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

DECLARATION OF LUKE O. BROOKS IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION OF RULING REGARDING PURPORTED "FINDING OF FACT" BY THE SEVENTH CIRCUIT

I, Luke O. Brooks, declare as follows:

1. I am an attorney duly licensed to practice before all of the courts of the State of California. I am a member of the law firm of Robbins Geller Rudman & Dowd LLP, Lead Counsel of record for plaintiffs in the above-entitled action. I have personal knowledge of the matters stated herein and, if called upon, I could and would competently testify thereto.

2. Attached are true and correct copies of the following exhibits:

Exhibit 1: Excerpt from Brief and Required Short Appendix for Defendants-Appellants filed in *Glickenhaus Instit. Grp. v. Household Int'l, Inc*., No. 13-3532 (7th Cir. Feb. 12, 2014);

Exhibit 2: Relevant excerpts from the trial transcript from the first trial; and

Exhibit 3: Transcript of oral argument in *Glickenhaus Instit. Grp. v. Household Int'l, Inc*., No. 13-3532 (7th Cir. May 29, 2014), transcribed from the audio recording posted on the Seventh Circuit's website (http://media.ca7.uscourts.gov/sound/2014/sp.13-3532.13-3532_05_29_2014.mp3).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 25th day of May, 2016, at Chicago, Illinois.

s/ Luke O. Brooks
LUKE O. BROOKS

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 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 25, 2016.

s/ Luke O. Brooks
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EXHIBIT 1

No. 13-3532

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GLICKENHAUS INSTITUTIONAL GROUP,

Plaintiff-Appellee,

v.

HOUSEHOLD INTERNATIONAL, INC., ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Illinois
No. 02-CV-5893
The Honorable Ronald A. Guzmán, District Judge

BRIEF AND REQUIRED SHORT APPENDIX
FOR DEFENDANTS-APPELLANTS

[Oral Argument Requested]

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February 12, 2014

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PRELIMINARY STATEMENT

This case amply demonstrates why defendants often settle even meritless securities cases once a class action is certified. The District Court's effort to try this case as a class action launched a 12-year odyssey in which Plaintiffs were allowed to proceed to trial despite the absence of any evidence of loss causation, and Defendants were denied the right to raise fundamental defenses they would have had in individual cases in the name of making this case work as a class action. Moreover, the length of the proceedings has guaranteed that the Supreme Court's case law has not stood still. As a result, instructional errors that were manifest enough when given have become undeniable in light of subsequent Supreme Court decisions. The net effect of all this is predictable: the jury awarded Plaintiffs billions of dollars based on mistaken instructions and despite a complete absence of evidence on critical elements of Plaintiffs' claims. The jury's massive verdict is not a reflection of one of the most impactful securities frauds in history; it is a reflection of how far removed from governing precedent and basic fairness the proceedings below strayed.

Although the proceedings below were riddled with error, three errors in particular require reversal.

First, Plaintiffs failed to offer sufficient proof of loss causation. The "specific disclosures" and "leakage" models submitted by Plaintiffs as their sole proof of loss causation both assumed that Household's share price was inflated at the beginning of the Class Period due to unidentified pre-Class Period misrepresentations and omissions. And Plaintiffs' "leakage" model (the model the jury selected, albeit in a warped form as explained below) purported to estimate the total amount of inflation that could have "leaked out" of the share price over the entire Class Period without even attempting to tie the supposed leakage to particular corrective disclosures. Plaintiffs also offered no other evidence to explain the inflation, made no effort to account for non-fraud firm-specific explanations for the decline in value they asserted, and failed to explain how that inflation left the stock in the leakage model. That left Plaintiffs with no legally sufficient evidence of loss causation.

And things went from bad to worse at trial. Over objection, the Court permitted jurors to apply the leakage model in a manner for which it was never designed, thereby resulting in a nonsensical verdict. The leakage model, by its own terms, attributed a maximum amount of $23.94 of total inflation to the Plaintiffs' three different theories of fraud (predatory lending, re-aging, and restatement) over the entire Class Period. Yet the District Court permitted the jury to attribute the entire $23.94 to a single statement on a single day reflecting only one of the three theories—a statement that occurred nearly 20 months into the Class Period and that was the 14th allegedly fraudulent statement chronologically. And this one statement was hardly the mother of all frauds; it was an article published in an industry circular ("*Origination News*") reprinting part of a statement that had been made public 10 days earlier on a day the jury found zero inflation.

Second, the jury was instructed in a manner that was error at the time, but is manifestly erroneous in light of *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011). *Janus* leaves *no* question that the jury was wrongly instructed on the threshold issue of what it means to "make" an alleged misstatement. The jury was instructed that it could find that a Defendant made a representation if "the defendant made, *approved or furnished information to be included*, in a false statement …." A536 (4714:5-10) (emphasis added); A338.

Janus squarely addressed, and unequivocally rejected, the theory that one who furnishes information to be included in a statement has made that statement or can be liable for a statement actually made by someone else. *See* 131 S. Ct. at 2302. That instructional error was clearly prejudicial and requires a new trial.

Third, in its effort to make this case work as a class action, the District Court prevented Defendants from meaningfully contesting whether individual class members relied on the misstatements the jury found. Hamstringing Defendants in this way was fundamentally inconsistent with *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), which allowed a limited presumption of reliance, but not an irrefutable one. Subsequent cases have confirmed that reliance remains "an essential element of the § 10(b) private cause of action," *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011), and the Supreme Court may provide further clarification this Term in *Halliburton Co. v. Erica P. John Fund*, No. 13-317. There is no question that in an individual action Defendants would have every right to contest individual reliance. Here, however, the District Court essentially eliminated Defendants' ability to obtain information (solely in Plaintiffs' possession) necessary to rebut the

Basic presumption and erroneously held that the Defendants' substantive rights had to be balanced with the imperatives of proceeding as a class action. That is not how class actions and the Rules Enabling Act are supposed to work. *See* 28 U.S.C. § 2072(b). Defendants' right to put on a full defense of their case cannot be balanced away or otherwise diminished in the name of allowing a procedural device to succeed. Regardless, the verdict itself, and the erroneous assignment of *all* inflation to a statement concerning only one component of the multi-issue fraud alleged, rebuts the presumption of reliance as a matter of law.

It is critical that this Court correct the District Court's failure to hold Plaintiffs to their burden in this case. Courts have justly worried about the "hydraulic pressure" to settle securities fraud cases in the wake of class certification, irrespective of the merits. If this is what a securities class action trial looks like—and this Court affirms the District Court's mishandling of this case—then that pressure will be insurmountable.

STATEMENT OF ISSUES

1) Whether Defendants are entitled to judgment in their favor as a matter of law because Plaintiffs failed to prove loss causation.

2) Whether the finding that all the alleged artificial inflation in Household's stock price was introduced by a single statement relating to only one of Plaintiffs' three fraud theories, which is irreconcilable with Plaintiffs' loss causation theory and without any evidentiary support, requires a new trial.

3) Whether the District Court's erroneous instruction on what it means to "make" a representation, which resulted in an inherently flawed verdict, requires a new trial.

4) Whether the District Court deprived Defendants of a meaningful opportunity to rebut the presumption of reliance.

5) Whether Defendants are entitled to judgment in their favor as a matter of law because, despite the severely circumscribed proceedings regarding reliance, Defendants successfully rebutted the presumption of reliance.

STATEMENT OF THE CASE

A. Plaintiffs' Complaint and the District Court's Narrowing of the Class Period

On January 14, 2000, the Dow Jones Industrial Average stood at 11,723, a then all-time high. By the end of 2002, the economy had taken a turn for the worse. Between July 1999 and October 2002, the Dow fell 3,873 points, or 37.7%. While the market overall was hit hard, consumer finance companies fared even worse. During that same timeframe, the stock price for companies such as Household classified as "consumer finance companies" in S&P's Supercomposite 1500 Index fell by 53.71%. Some companies within that sector fared particularly poorly—between July 1999 and October 2002, for example, Americredit's stock price dropped by over 50%, and Providian's stock price declined by over 90%. *See* A521-A524. Household's stock price also declined, though in line with overall sector performance; a 34.5% decline from July 1999 to October 2002. *See id.*

In a shareholders' class action suit filed over a decade ago, in August 2002, Plaintiffs alleged that Household's stock price decline was not wholly attributable to the larger overall market decline, but due to the revelation of fraud that had been perpetrated by Household and

William F. Aldinger, David A. Schoenholz, and Gary Gilmer in violation of §§ 10(b) and 20(a) of the Securities Exchange Act, 15 U.S.C. §§ 78j(b), 78t(a) and Rule 10b-5. Plaintiffs alleged that between October 23, 1997 and October 11, 2002, Defendants made false and misleading statements with respect to three categories of business practices. First, Plaintiffs accused Defendants of improperly "re-aging" loans of delinquent borrowers, which allegedly had the effect of "materially understat[ing] the Company's true asset quality ratio and overstat[ing]" earnings during the Class Period. A9-A10. Second, Plaintiffs asserted that Defendants falsely denied that Household engaged in "predatory lending" practices on a systematic basis. A10-A12. Third, Plaintiffs contended that Defendants issued inaccurate financial statements with respect to the booking of certain credit card contracts. A12-A13. Plaintiffs alleged that "as the truth about Household's illegal operations and accounting fraud was publicly revealed," the price of Household shares hit "a record seven-year low." A14. Plaintiffs sought recovery for all purchasers of Household stock between October 23, 1997 and October 11, 2002.

Defendants' moved to dismiss the suit because Plaintiffs had failed to allege facts sufficient to establish that Defendants' purported misrepresentations actually caused Plaintiffs' economic loss. Defendants separately moved to dismiss claims that had expired under the three-year statute of repose applicable before the enactment of the Sarbanes-Oxley Act on July 30, 2002.[1] The District Court denied the former motion, but granted the latter, "dismiss[ing] with prejudice the 10(b) claims based on any misrepresentation or omission that occurred before July 30, 1999." A164. The District Court thus moved the beginning of the Class Period from October 23, 1997 to July 30, 1999, rendering non-actionable allegations that misrepresentations before July 30, 1999 had inflated the share price.

B. Plaintiffs' Loss Causation Models and Defendants' Pre-Trial Motions

District Court proceedings were bifurcated. Phase I was designed to focus on class-wide liability issues such as whether there were any fraudulent statements that caused an economic loss. Phase II was intended to address, if necessary after Phase I, individualized issues such as reliance and damages. During Phase I discovery, Defendants

[1] The Sarbanes-Oxley Act extended the time within which to file a private securities fraud suit to two years after the discovery of the facts constituting the violation or five years after the violation, *see* 28 U.S.C. § 1658(b), but this Court has held that the Act does not apply retroactively. *See Foss v. Bear, Sterns & Co.*, 394 F.3d 540, 542 (7th Cir. 2005).

attempted to require Plaintiffs to articulate their theory of economic loss by, among other things, serving interrogatories asking Plaintiffs to explain how the three alleged frauds artificially inflated the price of Household's stock, when the market learned of the alleged frauds, and how those revelations impacted share price. As their only response to these questions, Plaintiffs submitted a report by Professor Daniel Fischel. The report purported to measure the "alleged artificial inflation" that left Household's stock price during the Class Period using two alternative models—a "specific disclosures" model and a "leakage" model. Neither model purported to identify whether, when, or how Household's stock price became artificially inflated in the first place. Instead, per Plaintiffs' instructions, Professor Fischel merely assumed that Household's stock price was artificially inflated at the beginning of the Class Period on July 30, 1999 due to unidentified earlier misrepresentations and omissions by Defendants. He also assumed that all the inflation had left the stock by the last day of the Class Period, October 11, 2002. *See, e.g.*, A419 (84:3-7), A425 (202:16-20); Doc. 1361-6, Ex. 3 at 25-26.

Plaintiffs' specific disclosures model purported to measure price declines by identifying specific days on which (1) the media reported allegations regarding Household's allegedly "predatory lending," its "re-aging" practices, or a financial restatement occurred, and (2) Household's stock price subsequently had a statistically significant decline. Doc. 1361-2, Ex. 1, at 20-23. Plaintiffs' report states that, per these calculations, Household's stock price included $7.97 of artificial inflation on the first day of the Class Period due to unidentified pre-Class Period misrepresentations and omissions, and remained inflated by $7.97 until the first purported "specific disclosure" of Defendants' alleged misrepresentations regarding lending practices on November 15, 2001, at which point the amount of inflation began to decrease slowly, eventually reaching zero with the last disclosure. A166-A178.

Plaintiffs' leakage model also assumed that Household's stock price was artificially inflated on the first day of the Class Period due to unidentified pre-Class Period misrepresentations and omissions. But, unlike the specific disclosures model, the leakage model did not attempt to identify when or how the alleged artificial inflation left Household's stock price through specific statements that revealed the "truth" to the market as to each of the three issues. Instead, the leakage model was premised on the assumption that Defendants' alleged fraud, without regard to the specific category of misrepresentation at issue, "was revealed slowly over time" by unspecified means between November 15, 2001 and the last day of the Class Period. Doc. 1361-2, Ex. 1 at 23-25. Plaintiffs' leakage model calculated the amount of artificial inflation in the stock price simply by measuring the difference between Household's stock performance from November 15, 2001 through October 11, 2002 and the performance of the S&P 500 and Financial Indexes during that same time frame, and then performing a regression analysis that controlled only for market and sector movements. *See id*. at 19, 23-25. Stock price movements that could not be explained by market forces were deemed inflation. According to these calculations, Household's stock price was artificially inflated by $17.81 at the start of the Class Period due to pre-Class Period misrepresentations and omissions, and the amount of artificial inflation fluctuated between $12.47 and $23.94 for most of the Class Period. A187-A201. Pursuant to Plaintiffs' instructions, the report does not indicate *any* connection between these fluctuations and Defendants' alleged fraudulent statements or partial disclosures during or before the Class Period and does not attribute specific inflation amounts to any of the three theories of fraud alleged.

Soon after the submission of Plaintiffs' loss causation report, Defendants again moved to dismiss Plaintiffs' complaint in its entirety. Doc. 1121. Defendants explained that Plaintiffs' loss causation theory relied solely on artificial inflation introduced by unspecified misrepresentations and omissions occurring before July 30, 1999—*i.e.*, misrepresentations and omissions the Court had already declared non-actionable due to the statute of repose. The District Court acknowledged that Defendants may have reached the "correct conclusion," but decided that it would "make[] more sense" to finish discovery and rule on the issue pursuant to a summary judgment motion. Doc. 1228-2, Tab 2 at 7, 10.

The parties completed discovery and established Plaintiffs' final position on the timing and source of the alleged artificial inflation in Household's stock price. Plaintiffs' expert confirmed that his models assumed the pre-existence of artificial inflation in the stock price as of the opening day of the Class Period. A419 (84:3-7), A422 (133:24-134:3). Plaintiffs likewise admitted that they had not established the source or inception date of the alleged inflation. Doc. 1228 ¶ 46 (explaining that

Plaintiffs' models were "not designed to determine the date on which inflation came into the stock").

Pursuant to the District Court's earlier instructions, Defendants moved for summary judgment based on the fatal deficiencies in Plaintiffs' loss causation theory and evidence. Doc. 1231-2. The motion explained that Plaintiffs had two related problems. First, they offered no evidence that specific misrepresentations made during the Class Period introduced artificial inflation. Second, they offered no evidence of how any inflation had entered Household's stock price even before the Class Period. Indeed, they expressly disclaimed the need to offer any such evidence. *Id.* at 7, 10.

