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' REPLY IN FURTHER SUPPORT OF THEIR MOTION *IN LIMINE* NO. 5

I. INTRODUCTION

In their Response to Plaintiffs' Motion *In Limine* No. 5 ("Defs' Opp. to MIL No. 5"), defendants fail to demonstrate that their proposed Question One or "Defendants' Specific Disclosures Model" merit inclusion on the jury verdict form. Nor can they. Defendants' proposed Question One unnecessarily complicates the issues of loss causation, damages, and proportionate liability, while defendants' cobbled-together Specific Disclosures Model undeniably lacks the inflation-per-share data that the jury will need to complete its damages findings. Because defendants cannot establish that their Question One or Defendants' Specific Disclosures Model fit the facts of this case or the task the jury must complete, plaintiffs' Motion *in Limine* No. 5 should be granted.

II. ARGUMENT

A. Defendants' Justification for Their Question One Betrays a Flawed Understanding of Loss Causation

Defendants' insistence that loss causation must be separately determined for each of the 17 actionable misstatements contradicts both the law of this case and common sense. The Seventh Circuit has ruled that in order to prove loss causation, plaintiffs must demonstrate that defendants' fraud caused Household's stock price to be inflated, and that plaintiffs suffered losses when the truth was revealed and the inflation left the stock. *See Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 415 (7th Cir. 2015) ("*Glickenhaus*"). The Seventh Circuit's opinion further explains that defendants' fraud consisted of concealing from investors three categories of bad acts: predatory lending practices, improper re-aging of delinquent loans, and resultant false 2+ delinquency statistics, and accounting practices that violated GAAP. *See Glickenhaus*, 787 F.3d at 424 (directing that on remand, jurors should be instructed that "if the first actionable misrepresentation relates only to one or two of the three ***categories of fraud***, they should find zero inflation in the stock (or some fraction of the model they've chosen) until there are actionable misrepresentations addressing all three").[1] Thus, to prove loss causation, plaintiffs must prove that their economic losses were substantially caused by the concealment, and eventual disclosure, of those bad acts. *See also*

[1] Here and throughout, emphasis is added and citations are omitted.

Caremark, Inc. v. Coram Healthcare Corp., 113 F.3d 645, 648 (7th Cir. 1997) (even "[t]o plead loss causation, the plaintiff must allege that it was the very facts about which the defendant lied which caused its injuries"); *Ong v. Sears, Roebuck & Co.*, 459 F. Supp. 2d 729, 747 (N.D. Ill. 2006) (plaintiff must show that "but for the circumstances that the fraud concealed, the investment . . . would not have lost its value").[2]

This is consistent with the Court's 9/8/15 Order setting the scope of the retrial. In its 9/8/15 Order, the Court explained that loss causation and damages would both be retried. Dkt. No. 2042 at 2-3. However, the verdict form and jury instructions were not before this Court, and the question of whether loss causation must be proved specifically as to each misstatement was not addressed. Though defendants would like to impute additional meaning to the Court's language – for example, that defendants' precise wording of the issues controls all future proceedings – the Court's Order does not support such a result. *See* Defs' Opp. to MIL No. 5 at 2 (Dkt. No. 2164).

Defendants' fundamental misunderstanding of the Seventh Circuit's opinion is further demonstrated by their assertions that: (1) plaintiffs' objection to defendants' proposed Question One, is based on a distinction between "inflation maintenance" and "inflation introduction" theories; and (2) the jury must determine whether ***each*** misstatement caused plaintiffs' losses in order for Fischel's leakage model to be applied.[3] *See* Defs' Opp. to MIL No. 5 at 4-5. Both claims are

