UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	)	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE TESTIMONY OF EXPERT DANIEL FISCHEL

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I. SUMMARY OF ARGUMENT

It is ironic that defendants seek to exclude the testimony of an expert they tried but failed to retain in this case. As defendants acknowledge, Professor Fischel is one of the preeminent testifying experts in the country on the issues of loss causation and damages in securities fraud cases. Almost always retained as an expert for the defense in high-profile cases such as *Enron*, *Tyco*, and *Adelphia*, the methodology used by Professor Fischel in this case is no different and meets all the requirements of Fed. R. Evid. 702 and the factors set forth in *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993). Many of the arguments defendants raise were previously raised by defendants (and their expert Mukesh Bajaj) and addressed in Professor Fischel's two expert reports and in Plaintiffs' Opposition to Defendants' Motion for Summary Judgment. *See* Exs. A, B, and C attached.[1] Professor Fischel has submitted a supplemental report to respond to an affidavit by Professor Brad Cornell that was submitted by defendants after the close of expert discovery. *See* Ex. D.

Professor Fischel used an accepted methodology called an "event study" and regression analysis to analyze the impact of disclosures of new fraud related information on Household's stock price to determine loss causation and inflation. Fischel Report, ¶¶31-42, Ex. 49.[2] Professor Fischel's event study methodology is a commonly used and accepted approach, verifiable and even used by defendants' own expert (Mukesh Bajaj) in his analysis and report. Professor Fischel's testimony is based on scientific knowledge, will assist the trier of fact, and is reliable. *Daubert*, 509 U.S. at 592. Contrary to defendants' arguments that Professor Fischel improperly "assumes" all parts of his opinion, Professor Fischel:

- (1) did ***not*** assume but rather opines ***both*** that the value of Household's stock declined when the market learned of Household's true business condition through a series of partial disclosures from November 14, 2001 through October 11, 2002, and that this decline measures the artificial inflation resulting from defendants' misrepresentations and omissions (*see* Fischel Report, ¶¶12-42; Fischel Rebuttal Report, ¶¶4-6, 37-39);

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[1] Unless noted otherwise, all exhibits referenced throughout are attached hereto.

[2] The exhibits to Dr. Fischel's Report are attached as Ex. 1 to the Declaration of Thomas J. Kavalier in Support of the Household Defendants' *Daubert* Motion to Exclude the "Expert" Testimony of Daniel R. Fischel ("Kavalier Decl.").

- (2) did ***not*** assume but rather performed an ***independent*** analysis of loss causation and corrective disclosures that revealed new information to the market and found loss causation in this case (*see* Fischel Report, ¶¶12-29);
- (3) did ***not*** assume but analyzed and ruled out any plausible alternative non-fraud explanations for Household's stock price decline in the disclosures selected (*see* Fischel Report, ¶¶31-33; Fischel Rebuttal Report, ¶¶20-24 and Appendix);
- (4) removed any portion of the Household stock drop resulting from market and industry factors by the use of a widely accepted event study and regression analysis (*see* Fischel Report, ¶¶30-42).

Although Household's stock price declined by approximately 53% (or $32.70 per share) during the partial disclosure period of November 15, 2001 to October 11, 2002, through the application of his event study and regression analysis, Professor Fischel identifies $7.97 of that decline as being related to fraud-related disclosures under his Specific Disclosures model. *See* Fischel Report, ¶¶34-37. The purpose of the regression analysis is to isolate Household's stock price decline that is separate from any decline that could be attributed to a market or industry decline. This amount of inflation is the sum total only of corrective disclosures that have a statistically significant impact on Household's stock price under his regression analysis. Professor Fischel then opines that defendants' fraudulent statements and omissions caused Household's stock price to be inflated by ***at least*** this amount from the beginning of the Class Period until the first partial disclosure on November 14, 2001. This is an appropriate methodology that is commonly used in securities fraud cases. In fact, defendants' argument that Professor Fischel is somehow including in his inflation calculation the Household stock price decline that is due to industry or other non-fraud factors is belied by the fact that only $8 of the $32 per share decline is attributable to inflation.

