IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, on Behalf of Itself and All Others Similarly Situated,	)	Lead Case No. 02-C-5893 (Consolidated)
Plaintiff,	)	CLASS ACTION
v.	)	Judge Ronald A. Guzmán
HOUSEHOLD INTERNATIONAL, INC., *et al.*,	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF THEIR SUBMISSION REGARDING REBUTTAL OF THE PRESUMPTION OF RELIANCE

Defendants Household International, Inc. ("Household"), William F. Aldinger, David A. Schoenholz, and Gary Gilmer respectfully submit this reply in support of their submission regarding rebuttal of the presumption of reliance.

I. Plaintiffs' Response Confirms that the Jury Verdict Rebuts the Presumption of Reliance as to the Entire Class.

Defendants demonstrated in their opening brief that the jury's adoption and application of Professor Fischel's "Leakage Model" resulted in a Phase I verdict that rebuts the presumption of reliance as to all class members. (Defs.' Br. at 3–18.) Because Plaintiffs are unable to refute this showing, they attempt to brush it aside. Plaintiffs characterize Defendants' arguments regarding the effect of the verdict on rebuttal of reliance as a mere "secondary attack" (Pls.' Resp. at 21) and address these arguments only at the end of their response. Even more telling, Plaintiffs have not submitted an affidavit by Professor Fischel (or any other expert) in response to the affidavit

of Professor Bradford Cornell. In any event, Plaintiffs' response leaves no doubt that the jury verdict rebuts the presumption of reliance.

First, rather than address Defendants' arguments head on, Plaintiffs try to convince the Court to ignore them by asserting that Defendants' arguments relate only to loss causation, and not to reliance. (Pls.' Resp. at 21–25.) This assertion is refuted by Plaintiffs' own authorities, which show that Defendants' position relates squarely to rebuttal of the presumption of reliance—an issue that the Court expressly reserved for Phase II of the trial. *See* Subsection A, *infra*.

Second, there is no merit to Plaintiffs' argument that the post-March 23, 2001 statements about the "Restatement" and "Re-aging" issues "maintained" the $23.94 of "artificial inflation" that the jury attributed to the March 23, 2001 statement that concerned only the "Predatory Lending" issue. The inflation maintenance cases cited by Plaintiffs are inapposite. In each of those cases, the subsequent statements that "maintained" inflation concerned the *very same issue* that gave rise to the inflation in the first instance. Here, the Court specifically ruled that the "Predatory Lending," "Restatement," and "Re-aging" issues are separate and distinct issues, and the jury found that *all* of the "artificial inflation" was caused by a statement that concerned only the "Predatory Lending" issue. *See* Subsection B, *infra*.

Third, Plaintiffs have failed to offer any substantive response to Professor Cornell's affidavit demonstrating that: (1) the jury's assignment of the entire $23.94 of "artificial inflation" to the March 23, 2001 statement that related only to the "Predatory Lending" issue is inconsistent with Professor Fischel's "Leakage Model" and unsupportable under settled economic and finance theory; and (2) it is impossible under Professor Fischel's "Leakage Model" to isolate the

amount of "artificial inflation" attributable to any one of the three specific fraud issues. *See* Subsection C, *infra*.

Fourth, contrary to Plaintiffs' suggestion, the Court may not selectively disregard the jury's specific findings and substitute its own finding that the $23.94 of "artificial inflation" can be attributed to a March 28, 2001 statement that concerned all three fraud issues. *See* Subsection D, *infra*.

Finally, the record refutes Plaintiffs' baseless suggestion that Defendants waived their arguments about the effect of the jury verdict on rebuttal of the presumption of reliance by failing to raise these arguments at the trial. *See* Subsection E, *infra*.

In sum, Defendants have rebutted the presumption of reliance through uncontroverted evidence that "severs the link" between the statements the jury found actionable and any inflationary impact of those statements. *See Basic Inc. v. Levinson*, 485 U.S. 224, 248 (1988) (holding that one way to rebut the presumption of reliance is to "show that the misrepresentation in fact did not lead to a distortion of price").

A. Plaintiffs' Own Authorities Refute Their Assertion that the Lack of Any Inflationary Impact Associated With a Statement Relates to Loss Causation, Rather than Reliance.

Plaintiffs cannot refute Defendants' evidentiary showing that no "artificial inflation" in the market price of Household Stock resulted from the alleged "Restatement" and "Re-aging" issues (with the sole exception of a December 4, 2001 statement that related solely to "Re-aging" and resulted in a $1.35 increase in "artificial inflation" that was dissipated within a week). Defendants' evidentiary showing is based solely on the "artificial inflation" figures calculated by *Plaintiffs' own expert*, Professor Fischel, under his "Leakage Model" and the jury's specific

application of that model in the verdict.[1]

Because Plaintiffs cannot contest their own expert's methodology and calculations, they try to convince the Court to ignore this evidence by asserting that Defendants "have simply renewed their failed loss causation arguments." (Pls.' Resp. at 21.) This assertion is baseless. As Plaintiffs themselves acknowledge, "loss causation is different and distinct from reliance." (Pls.' Resp. at 21 (citing *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2186 (2011)). In *Halliburton*, the Supreme Court noted that "[t]he term 'loss causation' does not even appear in our *Basic* opinion. And for good reason: ***Loss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock.***" 131 S. Ct. at 2186 (emphasis added). The *Halliburton* Court further explained:

> Under *Basic*'s fraud-on-the-market doctrine, an investor presumptively relies on a defendant's misrepresentation if that "information is reflected in [the] market price" of the stock at the time of the relevant transaction. . . .
>
> Loss causation, by contrast, requires a plaintiff to show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss.

Id. (citations omitted).

