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

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANTS-APPELLANTS

[Oral Argument Requested]

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs dedicate substantial portions of their response to imagined waivers and irrelevant "facts" while avoiding the glaring problems with their proof and the proceedings below. When they finally turn to the merits, Plaintiffs have no answer to the arguments Defendants actually advance on appeal. Even at this late stage of the proceedings, Plaintiffs refuse to pick a theory of their case, referring to inflation-maintenance and inflation-introduction theories interchangeably. But they are hardly fungible and Plaintiffs have fatal problems either way. The former requires Plaintiffs to identify when inflation entered the stock price, and Plaintiffs have never explained how the stock price was substantially inflated on the first day of the Class Period as their evidence supposed. The latter requires evidence of how a single relatively innocuous statement, which pertained to only one of Plaintiffs' three fraud theories and barely moved the stock price, could have introduced the sum total of alleged inflation into the stock. There is none.

But the problems hardly end there. Plaintiffs explain neither their failure to exclude the impact of firm-specific non-fraud related

factors from their loss causation analysis nor their inability to tie the dissipation of inflation to corrective disclosures. And Plaintiffs fail to present even a plausible argument as to how the instruction on who is a statement's "maker" can be reconciled with *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), or how proceedings regarding reliance—truncated in order to foster operation of the class action device—can be squared with *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), or the Rules Enabling Act, 28 U.S.C. § 2072(b).

In short, Plaintiffs come nowhere close to explaining away the errors that resulted in a multi-billion dollar judgment against Defendants in this case. The judgment below cannot stand.

ARGUMENT

I. Plaintiffs Failed To Prove Loss Causation.

As explained in Defendants' opening brief, Plaintiffs failed to prove loss causation as required by the precedents of this Court and the U.S. Supreme Court. Plaintiffs made no attempt to establish how Household's stock became inflated in the first instance—both Plaintiffs' loss causation models posited that substantial inflation was present in Household's stock price at the outset of the Class Period. But neither

model purported to explain the origin of that inflation, and even now Plaintiffs offer no explanation as to how the stock was initially inflated by either $7.97 (under the specific disclosures model) or $17.81 (under the leakage model). *See* A166, A187.

Instead of pointing to relevant evidence, Plaintiffs suggest that they had no obligation to show how inflation came into the stock price, but merely had to show that Defendants' "misrepresentations 'became generally known,' and 'as a result' share value 'depreciated,'" which suffices to demonstrate that "'defendant's actions had *something to do*' with" Household's stock price decline. Response Br. 24-25. But the law quite clearly requires Plaintiffs to do far more: they needed to "prove that the decline in [Household's] stock was 'because of the correction to a prior misleading statement' and 'that the subsequent loss could not be explained by some additional factors revealed then to the market.'" *Erica P. John Fund, Inc. v. Halliburton*, 131 S. Ct. 2179, 2185 (2011); *see* Opening Br. 34-42.

Effectively admitting they offered no evidence whatsoever concerning the origin of the pre-existing inflation that both of their models presumed, Plaintiffs now contend that "[w]hether plaintiffs

could have relied on pre-Class Period inflation" is merely "an interesting question" because "the jury found that the first false statement on March 23, 2001, introduced" all $23.94 of inflation "into Household's stock price." Response Br. 35. That finding—which was based entirely on the jury's application of the leakage model and lacks any independent evidentiary basis—is no substitute for the proof necessary to support an inflation-maintenance theory. The leakage model assumed—without explanation—that Household's share price was inflated by $17.81 at the outset of the Class Period. Thus, the jury's finding that the stock price was inflated by $23.94 *based on the leakage model* cannot substitute for proof of the pre-existing inflation because the jury's finding of $23.94 of inflation on March 23 itself depended on the pre-existence of at least $17.81 of inflation that is completely unsupported by any evidence. None of the cases cited by Plaintiffs remotely stands for the proposition that a plaintiff can establish loss causation without identifying when and how inflation came into a stock's price in the first instance. If this Court affirms the judgment below with respect to loss causation, it will be the first to so hold.

Plaintiffs respond that their loss causation proof "worked backward, measuring inflation as it came out of Household's stock price." Response Br. 13. But as emphasized in Defendants' opening brief, simply assuming that what went down must also have gone up is not sufficient. Opening Br. 37-38. In all events, Plaintiffs' effort to work backwards provides no explanation for the substantial inflation that Plaintiffs assumed to be present in Household's stock price at the beginning of the Class Period. Accordingly, the original source of the inflation is more than just an "interesting question"—it is the critical question, and Plaintiffs have never answered it.[1]

Even now, Plaintiffs cannot quite bring themselves to choose whether they brought an inflation-maintenance suit or an inflation-introduction suit. Plaintiffs sometimes describe their loss causation evidence as proof of inflation maintenance, *see, e.g.*, Response Br. 34 ("[i]f the adverse information had been revealed, the share price would have dropped to its true value"), sometimes as proof of the introduction

[1] Plaintiffs point to Dr. Bajaj's testimony that "inflation begins when there is a misstatement" and seem to think this testimony helps them. Response Br. 17. It does not. Plaintiffs asserted that Household's stock price was inflated on the first day of the Class Period. That inflation had to come from somewhere, namely unidentified pre-Class Period statements that, in any event, the district court held were time-barred.

of inflation during the Class Period, *see, e.g.*, *id.* at 13 (Plaintiffs "measured the amount of inflation introduced by a false statement"); *id.* at 35 (Defendants' "false statement[s] … introduced inflation into Household's stock price"), and sometimes as proof of either or both an inflation-maintenance and inflation-introduction theory, *see, e.g.*, *id.* at 20 (false statements "created and maintained the inflated stock price"); *id.* at 35 (statements "introduced and/or maintained inflation").

But these two theories describe fundamentally different lawsuits, and Plaintiffs' continuing ambivalence about which theory they pursued reflects the uncomfortable reality that they did not present sufficient evidence to support either. If Plaintiffs' case turns on an inflation maintenance theory—as their evidence stating that the stock price was inflated from the outset indicates—then Plaintiffs have two insurmountable problems. First, they never identified the source of the inflation that was purportedly maintained during the Class Period and thus their proof is legally insufficient. Second, the jury rejected that theory when it entered a "0" for every day that Plaintiffs claimed the maintained inflation was in the stock up until the March 23 statement. A288-A301. If, on the other hand, Plaintiffs' case was built on an

inflation-introduction theory, then Plaintiffs have two different, but equally fatal problems. First, there is no evidence to support the attribution of $23.94 of inflation purportedly introduced by the March 23 statement because the only evidence even associated with that number was a model that itself assumed that $17.81 of inflation already existed on day one of the Class Period. Second, it is impossible to assign the maximum amount of inflation asserted by Plaintiffs due to their three fraud theories to a single statement relating to only one of those theories.[2]

Plaintiffs also face the wholly independent failure to present evidence that controlled for non-fraud firm-specific factors. Plaintiffs employ the tactic that dominates their brief by arguing that Defendants waived this argument by failing to cross-examine Plaintiffs' expert on

[2] Plaintiffs cite the Eleventh Circuit's statement in *FindWhat* that "there is no 'legal distinction between fraudulent statements that wrongfully prolong the presence of inflation in a stock price and fraudulent statements that initially introduce inflation.'" Response Br. 49. That statement, however, merely supported the Eleventh Circuit's conclusion that an inflation-maintenance theory based on identified pre-class statements was viable. Nothing in *FindWhat* permits the pursuit of an inflation-maintenance theory without identifying specific pre-class statements that introduced the inflation, let alone sanctions Plaintiffs' effort to switch back and forth between inflation-maintenance and inflation-introduction theories in an effort to avoid confronting the absence of sufficient evidence to support either.

the subject. Plaintiffs, however, ignore the record below. Defendants cross-examined Plaintiffs' expert on exactly this issue:

> Q: And you agree there are a bunch of stock price movements that were significant under your regression analysis that were not attributable to fraud-related disclosures … ?
>
> A: There were probably some, both positive and negative, but a lot of the significant movements … had some fraud-related aspect and then they had some other aspect in addition to the fraud-related aspect.
>
> Q: And were there some, any, that had no fraud-related aspect?
>
> A: … I would say there were a few, but there were also … a significant number of the statistically significant movements that had this combined aspect.
>
> *But just be to 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.*

DSA2-DSA3 (emphases added). As Plaintiffs' own expert made clear, Plaintiffs' leakage model *did not* account for non-fraud firm-specific factors—the impact of those factors was included as actionable inflation.

Plaintiffs wrongly believe that their expert's casual observation that non-fraud factors "canceled each other out" solves this problem. It was Plaintiffs' burden to present a model that accounted for non-fraud

firm-specific price movements. They did not, and the observation that any such movements cancelled each other out is no substitute because the burden is to demonstrate loss causation, not to come close and assume the rest away. Moreover, even if non-fraud factors cancel each other out, some are positive and some are negative and the failure to account for them will leave some plaintiffs with a windfall and others with a shortfall. There is simply no substitute for a model that accounts for non-fraud firm-specific movements and Plaintiffs failed to carry that burden. Seventh Circuit precedent is unequivocal about the consequences: Plaintiffs' failure to carry their burden means that "the class loses outright." *Schleicher v. Wendt*, 618 F.3d 679, 687 (7th Cir. 2010).

Plaintiffs argue that "[b]oth *Dura* and Seventh Circuit precedent support the use of leakage evidence to prove loss causation," and argue that cases such as *In re Williams Securities Litigation*, 558 F.3d 1130 (10th Cir. 2009), and *In re Flag Telecom Holdings*, 574 F.3d 29 (2d Cir. 2009), provide no aid to Defendants because those cases "acknowledge[] that, if done correctly, leakage evidence may support loss causation." Response Br. 26, 32. Just so. But all those cases support the obvious

proposition that in order to prove loss causation a leakage model must be "done correctly." Here, the leakage model employed by Plaintiffs was not done correctly: it failed to account for non-fraud firm-specific factors, and was designed to support an inflation-maintenance theory that Plaintiffs now largely disclaim. This Court can recognize those errors without calling into question the validity of a leakage-based approach, "if done correctly."

The district court never confronted these glaring shortcomings in Plaintiffs' proof, and Plaintiffs have failed to explain them away.[3] This Court should vacate the judgment below and remand the case with instructions to enter judgment in Defendants' favor.

