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) <u>CLASS ACTION</u> Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

<u>PLAINTIFFS' OPPOSITION TO DEFENDANTS' SUBMISSION REGARDING REBUTTAL OF THE PRESUMPTION OF RELIANCE</u>

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Following the trial, the only remaining issue is whether defendants can create a triable issue of fact under "the third method set forth in *Basic*, *i.e.*, that the link between the alleged misrepresentation and either the price received or paid by the plaintiff was severed." November 22, 2010 Order at 8 [Dkt. No. 1703]. Unless defendants can demonstrate that certain class members did not rely on the price of Household's stock and purchased it knowing or believing the stock price was inflated by defendants' false statements, plaintiffs prevail and judgment should be entered in favor of all class members. *Id*. The Court ordered defendants "to file and serve on plaintiffs a list of claims as to which they contend the evidence in the record rebuts the presumption of reliance along with a citation to those portions of the record which support their contention." *See* August 24, 2011 Order at 3 [Dkt. No. 1777].

Defendants ignored the Court's directive. Instead, defendants claim the entire jury verdict should be vacated for ***all*** claimants by rearguing issues they already lost at trial. The jury already rejected, on a class-wide basis, defendants' attempts to rebut the presumption of reliance by arguing that their statements did not "distort" (*i.e.*, inflate) the price of Household's stock and cause plaintiffs' economic loss because the truth was in the market. November 22, 2010 Order at 8. Similarly, the jury rejected defendants' arguments that there could not be liability because the stock price or the amount of stock inflation did not increase each time the defendants made a false statement (*i.e.*, defendants "up leg" argument). Finally, in reaching their verdict, the jury found that defendants' false and misleading statements caused plaintiffs' loss. The verdict is supported by the evidence and the law.

For the sole issue properly before the Court, defendants must prove, as in *Basic*, that a class member "***believed*** that [defendants'] statements were false," but acquired "his shares nevertheless because of other unrelated concerns" and, therefore, "could not be said to have relied on the integrity of a ***price he knew had been manipulated***." *Basic Inc. v. Levinson*, 485 U.S. 224, 249 (1988) (emphasis added). Defendants can rebut the presumption only by proving that a class member did ***not*** rely on the price of Household stock and purchased it despite knowing the price had been manipulated by defendants' false statements. Defendants were permitted to conduct discovery to determine whether there was evidence that a "class member may have purchased Household stock for a reason totally unrelated to its value as reflected by the market price." November 22, 2010 Order at 9. Despite extensive discovery, defendants have failed to adduce evidence that would create a triable issue of fact as to whether any class member purchased Household stock knowing its price had been manipulated by defendants' false statements or did not rely, in part, on Household's stock price. Therefore, defendants have failed to rebut the presumption.

Defendants' attacks on particular class members are without merit. Class members who purchased Household as part of an index or "quantitative model" trading strategy still relied on the integrity of Household's stock price being free from fraud. In fact, the class members deposed by defendants that engaged in index buying in whole or part (Georgia TRS, State Street, Ohio TRS) all testified that they would not have purchased Household stock if they knew its stock price was artificially inflated by defendants' fraud. Defendants never even bothered to depose the other class members listed on their Exhibit 3 to attempt to adduce evidence that they would have still purchased the stock if they knew its price was artificially inflated. Defendants complain that a handful of investment advisors testified that they did not necessarily always believe in the efficient market pricing theory. However, defendants conveniently ignore the facts: each of these investment advisors testified that they relied on the price of Household stock and would not have purchased the stock if they knew its price had been artificially inflated. More importantly, defendants ***stipulated*** that Household stock traded in an efficient market. Defendants also contend that certain class members did not respond adequately to defendants' discovery requests. However, the vast majority of the entities that defendants point to are not even class members, and defendants never filed a motion to compel or sought Court relief as to the three class members who failed to respond. And, in any event, their failure does not rebut the presumption of reliance.

Defendants' effort to rebut the presumption on a class-wide basis with loss causation arguments should be summarily rejected. The verdict was proper. The jury found inflation per share on the date (March 23, 2001) when plaintiffs established all the elements of a §10(b) claim. Defendants do not seriously dispute that the jury found Household's stock price was inflated (*i.e.*, "distorted") beginning on March 23, 2001. Rather, defendants' argument is that the ***amount*** of inflation determined by the jury for the March 23, 2001 statement is inappropriate because the statement related only to predatory lending. Even if defendants were correct, which they are not, their argument does not rebut the presumption of reliance.

Similarly, defendants' argument that each false statement subsequent to the March 23, 2001 statement must create an "additional" inflationary impact (*i.e.*, increase in Household stock price or inflation) is also without support, does not rebut the presumption, and contradicts the applicable caselaw. *See Findwhat Investor Group v. Findwhat.com*, 658 F.3d 1282, 2011 U.S. App. LEXIS 19887, at *52-*53, *63, *78 n.33 (11th Cir. Sept. 30, 2011); *Schleicher v. Wendt*, 618 F.3d 679, 683-84 (7th Cir. 2010). In essence, defendants claim that the verdict is improper or inconsistent because it overstates the amount of daily inflation for the first three days of the Damages Period. However, there was sufficient evidence in the record for the jury to adopt Professor Fischel's leakage model. Indeed, Household's own internal analysis (PX1156) established that over $20 of the decline in Household's stock in 2002 was due to leakage of information contained in the damning Washington DFI report about Household's predatory lending practices. This evidence certainly supports the jury's finding of $23 of inflation.

More importantly, a jury is given wide discretion in awarding damages if there is a reasonable basis in the record, as in this case. Further, defendants' argument only relates to the first three days of the Damages Period (3/24/01, 3/26/01 and 3/27/01) because the jury found that defendants made false statements about predatory lending, delinquency/re-aging and the restatement on March 28, 2001 (Statement No. 15) [Dkt. No. 1611]. Certainly the entire verdict should not be thrown out (and defendants have failed to rebut the presumption of reliance) where defendants' argument deals with inflation (damages) only on the first three days of the Damages Period. And, if defendants were correct, which they are not, they waived their argument by failing to object to the verdict and by failing to ask the Court to order the jury to continue deliberations and modify its verdict for these three days. *Strauss v. Stratojac Corp.*, 810 F.2d 679, 687 (7th Cir. 1987). In any event, defendants' contention is completely unrelated to the presumption of reliance.

II. ARGUMENT

A. The Presumption of Reliance Has Not Been Rebutted for Any Class Members Specifically Identified by Defendants

1. Defendants Were Allowed Discovery to Rebut the Presumption

Defendants had ample opportunity to conduct discovery to demonstrate that triable issues of fact existed as to certain class members. Defendants represented to the Court on many occasions that they needed discovery only of the top 10-15 investors to develop evidence that would rebut the presumption. *See* January 31, 2011 Order at 3-4 [Dkt. No. 1737]; August 16, 2011 Order at 5-7 [Dkt. No. 1775]. Failing to adduce any such evidence, defendants simply rehash the same arguments they have made in previous filings. The Court's discovery orders were well within the confines of the Seventh Circuit's ruling in *Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999, 1005 (7th Cir. 1971). As the *Brennan* court held, discovery of absent class members is not a matter of right but is left to the discretion of the trial court. *See* January 31, 2011 Order at 3. The defendants were allowed the discovery they represented they needed and more. Defendants ended up serving discovery on 131 institutional investors. None of the discovery that they obtained rebuts the presumption of reliance.

2. Claimants That Allegedly Answered "Yes" to the Proof of Claim Form Interrogatory

a. Defendants Failed to Establish that Claimants Who Responded "Yes" to the Claim Form Question Purchased Household Stock for Reasons Totally Unrelated to its Value as Reflected by the Market Price

To rebut the presumption of reliance, defendants must establish that something severed "the link between the . . . misrepresentation[s]" proven by plaintiffs at trial "and . . . the price . . . paid by the plaintiff." *Basic*, 485 U.S. at 248-249. To do so, defendants must prove that a "class member . . . purchased Household stock for a reason totally unrelated to its value as reflected by the market price." November 22, 2010 Order at 9. A "yes" response to the claim form question does not satisfy defendants' heavy burden. Instead, pursuant to the Court's November 22, 2010 Order, a "Yes" response opened the door for defendants to serve additional discovery of "plaintiffs answering 'yes' to obtain convincing proof that price paid no part whatsoever in their decision-making." *Id.* Notwithstanding their intensive discovery regime, defendants presented no such proof in their submission.