Despite acknowledging that reliance and loss causation are distinct elements of a securities fraud claim, Plaintiffs attempt to conflate the two concepts by arguing that evidence regarding the inflationary impact of an alleged misstatement relates only to loss causation, and

[1] In a footnote, Plaintiffs try to suggest that *Defendants* have employed an incorrect methodology by measuring inflation based on the price changes at the time the actionable statements were made, rather than by analyzing the decline in Household's stock price when the "truth" was disclosed. (Pls.' Resp. at 23 n.22.) This assertion is specious. Defendants have not presented any independent calculations of the alleged "artificial inflation," nor do they need to do so. Defendants' arguments are based *solely* on Professor Fischel's calculations of "artificial inflation" under his "Leakage Model." According to Plaintiffs, Professor Fischel employed the accepted methodology for calculating "artificial inflation" by focusing on the residual stock price declines during the period when the truth supposedly was leaked to the market and using a regression analysis to work backward to determine the "artificial inflation" on each day of the Class Period. (*Id.* at 26.)

not to reliance. (Pls.' Resp. at 21–22.) This contention is refuted by Plaintiffs' own authorities. The Supreme Court in *Halliburton* could not have been more clear when it wrote: "As we have explained, ***loss causation is a familiar and distinct concept in securities law; it is not price impact.***" 131 S. Ct. at 2187 (emphasis added). Or as explained in another of Plaintiffs' authorities: "[R]eliance polices the front-end causation question of whether the defendants' fraud in fact inflated the plaintiff's purchase price, while loss causation polices the back-end causation question of whether the fraud-induced inflation in the plaintiff's purchase price ultimately caused financial losses." *FindWhat Investor Group v. FindWhat.com*, 658 F.3d 1282, 1314 n.32 (11th Cir. 2011).

At this juncture, Defendants are not raising arguments regarding the impact of the evidence and the jury's verdict on the separate element of loss causation. As to the issue now before the Court, *i.e.*, the independent element of reliance and the means by which the *Basic* presumption of reliance can be rebutted, the law is well-settled. As explained in *FindWhat*, on which Plaintiffs rely:

> The fraud-on-the-market presumption can be rebutted by "[a]ny showing that severs the link between the alleged misrepresentation and either the price . . . paid . . . by the plaintiff, or his decision to trade at a fair market price." *Basic*, 485 U.S. at 248–49. For example, the defendant can rebut the presumption of reliance by presenting evidence that the market price did not in fact reflect the misrepresentation, or that the particular plaintiff knew about the fraud but bought the stock at that price anyway for independent reasons. *Id.* ***The reliance element of a Rule 10b-5 action, therefore, patrols the question of whether the defendant's fraud in fact affected (or inflated) the purchase price that investors paid.***

658 F.3d at 1311 n.27 (emphasis added). Here, the jury verdict establishes that the presumption of reliance has been rebutted as to the post-March 23, 2001 statements concerning the "Restatement" and "Re-aging" issues, because the jury verdict establishes that these statements

(with the sole exception of the December 4, 2001 statement) did not "in fact affect[ ] (or inflate[ ]) the purchase price that investors paid." *Id.* [2]

B. The Court's Rulings and the Jury Verdict Refute Plaintiffs' Argument that the Statements Relating to the "Restatement" and Re-aging" Issues "Maintained" Pre-existing Inflation.

It is indisputable that the jury found that: (1) the entire $23.94 of "artificial inflation" in Household's stock price arose on March 23, 2001 in response to a statement that concerned only the "Predatory Lending" issue; and (2) the level of "artificial inflation" did not increase in response to any subsequent statements that concerned the "Restatement" and "Re-aging" issues (except for one statement on December 4, 2001, relating to "Re-aging"). (Verdict Form (Docket No. 1611).) Because Plaintiffs cannot contend otherwise, they argue that investors in fraud-on-the-market cases may be presumed to have relied on statements that merely *maintained* pre-existing inflation. (Pls.' Resp. at 22–25.) Plaintiffs "inflation maintenance" theory erroneously conflates two distinct concepts and is fundamentally inapposite to the jury verdict.

First, Plaintiffs' invoke *Schleicher v. Wendt*, 618 F.3d 679, 683 (7th Cir. 2010), for the principle that "a stock price can be inflated by a defendants' false statement or omission when it 'stops a price from declining.'" (Pls.' Resp. at 22.) To this end, Plaintiffs also note that Defendants' damages expert, Dr. Mukesh Bajaj, "agreed that Household's stock price did not have to increase for a false statement or omission to create inflation." (*Id.* at 24.) But this basic

[2] Also without merit is Plaintiffs' assertion that Defendants already presented their rebuttal of reliance arguments to the jury, and the jury rejected them. (Pls.' Resp. at 1, 21–22.) The Court specifically held that rebuttal of reliance would be reserved for Phase II of the trial and, therefore, refused to allow Defendants to conduct discovery on this issue during Phase I. (Docket Nos. 225, 786, 935.) In accordance with these rulings, the Phase I jury was not instructed to make any findings as to reliance, and instead was instructed that reliance could be presumed. (Preliminary Jury Instructions (Docket No. 1530) at 2.) Defendants' arguments, furthermore, are based solely on the jury's adoption and application of Professor Fischel's "Leakage Model" and the resulting verdict. Obviously, Defendants could not have made any arguments about the effect of the jury verdict on rebuttal of the presumption of reliance until after the jury rendered its verdict.

principle is not at issue here. Defendants do not contend that an alleged misstatement must increase *the market price* of a stock in order to create "inflation" in the stock price. To the contrary, Defendants' argument is based *solely* upon the findings of "inflation" actually rendered by the jury in its verdict (and not upon the actual market price).[3]

Second, Plaintiffs note that a misstatement may be actionable if it "maintains" inflation in the price of the stock. However, each of the cases cited by Plaintiffs involved a circumstance in which continued misrepresentations regarding *the same misrepresented issue* maintained "inflation" in the stock price that had been caused by that particular misrepresented issue. For instance, *FindWhat* involved allegations that an Internet commerce company that provided "pay-per-click" advertising services inflated its stock price by making false statements denying that the company engaged in a practice known as "click fraud" to boost its revenues. 658 F.3d at 1291–94. And in *In re Vivendi Universal, S.A. Securities Litigation*, 765 F. Supp. 2d 512, 562 (S.D.N.Y. 2011), the company "repeatedly ma[de] statements that omit[ted] information about its liquidity risk."