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

Plaintiffs concede—as they must—that "the jury found that the first false statement on March 23, 2001, introduced" $23.94 of inflation "into Household's stock price." Response Br. 35. But that concession is

[3] While Plaintiffs make no effort to explain the district court's silence on these issues in response to Defendants' motions for judgment as a matter of law or a new trial, they do attempt to justify the district court's failure to address the matter on summary judgment by pointing to the court's *Daubert* ruling. Of course, whether Plaintiffs' loss causation evidence was admissible is a fundamentally different question from whether that evidence was legally sufficient proof of loss causation. It was not, and the district court's silence on the matter speaks volumes.

tantamount to a concession that there must be, at a minimum, a new trial. There is no evidence in the record—none—to support the proposition that $23.94 of inflation was introduced into Household's stock price on March 23. *See* A387 (Affidavit of Professor Cornell) ("[T]here 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.'").[4]

More broadly, this concession explains why Plaintiffs move back and forth between defending their loss causation evidence as proof of inflation introduction "and/or" inflation maintenance. The loss causation evidence Plaintiffs submitted was clearly meant to support an inflation-maintenance theory—the evidence states that inflation was in Household's stock price from the beginning of the Class Period and well before any of the misstatements alleged in this case. A187. Thus, when

[4] Defendants submitted two affidavits by Professor Cornell—one with their *Daubert* motion and one during Phase II proceedings, which never made it to trial with respect to the claims on appeal. Opening Br. 17-18, 25-28. Accordingly, Plaintiffs' complaint that Professor Cornell was not cross-examined rings hollow. Plaintiffs were free to submit a competing affidavit in response to Professor Cornell's withering indictment of the application of the leakage model, which they never did. More fundamentally, and ignoring the absurd suggestion that this Court should disregard the opinion of the only scholar Plaintiffs cited in support of the leakage model, the affidavits are part of the record, were not excluded by the district court, and are appropriately relied on here.

the jury found that all of the inflation was "introduced" by the March 23 statement (having previously entered nothing but zeroes before the March 23 statement), it rejected the only theory of loss causation Plaintiffs' evidence even plausibly supported.

Having effectively conceded error, Plaintiffs resort to a series of attempts to distract this Court from the merits. Once again, Plaintiffs' principal submission is that Defendants "waived any arguments seeking a new trial based on the" jury's irretrievably flawed attempt to apply Plaintiffs' leakage model. Response Br. 37. Plaintiffs lodged this exact waiver claim in the district court in response to Defendants' argument that the jury's misapplication of the leakage model required a new trial. Doc. 1876 at 20. The district court did not accept that waiver argument, and for good reason—it had already ruled that Defendants had "reserve[ed] any issues [they] wish to raise in a written motion" regarding the verdict. DSA36.

The details of the proceedings below only underscore that Defendants did everything necessary to preserve their objections. After being informed that the jury had reached a verdict, counsel for Defendants stated: "we may need a few minutes to review it and caucus

ourselves, during which time it probably would be advisable to keep the jury but—send them back to the jury room while counsel review the verdict form." DSA14-DSA15. The court stated that after reviewing the verdict form itself it would "ask [counsel] if you have any motions to make before I discharge the jury." DSA15. The court then reviewed the form, stated that it was consistent, and published the verdict. DSA17. In response to the question whether there were "[a]ny other motions before the [the court] released the jury," counsel for Defendants stated on the record and in the jury's presence:

> We believe the verdict is fatally inconsistent in a number of ways, which we're prepared to detail to the Court. I'm not sure if you need the jury present. Obviously it's up to you.[5] Primarily, it's the interspersal of yeses and nos when juxtaposed against … [Plaintiffs'] leakage model, … whatever our position on the leakage model ab initio …, it certainly doesn't work that way. And certainly a verdict which contains both yeses and nos but nevertheless adopts … [the] leakage damage model is fatally flawed and internally inconsistent. … We have other things we'll say at the appropriate time, but that is something which I thought should be mentioned before the jury retires.

DSA33-DSA34. The jury was discharged, and counsel for Defendants began to outline additional objections to the verdict. The Court

[5] The context of this statement makes clear that Defendants' counsel was referring to whether the jury should return to the jury room, not whether, as Plaintiffs suggest, the jury should be discharged.

interjected: "I'm ruling that you're reserving any issues you wish to raise in a written motion." DSA36. And when Defendants submitted that motion in the form of a request for judgment as a matter of law or a new trial based, at least in part, on the jury's inconsistent verdict, that motion was denied as "premature." Doc. 1696. The same arguments were then presented in the post-trial motions that immediately preceded the order under appeal, and again the district court did not find any waiver.

Accordingly, Defendants clearly preserved the arguments regarding the jury's inconsistent verdict now pressed on appeal. Plaintiffs' waiver argument simply ignores the district court's contemporaneous finding that Defendants had done everything necessary to preserve their objections. Nothing more was required of Defendants.

Plaintiffs' cases about mixed special/general verdicts are not to the contrary. First, the verdict here is best viewed as a series of general verdicts regarding the various elements of Plaintiffs' claims, and this Court's precedents addressing such circumstances are crystal clear that even "[i]f inconsistency escapes notice until after the jury has

disbanded, the proper thing to do is hold a new trial." *Timm v. Progressive Steel Treating*, 137 F.3d 1008, 1010 (7th Cir. 1998); *see Gorden v Degelmann*, 29 F.3d 295, 298-99 (7th Cir. 1994) (same). But even if the verdict were a mixed special/general verdict, nothing in this Court's case law mandates a finding of waiver where, as here, Defendants expressly noted the inconsistency before the jury was discharged and the district court ruled that Defendants had preserved the arguments now at issue (and then denied Defendants' motion raising that issue as "premature"). The cases relied on by Plaintiffs involve a failure to complain about inconsistency altogether. *See Strauss v. Stratojac Corp.*, 810 F.2d 679, 684 (7th Cir. 1987) (appellant "failed to raise the present inconsistency arguments until it filed its brief with this court"); *Cundiff v. Washburn*, 393 F.2d 505, 506 (7th Cir. 1968) (the district court expressly noted the inconsistency before discharging the jury and neither party took any action).

Plaintiffs return to the waiver well to claim that Defendants waived any challenge to the attribution of $23.94 in inflation to a single statement relating to only one of Plaintiffs' three fraud theories by not raising the issue until post-trial briefing. But Defendants objected to

the verdict form as it related to the leakage model on the grounds that "[o]nce the[jury] ha[s] reached th[e] conclusion[] that on any given date the inflation was none … 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; *see* Opening Br. 20. The attribution of all inflation to a statement that went to only one theory was just a specific manifestation of the problem Defendants flagged for the district court. Accordingly, any preservation requirements were met. Indeed, Defendants could not have objected more specifically to the particular incoherence ultimately produced by the verdict form without knowing which statement(s) the jury would ultimately credit. The law requires preservation, not clairvoyance.

Plaintiffs next assert that the attribution of the sum total of inflation due to their three fraud theories to a statement pertaining to just one theory is permissible because "predatory lending was the primary source of Household's stock-price inflation." Response Br. 44. But even if predatory lending was the primary driver of the three-prong fraud theory Plaintiffs presented to the jury that cannot explain how all the inflation could be attributed to a single fraud theory. To the

contrary, that incoherent result was clearly just a glaring manifestation of a broader problem. Once Plaintiffs shifted gears from an inflation-maintenance theory to an inflation-introduction theory, they really needed evidence that could attribute separate inflation to separate statements about separate frauds. But they never submitted such evidence, and simply repurposing a model designed for other uses yielded a fundamentally incoherent result.[6]

Relatedly, Plaintiffs contend that "[e]ven if" the jury's "estimate of inflation on March 23" "lacks precision," "it must be upheld, for damages need not be proven with absolute certainty." Response Br. 45. This argument is ironic coming from Plaintiffs given their criticism that Defendants "conflate loss causation and damages." *Id.* at 29. As Plaintiffs well know, the jury did not "estimate damages" at all during Phase I proceedings, a point made clear at the jury instruction conference. DSA6. Instead, Plaintiffs offered the leakage model as evidence—ultimately their sole evidence—of the critical element of loss

[6] The jury's attribution of all inflation to a single statement about predatory lending was clearly a product of the misuse of the repurposed leakage model and not the centrality of the alleged predatory lending fraud. If the jury had entered zeros until April 9, 2002, it would have attributed nearly all the inflation predicted by the model ($23.16) to a single statement related to the alleged financial restatement. *See* A201.

causation. So importing "close counts" principles from the law of damages cannot save Plaintiffs' case. And the attribution of $23.94 to the March 23 statement is much more than a mere imprecise "estimate"—it is completely without any basis in the record. Indeed, the only relevant record evidence indicates that a mere 67 cents of inflation was introduced into the stock price on March 23, and Plaintiffs concede this 67 cent increase was not attributable to fraud. *See* Response Br. 48 n.45.

Taking a different tack, Plaintiffs assert that—at most—the verdict is only a little bit inconsistent because the jury found that Household made another false statement related to all three fraud theories on March 28, 2001. But the jury's finding with respect to March 28 only underscores the absurdity of the verdict. The jury found zero additional inflation on that day. That might have been a rational result under an inflation-maintenance theory, but it makes no sense to pursue three separate fraud theories, attribute $23.94 of initial inflation to a single statement about a single theory, which barely moved the stock price, and then attribute zero additional inflation to a statement that encompasses all three theories.

In the same breath, Plaintiffs invite this Court to "modify the verdict by either excising the first three [trading] days"—March 23, 26, and 27—"or ordering a remittitur and reducing inflation for those days." Response Br. 45-46. Given the substantial problems with the attribution of the sum total of alleged artificial inflation to the March 23 statement, one can appreciate why Plaintiffs would extend this extreme invitation to an appellate court, but this Court should politely decline. Plaintiffs have never asked for "excision" or "remittitur" before, and an initial appellate remittitur, or worse yet "excision," would raise Seventh Amendment concerns that go well beyond the normal admonition that appellate courts are courts of "review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). And since the jury actually found zero inflation independently introduced by the March 28 statement, Plaintiffs do not want a remittitur to zero, but want this Court to pretend that the jury made a different finding than it actually made.