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[2] Defendants' cases are not to the contrary. *See In re Northfield Labs., Inc. Secs. Litig.*, No. 06 C 1493, 2008 WL 4372743, at *6 (N.D. Ill. Sept. 23, 2008) ("Rather, plaintiffs must allege that '***but for the circumstances that the fraud revealed***, the investment . . . would not have lost its value.'"); *Prissert v. Emcore Corp.*, 894 F. Supp. 2d 1361, 1374-75 (D.N.M. 2012) ("'[T]o establish loss causation, a plaintiff must allege that ***the subject of the fraudulent statement*** or omission was the cause of the actual loss suffered, *i.e.*, that the misstatement or omission concealed something from the market that, when disclosed, negatively affected the value of the security.'"); *Sood v. Catalyst Pharm. Partners, Inc.*, No. 13-cv-23878-UU, 2014 WL 1245271, at *5 (S.D. Fla. Mar. 25, 2014) (no loss causation where corrective disclosure identified by plaintiffs did not concern alleged misstatements); *In re Colonial Bancgroup,. Inc. Sec. Litig.*, 9 F. Supp. 3d 1258, 1271-72 (M.D. Ala. 2014) (noting that "'a plaintiff may demonstrate loss causation circumstantially'" . . . in other words, "'did the relevant truth eventually come out and thereby cause the plaintiffs to suffer losses?'"); *Alpha Mgmt. v. Last Atlantis Capital Mgmt., LLC*, No. 12 C 4642, 2012 WL 5389734, at *5 (N.D. Ill. Nov. 2, 2012) (not reaching loss causation analysis because no false statements were sufficiently plead).

[3] Defendants suggest that they will argue to the jury that there is no loss causation where "the share price rose, rather than declined, on some of the days on which the misrepresentations were made." *See* Defs' Opp. to MIL No. 5 at 6. Defendants' argument makes no sense. In any event, the Seventh Circuit rejected this approach: "It's tempting to think that inflation can be measured by observing what happens to the stock immediately after a false statement is made. But that assumption is often wrong." 787 F.3d at 415. To the

inaccurate. Plaintiffs do not make this distinction and as the Seventh Circuit acknowledged, both of Fischel's models measure the amount of inflation due to investors not knowing the truth. *Glickenhaus*, 787 F.3d at 418. Household's stock price was only inflated by the fraud once the defendants made a false statement or failed to disclose the truth. Here, the first jury found that occurred on March 23, 2001 with regard to Household's predatory lending practices, and on March 28, 2001 with regard to all three categories of Household's fraud. *Glickenhaus*, 787 F.3d at 417-18, 423-24.

Once the first jury found that defendants made false statements and omissions on March 28, 2001, each of the 15 subsequent misstatement defendants made prevented the share price from falling to its true value. *See Glickenhaus*, 787 F.3d at 423-24. In other words, the 17 actionable misstatements found by the first jury define the period in which the inflation in Household's stock price was fraud-induced, and once plaintiffs prove that it was the disclosure of defendants' fraud that caused their losses, they will have proved loss causation for ***all*** misstatements made during that period.[4] It is therefore unnecessary and will only invite error to ask the jury to determine whether plaintiffs' losses were caused by each misstatement.[5]

Finally, defendants' desperate suggestion that their proposed Question One is necessary to the jury's determination of proportionate liability is baseless. *See* Defs' Opp. to MIL No. 5 at 5. As

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contrary, the Seventh Circuit expressly stated that "what 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" – ***not*** that a misstatement caused an immediate rise in the stock price. *See Glickenhaus*, 787 F.3d at 419. Presentation of purported evidence to the contrary will only serve to confuse the jury and prejudice plaintiffs.

[4] Thus, inviting the jury to find that a particular statement did not cause plaintiffs' losses, as defendants seek to do, would essentially result in a retrial on materiality, a result the Seventh Circuit specifically proscribed. *See Glickenhaus*, 787 F.3d at 429 ("[D]efendants may not relitigate whether any of the 17 statements were false or material."). The first jury found that each of the 17 misstatements made by defendants was false and material to investors. But in order for the second jury to determine that certain of those misstatements (but not others) were not causally related to plaintiffs' losses, it would have to find that, had investors known the true facts that the statements concealed, the value of Household's stock would not have changed. *See Glickenhaus*, 787 F.3d at 419. Such a finding would only be plausible if investors would not have cared about the facts underlying the statement in the first place (*i.e.*, if the statement was not material).