The District Court did not rule on the motion, so the parties proceeded to file various other pretrial motions. Among other things, Defendants filed a *Daubert* motion to exclude Plaintiffs' loss causation models and related testimony. Doc. 1364. Defendants explained that Plaintiffs had acknowledged that their models merely *assumed* the elements of loss causation, and thus were not credible proof of anything at all. *Id.* at 12-22. Defendants underscored the admission by Plaintiffs' expert that his report was merely "consistent with" Plaintiffs' allegations and thus provided no support for the proposition that the alleged fraud actually caused any of Plaintiffs' alleged losses. Doc. 1364 at 17-18; *see* A415 (49:17-50:3).

Defendants also stressed that Plaintiffs' loss causation report made no effort to account for, much less exclude, any non-fraud firm-specific explanations for the decline in the price of Household's stock price, but instead treated the impact of all information not attributable to general market or industry-wide forces as resulting from the alleged fraud. *See* Doc. 1364 at 26-28; A417 (57:12-16). Indeed, Defendants explained, the leakage model involved little more than identifying days on which Household's stock underperformed the S&P Finance and 500 Indexes and then attributing the entirety of that underperformance to the purported "leakage" of information revealing Defendants' alleged fraud, regardless of whether the movement was statistically significant, regardless of whether there was a firm-specific non-fraud related explanation for Household's stock price movement, and regardless even of whether there was any evidence of information about Household (fraud-related or not) leaking into the market. *See* Doc. 1364 at 26-36.

Defendants attached to their motion an affidavit by Professor Bradford Cornell—a co-author of the sole authority relied on by Plaintiffs in support of their leakage model—highlighting the fundamental flaws in Plaintiffs' report. *See* Doc. 1361-2, Ex. 1 at 23-25 (citing Bradford Cornell & R. Gregory Morgan, *Using Finance Theory to Measure Damages in Fraud on the Market Cases*, 37 UCLA L. Rev. 883 (1990)). Professor Cornell explained that Plaintiffs' leakage model simply compared Household's stock performance to the S&P Indexes over an eleven-month window, "attribut[ing] any decline in the security price that is not due to movements in the market or the industry to disclosure of the fraud." A212. The "model assumes, without demonstrating, that all the news items that affect Household's stock price are related to the fraud." A213. Professor Cornell noted that numerous economists and courts have concluded that leakage "models such as the one employed by" Plaintiffs "do not adequately measure the extent a company's stock price decline can be attributed to leakage of fraud related news," and that therefore "any estimate of inflation produced by [such] model[s] cannot be relied upon." A213

The District Court denied Defendants' *Daubert* Motion in a minute order. A216.

C. Phase I Proceedings

1. The Transmogrification of the Leakage Model

With discovery complete, and still with no ruling on Defendants' motion for summary judgment—which had then been pending for nearly a year—the District Court began the Phase I trial. Plaintiffs' leakage model lacked a mechanism for parsing individual alleged misstatements or for isolating the impact of Plaintiffs' three theories of fraud and thus required the jury to either adopt the model wholesale or reject it altogether. In the midst of trial, however, Plaintiffs attempted to convert the leakage model into a means for identifying the inflationary impact from specific statements. Despite the absence of any evidence on which the jury could rely, and the all-or-nothing nature of the leakage model, Plaintiffs told the jury that it could disregard the model's inflation calculations, and "replace the inflation number with a zero" for each day of the Class Period until it found a misrepresentation. A475 (2966:6-10).

When providing the jury with instructions on loss causation, the Court gave the jury three mutually exclusive options: (1) conclude that Plaintiffs' leakage model provided a reasonable estimate of losses;

(2) conclude that Plaintiffs' specific disclosures model provided a reasonable estimate of losses; or (3) conclude that neither model provided a reasonable estimate of losses. A259. In the latter case, the verdict form instructed that the jury had completed its task. *Id.* The Court also emphasized that the jury could "only use one model—the one ... chosen—to" assess economic loss. *Id.*

Because Defendants believed that Plaintiffs' attempt to repurpose their leakage model mid-trial as a means for identifying the amount of inflation due to specific misstatements created confusion which the Court's proposed instruction did not resolve, Defendants objected to the instruction. Defendants noted that there was no evidentiary basis under Plaintiffs' leakage model to determine the inflation associated with a specific misstatement if the jury found that any of the alleged misstatements included on the verdict form were not actionable:

> [I]f the jury rejects any aspect of [the expert's] analysis, if they find that on any day reflected in his table there was not a corrective disclosure that he found or there was not a false statement that he relied upon in developing his table ... the jury has no guidance whatsoever on how to reflect that decision.... Once the[jury] ha[s] reached th[e] conclusion[] that on any given date the inflation was none, there's really—they have no guidance for how to determine the figure to use on any day following that doesn't just rely on speculation.

A529-A530 (4680:17-4681:18). The Court overruled the objection. A530 (4681:19-21).

2. The Instruction Regarding Responsibility for a Representation

Defendants also objected to the Court's proposed jury instruction on what it means to make a misrepresentation. The instruction directed jurors to assess whether a "defendant made, *approved or furnished information to be included in* a false statement of fact or omitted a fact that was necessary, during" the Class Period. A536 (4714:5-10) (emphasis added); A338. Defendants explained that the Court's inclusion of the "approved, or furnished information" language was a misstatement of governing law and that this error would adversely impact the jury's evaluation of not only the misrepresentation element of the 10b-5 claim, but also issues of scienter, secondary liability, and the allocation of liability among Defendants. *E.g.*, A495 (3853:9-16), A503 (3862:13-15). The Court itself noted the significant appellate issues presented by the instruction and theory of liability advanced by Plaintiffs. A490-A491 (3848:1-3849:1).

3. The Phase I Verdict

After overruling Defendants' objections, the District Court gave the jury a verdict form listing 40 statements made during the Class Period that Plaintiffs alleged were fraudulent. A262. For each statement, the jury answered three questions: (1) with respect to each of the four Defendants (Household, Gilmer, Schoenholz, and Aldinger) whether Plaintiffs "prevailed on their 10(b)/Rule 10b-5 claim" with regard to the statement; (2) if yes, which "issue"—predatory lending, re-aging, or the financial restatement—the statement misrepresented; and (3) whether the Defendant(s) that the jury found liable for the statement acted knowingly or recklessly in making the statement. A219. The jury also completed a Table listing the amount of artificial inflation in the stock price for each day during the Class Period. A288-A313. As noted, the jury was instructed that in determining the amount of artificial inflation, it could apply only one of Plaintiffs' two loss causation models. A259.

On May 7, 2009, the jury returned a verdict finding Defendants not liable for 23 of the 40 alleged misstatements included on the verdict form and that the other 17 statements were actionable. The first statement found actionable by the jury—which did not occur until nearly 20 months into the Class Period and which, chronologically, was the 14th statement of 40—was a March 23, 2001 *Origination News* article repeating part of a statement that had been previously released 10 days earlier: "Gary Gilmer, president and chief executive of Household's subsidiaries HFC and Beneficial said the company's 'position on predatory lending is perfectly clear. Unethical lending practices of any type are abhorrent to our company, our employees and most importantly our customers.'" A272, A232. The March 23, 2001 statement related to only one of Plaintiffs' three theories of fraud: the predatory lending theory. The verdict form explicitly indicated that this statement did not relate to the re-aging or financial restatement theories. A232.

The jury indicated on the verdict form that it had selected Plaintiffs' leakage model (and not the specific disclosures model) and attempted to apply that model to the 17 statements it found actionable, but not the other 23. A259. The results were a predictable (and predicted) disaster. Indeed, the result was inconsistent with the leakage model itself. Household's stock price went from $54.72 on March 22, 2001, to $58.12 on March 23, 2001. A195. The leakage model attributed 67 cents of this increase to "inflation" in Household's stock price rather than broader market and sector movements, but even that number was illusory, given the concession of Plaintiffs' expert that the 67 cent increase was due to a modeling artifact. *See, e.g.*, A477 (2968:2-5). Despite that and the fact that the March 23 statement pertained to only Plaintiffs' predatory lending theory, the jury attributed the sum total of inflation due to all three of Plaintiffs' fraud theories over the entire Class Period—$23.94—to that one statement. The jury entered "0" every day from July 30, 1999 through March 22, 2001. A288-A301. According to that calculation, the stock had an uninflated true value of $54.72 on March 22, and by the next day the stock was worth only $34.18, and reflected nearly $24 of inflation. *See* A195.

Following the verdict, Defendants moved for judgment as a matter of law or, in the alternative, a new trial. On July 28, 2010, the District Court denied that motion as premature. Doc. 1696. That same day, the Court entered a minute order denying Defendants' summary judgment motion, which had been filed more than two years earlier, as moot. A353.

D. Phase II Proceedings

On November 22, 2010, the District Court issued an order establishing Phase II procedures, which were intended to "address the issue of defendant's rebuttal of the presumption of reliance as to particular individuals as well as the calculation of damages as to each plaintiff." A355. The centerpiece of Phase II proceedings as they pertain to reliance was a claim form submitted by Plaintiffs that included the following question:

> If you had known at the time of your purchase of Household stock that defendants' false and misleading statements had the effect of inflating the price of Household's stock and thereby caused you to pay more for Household stock than you should have paid, would you have still purchased the stock at the inflated price you paid? YES__ NO__.

A362.

Over Defendants' objections, the District Court concluded that this question was sufficient to divide those claimants for whom a trial on reliance might be necessary—the YESes—from those where a trial was unnecessary—the NOs. The Court explained that the "question goes to the heart of the issue of individual reliance," and that a "NO" answer was essentially dispositive as to whether the presumption could be rebutted. *Id.* The Court also stated that relying on the claim form question "sensibly resolves the tension between the rebuttable presumption of reliance and the practicalities and purposes behind Federal Rule of Civil Procedure 23." *Id.* Beyond the distribution of this single question, the only reliance-related discovery permitted pertained to whether a limited number of institutional claimants possessed non-public information. *See* A362-A363; A373.[2]

Deprived of the information necessary to address reliance, which was solely in the possession of Plaintiffs, Defendants were largely constrained to rely on the Phase I proceedings in their efforts to rebut the presumption of reliance. Defendants explained that even putting aside the broader problems with the jury verdict, the Phase I verdict would preclude awarding damages to the vast majority of class members. *See* Doc. 1780. Defendants submitted a second affidavit by Professor Cornell, who explained that "as a settled principle of economic and finance theory, if ... the amount of 'artificial inflation' does not increase[] by a statistically significant amount as a consequence of an alleged misrepresentation, then the market did not rely upon the alleged misrepresentation and the 'fraud on the market' presumption has been rebutted." A384. Here, the jury attributed all the inflation in Household's stock price to a single statement that related only to Plaintiffs' "predatory lending" theory. In

[2] Defendants were precluded from conducting any discovery relevant to the rebuttal of reliance during Phase I proceedings. *See* Docs. 225, 762, 935.

doing so, Professor Cornell observed, the jury necessarily and expressly found no inflation attributable to the "restatement" or "re-aging" issues, with the exception of a one-week period relating to a statement on December 4, 2001 regarding re-aging. A383-A385.

Professor Cornell also reiterated the irrationality of the Phase I verdict. As discussed, the jury assigned the full $23.94 of artificial inflation from the leakage model to a statement relating to only the issue of predatory lending. But, Professor Cornell explained, "there is no valid basis under" the leakage "model by which the full $23.94 inflationary price impact can be assigned to the March 23, 2001 statement on the single issue of 'Predatory Lending.'" A387. To the contrary, although Plaintiffs' leakage model did not and could not disaggregate inflation into components related to each of the three fraud allegations, Plaintiffs' own analysis relies on the proposition that the numerical impact of each component must be non-zero. Accordingly, Professor Cornell concluded, the Phase I jury verdict not only is unsupported by any evidence presented during trial, but is also "squarely inconsistent with" the leakage model itself and "contrary to the established principles of finance and economics that underlay the use of such a model." A388. Tellingly, Plaintiffs did not submit an affidavit by their expert defending the jury's application of the leakage model or its verdict.

Despite Professor Cornell's explanation of how the jury verdict necessarily rebutted the presumption of reliance, the District Court held that every claimant who answered "NO" to the claim form was "entitled to judgment as to liability because defendants have not created a triable issue of fact as to his reliance on price." A402. In the same order, the District Court appointed a special master to identify "(1) the claims on which plaintiffs are entitled to judgment as a matter of law and the amount of each such allowed claim; (2) the claims on which defendants are entitled to judgment as a matter of law; and (3) the claims that must be resolved at trial," which are primarily the claims where a claimant answered "YES" to the claim form question. A412.

E. Post-Trial Motions and Entry of Judgment Pursuant to Rule 54(b)

While special master proceedings were ongoing, the District Court decided it was the appropriate time to review Defendants' motions for judgment as a matter of law and for a new trial. Defendants contended, among other things, that they were entitled to judgment because Plaintiffs failed to meet their burden of proof on loss causation. Plaintiffs' proffered models, which were their only proof of loss causation, simply assumed that inflation was present in Household's stock price at the beginning of the Class Period, failed to establish a causal connection between alleged misrepresentations and losses, and failed to account for non-fraud firm specific factors that explained some (or all) of the artificial inflation identified. Defendants asserted that, at a minimum, a new Phase I trial was made necessary by the irrational and unsupported application of Plaintiffs' leakage model, which resulted in the attribution of the sum total of artificial inflation asserted by Plaintiffs due to all three alleged strands of fraud over multiple statements to a single statement related to only one of those three theories. Defendants also contended that a new trial was required because the jury was wrongly instructed on what it means to make a representation in conflict with *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), which infected several aspects of the jury's verdict. Finally, Defendants argued that the District Court had deprived them of a proper adjudication of the element of reliance and that, in any event, the Phase I verdict itself rebutted reliance with respect to the vast majority of the representations found fraudulent. *See* Docs. 1866, 1867.

The District Court denied Defendants' motion. As to the glaring shortcomings of Plaintiffs' loss causation proof, the irrational application of Plaintiffs' leakage model, and the Court's circumscribed view of rebuttal of the presumption of reliance, the Court said only that it had "carefully reviewed all of the filings and can discern no basis for relief." SA5. The Court did expound on its reasons for denying Defendants' new trial motion with respect to *Janus*, stating that "[b]ecause the instant case dealt with corporate insiders" and not "third party entit[ies]" the instruction was consistent with *Janus*, and that, "even assuming *arguendo* that the instruction included a misstatement" of the law, "Defendants cannot show prejudice." *Id.*

On Plaintiffs' motion, the District Court entered judgment regarding claimants with 10,092 claims, valued at $1,476,490,844, pursuant to Rule 54(b). *Id.* In doing so, the Court expressly concluded that: (1) judgment against Defendants on these claims is final; (2) there was no just reason for delay; (3) there was no concern regarding wasting judicial resources because the legal issues associated with these claims "are dispositive of the entire class"; and (4) the court could not "ascertain any basis on which" the "claims will be mooted by future events." SA6.

The Court also awarded pre-judgment interest in the amount of $986,408,772, bringing the total judgment to $2,462,899,616. SA10.

