afforded a full and fair opportunity to respond to this new evidence using experts of their choice.") (emphasis in original).

loss causation and damages – the exact issues the jury will be asked to determine.[5] Defendants certainly believed that Bajaj's testimony was probative of these issues in proffering it the first time. *See* Trial Tr. at 4077:1-4242:14 (questioning Bajaj on loss causation and damages for several hours during defendants' case-in-chief).[6] Moreover, contrary to defendants' assertions, there are several important inconsistencies between Bajaj's testimony and defendants' new experts' opinions, including differences as to whether there was leakage of fraud-related information in 2002 and how to appropriately construct an index of Household's peers. The jury is entitled to hear that evidence and determine for itself whether the evidence impacts the credibility of defendants' new experts or the weight of their opinions.

Plaintiffs are not offering Bajaj's testimony simply to prove that defendants are using different experts than they did at the first trial. This testimony is relevant to demonstrate that defendants' underlying analysis of loss causation and damages has changed and is inconsistent with their prior analysis. Defendants chose to abandon their old approach and should now live with the consequences, much as any other party can be impeached by their inconsistent testimony.

Defendants claim that the Court has already decided this issue in permitting defendants to employ new experts at the retrial. *See* Dkt. No. 2147 at 6 (citing the Court's Feb. 1, 2016 Order at 1-2). But the Court's decision never addressed the admissibility of Bajaj's prior testimony, and never discussed potential inconsistencies between Bajaj's and the new experts' opinions. *See* Dkt. No. 2102 at 1-2. Instead, its holding relied on the fact that plaintiffs would be able to depose the new experts, thus eliminating the risk that plaintiffs would be prejudiced if the new experts were permitted to testify to opinions beyond those offered by Bajaj. *Id.*[7] Notwithstanding their attempts

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[5] For example, the portions of Bajaj's testimony plaintiffs intend to present concern: the selection of an appropriate index of Household's peers (Trial Tr. at 4112:21-4113:18, 4248:14-4249:19); how inflation can enter and leave a stock price (Trial Tr. at 4244:2-6, 4245:4-7); how stock prices can be impacted by fraudulent omissions (Trial Tr. at 4090:13-16, 4091:23-4092:2); and evidence of leakage (Trial Tr. at 4267:12-4268:13).

[6] Relevant excerpts from the 2009 Trial Transcript are attached as Ex. 1 to the Brooks Decl.

[7] During Ferrell's deposition, defendants' counsel violated the Federal Rules of Civil Procedure by initially instructing Ferrell, who had read and cited all of Bajaj's reports and testimony in his reliance materials, not to disclose "whether there was anything [he] disagreed with from a methodological perspective about Dr. Bajaj's

to expunge Bajaj's opinions, defendants' prior adoption of those opinions is relevant, as are the inconsistencies between the story they told the last jury and the story they want to tell in the retrial. The jury is entitled to know that Household has changed its loss causation theory and to consider defendants' current theories in the context of the constantly shifting landscape from which they have emerged.

3. The Probative Value of Testimony from or About Bajaj Substantially Outweighs Any Risk of Unfair Prejudice

Finally, defendants have not demonstrated that testimony about or by Bajaj is inadmissible under Federal Rule of Evidence 403. Rule 403 permits trial courts to exclude relevant evidence if the probative value of the evidence is substantially outweighed by the risk of, *inter alia*, unfair prejudice, waste of time, or jury confusion. Fed. R. Evid. 403. In analyzing the risk of prejudice, "the question under Rule 403 is not whether evidence is 'prejudicial'; all . . . evidence is designed to undermine the [adverse party's] case; it is whether the evidence is ***unfairly*** prejudicial." *Cuff v. Trans States Holdings, Inc.*, 768 F.3d 605, 609 (7th Cir. 2014) (emphasis in original); *Davis v. Duran*, 276 F.R.D. 227, 233 (N.D. Ill. 2011) ("It is not enough to say that evidence is prejudicial. All evidence is prejudicial; that is why it is used."). Evidence is only unfairly prejudicial if it will "induce [] [the jury] to decide the case on an improper basis . . . rather than on the evidence presented." *Thompson v. City of Chicago*, 472 F.3d 444, 457-58 (7th Cir. 2006).