Defendants did not pursue discovery of the vast majority of the claimants that responded "yes" to the claim form question.[1] Defendants did pursue discovery from some of the claimants listed on Exhibit 2, who responded to interrogatories and produced documents to defendants concerning their investment strategies and methodologies. However, defendants were unable to

[1] Defendants identified the claimants they contend responded "yes" to the claim form question in Exhibit 2 to their Submission. As discussed herein, this list is incorrect and overly inclusive for several reasons.

identify a single document or discovery response from any claimant even suggesting "that price paid no part whatsoever in their decision-making," let alone meet their burden of coming forward with "***convincing proof***." November 22, 2010 Order at 9 (emphasis added).

To the contrary, the discovery provided by these class members establishes their reliance on the market price. For example, in responses to interrogatories sent by defendants, Chartwell Investment Partners, L.P. ("Chartwell") stated that "the fund purchased stocks (including Household common stock) only when the fund managers believed, on the basis of their analysis of publicly available information, that a given stock would appreciate in value." Class Member Chartwell Investment Partners L.P.'s Responses to Defendants' Revised Interrogatories, Response No. 1.[2] In other words, price was a ***primary*** factor in Chartwell's investment decision. Defendants have identified no evidence in Chartwell's 271-page document production contradicting Chartwell's interrogatory response or rebutting the presumption of reliance. Defendants could have deposed Chartwell, but made a tactical decision not to do so.

Similarly, the interrogatory responses by a handful of index purchasers who responded "yes" to the claim form confirm that they too relied on Household's market price in their purchase decisions. Specifically, depending on the type of index fund, Vanguard either "aimed to match the weight of every security in the index such that it had the exact same characteristics as the index" or "aimed to match the characteristics of the index, but in some instances did not purchase the full weight of the security in the index." The Vanguard Group, Inc.'s Responses and Objections to Defendants' Revised Interrogatories, Response No. 1. Appendix, Exhibit 2. Likewise, Munder Capital Management ("Munder") responded that its index fund "invested in stocks that were

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[2] Attached as Exhibit 1 to the Appendix of Exhibits in Support of Plaintiffs' Opposition to Defendants' Submission Regarding Rebuttal of the Presumption of Reliance ("Appendix"), filed herewith.

included in the particular index, in approximately the same proportions as they are represented in the index" and sought to "achieve a correlation between the performance of its portfolio and that of the S&P 500 of at least .95."[3] March 3, 2011 Letter from Stephen Shenkenberg of Munder Capital Management to Patricia Farren responding and objecting to interrogatories and document requests, at 6. Appendix, Exhibit 3. By "seek[ing] only to match the index and exclude other considerations (such as, for example, reliance on nonpublic information or other idiosyncratic motivations)," Vanguard, Munger and the other index purchasers on Exhibit 2 "rel[ied] exclusively upon the market to impound any representations (including misrepresentations) into securities' prices." *In re Countrywide Fin. Corp. Sec. Litig.*, 273 F.R.D. 586, 602 (C.D. Cal. 2009). Accordingly, these claimants exercised "***close to perfect reliance*** on market price-setting, which is a well established kind of reliance in securities cases." *Id.* (emphasis added). Again, both Vanguard and Munder also produced documents concerning their investment processes. Again, defendants were unable to cite a single document from these claimants rebutting the presumption of reliance.

Defendants cannot find support for their assertions in deposition testimony because, although defendants noticed depositions of several claimants identified on their Exhibit 2, they failed to follow through on ***any*** of the depositions. Although defendants challenge no fewer than 17 Vanguard funds on the basis of their claim form answers and feature Vanguard prominently in their arguments challenging the reliance of index purchasers, they made the tactical decision to cancel

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3 In addition, four other claimants noted on their claim forms that "[t]he stock was purchased by one of our passive index tracking funds. The stock would not have been purchased if it had not been included in the relevant index." Appendix, Exhibit 4.

Vanguard's noticed deposition.[4] This is hardly surprising given that the index purchasers who were deposed unanimously confirmed their reliance on Household's share price. *See* §II.A.3., *infra*.

In short, despite their far-reaching and time consuming discovery program, defendants came up empty. They were unable to identify ***any*** document, interrogatory response, testimony or other evidence establishing that ***any*** claimant listed on Exhibit 2 bought its "Household stock for a reason totally unrelated to its value as reflected by the market price." November 22, 2010 Order at 9. Like the other class members who purchased artificially inflated Household shares during the relevant time period, these investors were defrauded and suffered harm. Judgment should be entered, and their claims should be paid.

b. Defendants' List of Claimants Who Answered the Claim Form Question "Yes" is Overly-Inclusive

Defendants' list of claimants who answered "Yes" to the claim form question includes a number of entries that, for various reasons, do not belong.[5] For example, defendants seek to bar the claims of SAS Trustee Corporation ("SAS"), which filed two claims, Nos. 125492-8 and 125491-0. SAS responded "No" for the former and SAS responded "Yes" for the latter. In their submission, defendants failed to include the claim numbers of the claims they seek to preclude and thus attempt to lump SAS's "No" response in with its "Yes" response. Defendants' gambit should be rejected. Furthermore, with respect to its "Yes" response, SAS gave the following explanation:

> I have attached two claim forms in respect of the Household International Inc class action.

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[4] Defendants' utter failure to pursue a deposition from Vanguard has already caused the Court to note their lack of diligence in pursuing discovery. August 16, 2011 Order at 8.

[5] To the extent the Court is persuaded by defendants' contention that a bare "Yes" response to the claim form question is enough to rebut the presumption of reliance, these claims should be excluded from any such ruling.

> One form covers shares traded for STC by its fund managers Capital International Inc and Fidelity International Ltd in respect of which the answer to the Question in Part III is "NO". STC has confirmed this answer with its professional fund managers (Capital and Fidelity).
>
> The other form covers shares traded for STC by its fund manager, SSgA Global Advisors, Australia, Ltd in respect of which the answer to the question in Part III is "Yes".
>
> SSgA is an index manager and their mandate requires them to invest in the index. Household was part of the index during the relevant period. Therefore SSgA would have breached their mandate with STC if they had not purchased this stock during the relevant period, even in the knowledge of the false and misleading statements inflating the price. This scenario, based on an interpretation of the manager's mandate being followed "blindly", leads to the answer "yes".
>
> In reality, however, the manager and STC communicate daily, and if the manager "had known at the time of purchase of Household stock that the defendants' false and misleading statements had the effect of inflating the price..." they would have alerted STC to this knowledge with a request to exclude this stock at the inflated price from their mandate. Consequently, if STC had known of the inflated price due to misleading statements, it would have amended the SSgA mandate and required the manager to not purchase Household stock at the inflated price. The manager has confirmed with STC that they would have taken [this] course of action if they had known of the inflated price at the time of the purchase. This realistic scenario, based on the actual knowledge of the inflated price, ***leads to the answer "no***."

Appendix, Exhibit 5 (emphasis added).

SAS's explanation renders its "Yes" answer a "No," and SAS should be removed from defendants' Exhibit 2.

Additional claimants improperly included on defendants' Exhibit 2 are listed by category on Plaintiffs' Appendix, Exhibit 6. Plaintiffs provide a brief explanation of these categories below.

1. Claimants who actually answered the claim form question "No." Appendix, Exhibit 6, Nos. 1-5.

2. Claimants whose investment was made through an employee stock plan or dividend reinvestment plan. *Id.*, Nos. 6-26. However, the administrator filing on behalf of the plans responded "No" to the claim form question. Accordingly, these shares would not have been

purchased at the same price if the investment decision-maker had known that they were fraudulently inflated. Appendix, Exhibit 7.

3. Claimants who filed duplicate claims with conflicting answers to the claim form question. Appendix, Exhibit 6, No. 27.

4. Claimants who filed multiple claims with different answers. *Id.*, Nos. 28-29. Certain claimants filed multiple claims under the same name and answered "Yes" on some forms and "No" on others. Defendants' attempt to lump these claims together should be rejected.