SUMMARY OF ARGUMENT

The proceedings below are a case study in how district courts should not handle a securities class action proceeding, particularly one in which plaintiffs seek billions of dollars in damages. Early on Defendants identified fatal flaws with Plaintiffs' effort to prove loss causation. Rather than identifying specific allegedly fraudulent statements within the Class Period that introduced inflation into Household's stock price, or that maintained inflation attributable to any identified pre-Class Period misrepresentation, Plaintiffs insisted that they could just assume inflation was in the share price from the beginning based on unidentified pre-Class Period misrepresentations and omissions. The District Court sensed there was something wrong with that theory, but rather than rule on Defendants' motion for summary judgment, permitted Plaintiffs to proceed to trial. Then, the Court allowed things to go from bad to worse, allowing Plaintiffs to convert their already-flawed "leakage" model into something it never purported to be—a method for attributing inflation to specific misrepresentations within the Class Period. The results were a predictable disaster and attribute absurd consequences to a single relatively innocuous statement relating to only one of Plaintiffs' three fraud theories.

But the errors do not stop there. The Court made a wholly independent error in instructing the jury regarding responsibility for particular representations. That instruction was erroneous and objected to when given, but its invalidity is manifest in light of the Supreme Court's intervening decision in *Janus*. The District Court's effort to paper over this glaring instructional error is deeply flawed, and the error was profoundly prejudicial.

Finally, in the Phase II proceedings, the District Court eliminated any meaningful ability for Defendants to dispute reliance on an individualized basis. The Supreme Court has, at least for the time being, created a rebuttable presumption of reliance. The District Court effectively converted the presumption into an irrebuttable one—reducing Defendants' defense to a Plaintiff-skewed (and Plaintiff-provided) question that tested nothing beyond reading comprehension and impermissibly baked the *Basic* presumption into a question designed to test it. And all this was expressly done in the name of balancing away

Defendants' rights in order to accommodate the needs of the class action device. A court adjudicating a securities class action in which plaintiffs seek billions of dollars in damages has a responsibility to ensure that the defendants' rights are fully respected. Yet here the District Court expressly compromised those rights. Common sense and the Rules Enabling Act forbid that result.

STANDARD OF REVIEW

This Court reviews the denial of a motion for judgment as matter of law de novo. *Ross v. Black & Decker, Inc.,* 977 F.2d 1178, 1182 (7th Cir. 1992). Judgment as a matter of law is appropriate when "the non-moving party has failed to make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

This Court reviews the denial of a motion for a new trial for an abuse of discretion. *See Ross*, 977 F.2d at 1182. A new trial is warranted when "the clear weight of the evidence is against the jury verdict," *Scaggs v. Consol. Rail Corp*., 6 F.3d 1290, 1293 (7th Cir. 1993), or when a jury verdict is internally "inconsistent," *ABM Marking, Inc. v. Zanasi Fratelli,* *S.R.L.*, 353 F.3d 541, 543 (7th Cir. 2003), or "hopelessly confused," *Turyna v. Martam Construction Co.*, 83 F.3d 178, 179 (7th Cir. 1996).

"Whether jury instructions correctly state the law is a matter [the Court] review[s] de novo," *United States v. Olofson*, 563 F.3d 652, 656 (7th Cir. 2009), and a new trial is mandated when a jury is given an erroneous legal instruction on a fundamental element of a cause of action that results in prejudice. *See Dawson v. New York Life Ins. Co.*, 135 F.3d 1158, 1165 (7th Cir. 1998). "Prejudice to the complaining party includes the possibility that the jury based its decision on incorrect law." *Id.* Moreover, "[w]hen a jury could have based its verdict on either correct or incorrect statements of the law, its verdict must be set aside even if the verdict may have been based on a theory on which the jury was properly instructed." *Id.*

ARGUMENT

In every private securities fraud case—including class actions—plaintiffs must prove that defendants: (1) made a material misrepresentation or omission; (2) with scienter; (3) in connection with the purchase or sale of a security; (4) upon which the plaintiff relied; (5) that the plaintiff suffered an economic loss; and (6) that the material misrepresentation was the cause of that loss. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 157 (2008). The District Court proceedings in this case were riddled with errors from start to finish, *see* SA2-SA4, but the errors with respect to three of these critical elements—loss causation, the basic question of what it means to "make" an alleged misrepresentation, and reliance—were particularly pronounced and each independently requires reversal of the massive judgment on appeal.

I. Plaintiffs Failed To Prove Loss Causation.

"To prevail on the merits in a private securities fraud action, investors must demonstrate that the defendant's deceptive conduct caused their claimed economic loss. This requirement is commonly referred to as 'loss causation.'" *Halliburton*, 131 S. Ct. at 2183. To prove loss causation, Plaintiffs were required to "show both that [Household's] alleged misrepresentations artificially inflated the price of [Household] stock and that the value of the stock declined once the market learned of the deception." *Ray v. Citigroup Global Markets, Inc.*, 482 F.3d 991, 995 (7th Cir. 2007). Plaintiffs also needed to prove that their claimed losses could not "be explained by some additional factors revealed [] to the market," such as company-specific news that adversely impacted the value of the stock. *Halliburton*, 131 S. Ct. at 2185.

Plaintiffs' evidence was legally insufficient, and judgment as a matter of law should have been granted, for at least three reasons. First, and most fundamentally, Plaintiffs made no attempt to prove how Household's stock price became inflated in the first instance. Both of their proffered models—the only proof submitted by Plaintiffs to prove loss causation—expressly and unabashedly assumed that Household's stock price was inflated on the first day of the Class Period due to unspecified pre-Class Period misrepresentations and omissions, and Plaintiffs' expert acknowledged that his "analysis [wa]s premised on [this] assumption" per Plaintiffs' instruction. Doc. 1361-6, Ex. 3 at 25-26. According to Plaintiffs' specific disclosures model, Household's stock price was already inflated by $7.97 on the first day of the Class Period as a result of unidentified pre-Class Period misstatements, and per the leakage model more than twice that much inflation—$17.81—was already baked into the share price at the outset. A166, A187. That is likely why Plaintiffs' expert underscored that the loss causation models Plaintiffs asked him to construct were merely "consistent with" Plaintiffs' allegations, not that they provided legally sufficient proof of those allegations. A415 (49:10-50:3).

The District Court never tried to explain how allowing Plaintiffs to attribute alleged inflation to unidentified pre-Class Period statements was permissible. Indeed, as this Court has made clear, Plaintiffs cannot free themselves of their burden to "pin down *when* the stock's price was affected by the fraud." *Schleicher v. Wendt*, 618 F.3d 679, 687 (7th Cir. 2010). Nor can they avoid their obligation to explain how Household's stock price became artificially inflated by roughly estimating how much overvaluation came out of the stock during the Class Period, positing that what went down must have gone up, and calling it a day.

Plaintiffs' efforts to rely on unidentified pre-Class Period statements rather than explain how and when inflation entered Household's stock price is a giant step beyond even the broad "inflation maintenance" theories that have been countenanced by some courts. In cases such as the Eleventh Circuit's decision in *FindWhat Investor Group v. FindWhat.com*, 658 F.3d 1282 (11th Cir. 2011), courts have permitted plaintiffs to rely on inflation introduced by prior non-actionable statements when those representations were reconfirmed by later actionable statements. But here, Plaintiffs made no effort to identify any pre-Class Period misstatements that introduced inflation into Household's stock price, let alone link such representations to confirmatory Class Period statements that maintained that inflation.[3]

Second, Plaintiffs failed to account for non-fraud firm-specific explanations for the decline in value of Household's stock during the Class Period. In *Dura Pharmaceuticals, Inc. v Broudo*, 544 U.S. 336 (2005), a unanimous Supreme Court recognized that even when securities fraud takes place, investment losses may not result from the fraud—"changed economic circumstances, changed investor expectations, new industry-specific or firm-specific factors, conditions, or other events, ... taken separately or together [may] account for some or all of th[e] lower price." *Id.* at 343. In recognition of this fact, courts have consistently held that economic theories that fail to separate out losses caused by the alleged fraud from losses caused by everything else are

[3] Moreover, Plaintiffs' roundabout attempt to rely on unidentified pre-Class Period statements as the source of inflation not only is unfaithful to the requirements of loss causation, it also creates a clear path for obscuring serious statute of repose problems. The District Court correctly trimmed Plaintiffs' asserted Class Period to July 30, 1999 through October 11, 2002 because of the statute of repose. Undeterred, Plaintiffs' models allowed them to recover for inflation allegedly baked into the share price on July 30, 1999, notwithstanding the time bar imposed by the statute of repose.

insufficient. *See, e.g.*, *In re Omnicom Group, Inc. Sec. Litig.*, 541 F. Supp. 2d 546, 554 (S.D.N.Y. 2008) ("Because the law requires the disaggregation of confounding factors, disaggregating only *some* of them cannot suffice to establish that the alleged misrepresentations actually caused Plaintiffs' loss."), *aff'd*, 597 F.3d 501 (2d Cir. 2010); *In re REMEC Inc. Sec. Litig.*, 702 F. Supp. 2d 1202, 1273-74 (S.D. Cal. 2010) (rejecting a leakage model for failing to control for firm-specific variables); *United States v. Ferguson*, 584 F. Supp. 2d 447 (D. Conn. 2008) (same). Yet Plaintiffs did not meaningfully attempt to control for non-fraud firm-specific information that accounted for some—or even all—of the alleged decline in value of Household's stock during the Class Period. *See* A417 (57:12-16). As Plaintiffs explicitly acknowledged at trial, whether a stock price movement was "purely fraud related, combined fraud related, *or not at all fraud related*, they were all included in the leakage model." A473-A474 (2960:14-2960:17) (emphasis added).[4]

[4] At trial, Plaintiffs speculated that all non-fraud, firm-specific disclosures over the Class Period "cancel[ed] each other out," A432 (2684:6). There was, however, no evidence submitted to establish that implausible assertion. Moreover, even if such evidence existed it was still improper to fail to systematically address such movements because the specific dates of non-fraud related movement would be critical to assessing damages for any particular plaintiff depending on the dates of stock trades. As just one example, the leakage model included a 10-day period between July 5 and July 15, 2002, during which there was no identified news, fraud-

Plaintiffs' reliance on a leakage theory did not absolve them of their obligation to control for non-fraud explanations for the alleged decline in the value of Household's stock. As the court in *In re Williams Securities Litigation* explained, "*Dura* leaves no room for doubt that even where a securities fraud plaintiff proceeds on a 'leakage' theory of corrective disclosure, he must still establish that the lower price reflects the fraud-related inflation and not" non-fraud related factors such as those listed in *Dura.* 496 F. Supp. 2d 1195, 1266-67 (N.D. Okla. 2007), *aff'd*, 558 F.3d 1130 (10th Cir. 2009); *see also Nuveen Mun. High Income Opportunity Fund v. City of Alameda*, 730 F.3d 1111, 1123 (9th Cir. 2013) (granting summary judgment for defendant where plaintiffs' expert's "theories of loss causation could not distinguish between loss attributable to the alleged fraud and loss attributable to non-fraud related news and events"); *Fener v. Operating Eng'rs Constr. Indus. & Misc. Pension Fund*, 579 F.3d 401, 410 (5th Cir. 2009) (holding that a damages model "that shows only how a 'stock reacted to the *entire bundle* of negative

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related or otherwise, yet that model indicates a $2.52 decrease in inflation during that period. A202. A class member who purchased stock at the beginning of that 10-day period and sold it at the end would be able to recover, despite the fact the model identified no fraud-related movement during this period. Asserting some fraud-related movement elsewhere "cancelled out" this decline does not cure the legal insufficiency of this outcome.

information,' rather than examining the 'evidence linking the *culpable* disclosure to the stock price movement'" is insufficient. (emphasis in original)).

Third, Plaintiffs' leakage model—the only loss causation theory credited by the jury—failed "to show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss." *Halliburton*, 131 S. Ct. at 2186 (emphasis in original); *see Dura*, 544 U.S. at 342 ("an inflated purchase price will not itself constitute or proximately cause the relevant economic loss"). Rather, the model merely assumed that all of the posited inflation in Household's stock price at the outset of the Class Period exited the stock price by the end of the Class Period without identifying any specific corrective disclosures with particular "deflationary" effects. *See, e.g.*, A423 (138:14-18). The remainder of that model's analysis is no more than an exercise in assigning stock declines to dates between July 30, 1999 and October 11, 2002, so that all of the inflation assumed to be in the stock at the beginning of the Class Period exits the stock price by the end of the Class Period. But that cannot demonstrate the loss caused by any particular statement or corresponding disclosure, and no evidence submitted at trial made up for these fatal deficiencies.

Courts, including this Court, have uniformly recognized that a plaintiff must prove a causal connection between an alleged misrepresentation and the loss the plaintiff suffers. *See Tricontinental Indus., Ltd. v. Pricewaterhouse-Coopers, LLP*, 475 F.3d 824, 842 (7th Cir. 2007) (plaintiff must establish "a causal connection between the material misrepresentation and the loss"); *In re Williams Sec. Litig.*, 558 F.3d at 1137 ("Without showing a causal connection that specifically links losses to misrepresentations, [Plaintiff] cannot succeed."); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 41 (2d Cir. 2009) (plaintiff must "link[]" "the decline in the price of [the] stock" with "corrective disclosures"). The mere fact that a stock declines over time is not enough. The reasons for that rule are especially apparent where, as here, stock prices in an entire sector—and, indeed, the entire market—were declining. *See supra* p. 8.

"A plaintiff cannot simply state that the market had learned the truth by a certain date and, because the learning was through a gradual process, attribute all prior losses to the revelation of the fraud." *In re*

Williams, 558 F.3d at 1138. "The inability to point to a single corrective disclosure does not relieve the plaintiff of showing how the truth was revealed; he cannot say, 'Well, the market *must* have known.'" *Id.* But that is exactly what Plaintiffs got away with here, and, again, the District Court never explained how or why that was permissible.

These failures, both individually and cumulatively, resulted in a complete failure of evidence on the critical element of loss causation. Defendants, therefore, were entitled to judgment as a matter of law, and this Court should remand the case with instructions to enter judgment in favor of Defendants.

II. The Jury's *Ad Hoc*, Partial Adoption Of The Leakage Model Resulted In An Irrational And Unsupported Verdict.

Plaintiffs failed to offer legally sufficient proof of loss causation. But to make matters worse, the District Court improperly permitted Plaintiffs to invite the jury to use the leakage model in ways that the model could not bear. Predictably, the result was a jury verdict that is manifestly contrary to the leakage model itself, facially absurd, and without evidentiary support, requiring a new trial. *See, e.g.*, *ABM Marking*, 353 F.3d at 543; *Turyna*, 83 F.3d at 179.

A. The Jury's Finding That the March 23, 2001 Statement Introduced the Leakage Model's Sum Total of Inflation Into the Stock Price Is Foreclosed by the Model Itself.

According to the jury verdict, a single March 23, 2001 statement—a third-party partial reprint of a 10-day-old statement—somehow caused Household's stock to go from having zero of its $54.72 per share price attributable to inflation on March 22, 2001, to having $23.94 of its $58.12 per share price attributable to inflation on March 23, 2001. A301; A195. That facially absurd finding was wholly precluded by the leakage model itself, which determined $23.94 to be the maximum amount of inflation attributable to the combined impact of Plaintiffs' three fraud theories over the entire Class Period.