Thus, unlike here, none of Plaintiffs' authorities involved separate and distinct fraud issues. Instead, each involved subsequent statements that concerned the *same issue* that gave rise

[3] In their response, Plaintiffs repeatedly confuse the distinct concepts of an impact on *market price* and an impact on *inflation*. The most glaring example is Plaintiffs' attack on Professor Cornell based on the following statement in his affidavit: "'[W]here 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.'" (Pls.' Resp. at 24 (emphasis added by Plaintiffs).) Plaintiffs assert that this statement is inconsistent with the testimony of Dr. Bajaj and "finds no support from *Basic* or any other legal or finance literature and actually contradicts Cornell's 1990 article and recent writings." (*Id.* at 24–25.) These contentions are entirely without merit. Professor Cornell has *not* asserted that reliance requires that a statement must change the market price at which the stock is trading. To the contrary, Professor Cornell has correctly asserted, in accordance with *Basic*, and as demonstrated in *Schleicher*, that reliance requires that the statement have an independent impact on inflation (which can occur regardless of the lack of any price movement).

to the inflation in the first place. Here, the jury verdict assigned *no* inflation to statements concerning the "Re-aging" or the "Restatement" issues; thus there was no inflation relating to those issues to begin with that could have been "maintained" by subsequent misrepresentations concerning *those same issues* (except for the one statement on December 4, 2001, relating to "Re-aging").

Nevertheless, in an attempt to analogize the jury's findings in this case to the facts in *Schleicher*, *FindWhat*, and *Vivendi*, Plaintiffs suggest that the "Predatory Lending," "Restatement," and "Re-aging" issues are all "part and parcel" of one unitary fraud. (Pls.' Resp. at 29–30.) Plaintiffs also assert that "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." (*Id.* at 29 n.28.) Plaintiffs, however, already made these arguments to the Court, and the Court soundly rejected them.

At an April 27, 2009 hearing about the content and format of the Verdict Form, Plaintiffs argued that the jury should be required to determine only whether each challenged statement was false or misleading, and should not also be required to determine as to which specific issue(s) the statement was misleading. (Trial Tr. at 4067:4–4068:2; 4068:4–15; 4069:7:10.) The Court responded: "I disagree, period. I disagree." (*Id.* at 4069:11.) The Court explained: "I think that's a formula for reversal." (*Id.* at 4069:13.) The Court ruled that, on the Verdict Form, "we're going to check as to what—which statement and why. I just think that's the only way to do it." (*Id.* at 4070:2–5.)

The Court, furthermore, considered each challenged statement and made certain, after hearing argument from the parties, that only the specific issue(s) that a particular statement *might* concern were included on the Verdict Form with respect to that particular statement. Specifically,

in an April 29, 2009 Order, the Court ruled: "Because defendants do not, as a matter of law, have a duty to disclose Household's alleged predatory lending practices in the statements of net income and E.P.S. set forth in proposed verdict form statements 1, 3, 5, 7, 9, 12, 17, 20, 22, 32 and 38, the Court strikes from the verdict form the 'predatory lending' option with respect to those statements." (Docket No. 1602 at 2.) In view of the Court's rulings, Plaintiffs cannot now contend that the post-March 23, 2001 statements relating to the "Restatement" and "Re-aging" issues, which the jury found did not result in any increase in inflation, somehow maintained inflation created by a March 23, 2001 statement that related solely to the *separate and distinct* issue of "Predatory Lending."[4]

The Court's rulings and the jury verdict thus establish that, with the exception of one statement on December 4, 2001 relating to the "Re-aging" issue, none of the post-March 23, 2001 statements relating to the "Restatement" or "Re-aging" issues introduced new inflation into Household's stock price *or* maintained any pre-existing inflation as to those issues. The reliance element of a securities fraud claim "patrols th[is] question" of whether each of the separate fraud issues in this case "in fact affected (or inflated) the purchase price that investors paid." *FindWhat*, 658 F.3d at 1311 n.27. The jury verdict conclusively establishes that statements relating to the "Restatement" and "Re-aging" issues did *not* affect or inflate the purchase price that investors paid. The jury verdict thus "severs the link" between the statements relating to the "Restatement"

[4] Citing *FindWhat*, Plaintiffs also appear to suggest that that the "Restatement" and "Re-aging" statements could have maintained inflation that existed prior to March 23, 2001, or even prior to the start of the Class Period. (Pls. Resp. at 23.) Unlike the plaintiffs in *FindWhat*, however, Plaintiffs here *explicitly disclaimed reliance on any pre-class period statements*, and took the position that *no* artificial inflation could or did exist until the first date on which the jury found an actionable misstatement. (*See* Defs.' Br. at 8–9.) The jury found that the first actionable misstatement occurred on March 23, 2001 and, consistent with the theory presented by Professor Fischel, found that there was no artificial inflation prior to that date; the jury's verdict explicitly reflects the finding that there was $0 of inflation in the stock price on March 22, 2001. (Verdict Form (Docket No. 1611).)

and "Re-aging" issues and the price paid by class members for their Household stock and rebuts the presumption of reliance on those statements. *See Basic*, 485 U.S. at 248 ("Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance.").

C. Plaintiffs Offer No Substantive Response to Professor Cornell's Testimony About the Lack of Any Supportable Basis to Attribute the Entire $23.94 of "Artificial Inflation" to a Statement that Related Solely to the "Predatory Lending" Issue.

In his affidavit in support of Defendants' opening brief, Professor Cornell explained that: (1) the jury's assignment of the entire $23.94 of "artificial inflation" to the March 23, 2001 statement that related solely to the "Predatory Lending" issue is inconsistent with Professor Fischel's "Leakage Model" and settled economic and finance theory; and (2) it is *impossible* under Professor Fischel's "Leakage Model" to determine the amount of "artificial inflation" attributable to any one of the three distinct fraud issues in this case. (Cornell Aff. at ¶ 24.) Because Plaintiffs have no substantive response to Professor Cornell's affidavit, they resort to *ad hominen* attacks, referring to Professor Cornell as an "expert" in quotation marks (Pls.' Resp. at 24), and baselessly insinuating that he altered his views about the appropriateness of a "leakage model" as a result of "ma[king] it onto defendants' payroll." (*Id.* at 25–26.)