5. Claimants who indicated that they did not make the investment decision. *Id.*, Nos. 30-31.

3. Defendants Have Not Rebutted the Presumption of Reliance for Index and Quantitative Traders Since They All Rely on a Stock's Market Price

Class members that purchased Household stock pursuant to either an index or quantitative strategy all relied on the integrity of Household's stock price. *In re Homestore.com Inc. Sec. Litig.*, CV-01 11115 RSWL, 2011 U.S. Dist. LEXIS 46552, at *11-*13 (C.D. Cal. Apr. 22, 2011) (in denying post-verdict Rule 50b motion, the court rejected defendants' attempt to rebut the presumption of reliance and found the plaintiff (an institutional investor) relied on the integrity of the market in purchasing company stock for "passive" (*i.e.*, index) trading); *Countrywide*, 273 F.R.D. at 602 (rejecting argument that index purchases are not made in reliance on any misrepresentation; "because index purchases seek only to match the index and exclude other considerations (such as, for example, reliance on nonpublic information or other idiosyncratic motivations), index purchases rely exclusively upon the market to impound any representations (including misrepresentations) into securities' prices. This is close to perfect reliance on market price-setting, which is a well established kind of reliance in securities cases."); *In re Connetics Corp. Sec. Litig.*, 257 F.R.D. 572, 579 (N.D. Cal. 2009) (rejecting argument that lead plaintiff did not rely on the integrity of the market where it used a computer model designed to mirror the Russell 2000 growth index); *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 296 (S.D.N.Y. 2003) (index or computer model trading does not defeat the presumption of reliance).

As the Court previously held (*see* November 22, 2010 Order at 9), it does not matter if an investor purchased Household stock through an automatic dividend reinvestment program, or pursuant to a proprietary trading model or other trading strategy. As long as the investor relied, in part, on price and did not know the price of Household stock had been manipulated by defendants' fraud, the presumption cannot be rebutted. *Id.* Index and quantitative traders fall into this category.

Defendants took the depositions of three class members that used an index trading strategy. The representatives of these index investors all testified that they would ***not*** have purchased Household stock if they knew its price had been artificially inflated by defendants' false statements. *See* Deposition of Mike Majure ("Georgia TRS Depo.") Tr. at 103:13-22; Deposition of Alan Warner ("Ohio TRS Depo.") Tr. at 107:13-19; Deposition of Lynn Blake ("State Street Depo.") Tr. at 44:13-46:16.[6] Defendants noticed, but later cancelled, the deposition of Vanguard. The testimony provided by Lynn Blake is applicable to all index traders. Ms. Blake testified that State Street, in answering "no" to the claim form question, undertook an internal analysis and decided "we wouldn't have purchased the stock in any of the portfolios which were found to be fraudulent." State Street Depo. Tr. at 43:15-44:19. She said that this answer applied to both actively and passively (index) managed funds. She stated State Street had no hesitation in answering the question "no" for passive funds, since it "ha[d] a duty to our participants to not expose them to a stock that has committed

[6] The deposition transcripts of Mike Majure, Alan Warner and Lynn Blake are attached as Exhibits 8-10 to the Appendix.

fraud." *Id*. at 44:20-45:25. When asked what course of action State Street would have adopted, if it knew there was an ongoing fraud, she testified

> It's speculating because, again, it's nothing we've ever experienced, but I can think of two, sort of two paths we could have gone down as passive providers. We could have – we would have discussed it with our clients and made the explicit decision in writing not to trade the stock, or we would have gone to the Index vendors and said, you need to price this stock at zero to reflect the reality of the situation.

Id. at 46:1-16.[7] Thus, the only evidence in the record regarding class members who engaged in an index trading strategy is that they would have removed Household from the list of stocks to purchase or not purchased the stock if they knew its price was artificially inflated.

Moreover, transactions made by index fund investors are, by definition, affected by stock prices, since the price and shares outstanding of any given stock determines its weight in the index relative to other stocks. For the "quantitative" funds, the evidence in the record is that price was a factor in purchasing Household stock and class members would not have bought the stock if they knew its price was inflated by defendants' fraud. Georgia TRS Depo. Tr. at 40:14-25; 103:13-22 (answered claim form question "no"); 106:7-107:4. There is no triable issue of material fact. These class members all relied on the integrity of the market and defendants have not rebutted the presumption.

4. Questioning the Efficient Market Hypothesis Does Not Mean a Class Member Did Not Rely on the Integrity of the Market

Defendants argue that the presumption of reliance has been rebutted for certain class members (Capital Guardian Funds, Capital Research Funds, and Davis Select Funds) because they

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[7] Other index investors, who provided an explanation, rather than an answer to the proof of claim form question, provided similar responses to Ms. Blake's analysis. *See, e.g.*, Appendix, Exhibit 11 (responses for 1199 Healthcare Rhumbline (claim 610007-4) and responses provided by Northern Trust for various index traders. (Claims 609901-7, 607817-6, 607821-4, 610071-6, 607831-1, 625309-1 and 625311-3)).

purportedly disavowed any belief in the efficient market hypothesis. However, as this Court stated in its August 16, 2011 Order:

> The issue is whether any investor would have purchased the Household stock even if he had known that its price had been artificially inflated by defendants' false and misleading statements. Defendants have stipulated that Household stock traded in an efficient market. That being the case, 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. Did any of the investors who proclaimed they did not believe in the efficient market theory state that they would have purchased the Household stock even if they had known that its market price had been artificially inflated by defendants' false and misleading statements? Defendants make no such assertion.

Id. at 10.

In fact, each of the investment managers for these class members testified that they relied, in part, on the price when purchasing Household stock. Deposition of Kenneth Feinberg ("Davis Select Depo.") Tr. at 43:15-23; 87:20-89:5 ("price is critical"), 212:22-24; Deposition of Andrew Barth ("Capital Guardian Depo.") Tr. at 63:25-64:8, 65:13-16; Deposition of Martin Romo ("Capital Research Depo.") Tr. at 33:9-34:17.[8] Each of the investment managers testified that they invested in Household because they believed it was "undervalued" based on their internal research – that is, that its price could increase. Davis Select Depo. Tr. at 212:22-24; Capital Research Depo. Tr. at 33:9-34:17; Capital Guardian Depo. Tr. at 63:25-64:8. Most investors buy for the same reason, yet this does not mean the stock is not trading in an efficient market. Under defendants' nonsensical theory, neither passive (*i.e.*, index funds) nor active investors rely on the integrity of the market.

Each of these entities testified that they would ***not*** have purchased Household stock if they had known its price had been artificially inflated by defendants' false and misleading statements. *See* Capital Guardian Depo. Tr. at 33:12-35:23; Capital Research Depo. Tr. at 70:7-72:3, 72:6-73:17,

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[8] The deposition transcripts of Kenneth Feinberg, Andrew Barth and Martin Romo are attached as Exhibits 12-14 to the Appendix.

74:7-9; Davis Select Funds Claim Form. Appendix, Exhibit 15. None of the investment managers testified that they conducted an analysis of Household stock and determined it was not trading in an efficient market. *See* Davis Select Depo. Tr. at 222:9-23. In sum, although these three investment managers testified to their belief that the efficient market pricing theory is not always accurate (*i.e.*, Capital Research Depo. Tr. at 37:11-38:2 (market not always "efficient")), they did not testify that ***Household*** was not traded in an efficient market, and they all relied on the integrity of the price of Household stock and would not have purchased it if they knew it was inflated by defendants' statements.[9] Finally, defendants ***stipulated*** that Household stock traded in an efficient market, demonstrating the fallacy of their arguments here.

5. Defendants Have Not Rebutted the Presumption of Reliance for Lead Plaintiff Glickenhaus & Co.

Defendants mischaracterize the testimony of James Glickenhaus, the 30(b)(6) representative for Lead Plaintiff Glickenhaus & Co., in a misguided attempt to rebut the presumption of reliance. The Court permitted defendants to conduct discovery to determine whether Glickenhaus & Co. and other class members "purchased Household stock for a reason totally unrelated to its value as reflected by the market price." November 22, 2010 Order at 9. Mr. Glickenhaus' testimony actually

[9] Defendants' claim that the presumption of reliance has been rebutted for Davis Select Advisors for the "restatement" misstatements is also without merit. There is no evidence that Davis Select did not rely on the integrity of the market price being free of fraud for of all defendants' statements. In fact, the testimony of Mr. Feinberg of Davis Select was that they were misled by Household on all issues and were "fooled" by Household management because they had defended their credibility in the press. Davis Select Depo. Tr. at 131:14-132:5. Mr. Feinberg's testimony that the restatement was not "significant" does not rebut the presumption. Mr. Feinberg was merely pointing out that since the price of Household stock had declined so much (50%) by the time the restatement was disclosed, it was not as significant as other issues (*id.* at 184:9-185:3), and Mr. Feinberg was relying ***at the time*** on Household management's explanation for the restatement (which was rejected by the jury). *Id.* at 185:9-186:3. Since Mr. Feinberg was adamant that the "price" paid was critical, Davis Select clearly relied on the integrity of the market and is entitled to the presumption of reliance. *Id.* at 43:15-23; 87:20-89:5.

demonstrates that price was the key factor in his investment decisions and that he relied on defendants to tell the truth.