Defendants offer no justification for claiming that evidence from or about Bajaj would induce the jury to decide the case on an improper basis. Nor can they, as defendants previously asked the jury to decide the case based on that same testimony. Instead, defendants argue that they will be prejudiced if plaintiffs present evidence suggesting that the opinions of defendants' new experts and Bajaj differ, because defendants will then need to rebut any inferences the jury might draw from that information. The fact that defendants would prefer the jury not hear certain evidence does not make

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reports." Ferrell Tr. at 36:12-39:10 (Brooks Decl., Ex. 2). Later, after several breaks and lunch, and following several lengthy and improper speaking objections, defendants' counsel permitted Ferrell to respond to similar questions. At that point, Ferrell testified that he had read Bajaj's testimony and reports "last summer" and could not remember whether he disagreed with any portion of Bajaj's methodology. Ferrell Tr. 166:3-170:20.

it unfairly prejudicial or inadmissible under Rule 403. *See Hanford*, 534 F.3d at 1016 (holding that while the plaintiff had "apparently decided that [her expert's] testimony was more harmful than helpful," the plaintiff could not "exclude trial testimony that she, herself, proffered" in the first instance); *DLL*, 851 F. Supp. 2d at 853 ("Allowing one party to use the testimony of the opponent's expert witness causes no 'undue prejudice' particularly when timely notice of the intention to call the expert has been given."); *Bone Care*, 2010 WL 3894444, at *10 (rejecting argument that plaintiffs should be precluded from using defendants' former expert's deposition testimony at trial because such testimony would be misleading or unduly prejudicial).

The Bajaj trial testimony that plaintiffs have designated to introduce in their case-in-chief will take about 15 minutes of Court time. Further, the subject matter covered by Bajaj's prior reports and testimony – *e.g.*, the leakage of fraud-related information and Household's appropriate peer group – will be raised in the trial whether or not Bajaj's testimony is allowed. Allowing plaintiffs to present portions of Bajaj's testimony presents no risk that the jury's time will be wasted, as such testimony is both relevant and non-cumulative.

Defendants also fail to substantiate their claim that plaintiffs' proffer of limited portions of Bajaj's testimony or reference to Bajaj would result in "jury confusion." *See* Dkt. No. 2147 at 5-6. The jury will not be confused by the fact that Bajaj was formerly defendants' expert, but plaintiffs are offering the testimony. Juries are instructed to consider all evidence, regardless of which party is offering it. *See United States v. Schaudt*, No. 07 C 0895, 2009 WL 1218605, at *3 (N.D. Ill. Apr. 30, 2009) (jurors "are not advised to only consider plaintiff's testimony in a manner in which it helps plaintiff's case, or vice versa"). Further, defendants' argument gives too little credit to the jury's ability to parse the evidence being offered. As one court in this district has explained:

> Everyday, in courts across the country, juries are exposed to relevant evidence from experts and non-expert witnesses alike, having varying degrees of prejudicial implications. . . . Indeed, the jury's ability to follow instructions and intelligently assess evidence is the very premise on which the jury system and the Federal Rules of Evidence rest. They presuppose a level of discernment that the [defendants'] argument incorrectly assumes they do not possess.

Davis, 276 F.R.D. at 233.

In sum, Bajaj's testimony is available to plaintiffs, probative of facts to be decided in the second trial, and presents no risk of unfair prejudice, jury confusion or waste of time. Defendants' motion *in limine* on this issue should therefore be denied.