Of course, Plaintiffs' expert, Professor Fischel, thought highly enough of Professor Cornell's scholarly work to try to adopt it and cite it as the only supporting authority when formulating his "Leakage Model." Furthermore, as Plaintiffs acknowledge, the fact that a "leakage model" is unable to disaggregate the amount of inflation attributable to any one issue in a multi-issue fraud was *specifically identified* by Professor Cornell in his 1990 article upon which Professor Fischel relied. (*Id.* at 28.) Plaintiffs assert that, "[i]n his article, Cornell did not

claim that this approach discredits the leakage model." (*Id.*) There was no reason for Professor Cornell to make such a sweeping statement. The disaggregation problem does not affect *every* "leakage model." Many cases do involve unitary frauds that concern only one issue. That is *not* the situation here, however, and Professor Fischel knew when he developed his "Leakage Model" that this case involved three separate fraud issues.

Notably, Professor Fischel has not joined in Plaintiffs' attacks on Professor Cornell, and has not submitted an affidavit contesting Professor Cornell's assertions about the inability of the Fischel "Leakage Model" to disaggregate the amount of inflation attributable to each of the three separate fraud issues. This is hardly surprising. As Professor Cornell noted in his affidavit, "Professor Fischel has never stated, ***and could never state*** in a manner consistent with economic and finance theory, that his 'Leakage Model' provides a means to determine the inflationary price impact associated with any one individual issue among the three fraudulent issues alleged by Plaintiffs." (Cornell Aff. ¶ 24 (emphasis added).) Obviously, Professor Cornell was correct. Professor Cornell's affidavit, therefore, stands *unrebutted*, and establishes that there is no basis under Professor Fischel's "Leakage Model" and accepted economic and finance theory to attribute $23.94 of "artificial inflation" to the March 23, 2001 statement that concerned only the "Predatory Lending" issue. (Cornell Aff. at ¶ 30.)

Because Plaintiffs cannot contend otherwise, they invoke the well-settled principles that a jury has "wide discretion" in determining damages, and need not determine damages with "mathematical precision." (Pls.' Resp. at 27–28.) But as Plaintiffs acknowledge, the issue before the Court is neither damages nor loss causation but rather the independent issue of reliance, and as even their authorities on damages make clear, a jury's determination of damages will be upheld only "***so long as it has a reasonable basis***." (*Id.* at 28 n.26 (quoting *Dresser Indus., Inc. v.*

Gradall Co., 965 F.2d 1442, 1447 (7th Cir. 1992) (emphasis added by Defendants)).) Professor Cornell's unrebutted testimony establishes that there is ***no reasonable basis*** under the "Leakage Model" that the jury explicitly chose, or under accepted economic and finance theory, for the jury's assignment of the $23.94 of "artificial inflation" to the March 23, 2001 statement about solely "Predatory Lending."

The jury, moreover, had ***no discretion*** in determining the amount of "artificial inflation." To the contrary, the jury was specifically instructed that, in determining "artificial inflation," its *only* options were to reject both of Professor Fischel's models, or to accept and apply only one of those models. Question No. 4 on the Verdict Form instructed:

> If you determine that neither of the proposed damages models reasonably estimates plaintiffs' damages, then you have finished with the Verdict Form. Please turn to the last page, sign and date the Verdict Form and inform the Court that you have finished.
>
> Otherwise, write the amount of loss per share, if any, that, according to the model you have chosen, any defendant's conduct caused plaintiffs to suffer on each of the dates set forth in Table B. (If no loss was caused on any date, write 'none' or '0.') **You may use only one model – the one you have chose – to fill out Table B.**

(Docket No. 1611.) The Court included this instruction after rejecting the very argument Plaintiffs now reprise—that that the jury could permissibly make up a damages number without record support. (Tr. 4367:20-4368:2 ("[T]hey [the jurors] only have two ways to figure out what's a reasonable damage amount: Either of the two theories Professor Fischel gave them. Anything else is outside the evidence presented in the case. It would be creating their own theory of liability.").

Thus, once the jury selected the "Leakage Model," the jury had ***no discretion*** to do anything other than to: (1) fill in "0" as the amount of "artificial inflation" for each day within the Class Period that preceded the first date on which the jury found an actionable misstatement;

and (2) fill in the "artificial inflation" amounts precisely as indicated in the "Leakage Model" for the first date on which the jury found an actionable misstatement and for each subsequent day within the Class Period.

Because the jury found that the first actionable misstatement did not occur until March 23, 2001, the jury, in accordance with Professor Fischel's "Leakage Model": (1) filled in "0" on the Verdict Form for every day preceding March 23, 2001; and (2) assigned to the March 23, 2001 "Predatory Lending" statement the $23.94 of "artificial inflation" that Professor Fischel's "Leakage Model" indicated was present in Household's stock price on that date—notwithstanding that: (1) under Professor Fischel's "Leakage Model," the $23.94 of "artificial inflation" represented the combined effect of all three fraud issues; and (2) Professor Fischel had determined that only 67 cents of artificial inflation was introduced into Household's stock price on March 23, 2001.[5]

Accordingly, responsibility for the failure to provide the jury with any reasonable basis to ascribe an inflation amount to the March 23, 2001 statement rests with Plaintiffs alone. This lapse and any resulting ambiguity constitutes a failure of proof on Plaintiffs' part. *See Schleicher*, 618 F.3d at 687 (observing that if, at trial, plaintiffs are unable "to pin down *when* the stock's price was affected by any fraud," they will lose: "If the data are so ambiguous that the decision can't be made at all, then the class loses outright (plaintiffs bear the burden of persuasion, after all) . . . .")).

[5] James Glickenhaus, the Rule 30(b)(6) deponent for Lead Plaintiff Glickenhaus & Co. ("Glickenhaus"), testified that Glickenhaus did not rely on the March 23, 2001 statement at all. (Defs.' Br. at 26–27.) Defendants, however, were unable to present this evidence to the jury, because they were not permitted to depose Glickenhaus until after the conclusion of the Phase I trial.

