IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, on Behalf of Itself and All Others Similarly Situated, Plaintiff,	)	Case No. 02 C 5893
	)	Judge Jorge L. Alonso
v.	)	
HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION *IN LIMINE* NO. 4

Plaintiffs' Motion *In Limine* No. 4 seeks to bar Defendants from presenting: (1) testimony or evidence concerning company-specific nonfraud-related information that Defendants' experts contend distorted Professor Daniel Fischel's leakage and/or specific disclosures models; (2) testimony or argument that Fischel's leakage model is not a valid method for quantifying artificial inflation; (3) *Institutional Investor* magazine and certain other documents not cited in Defendants' experts' reports; and (4) allegedly cumulative testimony about market disclosures and their impact on Household's stock price. For the reasons set forth below, the Court should deny Plaintiffs' Motion *In Limine* No. 4 in its entirety.

ARGUMENT

A. Neither This Court's February 1, 2016 Order Nor the Seventh Circuit's Opinion Precludes Defendants from Presenting Evidence of Firm-Specific, Nonfraud-Related Information that Affected Household's Stock Price or from Disputing the Validity of Fischel's Leakage Model More Generally.

Plaintiffs seek to preclude Defendants from (i) introducing testimony or documents regarding firm-specific, nonfraud-related factors that affected Household's stock price during the

relevant period; and (ii) disputing the validity of Fischel's leakage model more generally. Plaintiffs in essence argue that the Seventh Circuit's opinion and this Court's *Daubert* ruling ***require*** the jury to find that Fischel's leakage model accurately measures artificial inflation caused by the fraud and appropriately accounts for firm-specific nonfraud-related information. That is wrong. Neither the Seventh Circuit nor this Court could, or did, make that factual finding for the jury. The Seventh Circuit held only that a leakage model may be admissible if it satisfies certain criteria, *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 422-23 (7th Cir. 2015), and this Court ruled that Fischel's leakage model met the requirements for admissibility. Dkt. 2102. It is now up to the jury to decide which loss causation model most accurately measures artificial inflation caused by the fraud, and Defendants are entitled to introduce evidence to prove that Fischel's leakage model does not accurately measure inflation.

In an effort to prevent Defendants from presenting such evidence, Plaintiffs first contend that this Court, in its February 1, 2016 Order denying Defendants' *Daubert* motion to exclude Fischel's testimony, conclusively ruled that the information identified by Defendants' experts was *not* firm-specific, nonfraud-related information. Mot at 1, 2-3, 5. That assertion misconstrues this Court's ruling.

The threshold issue on remand was determining whether Fischel's leakage model could be submitted to the jury at the new trial. The Seventh Circuit specified the following procedure for addressing that issue on remand:

> If the plaintiffs' expert testifies that no firm-specific, nonfraud related information contributed to the decline in stock price during the relevant time period and explains in nonconclusory terms the basis for this opinion, then it's reasonable to expect the defendants to shoulder the burden of identifying some significant, firm-specific, nonfraud related information that could have affected the stock price. If they can't, then the leakage model can go to the jury; if they can, then the burden shifts back to the plaintiffs to account for that specific information or provide a

> loss-causation model that doesn't suffer from the same problem, like the specific-disclosure model.

Glickenhaus & Co. v. Household Int'l, Inc., 787 F.3d 408, 422 (7th Cir. 2015). In accordance with the Seventh Circuit's directive, Professors Ferrell and James identified information that they contend was firm-specific and nonfraud-related that could have affected Household's stock price during the relevant period.

In ruling on Defendants' *Daubert* motion, the Court reviewed "the categories of disclosures that defendants characterize as firm-specific and unrelated to fraud" and—solely in the context of deciding whether Defendants had met their burden of production under the Seventh Circuit's threshold test for determining the admissibility of Fischel's leakage model—expressed the Court's view that they "are neither." Dkt. 2102 at 6. This statement by the Court in ruling on Defendants' *Daubert* motion was not an ultimate finding of fact on these disputed issues. Courts do not make ultimate factual findings in ruling on a *Daubert* motion. *See, e.g.*, *Stollings v. Ryobi Techs., Inc.*, 725 F.3d 753, 765 (7th Cir. 2013) ("[T]he district court's role as gatekeeper does not render the district court the trier of all facts relating to expert testimony.").