Mr. Glickenhaus testified that his firm tried to make sound investments based on publicly available information. Glickenhaus Depo. Tr. at 16:16-17:15; 92:22-93:8; 125:9-23. Appendix, Exhibit 16. Glickenhaus & Co. tried to identify stocks which were at a price point that would increase over time. *Id.* at 92:22-93:8. Mr. Glickenhaus followed the price movements of Household stock, including on the day of the restatement and during the pendency of the investigation by state Attorneys General. *Id.* at 45:21-25; 127:24-128:10. He was emphatic that it was "completely important that companies who issue public statements tell the truth because we rely on it." *Id.* at 143:12-18. He further testified that he assumed that Household and its officers "were aware that what any public statement they issued had to be true" and "that there were consequences" if the statements were false. *Id.* at 63:23-64:13.

Faced with Mr. Glickenhaus' testimony that he relied on the price and counted on defendants to tell the truth, defendants shift their position. Instead, defendants contend that Glickenhaus read the press release issued on March 12, 2001, which contained similar statements to the March 23, 2001 statement found actionable by the jury, and, therefore, he somehow did not rely on the ***right*** version of their false and misleading statement. Defendants are wrong. Under *Basic*, defendants must sever the link between the decision to invest and the market price. However, Mr. Glickenhaus was adamant that price was critical to the Lead Plaintiff's investment decisions. Therefore, defendants' argument fails. Mr. Glickenhaus' inability to specifically recall whether or not he read the March 23 statement, 10 years later, is of no import. Glickenhaus Depo. Tr. at 57-62. The price incorporates all publicly available information about Household. *Basic*, 485 U.S. at 247. Since Glickenhaus relied on the price and the integrity of the market in making investment decisions, defendants have not demonstrated a triable issue of fact.

6. Defendants' Failure to Pursue Discovery of Certain Class Members Does Not Defeat the Presumption of Reliance

In an effort at misdirection, defendants point to a few discovery disputes and conclude that this creates a genuine issue of material fact entitling them to a jury trial on reliance. Defendants' argument on this point is difficult to follow because it is obscured by pages of irrelevant and/or incorrect assertions. For example, defendants protest that some plaintiffs have not produced certain evidence in discovery, that some claimants have not returned a supplemental claim form, and that a Fidelity entity told defendants that they "have offered no evidence that the Funds are even class members eligible to participate in any settlement." Appendix, Exhibit 17 at 3. If defendants believed that some plaintiffs withheld requested discovery, "their remedy was not to complain about it in Rule 56 briefing, but to file a timely motion to compel, which they evidently did not do." *See Sparks v. Phillips & Cohen Assocs., Ltd.*, 641 F. Supp. 2d 1234, 1255 (S.D. Ala. 2008).[10] And whether a Fidelity entity asked whether it was a class member or other claimants returned a supplemental claim form is irrelevant to whether defendants have provided evidence that rebuts the presumption of reliance.

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[10] *See, e.g.*, *Amin v. Loyola Univ. Chicago*, 423 F. Supp. 2d 914, 916-17 (W.D. Wis. 2006) ("If defendant believed that plaintiff was not forthcoming in producing answers to its discovery requests, its remedy was to file a timely motion to compel . . . . Defendant did not do so. Therefore, where defendant has attempted to place facts into dispute solely by alleging discovery violations, plaintiff's proposed facts will be treated as undisputed."); *Reyes v. Wilson Mem. Hosp.*, 102 F. Supp. 2d 798, 826 (S.D. Ohio 1998) (holding that remedy where a party does cooperate with discovery requests is a motion to compel and that "[a] motion under Rule 56(f) is not the equivalent of a motion to compel"); *Era Helicopters, LLC v. Island Operating Co.*, No. G-07-487, 2009 U.S. Dist. LEXIS 13726 (S.D. Tex. Feb. 23, 2009) (explaining that a motion to compel is a pre-requisite for any discovery sanction because Fed. R. Civ. P. 37 allows discovery sanctions only upon a failure to comply with a discovery ***order***).

a. Claimants With An Allowed Loss Greater Than $250,000 Who Have Not Answered Claim Form Questions

On June 10, 2011, as directed by the Court, the claims administrator, Gilardi & Co., LLC, sent a supplemental one-page claim form to 626 class members who had not already answered the question on page 5 of the Proof of Claim form.[11] Gilardi, as ordered, sent the supplemental form only to class members whose claims were filed by third-party filers and who had an allowed loss in excess of $250,000 (as calculated by Gilardi using the formula set forth in the Court's November 22, 2010 Order). The overwhelming majority of these 626 claimants have now answered the question or filed a duplicative claim in which the answer to the proof of claim form was already received.

Nevertheless, defendants have submitted a list of 368 claimants who they contend failed to answer the claim-form question. Defendants' list is inaccurate. In fact, only 54 claimants identified on defendants' list have actually failed to respond to the claim-form question. Defendants' miscount is a result of several errors: they failed to identify all of the "No" responses submitted by the class members; they improperly included on their list class members with allowed losses less than $250,000 according to the claim administrator's current calculations; they included class members who provided an explanation rather than a "yes" or "no" answer; and defendants failed to remove duplicative claims. For the Court's convenience, plaintiffs have attached to their Appendix as Exhibit 11, a claimant-by-claimant analysis of defendants' list of 368 entities to correct these

[11] The question states: "If you had known at the time of your purchase of Household stock that defendants' false and misleading statements had the effect of inflating the price of Household stock and thereby caused you to pay more for Household stock than you should have paid, would you have still purchased the stock at the inflated price that you paid?" The Proof of Claim form asks the claimant to check either the "yes" or "no" box. Gilardi sent supplemental claim forms to 14 other class members who were determined to have allowed losses in excess of $250,000 after June 10.

inaccuracies and to properly identify the 54 claims identified by defendants for which a response actually remains outstanding.[12]

The issue, however, is not whether defendants incorrectly counted the number of supplemental claims outstanding. Defendants were instructed to explain why they had believed they had rebutted the presumption of reliance. Even as to the 54 class members who have not yet responded to the claim-form question, defendants have not come close to meeting their burden. It is up to defendants to demonstrate that a class member is not entitled to the presumption of reliance. *Basic*, 485 U.S. at 247. A class member's failure to answer the question leaves defendants with no evidence supporting their position. Moreover, defendants were given an opportunity to take discovery of absent class members. And they took advantage of that opportunity, serving discovery on 131 entities. As set forth herein, none of the evidence gathered by defendants creates a triable issue of fact as to the presumption of reliance. In light of this record, the claims of the 54 class members who have not answered the question are valid and should be upheld.

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[12] Undoubtedly, some of the 54 class members who have not, to date, answered the question, will assert that they never received a supplemental claim form. Certain claims submitted by Prudential Insurance Company of America best exemplify this issue. As of August 3, 2011, there were 12 claims submitted by Prudential mutual funds or funds for which Prudential Investments LLC was the investment manager, which required a response to the claim form question pursuant to the Court's May 31, 2011 Order. Gilardi sent the supplemental forms to the third-party claims filer for these 12 funds. According to Prudential, they were notified only that they had five claims which needed to be supplemented with an answer to the claim form question. Prudential submitted the supplemental claim form for all five funds in advance of the September 12, 2011 deadline. Prudential has informed plaintiffs' counsel that it followed up with their third-party filer to ensure that no additional information was necessary with respect to the claim form question. However, due to confusion or oversight, Prudential was never informed that seven supplemental claim forms were outstanding. On November 15, plaintiffs' counsel informed Prudential that seven forms remained outstanding. Three days later, on November 18, Prudential submitted the seven claim forms, answering "no" to the claim-form question on each. Therefore, these claims should not be considered in the group of class members that have failed to answer the question. It is possible that some other class members were confused or will assert that they never received a request for supplemental information as well.

b. Class Members Who Objected to Defendants' Overbroad Discovery

Defendants served overbroad party discovery on at least 131 institutions. While defendants claim vaguely that 15 of these entities were "noncompliant" in responding to discovery, they do not – and cannot – point to a single instance in which any of these entities violated a court order. The remedy for noncompliance with requests for discovery is a motion to compel. Having made a tactical decision not to file a motion to compel, defendants cannot now complain about requested discovery in their submission.