It is Professor Fischel's expert opinion that this approach "significantly ***understates***" damages because "a steady stream and extensive amount of incomplete information related to Defendants' alleged fraud was disclosed beginning at least as early as November 15, 2001 . . . but only some of these disclosures were associated with statistically significant residual returns." Fischel Report, ¶¶39-40. Since Household's stock lost more than half of its value and substantially underperformed market and industry indices over this period, and ***market participants (analysts, investors) attributed the decline to concerns regarding defendants' allegedly fraudulent practices***, there is strong economic evidence of leakage of artificial inflation that would support the use of a "[L]eakage" Model. *Id.* For example, although the defendants previously denied any systemic predatory lending issues, news of the Washington state regulatory report finding that Household was

engaged in systemic predatory lending practices which was under court ordered seal per the defendants' request, leaked into the market along with other information about Household's predatory lending practices in the summer of 2002. Fischel Report, ¶18. Even defendants' expert concedes that "news media had leaked the contents of [the Washington State Regulatory] Report." Bajaj Report at 57, attached as Ex. E hereto. There is also no dispute that information leaked to the market that Household would have to pay a huge fine/restitution of up to $500 million and discontinue its systemic predatory lending practices which would reduce future earnings growth. Analysts reduced their estimates of Household's future earnings growth as this and other information continued to leak into the market. Fischel Report, ¶20. Due to the nature of the leaked disclosures, the Specific Disclosure Model does not capture all of this information.

The "event study" methodology used by Professor Fischel for the Leakage Model comes directly from a published article by defendants' "new" expert (Professor Brad Cornell), which has been reviewed and accepted in the field. *See* Fischel Report, ¶¶38-42. The use of a leakage model has also been upheld in certain cases. *See In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 245 F.R.D. 147, 166-67 (S.D.N.Y. 2007). Using this model, $12.82 to $23.94 of the $32.70 per share decline is attributable to inflation.

Professor Fischel's approach under both models is fully in conformance with the loss causation law set forth by the Supreme Court in *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005), and by the Seventh Circuit in *Bastian v. Petren Res. Corp.*, 892 F.2d 680 (7th Cir. 1990), *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645 (7th Cir. 1997), and *Ray v. Citigroup Global Mkts.*, 482 F.3d 991 (7th Cir. 2007). Magistrate Nolan has also ruled that based on Professor Fischel's Reports "the court expressly rejected defendant's objection that plaintiffs have not made a showing of a causal connection between economic loss and the alleged misrepresentations." *See* Ex. C (Plaintiffs' Summary Judgment Opposition at 13 n.6).

Defendants' disagreements about Professor Fischel's selection of disclosure dates and other expert judgments in his methodology (*i.e.*, selection of "event window," use of a one-tailed versus two-tailed test) is proper cross-examination material but certainly not grounds for exclusion. It is also well settled that as a damages expert, contrary to defendants' argument, Professor Fischel's job is ***not*** to opine on legal issues of liability, including whether defendants' statements were false or misleading, but it is to assume liability and analyze loss causation and damages. *See Freeland v. Iridium World Commc'ns*, 545 F. Supp. 2d 59 (D.D.C. 2008) (rejecting *Daubert* challenge); *RRK*

Holding Co. v. Sears, Roebuck & Co., 563 F. Supp. 2d 832 (N.D. Ill. 2008) (affirming admissibility of expert testimony).

As set forth in more detail below, Professor Fischel's opinion in this case meets the requirements of Fed. R. Evid. 702 and the *Daubert* factors. All of defendants' arguments go to the weight and credibility of Professor Fischel's opinions and are more appropriate for consideration by the jury.

II. ARGUMENT

A. Professor Fischel Is Well Qualified to Render an Opinion in This Matter

Since they tried to retain him, defendants do not seriously dispute Professor Fischel's qualifications. His resume (*see* Ex. 1 to the Kavalier Decl.) evidences the fact that he has been qualified as an expert by courts around the country on issues related to loss causation and damages over the last 25 years. His seminal article on the fraud-on-the-market theory was cited by the Supreme Court. *Basic Inc. v. Levinson*, 485 U.S. 224, 246 n.24 (1988).