Plaintiffs, in effect, are attempting to convert this Court's threshold determination regarding the admissibility of Fischel's leakage model into a bar to Defendants' right to present evidence regarding the central issue of contested fact to be determined by the jury at the new trial, *i.e.*, whether Plaintiffs have met their burden to prove that inflation in Household's stock price was caused by fraud. As the Seventh Circuit stated when it summarized the Supreme Court's holding in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005): "So in order to prove loss causation, plaintiffs in securities-fraud cases need to isolate the extent to which a decline in stock price is due to fraud-related corrective disclosures *and not other factors.*" *Glickenhaus*, 787 F.3d at 421 (emphasis added). To accept Plaintiffs' construction of the Court's

Daubert ruling, and to remove from the jury the contested issue of whether information affecting Household's stock price during the relevant period was, or was not, firm-specific, nonfraud-related information, would be plain legal error.[1]

Plaintiffs also argue that the Seventh Circuit held that Fischel's regression analysis controlled for the effect of market and industry information on Household's stock price and, therefore, this is not an issue the jury will decide. Mot. at 3. To the contrary, the Seventh Circuit held only that Fischel's regression analysis accounted for the effect of market and industry factors as reflected by the price movements in *Fischel's* selected market and industry indices—the S&P 500 Index and the S&P Financials Index. *Glickenhaus*, 787 F.3d at 415-16, 421.

The Seventh Circuit's ruling does not preclude Defendants from presenting evidence that Fischel's chosen industry index does not reliably account for information that was having a disproportionate effect on Household and other companies that operated in the narrower subprime sector of the financial industry, and which was not captured by price movements in the broader S&P Financials Index. In similar circumstances, courts have recognized that problems with the construction of an expert's index may fatally undermine the expert's regression analysis. *See, e.g., Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713, 729-30 (11th Cir. 2012) (affirming judgment in favor of defendant where plaintiff's expert performed a regression analysis using the S&P 500 Index and the NASDAQ Bank Index but failed to account for the effect on the company's stock price of the collapse of the Florida real estate market, which was not captured by the NASDAQ Bank Index); *In re Executive Telecard Sec. Litig.*, 979 F. Supp.

[1] Section A of Plaintiffs' Motion *In Limine* No. 4 largely rehashes arguments that Plaintiffs made in their pending Omnibus Motion To Exclude the Testimony of Defendants' experts. Dkt. 2128. Defendants have responded to those arguments in their Response to Plaintiffs' Omnibus Motion. Dkt. 2152.

1021, 1027-28 & n.2 (S.D.N.Y. 1997) (concluding that expert should have used a "more precisely correlated" index for purposes of calculating damages than the Telecom Index to which the company compared its performance in its SEC filings); *In re Seagate Tech. II Sec. Litig.*, 843 F. Supp. 1341, 1348 (N.D. Cal. 1994) ("Usually, industry indices need to be specially constructed because most companies do not fit neatly into a single industry category.").[2]

Furthermore, whether Plaintiffs' expert or Defendants' experts are correct about the appropriate industry index to use in conducting a regression analysis in this case is an issue to be decided by the jury. "[T]he Supreme Court and this Circuit have confirmed on a number of occasions that the selection of the variables to include in a regression analysis is normally a question that goes to the probative weight of the analysis rather than to its admissibility. . . . These precedents teach that arguments about how the selection of data inputs affect the merits of the conclusions produced by an accepted methodology should normally be left to the jury." *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 808 (7th Cir. 2013). The Seventh Circuit's decision in this case did not remove this issue from the jury on remand.

Plaintiffs' Motion *In Limine* No. 4, therefore, presents no valid reason to preclude testimony or other evidence regarding firm-specific, nonfraud-factors that were affecting Household's stock price during the relevant period, or testimony or other evidence that demonstrates that Fischel's use of the S&P Financials Index as his industry index resulted in his regression analysis failing to account fully for the effect of nonfraud information on Household's stock price.

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[2] As Defendants have explained in their Response to Plaintiffs' Omnibus Motion To Exclude Defendants' Experts, because "firm-specific" price movements are those that are left after accounting for market and industry price movements, what is considered to be "firm-specific" in any particular case depends on the market and industry indices that the expert conducting the regression analysis in that case chooses to use. Dkt. 2152 at 5-10.

B. There Is No Basis To Exclude *Institutional Investor* Magazine or the Other Exhibits to Which Plaintiffs Object.

Plaintiffs also seek to preclude Defendants from using at trial *Institutional Investor* magazine and 32 other documents that Plaintiffs contend were not included by Defendants' experts in their lists of the materials they relied upon. Mot at 6-8. As an initial matter, seven of those 32 documents (Defs.' Exs. Nos. 1-E.3, 1-E.4, 1-E.18, 68, 179, 180, and 185) *were* included either in Fischel's or Defendants' experts lists of reliance materials.[3] Another exhibit, Defs.' Ex. No. 171, is a document that that will not be used with any expert witness. The remainder of the 32 exhibits are publicly available analyst reports, many of which were included in Defendants' document productions, that are duplicative of, or entirely consistent with, the specific analyst reports identified in Defendants' experts' lists of materials relied upon. These analyst reports, if introduced at trial, would not be used in any way to alter any of the opinions expressed by Defendants' experts in their reports and, therefore, the fact that they were not identified as reliance materials by Defendants' experts is harmless. Furthermore, there is no basis to preclude Defendants from using these exhibits with any fact witnesses.