Nor have defendants provided evidence rebutting the presumption of reliance for any of the 15 entities on their Exhibit 5 that they claim did not respond to discovery or provided inadequate responses. Many of these institutions are not even class members (and thus not subject to party discovery),[13] objected to the discovery[14] or answered "no" to the claim-form question.[15] For three of

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[13] Adage Capital Management, L.P., Algemeen Burgerlijk Pensionefunds, Archdiocese of Milwaukee Supporting Fund, Inc., ASB Capital Management, Inc., BlackRock, Inc., Comerica Inc., Deutsche Bank Aktiengesellschaft, Lutheran Brotherhood Research Corporation, Madison Investment Advisors, Spears, Grisanti and Brown LLC, Thales Fund Management and Value Line Inc.

[14] Fidelity Contrafund, Fidelity Dividend Growth Fund, Fidelity Equity-Income Fund, Fidelity Puritan Fund, Fidelity Magellan Fund, Fidelity VIP Equity-Income Fund, and Fidelity VIP II Contrafund Portfolio (the "Fidelity Funds"). Defendants contend that BNY Mellon refused to respond to defendants' party discovery requests. But BNY Mellon is a non-party custodian bank – not a class member – and is not subject to party discovery. Nor is there evidence that defendants met and conferred with BNY Mellon to determine if any BNY Mellon-related entities were class members. Indeed, there is no evidence that defendants properly served BNY Mellon with discovery requests. *See* Plaintiffs' Status Conference Report, filed June 10, 2011, at 11-13 [Dkt. No. 1766].

[15] If defendants intended to serve class members Adage Capital Partners, L.P. and Thales Fund LP, rather than Adage Capital Management, L.P. and Thales Fund Management, they would still have come up empty-handed. Adage Capital Management, L.P. and Thales Fund answered "no" to the claim-form question. As this Court explained: "If the answer is 'no,' it does not matter whether the individual plaintiff purchased or sold any Household share (1) via an options contract, (2) as a day trader, (3) to hedge another tracking strategy, (4) through an automatic dividend reinvestment program or (5) pursuant to a proprietary trading model." November 22, 2010 Order at 9. Thus, defendants are not entitled to any additional discovery from these entities.

the 15 for entities that are arguably class members, defendants have not rebutted the presumption of reliance since defendants utterly failed to complete the meet-and-confer process and, more importantly, never sought judicial relief to compel further discovery responses.[16]

c. The Fidelity Funds' Timely Objected to Defendants Discovery and Never Represented that They Were Not Participating in this Action

Defendants claim that seven Fidelity Funds should be excluded from recovery because they represented "that they were not participating in this action." Defs' Brf. at 29. Defendants are wrong. In fact, the Fidelity Funds objected to defendants' discovery requests on several grounds, including overbreadth, relevance and burden.[17] These objections were reasonable, in light of the Court's April 7 ruling against similar discovery requests. The Fidelity Funds ***never*** stated that "they were not participating in this action." To the contrary, the Fidelity Funds expressly reserved the right to respond to appropriate future requests and process: "In objecting to the discovery requests, the [Fidelity] Funds reserve the right to respond to any future notices they may receive."[18] Included in a long list of objections was the observation that the defendants did not offer any evidence that the Fidelity Funds named in the discovery request were class members. This certainly is not a waiver of a claim or a promise not to participate in the action. The fact that the defendants previously served the wrong Fidelity entity with discovery supports this objection.[19] Further, upon investigation,

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16 Defendants acknowledged the necessity of moving to compel requested discovery when they belatedly filed a motion to compel Wells Fargo to produce discovery (although they ultimately chose not to take Wells Fargo's deposition).

17 *See* Letter from Mark C. Jensen to Patricia Farren dated April 21, 2011 (Exhibit 1 to Affidavit of Mark C. Jensen in Opposition to Defendants' Objections to the Claims of Certain Fidelity Funds, ¶4 ("Affidavit of Mark C. Jensen")). Appendix, Exhibit 17.

18 *Id.*, ¶6.

19 Defendants previously served Fidelity Management and Research Company ("FMR") (not a class member but an investment adviser) with discovery. *See* FMR April 7, 2011 Letter, Appendix, Exhibit 18.

Fidelity discovered that the list of funds with claims was substantially different than the list of funds named by defendants.

Moreover, the Fidelity Funds invited defendants' counsel to meet and confer regarding these objections. Defendants' counsel never contacted counsel for the Fidelity Funds and never made a motion to compel discovery before the discovery deadline.[20] Despite defendants' efforts to manufacture out of a whole cloth a "representation" by the Fidelity Funds not to participate in this action, the Fidelity Funds have timely complied with every Court-approved request for information in this action and have expressly reserved their right to file a claim.[21]

B. Defendants' Inflationary Price Impact Argument Is a Loss Causation Argument That Does Not Relate to Rebutting the Presumption of Reliance and Was Already Rejected by the Jury

As set forth above, defendants have failed to raise a triable issue of fact as to the presumption of reliance for the claimants specifically identified in their submission. Defendants' secondary attack is that ***all*** class members' claims should be rejected because the jury's verdict in favor of the Class somehow rebuts the presumption on a class-wide basis. In fact, defendants have simply renewed their failed loss causation arguments. However, their loss causation arguments are not a means to rebut the presumption of reliance. As the Supreme Court recently held, loss causation is different and distinct from reliance. *Erica P. John Fund, Inc. v. Halliburton Co.*, __U.S.__, 131 S. Ct. 2179, 2186 (2011) ("Loss causation has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory.").

Nevertheless, defendants renew their argument that each false statement did not lead to a "distortion" in price via an "independent" inflationary price impact. Defs' Brf. at 1, 3. Defendants

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[20] Affidavit of Mark C. Jensen, ¶3.

[21] *Id.*, ¶5.

argue that either the stock price or the amount of inflation must increase with each false statement or else there is no "distortion" in price created by the false statement. Defendants made this "independent inflationary impact" argument – the "up leg/down leg" argument – at trial and lost. *See* Trial Tr. at 2890:2-2919:20 (cross-examining Fischel under specific disclosures model in an attempt to demonstrate that defendants' false statements did not cause a statistically significant stock price increase); Trial Tr. at 3820:3-3822:1 (defendants' attorney arguing that none of the false statements caused any artificial inflation); Trial Tr. at 4611:16-4613:10 (same); Trial Tr. at 4614:15-20; 4616:2-4617:10; 4623:15-4624:3 (arguing during closing statements that plaintiffs failed to prove that the stock price was artificially inflated); Trial Tr. at 4084:1-4085:6 (Bajaj discussing up-leg, down-leg concept); Trial Tr. at 4098:15-4100:3 (Bajaj testifying that Household's stock price was never inflated during the relevant period); Trial Tr. at 4104:20-4105:11 (same); Trial Tr. at 4106:10-16 (same).

Moreover, there is simply no requirement that ***each*** false statement must cause a stock price to increase or have an "independent" inflationary impact (increase in inflation). In fact, *Basic* is clear that just as an efficient market translates all available ***truthful*** information into the stock price, the market processes the publicly disseminated ***falsehood*** and prices it into the stock as well. *Findwhat*, 2011 U.S. App. LEXIS 19887, at *63 (citing *Basic*, 485 U.S. at 241-44, 246-47). In *Schleicher*, the Seventh Circuit held that a stock price can be inflated by a defendants' false statement or omission when it "***stops a price from declining***." *Schleicher*, 618 F.3d at 683 (emphasis added). As the *Schleicher* court stated:

> Defendants don't ask in so many words that we jettison the fraud-on-the-market doctrine. A court of appeals can't revise principles established by the Supreme Court. But they see an opening in the fact that although, in many securities fraud cases, the false statements (or the material omissions) propel the stock's price upward, for *Conseco*, the statements were designed to slow the rate of fall. . . . [W]hen an unduly optimistic statement stops a price from declining (by adding some good news to the mix): once the truth comes out, the price drops to where it would

> have been had the statement not been made. . . . [T]hat statement will keep the price higher than it ought to be.

Id.