In the final analysis, this extraordinary request just underscores that Plaintiffs have an extraordinary problem. Plaintiffs' only basis for showing the inflation was a leakage model that was designed for a very

different case than the one that Plaintiffs now find themselves trying to explain. The fundamental incoherence of the jury's verdict would have been obscured—but by no means eliminated—if the jury had attributed all the inflation to a statement (like the March 28 statement) that touched on all three fraud theories. But by attributing all inflation to the March 23 statement, the jury exposed the problems with Plaintiffs' effort to switch horses midstream. Plaintiffs cannot paper over this fundamental problem by asking this Court to pick a different day and different misrepresentation than those chosen by the jury.

Precisely because the jury ultimately attributed all inflation to only one of Plaintiffs' three fraud theories, the mistake here is quite similar to the one the Supreme Court faced in *Comcast Corp. v. Behrend*, 133 S. Ct. 1422 (2013). Plaintiffs suggest that *Comcast* is inapposite because the jury ultimately credited all three theories, but that is a distinction without a difference. The jury did find that post-March 23 statements supported different theories of fraud, but that does not somehow excuse the jury for attributing the inflation associated with all three theories to a single statement pertaining to a single theory. As in *Comcast*, there is "no question that the model failed

to measure damages resulting from the particular" theory "on which [Defendant's] liability in this action is premised." *Id.* at 1433. The leakage model did not offer any mechanism for isolating the economic impact of a single theory of fraud, let alone a single statement.

In sum, by assigning the total $23.94 of inflation to a single statement pertaining to only one of Plaintiffs' three fraud theories, the jury applied the leakage model—which, by its very nature, was not designed to and could not disaggregate inflation attributable to individual statements and individual fraud theories—in a way that was inconsistent with the model itself. This error resulted in an unsupportable and irrational verdict, requiring, at a minimum, a new trial.

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

In *Janus Capital Group Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), the Supreme Court squarely held that one who furnishes "'the false or misleading information that another person then puts into the statement,'" or who provides "'substantial assistance'" in formulating the content of a representation, does not thereby "'make'" the statement as required to meet the first element of a Rule 10b-5

claim. *Id.* at 2301-03. The district court's instruction to the jury on this score—that Plaintiffs needed to prove only that a Defendant "made, approved or furnished information to be included in a false statement of fact"— was in direct conflict with *Janus* and requires a new trial.

Plaintiffs suggest that the court's instruction was not a misstatement of law because it "was taken from *Makor Issues & Rights, Ltd. v. Tellabs Inc.,* 513 F.3d 702, 708 (7th Cir. 2008)." Response Br. 50 n.47. Plaintiffs are doubly wrong. First, *Makor* predates *Janus*. Second, *Makor* did not even address when a defendant can be deemed to have "made" a false statement. *Makor* addressed instead the issue of *corporate scienter* and explicitly rejected the "group pleading doctrine." 513 F.3d at 710; *see Pugh v. Tribune Co.*, 521 F.3d 686, 693-94 (7th Cir. 2008).

Plaintiffs also suggest that this Court corrected the erroneous summary instruction by omitting the "approved or furnished" language from a later instruction on the first element. Response Br. 50-51. The omission of the language in the subsequent instruction, however, did nothing to correct the misstatement of law that was conveyed to the jury. As explained in Defendants' opening brief, *see* Opening Br. 56 n.7,

the summary instruction was *more detailed* on this point than the subsequent instruction and informed the jury about the various circumstances in which (under the incorrect view of the law) a defendant could be considered the "maker" of a false statement. When the jury was given the immediately following instruction on the first element of Plaintiffs' Rule 10b-5 claim, the jury necessarily would have understood the requirement to be met by proof that a Defendant either "made, approved, or furnished information to be included in a false statement of fact." And this Court's precedents are clear that "[w]hen a jury could have based its verdict on either correct or incorrect statements of 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 v. New York Life Insurance Co.*, 135 F.3d 1158, 1165 (7th Cir. 1998). In all events, the verdict—which attributes greater scienter to someone who was not the "maker" of a statement in the *Janus* sense than to the actual maker of the statement—manifests that the jury did in fact understand the instruction as authorizing a finding of primary liability under circumstances now foreclosed by *Janus*.

Plaintiffs argue that *Janus*'s holding is limited to the specific facts of that case, which dealt with statements by a "third party," and that *Janus* does not apply in cases involving corporate officers or "insiders." Response Br. 51-52. Nothing in *Janus* supports such a strained limitation and courts have appropriately rejected attempts to limit *Janus*'s holding in this manner. *See* Opening Br. 54-55. What is more, none of Plaintiffs' authorities supports their assertion that, notwithstanding *Janus*, one corporate insider may be held liable for a statement made by another corporate insider in a private securities suit. In both *City of Pontiac General Employees' Retirement System v. Lockheed Martin*, 875 F. Supp. 2d 359 (S.D.N.Y. 2012), and *In re Satyam Computer Services Securities Litigation*, 915 F. Supp. 2d 450 (S.D.N.Y. 2013), the courts based their decisions on the group pleading doctrine. As discussed above, the Seventh Circuit rejected the group pleading doctrine even before the Supreme Court issued its decision in *Janus*. And *SEC v. Daifotis*, 874 F. Supp. 2d 870 (N.D. Cal. 2012), and *SEC v. Benger*, 931 F. Supp. 2d 908 (N.D. Ill. 2013), were SEC enforcement actions, not private securities suits. As *Benger* notes, it is an open question whether *Janus* applies to SEC enforcement actions.

Id. at 911. Furthermore, the issue in both *Benger* and *Daifotis* was whether executives could be held responsible for statements made by the corporation, not by other officers. *Id.*

Recognizing that the instruction simply cannot survive *Janus*, Plaintiffs quickly move to arguing there was no prejudice from the instructional error. But prejudice exists as a matter of law where, as here, the jury premised its verdict on an incorrect legal theory. "Prejudice to the complaining party includes the possibility that the jury based its decision on incorrect law." *Dawson,* 135 F.3d at 1165; *see also Byrd v. Ill. Dep't of Pub. Health*, 423 F.3d 696, 709 (7th Cir. 2005).

Moreover, the prejudice resulting from use of the erroneous instruction is clear. Plaintiffs do not dispute that Aldinger, Schoenholz, and Gilmer each were found liable for statements that they did not personally make. Plaintiffs contend, however, that this result is legally permissible because: (1) Aldinger allegedly "crafted" Gilmer's March 23, 2001 statement; (2) Aldinger attended an April 2000 Household conference and "watched" as Schoenholz made allegedly false statements; (3) Schoenholz and Gilmer "plotted" Aldinger's allegedly false Goldman Sachs conference statements and prepared slides for

Aldinger's presentation; and (4) Gilmer reviewed and approved Household's SEC filings and "Schoenholz, who signed the filings, took comfort in this process." Response Br. 54-57.

Plaintiffs' arguments fail under *Janus*. As the Supreme Court explained, "[o]ne who prepares or publishes a statement on behalf of another is not its maker.... Even when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it." 131 S. Ct. at 2302. As a result, only Gilmer "made" the March 23 statement, only Schoenholz "made" the statements attributed to him at the April 2000 conference, only Aldinger "made" the statements attributed to him at the Goldman Sachs conference, and only Schoenholz and Aldinger, who signed Household's SEC filings, "made" the allegedly false statements contained therein.

Plaintiffs also contend that no prejudice resulted from the *Janus* error because the jury found Aldinger, Schoenholz, and Gilmer liable for certain statements that, under *Janus*, they *did* make. Response Br. 54-57. Again, Plaintiffs miss the mark. A finding that an individual Defendant was primarily liable for a statement actually made by another individual Defendant necessarily impacted the jury's

determination of the fundamental issues of scienter and the allocation of liability. The legally unsustainable scienter finding with respect to the March 23, 2001 statement "recklessly" made by the actual maker—Gilmer—yet found to have been "knowingly" made by Aldinger—who did not "make" the statement—proves the point. *See* Opening Br. 51-56.

That the jury found Aldinger liable under Section 20(a) as a controlling person of Gilmer and Schoenholz, and Schoenholz liable as controlling person of Aldinger and Gilmer, does not erase the prejudice from holding Aldinger and Schoenholz *primarily liable* for statements that, under *Janus*, they could not be found to have made. The apportionment of liability among the Defendants was based on the jury's determination of each Defendants' primary liability under Section 10(b) and Rule 10b-5. Moreover, the determination of secondary liability under Section 20(a) followed the threshold determination of primary liability. *See* A261. Each individual Defendant was entitled to have the jury determine his relative responsibility for the alleged fraud based *only* on the statements for which that Defendant could be held liable as the "maker" of the statement under *Janus*. That is not what

happened here, and this fundamental defect can only be rectified by ordering a new trial.

In a final Hail Mary, Plaintiffs suggest that even if Defendants are right about prejudice with respect to the individual Defendants, necessitating a retrial for them, Household could still somehow be on the hook for the entire judgment. Response Br. 23, 59 n.57. It is not entirely clear what Plaintiffs have in mind, but at the risk of stating the obvious, a finding of prejudicial *Janus* error here with respect to any of the Defendants would require a new trial with respect to all Defendants, including Household. Household cannot somehow be held vicariously liable based on the individual officers' statements if those individual officers are entitled to a retrial where, based on proper instructions, they could be found responsible for entirely different statements, or found not to have made any actionable statements at all.

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

The centerpiece of proceedings regarding rebuttal of the presumption of reliance was a self-serving claim form question submitted by Plaintiffs. That question amounted to little more than a reading comprehension test and impermissibly baked the *Basic*

presumption into a question designed to test it. *See* Opening Br. 62-67. The district court wrongly believed that limiting reliance proceedings in this manner was permissible because the claim form "question goes to the heart of the issue of individual reliance" and "sensibly resolves the tension between the rebuttable presumption of reliance and the practicalities and purposes behind Federal Rule of Civil Procedure 23." A362. As a result of the district court's mishandling of Phase II proceedings, the only means by which Defendants could rebut the presumption of reliance with respect to 99.9% of claimants were the answers to Plaintiffs' claim form question.

Accordingly, Plaintiffs' attempt to recast this matter as a mere discovery dispute misses the point. 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. "*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. The district court's wrongheaded view of *Basic* and felt need to tailor the

substance of the Phase II proceedings to suit the imperatives of the class action device, deprived Defendants of a meaningful adjudication of the essential element of reliance.