B. Professor Fischel's Opinions Easily Satisfy Fed. R. Evid. 702

The *Daubert* Court itself stressed that exclusion of conclusions based on sound methodology is not the proper course:

> ***Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence***. . . . These conventional devices, rather than wholesale exclusion under an uncompromising "general acceptance" test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.

509 U.S. at 596.

The Court's gatekeeper role in evaluating the admissibility of expert testimony is not intended to supplant the adversary system or the role of the jury. *See Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003). "Both parties should be permitted to present evidence, cross-examine each other's witnesses, and present to the jury the methodologies that they believe should be applied in the calculation of damages." *Villa v. Burlington N. & Santa Fe Ry.*, 397 F.3d 1041, 1046 (8th Cir. 2005).

It is also well settled that disputes about an expert's particular application of an accepted methodology – which is the actual dispute raised by defendants here – go to the weight of the

evidence, not its admissibility. *See Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1192 (9th Cir. 2007).

C. Professor Fischel Did Perform a Loss Causation Analysis

Professor Fischel devoted 12 pages of his initial 27-page report (18 paragraphs) to a section entitled "The Relationship Between Plaintiffs' Allegations And Investors' Losses," which links "new" information about each prong of defendants' fraudulent scheme – predatory lending, reaging and the restatement – to the decline in Household's stock price. Fischel Report, ¶¶12-29. Additionally, Professor Fischel's regression analysis removed the impact of market and industry factors and found a statistically significant decline in Household's stock due to partial revelations of the fraud. Fischel Report, ¶¶30-42. Significantly, Professor Fischel in his Rebuttal Report even performed an analysis using the so-called Consumer Finance Index made up by defendants' damage expert and found that it did not change his analysis that Household's stock price declines were due to fraud related disclosures. Fischel Rebuttal Report, ¶32.

D. Professor Fischel's Specific Disclosure Model Clearly Meets Any *Daubert* Challenge

1. The Specific Disclosure Model Is Appropriate

Lead Plaintiffs' expert Professor Fischel conducted two separate analyses to determine the amount of artificial inflation in Household's stock price and the causal link to the economic losses suffered by Class members as a result of the gradual revelation of defendants' alleged fraud. The first analysis (the "specific disclosures" model) was an event study and via regression analysis found statistically significant declines caused by certain fraud-related disclosures.[3] These disclosures each revealed yet more information about defendants' fraud pertaining to predatory lending, reaging and accounting manipulations. Fischel Report, ¶¶34-37. ***Professor Fischel analyzed and rejected non-fraud reasons for Household's stock price decline***. *See* Fischel Rebuttal Report, ¶¶20-24 and Appendix. As each bit of information came out, the artificial inflation was gradually removed from

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[3] Courts in this district apply a flexible approach in determining whether a disclosure is fraud-related, recognizing that a corrective disclosure does not, on its face, have to specifically identify or explicitly correct a previous representation, or expressly disclose the particular fraudulent scheme the plaintiff alleges. *Greater Pa. Carpenters Pension Fund v. Whitehall Jewellers, Inc.*, No. 04 C 1107, 2005 U.S. Dist. LEXIS 376, at *12-*14 (N.D. Ill. Jan. 7, 2005) (holding disclosures of insider sales, lower guidance and lower than expected quarterly financial results were partial disclosures of adverse information pertaining to the alleged fraud); *see also In re Motorola Sec. Litig.*, 505 F. Supp. 2d 501, 546 (N.D. Ill. 2007).

the stock. For example, as a result of the first disclosure on November 14, 2001 relating to predatory lending, the artificial inflation declined $1.86 per share. Using the specific disclosure analysis, Professor Fischel identified a collective decline of artificial inflation of $7.97 even though Household declined by $32.70 (53%) during the disclosure period and vastly underperformed the peer group– the S&P Financials (21% decline) – identified by Household as its stock performance peer group in its SEC filings. Fischel Report, ¶29.[4] The methodology used (an event study and regression analysis) is clearly in accord with *Dura* and *Ray*, is accepted in the community, the criteria used is verifiable, and Professor Fischel's model provides useful technical expertise for the jury to consider in analyzing loss causation and damages.[5]