The jury's assignment of the full $23.94 of inflation to a statement relating only to predatory lending requires a new trial for at least three reasons. First, it is legally impossible to assign the entire $23.94 to a statement relating solely to one of Plaintiffs' three fraud theories. Plaintiffs' evidence was that $23.94 was the maximum aggregate inflationary stock price impact based on the combined effect of the three alleged frauds. *See* A387. The jury's conclusion that the full $23.94 is attributable to a statement addressing only predatory lending (and reiterating part of a press release from 10 days earlier) is irreconcilable with the leakage model itself. As Professor Cornell explained, "when, as here, it has been alleged that a securities fraud involved multiple 'issues,' the 'Leakage Model' cannot be used to determine the amount of 'artificial inflation' attributable to just one of those 'issues' ... This is a well-established principle of finance and economics...." A385. That is why Plaintiffs' expert "never stated, and could never state in a manner consistent with economic and finance theory, that his 'Leakage Model' provides a means to determine the inflationary price impact associated with any one individual issue among the three fraudulent issues alleged by Plaintiffs." A386.

The jury's attribution of the sum total of the leakage model's inflation to one of the three alleged frauds gave rise to the same fundamental error requiring reversal in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). In *Comcast*, the Court held that a class action antitrust suit was wrongly certified because certification had been predicated on a model that did not provide a causal link between the plaintiff's one remaining theory of liability and damages. The plaintiffs in that case initially "proposed four theories of antitrust impact," but the district court rejected all but one. *Id*. at 1430. The district court then allowed the case to proceed despite the fact that plaintiffs' damages model "did not isolate damages resulting from any one theory of antitrust impact," but instead continued to calculate damages resulting from all four theories of unlawful conduct. *Id*. at 1431. The Supreme Court reversed the district court because there was "no question that the model failed to measure damages resulting from the particular antitrust injury on which [Comcast's] liability in this action is premised." *Id*. at 1433. "The methodology might have been sound ... if all four of th[e] alleged [market] distortions remained in the case," but once that was no longer true plaintiffs' theory of damages became untenable. *Id*. at 1434. The same is true here. The leakage model did not offer any mechanism for isolating the economic impact of a single theory of fraud. As in *Comcast*, the model was not designed to accommodate such tailoring; it calculated prix fixe prices for all three theories together across the Class Period, not à-la-carte options for particular theories.

Second, and relatedly, the leakage model did not permit the jury to isolate the amount of inflation resulting from any particular statement. It was designed, albeit in a flawed manner, to calculate the total extent of the overvaluation of Household's stock over the Class Period. Because Plaintiffs' inflation calculations under the leakage model are not, and cannot be, separated into specific amounts attributed to individual alleged misstatements, the jury had no means for determining what portion, if any, of the $23.94 of artificial inflation could possibly be attributed to the March 23 statement.

Even assuming against fact and evidence that the leakage model could be used to isolate the inflation due to a specific misstatement, the only possible way the jury could have done so with respect to the March 23rd statement would have been to look to the difference between the inflation in the stock on March 22nd and March 23rd. Assuming that such an approach is viable for argument's sake, the jury would have found inflation of only 67 cents, because the model suggested that 67 cents of the relatively modest upward movement in Household's stock price on that day was attributable to overvaluation. The jury instead accepted the invitation to put zeroes all the way down, and then attributed the model's full inflationary impact over the entire Class Period to a single statement on a single day. But once the jury found Defendants not liable for the first 13 statements challenged by Plaintiffs over the first 20 months of the Class Period and, accordingly, found no actionable inflationary impact associated with those statements, the leakage model no longer provided the jury with any basis to determine the inflationary impact of the March 23 statement standing alone. As Professor Cornell explained, "there is no valid basis under the jury verdict, and the jury's selection and application of" the "'Leakage Model,' to determine the actual inflationary price impact attributable to" the March 23 statement. A388.

Finally, the jury's attribution of $23.94 to a single statement necessarily (and improperly) included inflation resulting from misstatements for which the jury rejected liability. The model presented to the jury calculated artificial inflation as of March 22, 2001, to be $23.27, thereby attributing at most an increase of 67 cents to the new misstatement made the next day on March 23, 2001. A195. The other $23.27, or at least part thereof, was necessarily introduced by earlier misstatements for which the jury rejected liability. The jury's incorporation of inflation resulting from misstatements for which no liability was found—reminiscent of the model's flawed assumption of preexisting inflation resulting from unidentified prior misstatements—further confirms the verdict's internal inconsistencies.

Plaintiffs' leakage theory was, in short, an all-or-nothing proposition. The leakage model did not offer any mechanism for isolating the economic impact of a single theory of fraud, let alone a single statement. It was not designed for use by a jury to distinguish between purported inflation from the 17 statements found fraudulent and purported inflation from the 23 statements the jury found nonfraudulent. Once the jury decided not to adopt Plaintiffs' theory wholesale, adopting it piecemeal was not an option. The District Court offered only predictable silence as to why the jury's irretrievably flawed verdict did not warrant a new trial.

B. There Is No Evidentiary Basis for Attributing $23.94 of Artificial Inflation to the March 23, 2001 Statement.

More fundamentally, there is no record evidence—*none*—to support the jury's finding that $23.94 of inflation was introduced into the stock price by a single statement (partially) republished on March 23, 2001, but actually made 10 days earlier. As noted, the model itself attributed only 67 cents of inflationary impact to that day, and Plaintiffs admitted that even that 67 cents was a product of the model's overall methodology, not a direct result of the statement that day. *See, e.g.*, A477 (2968:2-5). Given this complete absence of evidence, the jury could not properly determine that Household's stock price went from having zero of its $54.72 per share price attributable to inflation on March 22, 2001, to having $23.94 of its $58.12 per share price attributable to inflation on March 23, 2001.

The leakage calculations adopted by the jury for the remaining 16 statements found actionable fare no better. Not a single one of those statements bears any rational relationship to the supposed inflationary movement in Household's stock price. Indeed, 14 of those statements occurred on dates on which the jury, applying the leakage model designed for other purposes, found no increase in inflation. *See* Doc. 1634-2 at 18-19. For example, although the jury found that a March 28, 2001 statement was fraudulent, the leakage model and thus the jury's nonsensical verdict reflects no corresponding increase in inflation on that date. A301. It is a flat line. The same is true for the April 18, May 9, July 18, August 10, October 17, and November 14, 2001 statements; the January 16, March 13, April 9, May 10, and July 17, 2002 statements; and the two August 14, 2002 statements. A302-A312. As for the two remaining statements, Plaintiffs confirmed that the inflationary increases reflected in the leakage model were *not* attributable to the false statements. While the model attributed some inflation to stock movements on December 4, they had nothing to do with the misrepresentation the jury found on that date, because that statement was not made until after trading hours, meaning any increase in inflation would have occurred on December 5, 2001, as Plaintiffs confirmed. A438 (2875:5-11); A447 (2884:25-2885:7). The leakage model found, however, no increase in inflation on December 5th. A199. It was another flat line. As for the final date, April 17, 2002, the model attributed a mere 6 cents of inflation, and Plaintiffs admitted that there was no statistically significant price increase that day. A468 (2909:16-18).

Again, the District Court made no effort to explain how the jury's nonsensical verdict could be reconciled with Plaintiffs' evidence.

III. The District Court Wrongly Instructed The Jury On What It Means To "Make" An Alleged Misrepresentation.

A new trial is also required because the District Court incorrectly instructed the jury on the central element of what it means to "make" an alleged misrepresentation. The jury instruction on the first element of the Rule 10b-5 claim directed jurors to address whether "the defendant made, *approved or furnished information to be included in* a false statement of fact ...." A536 (4714:5-10) (emphasis added); A338. Defendants repeatedly objected to the Court's inclusion of the "approved or furnished information" language and underscored that this error of law would adversely impact not only who can be held liable for specific statements, but also the issues of scienter and secondary liability. The District Court overruled the objection but acknowledged that the instruction raised a potential significant issue for appeal. A490-A491 (3848:1-3849:1).

Janus Capital Group, Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011), leaves no doubt that the instruction was erroneous and that a new trial is thus required. In *Janus*, the Supreme Court squarely held that the phrase "make[s] any untrue statement of a material fact" in Rule 10b-5 applies only to the person who "'makes' a statement by stating it." *Id*. at 2301, 2302. The Court expressly rejected the position that furnishing information to be included in a statement suffices. *Id*. at 2302-03 (holding that the Government's view that one who "'provides the false or misleading information that another person then puts into the statement'" actually "makes" the statement misstates the law). The

Court also made clear that "'substantial assistance'" in formulating the content of a representation is not enough. *Id.* at 2302 (noting that only the speaker, not a speechwriter, can be responsible under Rule 10b-5).

Plaintiffs' primary argument in support of the instruction, which the District Court endorsed, was that *Janus* applies only to "third party entit[ies]" and not "corporate insiders." SA5. But that contention is irreconcilable with *Janus* itself. First, nothing in *Janus* suggests that "corporate insiders" should be held to a different standard. Nothing in the text of § 10(b) or Rule 10b-5 differentiates between insiders and outsiders, nor did anything in the Court's opinion in *Janus*. To the contrary, *Janus* established a general principle that only the individual that actually *makes* a false statement can be held accountable for that statement.

Moreover, the District Court's limited view of *Janus* is contrary to *Janus*'s reasoning. The Supreme Court explained that the rule announced in *Janus* followed directly from the Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994), which held that there is no private right of action against aiders and abettors—persons who "contribute 'substantial assistance' to the making of a statement but do not actually make it." *Janus*, 131 S. Ct. at 2302. A broader reading of "make," the Court said, would "substantially undermine" *Central Bank* by making people who provide "substantial assistance" liable as *primary* violators for "making" false statements. The District Court's limited view of *Janus* would do exactly that for "corporate insiders."[5]

Courts have already rejected the strained reading of *Janus* adopted by the District Court. For example, in *In re UBS Ag Securities Litigation*, No. 07-11225, 2012 WL 4471265 (S.D.N.Y. Sept. 28, 2012), plaintiffs "attempt[ed] to read into *Janus* a distinction that does not appear in the opinion—namely, that although the opinion applies to a third-party advisor, it does not apply to 'corporate insider[s].'" *Id.* at *10. But "while it is true that *Janus* might 'not alter the well-established rule that a corporation can act only through its employees and agents,' it is nonetheless also true that a theory of liability premised on treating corporate insiders as a group cannot survive a plain reading of the *Janus*

[5] This Court has subsequently noted that a plaintiff may not "get around" *Janus* by asserting that a defendant who did not "make" a statement nonetheless has a duty to correct a misstatement made by another—"no statute or rule creates such a duty." *Fulton Cnty. Emps. Ret. Sys. v. MGIC Inv. Corp.*, 675 F.3d 1047, 1051-52 (7th Cir. 2012).

decision." *Id.*; *see also, e.g.*, *Haw. Ironworkers Annuity Trust Fund v. Cole*, No. 10-371, 2011 WL 3862206, at *4 (N.D. Ohio Sept. 7, 2011) ("The Court's interpretation of the verb 'to make' is an interpretation of the statutory language in question in this case, and therefore cannot be ignored simply because the defendants are corporate insiders.").

The District Court's erroneous instruction was prejudicial and contributed to an irrational and unsupportable verdict. As this Court has recognized, "the possibility that the jury based its decision on incorrect law" is itself prejudicial. *Dawson*, 135 F.3d at 1165. Here, there is no question that the jury based its decision on incorrect law—the instruction given is irreconcilable with *Janus*, and a new trial is required.

Moreover, the prejudice manifested by the District Court's error is readily apparent from even a casual review of the jury verdict. The jury's treatment of the critical March 23, 2001 statement is a prime example. The statement in the March 23, 2001 *Origination News* article, to which the jury assigned the entire $23.94 of artificial inflation, was attributed solely to Gilmer as "president and chief executive of Household's subsidiaries HFC and Beneficial." A272. The jury found that Gilmer made this statement "recklessly," but then—quite counterintuitively—

found that both Household and its CEO, Aldinger, "knowingly" made the statement. A232. After *Janus*, this scenario is not just counterintuitive, but legally impossible. The only conceivable explanation for finding that the person to whom the March 23, 2011 statement was attributed made that statement "recklessly," but finding Aldinger and Household did so "knowingly" is the District Court's misguided jury instruction. Indeed, that disconnect demonstrates both that the misguided instruction impacted the verdict and infected the jury's assessment of scienter.[6]

The anomalies created by the mistaken instruction do not end there. For example, Gary Gilmer was found responsible as a "maker" of representations in Household's Form 10-K and 10-Q filings. Yet the evidence showed that, at most, Gilmer "furnished" limited information used by others to prepare the filings. It is likely that the jury would not have found that Gilmer "made" the identified statements had it been properly instructed under *Janus*. Indeed, under a proper application of

[6] The District Court failed to address the obvious injustice of imposing liability on Defendant David Schoenholz notwithstanding that the jury found him not liable as to the March 23, 2001 statement that introduced all the purported inflation. Because the jury found that all inflation in the market price of Household stock was attributable to the March 23, 2001 statement, Schoenholz was entitled to judgment as a matter of law.

the law, Gilmer could not have been found to be a "maker" of 16 of the 17 statements found by the jury to be actionable.

Likewise, the jury found that Gilmer and Schoenholz "made" a statement that was, in fact, made solely by Aldinger during a Goldman Sachs presentation on December 4, 2001. A279. Similarly, the jury found that Gilmer and Aldinger "made" statements that, in fact, were made solely by Schoenholz at a conference on April 9, 2002. A246.[7]

Given the manifestly erroneous nature of the jury instruction after *Janus* and its clear impact on the verdict a new trial is plainly required.

IV. The District Court Deprived Defendants Of A Meaningful Opportunity To Rebut The Presumption Of Reliance.

The District Court's errors continued into Phase II, when the Court—in an effort to ensure that this case could proceed as a class action—deprived Defendants of any meaningful opportunity to rebut the

[7] Plaintiffs argued below that the District Court's flawed instruction was of no moment because the "approved or furnished" language was omitted in a restatement of the instruction later on in the document. Doc. 1876 at 36. But that later omission did nothing to correct the misstatement of law that was conveyed to the jury. This Court has underscored that "[w]hen a jury could have based its verdict on either correct or incorrect statements of the law, its verdict must be set aside even if the verdict may have been based on a theory on which the jury was properly instructed." *Dawson*, 135 F.3d at 1165. Moreover, the jury's deeply confused attribution of various statements to Defendants who in no way "made" those statements makes plain that the jury applied the more detailed and clearly erroneous instruction which *Janus* flatly prohibits.

presumption of reliance as to individual class members. That was an independent and clear reversible error.

Reliance "is an essential element of the § 10(b) private cause of action," ensuring "a proper connection between a defendant's misrepresentation and a plaintiff's injury." *Halliburton*, 131 S. Ct. at 2184. Although the Supreme Court has endorsed—at least for the time being—a rebuttable presumption of reliance based on the fraud-on-the-market theory, it has repeatedly stressed that "'the presumption,' ... is 'just that, and [can] be rebutted by appropriate evidence.'" *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013) (quoting *Halliburton*, 131 S. Ct. at 2185). "Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption." *Basic*, 485 U.S. at 248.

In establishing Phase II procedures, the District Court noted that it "receive[d] very little guidance from other courts because securities fraud class actions have rarely proceeded to trial, let alone reached subsequent proceedings." A356. True enough. The hydraulic pressures for settlement usually take their toll. But when a case actually goes to trial, both the securities laws and the foundational principles of class actions demand that defendants have a meaningful opportunity to rebut the presumption of reliance. The District Court's refusal to allow Defendants to contest reliance in any meaningful way, especially in light of the Phase I verdict's undermining of the presumption, was erroneous under both the securities laws and the rules respecting the proper role of the class action device.