Notably, the possibility that the jury's application of the Fischel "Leakage Model" could lead to a verdict that was inconsistent with the very premises of the model and the underlying economic evidence was identified and addressed by Defendants at a hearing on May 1, 2009. At that hearing, counsel for Defendants reiterated the request that Defendants' proposed verdict form be used rather than Plaintiffs' proposed form. Counsel explained:

> [O]ne of the reasons is that in answering question four, if the jury rejects any aspect of Professor Fischel's analysis, if they find that on any day reflected in his table there was not a corrective disclosure that he found or there was not a false statement made that he relied upon in developing his table, that from that day forward none - - the jury has no guidance whatsoever on how to reflect that decision. And the form in its totality then becomes meaningless.

(Trial Tr. at 4680:17–4681:1.) Counsel added: "It's a fundamental flaw with the form. It's a fundamental failure of proof on the plaintiffs' part." (*Id.* at 4681:3–4.) Following questions by the Court, counsel reiterated:

> I'm trying to be very, very specific in this objection to this particular question asking the jury that if no loss was caused on any date, write none. Once they have reached that conclusion, that on any given date the inflation was none, there's really - - they have no guidance for how to determine the figure to use on any day following that that doesn't just rely on speculation.

(*Id.* at 4681:12–18.)

Defendants' well-founded concerns materialized. As a result, there is no supportable basis for the jury's assignment of the entire $23.94 of "artificial inflation" to the March 23, 2001 statement that related solely to the "Predatory Lending" issue *and* no way under Professor Fischel's "Leakage Model" to disaggregate the amount of "artificial inflation" attributable to each of the three distinct issues.

D. Plaintiffs' Suggestion that the Court Should Ignore the Jury's Findings and Substitute Its Own Factual Findings Must Be Rejected.

Tacitly conceding that there is no supportable basis to assign the entire $23.94 of "artificial inflation" to the March 23, 2001 statement that concerned only the "Predatory Lending" issue, Plaintiffs argue that this flaw in the verdict is of little consequence, because the jury found that the second actionable statement occurred on March 28, 2001 and concerned all three fraud issues. (Pls.' Resp. at 30–31.) In essence, Plaintiffs contend that the Court should disregard the March 23, 2001 statement and assume instead that the jury found that the *first* actionable statement occurred on March 28, 2001, and that it was *this* statement that resulted in $23.94 of "artificial inflation" entering Household's stock price. ***But that is not what the jury found.***

The jury found that: (1) that the first actionable misstatement occurred on March 23, 2001, concerned solely the "Predatory Lending" issue, and resulted in $23.94 of "artificial inflation" entering Household's stock price on that date; and (2) the March 28, 2001 statement and subsequent statements did not result in *any* additional artificial inflation. (Verdict Form (Docket No. 1611).) Although the Court may grant judgment to Defendants as a matter of law or order a new trial in the event of a legally insufficient verdict, the Court cannot disregard or reform selected jury findings to accommodate Plaintiffs. *See, e.g.*, *Speedy v. Rexnord Corp.*, 243 F.3d 397, 401 (7th Cir. 2001) ("'[T]his court may not step in and substitute its view of the contested evidence for the jury's.'" (quoting *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627, 634 (7th Cir. 1996))); *Haluschak v. Dodge City of Wauwatosa, Inc.*, 909 F.2d 254, 258 (7th Cir. 1990) ("[W]e will not substitute our views for those of the jury, nor should the trial court.").

E. Defendants Did Not Waive Their Objections to the Jury Verdict.

Finally, Plaintiffs argue that Defendants waived any objections to the jury's assignment of the entire $23.94 of "artificial inflation" to the March 23, 2001 statement that related only to "Predatory Lending" by failing to raise this issue when the verdict was published. (Pls.' Resp. at 31–32.) The record, however, shows that Defendants raised adequate objections to the jury verdict. Furthermore, the law in this circuit is clear that Defendants wee not required to immediately identify and raise every *conceivable* objection to the verdict.

Once the jury indicated that it had reached a verdict, the Court apprised counsel that "after it's been published, I will, as usual, ask you folks if you have any motions to make before I discharge the jury." (Trial Tr. at 4788:17–18.) Counsel for Defendants responded that "depending on what you publish to us, at that point, we may need a few minutes to figure out what to say." (*Id.* at 4788:20–21.) The Court then stated: "Okay. If you feel you need that, you can ask for it and then we can, I guess, ask the jury to retire back to the jury room while you do that." (*Id.* at 4788:22–24.)

After publishing the verdict, the Court asked: "***Any other motions before I release the jury?"*** (*Id.* at 4806:23 (emphasis added).) Counsel for Defendants responded: "***Yes, your Honor. We believe the verdict is fatally inconsistent in a number of ways, which we're prepared to detail to the Court."*** (*Id.* at 4806:25–4807:2 (emphasis added).) Counsel for Defendants then *began* to enumerate Defendants' objections by stating:

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

(*Id.* at 4807:4–10.) Counsel added: "We have other things we'll say at the appropriate time, but that is something which I thought should be mentioned before the jury retires." (*Id.* at 4807:12–14.) The Court's only response to Defendants' counsel's statements was to inquire whether Plaintiffs' counsel had anything to say and, after ascertaining that they did not, to discharge the jury. (*Id.* at 4807:15–21.)

Defendants' objection to the jury verdict was more than adequate. In any event, the Seventh Circuit has never held that the failure to contemporaneously specify every inconsistency in a jury verdict waives related objections. *See, e.g.*, *Carter v. Moore*, 165 F.3d 1071, 1079 (7th Cir. 1998) ("Although many circuits have concluded that the failure to object to an inconsistent general verdict and to move for resubmission of the case to the jury prior to the jury's discharge constitutes a waiver of such an objection, . . . we have never specifically endorsed such a view." (citations omitted)); *see also, e.g.*, *Fox v. Hayes*, 600 F.3d 819, 844 (7th Cir. 2010). To the contrary, the Seventh Circuit has held that "[i]f the problem is not caught before the jury disbands (and no one noticed this conflict until post-trial motions), the proper thing to do is to hold a new trial with respect to all affected parties." *Gordon v. Degelmann*, 29 F.3d 295, 298–299 (7th Cir. 1994); *accord Timm v. Progressive Steel Treating*, 137 F.3d 1008, 1010 (7th Cir. 1998).