Plaintiffs' myopic focus on the quantity of discovery undertaken by Defendants during Phase II proceedings misunderstands the nature of the problem. While the district court unduly constrained the amount of discovery here—especially given the nature of the claims and eye-popping magnitude of the recovery sought—those restrictions were only the tip of the iceberg. More problematically, the district court precluded Defendants from obtaining information regarding the *actual basis* for any claimant's trading decision, other than whether the claimant possessed non-public insider information. *See* A371-A374; DSA39-DSA40; DSA44-DSA48. According to the district court, absent insider trading, "only purchasers who paid no attention to the market price did not rely on defendant's false and misleading statements as reflected in the market price of the stock." PSA753.

That virtually irrebuttable presumption of reliance is irreconcilable with *Basic*. By the district court's lights, evidence that a claimant actually considered an alleged misrepresentation and did not

credit it (*e.g.*, knew about predatory lending practices despite denials and invested anyway, intending to sell before the practices were broadly revealed), conceded that an issue did not impact the claimant's trading decision (*e.g.*, the Restatement issue[7]), or made an affirmative decision to invest in Household irrespective of price, would do nothing to rebut the presumption of reliance. That extreme position is in direct conflict with controlling case law. *See Halliburton*, 131 S. Ct. at 2186 ("[W]hen considering whether a plaintiff has relied on a misrepresentation, we have typically focused on facts surrounding the investor's decision to engage in the transaction."); *Basic*, 485 U.S. at 248 (presumption may be rebutted by proof that an individual plaintiff "would have traded despite his knowing that the statement was false"). Thus, the problem is not the volume of discovery allowed, but that the district court's mistaken view of *Basic* made evidence that would have been highly relevant to a proper reliance inquiry off-limits based on legal error.

Plaintiffs' observations about the amount of discovery Defendants sought are factually and legally misplaced. Defendants were precluded

[7] Davis Selected testified that the Restatement was not significant to its investment decisions because it "has no impact at all after three years." Doc. 1765 Ex. J at 185:16-23; 231:20-25.

from obtaining some of the promised discovery referenced by Plaintiffs due to the issuance of a protective order that Plaintiffs requested, Doc. 1737, the denial of Defendants' motion to compel, Doc. 1757, and the termination of three depositions at Plaintiffs' request, Doc. 1766 at 8-13. But even if Defendants had not fully pursued the circumscribed discovery allowed into topics deemed legally relevant by the district court, that would hardly have estopped them from challenging the restrictions on the scope of discovery based on erroneous legal views regarding what evidence matters when it comes to contested issues of reliance.

Indeed, the district court admitted that it was limiting Defendants' opportunity to contest reliance because this is a class action. That is essentially an admission of legal error. The presumption of reliance in *Basic* is just that—it remains rebuttable and the ultimate burden of proving reliance is on the plaintiff. That is no less true in a class action than in an individual action as the Rules Enabling Act and Supreme Court precedent make clear. *See Wal-Mart*, 131 S. Ct. at 2551. The claims must fit the class device, not be twisted to suit it. There is simply no room for lightening Plaintiffs' load to

accommodate the "practicalities and purposes behind Federal Rule of Civil Procedure 23." A362. In short, the district court's avowed effort to trim Defendants' ability to contest reliance to make this case work as a class action cannot stand.

True to form, Plaintiffs insist that Defendants waived their objections to the claim form by "fail[ing] to suggest any specific changes to the wording," repeating Defendants' counsel's statement that "'our issue with the notice is not one of line editing.'" Response Br. 61-62 (quoting PSA781). That single clause, however, is extracted from the transcript of a proceeding which was dedicated to Defendants' objections to the use of the claim form writ large as a means of rebutting reliance. In other words, while the claim form's language was objectionable, the more fundamental problem was with the use of the claim form as the sole means for rebutting the presumption of reliance with respect to the vast majority of the Class.

V. The Phase I Verdict Rebutted The Presumption Of Reliance With Respect To All But Two Of The Statements Found Fraudulent.

Plaintiffs dedicate little effort to explaining why the Phase I verdict did not, in fact, rebut the presumption of reliance. As explained

in Defendants' opening brief and *supra*, the Phase I verdict's assignment of the total sum of inflation from the leakage model to a single statement was deeply flawed in its own right, but if that finding is valid, the presumption of reliance is rebutted with respect to all but two statements found fraudulent. *See* Opening Br. 65-68. According to the jury, only the March 23 and December 4 statements "affect[ed] market price." *Amgen Inc. v. Conn Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013). In light of that finding, "there is no basis for presuming classwide reliance" on the remainder of the alleged misrepresentations. *Id.* at 1194.

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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April 11, 2014

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

1. This Brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because, according to the "word count" function of Microsoft Word 2013, the Brief contains 6,996 words, excluding the parts of the Brief exempted from the word count by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

2. This Brief complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because the Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Century Schoolbook font, with footnotes in 12 point Century Schoolbook font.

Dated: April 11, 2014

s/D. Zachary Hudson
D. Zachary Hudson

Defendants-Appellants Supplemental Appendix

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Court and Counsel on May 7, 2009 Doc. 1923-7	4787-4810	DSA14
Court and Counsel on January 27, 2011 Doc. 1926	12, 17-26	DSA39

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., Defendants.	)	Chicago, Illinois April 20, 2009 9:00 a.m.

VOLUME 14
TRANSCRIPT OF PROCEEDINGS - TRIAL
BEFORE THE HONORABLE RONALD A. GUZMAN, and a jury

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Q. And if I were looking at my brokerage statement if I owned Household stock, I wouldn't see minus $1.86?
A. No. But in all those documents, you might see discussion of how the stock price movement compared with the overall market and movements of other firms in the industry. That's a very common measure that Household itself used in its proxy statements that's, in effect, required by SEC regulations.
Q. I'm making --
A. So this is just a quantification of what investors look at all the time.
Q. I'm making a very small point, sir. Stocks are quoted in a price which is the price usually that they close on the New York Stock Exchange, right?
A. Correct. But there's also frequently comparisons of stock prices and prices of the overall -- movement to the overall market, movements in the industry. That's what Household itself disclosed in its proxy statement. This is just a quantification of that relationship.
Q. You've been very patient all afternoon while we talked about your first model. I want to turn to your second model.
A. Okay.
Q. This is the model with the leakage, right?
A. Okay.
Q. Okay. And you agree there are a bunch of stock price movements that were significant under your aggression analysis

that were not attributable to fraud-related disclosures, don't you?

A. There were probably some, both positive and negative, but a lot of the significant movements were combined disclosures of -- they had some fraud-related aspect and then they had some other aspect in addition to the fraud-related aspect.

Q. And were there some, any, that had no fraud-related aspect?

A. It's a matter of judgment as to whether something has a fraud-related aspect or not. I would say there were a few, but there were also, I would say, a significant number of the statistically significant movements that had this combined aspect.

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.

Q. I understand. But my point is there was some of all three?

A. You probably could -- that would probably be a fair statement.

Q. Okay. Now, this is not on either model. This is a general question.

A. Okay.

Q. You assumed that the defendants did make false statements

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
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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
	)	May 1, 2009
Defendants.	)	1:20 p.m.

VOLUME 23
TRANSCRIPT OF PROCEEDINGS - JURY INSTRUCTIONS CONFERENCE
BEFORE THE HONORABLE RONALD A. GUZMAN

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THE CLERK: 02 C 5893, Jaffe v. Household.

THE COURT: Okay. Good afternoon, everyone. I hope you've all noticed the weather is as promised. It's beautiful today.

Let's see. Can you hand those out to each side?

(Tendered.)

THE COURT: I thought we'd start with these proposed changes to the verdict form.

(Brief pause.)

THE COURT: Really the major changes are on page 41, question No. 4, which is the second page on the handout. That comes in response to -- I think it was an objection made by the defendants last time we discussed this, question No. 4. And that caused us to go back and review again the way in which we phrase the alternatives for the jury and to try to restructure it so as to not seem to be funneling or pushing the jury in any one direction.

MR. BURKHOLZ: Judge, we have no problems with any of the changes.

MS. BEER: Judge, we think the direction in which this has gone is definitely correct.

We still have, I think, a problem with the use of the term "damages," as we've gone back around several times on whether or not to use the term inflation. And I think --

MR. KAVALER: Give me one second to read it.

(Brief pause.)

THE COURT: I'm sorry?

MS. BEER: Mr. Kavaler was offering to hand up a copy with some handwritten changes.

MR. KAVALER: Ms. Beer is offering to save you from my handwriting.

MS. BEER: It may be better to read it. This follows question No. 4, Determine which, if any, of plaintiffs' proposed inflation models reasonably estimates inflation. And then, Neither of plaintiffs' proposed -- neither of plaintiffs' proposed models reasonably estimates inflation. Leakage model -- neither of plaintiffs' proposed models reasonably estimates inflation. Leakage model reasonably estimates inflation. Specific disclosures model reasonably estimates inflation.

And then in the following paragraph, If you determine that neither of the proposed models reasonably estimates the inflation.

THE COURT: Okay. Anything else?

MS. BEER: Then you have finished -- otherwise write the amount of inflation per share, if any, and continue as typed.

THE COURT: Okay. So it appears that the only real change is to swap the word "damages" -- for the word "damages" the word "inflation." And I think the problem with that is

that we would have to rewrite the damages instruction as well, and we've kind of already been over that.

MR. KAVALER: Well, your Honor, the problem with not doing that is it seems to me that it's a serious problem. Inflation is part of the plaintiffs' cause of action. If there's no inflation, as I explained to them yesterday, there's no securities fraud. Damages is a different concept. Some of them have been jurors before. They probably understand that there's liability and there's damages. Here, confusingly to all, your Honor, I certainly acknowledge that, something that sounds like a measure of damages is actually a part of whether or not there exists a cause of action. Because if there's no inflation, then there was no economic harm, which is an element.

My concern is by conflating the two -- by using the word damages -- and, your Honor, I think if you're weighing the amount of effort it requires to retype some language on a form versus a substantial defect of what the jury is being told, I don't think it's a difficult question.