B. The First Jury's Acceptance of the Leakage Model and the Amount of Partial Judgment and Prejudgment Interest Awarded After the First Trial

Plaintiffs do not intend to refer at trial to the fact that the first jury originally selected Professor Fischel's leakage model to estimate the amount of inflation defendants' fraud caused during the Class Period or that the first jury found evidence of leakage during the Class Period. However, defendants have indicated that they may open the door to such evidence; at Professor Fischel's deposition, defendants asked nearly 50 questions concerning Fischel's understanding of, and whether he specifically adapted his models to, the first jury's findings. *See, e.g.*, Fischel Tr. 9:8-22:9; 28:14-16; 80:25-81:2; 81:8-82:4; 86:12-17; 87:2-10; 183:18-22 (attached as Ex. 5 to the Brooks Decl.). Thus, while plaintiffs do not oppose defendants' motion on this issue as a general matter, in the event that defendants reference the first jury's findings as they relate to leakage, or if they persist in questioning Fischel regarding the first jury's findings, plaintiffs (and Fischel) must be permitted to respond in kind. *See Griffin v. Foley*, 542 F.3d 209, 219 (7th Cir. 2008) ("'[W]hen a party opens the door to evidence that would be otherwise inadmissible, that party cannot complain . . . about the admission of that evidence.'" (citation omitted)).

Similarly, plaintiffs currently do not intend to refer to the amount of the partial judgment or prejudgment interest awarded by the jury in the first trial. *See* Defs' MIL No. 2 at 7. In fact, plaintiffs have moved *in limine* to prohibit defendants from offering evidence or argument relating to the aggregate damages the Class has been or may be awarded. *See* Plaintiffs' Motion *In Limine* No. 8 ("Pltfs' MIL No. 8") (Dkt. No. 2140). Plaintiffs' motion was necessitated by defense counsel's prejudicial references in the first trial to the "gigantic number" that would result if the jury adopted even Professor Fischel's Specific Disclosures quantification of inflation. *See* Pltfs' MIL No. 8 at 1.[8]

[8] Defendants indicated they will oppose Plaintiffs' MIL No. 8. *See* Declaration of Luke O. Brooks in Support of Plaintiffs' Motions *In Limine*, Dkt. No. 2142, ¶2.

Given this history, if defendants are permitted to introduce evidence of aggregate damages at the second trial, plaintiffs should also be permitted to refer to the partial judgment and other available information to ensure that the jury is given an accurate portrayal of the potential damages. Otherwise, plaintiffs have no objection to defendants' motion to preclude reference to the first jury's award of damages.

Nevertheless, while plaintiffs generally do not object to defendants' requests to preclude evidence on these topics – recognizing that the jury's ***ultimate*** findings on loss causation and damages have been vacated – plaintiffs object entirely to defendants' mischaracterization of the Seventh Circuit's Order as vacating ***all*** findings relating to loss causation and damages.[9] *See* Defs' MIL No. 2 at 7. Actually, as discussed in §D, *infra*, and plaintiffs' MIL No. 2, the Seventh Circuit made a number of express and implied findings of fact and law implicating loss causation and damages which control the future proceedings.[10]

C. The First Jury's Findings Concerning the Fraud and Reference to Alleged Misstatements Other Than the 17 Actionable Misstatements Identified by the First Jury

In the first trial, plaintiffs proved that defendants engaged in a massive fraud, concealing the fact that Household's remarkable financial "growth" during the Class Period resulted from predatory lending practices, improper "reaging" of delinquent loans, and improper accounting. *See Glickenhaus*, 787 F.3d at 413. Plaintiffs did so through evidence that, for example:

- In each of the years from 1999-2001, the portion of Household's net income attributable to predatory lending practices was ***28.4%, 32.6% and 36.2%***, respectively. Trial Tr. 2414:18-2415:22. During that same time, Household's stock

[9] Defendants' reliance on *Pickett v. Sheridan Health Care Ctr.*, 813 F.3d 640 (7th Cir. 2016) in support of this contention is misplaced. In *Pickett*, the Seventh Circuit held that the district court had not exceeded the scope of remanded issues by conducting an entirely new examination of damages issues, as the remand order had expressly instructed. *See* 813 F.3d at 644. Here, however, the issues the Court remanded with regard to leakage were far narrower, and the opinion certainly does not suggest that the court should ignore the Seventh Circuit's own findings on remand.