* * * * * *

To summarize, Defendants have demonstrated through *uncontrovered evidence* that: (1) the post-March 23, 2001 statements relating to the "Restatement" and "Re-aging" issues had no inflationary impact; (2) there is no basis under the "Leakage Model" or accepted economic theory for the assignment of the entire $23.94 of "artificial inflation" to the March 23, 2001 statement that related only to the "Predatory Lending" issue; and (3) there is no basis under the

"Leakage Model" to determine the amount of "artificial inflation" attributable to any one of the three distinct fraud issues. This uncontroverted evidence rebuts the presumption of reliance as to all class members. *See Basic*, 485 U.S. at 248 (holding that one way to rebut the presumption of reliance is to "show that the misrepresentation in fact did not lead to a distortion of price").

II. Plaintiffs' Response Also Confirms that There Are Genuine Issues of Material Fact Regarding the Presumed Reliance of Certain Groups of Claimants and Individual Claimants that Preclude Summary Judgment in Favor of Plaintiffs.

Because Defendants' evidence rebuts the presumption of reliance as to *all* class members, Defendants are entitled to judgment as a matter of law, and the Court need not consider the myriad additional evidence that for other, independent reasons, rebuts the presumption of reliance as to particular claimants. If, however, the Court chooses to consider this evidence, it must apply the proper legal standard—not the erroneous standard advocated by Plaintiffs.

Plaintiffs appear to contend that, to avoid summary judgment, Defendants must ***prove*** that class members did not rely on the price of Household's stock. (Pls.' Resp. at 1, 2.) This contention is erroneous. As the Supreme Court repeatedly has stated, "the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288–89 (1968); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). The Supreme Court also repeatedly has admonished that "'[on] summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" *Matsushita Electric Indus. Co. v. Zenith*

Radio Corp., 475 U.S. 574, 587–88 (1986) (quoting *United States v. Diebold*, 369 U.S. 654, 655 (1962)).

The fact that this case involves a rebuttable presumption of reliance in no way alters these well-established principles governing summary judgment. In a recent case involving a rebuttable presumption under the Truth-in-Lending Act that the plaintiff had received the required two copies of the notice of his right to rescind a loan, the Seventh Circuit explained:

> The standard of review from a grant of summary judgment is well known, but it is worth emphasizing that the non-moving party does not bear the burden of *proving* his case; the opponent of summary judgment need only point to evidence that can be put in an admissible form at trial, and that, if believed by the fact-finder, could support judgment in his favor. Our role, applying what is usually called *de novo* review, is to see if the opponent has identified such evidence in the record; in so doing, we draw all reasonable inferences and view all facts in favor of the non-moving party.

Marr v. Bank of America, N.A., No. 11-1424, 2011 U.S. App. LEXIS 24134, at *6–7 (7th Cir. Dec. 6, 2011).

In *Marr*, the Seventh Circuit also addressed the relative burdens created by a rebuttable presumption as follows:

> Rule 301 [of the Federal Rules of Evidence] provides the default rule, and it states:
>
> > In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

Id. at *9 (quoting Fed. R. Evid. 301).

Applying these principles to the facts before it, the Seventh Circuit in *Marr* explained: "Here, to overcome the presumption created by his written acknowledgment and thus to raise a genuine fact that would make summary judgment inappropriate, Marr needed to produce enough

evidence to permit a reasonable jury to find that he did not receive two copies." *Id.* at *10. Because the Seventh Circuit found that the defendant's evidence, "[if] believed," was sufficient to rebut the presumption that he had received the two required copies, it reversed the district court's grant of summary judgment in favor of the plaintiff bank. *Id.* at *13–14.

Plaintiffs further assert—also incorrectly—that to rebut the presumption of reliance as to any individual claimant, Defendants' evidence must show *both* that the claimant did not rely on Household's stock price *and* that the claimant purchased the stock "despite knowing the price had been manipulated by defendants' false statements." (Pls.' Resp. at 2.) This contention is refuted by *Basic* itself. The Supreme Court in *Basic* held that "***[a]ny showing*** that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance." 485 U.S. at 248 (emphasis added). The Supreme Court then gave several ***nonexclusive examples*** of how this could be done. *Id.* at 249. Indeed, the Supreme Court began its recitation of possible ways to rebut the presumption of reliance with the introductory clause "[f]or example." (*Id.* at 248.) Thus, Plaintiffs' suggestion that the *only* way to rebut the presumption of reliance as to an individual claimant is to show that the claimant bought Household stock even though he knew the price was inflated is without merit.

Once the correct legal standards are applied, there can be no doubt that Defendants have presented sufficient evidence, which "if believed," could lead a reasonable jury to conclude that the presumption of reliance has been rebutted as to certain groups of claimants and individual claimants. Plaintiffs, therefore, are not entitled to summary judgment on the issue of rebuttal of the presumption of reliance, and instead this issue must be decided by a jury.

A. To Survive Summary Judgment, Defendants Were Not Required to *Establish* That Claimants Who Answered "Yes" to the Claim Form's Question Purchased Their Household Stock for Reasons Totally Unrelated to Its Price.

Citing the Court's November 22, 2010 Order (Docket No. 1703), Plaintiffs assert that the only effect of a "Yes" answer to the Claim Form's question was to "open[] the door" for Defendants' to take additional discovery to obtain "***convincing proof***" that Household's stock price played "no part whatsoever" in the responding claimant's decision to purchase. (Pls.' Resp. at 5 (emphasis added).) This argument is contrary to *Basic* and, as discussed above, turns the summary judgment standard on its head.