It's hard enough, I appreciate, for them to understand what Mr. Dowd and I said to them yesterday about loss causation in the first place. It's going to be hard enough to understand your instructions as well. To add to the confusion in terms of using the word "damages" in a way, we think, this is something they get to afterwards -- by the way,

I'm not sure which way it cuts; and I'm not sure it doesn't benefit me. But, nevertheless, I believe it's wrong.

In a securities fraud case, the loss causation, the element of economic harm, is one of the elements of the claim. If you get past all the elements of the claim, then you go to damages. In this case, they don't know it unless you tell them -- which is okay with me too -- damages will be the subject of another proceeding before another tribunal, whether a jury, yourself, someone else, whatever. We're not going to fix damages in this case. All we're going to come out of with this case is an inflation figure vel non.

So to use the word "damages," I think is to confuse them and to confuse the record. And certainly, it seems to me, is to take away from the plaintiffs their burden of proving one of the elements of 10b-5 liability before the jury gets to anything else. If they haven't proven each element of the 10b-5 liability, the defendants are entitled to a verdict.

So if they don't find any inflation, if they reject all the inflation models, that goes to liability. It has nothing to do with damages. And anything that bridges that process is unfair and erroneous.

THE COURT: Okay. Do you want to say anything?

MR. BROOKS: Sure, your Honor. There are -- loss causation is one of the four elements. And then they'll check yes right here for the four elements, that they're satisfied

for 10b-5; it's an element of the 10b-5 claim. It's going to be read to them as an element of the 10b-5 claim. And then they're going to be deciding what the reasonable amount of loss per share is. And that's what that thing in the back is.

Now, what Mr. Kavaler is saying is that he wants to them decide this loss causation question twice, I guess. I don't understand exactly where he's going with this.

THE COURT: I think it's a slightly different concept, but I don't think it requires a change -- the change Mr. Kavaler is arguing for.

In any tort, one of the elements of the tort is harm to the plaintiff; something the jury has to find before they determine the damages. The damages is a quantification of the harm. That's all. And this is a similar situation. Part of the damages calculation is inflation. That's what we're doing here. We're calculating that portion of the damages.

MR. KAVALER: Just to be clear --

THE COURT: But the harm has to be found as one of the elements, and that's the loss causation. There's no harm if there's no loss causation.

MR. KAVALER: I agree with that, your Honor. I disagree with Mr. Brooks when he said then they're going to calculate damages. They're not going to calculate damages. That's the second phase.

THE COURT: Well, I think that they're going to

calculate an element of damages.

MR. KAVALER: Your Honor, they're going to calculate inflation.

THE COURT: You can call it an inflation element of damages or you can just call it damages for the sake of this jury. They don't know the difference, and it won't make any difference to them. The calculation they're being asked to make will serve our purposes in the next round.

MR. KAVALER: It may serve some purpose, your Honor. It will not serve the purpose of either accuracy of the law or fairness. Those are my concerns.

THE COURT: Well, I don't think --

MR. KAVALER: I believe it's unfair, and I believe it's inaccurate. I believe it's error. And I respectfully ask you to reconsider. And if the only argument against it is retyping a portion of the charge, you know, we'll do what we can to alleviate the burden. We're not trying to make work for you.

THE COURT: I understand. It's not merely a question of retyping a few words, as you know. Everything has a trickle effect in these instructions. Everything. We would have to review the entire set of instructions. And we'd have to consider whether the language you're asking us to use comports with the language that was used during the course of the trial. And I'm not sure that it does. I think the term

inflation and the term damages were used interchangeably.

And we make it clear to the jury in these instructions, the instructions on damages, we tell them that the only damages they're going to be asked to ascertain in this case is the price change per share, which is the inflation. And we even use the word inflation in the damages instruction. So I just disagree.

All right. Then if there are no other objections --

MS. BEER: Your Honor, this is not a request for any additional changes on the page that has been handed out. But we do want for the record to reflect that while we've been trying to cooperate with the Court in developing a version of this form that will be useful to the jury, we have not withdrawn our request that defendants' proposed verdict form be used and not any form that the plaintiffs submitted or the verdict form that we've been looking at today.

One of the reasons -- and we put many of our objections on the record previously. But one of the reasons is that in answering question four, if the jury rejects any aspect of Professor Fischel'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 made that he relied upon in developing his table, that from that day forward none -- the jury has no guidance whatsoever on how to reflect that decision. And the form in its totality

then becomes meaningless.

THE COURT: Well, I think what you're attacking --

MS. BEER: It's a fundamental flaw with the form. It's a fundamental failure of proof on the plaintiffs' part.

THE COURT: That's what you're arguing. You're arguing Dr. Fischel's theory is insufficient to support the plaintiffs' claim. I understand that. You've argued that. To the extent that we disagree with that and we've ruled against that, any form we prepare is going to reflect that ruling. And that's what you're pointing out here. I understand that.

MS. BEER: I'm trying to be very, very specific in this objection to this particular question asking the jury that if no loss was caused on any date, write none. Once they have reached that 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 that doesn't just rely on speculation.

THE COURT: Okay. Well, that statement has been there since this form was first proposed. And to the extent that you've made your objection, it stands on the record.

MR. KAVALER: Your Honor, just because I'm aware of your devotion to accuracy, I just want to point out you've fallen to Mr. Dowd's erroneous method of speech. It's Professor Fischel and Dr. Bajaj.

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.

HOUSEHOLD INTERNATIONAL, INC., et al.,

Defendants.

No. 02 C 5893

Chicago, Illinois
May 7, 2009
2:09 p.m.

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

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APPEARANCES: (Continued)

THE CLERK: 02 C 5893, Jaffe v. Household International, Incorporated.

THE COURT: Folks, we have a note from the verdict -- from the jury, which I just gave away. The jury has reached a verdict.

Generally speaking, I now ask you if there's any reason why we shouldn't bring the jury out to return the verdict. In this situation, I might also ask another question, which is, after the jury returns the verdict in open court, it may be desirable to have them retire to the jury room while the Court reviews the verdict and allows -- raises with the attorneys any inconsistencies or improprieties that the Court finds, rather than having the jury sit out here. Then we can call them back in and announce the verdict to the court.

Does anybody have an objection to that process?

MR. DOWD: Not from the plaintiffs, your Honor. We agree.

MR. KAVALER: I'm not sure I understood it, your Honor. You're going to review the verdict without showing it to us and you're going to decide --

THE COURT: Well, I always review the verdict without showing it to the attorneys. The question is do we do it with the jury sitting here in the jury box or do we let them retire back to the jury room.

MR. KAVALER: Certainly have them retire. I'm simply suggesting you may need a second round of the same thing after you show it to us because depending on what it says, it may or may not be immediately apparent to us if we have a response to make on either side or we may need a few minutes to review it and caucus ourselves, during which time it probably would be advisable to keep the jury but -- send them back to the jury room while counsel review the verdict form.

THE COURT: At the risk of making complicated something that ought not to be, here's what I envision the process will be: I'll call the jury out, ensure that they have, in fact, reached a verdict, take the verdict from them, ask them to retire to the jury room, review the verdict, announce to you folks whether I find any problems or improprieties. If not, I will ask the jury to come back. I will then publish the verdict to the jury. And at that point, after it's been published, I will, as usual, ask you folks if you have any motions to make before I discharge the jury.

MR. KAVALER: All I'm saying, your Honor, is depending on what you publish to us, at that point, we may need a few minutes to figure out what to say.

THE COURT: Okay. If you feel you need that, you can ask for it and then we can, I guess, ask the jury to retire back to the jury room while you do that.

MR. KAVALER: That was all I was suggesting, your

Honor. Thank you.

THE COURT: All right. Very well.

Let's bring the jury out.

(Jury in.)

THE COURT: Good afternoon, ladies and gentlemen.

Let me inquire: Who speaks for the jury?

JUROR MATONIK: I do.

THE COURT: And you are Ms. Matonik?

JUROR MATONIK: Gail Matonik, yes.

THE COURT: Ms. Matonik, has the jury reached a verdict?

JUROR MATONIK: Yes, we have.

THE COURT: And is the verdict unanimous?

JUROR MATONIK: Yes, it is.

THE COURT: Will you please hand the verdict forms to the Court Security Officer.

(Tendered.)

(Brief pause.)

THE COURT: Ladies and gentlemen, ordinarily I announce the verdict to the court. But because I have to review the verdict form first, and it's such a long one, I'm going to ask you folks just to retire back to the jury room to give me a few minutes to do that. And then we will call you right back out again. All right.

(Jury out.)

THE COURT: Be seated, folks.

(Brief pause.)

THE COURT: Okay. I have reviewed the verdict form. I find that it is filled out consistently and completely and that it is signed and dated by all of the jurors. It's my intention now to call the jury back and publish the verdict to the court.

Bring the jury out.

(Jury in.)

THE COURT: Be seated.

Ladies and gentlemen, I have reviewed the verdict form, and I have concluded that the verdict form is appropriately filled out with respect to all of the questions with the exception of question number four regarding damages. So I'm not going to publish the verdict form at this time. I'm going to ask you to retire to the jury room. I'm going to consult with the attorneys about a specific instruction to you with regard to that question. And after we have done that, we will ask you with respect to that question to continue your deliberations.

Please retire to the jury room.

(Jury out.)

THE COURT: Folks, the verdict form has been filled out correctly -- you may be seated -- with respect to all of the issues except the direction under question number four,

which requires the jury to write the amount of loss per share, if any, that, according to the model you have chosen, any defendant's conduct caused plaintiffs to suffer on each of the dates set forth in Table B.

In that regard, it's the Court's opinion that the amounts filled in by the jurors do not correspond to the amounts in plaintiffs' exhibit which corresponds to the model that they have indicated they have chosen to follow.

So there is an instruction needed to the jury instructing them specifically how to correlate the -- how to use the plaintiffs' exhibit that corresponds to the model of damages that they have chosen.

I'm open to suggestions.

MR. KAVALER: Your Honor, may we inquire: Have they checked any of the boxes under question four or none? Or is your point that there's a discrepancy --

THE COURT: No, they have selected a model of damages. They have applied it to each and every date in verdict form Table B. But the amounts that they have filled in does not appear to correspond to the amounts on the plaintiffs' exhibit which corresponds to that particular damages model.

Does that answer your question?

MR. KAVALER: Yes, it does your Honor. Thank you.