[10] *See 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). *See also Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2013 WL 5958178, at *6 (N.D. Cal. Nov. 7, 2013) (emphasizing that evidence relating to findings which remain intact "is qualitatively different than . . . evidence" about findings which were overturned, and that evidence of intact findings is admissible).

price rose from approximately $40 per share to the mid $60s, just as defendant Gilmer had predicted it would if defendants could convince Wall Street that Household had the ability to grow. PX267, PX458.

- In 2002, several State Attorneys General concluded that Household was engaged in "widespread lending patterns and practices that violate both state and federal law," and that Household's "insidiously deceptive sales practices" had "almost assuredly" contributed to Household's unprecedented growth. *See* PX550.

- In spring and summer 2001, defendants ordered Household employees to destroy all evidence of predatory lending and predatory sales tactics. PX573, PX596, PX796, PX1007, PX1026; Trial Tr. 3637:22-3638:26.

The first jury found that on 17 separate occasions, defendants made material false statements with scienter, all to conceal the existence and enormity of their improper and often illegal acts from the public. *See* Dkt. No. 1611. Defendants now seek to preclude plaintiffs and their experts from "characterizing the first jury's findings" with regard to those statements in the presence of the second jury – in effect, to limit the second jury's knowledge of defendants' fraud to the words on the first verdict form (and inferences drawn therefrom). *See* Defs' MIL No. 2 at 9.

Defendants' motion to preclude plaintiffs or plaintiffs' experts from "characterizing the first jury's findings" is insupportable. As an initial matter, that plaintiffs or their experts may "characteriz[] the first jury's findings" is an impossibly vague complaint, and provides no reasonable grounds for relief. *See Lupescu v. Napolitano*, No. 07 C 4821, 2011 WL 1342996, at *2 (N.D. Ill. Apr. 6, 2011) (denying motion *in limine* requesting "a blanket ruling excluding partial jury instructions and misstatements of the law" because the relief requested was "too general and vague" and noting that defendant "may not escape its obligation to object at trial and chill [plaintiff's] presentation of his case via broad *in limine* rulings").

Further, defendants' motion is based on the misconceived notion that the scope and magnitude of the fraud has only limited, if any, bearing on the issues of loss causation and damages. *See* Defs' MIL No. 2 at 9. Evidence that the inflation in Household's stock price was, in some amount, caused by the fraudulent concealment of defendants' bad acts is critical to proving loss causation.[11] Thus, the jury must be permitted to hear evidence that will allow it to understand the

[11] Defendants' experts, Cornell and Ferrell, have conceded as much. *See* Cornell Depo. Tr. at 136:20-24 (Dkt. No. 2130-11) (Q: If you didn't have a complete understanding of what the fraud was, how were you

magnitude of defendants' fraud, and what the 17 actionable statements found by the first jury concealed; that is the only way the second jury will be able to fulfil its task of determining what portion of plaintiffs' losses were caused by fraud as opposed to other factors. *See* Plaintiffs' MIL No. 1. The Seventh Circuit has previously explained in similar circumstances that partial retrials cannot be conducted in an evidentiary vacuum. *See id.*; *Watts*, 774 F.2d at 181 (instructions to jury that issues of liability were decided in first trial "shall not . . . preclude the free presentation of evidence and information from the liability phase" to the extent it is relevant to issues in partial retrial); *MCI Comms. Corp. v. AT&T Co.*, 708 F.2d 1081, 1168 (7th Cir. 1983) (same).