The Supreme Court in *Basic* plainly stated that the presumption of reliance may be rebutted by evidence showing that "an individual plaintiff traded or would have traded despite his knowing the statement was false." 485 U.S. at 248. That is *precisely* what a claimant's sworn "Yes" answer to the Claim Form's question establishes. Nothing in *Basic* supports the proposition that, upon obtaining a sworn admission that a plaintiff purchased or would have purchased a stock despite knowing that its price was inflated by false statements, a defendant must inquire further in order to rule out any possibility that—despite the plaintiffs' sworn admission to the contrary—the plaintiff in fact relied on the inflated price. Plaintiffs' argument that Defendants have failed to rebut the presumption of reliance as to claimants that answered "Yes" to the Claims Form's question by not taking additional discovery must be rejected.[6]

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[6] Plaintiffs continue to criticize Defendants for noticing and then canceling the deposition of The Vanguard Group, Inc. ("Vanguard"). (Pls.' Resp. at 7–8.) This criticism is unwarranted. Defendants canceled Vanguard's deposition based on Vanguard's representation that it would be unable to produce a witness with knowledge of the topics indicated in the deposition notice. Thereafter, Vanguard submitted its Claim Form with a "Yes" answer. This sworn admission made it unnecessary for Defendants to pursue further discovery of Vanguard. Furthermore, even if there were any basis for Plaintiffs' assertion that a "Yes" answer merely "opened the door" to additional discovery (and there is not), with respect to the vast majority of claimants there was no adequate opportunity to conduct *(cont'd)*

Plaintiffs also contend that the discovery responses provided by *some* of the limited number of claimants as to which Defendants were permitted and able to conduct discovery contradict, or raise questions about the accuracy of, those claimants' "Yes" answers. (Pls.' Resp. at 6–8.)[7] Similarly, Plaintiffs argue that SAS Trustee Corporation submitted an explanation for its "Yes" answer that shows that the "Yes" answer actually should be construed as a "No." (*Id.* at 8–9.) These assertions only highlight that there are genuine issues of material fact that must be resolved by a jury.

To avoid summary judgment, a defendant need only "point to evidence that can be put in an admissible form at trial, and that, if believed by the fact-finder, could support judgment in his favor." *Marr*, 2011 U.S. App. LEXIS 24134, at *6–7. A claimant's sworn "Yes" answer to the Claim Form's reliance question indisputably would be admissible at trial. And a jury could choose to believe the claimant's sworn "Yes" answer—even in the face of conflicting evidence.

Weighing the evidence and making any necessary credibility determinations is the province of the jury. As stated by this Court in *Miller v. TGI Friday's, Inc.*, No. 05 C 6445, 2007 US. Dist. LEXIS 16004, at *4 (N.D. Ill. Mar. 5, 2007): "[I]t is not the judge's function to weigh the evidence or make credibility determinations; rather, these are issues that should be resolved

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such discovery. Most of the Claim Forms were submitted at the very tail end of the period for submission of claims. Indeed, this is one of the reasons why the claims administrator needed until December 2011 to review and process the claims. The Court, moreover, limited Defendants to fifteen depositions during the Phase II "discovery" period. Given these limitations on the timing and number of depositions, there is no way that Defendants could have deposed every claimant that responded "Yes" to the Claim Form's question.

[7] As an example, Plaintiffs point to a statement by Chartwell Investment Partners, L.P. ("Chartwell"), in its interrogatory responses, that it only made purchases if it believed "'that a given stock would appreciate in value.'" (*Id.* at 6 (quoting Pls.' Ex. 1).) This response related only to the Chartwell Dividend and Income Fund. (Pls. Ex. 1.) More important, the response is *not* inconsistent with a "Yes" answer to the Claim Form's question. An investor could believe that a stock would appreciate in value even if the investor believed the price at the time of purchase was "artificially inflated."

by a jury." (citing *Anderson*, 477 U.S. at 248). *See also Witherspoon v. City of Waukegan*, No. 06 C 7089, 2011 U.S. Dist. LEXIS 33712, at *16 (N.D. Ill. Mar. 30, 2011) ("'[A]ccording to our civil justice system, as enshrined in the *Seventh Amendment to the Constitution*, the jury is the body best equipped to judge the facts, weigh the evidence, determine credibility, and use its common sense to arrive at a reasoned decision.'" (quoting *Massey v. Blue Cross-Blue Shield of Ill.*, 226 F.3d 922, 924 (7th Cir. 2000) (Guzmán, J.)).

Accordingly, there is no basis in fact or law for Plaintiffs' contention that Defendants have failed to rebut the presumption of reliance with respect to claimants who answered "Yes" to the Claim Form's question. At the very least, Defendants have raised genuine issues of material fact as to these claimants.[8]

B. There Are Genuine Issues of Material Fact as to Whether Index and Program Traders Relied on Household's Stock Price—Even as to Those that Answered "No" to the Claim Form's Question.

In its August 16, 2011 Order, the Court expressed its view (with which Defendants disagree) that "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." (Docket No. 1775 at 10.) Under the Court's own articulation of the issue, however, the presumption of reliance is rebutted as a matter of law as to index and program traders, because such traders purchase and sell to replicate or track the performance of an index, without regard to the prices of the particular stocks that are included in the reference index.

[8] Plaintiffs assert that Defendants' Exhibit 2 is over-inclusive because it includes some claimants that in fact answered "No" or filed duplicate claims with conflicting responses. (Pls.' Resp. at 8–10.) The Court need not resolve disputes about these particular claims at this juncture. Rather, the parties can work together to resolve any factual disputes about particular claims. If the parties are unable to resolve these issues on their own, the disputes can be submitted to and resolved by Magistrate Judge Nolan in conjunction with other disputes about specific claims.

Even if the Court does not agree that the presumption of reliance has been rebutted as a matter of law as to index and program traders, the evidence in this case reveals the existence of genuine issues of material fact—regardless of whether the index and program traders answered "Yes" or "No" to the Claim Form's question. According to Plaintiffs, the testimony of Lynn Blake, the Rule 30(b)(6) deponent of index trader State Street Corporation ("State Street"), explaining why State Street answered "No" to the Claim Form's question, "is applicable to all index traders." (Pls.' Resp. at 11.) Ms. Blake testified that State Street (like other indexers) has ***no discretion*** not to purchase the stocks in the relevant index, because that "would violate the objective of the strategy and fund." (Blake Tr. (Defs.' App. Ex. 9) at 26:17–27:15.) Ms. Blake, however, attempted to justify State Street's "No" answer to the Claim Form's question by admittedly "speculating" about possible avenues that State Street might have taken to avoid purchasing or to divest its Household stock if it had known that the price was "inflated"—notwithstanding that such actions would have been contrary to the fund's mandate. (Pls.' Resp. at 12 (quoting Blake Tr. at 46:1–16).)