2. Professor Fischel's Selection of Relevant Disclosure Dates Is a Proper Exercise of His Judgment

Defendants argue that Professor Fischel's selection of certain disclosure dates in his Specific Disclosures analysis warrants exclusion. Yet, courts routinely reject *Daubert* attacks on damages experts based on a disagreement over which events are relevant and should be included in a loss causation and damage analysis. In fact, courts acknowledge the role of judgment in expert analyses of relevant dates in event studies:

> ***[T]he Court notes that even a statistical event study involves subjective elements. A researcher performing an event study must identify which company-specific events to study, and in the process, categorize those events as fraud or non-fraud related***. *See* MacKinlay, *supra* note 15, at 14. This is no different than what Preston did in

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[4] Professor Fischel "netted" or reduced the amount of inflation per share by including the stock price increases on the last two days of the Class Period (October 10 and 11, 2002). Defendants' expert criticized this approach and Professor Fischel explained his methodology and noted that including those dates lowered the inflation number substantially to the benefit of defendants. Fischel Rebuttal Report, ¶¶15-17; Plaintiffs' Rule 56.1 Statement, ¶28, Ex. F hereto.

[5] Defendants "cherry-pick" an irrelevant period with which to compare Household's stock price to the Consumer Finance Index and present a chart that actually undermines their position. Household Defendants' Motion for Leave to File *Instanter* Memorandum of Law in Excess of Fifteen Pages in Support of Defendants' *Daubert* Motion to Exclude the "Expert" Testimony of Daniel Fischel ("Defs' Mem.") at 30-31. Their period begins on "the Class Period high on July 18, 2001," but defendants (and plaintiffs and Professor Fischel) do not ascribe any relevance to plaintiffs' allegations regarding Household's stock price decline prior to November 15, 2001. Moreover, defendants' Chart A presents the stock price change between November 14, 2001 and October 11, 2002 for six Consumer Finance Companies, but what they ignore is that the average decline for these six companies is only -22%. Consequently, defendants ignore that Household's stock price fell almost ***2-1/2 times more*** during this period than the average decline experienced by their own set of comparable companies. Defendants fail to supply a reasonable explanation for this substantial difference other than the revelation of their fraud.

> conducting the Event Analysis. . . . In making this decision, Preston drew upon her knowledge and experience gained over a two-decade career in the field of security valuation, and upon accepted principles within her field. . . . Because Preston's decision was informed by a detailed factual analysis and grounded on principles generally accepted within the relevant field, her testimony is sufficiently reliable to be admitted.

RMED Int'l, Inc. v. Sloan's Supermarkets, Inc., No. 94 Civ. 5587 (PKL) (RLE), 2000 U.S. Dist. LEXIS 3742, at *28-*30 (S.D.N.Y. Mar. 24, 2000).

Professor Fischel's Rebuttal Report responded to defendants' challenge that he "cherry-picked" disclosure dates. Fischel Rebuttal Report, ¶19. Professor Fischel independently analyzed all of the possible disclosure dates (not just those identified in Plaintiffs' Complaint) and selected the dates where new information was disclosed that related to the fraud and where there was a statistically significant price change. Professor Fischel also considered and rejected concurrent non-fraud related information.[6]

Instead of raising the issue in their expert's lengthy report, the defendants now raise for the first time the issue of why seven specific dates were not included as disclosure dates by Professor Fischel. *See* Defs' Mem. at 40. In fact, the stock price increase dates in defendants' Chart B are different than the dates raised in defendants' expert's report that Professor Fischel addressed in his rebuttal report. *See* Fischel Rebuttal Report at ¶7-17. However, Professor Fischel did not "ignore" the days defendants identify. Rather than simply assume that because there were allegations there must be a price decline as defendants have assumed, he analyzed the total mix of information available to investors that could explain the price reaction.[7] Defendants' arguments go to the weight