Even the most narrow interpretation of the issues to be retried demonstrates a need for evidence of the scope of defendants' fraud. For instance, both parties intend to present the jury with conflicting calculations of what the correct amount of fraud-related inflation was on each day of the Class Period. While plaintiffs' expert contends that the fraud-related inflation was either $7.97 or up to $23.94 of Household's stock price during the Class Period, depending on which model the jury selects, defendants' expert contends it is far less, down to a mere $4.19.[12] *See Glickenhaus*, 787 F.3d at 416. Ferrell Rebuttal Report, ¶¶97-98 & Exs. 8 and 9 thereto (Dkt. No. 2074-3). Plaintiffs are entitled to proffer evidence demonstrating that defendants' expert is wrong and that, in fact, defendants' fraud was far too "massive" or extensive to credibly claim that it had little to no impact on defendants' stock price. Further, plaintiffs' expert is entitled to explain his reasoning and basis for the opinions he is offering, including his understanding of what the fraud at issue is, what market participants said about the fraud, its magnitude, its impact on Household's stock price during the

able to determine whether information was non-fraud? A: I don't think I could make a scientific determination of that.); Ferrell Depo. Tr. at 162:3-6 (acknowledging that "in order to determine whether something is fraud-related or not, one has to understand the fraud").

[12] Plaintiffs have separately moved to preclude defendants' expert from offering this quantification. *See* Plaintiffs' Omnibus Motion to Exclude Defendants' Experts at 30 (Dkt. No. 2128). In addition, Ferrell's inflation calculations began on November 15, 2001, eight months after the relevant period begins (March 23, 2015).

Leakage Period, and how his models accurately account for the information he considered.[13] The probative value of such an explanation far outweighs any potential prejudice to defendants. *See* Fed. R. Evid. 403; *Davis*, 276 F.R.D. at 233 (noting the jury's ability to discern the probative and prejudicial impact of potential evidence, and its ability to intelligently assess both).

Defendants also seek to preclude plaintiffs from referring to any alleged misstatements as fraudulent other than the 17 found by the first jury. *See* Defs' MIL No. 2 at 10. Plaintiffs do not intend to introduce or discuss the fact that the jury determined 23 statements did not violate the federal securities laws. *See* Plaintiffs' MIL No. 2. However, plaintiffs do object to defendants' implication that the first jury's findings of no §10(b) violation as to those statements means that the statements were not false, not material, and not made with scienter. In fact, the jury's conclusions as to each of the 23 statements may have resulted from findings that only one of §10(b)'s six elements was not proven. In short, the jury's finding prevents a conclusion that the 23 statements violated ***all*** of the required elements under §10(b), but nothing more. Defendants are wrong to suggest otherwise.

D. The Seventh Circuit's Opinion and This Court's February 1, 2016 Order

Defendants seek to preclude use of the Seventh Circuit's Opinion and this Court's February 1, 2016 order denying defendants' request to exclude Professor Fischel ("February 1 Order"). The motion should be denied for several reasons.

First, defendants themselves have put the Seventh Circuit's Opinion in play. ***All*** of defendants' experts relied on the Seventh Circuit's Opinion in formulating their opinions. *See* Dkt. Nos. 2060-3, 2074-3 (Ferrell), Dkt. Nos. 2060-4, 2074-4 (James), Dkt. Nos. 2060-2, 2074-2 (Cornell). Ferrell alone cited the Opinion more than thirty times in his reports – his most-cited reference by far, other than Fischel's report. *See* Dkt. Nos. 2060-3, 2074-3. James and Cornell also repeatedly cited and relied on the Opinion. *See* Dkt. Nos. 2060-4, 2074-4, 2060-2, 2074-2.

[13] This is precisely what Fischel was doing in the deposition answers that defendants find objectionable. Defendants ignore the fact that it was defense counsel that repeatedly put the jury's findings at issue and invited Fischel to discuss defendants' fraud. *See supra* at 7.