[5] *See Turyna v. Martam Constr. Co.*, 83 F.3d 178, 181 (7th Cir. 1996) (general verdicts with special interrogatories "almost invite[] contradictory and inconsistent answers").

an initial matter, proportionate liability is a ***damages*** issue; it has nothing to do with loss causation. Moreover, the jury will allocate liability based on their perceptions of defendants' individual responsibility for the misstatements made and the overall concealment of Household's improper predatory lending, re-aging and accounting practices. The jury need not determine proportionate liability for ***each*** misstatement. Indeed, in the first trial, the jurors were not asked to allocate liability on a statement-by-statement basis. Defendants never objected to this procedure and never appealed this issue. *See* Dkt. No. 1611 at 42 (instructing the jury to "determine what percentage of responsibility, if any, for any loss plaintiffs suffered is due to [each defendant]" and to "consider the nature of the conduct of each person found to have caused or contributed to plaintiffs' loss and the nature and extent of the causal relationship between each such person's conduct and plaintiffs' loss"). By failing to appeal the issue, defendants waived their right to challenge the propriety of using the same jury question in the second trial. Besides, defendants' proposed verdict form indicates that defendants do not really contemplate that the jury will assign proportionate liability on a statement-by-statement basis – after all, defendants' proposed proportionate liability question is ***identical*** to the one used in the first trial. *See* [Proposed]Final Pretrial Order, Ex. H-8 (Dkt. No. 2151-27). In sum, defendants cannot show that it is necessary or appropriate to require the jury to make 17 individual determinations of loss causation.

B. Ferrell's Specific Disclosures Model Omits a Vast Swath of the Relevant Time Period and Will Not Aid the Jury in Completing the Task It Is Being Asked to Perform

In their MIL No. 5, plaintiffs establish that Defendants' Specific Disclosures Model is inappropriate for the task the jury is being asked to complete: assigning an amount of fraud-induced inflation per share for each day during the class period.[6] The primary problem with defendants' model is, of course, that the expert whose calculations serve as the basis for the model ***intentionally*** did not do the analysis required to assign an inflation value for any day within the first eight months of the relevant time period. *See* Ferrell Depo. Tr. at 102:1-9 (Dkt. No. 2142-1) (conceding that he

[6] Plaintiffs have separately moved to exclude Ferrell and his Model completely on other grounds. *See* Plaintiffs' Omnibus Memorandum to Exclude Defendants' Experts (Dkt. No. 2128).

hasn't done the calculations necessary to determine how to allocate inflation for the first eight months of the class period); Ferrell Rebuttal Report, ¶¶99-100 (Dkt. No. 2074-3) (noting the need for additional mathematical analysis to determine the amount of inflation in Household's share price on a particular day); Ferrell Report, ¶122 (Dkt. No. 2060-3) ("Accurately estimating damages for individual shares, for each shareholder, and for the class as a whole requires accurately determining the level of inflation ***on each day*** during the class period.") (emphasis in original). *See also* Pltfs' MIL No. 5 at 6-7 (Dkt. No. 2137).

Defendants do not claim that their model's lack of relevant data for the entire period is not a problem. Instead, defendants urge that Ferrell's failure to "provide a table, comparable to the table provided by Fischel" is easily solved because to the extent the jury even ***needs*** a "corresponding table of inflation," defendants' model "would simply" assign the maximum $4.19 inflation identified in Ferrell's analysis for each day prior to November 15, 2001. *See* Defs' Opp. to MIL No. 5 at 6-7. Defendants offer no justification or explanation – let alone one that is mathematically valid or supported by expert opinion – for "simply" assigning $4.19 of inflation to Household's stock price for each day for the first eight months of the class period. *See id.* at 7-8. In fact, the only mathematical analysis defendants use to support the validity of their model purports to demonstrate how Ferrell calculated the maximum of $4.19 in the first place – a complete *non-sequitur*. *See id*. at 7. After all, Ferrell, whose model defendants want to employ, said this cannot be done without further work that he has ***not*** performed. Ferrell Depo. Tr. at 102:1-9. Defendants' make-shift "fix" demonstrates precisely how *ad hoc* and unreliable their model truly is, and why it should be excluded.

III. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that their Motion *in Limine* No. 5 be granted, and defendants' proposed Question One and Defendants' Specific Disclosures Model excluded from the jury verdict form.

DATED: May 13, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 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 13, 2016.

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