In *Findwhat*, the Eleventh Circuit also held that each false statement does not have to cause the stock price or the amount of inflation to increase for a plaintiff to rely on the presumption of reliance.[22] 2011 U.S. App. LEXIS 19887, at *78. In *Findwhat*, the court even held a false statement can maintain inflation in the company's stock price from pre-Class Period or Damage Period statements. *Id.* at *52-*53. As the court held in *Findwhat*:

> [F]raudulent misstatements that prolong inflation can be just as harmful to subsequent investors as statements that create inflation in the first instance. Inflation creates an ongoing risk of harm. Every investor who purchases at an inflated price – whether at the beginning, middle or end of the inflationary period – is at risk of losing the inflationary component of his investment when the truth underlying the misrepresentation comes to light.

Id. at *81-*82.

Loss causation arguments identical to those made by defendants were recently rejected in another securities case after trial. *See In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 561 (S.D.N.Y. 2011) ("Vivendi contends that at minimum there can be no liability for statements made on days on which inflation remained constant or decreased. Vivendi has not identified a single case to support this proposition and the court is aware of none. On the other hand, courts have suggested that a misstatement may cause inflation simply by maintaining existing market expectations, even if it does not actually cause the inflation in the stock price to increase on the day the statement is made.") (citing *Castillo v. Envoy Corp.*, 206 F.R.D. 464, 472 (M.D. Tenn. 2002) ("the lack of statistically significant movement of the stock price following each misrepresentation

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[22] Defendants' arguments also ignore the axiomatic principle that the amount of inflation caused by a false statement ***or*** omission is ***not*** determined by analyzing the stock price when the statement is made, but rather by analyzing the decline in Household's stock when the truth is disclosed. Trial Tr. at 2965:7-17.

. . . does not address whether the misstatements caused the stock to be 'artificially maintained at a level that did not reflect its true value'")).

Moreover, defendants' claim was rejected by their own loss causation expert at trial. Defendants' expert at trial, Dr. Bajaj, agreed that Household's stock price did not have to increase for a false statement ***or*** omission to create inflation. Trial Tr. at 4244:2-6; *see also* Trial Tr. at 2605:2-19 (the stock is inflated because the "stock is prevented from falling to a lower level"); Trial Tr. at 2963:21-2964:6. Even the Fifth Circuit case heavily relied on by the defendants, *Nathanson v. Zonagen, Inc.*, 267 F.3d 400, 419 (5th Cir. 2001), held that a statement is actionable "even though the stock's price does not soon thereafter change" as long as the stock price declines when the true facts are revealed.[23]

Unsupported by the caselaw and contradicted by the testimony of their trial expert Bajaj, defendants resort to a new "expert." Defendants proffer the Cornell Affidavit for the proposition that "'where it is shown that an alleged misrepresentation did not ***independently*** result in ***an additional amount of artificial inflation in the stock price***, the market did not rely upon the alleged misrepresentation and the *Basic* presumption is rebutted.'" Defs' Brf. at 5-6 (emphasis added)

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[23] Defendants' citation to *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623 (3d Cir. 2011) does not support their argument. In *DVI*, the court stated the obvious:

> In an otherwise efficient market, the failure of a ***corrective disclosure*** to affect the market price may therefore serve as a rebuttal to the presumption of reliance because it renders the misstatement immaterial as a matter of law.

Id. at 638 (emphasis added). The court in *DVI* did ***not*** hold that each false statement must create an "independent inflationary price impact" as defendants argue. Rather, the "impact" of the misstatement on Household's stock price is shown by the ***later*** disclosure of the true facts and whether the corrective disclosure (not the misstatement) causes the stock price to decline. The other series of cases cited by defendants – *In re Solomon Analyst*, *Cendant*, *Tellabs* and *In re System Software* – also do not help defendants since those cases only set forth the *Basic* test that defendants can only rebut the presumption by severing the link between the price and the decision to buy. All of these cases deal with the truth-on-the-market or loss causation issues that defendants already tried and lost before the jury.

(citing Cornell Affidavit, ¶13). This opinion of Professor Cornell finds no support from *Basic* or any other legal or finance literature and actually contradicts Cornell's 1990 article and recent writings. *See* Bradford Cornell, *Using Finance Theory to Measure Damages in Fraud on the Market Cases*, 37 U.C.L.A. L. Rev. 883, 886 (1990); Bradford Cornell, *Collateral Damage and Securities Litigation*, 2009 Utah L. Rev. 717, 719 (2009) ("Inflation occurs because the stock price should have fallen to its "true value" had the correct financial information been disclosed."). Furthermore, the language in the Cornell Affidavit cites to §III.B. of his 1990 paper, but this opinion is nowhere to be found in that section or anywhere else in the paper. Professor Cornell invented it in his recent affidavit, and cited no authority – legal, financial or otherwise. In fact, the "Rebutting the Presumption of Reliance" section of Cornell's 1990 article suggests, as its name implies, ways a defendant can rebut the presumption. Cornell discusses possible methods of disputing the efficiency of the market – which, obviously, offers little solace to these defendants who stipulated to it. Alternatively, the 1990 article suggests that one could argue that market makers were privy to the truth – which defendants have not done and cannot do here. Finally, the article suggests a defendant can argue that the truth was in the market and defendants' omissions were already reflected in the stock price – again of no help to the defendants, as the jury already rejected that argument. *See* 37 U.C.L.A. L. Rev. at 917.[24] In short, Cornell's revisionist views do not help. Defendants' new theory is fatally flawed.

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[24] In fact, the truth-on-the-market defense is actually a method of refuting the materiality of the misrepresentations which is, in essence, defendants' current "distortion in price" argument. *See Connecticut Ret. Plans v. Amgen*, No. 09-56965, 2011 U.S. App. LEXIS 22540, at *18 (9th Cir. Nov. 8, 2011) (citing *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097-98 (1991)). However, the jury rejected defendants' truth-on-the-market defense by finding defendants' statements materially false.

C. The Verdict is Proper and Does Not Itself Rebut the Presumption of Reliance

In addition to their failed loss causation arguments, defendants argue that the jury's verdict is inconsistent. This claim, however, also does not rebut the presumption of reliance. The jury found that defendants' March 23, 2001 statement (Statement No. 14) was the first date for which ***all*** the elements of a §10b-5 violation were met by plaintiffs. It is only at that point that the jury could determine the damages per share. The jury properly filled in the inflation per share ($23.94) from Professor Fischel's leakage model (PX1395) for that date – March 23, 2001. The jury adopted the remaining inflation per share (that varied) for each day for the rest of the Class Period. The inflation per share for each day under the leakage model was quantified by Fischel using an event study and regression analysis that focused on residual stock price declines for Household when the fraud-related conditions at Household were leaked and disclosed from November 15, 2001 to October 11, 2002 ("Disclosure Period"). March 23, 2009 *Daubert* Order at 1-3 [Dkt. No. 1527]; Trial Tr. at 2680:17-2681:6; 4315:25-4316:4.[25] Fischel's leakage model quantified ***net*** daily inflation of $12.92 to $23.94, netted out any peer, market, or non-fraud declines, and was far lower than Household's actual stock price decline or that of its peers during this period. PX1395; Trial Tr. at 2682:3-2684:6; *see also* Fischel Report, ¶¶40-42 [Dkt. No. 1416-2]; Fischel Rebuttal Report at 4 n.4 [Dkt. No. 1416-3]. *See* Plfs' Opp. to Defs' Rule 50(b) Motion at 7-8 [Dkt. No. 1656]. The leakage approach was blessed by defendants' post-trial expert, Cornell, as an acceptable method for determining damages in an article published years before he made it onto defendants' payroll. Fischel Report, ¶41 (citing Cornell 1990 article).

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[25] Plaintiffs' rebuttal to defendants' loss causation-type arguments is more fully set forth in Plaintiffs' Opposition to Defendants' Rule 50(b) Motion at 3-12 [Dkt. No. 1656].