MR. DOWD: Your Honor, our suggestion would be that

the jurors be told if they've selected one of the two plaintiffs' models of damages, that they should fill in the amounts from the artificial inflation column in either 1397 or 1395. I think there used to be language like that in question four, and it was taken out; and maybe they got confused by the columns.

THE COURT: I think you might be right. I did not bring out here with me the two plaintiffs' exhibits that correspond. Do you have copies?

MR. DOWD: I have one copy, your Honor.

THE COURT: Okay. All I have is partial exhibits.

(Tendered.)

MR. DOWD: And they're not stapled.

(Brief pause.)

THE COURT: Okay. Well, it appears that the jury may have understood the verdict form better than I did. No, this can be reconciled. Folks, I'm going to bring them out and announce the verdict.

Bring them out.

(Jury in.)

THE COURT: Upon further review of the verdict form, ladies and gentlemen, I feel that it is appropriately filled out and I need only publish it now.

Please listen carefully as I publish your verdict to the court.

With respect to statement number 1 through 13, statements 1 through 13, as to all defendants, Household, Gilmer, Schoenholz and Aldinger, the jury answers question number one no.

As to question number 14, regarding defendant Household, the jury answers question number one yes; question number two, predatory lending; question number three, knowingly. Defendant Gilmer, question number one, yes; question number two, predatory lending; question number three, recklessly. Schoenholz, question number one, no. Aldinger, question number one, yes; question number two, predatory lending; question number three, knowingly.

Statement number 15. As to Household, Gilmer, Schoenholz and Aldinger, question number one, yes, as to all four defendants; question number two, predatory lending, delinquency -- two-plus delinquency/re-aging, restatement, as to all four defendants; question number three, recklessly, as to each issue for all four defendants.

Question number 16. As to all four defendants -- I'm sorry, statement number 16. As to all four defendants, question number one, yes; question number two, predatory lending, two-plus delinquency/re-aging, restatement, as to all four defendants; question number three, recklessly, as to all four defendants.

Statement number 17. Question number one, yes, as to

all four defendants; question number two, two-plus delinquency/re-aging and restatement, as to all four defendants; question number three, recklessly, as to all four defendants.

Statement number 18. Question number one, yes, as to all four defendants; question number two, predatory lending, two-plus delinquency/re-aging and restatement, as to all four defendants; question number three, recklessly, as to all three issues, all four defendants.

Statement number 19. Question number one, no, as to all four defendants.

Statement number 20. Question number one, yes, as to all four defendants; question number two, two-plus delinquency/re-aging and restatement, as to all four defendants; question number three, recklessly, as to all four defendants.

Statement number 21. Question number one, yes, as to all four defendants; question number two, predatory lending, two-plus delinquency/re-aging and restatement, as to all four defendants; question number three, recklessly, as to all three issues and all four defendants.

Statement number 22. Question number one, yes, as to all four defendants; question number two, two-plus delinquency/re-aging and restatement, as to all four defendants; question number three, recklessly, as to both

issues and all four defendants.

Statement number 23. Question number one, yes, as to all four defendants; question number two, two-plus delinquency/re-aging; question number three -- I'm sorry -- as to all four defendants; and question number three, recklessly, as to all four defendants.

Statement number 24. Question number one, yes, as to all four defendants; question number two, predatory lending, two-plus delinquency/re-aging and restatement, as to all four defendants; and question number three, recklessly, as to each issue and all four defendants.

Statement number 25. Question number one, no, as to all four defendants.

Statement number 26. Question number one, no, as to all four defendants.

Statement number 27. Question number one, yes, as to all four defendants; predatory lending -- question number two, predatory lending, two-plus delinquency/re-aging and restatement checked as to all four defendants; question number three, recklessly checked as to each issue for all four defendants.

Statement number 28. Question number one, yes, as to all four defendants; question number two, two-plus delinquency/re-aging as to all four defendants; question number three, recklessly, as to all four defendants.

Question number -- I'm sorry. Statement number 29. Question number one, yes, as to all four defendants; question number two, predatory lending, two-plus delinquency/re-aging and restatement, as to all four defendants; question number three, recklessly, as to all four defendants and each issue.

Statement number 30. Question number one, no, as to all four defendants.

Statement number 31. Question number one, no, as to all four defendants.

Statement number 32. Question number one, yes, as to all four defendants; question number two, two-plus delinquency/re-aging and restatement, as to all four defendants; question number three, recklessly, as to each issue and all four defendants.

Statement number 33. Question number one, no, as to all four defendants.

Statement number 34. Question number one, no, as to all four defendants.

Statement number 35. Question number one, no, as to all four defendants.

Statement number 36. Question number one, yes, as to all four defendants; question number two, predatory lending checked, two-plus delinquency/re-aging is checked and restatement is checked, as to each defendant; question number three, recklessly is checked as to each issue for each

defendant.

Statement number 37. Question number one, yes, as to all four defendants; question number two, predatory lending; question number three, recklessly, as to all four defendants. Let me also add that question number two, predatory lending, was checked as to all four defendants. And then question number three, recklessly, as to all four defendants.

Statement number 38. Question number one, yes is checked as to all four defendants; question number two, two-plus delinquency/re-aging and restatement is checked as to all four defendants; question number three, recklessly is checked as to each issue for each defendant.

Statement number 39. Question number one, no is checked as to each defendant.

Statement number 40. Question number one, no is checked as to each defendant.

Question number four. Determine which, if any, of plaintiffs' proposed damages models reasonably estimates plaintiffs' damages. Choose only one option below. The jury has checked leakage model, Plaintiffs' Exhibit 1395, reasonably estimates plaintiffs' damages.

If you determine -- I'm sorry. The jury instructs -- the verdict form instructs the jury to fill out the amount of loss per share, if any, that, according to the model you have chosen, any defendant's conduct caused plaintiffs to suffer on

each of the dates set forth in Table B. If no loss was caused on any date, write none or zero.

Table B is filled out as follows: For the dates July 30, 1999, through and including March 22, 2001, the amount per share filled out is zero.

For the dates 3/23/01 through 9/6/01, and including 9/6/01, the amount $23.94 per share is filled out; for September 7, '01, the amount $23.56; September 10, '01, 23.94; September 17, '01, 22.61; September 18, '01, 22.53; September 19, '01, 22.38; September 20, '01, 22.02; September 21, 21.54; September 24, 22.62; September 25, 22.29; September 26, 23.03; September 27, 23.42; September 28, 23.94.

October 1, 2001, 23.94. That amount is filled out through and including October 11, of '01. October 12, '01, 23.59; October 15, '01, through and including October 19 -- I'm sorry, October 22 -- again, I'm sorry -- October 23, '01, the amount $23.94 is filled out. That includes October 23 of '01. October 24 of '01, 23.83; October 25, 23.94; October 26, 23.94; October 29, 23.42; October 30, 23.00; October 31, 22.48.

November 1, 22.73; November 2, 22.67; November 5, 23.10; November 6, 23.94; November 7, 23.94; November 8, 23.94; November 9, 23.94; November 12, 23.94; November 13, 23.94; November 14, 23.94; November 15, 23.94; November 16, 23.60; November 19, 23.94; November 20, 23.85; November 21,

23.94; November 23, 23.94; November 26, 23.94; 23.94 through and including November 30 of '01.

December 3, '01, 22.59; December 4, 23.94; 23.94 through and including December 7, '01. December 10, 23.30; December 11, 22.20; December 12, 19.80; December 13, 20.29; December 14, 19.64; December 17, 20.61; December 18, 21.84; December 19, 22.04; December 20, 21.75; December 21, 21.37; December 24, 21.60; December 26, 21.82; December 27, 23.30; December 28, 23.94; December 31, 23.28.

January 2 of 2002, 22.58; January 3, 22.5 -- I'm sorry -- 22.41; January 4, 23.94; January 7, 23.19; January 8, 22.29; January 9, 22.42; January 10, 21.70; January 11, 19.85; January 14, 18.53; January 15, 20.28; January 16, 19.87; January 1, 18.90 -- January 17, 18.90; January 18, 20.03; January 22, 19.24; January 23, 18.59; January 24, 18.86; January 25, 19.70; January 28, 18.10; January 29, 16.58; January 30, 15.76; January 31, 17.12.

February 1, 2002, 17.34; February 4, 16.06; February 5, 14.99; February 6, 12.47; February 7, 15.56; February 8, 18.71; February 11, 17.94; February 12, 17.49; February 13, 18.36; February 14, 18.04; February 15, $18.00; February 19, 17.84; February 20, 17.72; February 21, $16.00; February 22, 16.24; February 25, 16.45; February 26, 16.72; February 27, 18.55; February 28, 17.81.

March 1, 2002, $19.02; March 4, 22.21; March 5,

21.17; March 6, 22.17; March 7, 23.00; March 8, 23.94; March 11, 23.94; March 12, 23.37; March 13, 22.86; March 14, 21.87; March 15, 22.69; March 18, 22.93; March 19, 22.77; March 20, 21.93; March 21, 22.23; March 22, 22.39; March 25, 21.06; March 26, 21.66; March 27, 21.80; March 28, 21.25.

April 1, 2002, 21.68; April 2, 21.52; April 3, 20.53; April 4, 21.39; April 5, 22.28; April 8, 23.24; April 9, 23.16; April 10, 23.23; April 11, 21.73; April 12, 22.40; April 15, 22.24; April 16, 23.65; April 17, 23.94; April 18, through and including April 26, 23.94; April 29, 22.70; 30, 23.34.

May 1, 2002, $22.61 per share; May 2, 21.92; May 3, 21.64; May 6, 21.00; May 7, 20.25; May 8, 21.83; May 9, 21.26; May 10, 19.64; May 13, 20.72; May 14, 21.31; May 15, 20.03; May 16, 19.24; May 17, 18.40; May 20, 18.19; May 21, 17.54; May 22, 17.74; May 23, 17.87; May 24, 17.85; May 28, 17.98; May 29, 17.89; May 30, 16.88; May 31, 16.26.

June 3, 2002, $16.67 per share; June 4, 16.66; June 5, 17.91; June 6, 19.83; June 7, 19.06; June 10, 18.58; June 11, 19.54; June 12, 18.92; June 13, 17.44; June 14, 17.62; June 17, 18.20; June 18, 18.08; June 19, 17.24; June 20, 16.02; June 21, 16.16; June 24, 16.50; June 25, 15.68; June 26, 16.25; June 27, 16.78; June 28, 16.19.