Plaintiffs are entitled to vigorously cross-examine defendants' expert witnesses with the very materials they relied upon to form their opinions. *See Lapsley v. Xtek, Inc.*, 689 F.3d 802, 805, 809 (7th Cir. 2012) ("As the Rule 702 committee notes and Rules 703 to 705 make clear, an expert may give an opinion to the jury concerning the facts, subject to cross-examination ***on the work forming the basis of that opinion*** . . . .") (emphasis added). One of the "safeguards [] built into" FRE 703 is that "the expert's reliance on [] out-of-court statements may be amply tested on cross-examination of the expert." *U.S. v. Affleck*, 776 F.2d 1451, 1457 (10th Cir. 1985). Accordingly, opposing counsel must be "provided the opportunity to cross-examine the expert regarding his conclusions ***and the facts on which they are based***." *Smith v. Ford Motor Co.*, 215 F.3d 713, 719 (7th Cir. 2000) (emphasis added); *see also Newell Puerto Rico, Ltd. v. Rubbermaid Inc.*, 20 F.3d 15, 21 (1st Cir. 1994) ("'The burden is on opposing counsel through cross-examination to explore and expose any weaknesses in the underpinnings of the expert's opinion.'") (citation omitted). If any of defendants' experts are allowed to testify, the Seventh Circuit's Opinion can be used to cross-examine them.

Defendants contend their experts should be shielded from cross-examination on the Seventh Circuit's Opinion because appellate courts cannot make fact findings. Defendants would have the Court of Appeals' 47-page opinion reduced to a nullity except for its conclusion that the case is reversed and remanded. But in treating the Seventh Circuit's analysis of the facts and law as mere musings, defendants misconstrue the court's opinion. Circuit courts do not issue advisory opinions. To the contrary, the court's opinion lays out the legal and factual foundation for its decision largely denying defendants' multifaceted challenge of the jury's verdict.

Thus, 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 ruled both upon legal issues and factual findings by the jury that were left untouched. *Glickenhaus*, 787 F.3d at 413-14 (observing that defendants' loss causation argument "has several layers"). For example, in finding that Fischel's leakage model comports with *Dura Pharms, Inc. v. Broudo*, 544 U.S. 336 (2005), the court held: "[W]hat the plaintiffs had to prove is that the defendants' false statements caused the stock price to remain higher than it would have been

had the statements been truthful. Fischel's models calculated the effect of the truth, once it was fully revealed, and the jury found that the defendants concealed the truth through false statements. That is enough." *Glickenhaus*, 787 F.3d at 419-20 ("In our case the plaintiffs proved that Household's share price declined after the truth came out, so the problem identified in *Dura* is not present here."). Likewise, the Court of Appeals found that "Fischel's models controlled for market and industry factors and general trends in the economy – the regression analysis took care of that." *Id*. at 421. The Seventh Circuit's application of the law to the relevant facts is binding and cannot be disturbed on remand.[14] *See Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991) (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"); *Adams*, 746 F.3d at 744 ("'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.'") (citation omitted).

Defendants want to introduce expert opinions directly contrary to the Court of Appeals' rulings. *See* Ferrell Report, ¶¶56-118, James Report, ¶¶24-57. For example, in their opposition to plaintiffs' *Daubert* challenge, defendants argue that their experts will testify that "Fischel's leakage model does not exclude the effect on Household's stock price of *nonfraud* factors that were disproportionately affecting companies like Household that operated in the subprime sector or industry." Defs' *Daubert* Opp. at 8 (Dkt. No. 2152). This testimony directly contradicts the Seventh Circuit's holding that Fischel's leakage model properly accounted for the impact of industry and market news – "the regression took care of that." *Glickenhaus*, 787 F.3d at 421. There is no basis to relitigate this issue, as doing so is not necessary to correct the "'discrete, particular error'" found by the court – Fischel's failure to adequately explain why the leakage model was not distorted by company-specific nonfraud information – and on remand "'the district court is limited to correcting that error.'" *United States v. Barnes*, 660 F.3d 1000, 1006 (7th Cir. 2011) (quoting *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996)). Accordingly, the Court should exclude this testimony.

[14] The Seventh Circuit made numerous additional findings that govern the retrial, and that plaintiffs should be permitted to use for any purpose. *See* Plaintiffs' MIL No. 2.