There is a "relative paucity of decisions" dealing with damages in Rule 10b-5 cases due to the fact that "most 10-5 litigation does not proceed to final judgment on the merits." 2 Thomas Lee Hazen, *The Law of Securities Regulation*, §12.12 at 528 (4th ed. 2002). Calculating damages in 10b-5 cases is not a precise exercise, as the U.S. Supreme Court noted in *Blue Chip Stamps v. Major Drug Stores*, 421 U.S. 723, 734 (1975). This follows the Supreme Court's general directive that "§10(b) must be read flexibly, not technically and restrictively" (*see Santa Fe Indus. Inc. v. Green*, 430 U.S. 462, 475-76 (1977)) and its holding that plaintiffs may establish "facts and circumstances tending to show the probable amount of . . . damages" sufficient to allow the trier of fact to form a "reasonable and probable estimate" of recoverable damages. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 565 (1931). If a plaintiff proves liability and "damages which are definitely attributable to the wrong," a jury's award of damages will be upheld even if there is some "uncertainty" as to "their amount." *Id.* at 562. As Cornell admits, "there is no finance theory formula for measuring damages into which the facts of all cases can be substituted," and "[c]ourts may be willing to invoke policies underlying federal securities laws to justify overestimates rather than underestimates." 37 U.C.L.A. L. Rev. at 911, 917 & n.89 (citing *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975)). This Court also acknowledged that "although damages cannot be based on pure speculation, they need not be calculated with mathematical precision." November 22, 2010 Order at 10.

Professor Fischel's ***net*** quantification of inflation in the leakage model provided the jury with a reasonable and conservative estimate of inflation that did not include industry, market or company-specific non-fraud declines unrelated to the wrong and focused on the leakage of information arising from defendants' fraud. Trial Tr. at 2680:17-2681:6; 2682:3-2684:6; Fischel Report, ¶¶40-42.

March 23, 2009 *Daubert* Order [Dkt. No. 1527]. Fischel's testimony was reliable, and the jury was justified in relying on his estimated damages.[26] In a battle of the experts, it is within the province of the jury to determine whether to credit Professor Fischel's opinions or not. *Knapp v. Leonardo*, 46 F.3d 170, 179 (2d Cir. 1995); *United States v. Artuso*, 618 F.2d 192, 195 (2d Cir. 1980).

Defendants argue that the $23.94 of inflation on March 23, 2001 is improper because that statement only related to predatory lending.[27] The $23.94 in inflation on that date has evidentiary support and there are a number of plausible reasons for the jury's determination of damages. The jury's finding should not be disturbed.

As Professor Cornell's own 1990 article states, where there are interrelated frauds, "the total damage must be estimated using one value calculated backwards from the time at which all elements of the fraud have been effectively disclosed." 37 U.C.L.A. L. Rev. at 909. In his article, Cornell did not claim that this approach discredits the leakage model. In fact, Cornell admits that the leakage model is appropriate and necessary for "a fraud which is revealed slowly over time" so that "true

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[26] "[A] jury has wide discretion in determining damages, so long as it has a reasonable basis." *Dresser Indus., Inc. v. Gradall Co.*, 965 F.2d 1442, 1447 (7th Cir. 1992) (upholding jury award of lost profits even though it exceeded expert's estimates); *see also First Nat'l Bank v. United States*, 763 F.2d 891, 896 (7th Cir. 1985) (upholding jury award as within the range of evidence presented); *Am. Nat'l Bank & Trust Co. v. Regional Transp. Auth.*, 125 F.3d 420, 435-40 (7th Cir. 1997) (affirming jury award of damages in excess of plaintiffs' demand due to jury's wide discretion).

[27] Defendants never even raised this argument in their extensive attack on Fischel's leakage model in their *Daubert* motion. *See* Defs' Daubert Motion at 22-47 [Dkt. No. 1364]. Defendants' half-hearted argument that the March 23, 2001 statement was merely a confirmatory statement and thus inactionable is without merit. Defendants cite to the Fifth Circuit's decision in *Greenberg v. Crossroads Sys*., 364 F.3 657 (5th Cir. Tex. 2004), yet that decision conflicts with the Fifth Circuit's own recognition in *Nathenson*, 267 F.3d at 419 that fraudulent information that confirms what the market already believes, is actionable if it prevents the stock price from dropping to the level the market would set if the truth were revealed. Moreover, in *Findwhat*, 2011 U.S. App. LEXIS 19887, at *78-*80 & n.33, the Eleventh Circuit explicitly rejected the court's decision in *Greenberg*, noting that no other circuit has embraced the Fifth Circuit's view of confirmatory statements. *Id*. at *80 ("we do not agree that such confirmatory information can therefore never be actionable").

damages" are not significantly understated. *Id.* at 906.[28] Since the traditional specific disclosure model understated damages in this case where there was clear evidence of leakage, the jury adopted the leakage model since it was a more reliable estimate of damages. Even the defendants and their expert Bajaj admitted there was evidence of leakage. *See* Trial Tr. at 4267:19-25; Bajaj Report at 58 [Dkt. No. 1416-6-7]; PX1156 (defendants internally blamed the continuous leakage of the Washington DFI report as the reason for Household's $20 stock price decline between 5/02-8/02).[29] The jury did not reject the specific disclosure model, but found the inflationary calculation under that model for only statistically significant price drops understated damages when plaintiffs had proven leakage. The defendants' own document (PX1156) shows that $20 of the decline in Household's stock from May 15, 2002 to August 30, 2002 was due to leakage of Household's predatory lending practices in the Washington DFI report alone. *See also* PX1395 at 15, 17 (shows decline in Household stock price): PX1429 (8/27/02 *Bellingham Herald*: "[I]n recent weeks, copies of the report have been leaked to every news organization . . . ").

In determining inflation, the jury also could have considered the relationship between Household's proven predatory lending practices and its consequent need to hide the effect of those practices on their loan portfolio through its reaging practices. For example, the jury could have considered subsequent leakage about reaging as part and parcel of the inflation on March 23, 2001 since it was shown that the predatory lending and reaging issues were related. Trial Tr. at 697:22-

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[28] Defendants claim that the leakage model is improper because it cannot disaggregate out the inflation due to disclosures related to predatory lending, reaging, and restatement issues. However, the jury found that statements relating to ***all*** three issues were actionable, and there is no requirement that the disaggregation take place when the frauds are interrelated. Thus, defendants' speculative argument has no merit.

[29] Numerous courts have held that leakage occurs so that a leakage model is appropriate where there is evidence of leakage. *Dura Pharms, Inc. v. Broudo*, 544 U.S. 336, 342 (2005) ("the relevant truth begins to leak out"); *In re Williams Secs. Litig.*, 558 F.3d 1130, 1137 (10th Cir. 2009); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 07-4017, 2009 U.S. App. LEXIS 16080, at *31-*32 n.5 (2d Cir. July 22, 2009).

700:7 (plaintiffs' expert describing the "correlation between predatory lending practices and the need for Household to re-age and mask their delinquencies"). There was abundant evidence in the record of leakage of reaging issues to support the jury's finding of $23.94 of inflation on March 23, 2001. *See* PX140 (4/10/02 Legg Mason report on reaging); PX515 (two CFRA reports on reaging); Trial Tr. at 2840:18-2841:11. This is another plausible explanation for the jury's finding of $23.94 of inflation on March 23, 2001. The *Vivendi* court, in denying defendants' Rule 50(b) motion, upheld a jury verdict that awarded plaintiffs only 50% of the per share damages determined by plaintiffs' expert. The court in *Vivendi* found that the jury's inflation finding should not be disturbed in a case where there were multiple statements and partial disclosures over a long period of time – similar to the facts in this case. *Vivendi*, 765 F. Supp. 2d at 562.

Contrary to defendants' assertions, there is also no evidence that the amount of inflation determined by the jury under the leakage model overstated damages since the daily inflation amounts were "capped" at the cumulative residual price declines (net of industry and peer group declines) of $23.94. *See* Fischel Report, ¶¶41-42; Plfs' Opp. to Defs' Rule 50(b) Motion at 7 n.7 [Dkt. No. 1656]. There was a plausible basis for the jury to award $23.94 of inflation on March 23, 2001, and its verdict should not be disturbed.