A. The District Court's Conduct of Phase II Proceedings Rendered Defendants' Purported Failure to Rebut the Presumption of Reliance a Foregone Conclusion.

The District Court here applied an overly muscular, almost cartoonish version of *Basic*'s presumption of reliance, which rendered the presumption effectively irrebuttable. Although the Phase I jury's verdict itself rebutted the presumption of reliance in many respects, *see infra*, the District Court nonetheless limited Defendants' efforts to rebut the presumption to a self-serving claim form drafted by Plaintiffs and discovery as to a limited number of institutional investors (which Defendants were forced to select even before most claims had been submitted) on the narrow issue whether those investors had non-public information that might sever the link between the relevant alleged misrepresentation and the price paid. *See* A363; A373.

Those severe restrictions are wholly incompatible with *Basic*'s function as a limited and rebuttable presumption that does not obscure the reality that reliance remains an "essential element" of a plaintiff's case. *Amgen*, 133 S. Ct. at 1192. *Basic* could not have been more clear about the presumption's limited nature: "*Any* showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance." 485 U.S. at 248 (emphasis added). But if "any showing" will allow defendants to effectively rebut the presumption, then restrictions on a defendant's right to obtain the information necessary to make such a showing are highly suspect. For instance, if a defendant is not permitted to obtain information regarding whether "a plaintiff traded or would have traded despite ... knowing the statement at issue was false," 485 U.S. at 248, then the rebuttable *Basic* presumption, which itself may be on thin ice,[8]

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[8] The validity of *Basic* and its presumption of reliance are currently under Supreme Court review in *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317. For the reasons explained above, the District Court's conduct of Phase II proceedings

impermissibly becomes irrebuttable. And plaintiffs will be allowed to presume, rather than prove, an "essential element" of their case.

Here, the restrictions imposed by the Court were extreme. As to the vast majority of class members, Defendants were limited to the untested results of a deeply flawed claim form. And even as to the limited number of institutional investors with respect to which Defendants were not restricted to the claim form, discovery was limited to inquiries related to "non-publicly available information relied upon by individual purchasers." A373-A374. Nothing in *Basic*, of course, suggests that rebuttal of the presumption of reliance may be based on only non-public information in the possession of a plaintiff.

Plaintiffs' claim form question, which was the centerpiece of the Phase II proceedings and the primary means through which Defendants were purportedly given a chance to rebut *Basic*'s presumption of reliance, stated:

> If you had known at the time of your purchase of Household stock that defendants' false and misleading statements had the effect of inflating the price of Household's stock and

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was based on an unsupportable view of *Basic*, and a remand is necessary. But if the Supreme Court jettisons *Basic*'s presumption of reliance, the necessity of a remand will be beyond question. And *Halliburton* may have implications far beyond the District Court's mishandling of Phase II proceedings.

> thereby caused you to pay more for Household stock than you should have paid, would you have still purchased the stock at the inflated price you paid? YES__ NO__.

A362. That loaded question amounts to little more than a reading comprehension test, which predictably resulted in an avalanche of forms checking the "NO" box.[9]

The District Court believed that this form passed muster for two reasons. First, the Court explained, the claim form "question goes to the heart of the issue of individual reliance," and that a "NO" answer was essentially dispositive as to whether the presumption could be rebutted. *Id.* Second, the Court stated that relying on the claim form question "sensibly resolves the tension between the rebuttable presumption of reliance and the practicalities and purposes behind Federal Rule of Civil Procedure 23." *Id.*

The District Court was wrong on both counts. First, the content of the claim form question does not go to the heart of the relevant individual reliance question—whether investors *relied on the misrepresentations*—but instead impermissibly bakes the presumption into the question by

[9] If the correct answer were not obvious enough, the question was sent under the guise of a requirement "[t]o recover as a member of the Class," and the instructions advised claimants to "contact counsel for the plaintiff" if there were "any questions concerning ... the claim form." Doc. 1721, Ex. 2 at 1, 3.

asking whether investors relied on the presumed inflationary impact of the misrepresentations. That is clearly erroneous. The claim form did not simply ask whether class members would have made their purchases if they knew specific statements were false. It went further and asked whether they would have still purchased Household's stock *at the inflated price* if they knew the statements were false and "caused you to pay more for Household stock than you should have paid." *Id.* That bakes the *Basic* presumption into the very question that was supposed to give Defendants a limited opportunity to rebut the presumption. *Basic* itself states that its presumption would be rebutted if a "plaintiff traded or would have traded despite ... knowing the statement" at issue "was false." 485 U.S. at 248.

Certainly, some class members at different points may have discredited statements asserting Household's compliance with "predatory lending" laws and may have believed the company would be required to address violations of "predatory lending" restrictions and nevertheless purchased Household stock. For instance, the record suggests that Lead Plaintiff Glickenhaus purchased Household stock despite being aware of information suggesting that Household was engaged in predatory lending practices. In applying Plaintiffs' leakage model, the jury found that the "truth" about Household's alleged predatory lending practices began to "leak out" on November 15, 2001. A306. Yet the trading records submitted by Glickenhaus show that, beginning on November 16, 2001, the day after the first partial disclosure, and continuing over the next 31 days, Glickenhaus made 15 separate purchases of Household stock. *See* Doc. 1711-1, Tab 1. So too, other class members may have found the issue concerning Household's alleged restatement to be immaterial to their trading decisions. *See* Doc. 1780 at 27 (Davis Selected viewed the restatement issue as "not significant"). Still others would have based their trading decisions on factors unrelated to the representations at issue, such as pre-existing periodic acquisition plans or computerized trading models that were not dependent on Household's stock price. *See id.* at 20-25 (addressing limited evidence concerning institutional quantitative funds, index funds, and passive investment funds) *See Basic*, 485 U.S. at 251 ("For example, a plaintiff who decides, months in advance of an alleged misrepresentation, to purchase a stock; one who buys or sells a stock for reasons unrelated to its price; one who actually sells a stock 'short' days before the misrepresentation is made—surely none of these people can state a valid clam under Rule 10b-5") (White, J., and O'Connor, J., concurring in part and dissenting in part).

The second prong of the District Court's reasoning was, if anything, more problematic. In balancing away Defendants' right to meaningfully contest reliance—a right Defendants would clearly have in individual actions—in the name of accommodating the "practicalities and purposes behind Federal Rule of Civil Procedure 23," A362, the District Court got things exactly backwards and, in doing so, ignored the Supreme Court's jurisprudence regarding the intended function of class action law suits. The Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), reaffirmed that a class action is simply a procedural mechanism for aggregating individual claims that by their nature are amenable to class treatment. Only when all "class members have suffered the same injury" and their claims "depend upon a common contention," which is "of such a nature that it is capable of classwide resolution," is class treatment appropriate. *Id.* at 2551. And the class device cannot be used to obliterate defendants' right "to litigate its ... defenses to individual claims." *Id.* at 2651.

Critically, class treatment does not alter the substance of the merits—nor could it consistent with the Rules Enabling Act. *See* 28 U.S.C. § 2072(b) (the Federal Rules "shall not abridge, enlarge, or modify any substantive right"). It is inconceivable that in a non-class action, a court would permit plaintiffs, especially large and sophisticated investment companies, to recover billions of dollars without being required to actually establish, rather than presume, reliance. But that is exactly what happened here because the District Court thought the merits should be fundamentally altered by the case's class action status. If anything, the massive stakes of this class action should have made the District Court sensitive to ensuring that Defendants' ability to contest individualized reliance was fully preserved. Instead, the District Court used the fact that thousands of claims and billions of dollars were on the line to circumscribe Defendants' rights.

B. In All Events, the Phase I Verdict Rebutted the Presumption of Reliance With Respect to All but Two of the Statements Found Fraudulent.

The restrictions on Defendants' ability to rebut the presumption of reliance were particularly egregious in light of the fact that the Phase I findings themselves profoundly undermined the applicability of the presumption of reliance to this case. As already noted, the Phase I verdict's assignment of the total sum of inflation from the leakage model to the March 23, 2001 statement was deeply flawed for other reasons. But if that finding is to be taken seriously, as it must be in considering the validity of the Phase II proceedings, it surely would have rebutted the presumption of reliance with respect to the vast majority of alleged misstatements.

The jury found no artificial inflation for each day from the start of the Class Period (July 30, 1999) until March 23, 2001. The jury then found that this single statement artificially inflated Household's stock price by $23.94. For the next six months, from March 23 to September 7, 2001, the jury found that the $23.94 of artificial inflation remained constant; none of the purportedly actionable statements during that six-month period altered the amount of inflation in the stock. The jury then found that from September 7, 2001 until the end of the Class Period (October 11, 2002), artificial inflation decreased. *See* Doc. 1780-1, Ex. A at 6-8. During that "disclosure period," the jury identified one additional misrepresentation that purportedly introduced $1.35 of artificial inflation into the stock on December 4, 2001. *See id.*

Accordingly, the jury's verdict wholly untethers all but two of the actionable statements from any distortions of price. Of the 17 purported misrepresentations made during the Class Period, only a single statement on March 23, 2001 (about predatory lending) and a single statement on December 4, 2001 (about re-aging) were associated with any statistically significant inflation of Household's stock price. *See id.* These conclusions, if taken seriously, would wholly refute any presumption of reliance. "If a market is generally efficient in incorporating publicly available information into a security's market price, it is reasonable to presume that a particular public, material misrepresentation will be reflected in the security's price." *Amgen*, 133 S. Ct. at 1192.

Because statements made on all dates but March 23, 2001 and December 4, 2001 did not "affect market price" by further inflating the value of Household stock, "there is no basis for presuming classwide reliance on those misrepresentations and omissions through the information-processing mechanism of the market price." *Amgen*, 133 S. Ct. at 1194; *see also, e.g.*, *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 638 (3d Cir. 2011) ("[A] defendant's successful rebuttal demonstrating that misleading material statements or corrective disclosures did not affect the market price of the security defeats the presumption of reliance."); *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 415 (5th Cir. 2001) (where it is established that a misrepresentation "did not affect the price of the stock" then the *Basic* presumption has been rebutted). The Defendants detailed all of this for the District Court, with support from Professor Cornell, but the District Court was wholly unmoved.[10]

The Court applied the *Basic* presumption in ways that are wholly incompatible with *Basic* itself, which allows "any showing" to rebut the presumption. Thus, even if *Basic* survives the summer, the Phase II proceedings were deeply and fatally flawed.

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[10] The District Court cited the "inextricably intertwined" and "interdependen[t]" nature of Plaintiffs' fraud theories in support of its ruling that the Phase I verdict did nothing to rebut the presumption of reliance. A403. As explained *supra*, however, Plaintiffs' case was built on three distinct theories of fraud and the Phase I verdict, which attempts to tie specific alleged misstatements to specific theories, clearly reflects that fact. Moreover, while the District Court's Phase II ruling failed to recognize as much, during Phase I proceedings the Court expressly prohibited Plaintiffs from conflating those theories. At an April 27, 2009 hearing about the content and format of the Verdict Form, Plaintiffs argued that the jury should be required to determine only whether each challenged statement was false or misleading, and not be forced to identify to which theory (or theories) of fraud the statement pertained. *See* A512-A514 (4067:4-4069:10). The Court responded: "I disagree, period. I disagree.... I think that's a formula for reversal." A514 (4069:11-13). Accordingly, the Court ruled that, on the Verdict Form, "we're going to check as to what—which statement and why. I just think that's the only way to do it." A515 (4070:2-5).

CONCLUSION

For all these reasons, this Court should vacate the judgment below and remand the case with instructions to enter judgment in favor of Defendants or, at a minimum, that a new trial be conducted. Alternatively, this Court should vacate the judgment and remand the matter for a proper adjudication of reliance.

Respectfully submitted,

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February 12, 2014

EXHIBIT 2

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,)
)
vs.) No. 02 C 5893
)
HOUSEHOLD INTERNATIONAL, INC.,)
et al.,) Chicago, Illinois
) April 28, 2009
Defendants.) 9:10 a.m.

VOLUME 20
TRANSCRIPT OF PROCEEDINGS - TRIAL
BEFORE THE HONORABLE RONALD A. GUZMAN, and a jury

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more important is that in this case, it leads to two serious methodological problems with this event study.

Q. What are those?

A. Well, if we look at Professor Fischel's own charts, you will find the estimation window that he picked was very unusual.

Over that one-year period, Household's stock price went up by about 25 percent, when Standard & Poor's 500 Index, which is his market measure, went down by about 17 and a half percent. I may not remember it exactly, but it's approximately that. And the industry index that he relied on, Standard & Poor Financial, went down by about 6 and a half percent.

So now what Professor Fischel is doing is he's looking at about 250 data points. There are about 250 trading dates in a year. And he's telling his computer, take 250 data points on Household stock return day by day, market return on S&P 500 and Standard & Poor Financial return. Household's stock price index is trending up, market is declining and industry is declining.

Household outperformed Standard & Poor's 500 by over 40 percentage point in this one-year period. And it outperformed its industry index by over 30 percent in this period.

So the only way a computer can make this data fit is

it spits out an equation which says, on average, when Household's stock price goes up, Standard & Poor's market index goes down. That's what the only way computer can fit this data. That's what the dumb computer does in a regression
11:08:56 analysis. It finds the best possible fit.

And because the market went down a lot and the company stock went up a lot, built into Professor Fischel's regression model is a prediction that more the market goes down, higher S&- -- higher Household stock price should be.

11:09:18 And now when he takes that regression equation and he applies it to various purported corrective disclosures after this period, it creates a bias.

Q. When you say after this period, Professor, you mean after November 14, '01?
11:09:38 A. Yes.
Q. So he derives some kind of a formula over here in this area shown by the circle, the estimation period, and he uses it out here?
A. That is correct, subsequent to this period.
11:09:48 Q. What -- this is the estimation period. What do we call this period?
A. He calls it his corrective disclosures period.
Q. Is this where he finds the down leg?
A. This is where he says the fraud is being learned by the
11:10:01 market, the down leg, yes.

Q. So this is the down leg. And this is the estimation period.

Okay. Please continue.

A. So, you know, what happens here is, we talked about how 11:10:22 starting November 15, 2001, to October 12, 2002, the end of the relevant period, was a bad time in the market. S&P 500 did poorly. Most stocks did poorly.

But now Professor Fischel is working with a model that makes him predict that, other things being equal, worse 11:10:50 the market does, better Household should have done. And, of course, over this period, that 40 percent overperformance, superior performance related to S&P that was true during his estimation window doesn't happen.

So as a result, he is biasing his measure of how 11:11:12 poorly Household is doing on any day that he studies Household's stock price reaction. He's putting too high a benchmark and, therefore, concluding Household's stock price declined by a lot and it is significant, even though it was not. This bias makes him find inflation coming out of the 11:11:36 stock when, in a proper regression analysis, he would not have so concluded. So that's one of the important biases that results from wrong choice of estimation window.

Q. When you use the word bias in that answer, you don't mean bias the way we use it when we talk about someone is biased 11:11:56 against someone? It's an economic term?

A. Oh, not at all. I didn't mean to imply that at all. This is a statistical term of art where your model is biased. I don't mean to suggest Professor Fischel is in any way, shape or form biased. He's a respected scholar. I have high regard

11:12:14 for him. It's just that his method is biased.