However, if Ferrell and James are allowed to testify, plaintiffs must be allowed to cross-examine them with their reliance materials, including the Seventh Circuit's Opinion.

Defendants focus heavily on the Seventh Circuit's "Background" section, claiming that the discussion there is off limits because the Court of Appeals cannot find facts. But the court was not finding facts in that section, it was reciting the ***jury's*** factual findings with the benefit of the entire trial record. That the court left those findings – on falsity, materiality, scienter and reliance – "undisturbed" (*see* 787 F.3d. at 429) means that they are binding as the law of the case. *Key*, 925 F.2d at 1060. To be sure, the law of the case doctrine 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).

Defendants' cases do not hold otherwise. In fact, the primary (out-of-circuit) case on which they rely, *Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1288-89 (11th Cir. 2010), expressly states the general rule that appellate courts' "findings of fact" are binding on remand: "It is true that '[u]nder the "law of the case" doctrine, the ***findings of fact*** and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the trial court or on a later appeal.'" *Id.*[15] But, in *Norelus*, the Eleventh Circuit had specifically directed the district court to "'accept the magistrate judge's basic findings of fact' or 'conduct its own hearing' before making its own findings of fact." *Id*. at 1289. So, the court held that under the "mandate rule," the prior panel's recitation of the facts was not intended to be binding: "***Seen in that light*** [the prior panel's] factual narrative did not operate as law of the case to bind the district court on remand or us in this appeal."[16] *Id*. (emphasis

[15] *See also Kelly v. Dun & Bradstreet, Inc.*, No. 15-11888, 2016 WL 370539, at *2 (11th Cir. Ga. Feb. 1, 2016) ("the district court and this court are bound by ***findings of fact*** and conclusions of law made by this court in an earlier appeal of the same case") (citing *Ash v. Tyson Foods, Inc.*, 664 F.3d 883, 891 (11th Cir. 2011) (emphasis added)).

[16] In *Norelus*, the court described the "mandate rule" as a "specific application of the 'law of the case' doctrine requiring that '[a] trial court, upon receiving the mandate of an appellate court, may not alter, amend, or examine the mandate, or give any further relief or review, but must enter an order in strict compliance with the mandate.'" *Id.* at 1288.

added). The Seventh Circuit in this case did not direct the district court to revisit the facts concerning defendants' fraudulent conduct set forth in its opinion. To the contrary, the court expressly stated that defendants "may not relitigate" whether the 17 remaining statements were fraudulently made. *Glickenhaus*, 787 F.3d at 429.

Defendants' motion should be denied for the additional reason that it would be improper to bar Professor Fischel from discussing either the Seventh Circuit's opinion or the February 1 Order in response to questions like those posed during his deposition in which defense counsel incorrectly suggested that leakage had never been used or judicially approved. In response to these questions suggesting that leakage models had never before been approved of in litigation, Fischel naturally referred to the Seventh Circuit's opinion approving of his leakage model under the facts and circumstances of this case, and this Court's February 1 Order allowing him to present the leakage model and quantification of damages to the jury over defendants' objection. *Id*. Put simply, defendants opened the door. If they open the door again, Fischel should not be prevented from responding by reference to either opinion. *See Estate of Rudy Escobedo v. Martin*, 702 F.3d 388, 400-01 (7th Cir. 2012) ("[W]hen a party puts evidence at issue, that party must 'accept the consequence[s]' of opening the door to that evidence.").[17]

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Respectfully submitted,

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[17] Because plaintiffs do not plan to use the February 1 Order unless defendants open the door, defendants' cases about resolving factual disputes in *Daubert* motions are inapplicable to this motion. Plaintiffs note however, that in light of the Seventh Circuit's mandate, this Court by necessity went beyond "an examination of the expert's methodology" into an assessment of the necessary predicate facts in determining that Fischel can present the leakage model and estimation of inflation in the retrial. *See* Reply in Support of Plaintiffs' Omnibus Motion to Exclude Defendants' Experts, §II.A.1.

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 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 May 6, 2016.

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