D. Even Accepting Defendants' Arguments, Only Three Days of the Damages Period Are Impacted

Even if the Court were to accept all of defendants' arguments, there is no basis to throw out the entire jury verdict. Defendants' main argument is that there could not have been $23.94 of inflation on March 23, 2001, because that statement only related to predatory lending. However, the next §10(b) violation found by the jury was four trading days later on March 28, 2001, when Household released its 2000 year-end 10-K. The jury found that the March 28 statement was false and misleading as to all three issues.[30] *See* Statement No. 15, at 12 [Dkt. No. 1611]; Appendix, Table A, at 12 [Dkt. No. 1611]. As Fischel testified, this statement either maintained the prior $23.94 of inflation in Household's stock or created $23.94 in inflation. Trial Tr. at 2848:10-22; 2852:8-15; 4289:9-4292:2. Fischel's leakage model found inflation of $25.32 on March 28, 2001, but it was conservatively "capped" at $23.94. Even if defendants were correct, only three trading days (3/23/01, 3/26/01 and 3/27/01) would be impacted, and all the dates in the Damages Period after March 28, 2001 would remain unchanged.[31]

Defendants could have objected at the time the verdict was published, and requested the jury be instructed to reconsider those three days and modify the verdict to allow for no recovery or a partial recovery for class members that purchased on only those three days. Defendants failed to

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[30] Defendants incorrectly argue that inflation is constant from March 23, 2001 to the first partial disclosure on November 15, 2001 and, therefore, no reaging or restatement statement added any additional inflation after March 23, 2001 or distorted Household's stock price. This argument should be rejected since (as set forth above) there is no requirement that later statements add new inflation and each false statement either maintains prior inflation or creates inflation due to defendants' failure to disclose the truth. Also, the March 28, 2001 statement related to all issues. Finally, Professor Fischel's leakage model shows inflation per share that ***varies*** during this time period and also during the Disclosure Period (11/15/01 to 10/11/02) due to Fischel's use of a modified constant percentage method similar to Cornell and Morgan's leakage model method. *See* Fischel Report, ¶¶41-42; Pltfs' Opp. to Defs' Rule 50(b) Motion at 11. In many cases, the inflation per share is greater than $23.94 on certain days, but Fischel "capped" the inflation at $23.94. *See id.* at 7 n.7; Ex. B to Fischel Rebuttal Report [Dkt. No. 1416-3].

[31] Defendants' argument that damages should somehow be limited to purchasers from December 5, 2001 to December 11, 2001 is wholly without merit. Defendants point to the increase in inflation of December 5, 2001 due to defendants' false statement following the December 4, 2001 Goldman Sachs conference. However, this increase in inflation took place ***after*** fraud-related information was disclosed and some inflation came out of Household's stock price on December 3, 2001. The fact that the stock price was reinflated following a partial disclosure a few days before does not mean that purchasers on other days (before or after this "stub period") during the Relevant Period did not buy Household stock at inflated prices due to defendants' omission of the truth. Defendants' reference to Fischel's testimony on this issue is misleading since Fischel was responding to a hypothetical from defendants' counsel where he was directed to assume that the only false statement was uttered on December 4, 2001 and the only corrective disclosure was December 12, 2001. Trial Tr. at 2884:7-14 ("Well, in your hypothetical if that were the whole case . . . ."). Of course, the evidence was otherwise. In addition, Professor Fischel was asked about the Specific Disclosures model, not the Leakage Model. Defendants' entire argument is both disingenuous and specious and should be rejected.

make such a request. Defendants' only objection when the verdict was published was "[p]rimarily it's the interspersal of the yeses and nos when juxtaposed against Professor Fischel's leakage model." Trial Tr. at 4807:4-5. Whatever that objection means, it is not the argument now being made. Defendants never even raised these issues or made a motion for the verdict to be modified, even though the Court asked counsel for "[a]ny other motions before I release the jury." Trial Tr. at 4806:23. Defendants waived any argument by failing to object to the jury's verdict on this basis and to request that the Court order the jury to return to deliberate and rectify the supposed conflict before the jury was discharged. *Strauss*, 810 F.3d at 683; *Kosmynka v. Polaris Indus.*, 462 F.3d 74, 83 (2d Cir. 2006); *DiBella v. Hopkins*, 403 F.3d 102, 117 (2d Cir. 2005).[32] In any event, there was evidence in the record to support $23.94 of inflation on March 23. The entire verdict should not be thrown out.

E. The Court Has Not Violated Defendants' Procedural or Constitutional Rights

Defendants once again argue that they have been deprived of their Seventh Amendment right to a jury trial on the issue of reliance. *See, e.g.*, Defs' Phase II Brief [Dkt. No. 1623]; Jan. 15, 2011 Hr'g Tr. at 7, 10 (raising the issue of their "right" to a jury trial). They also contend that the Court's August 24, 2011 Order requiring them to present evidence rebutting the presumption of reliance – a burden that is theirs to meet – somehow contravenes the Federal Rules of Civil Procedure. Both arguments are without merit.

First, defendants have consistently and repeatedly ignored the fact that they have already been afforded a jury trial on the first two methods of rebutting the presumption of reliance set forth

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[32] Defendants were well aware prior to the jury's return of the verdict that they could request more time from the Court to review the verdict, but they would have to make any motions at that time. Trial Tr. at 4788:17-4789:1. Defendants only motion was to poll the jury. Trial Tr. at 4803:7-12.

in *Basic*. Specifically, at trial defendants raised a "truth-on-the-market" defense and "attempted to prove that the truth about Household's predatory lending practices and credit quality manipulation was well known." November 22, 2010 Order at 5. Defendants also argued that the investors in Household stock were among the most sophisticated investors in the world and could not have been fooled by defendants' fraud. *Id*. at 8. The jury was not persuaded: "the issues with regard to the first two of the three methods of rebutting the presumption of reliance have been litigated and defendants will not be afforded a second bite at the apple." *Id.* As the Seventh Amendment makes clear, "no fact tried by a jury shall be otherwise re-examined." U.S. Const. amend. VII.

Second, with regard to the remaining method of rebutting the presumption of reliance – whether the link between the alleged misrepresentation and either the price received or paid by the plaintiff was severed – despite months of written discovery and depositions, defendants have come up empty-handed. As discussed above, none of the evidence defendants obtained during Phase II discovery creates a triable issue of fact that class members purchased Household stock knowing its price had been manipulated by defendants' fraud or that any class member did not rely in part on Household's stock price. Because defendants have not put forth any evidence that rebuts the presumption of reliance, there are no factual issues that remain to be tried. "[T]he Seventh Amendment does not entitle parties to a jury trial when there are no factual issues for a jury to resolve." *Burks v. Wisc. Dep't of Transp.*, 464 F.3d 744, 759 (7th Cir. 2006) (granting summary judgment in favor of defendants did not deprive plaintiff of her Seventh Amendment rights); *Koski v. Standex Int'l Corp.*, 307 F.3d 672, 676 (7th Cir. 2002) (rejecting argument that plaintiff was deprived of his Seventh Amendment right to a jury trial where the district court determined that there were no material issues of fact that could be presented to a jury). Defendants' Seventh Amendment rights have not been violated in this case.

Finally, there is nothing improper about the Court's August 24, 2011 Order requiring defendants to affirmatively present evidence that rebuts the presumption of reliance. It is ***defendants'*** – not plaintiffs' – burden to rebut the presumption of reliance. *See, e.g.*, *Basic*, 485 U.S. at 248 (placing the burden of rebuttal on defendants); *see also* June 15, 2011 Hr'g Tr. at 14:20-24 ("[I]t is at this point [defendants'] burden to come forward with some rebuttal evidence. That's why you have a presumption. It puts the burden on the other side to come forward and rebut the presumption."); *id*. at 16:6-8 (noting that defendants have the responsibility of coming forward with some rebuttal evidence); *id*. at 17:20-21 (plaintiffs "don't carry the burden on this issue"). The Court was not required to "adhere[] . . . [to] Rule 56" in this "anomalous situation," and defendants cite no case law to the contrary. Indeed, as the Court noted during the June 15, 2011 hearing, "Rule 56 motions generally take place after close of discovery and before trial. ***We've already done a trial***." June 15, 2011 Hr'g Tr. at 14:10-14 (emphasis added). Requiring defendants to put forward evidence rebutting the presumption of reliance was well within the Court's broad discretion to deal with the management of class actions under Rule 23. *See, e.g.*, *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656 (7th Cir. 2004) ("Rule 23 allows district courts to devise imaginative solutions to problems created" by class actions).

III. CONCLUSION

Defendants have not presented any evidence raising a triable issue of fact as to any class member's entitlement to the presumption of reliance. This Court should proceed with the claims process and enter judgment in favor of the Class.

DATED: November 28, 2011

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 W. Broadway, Suite 1900, San Diego, California 92101.

2. That on November 28, 2011, declarant caused to be served by electronic mail and by U.S. Mail to the parties the following documents:

PLAINTIFFS' OPPOSITION TO DEFENDANTS' SUBMISSION REGARDING REBUTTAL OF THE PRESUMPTION OF RELIANCE

The parties' e-mail addresses are as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of November, 2011, at San Diego, California.

/s/ TERESA HOLINDRAKE
TERESA HOLINDRAKE

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