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[6] The two examples raised by defendants in their memorandum – the November 14, 2001 disclosure and subsequent stock price drop, and the September 3, 2002 disclosure and stock price drop – and Professor Fischel's response as to why they were appropriate and "new" disclosures were addressed in Professor Fischel's Rebuttal Report, ¶¶21-22 (11/15/01 disclosure) and ¶29 (9/3/02 disclosure) and Appendix. The dates identified in plaintiffs' interrogatory responses as disclosure dates are consistent with Professor Fischel's Leakage Model and are not in conflict with his Specific Disclosure Model, as defendants claim. *See* Defs' Mem. at 43 n.16.

[7] For example, defendants include the price increases on October 10, 2002 and October 11, 2002 in their Chart B. *Id*. at 43. As explained in the Fischel Report and the Fischel Rebuttal Report, although one would expect that the negative news related to the allegations would have caused the price to decline on these days, the increases occurred because, relative to market participants' prior expectations, the news was positive. Fischel Report, ¶35 n.21; Fischel Rebuttal Report, ¶16. Defendants also discuss the price increase on February 7, 2002 that coincided with a disclosure related to the predatory lending claim, which they first brought up at Professor Fischel's deposition. Defs' Mem. at 41. After the deposition, plaintiffs' counsel

of Professor Fischel's testimony, not its admissibility. *RMED*, 2000 U.S. Dist. LEXIS 3742, at *35-*36 (opinions based on 70-page event study similar to Fischel event study not excluded).

3. Professor Fischel's Use of the "One-Tailed" Test Is an Accepted Methodology

Defendants seek to exclude Professor Fischel's testimony because he used a "one-tailed" test in his regression analysis. There is ample support for using either a one-tailed or a two-tailed test in the economic literature. *See* Fischel Report, ¶33. Nevertheless, Professor Fischel found that all of the price changes following specific disclosures are statistically significant in a ***two-tailed test*** with a 10% level of significance. As Professor Fischel noted in his Rebuttal Report, "the ten percent level of significance (*i.e.*, a t-statistic of 1.65 or greater in a 'two-tailed' test of significance) is also commonly considered statistically significant." *See* Fischel Rebuttal Report, ¶32 n.26. Once again, defendants' arguments go to the weight of Professor Fischel's opinions, not its admissibility.[8]

E. Professor Fischel's Leakage Model Is an Accepted Methodology in Certain Situations Such as the Instant Case

The second analysis, also an event study and regression analysis, utilized a Leakage Model published by defendants' new expert, Brad Cornell and his co-author, to address situations "in which fraud was revealed slowly over time, including one in which 'a slow flow of increasingly negative news fueled a rising tide of doubts and rumors' with the result that 'only a few dramatic announcements were associated with [statistically significant declines]'" and using residual price changes in those cases "'only on disclosure days will ***understate*** damages.'" Fischel Report, ¶38 (quoting Bradford Cornell & R. Gregory Morgan, *Using Finance Theory to Measure Damages in Fraud on the Market Cases*, 37 UCLA L. Rev. 883, 905-06 (1990)). Professor Fischel opined that

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informed defendants' counsel that Professor Fischel would not be changing his report on this issue, since it is clear that he did not include this date in his Quantification Using Specific Disclosure because the price increase could be fully explained by news unrelated to the predatory lending disclosure. Specifically, Household held an impromptu conference call with investors on February 7, 2002 to assure them that the Company was not having difficulty getting access to money to make loans and that it had no problems with its auditing firm. *See* Ex. G hereto. After previously declining following rumors that had also affected other finance companies, the stock rebounded on February 7, 2002. *Id.* Defendants certainly can cross-examine Fischel on these issues at trial.