Q. It's a mistake?

A. It's a mistake, yes.

Q. People make mistakes?

A. Well, I know I do.

11:12:24 Q. Okay. Is there a second mistake that Professor Fischel made?

A. Yes. There is a second implication of his picking the wrong window.

Q. And what's that?

11:12:35 A. The period that he picks for his estimation window was relatively calm period for Household. It's like you go to the ocean. Some days are very calm days; and, you know, if you'll see a five-foot wave, you'll say, wow, this is a big one. And there are other days when ocean is very stormy and almost

11:13:04 every other wave will be more than five feet. Or, you know, in Chicago in the middle of the winter, 30 degrees would be considered balmy and nice and hot. And if you use that benchmark to judge what happens in the summer, you'll find every day in the summer very abnormally hot.

11:13:24 So what happens is because of his estimation window, 11:13:55

11:14:21

11:14:37

11:15:06

11:15:28

he ends up setting too low a bar for what he considers to be a significant price movement. And he does that in two ways. Remember, I told you typically statisticians say a reaction is not significant unless there's 5 percent or more chance that it's not just a random occurrence. Professor Fischel picks a 10 percent threshold rather than 5 percent.

That choice, combined with the fact that his estimation window is unusually quiet for Household, except normal returns didn't vary as much -- this was a good time for Household -- means he judges too many of his specific disclosure dates significant; whereas, under a proper threshold, he would not have found them significant. So that's the second of the three errors in his regression analysis.

Q. And what's the third one?

A. Well, the third one is this: You want to adjust for market and industry factors when you study a particular stock price movement by carefully picking the right benchmarks.

And what he did in picking the two indices is normal and fine as a starting point. Most people compare a company's stock price to a broad-based market index. Professor Fischel testified that Household itself in its proxy statement compared itself to Standard & Poor's 500. Nothing wrong there. I have no quarrel with his choice of S&P 500 there.

Of course, he should have noticed why is he

11:15:50 predicting a negative coefficient on S&P 500, meaning more the market went -- goes down, higher Household should go up. Well, that's not the reason Household compares itself to S&P 500. He might have been alerted to his estimation window being wrong perhaps, but leave that aside.

He picks the S&P 500. And then he picks a broad-based financial index called Standard & Poor's Financials, which have over 80 companies, if I remember, most of whom were not in consumer finance business. And he says,

11:16:10 well, Household uses that comparison too in its proxy statement; so that's fine and good.

But what is missing in his regression equation is a benchmark that's close to Household's business. That's the consumer finance business.

11:16:26 Q. Let me stop you there a minute. Let's go back to DDX 405.

This is the one we looked at earlier. Is this what you're talking about, the Consumer Finance Index?

A. Yes.

Q. And you think this would have been a better index to use

11:16:40 as a comparison?

A. Well, I would say in all the tests I did statistically, every time, model tracked the data better. And the performance of the model on technical measures that you typically use to see how good your model is improved when you

11:17:02 added an index of consumer finance companies in addition to

Standard & Poor 500 Index and S&P Financial Index that he used.

I don't say that he chose the wrong indices. In fact, in my report, I used the same two indices. But I added a third one, which is consumer finance companies because the economic environment during this time that explained Household's return was being felt by consumer finance companies that had similar clientele to Household.

So I thought S&P 500 for broad market-based influences, Standard & Poor Financial for broad financial sector, and then an index of these six consumer finance companies for consumer finance business would make a better model.

11:17:21

11:17:44

Q. All three of these indices include Household; is that right?

11:18:01

A. Yes. But I took care to exclude Household from these indices because otherwise you end up comparing Household against itself. It doesn't matter a whole lot in this particular case because Household was a very small part of S&P 500 and a very small part of S&P Financials; but it was a significant part of consumer finance companies. So I constructed the Consumer Finance Index without Household in it. And I also adjusted S&P index and S&P Financial Index to make sure that I take out the influence of Household in those indices.

11:18:19

11:18:44

Q. So would you say that your analysis is slightly more sophisticated than his?
A. Well, I believe it is more precise.
Q. Precise.
11:18:53 A. And it gives you a better picture of what is happening. And there is a measure that statisticians use to know how good their model is. It's called R-square. And my R-square was significantly higher than his R-square.
Q. I'm not going to ask you what R-square is.
11:19:13 Let me ask you this: Your Ph.D. is in economics and finance?
A. Yes.
Q. Do you know what Professor Fischel's Ph.D. is in?
A. Well, I understand his formal training is as a lawyer.
11:19:31 But I'm not going to sit here and say he's not an accomplished scholar. He's a very smart man. He's contributed a lot to use of economics in law. He's very well-qualified.
Q. Agreed. But you had to study a lot of technical stuff like R-squared that lawyers don't study in law school?
11:19:49 A. Well, I know some law school courses go into pretty sophisticated econometrics. I do not know whether he studied econometrics or not.
Q. In any event, your analysis was more precise, in your opinion, than his?
11:20:06 A. I believe my analysis is more precise, yes.

Q. Because you added the most appropriate comparative schedule, which is the other finance companies?
A. Yes. And I chose a more appropriate estimation window.
Q. Okay. Did you prepare a demonstrative which compares Household's returns to the various stock indices you mentioned for a particular day during the relevant period?
A. Yes.
Q. Let's look at DDX 750-02.
What does this chart show us, Professor?
A. Well, this chart shows you, through an example of a specific disclosure date in Professor Fischel's analysis as to how shortcomings of his regression analysis cause him to conclude that inflation came out of Household's stock price; whereas, in fact, there was nothing abnormal about this day at all in a properly specified regression analysis.
Q. Tell us what day we're looking at here.
A. If you look at the bottom, it is looking at -- it says it's -- we are looking at September 3, 2002, which is one of his specific disclosure dates.
Q. Okay. And tell us -- walk us through this chart, Professor, and tell us what it shows us.
A. So this was a day that was a pretty bad day in the market. As you can see, S&P 500 Index declined by more than 4 percent. That's pretty unusual. It was a bad market day. And S&P Financials Index declined by almost 5 percent, 4.9 percent.

And these are some of the largest financial companies. So it was not a good day for financial companies in general.

Now, remember I told you Professor Fischel's regression model contains these two indices, Standard & Poor's 500 and S&P Financials. So in his model when it's a bad day for S&P Financials, he says, well, I expect Household to do poorly too because it is positively related to S&P Financials.

So the minus 5 percent that you see on S&P Financials causes him to predict that Household's stock price should have gone down on this day by some amount. But he has a negative coefficient on his market index, S&P 500 portfolio.

Because of that odd result, this being a very bad day in the market, it causes him to revise upward his prediction of how Household should have done. So other things being equal, on a bad market day, he would predict Household's stock price should go up, when we know it didn't go up. It actually declined by 7.62 percent.

So Professor Fischel's prediction was it would go down because it was a bad day for S&P Financials. It would go up because it was a bad day for the market. And overall, he predicted that on this day, Household should have declined by around 4 percent; and it declined by 7 and a half. He says that 3 and a half percent of difference is abnormal return. And given his low threshold of judging significance, he says 3 and a half percent is significant.

And this is why I conclude on this day, the news that came into the market about Household significantly affected it negatively after adjusting for market and industry. And I conclude inflation came out of the stock price. But this mistaken conclusion is because of shortcomings in his event study.

Q. Okay. And you've added the Consumer Finance Index here?

A. Yes.

Q. And how does that change what we're looking at?

A. So there are two reasons why I found that there was nothing abnormal on this day.

One, in my model, I don't have this odd prediction that when market goes down, Household should go up. My model says when market goes down, Household is likely to go down. And that's why Household compared itself to the entire market. So that's one difference between Professor Fischel's event study model and mine.

And, second, I found that Household moved together on average with Consumer Finance Index. And you'll see what Consumer Finance Index did that day. It went down by almost as much as Household did, by 7 and a half percent.

So based on these two differences, I found that Household's 7 and a half percent drop that day was within the range of what you would have expected; and the market did not learn anything significant on September 3.

Q. Now, did you prepare a demonstrative, Professor, illustrating how Household compared to other companies in the Consumer Finance Index on that day?
A. Yes, I did.
11:25:48 Q. Can we see DDX 751-02, please.
Professor, is this that demonstrative?
A. This is the demonstrative.
Q. And what does this show us, please?
A. It shows each and every company in Consumer Finance Index
11:26:03 had a down day that day. Cash America by very little. But most companies declined by at least 4 percent. All the rest declined by at least 4 percent. Countrywide, over 4 percent decline; AmeriCredit, over 4 percent decline; Capital One, 6 and a quarter percent decline; MBNA, 8.76 decline, more steep
11:26:30 than Household; Providian, 10.39 percent decline, much more steep than Household. Household was behaving like other consumer finance companies on that day. This was not an unusual day for Household.
And what you will find on Professor Fischel's 14
11:26:50 specific disclosure dates, most of the time when he says Household's stock price declined significantly and I say no, which happens on most of the days, if you draw charts like this, if you look at data like this, you will find Household was behaving like other consumer finance companies were
11:27:13 behaving. So that's the reason he misses the fact that the

declines were not extraordinary, and he ends up concluding a lot more often than he should have, according to me, that Household's stock price declined significantly when the market learned certain news.

11:27:35 In my regression analysis, most of his days are not statistically significant.

Q. Let's talk a little bit about specific issues confronting Household and the rest of the consumer finance industry during the relevant time period.

11:27:56 Did you consider those issues in conducting your analysis?

A. Yes, I did.

Q. And are you aware that Mr. Dowd in his opening statement suggested that Household was focused on growth?

11:28:07 A. Yes.

Q. Are you also aware that Mr. Aldinger testified that he disagreed with Mr. Dowd?

A. Yes. I read that transcript.

Q. Did you investigate the issue of growth in the industry
11:28:19 during the relevant period?

A. Yes. As I had said in my report, it was indeed a period when this subprime lending industry became very big, relative to where it had started.

As I was saying earlier, before 1995, if you were not
11:28:44 what is called a prime customer, you couldn't get credit to

EXHIBIT 3

HOUSEHOLD ORAL ARGUMENT BEFORE THE
SEVENTH CIRCUIT COURT OF APPEAL ON MAY 29, 2014

Good morning ladies and gentlemen. The first case this morning is the *Glickenhaus v. Household International*. Mr. Clement.

CLEMENT: Good morning, Your Honors, and may it please the Court. Paul Clement for the Appellants. I will endeavor to save five minutes for my rebuttal. This lawsuit was filed in 2002 and in the decade more proceedings that have followed have been riddled with errors. But in our appellate briefing, we have focused on errors that go to three critical elements of plaintiffs' case. Loss causation, who is the maker of a particular misrepresentation, and the issue of reliance. Now I want to start about talking about loss causation, which really is the error that we think pervaded the entire proceedings, but I want to make sure I have time to talk about what is probably the even more straightforward basis for ordering a new trial here, which is the *Janus* error.

But let me start with loss causation. The plaintiffs have two different models designed to prove loss causation for each of these statements in this case. Both of them shared a common defect, which is they assumed inflation at the beginning of the class period, rather than demonstrating where the inflation came in in the first place. And that is a particularly significant problem, I think, with respect to the so-called "leakage model" as opposed to the specific disclosures model. The principle problem here I think, is illustrated by the fact that we're talking about a leakage model, which is already on the periphery of what we understand is a classic securities case. It's a classic securities case if you have a misrepresentation. It makes the stock price go up and you can see the inflation in the stock price. Then the stock trades at an inflated level, and then there is a disclosure, where you see the inflation come out of the stock. Now the Supreme Court in a case like *Dura*, acknowledges, it doesn't specifically endorse, but acknowledges, the possibility that well maybe rather than the information coming out in one fell swoop with one disclosure, it can leak out over time. But what the plaintiffs want to do here is say, by showing how it leaked out over time, we can obviate the need to ever show where it came in in the first place.

JUDGE SYKES: I thought this was litigated on a theory of price inflation maintenance, as opposed to price inflation in the first instance, or is that not clear?

CLEMENT: Well that is far from clear, and I think that even at this late stage in the proceedings, the plaintiffs really haven't picked a course on that. Now, I think that's problematic. I think either way you look at this, you still have to have one theory or the other, and with either theory there's a problem. But even if it's a so-called inflation maintenance theory, I still think there ought to be an obligation to show loss causation, where the inflation came in. Even if it came in outside the class period, and their theory is that it was maintained by a misrepresentation in the class period, I still think you need to show where it came in in the first instance.

JUDGE SYKES: Well, why would that be with that particular theory of loss causation, it seems to me that in the *Schleicher* case, we suggested that that theory sort of takes as a given that the price is inflated and that the loss causation concept is addressed from the standpoint of when the misrepresentations were made, and maintained the inflated price, which otherwise would have dropped had the truth been told.

CLEMENT: Your Honor, I don't think *Schleicher* addresses this question of whether in a inflation maintenance theory, you have to show when it first came in, because even if the idea is, it is a misrepresentation that stopped the stock from going lower, still presumably that corresponds to some misrepresentation that made it trade higher and that's, I think, true.

JUDGE SYKES: Well, it's an omission. It's a concealment of the truth, is the theory here, that the price was inflated. We know that because it dropped during the disclosure period at a rate that was more than twice what other entities in this sector were experiencing so it can't be explained away by general market trends, and so there's got to be some explanation for that and the model is intended to address that explanation.

CLEMENT: Well, Your Honor, this is why I think it's critical for them to have actually presented one theory or the other, but even in this inflation maintenance theory, I don't think they've said that this is an omission case. They've never suggested that. This is a misrepresentation case. Now, I think their original theory was the inflation came into the stock because there was representations about this being a growth company, and they were going to launch on a growth path, and that then questions became raised about, well, are you engaging in some unlawful conduct, and then they say no, we're not doing predatory lending. And I still think then you would want them to show where it came in so you could have some discipline about showing whether it came out based on the revelation of that fraud, or based on other specific factors, and I do want to be emphatic, that with respect to the leakage model in particular, which the jury bought, there's nothing that disciplines them to make sure that this model accounts for firm-specific, non-fraud factors, and that is absolutely critical under the *Dura* case. And at least in the specific disclosures model, you have some discipline, because there they say, okay on a particular date, inflation came out based on a disclosure that is relevant to the fraud. But with respect to the leakage model, they don't do that. What they do, I think it's quite simple, is they look at the overall price drop of the stock, they adjust for the overall drop in the stock market as a whole, and then they adjust for an industry index, and then they're done.

JUDGE SYKES: Right, I mean there's no question that both models, well the leakage model in particular doesn't account for firm-specific reasons for the drop. That's clearly not part of the model, so you're asking for a ruling that forecloses the use of this economic model to measure loss causation?

CLEMENT: We are looking for a ruling that would foreclose the use of a model that doesn't account for non-fraud, firm-specific information.

JUDGE SYKES: So it's not good enough to have the experts say I took into account firm-specific explanations and ruled them out because there were some that went up, some went down and they canceled each other out.

CLEMENT: Certainly not enough to say that they canceled each other out. Now, I think that's true at a broader level which is, that you know, they just don't magically cancel each out. But to be specific, I think there's a problem in this case with that testimony because all that's saying is that over the course of the class period, the positive news and the negative news canceled each other out. But what that still allows, and we illustrate a very specific example in footnote 4 of our opening brief, is a situation where somebody buys, and here, just to be concrete, there's a 10-day period in July 2002, where there's no misrepresentation, and no disclosure, but based on this model, there's two and a half dollars of inflation that come into the stock. Now, somebody bought on July 5th and sold on July 14th, would recover, even though there's no misrepresentation and there's no disclosure. It's just an artifact of this model. It's purely firm-specific, non-fraud information. So even if that's canceled out later in the class period, that's not a solution to this problem. And we think that *Dura* is quite specific, that it's the plaintiffs' burden to foreclose this kind of firm-specific, non-fraud factors.