As for *Institutional Investor* magazine, (Defs.' Exs. 2 and 77), Plaintiffs seek to exclude the introduction of this evidence on the ground that Professor Ferrell did not disclose that he had consulted *Institutional Investor* magazine as one of his steps in determining to use the CSFB Specialty Finance Universe when constructing his industry index. Mot. at 6-7. Professor Ferrell did in fact rely on *Institutional Investor*, and the fact that *Institutional Investor* was not identified list of materials relied upon was an inadvertent oversight. As Plaintiffs acknowledge, materials

[3] Defendants' experts indicated that they relied on materials identified by Fischel.

relied upon by an expert that are not referenced in the expert's report are not automatically excluded if the omission was harmless. *Id.* at 6. That is the case here.

When questioned at his deposition about how he selected the CSFB Specialty Finance Universe, Professor Ferrell testified that he reviewed *Institutional Investor* magazine to determine the "star analyst" covering the subprime sector of the financial market, and then determined that this analyst reported on the companies included in the CSFB Specialty Finance Universe. Dkt. 2128 at 18-21 & n.13. Professor Ferrell further explained that "'the academic literature regularly uses this source, the "Institutional Investor" magazine, to identify star analysts.'" *Id*. at 19 (quoting Ferrell Dep. Tr. at 228:5-229:4).[4]

Because Plaintiffs were able to, and did, question Professor Ferrell at length at his deposition about his use of *Institutional Investor* magazine, Plaintiffs have not identified any prejudice they suffered from the fact that *Institutional Investor* magazine was not cited in Professor Ferrell's report. Accordingly, Plaintiffs will not be "ambushed" if this evidence is introduced at trial and their request to preclude this evidence should be denied. *See, e.g.*, *Rabin v. Cook Cty.*, No. 09 C 8049, 2015 WL 1926420, at *5 (N.D. Ill. Apr. 27, 2015) (denying motion to exclude expert's testimony due to alleged violation of Rule 26(a)(2)(B), where, after reviewing the transcript of the expert's deposition, the court stated it would be "hard-pressed" to conclude that opposing counsel was unable to examine the expert thoroughly, and because there was "no evidence of any bad faith or willfulness on the part of Defendants nor that non-compliance is likely to disrupt trial").

C. The Testimony of Defendants' Witnesses Is Not "Needlessly Cumulative."

[4] Each year *Institutional Investor* publishes its ranking of the leading sell-side equity analysts, known as *Institutional Investor*'s "All-America Research Team." *See* www.institutionalinvestor.com/article/3495913/research-and-rankings/2015-all-america-research-team-how-the-firms-fared.

In their previously filed and pending Omnibus Motion To Exclude Defendants' Experts, Plaintiffs contend, among other things, that the testimony of Defendants' experts should be excluded because it is cumulative. Dkt. 2128 at 32-36. Defendants have demonstrated in their Response to Plaintiffs' Omnibus Motion that the testimony of Defendants' three experts is not cumulative, and that they have no intention of presenting cumulative expert testimony at trial. Dkt. 2152 at 30-32.

In their Motion *In Limine* No. 4, Plaintiffs further contend that "it is possible" that Defendants intend to elicit expert testimony from one or more of their five "may call" fact witnesses. Mot. at 8 n.10. As set forth in Defendants Response to Plaintiffs' Motion *In Limine* No. 6, by which Plaintiffs seek to preclude Defendants' fact witnesses from offering expert testimony, Defendants' fact witnesses do *not* intend to offer expert testimony. To state the obvious, Plaintiffs' counter-factual speculation that Defendants' fact witnesses *might* offer expert testimony cannot render the testimony of Defendants' expert witnesses "cumulative."

The Court, moreover, can take appropriate steps if it appears that Defendants' fact witnesses are attempting to offer expert testimony, or if the testimony of Defendants' experts appears to be cumulative. *See, e.g.*, *Wielgus v. Ryobi Techs., Inc.*, No. 08 CV 1597, 2012 WL 1853090, at *7 (N.D. Ill. May 21, 2012) (denying motion *in limine* to bar lay opinion testimony as "both premature and overbroad" and noting that, "[s]hould lay testimony stray into the realm of specialized or technical interpretations of the technology, the defendants may raise more specific objections at trial"); *Abbott Point of Care, Inc. v. Epocal, Inc.*, 868 F. Supp. 2d 1310, 1333 (N.D. Ala. 2012) (refusing to preclude allegedly cumulative expert testimony and stating that "if the testimony of the second expert called to the stand begins to become cumulative . . . ,

the court could take appropriate action to minimize any undue delay"). Plaintiffs' premature motion to exclude testimony from Defendants' witnesses should be denied.

CONCLUSION

For the reasons set forth above, the Court should deny Plaintiffs' Motion *In Limine* No. 4 in its entirety.

Dated: May 6, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

R. Ryan Stoll, an attorney, hereby certifies that on May 6, 2016, caused true and correct copies of the foregoing Defendants' Response to Plaintiffs' Motion *In Limine* No. 4 to be served via the Court's ECF filing system on the following counsel of record in this action:

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