[8] The cases cited by the defendants involve one-tailed tests in the employment discrimination context and are inapplicable. Defendants also fail to cite any securities cases where the use of a one-tailed test was not allowed.

the Leakage Model "more accurately reflects the effects of the alleged disclosure defects on stock prices than the [specific disclosure model]" (Fischel Depo. Tr. at 165:11-15, Ex. H hereto) because of the similar fact pattern presented in this case, *i.e.*, "a steady stream and extensive amount of incomplete information related to Defendants' alleged fraud . . . beginning at least as early as November 15, 2001 . . . but only some of these disclosures . . . associated with statistically significant residual returns," Fischel Report, ¶39, as well as the overall decline of 53% ($32.70 per share) in Household's stock price and its underperformance compared to the market and industry indices over that same period. Fischel Report, ¶29. The leakage model, quantified a cumulative drop in artificial inflation of $12.82 to $23.94 over the disclosure period of November 15, 2001 through October 11, 2002.

Defendants have submitted an affidavit from Professor Brad Cornell that questions Professor Fischel's use of the leakage model (but does not question the Specific Disclosure Model). *See* Kavalier Decl., Ex. 9.[9] Yet, the leakage model used by Professor Fischel is taken directly from Professor Cornell's published article. Fischel Report, ¶¶38-42; *see also* Fischel Rebuttal Report, ¶6 n.4. The new criticisms raised by the Cornell Affidavit were not previously raised during expert discovery even though defendants had Professor Fischel's report since August 2007. In any case, Professor Fischel's Rebuttal Report explains how his leakage model uses the same methodology set forth by Cornell in his article, including the use of an 11 month "window" period of disclosures. *See* Fischel Rebuttal Report, ¶6 n.4; Fischel Supplemental Report, ¶5 n.4, Ex. I hereto.

The leakage model is appropriate for this case since the truth about Household's fraud did not come out in a single disclosure, but leaked out over the course of a year through a series of partial disclosures that occurred in the face of defendants' repeated denials. *See Motorola*, 505 F. Supp. 2d at 544 ("[T]he loss causation requirement should not allow securities fraud defendants to 'immunize themselves with a protracted series of partial disclosures.'"). Moreover, loss causation need not "take the form of a single, unitary disclosure, but [can] occur[] through a series of disclosing events." *In re Bradley Pharms., Inc. Sec. Litig.*, 421 F. Supp. 2d 822, 828-29 (D.N.J. 2006) (citing *Whitehall Jewellers*, 2005 U.S. Dist. LEXIS 376). The *Motorola* court stated in language applicable here:

> As a practical matter, however, the truth that a misrepresentation or omission conceals can make its way into the market, resulting in dissipation of a fraudulently

[9] Professor Cornell was not designated as an expert by defendants and his late filed declaration (plaintiffs received it in November 2008) should not even be considered by the Court.

inflated share price, long before a company issues a formal "corrective" announcement, and by a variety of other ways. As one commentator points out:

> Prior to an unambiguous public announcement, the operation of one or more phenomena may lead to complete market realization of the truth. One way is a series of earlier, smaller disclosures by the issuer ***or others*** that gradually leads market participants whose actions set price to conclude that the misstatement was false.

505 F. Supp. 2d at 543 (quoting Merrit B. Fox, *After Dura: Causation in Fraud-on-the-Market Actions*, 31 J. Corp. L. 829, 851 (2006)).[10]

Use of a leakage model by experts has been accepted by other Courts, and found to ***not*** violate the dictates of the Supreme Court's decision in *Dura*. In *Flag Telecom*, 245 F.R.D. at 166-67, the court rejected defendants' *Daubert* challenge under Fed. R. Evid. 702 and 703 to the leakage theory of plaintiffs' expert. The court (citing the *Winstar* opinion) found that a leakage theory is in accord with *Dura*:

> Contrary to defendants' suggestion, the Supreme Court in *Dura* was simply explaining that no liability exists under the securities law when the value of the stock declines as a result of some subsequent event that is unrelated to the alleged fraud. Indeed, the sale of stock at a "lower price may reflect, not the earlier misrepresentation, but ***changed*** economic circumstances, ***changed*** investor expectations, ***new*** industry-specific or firm-specific facts, conditions, or other events . . . ." *See Dura*, 544 U.S. at 342-43 (emphasis added). Under these circumstances, loss causation would not be established because the decline in value of stock would be due to subsequent events that have no connection to the alleged fraud. ***If, however***, the publication of new information reveals that the alleged fraudulent information is incorrect, then this corrective information can serve as evidence of loss causation. As explained by the court in *Jefferson Ins. Co. v. Rouhana (In re Winstar Communs.)*, No. 01 CV 3014, 2006 U.S. Dist. LEXIS 7618, 2006 WL 473885, at *14-15 (S.D.N.Y. Feb. 27, 2006):