JUDGE SYKES: Right, there's no question about that, but the question in this case is how does the plaintiff carry that burden. Whether it has to be built into the economic model itself or whether it can be addressed by way of expert testimony that accounts for it in a different way. In other words, not a non-statistical way but a testimonial way.

CLEMENT: I think it would have to be built into the model. I think that's the right rule of law, but I would say that even if you think it's possible to do it through non-statistical testimony, you need something more than they canceled each other out, especially when you have a case where you can demonstrate that that's not good enough because you'd still have people who could recover and show loss causation based on non-fraud factors that have nothing to do with any misrepresentation or any disclosure whatsoever. So we think that that is a fundamental problem. We do think that, you know, you certainly could decide this case in a way that you ordered a new trial with a suggestion that maybe the specific disclosure model would have been sufficient because, I think there's still problems with the specific disclosure model, but it at least tethers the disclosures to the fraud, because it basically looks through the period and says, every time there is a statistically significant drop in the price on the date of a disclosure, we're going to tally that up.

JUDGE SYKES: Right, but that understates loss causation, at least potentially understates loss causation, in a case like this where some of this information was potentially known by industry actors, and not specifically disclosed.

CLEMENT: With respect, I think if it was known by industry actors, that meant it leaked out and you should have been able to show that, and if you can't show that, that's because it actually is already in the market, and so, you know, there were other disclosure days, for example, where they looked, and there was either no statistically significant movement of the price or it actually moved the other way. And that shows that as for that disclosure, the market must have already known it, if we're going to be here on the assumption that we had fraud-on-the-market. But I guess what I would say is this, Your Honor, even if there's some possibility that the specific disclosure model might underestimate what leaks out, there is no question that the leakage model systematically overestimates it, because it takes into account these non-fraud, firm-specific matters. And then in a sense, this becomes very clearly demonstrated with the specific verdict here, because the jury assigns the sum total of inflation that's attributed to all three fraud theories to a single statement on March 23, 2001, that only goes to predatory lending. Now that can't be right, I mean we described that as essentially a *Comcast* error and I think it is that, but it also shows the broader problem with the model, because when you use the model in this way, it became inevitable that they would attribute things to that March 23rd statement that had nothing to do with predatory lending, because the model attributes everything.

JUDGE SYKES: Right. But three days later, or three business days later, there's a 10-K filing that contains all three species of fraud.

CLEMENT: That's right and that just demonstrates that the jury did think there were three species of fraud here. It thought that they all contributed to inflation but yet

JUDGE SYKES: You can't just lop off those three days?

CLEMENT: With all due respect, Your Honor, I think you know you can't just lop off three days. That wouldn't work on a remittitur and I've never heard of anything that would be so inconsistent with the Seventh Amendment as to say, well, you know, if the jury had come out on the 28th of March instead of the 23rd of March, we might not have the problem being this evident. I think what I would leave you with though, is on this, is the idea that if it happened on the 28th, it wouldn't mean, you wouldn't have the same glaring problem, I don't know that I'd be able to label the problem a *Comcast* problem, but you would still have the same basic problem, which is everything goes into this model, including the non-fraud, firm-specific information, which is a problem under *Dura*.

JUDGE SYKES: I, I know you – go ahead . . .

JUDGE KANNE: Well, I was just going to say, they can't work in conjunction then, both models then, they're separate?

CLEMENT: They are separate models, and then the way that this jury was instructed, they were specifically told to pick one or the other. And so, we'd obviously have a different suite of appellate arguments if they'd picked the specific disclosures model, we'd also have a radically lower verdict against my client if they'd picked that model. So, I think the way to think about it is, if you think that the leakage model is problematic, the specific disclosure model might have been okay, then the proper remedy is a new trial.

JUDGE SYKES: I know you want to get to your other arguments, but before we leave this topic, what was, I didn't read the closing arguments, what was the defense approach or theory of loss causation here? There must have been some explanation offered to the jury for why the stock dropped at so significantly higher a rate than other sector entities.

CLEMENT: And it was essentially, first of all, you know, most of the closing argument was spent saying, there's no liability here at all and all of that, and then some of it was saying they've only offered you, you know, these theories and these theories don't work and I think the real idea was that what's going on here is, you're in a market where you have, you know, there's concerns with what we refer to as "headline risk," and it is certainly not good for a company to be investigated by state attorneys general and the like, and that's not just the fraud, I mean, that's just bad news for any company. Then I think if you think about their own theory of this case, there's a reason why you'd expect a company like Household, its price to fall more than the industry average, which is, it had been identified as a growth stock, it had certainly picked up at a higher rate when times were good within the rest of the industry, and then when the whole industry goes through a bad patch and Household, for firm-specific reasons that are not completely tethered to the fraud, goes through a bad patch, you'd expect it to drop at a greater rate. And that's why I think what you, I'll just sum up with this, I think what you have here, is you have exactly what the Supreme Court was worried about in *Dura*, you have a price drop, and it's just not good enough to say, okay well I'm going to take out the fact that the whole market dropped and I'm going to take out the fact that the industry dropped and everything that's left, I get to count as my inflation.

So, let me turn if we could then to the *Janus* error, because although we think in some respects the loss causation problems are what really explains this enormous verdict, we do think that the *Janus* error is in fact the more straightforward basis for ordering a new trial in any event. The jury here was instructed before the *Janus* decision, the error was properly preserved, and we think the jury was instructed in a way that is fundamentally incompatible with *Janus*. Then the only question I think becomes at that point is whether there is prejudice, and there is clearly prejudice in this case. And I think you see it most clearly from the all important March 23rd jury finding, because there is a statement that is made by Mr. Gilmer in the *Janus* sense. It is specifically attributed to Gilmer, and remember that the Court in *Janus* goes out of its way to say that when a statement is specifically attributed to someone, it is a fair inference that they made it and that they made it solely. So, this is Gilmer's statement in the *Janus* sense, he's found to be reckless. Aldinger, who did not make the statement in the *Janus* sense, is found to be knowing. Now, that kind of disconnect is possible in a world pre-*Janus*. But after *Janus*, we would respectfully suggest you don't get to that result. It is surely evidence, which is all we need to show, that the erroneous instruction prejudiced the proceedings, and it prejudiced, obviously, the individuals who are being held liable for statements they didn't make.

JUDGE SYKES: Maybe so for Gilmer, but not the others?

CLEMENT: Oh yes the others as well. As to that statement, it's most obvious as to Gilmer. But if you look at the other statements, for example, you have a statement that's made by Aldinger. Now the jury holds both Gilmer and Schoenholz responsible for the statement that only Aldinger made at an investment conference. You likewise have a statement that Schoenholz makes at a different investment conference.

JUDGE BAUER: Mr. Clement, you're into your rebuttal time. You can use it if you want.

CLEMENT: Thank you for that. I want to save the rebuttal. I would simply say though, that it is important to recognize as well, that with respect to Household as well, there's prejudice, because that Aldinger finding on the 23rd is the only basis for a knowing finding against Household, and that is the only basis for joint and several liability against Household. Thank you, Your Honors.

JUDGE KANNE: Thank you, Mr. Clement. Mr. Dowd?

MR. DOWD: Good morning, Your Honors, may it please the Court. Mike Dowd for the Plaintiffs/Appellees. Your Honors, I just heard Mr. Clement say as he stood up something about a classic securities case, and it just made me think, you know, this case, we picked a jury five years ago and that was after seven years of pretrial litigation, and one of the first things that jury heard in this case, is that at the beginning of the class period, the defendants looked at their stock price and said, it's trading way too low, we're in the $30s, we could get the stock price up to $66, it should trade $22 more per share if we could convince Wall Street that we can grow. And they convinced Wall Street about their growth through the use of predatory lending, through hiding their delinquency statistics and through accounting fraud. That's what they did, and then the stock grew, just like they said, up over $22 per share increase. And then, when the defendants got it to a point where they knew the fraud couldn't be sustained, they tried to sell the company to Wells Fargo, and if they had completed that sale, each of these three defendants, between them, they would have pocketed $150 million, personally. And instead, Wells Fargo saw the scam inside Household's books and what happened is as the truth emerged, the stock dropped. The stock dropped as the truth emerged, back down, our expert said, $23 per share. It was like the defendants predicted exactly how much they could trick the markets, and then at the end when the truth emerged, it came down that exact amount. I don't think that's a coincidence, it's a classic securities fraud, and this was a rational jury, Your Honors, a rational jury. They didn't find liability for the plaintiffs until March of 2001. After that time, they carefully went through the false statements. They found 17 in favor of the plaintiffs and 10 others they found in favor of the defendants.

JUDGE KANNE: But that 23 dollar figure, whatever, wasn't derived by the jury. It was one of three offered them, right?

MR. DOWD: Yes, it was one of three offered to the jury and that's the one that the jury chose. I'd like to address first the loss causation argument. And I think, you know, the defendants say we have to prove loss causation and that they're entitled to judgment as a matter of law. *Dura* requires that the plaintiffs show the defendants made a misrepresentation that inflated the stock price and that thereafter the truth became generally known, and as a result, the share value depreciated. And that's exactly what we did. And there was more than one type of loss causation evidence in this case. I mean the first thing that the jury looked at, undoubtedly, were the defendants' analysis at the time. Their contemporaneous analysis of why did this stock drop, and the defendants' internal investor relations reports from that time period, in August of 2002, looked back at the last four months and said, why is the stock price declining, and they cited a series of articles that had leaked principally about the Washington Department of Financial Institutions' report, and how it was coming out, and then Household got an injunction and then analysts reacted to that, and finally the report came out and said there was pervasive fraud. And the defendants attributed the vast majority of a $22 stock decline at that time to the revelation of that information about predatory lending. Certainly the jury could look at that for loss causation.

Secondly, the jury could look at what market analysts thought. The market analysts all were downgrading Household. They were saying, well, if there's predatory lending and they have to stop those practices, we don't know if their business model is even sustainable and therefore they downgraded and that caused stock declines. And then you had the specific disclosure model, where our expert, Professor Fischel, that they called the "gold standard" in front of the jury, he identified 14 specific disclosures that he tied to the frauds and said those show loss causation. And finally, he identified in a leakage quantification model, a cascade of negative information. The same type of information that the defendants pointed to in their internal documents. There is no question that we proved loss causation under *Dura*. So the defendants come back and they say, well, well, well, you know, maybe they proved loss causation, but they haven't eliminated the market, the industry. Clearly, we did. That's what the expert did in his analysis. So they say, well there might have been non-fraud, company-specific factors that the expert didn't consider. Well that wasn't the testimony at trial. This expert took the stand, the defendants make some argument that he said "oh those were included." Your Honors, that's just a red herring. They are included in the model, everything's included in the model. Whether there was company-specific information or information that goes somewhere else, it's accounted for by the model, that's what the expert meant.

JUDGE SYKES: How?

MR. DOWD: It's accounted for, Your Honor, because you look at in an event study every day. Some of those days there might be an increase or a decrease that has nothing to do with . . .

JUDGE SYKES: That's the specific disclosure method.

MR. DOWD: That's correct, Your Honor, but you also . . .

JUDGE SYKES: What about the leakage method?

MR. DOWD: I'm sorry, Your Honor, you also use the event study as part of your leakage quantification analysis. The specific disclosure drops are specifically included in the leakage quantification. And then . . .

JUDGE SYKES: But to they control for firm-specific?

MR. DOWD: Yes, he said . . .

JUDGE SYKES: Non-fraud events?

MR. DOWD: He carefully examined each one of the days where there were residual returns where there was some difference between . . .

JUDGE SYKES: Right, he testified that he looked at those, and that there were some that caused increases and some that caused decreases and they canceled each other out, but does the model account for that?

MR. DOWD: Well, I think the model, Your Honor, would initially lay out the dates where you had to look at that type of information. The model would show you whether there was any difference in price movement or if it just moved with the market. And then he did an analysis to look at those days to see whether there was some firm-specific company information that was not related to the fraud. He said he carefully examined it and they canceled each other out. Now, I don't understand how we can stand here after 12 years of litigation and say that somehow you get judgment as a matter of law because you completely failed to cross-examine an expert witness. They didn't ask him any questions about it. They didn't say what days. I mean they speculate here about July of 2001 or July of 2002, why didn't they ask the expert those questions. That was the time. After 12 years of litigation, you don't get to say, hey, it didn't work the first time. At the first trial, we tried truth-on-the-market, that's what they tried. And you know what, it didn't work for us.

JUDGE SYKES: I thought the expert testified that the models, both of them, did not account for firm-specific, non-fraud events. The regression analysis controlled for market-specific.

MR. DOWD: Market and industry, Your Honor. What I was saying is that there might be some days where you would still look at residual returns and, you know, you might have to then look at it and say, was it company-specific information, so yes, the expert is applying his judgment at that point. If that's the question.

JUDGE SYKES: Right, it's not built into the statistical model.

MR. DOWD: Right, I think that the statistical model helps you look at which days you need to examine. That's what I guess I'm trying to say.

JUDGE SYKES: So the models do not account for firm, that's a given, neither model accounts . . .

MR. DOWD: Right they don't, they might . . .

(Mr. Dowd and Judge Sykes speaking at the same time)

JUDGE BAUER: Counsel, just indulge me, wait until she finishes the answer.

MR. DOWD: I'm sorry, Your Honor.

JUDGE SYKES: So we stipulated to that apparently, that the models do not account for firm-specific, non-fraud events.

MR. DOWD: No, they wouldn't take it out, you have to look at it.

JUDGE SYKES: Okay.

MR. DOWD: And I think that, you know, if you look at cases like *Lapsley* or *Havvard*, you have to cross-examine the expert. You can't just say, you know, my failed litigation tactics, now I get a new shot because of an appeal.

JUDGE SYKES: Well that presupposes that it's acceptable under *Dura* to measure loss causation in this way, by addressing the firm-specific, non-fraud events testimonially as opposed to through the statistical model. The defense argument is that the model is flawed for that very reason and can't be used.

MR. DOWD: I don't know that they've specifically said it that way, Your Honor, I think that . . .

JUDGE SYKES: Well I asked the question and they said they're looking for a categorical holding that this model is fatally flawed and can't be used for loss causation.

MR. DOWD: Well, I think *Dura* and *Schleicher* both recognize the possibility of leakage. That that's one of the things you look at and I think what defendants miss is in

Schleicher, the court specifically talks about how, you know, when the truth comes out the stock would drop, it talks about you can have a statement that increases inflation or you can have a statement that prevents a decline. And, you know, when you look at this case, had the defendants said on any of the days where there was a false statement, we're predatory lenders and we have masked our delinquency statistics and we're committing a huge accounting fraud, the stock would have dropped.

JUDGE SYKES: Oh sure and the model measures the value of the truth and the question is whether the full value is attributable to that first misrepresentation that the jury found. That March 23rd statement which pertained to only one species of fraud, so it suggests that by attributing the full inflated value as of that date going forward, there was some duty to disclose the full truth including all of the other species of fraud. Now that might have kicked in 3 days later when the 10-K filing was made because, of course, when you make a government filing, you have to tell the whole truth. But, you know, for that first date, that was one statement made by one of the defendants in, if I understand it in a press release, I think, or . . .