July 1, 2002, $14.84 per share; July 2, 14.94; July 3, 15.76; July 5, 16.69; July 8, 16.28; July 9, 14.58; July

10, 12.48; July 11, 13.14; July 12, 14.69; July 15, 14.17; July 16, 15.01; July 17, 11.59; July 18, 12.56; July 19, 11.33; July 22, 10.38; July 23, 9.30; July 24, 11.68; July 25, 10.57; July 26, 8.68; July 29, 9.19; July 30, 9.55; July 31, 11.49.

August 1, 2002, $10.63; August 2, 9.59; August 5, 8.11; August 6, 10.06; August 7, 8.28; August 8, 9.60; August 9, 8.73; August 12, 8.29; August 13, 7.06; August 14, 6.39; August 15, 7.61; August 16, 5.76; August 19, 5.22; August 20, 4.65; August 21, 4.98; August 22, 8.14; August 23, 5.85; August 26, 6.77; August 27, 5.58; August 28, $5.22; August 29, $4.69; August 30, 4.33.

September 3, 2002, $2.96 per share; September 4, 3.53; September 5, 2.87; September 6, 3.10; September 9, 5.02; September 10, 4.16; September 11, 4.57; September 12, 3.73; September 13, 4.35; September 16, 3.35; September 17, minus 0.17 per share; September 18, .41; September 19, .73; September 20, .64; September 23, minus 0.85; 24, minus 0.35; 25, minus 0.24; 26, 0.34; September 27, minus 0.56; September 30, minus 0.10.

October 1, 2002, minus 1.12; October 2, minus 1.13; October 3, minus 0.66; October 4, minus 1.87; October 7, minus 2.45; October 8, minus 3.17; October 9, minus 4.66; October 10, minus 0.68; October 11, zero.

Question number five. If you checked knowingly in

question number three for all 40 alleged false or misleading statements, please proceed to question number six.

If you checked recklessly in question number three for any of the 40 alleged false or misleading statements, you must determine what percentage responsibility, if any, for any loss plaintiffs suffered is due to the conduct of defendants Household, Aldinger, Schoenholz and Gilmer. In making this determination, you should consider the nature of the conduct of each person found to have caused or contributed to plaintiffs' loss and the nature and extent of the causal relationship between each such person's conduct and plaintiffs' loss.

As to Household, the jury filled in 55 percent. As to Aldinger, the jury filled in 20 percent. As to Schoenholz, the jury filled in 15 percent. As to Gilmer, the jury filled in 10 percent.

Question number six. With respect to Section 20(a). With respect to the Section 20(a) claim, have plaintiffs proved that defendant William Aldinger is a controlling person as to: Household, yes; David Schoenholz, yes; Gary Gilmer, yes.

Question number seven. With respect to the Section 20(a) claim, have plaintiffs proved that defendant David Schoenholz is a controlling person as to: Household, yes; William Aldinger, yes; Gary Gilmer, yes.

Question number eight. With respect to Section 20(a) claim, have plaintiffs proved that defendant Gary Gilmer is a controlling person as to: Household, no; William Aldinger, no; David Schoenholz, no.

Page 44 of the verdict form is signed by the jury foreperson, the other jurors and dated today's date.

Are there any motions with respect to the verdict as published in open court?

MR. DOWD: None from the plaintiffs, your Honor.

THE COURT: Defense?

MR. KAVALER: Your Honor, the defense requests that you poll the jury.

THE COURT: The jury will be polled.

Ladies and gentlemen, I'm going to ask you one by one to stand, state your name and answer one question for me. Actually two questions.

Will the first juror please stand.

Your name?

JUROR MATONIK: Gail Matonik.

THE COURT: Ma'am, did you hear the verdicts as published by the Court?

JUROR MATONIK: Yes.

THE COURT: And do these verdicts constitute your individual verdicts in all respects?

JUROR MATONIK: Yes, they do.

THE COURT: Thank you.
Sir.
JUROR SERA: Alan Sera.
THE COURT: Sir, did you hear the verdicts as published by the Court?
JUROR SERA: Yes.
THE COURT: And do these verdicts constitute your individual verdicts in all respects?
JUROR SERA: Yes, it is.
THE COURT: Thank you.
Next.
JUROR GARCIA: Raul Garcia.
THE COURT: Sir, did you hear the verdicts as published by the Court?
JUROR GARCIA: Yes, I did.
THE COURT: And do these verdicts publish -- do these published verdicts constitute your individual verdicts in all respects?
JUROR GARCIA: Yes.
THE COURT: Sir.
JUROR GALVAN: Joseph Galvan.
THE COURT: Sir, did you hear the verdicts as published by the Court?
JUROR GALVAN: Yes.
THE COURT: And do these verdicts constitute your

individual verdicts in all respects?
JUROR GALVAN: Yes.
THE COURT: Next.
JUROR KAMINSKI: Joe Kaminski.
THE COURT: Sir, did you hear the verdicts as published by the Court?
JUROR KAMINSKI: Yes.
THE COURT: And do these verdicts constitute your individual verdicts in all respects?
JUROR KAMINSKI: Yes.
THE COURT: Sir.
JUROR DAVIS: Charles Davis.
THE COURT: Sir, did you hear the verdicts as published by the Court?
JUROR DAVIS: Yes.
THE COURT: And do these verdicts constitute your individual verdicts in all respects?
JUROR DAVIS: Yes.
JUROR HODGES: Renee Hodges.
THE COURT: Ma'am, did you hear the verdicts as published in open court?
JUROR HODGES: Yes.
THE COURT: And do these verdicts constitute your individual verdicts in all respects?
JUROR HODGES: Yes.

JUROR STUBBS: Gail Stubbs.
THE COURT: Ma'am, did you hear the verdicts as published by the Court?
JUROR STUBBS: Yes.
THE COURT: And do these verdicts constitute your individual verdicts in all respects?
JUROR STUBBS: Yes.
JUROR BERARD: James Berard.
THE COURT: Sir, did you hear the verdicts as published by the Court?
JUROR BERARD: Yes.
THE COURT: And do these verdicts constitute your individual verdicts in all respects?
JUROR BERARD: Yes.
JUROR HUNT: David Hunt.
THE COURT: Sir, did you hear the verdicts as published by the Court?
JUROR HUNT: Yes.
THE COURT: And do these verdicts constitute your individual verdicts in all respects?
JUROR HUNT: Yes.
THE COURT: Very well.
Any other motions before I release the jury?
MR. DOWD: None from the plaintiffs, your Honor.
MR. KAVALER: Yes, your Honor. We believe the

verdict is fatally inconsistent in a number of ways, which we're prepared to detail to the Court. I'm not sure if you need the jury to be present. Obviously it's up to you.

Primarily it's the interspersal of the yeses and nos when juxtaposed again Professor Fischel's leakage model, whatever the -- whatever our position on the leakage model ab initio might have been, it certainly doesn't work that way. And certainly a verdict which contains both yeses and nos but nevertheless adopts Professor Fischel's leakage damage model is fatally flawed and internally inconsistent.

THE COURT: Okay.

MR. KAVALER: We have other things we'll say at the appropriate time, but that is something which I thought should be mentioned before the jury retires.

THE COURT: All right. Does the plaintiff have anything to say?

MR. DOWD: No, your Honor. We think the verdicts are consistent.

THE COURT: Very well.

Ladies and gentlemen, that constitutes your jury service in this case. And I might add, quite a long, diligent and some might even say heroic service it has been. I want to personally thank you for your patience, your attentiveness and your persistence as jurors in this case. I don't need to tell you, it has been a difficult case. It has been a long case.

It has been a complicated case. But it has been an important case. And as such, I thank you for having taken the time out of your lives at what I know is considerable cost both personal and pecuniary to many of you to do this.

I also tell you that you should consider yourselves to some -- in some respect fortunate to have had the opportunity to take part in what is a fundamental aspect of our democratic way of life. You have served your country today without having to join the military, pay anything extra in taxes or volunteer for community service. And we very much appreciate it, and you should be proud of it.

We'll be back for any of you who wish to stick around to talk to you if you want to -- have any questions for me, if there's anything you want to ask, anything you want me to explain. But you need not stick around.

Now, you are not required to and I would advise you not to speak to anyone about your jury service after you leave here today. It's done. You have done your duty. You have finished. You have done it well. Put it behind you and move on.

Retire to the jury room.

(Jury out.)

THE COURT: Date for motions?

(Brief pause.)

THE COURT: Does anybody need a date for motions?

MR. KAVALER: Your Honor, I'm waiting to hear if Mr. Dowd has anything to say.

MR. DOWD: Not at this time, your Honor. Did you ask for a date for motions?

THE COURT: Motions, yes.

MR. KAVALER: Your Honor, we will be making formal motions. But at this time, I want to renew the 50(a) motion. And specifically I want to observe to the Court that -- there's a couple of points. Professor -- the jury has selected Professor Fischel's more dubious by far, legally and economically, damage model to the exclusion of anything else. So we renew the motion on that ground since that model, in our view, is not legally permissible and cannot sustain a judgment.

Secondly --

THE COURT: Let me ask you to -- I mean, the record will reflect that you have reserved -- I'm ruling that you're reserving any issues you wish to raise in a written motion. So how much time do you want to file a motion? That's really what we need to --

MR. KAVALER: Your Honor, let me say this: I won't repeat everything I've said previously. And I appreciate your Honor's comment.

To the extent the jury has found against the defendant Gilmer on restatement, I believe the record contains

no indication whatsoever that he had any involvement in the underlying accounting. They also found that he's not a control person. So it's a little hard to understand what evidentiary basis there is for a finding against him on a restatement.

Also, the failure to include Andersen in question number five for the allocation, I believe fatally infects the allocation.

But I take your Honor's point. I want some guidance from the Court as to what motions you want us to make when.

THE COURT: Well, you're right. What I'm asking you for is a date for motions on the jury verdict. I mean, we also have to, of course, address what we're going to do with the rest of the case. But I think the first step is a date for motions and resolution of any motions on the jury verdict.