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[10] As the *Dura* author Justice Breyer noted at the oral argument, the truth "might come out in many different ways," not simply through an announcement by a corporate executive that "I'm a liar." *Dura Pharms., Inc. v. Broudo*, No. 03-932, 2005 U.S. TRANS LEXIS 4, at *37 (U.S. Jan. 12, 2005). In addition, Justice Stevens asked *Dura* counsel:

> What if the information leaks out and there's no specific one disclosure that does it all and the stock gradually declines over a period of 6 months? . . . [M]aybe [plaintiffs] don't know the leaks. The only thing they can prove is that there was a gross false statement at the time they bought the stock and they don't know what happened to the decline. Later on they find out that it gradually leaked out.

Id. at *12-*13.

> . . . ***The Dura opinion did not specify what was required to adequately plead loss causation***. The Supreme Court spoke in terms of the "relevant truth" and the "truth" making its way into the market place. *Dura*, 125 S.Ct. at 1631-32. The Court did not address the means by which the information is imparted to the public. ***Specifically, Dura did not set forth any requirements as to who may serve as the source of the information, nor is there any requirement that the disclosure take a particular form or be of a particular quality. Thus, it is the inherent veracity of the information that is of paramount concern in Dura. It is the exposure of the falsity of the fraudulent representation that is the critical component of loss causation. . . . [I]n addition to formal disclosure by a defendant, "the market may learn of possible fraud [from] a number of sources: e.g., from whistleblowers, analysts' questioning financial results, resignation of CFOs or auditors, announcements by the company of changes in accounting treatment going forward, newspapers and journals, etc***."

Id. at 170-71 (emphasis in original and added).

In *Williams*, the court rejected a leakage theory because plaintiffs' expert did not identify ***any*** leakage of the relevant truth or address any possible alternative explanations. *In re Williams Sec. Litig.*, 496 F. Supp. 2d 1195, 1266-67 (N.D. Okla. 2007). In contrast, Professor Fischel identified substantial economic evidence of leakage and addressed possible alternative explanations. Fischel Report, ¶¶12-29, 38-42. In sum, the leakage model is an accepted methodology if the expert identifies the leakage and the facts of the case indicate that the company's stock price decline was due to the leakage of information. *Id.*

F. Professor Fischel Properly Assumed Liability in This Case

As a damages expert, Professor Fischel is ***not*** supposed to opine on whether defendants' statements were false or misleading and is expected to assume liability. In fact, no expert should opine on an issue that is within the province of the jury. Courts have rejected motions to exclude experts who assume liability. *See Freeland*, 545 F. Supp. 2d at 88 ("It is not [the expert's] responsibility to prove [defendants] committed fraud; [the expert] is only proposing to illustrate how disclosures correcting that fraud affected the stock price" and defendants' complaints went to the credibility, not admissibility.); *Avery Dennison Corp. v. Four Pillars Enter. Co.*, 45 F. App'x 479, 487 (6th Cir. 2002) (failure to exclude upheld where plaintiffs' expert assumed liability and defendants' motion to exclude were "***not*** scientific facts to be evaluated under *Daubert*, but are rather the central questions of liability in the case, which were properly presented to the jury"). Furthermore, experts are allowed to make certain assumptions based on the facts of the case. *RRK*

Holding, 563 F. Supp. 2d 832 (no grounds for exclusion where expert assumed certain facts); *Smith v. Biomet, Inc.*, No. 3:01-CV-753 PS, 2004 WL 5499511, at *5 (N.D. Ind. Apr. 12, 2004) (same) (citing *Fidelity Nat'l Title Ins. Co. of New York v. Intercounty Nat'l Title Ins. Co.*, No. 00 C 5658, 2003 WL 2005233, at *8 (N.D. Ill. Apr. 30, 2003) ("Disputes between the parties' experts about assumptions and conclusions are appropriate grounds for exploration on direct and cross-examination")).[11]