MR. DOWD: Yes, Your Honor, it was in an article in the *Origination News*.

JUDGE SYKES: Right, so how is the full value of the inflated price attributable to that statement?

MR. DOWD: I think, Your Honor, what happened here is that you have the statement. The first statement that the jury found was false was the March 23rd statement and it only related to predatory lending. The jury is back in the jury room and they have to pick. Do we pick the leakage quantification, the specific disclosure quantification or zero. And I think faced with the statement that only related to one of the three frauds, the jury was left to figure out which one best estimated the damages. They knew that the predatory lending was the largest component of the $23.94, they understood defendants' internal documents and they did the best they could in that circumstance. I think it only affects three trading days. It's March 23rd, the 26th and the 27th. Once you get to the 28th, the defendants make statements that relate to all three frauds. The jury found all three frauds, and under *Schleicher*, at that point, had they told the truth, we're predatory lenders, we mask our delinquency statistics and we're committing a big accounting fraud, the stock would have dropped. And so it's cured by . . .

JUDGE SYKES: By $23.94 that day?

MR. DOWD: Yes, Your Honor. And I think . . .

JUDGE SYKES: That's the theory anyway.

MR. DOWD: That's correct, Your Honor. And I think that, you know, what you have here is what the defendants are really arguing, and they don't argue it, is that there's not enough evidence to support the $23.94 for just those three days. I mean I think, ultimately, that's really the argument that, you know, they should have made and they haven't here. They haven't even raised that as an issue, because what they're trying to do is take one day, where the jury had to do the best they could and pick between three sets of numbers, and they're trying to take that to throw the baby out with the bathwater. It's that simple. But by March 28th, you have a statement about all three frauds. I think that, you know, as to that issue, I think the defendants waived it, I mean, whatever intersperals of the yeses and nos mean, it's not, hey you can't give them $23.94 for predatory lending alone on March 23rd, and I think, you have to raise that, because otherwise you find yourself in this position where we're up on appeal after 12 years arguing about something that you could have sent the jury back in to fix at the time. And that's why the waiver argument applies.

JUDGE SYKES: Well, the judge did let everybody know that all arguments attacking the verdict were preserved.

MR. DOWD: Your Honor, you're reading defendants' brief when you see that because if you look at the record, what happened is that counsel raised the inconsistent intersperals of yeses and nos. Thereafter, Judge Guzman excused the jury. Told them, your duty is done and it says, "jury exits" in the transcript. After that, counsel starts to address, defense counsel starts to address, his 50(a) motions that he wants to raise and the judge says those are preserved. I mean, you can't say that we put our faith in Judge Guzman because the jury was already gone when he said that and he was talking about a question about the 50(a) motion. And so, I think it is waived, plus the case law in the 7th Circuit says, you know, you can't rely on the judge. You need to make a motion to have the jury resume deliberations, and that wasn't done here and the case law is clear in *Cundiff* and *Barnes* and *Strauss* that that's your obligation. You can't, it says something like, in one of those cases, a mutual error doesn't excuse you.

I think that I want to get to the *Janus* issue, just quickly, Your Honors. I think that if you look at March 23rd which counsel spoke about here. It's Mr. Gilmer's statement. He testified at trial, I made the statement that day and I made it other days as well. And, you know, they say well how can Aldinger be on the hook for it? Well, if you look at *Janus*, I think that you'll see that it says, you know, did you have ultimate authority over the statement, did you have control over the contents, whether and how to communicate it. And if you go back and look, Mr. Gilmer's statement on March 23rd was something like, predatory lending, we don't engage in it, it's abhorrent. That's what he said. His exact words came from a memo that Mr. Aldinger wrote in September of 2000, where he told Household people he cc'd Mr. Gilmer on the memo and he said, "when you're asked about predatory lending, this is what you should say." They're the identical, exact same words that Gilmer uttered six months later when he spoke to the markets.

JUDGE SYKES: So he furnished it, which is the *Janus* error.

MR. DOWD: I don't think that you can say furnished, Your Honor. I think that when you're the CEO of a company, he had ultimate authority. He's telling his employees what to say when asked about predatory lending. He said at trial that he gave that memo to Gilmer and he said he approved it. That's what he said, that's what you were supposed to say. From Mr. Aldinger's lips, this is what you're to say, as Household, when asked about predatory lending, and that's exactly what Gilmer said. And I suspect that that may be why the jury found that Mr. Aldinger was knowing, but Mr. Gilmer reckless for uttering the statement. So I think that when you look at a day like that, it's clear that under *Janus*, it's absolutely Mr. Aldinger's statement. I think that, you know more importantly, in terms of showing prejudice, there is no prejudice. The jury didn't find these defendants liable for any statements made by a corporate spokesperson. The jury excluded 10 statements after March 23rd that were made by corporate spokespeople. Perhaps because the instruction on making a statement, the specific instruction, said make a statement. They let the defendants out on those. They only found the defendants liable for statements that one of the defendants made.

JUDGE KANNE: Getting back to they had three alternatives, the $23 one, what were the other two?

MR. DOWD: Specific disclosure and zero. Those were their three choices that Judge Guzman gave them. We asked if we could just have the jury pick a reasonable estimate of damages, defendants wanted all three, Judge Guzman decided to give all three. You have to pick between these three, you can't just put in any number you want.

JUDGE SYKES: I'm glad about that. (laughter)

MR. DOWD: I understand, Your Honor.

JUDGE SYKES: That would have been really speculative.

(Judge Sykes and Mr. Dowd talking at the same time)

MR. DOWD: I'm sorry, Your Honor, I did it again. The reasonable estimate of damages, I think you do tell a jury that in some cases.

JUDGE SYKES: Not a case like this, I mean you got to have some expert support for the numbers in a case like this.

MR. DOWD: I understand, Your Honor and I think we did. I think we did, clearly. I think that when you look at these statement though, you know, for Household, they're on the hook for all 17 statements. They were uttered by one of the defendants. Mr. Aldinger was on the hook because he concedes he made 15 of the 17 statements and the other two, he's liable in any event, under control person liability. I mean the jury found he was a control person so he gets hit for all 17. Mr. Schoenholz was only found primarily liable for 16. Fifteen he concedes he made, and the other two he's liable under 20(a), so the March 23rd issue doesn't even hit him. As to Mr. Gilmer, you know, I think Your Honor, Mr. Gilmer says, well, you know, what about the SEC filings, I mean Schoenholz and Aldinger signed them so you can certainly find them liable for those. But you can't find me liable for those. And I think the reality is that when you look again at the words of *Janus*, you look at the facts and circumstances. Who had ultimately authority? There doesn't have to be just one maker. Did you have control over the contents and whether and how to communicate it? And the testimony in this case was that Mr. Gilmer was the Vice-Chairman of the company in 2002. He was the head of the largest unit, the one that the fraud emanated from in this case. He also approved the content of all the SEC filings and the

CFO, Mr. Schoenholz, testified, "I took comfort in the fact that we got these approvals from the business heads." I think under *Janus*, you can find he made those statements. But in any event, it has no impact on the other three defendants, because all three of them are on the hook for all 17 statements no matter how you cut it. I mean I understand the defendants raise some proportionate liability argument in their reply brief. I mean I think that when you look at it, you know, proportionate liability, *Janus* doesn't talk about proportionate liability. The PSLRA and the jury instruction and the verdict form here, that they don't challenge on this basis, told the jury to analyze the defendants' conduct in portioning liability and certainly that's what the jury was entitled to do.

You know the last thing I want to talk or discuss is I want to talk a little bit about rebutting the presumption. I think that it's, you know, one of the things that doesn't really come through in the briefs here is that, in this case, the defendants got a chance to rebut the presumption at trial. You know, when you go back and look at *Basic v. Levinson*, and you take a look at it, it says there's really three ways that you could rebut the presumption of reliance. First, you can say that market makers were privy to the truth. I mean we don't really have that issue here because the defendants said nobody had inside information, and they had to say that because they were going to say they weren't predatory lenders so how could somebody have inside information. Secondly though, the main way that you can rebut the presumption of reliance is the truth-on-the-market defense. That was the case that was tried here, Your Honor. When you asked earlier about questions about what was said in closing arguments, I think that was what the closing argument was about for the defendants. They said everybody knew. I remember the big charts, "everybody knew," and that was rejected by the jury in this case. When you look at *Basic*, that's the main way you rebut the presumption on a class-wide basis. They tried it, they lost it, as Judge Guzman noted after the trial. I think that then you come to the defendants' arguments with respect to well, we didn't really get a chance to attack particular class members. They did. They asked for the, the claim form question cut out 26% of the class. They asked for discovery and they got it, Your Honors. They asked for 120 days, that's what Judge Guzman gave them. They were dilatory, they didn't use it very well. It's that simple. And they weren't able to sever that link between the decision to purchase the stock and the price that *Basic* requires you to do as to any one of those class members. I mean if you look at, there's one document not cited in the briefs, it's Clerk's Docket 1777, where Judge Guzman says, hey discovery is over, now the defendants have to raise this issue. They have to show us there's a genuine issue of material fact and they couldn't do that.

I see my time is up, Your Honors, thank you very much.

JUDGE KANNE: Thank you counsel.

MR. DOWD: Thank you, Your Honor.

JUDGE KANNE: Mr. Clement, how much time, you have four minutes, Mr. Clement.

MR. CLEMENT: Thank you, Your Honors, I'd like to make three points in rebuttal. I'm going to start with whether we had some burden to do more on cross-examination. I think, first of all, Judge Sykes, you made the most important point, which is the models themselves simply do not account for the non-fraud, firm-specific information and that just means they're not good enough under *Dura*. Now we think that's alone enough as you suggested. But even if you can complement that or supplement that with other testimony, the testimony here doesn't cut it, because it just says "over the whole period" it nets out. But it doesn't say that at specific times it nets out, and people are going to recover based on all of those day inflation, based on when they traded, they're going to recover for every single one of those days, even though lots of those days are going to reflect inflation that has nothing to do with the fraud.

Now, on the cross-examination I think in fairness to trial counsel, the reason there wasn't more cross-examination on this point is that trial counsel got the exact admission he was looking for. The last part of the exchange, this is on page 8 of our reply brief, with the plaintiffs' expert is the plaintiffs' expert says, "but just to be clear, under the leakage model, whether they did, whether they were purely fraud related, combined fraud related or not at all fraud related, they were all included in the leakage model." So when you're cross-examining an expert and he says there's a *Dura* error here, I think you're entitled to move on to the next topic, which is what happened. Now let's talk about March 23rd a little bit longer, because as part of the colloquy, the question became, well on any one of these days if the truth came out, then the price would drop that amount. But, as I believe Your Honor pointed out, that can't be true about March 23rd. If the truth came out about predatory lending on March 23rd, nobody thinks the price would have dropped $24, because I think it's common ground that the $24 reflects the predatory lending fraud, the re-aging fraud, the restatement fraud and non-fraud, firm-specific information. So if all that happened on March 23rd is the one misrepresentation the jury found would have been truthfully disclosed to the market, the price might have dropped, but it wouldn't have dropped $24.

Now they want to dismiss this as just, and they're actually quite candid that the jury was presented with three options and none of them worked, well that's not true, I mean zero would have worked, but so would have the specific disclosures model because, remember, the specific disclosures model ties inflation coming out to disclosures on specific days. Those disclosures were about specific frauds. So you can find, okay here's $2 that's specifically associated with re-aging, or here's $3 that's associated with predatory lending. You can't do that with the leakage model, and so, the jury had a viable option, but they picked one that just doesn't work. Now it's not just sort of well, you know, it's three trading days, we can ignore it, because as we suggest, what it really shows, is it shows the broader problem with this model. If they would have, if the jury would have come back and said the first misrepresentation was on December 4, 2001, they would have attributed the entire amount of inflation to re-aging. If instead of coming out with 4/23, they would have come up with May 9, 2001, they would have attributed everything to re-aging and restatement and not a penny to predatory lending. What that shows is that model was not designed to account for a single fraud. But it was also not designed to be able to differentiate the effects of non-fraud, firm-specific information.

Let me close with just the *Janus* error. What you heard is maybe an argument that under the most elastic reading of *Janus*, there might be a possible theory to get Aldinger as the maker of a statement. That's not the test. Essentially, if you recognize there's a *Janus* error, then the question is prejudice. The question on prejudice is much more forgiving for my clients. It basically says, "can you show that this error didn't have an effect."

JUDGE SYKES: I thought there were some stipulations here that might create a prejudice problem for your side of the case. Weren't there stipulations about who was the maker of the 10-K statements and the 10-Q statements?

MR. CLEMENT: Your Honor there was a stipulation that the 10-Ks, the 10-Qs and the company press releases were made by Household, but that doesn't create any kind of problem here for showing prejudice, and the easiest way to explain that is, that there's two ways. I know my time is up but I'm trying to be responsive to this question. The first is that the critical statement I think for showing prejudice to Household is the March 23rd statement, and that's a statement in *Origination News* by Gilmer, and there's no stipulation as to that statement. So the stipulation only goes to 10-Ks, 10-Qs and company press releases, not statements like that from Gilmer. And that statement is so critical, because of all the findings the jury made, they only made one knowing finding for Aldinger on the 23rd which is then passed up to Household on the 23rd. So every other finding the jury makes is recklessness, and the difference between recklessness and knowing is entirely prejudicial under the PSLRA because under 21(d)(f)(2) of the PSLRA, if you are found to have made a knowing statement, you can be jointly and severally liable, but if there's no knowing statement, then you are only liable for your proportional share. So that's . . .

JUDGE SYKES: And the verdict was not sliced and diced in that way here?

MR. CLEMENT: It was sliced and diced and I want to, that actually gets to the second prejudice. So what happens is the verdict has knowing reckless for each one of the counts.

JUDGE SYKES: Right.

MR. CLEMENT: The only one there's knowing is this March 23rd.

JUDGE SYKES: Ok.

MR. CLEMENT: There is an assignment that's a generic assignment to the whole form that deals with proportional liability, and so, and that gives 55% to Household, so if there's no knowing statement here, Household's liability is capped at 55%. If there is a knowing statement, there's the possibility of joint and several liability, that difference seems to me more than sufficient to show prejudice and it's to a statement that the stipulation doesn't touch.

If I could just finish. The other way that there's prejudice, gets right to that proportionality, because the jury is instructed on proportionality to look at, simply all of the conduct of the defendants. And that has to include because, as every one of the statements including the ones that shouldn't be attributed to people, they're making judgments that yes, so Gilmer acted recklessly with this statement. So then when they get to making the proportional share, they're clearly influenced by whether they think certainly the individual defendants had made or not made certain statements, and they attribute that all up and it's got an equal 100%. Its clearly prejudicial *inter se* among the individuals and if they are entitled to a new trial on that basis, you have to give a new trial to household as well.

JUDGE SYKES: Just to clarify, your bottom line request. Looking for a new trial on just loss causation and this question of the *Janus* error on proportionality or even the questions of the basic actionability of the statements because those I didn't see any argument about that.

MR. CLEMENT: Right, I think to be clear, though, we believe we'd be entitled to a new trial. We'd be entitled to a new trial on all those issues. Those issues may not be the subject of the vigorous contesting of the parties on remand, but we still think we're entitled to a new trial. Obviously, in the strong form of the loss causation argument, we think we'd be entitled to judgment as a matter of law.

JUDGE KANNE: Thanks to both counsel. The case will be taken under advisement.