MR. KAVALER: You're exactly right. My point simply, your Honor, is there is a jurisdictional ten-day limit which applies to motions directed to a judgment. Since there's no judgment, I don't believe we're under the jurisdictional ten-day limit. So I would be inclined to ask you for 30 days. If your Honor has any doubt about that, however, we will comply with the requirement that we file the notice of motion and motion within ten days. And then we would ask you -- you have the power to give us up to 60 days for a brief. We would ask you for the maximum time available for the brief.

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,	)	
Plaintiffs,	)	
vs.	)	No. 02 C 5893
HOUSEHOLD INTERNATIONAL, INC., et al.,	)	Chicago, Illinois
	)	January 27, 2011
Defendants.	)	9:30 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RONALD A. GUZMAN

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don't have to produce --

THE COURT: Wait. We have to presume that the answers are going to be honest answers, right? And when you ask a question, you're not asking any individual; you're asking the institution. It's the institutional memory that they're responding to, and that includes any information or documents that they have about what their trading strategy was in whatever, 1955 or 1989 or 1990. They'll be able to give you that answer.

Now, if a person or an entity has no recollection, then there's nothing anyone can do about it. But the distinction between the fraud-on-the-market theory and the presumption that arises from it and the determination on an individual basis as to reliance is simply this: What it boils down to is, did they rely on the price? Was it a trading strategy that was based upon buying and reliance on the price of the stock? If it was, the fraud-on-the-market theory says all of the information flowed to them through that price. And that's what your questions ought to be directed to. And if you get answers to those questions, you'll know. And if they say, no, our strategy was based upon minimizing taxes; we didn't care what the price was, you've got an issue; you've got a problem with a claim.

MR. RAKOCZY: Respectfully, Judge, for us to make an evaluation of what they base their trading practices on and

Journal that every employee of that particular institution that dealt in trades read on the subway on the way in to work and back. You would have to list all of the information that was elicited during the course of the trial bearing on the public information that was available. You would have to list -- I mean, it just doesn't make any sense to me to ask that question in that way. And it is incredibly burdensome.

I think that the objection points out what is really the important factor here, which is, the only information that really matters to the issue before us is if there was information that was not publicly available. Because anything else is rolled up in the price. And if they relied on price, they considered those other sources of information.

MR. RAKOCZY: Judge, respectfully, if they were aware of the allegations of predatory lending and the other allegations that came out during the trial and still traded in Household securities, would that not defeat the presumption?

THE COURT: Do you want to respond?

MR. DOWD: Yes, your Honor.

I mean, that was absolutely tried in this case. I mean, if I -- I heard Mr. Kavaler say, "Everybody knew. Investors knew every time. They knew about predatory lending. Here's the Acorn articles. Here's this information. Here's that information." We've already been down that road. It doesn't matter if they saw that.

MR. RAKOCZY: Judge, that was not litigated by the jury. The jury didn't find out if the top -- you know, let's say the number one -- number one on the hit list knew. There's no determination that they were aware or not of various public statements. There's no indication at all whether or not they relied on these alleged misrepresentations. That was never litigated. That was never litigated. There was -- the jury was never even instructed on that issue.

THE COURT: Well, what the jury did determine is that the truth-on-the-market theory that the defendants pushed forth during the course of the trial did not keep the jury from finding that the price was inflated by fraud, which means that the jury found that there wasn't enough truth-on-the-market to do that. And that's why if the people purchasing the stock relied on the price, then that's reliance in terms of the fraud-on-the-market theory.

If you want to ask these folks if they had other information, not market information, such as, for example -- what was the one company?

MR. DOWD: Wells Fargo.

THE COURT: Wells Fargo. Perfectly reasonable question. It's pretty clear that Wells Fargo had non-public information so that their reliance went beyond price. It went to some information that wasn't available to the public.

All of the information available to the public the jury was aware of and they decided, no, it wasn't enough to rebut the fraud. It wasn't enough to rebut the effect on the price and the inflation on the price. And once that inflation is relied upon, you have your reliance.

MR. RAKOCZY: Judge, if the investor had actual knowledge that the price had been inflated due to these --

THE COURT: Good. Do you want to ask that question?

MR. RAKOCZY: -- alleged misrepresentations --

THE COURT: Do you want to ask that question? I agree. Let's ask that question. "Did you have actual knowledge that the price was inflated and did you buy it anyhow?" In fact, I think we already have that question, don't we, in our questionnaire? And that's exactly what I'm getting to. That's the fundamental issue here. And that's what we should be asking.

What you're asking for here is a lot of information on the theory that there might be some circumstantial evidence that if an investor answers the question I've just posed by saying, no, we wouldn't have purchased it, that you're going to be able to rebut that by showing hundreds of little minute pieces of information from documents that go back ten years to indicate that that's not a truthful answer to the question. And what I'm telling you is that some amount of that is okay; but the extent to what you're asking for here is way, way

overboard. It's not justified by the likely probative value or relevance of the information you're seeking. And given the circumstances of this case, the effect would be to delay this case for ten years.

And let me also add that I indicated -- and I heard no objection; in fact, I heard acquiescence last time we were in court -- that I made it clear that the period of discovery was 120 days; and that you should structure your discovery, target your discovery and prioritize your discovery in such a way that you were able to complete the most important parts of it during that 120-day period because you weren't going to get any more time.

It doesn't seem to me you've done that. It doesn't seem to me you've done that. It seems to me what you've done here is ask for every conceivable piece of information that could, under the widest theory of relevance, be of use to you. And that's not going to work in a 120-day period. It isn't going to work. But that's up to you.

What I suspect is going to happen, if I were to allow all of this discovery, is that you would be back here in 120 days telling me they haven't gotten back to us yet with all this stuff. And they would be back here saying it's impossible to get it all in 120 days, Judge, what they're asking for.

MR. STOLL: Judge, may I raise one issue --

THE COURT: Sure.

MR. STOLL: -- with regard to that, respectfully?

THE COURT: Absolutely.

MR. STOLL: We understand the 120-day limitation and are structuring things within that.

But the one limited issue that's slightly different from the trading matters that -- the trading strategy issue that the Court is addressing, if there was a circumstance in which an institution, for instance, specifically evaluated predatory lending issues and exposure at a certain point in time and assume, for instance, there is an internal document which says that they've been accused of predatory lending, they have denied those accusations, we think there is substantial exposure with regard to predatory lending issues.

THE COURT: What does that mean, "substantial exposure"?

MR. STOLL: Well, these internal analysts, they'll decide what they think potential impacts would be, et cetera. And they may nonetheless --

THE COURT: Isn't that what --

MR. STOLL: They may nonetheless, disbelieving the representations regarding predatory lending, conduct an analysis in which they say but for -- we still think it's a purchase for the following reasons.

THE COURT: Isn't that what happens in the market

when the price is set, exactly that same kind of determination? Isn't that what the fraud-on-the-market theory is, what you just described to me here? All this information comes in; and based upon the information that the market has, the price is set. And if that price is fraudulent, it's because the market was given incorrect information by your clients. That's what the jury found, by the way. So all of what you're telling me is what happened in the public arena in the setting of the price.

And the question then boils down to: Did the purchasers rely on that price in making their determination? If they did, then they've got a good claim. If they didn't, you've got a good defense.

MR. STOLL: Your Honor, respectfully, with one limitation on that that I'd like to point out. Basic is driven by reliance on the representation at issue. That is its express language.

Also, your Honor, we have never had the opportunity with regard to an individual institution to determine their internal specific analysis. So while there has been a reasonable investor issue that went to the jury with regard to materiality and falsity, there has never been an opportunity with regard to these very large institutions with sophisticated internal analysis to determine specifically what did they know about the alleged representations at issue and

how did those impact or not impact their decision to purchase, which is squarely relevant to the issue of reliance.

THE COURT: Sure, I understand that. The question is, how do we get to that. And I say that the way you get to it in a case such as this, given all the circumstances, is to ask, at least at the beginning, some very direct questions such as the one in the claims form and the ones that your co-counsel just posed to me.

MR. STOLL: And, your Honor, in light of the circumstances that you've raised today, what I'm flagging is that I think there are ways to tailor item 3 more narrowly in light of the Court's concerns that allow us to get to that point more effectively, which is, as to these institutional investors, their knowledge of the particular representation that's at issue or alleged to be at issue or was at issue by the jury.

THE COURT: You mean their non-public information knowledge?

MR. STOLL: Well, your Honor, it could be their internal analysis.

THE COURT: Which is non-public information.

MR. STOLL: Well, which is not public in the sense that we've ever had access to it or the public has access to it.

THE COURT: That's what --

MR. STOLL: But their --

THE COURT: -- non-public means, the public doesn't have access.

MR. STOLL: Okay. Then I misunderstood the Court because that is non-public information, but it may be predicated -- the analysis may be predicated on otherwise public information.

MR. DOWD: And, your Honor, that's where we run right back into the same problem. If they're analyzing public information, I mean, they can make a decision on it one way or the other; but they still got defrauded based on what was in the public.

So the question becomes -- if you look at their depo subjects of examination on Page 9, for example -- it's their No. 4 -- you could convert that deposition topic into an interrogatory and say: "Did you have any non-public information about Household, including information." That's the issue. That, and did you have actual knowledge of the fraud, similar to the first half of their depo examination No. 8.

THE COURT: That's what all of these are coming down to. And the point is that a question like that can be answered by an institution truthfully rather quickly. Whereas a question that asks them to list the date, time, et cetera, people involved, of every single communication they had with

HFC is something that will take them months and months to do and probably something they can't even do. And then you multiply that times 98 institutional investors and who knows how many more individual investors and you've got an absolutely impossible discovery situation. And the probative value is just not nearly sufficient or strong enough to justify the delay, the confusion and the oppressive effect it will have on the claimants. And that's what I'm telling you.

Sure, there are different ways you could have phrased these interrogatories, but you didn't. That's why we're here. You phrased them in the broadest way possible, to cause the claimants to have to do the most work possible, to take the longest period of time possible to cover all your bases. I understand that. That's what lawyers do. But it's my job to come up with a reasonable approach to discovery given the circumstances of this case. And what you've got here for the most part is not reasonable. It doesn't adequately weigh the probative value of what you're asking for versus the oppressive nature, the delay, the consumption of resources that it's going to take. And that's always the balancing act in discovery. And I just think you're way on one side of it in this case.

As counsel put it, if you want to ask folks what non-public information, private information -- not what private conclusions they reached -- but what private

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/D. Zachary Hudson
D. Zachary Hudson