G. Defendants' Arguments About Professor Fischel Relying on Pre-Class Period Inflation Are Invalid

This argument by defendants is completely without merit. Plaintiffs incorporate and respectfully refer the Court to their arguments at pp. 2-4 and 21-25 of their summary judgment opposition. *See* Ex. C. *See also* ¶7 of Plaintiffs' Rule 56.1 Statement, Ex. F hereto.

H. Professor Fischel Found that Household's Stock Was Inflated During the Class Period

Professor Fischel's reports rejected as "incorrect and misleading" the contention that his analysis "explicitly assumes that no inflationary events occurred prior to November 15, 2001 (and after July 30, 1999, the first day of the Class Period)." As Professor Fischel explained:

> Plaintiffs claim that the alleged omissions [during this time period] were inflationary events because they prevented the price from falling to its true, uninflated value. Under this theory, the Company's stock price did not have to increase upon Defendants allegedly false statements (*e.g.*, quarterly financial results) in order to become inflated. Consequently, the fact that I did not identify statistically significant price increases that resulted in the inflation increasing between the beginning of the Class Period and November 15, 2001 does not contradict Plaintiffs' allegations.

Fischel Rebuttal Report, ¶38. Professor Fischel noted support for this proposition once again from another well-known defense expert, Brad Cornell, who wrote "the observed market price can become inflated even if it remains basically constant because, had adverse information been disclosed, the market price would have declined." *Id.*, n.30.

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[11] The Fischel Rebuttal Report addressed defendants' criticism of Professor Fischel's analysis based on his report in the *In re Blech Securities Litigation*. *See* Fischel Rebuttal Report, ¶6 n.5. In addition, defendants improperly cite to portions of Fischel's deposition and mischaracterize his testimony as improper "assumptions." *See* Defs' Mem. at 9-13. Plaintiffs will not burden the Court with an analysis of each piece of testimony, and why defendants are wrong since this opposition addresses all of the relevant issues. Defendants can use the testimony for cross-examination at trial if it is so damaging (which it is not) but it does not even come close to any basis to exclude his testimony.

Professor Fischel also made clear in his deposition that he did ***not*** simply assume artificial inflation was in place in Household's stock but rather only assumed plaintiffs could prove liability or "disclosure defects" from defendants' statements. Plaintiffs' Rule 56.1 Statement, Ex. F, ¶¶9-11, 14; Lead Plaintiffs' Response to Defendants' Rule 56.1 Statement in Support of Their Motion for Summary Judgment, ¶¶41, 45 (citing to Fischel deposition testimony), Ex. J hereto. Defendants try to confuse the issue by arguing that there needs to be a ***statistically significant price increase*** from day one of the Class Period until the date of the first partial disclosure (November 14, 2001). As noted by Professor Fischel and defendants' "new" expert, Brad Cornell, there is no such requirement and Household's stock price can be inflated during the Class Period by failing to decline to its true value because of defendants' misrepresentations and omissions. Defendants' statements clearly introduced inflation into Household's stock price each time defendants made false statements to investors. *See* Plaintiffs' Opposition to Summary Judgment, at 2-4.

III. CONCLUSION

Based on the foregoing, defendants' motion to exclude Professor Fischel's testimony should be denied.

DATED: February 10, 2009

Respectfully submitted,

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DECLARATION OF SERVICE BY ELECTRONIC MAIL AND BY U.S. MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Diego, State of California, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway Suite 1900, San Diego, California 92101.

2. That on February 10, 2009, declarant served by electronic mail and by U.S. Mail to the parties the **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE TESTIMONY OF EXPERT DANIEL FISCHEL**.

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 10th day of February, 2009, at San Diego, California.

/s/ Teresa Holindrake
TERESA HOLINDRAKE