Michael Majure of Georgia TRS and Alan Warner of Ohio TRS similarly tried to justify Georgia TRS's and Ohio TRS's "No" answers by speculating about what those entities might have done had they known Household's stock price was "inflated." (Pls.' Resp. at 11–12.) And Plaintiffs assert that "[o]ther 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." (*Id.* at 12 n.7.) Ms. Blake's testimony, and the testimony of other index and program traders that attempted to rationalize their "No" answers to the Claim Form's question or provide reasons for not answering the question, gives rise to genuine issues of material fact, including issues as to credibility, that must be decided by a jury.

Plaintiffs' authorities do not support a contrary conclusion. Three of Plaintiffs' authorities are class certification decisions, in which the respective courts held only that the presence of index or program traders in the proposed class did not defeat typicality, because such traders could be presumed to have relied on the integrity of the market. *See In re Countrywide Fin. Corp. Sec. Litig.*, 273 F.R.D. 586, 602 (C.D. Cal. 2009) (holding that "index purchasers pose no typicality concern"); *In re Connetics Corp. Sec. Litig.*, 257 F.R.D. 572, 578 (N.D. Cal. 2009) (rejecting argument that the lead plaintiff was atypical and subject to a unique non-reliance defense because it made some of its purchases pursuant to a computer model that was designed to mirror a stock index); *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 281–82 (S.D.N.Y. 2003) (same).

These decisions, therefore, simply support the proposition that index and program traders, like other investors, are entitled to a *presumption* of reliance. They do not hold, as Plaintiffs suggest, that the presumption of reliance as to index and program traders is *irrebutable*. Indeed, any such contention would be untenable. *See Halliburton*, 131 S. Ct. at 2185 (reiterating that the Court's decision in *Basic* "made clear that the presumption was just that, and could be rebutted by appropriate evidence").

As Plaintiffs' remaining authority shows, where, as here, there is conflicting evidence about whether index or program traders relied on the integrity of the market price, the issue is one for the jury to resolve. *See In re Homestore.com, Inc. Sec. Litig.*, No. CV 01-11115 RSWL (CWx), 2011 U.S. Dist. LEXIS 46552, at *13 (C.D. Cal. Apr. 22, 2011) (denying a Rule 50(a) motion and holding, based on the evidence presented at trial, that a reasonable jury could find that both active and passive investors relied on the integrity of the market in purchasing the company's stock); *see also, e.g.*, *In re Schering-Plough Corp. Sec. Litig.*, No. 01-0829, 2003 U.S.

Dist. LEXIS 26297, at *15 (D.N.J. Oct. 9, 2003) (explaining that "'a jury may conclude that pursing an index strategy entails reliance' on the integrity of the market" (citation omitted)). Accordingly, the issue of whether index and program traders did, or did not, rely on the integrity of Household's market price must be presented to and resolved by a jury.

C. There Are Genuine Issues of Material Fact as to Claimants that Disavowed Belief in or Reliance on the Efficient Market Hypothesis.

The Rule 30(b)(6) deponents for Capital Guardian Trust Company ("Capital Guardian"), Capital Research & Management Company ("Capital Research") and Davis Selected Advisors ("Davis Selected"), on behalf of their respective firms, all disavowed any belief in, or reliance on, the efficient market hypothesis. (Defs.' Br. at 25–26.) Plaintiffs suggest that Defendants are precluded from contesting the reliance of these entities, because Defendants stipulated that Household stock traded in an efficient market. (Pls.' Resp. at 14.) The issue, however, is not whether Household stock traded in an efficient market, but rather whether Capital Guardian, Capital Research, and Davis Selected relied on the price set by the efficient market in making their purchases of Household stock. They each testified that they did not. (Defs. Br. at 25–26.) If this testimony does not rebut the presumption of reliance outright (as Defendants contend it does), it at least raises genuine issues of material fact about these entities' actual reliance that must be resolved by a jury.

III. It Would Be a Fundamental Violation of Defendants' Due Process and Seventh Amendment Rights to Allow Recovery by Claimants as to Which Defendants Have Been Afforded No Discovery Whatsoever and as to Claimants that Refused to Respond to Defendants' Discovery Requests.

The Court has excused claimants with claims of $250,000 or less whose Claim Forms were submitted by third-party filers and did not contain an answer to the Claim Form's question from any requirement that they provide an answer to the question. (Docket No. 1763.) The

Court's ruling constitutes a fundamental violation of Defendants' due process rights and is contrary to *Basic*, because it renders the presumption of reliance *unrebuttable* as to these claimants.

It is inconceivable that a plaintiff in an individual securities fraud action could bring a claim for up to $250,000 and be permitted to recover without being required to respond to *any discovery whatsoever*, simply because the court concluded that it would be inconvenient for the plaintiff to do so. But that is what the Court is allowing here. Moreover, it is no answer to invoke the mantra of "class action efficiency," as the Court and Plaintiffs repeatedly have done. As the Supreme Court recently reiterated, "the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (quoting 28 U.S.C. § 2072(b)). Claimants with claims of $250,000 or less, therefore, simply *cannot* be permitted to recover without at least requiring them to answer the Claim Form's question.

With respect to claimants with claims of over $250,000 that did not answer the Claim Form's question, Plaintiffs mostly quibble about the accuracy of Defendants' list. (Pls.' Resp. at 17–18.) Any disputes about the accuracy of the parties' respective lists, however, can be resolved by the parties themselves or by the Magistrate Judge. Indeed, Plaintiffs themselves acknowledge that the issue presently before the Court "is not whether defendants incorrectly counted the number of supplemental claims outstanding." (*Id.* at 18.)

Plaintiffs nevertheless contend that claimants with claims over $250,000 that failed to answer the Claim Form's question are entitled to recover because ***"[a] class member's failure to answer the question leaves defendants with no evidence supporting their position."*** (*Id.* (emphasis added).) Under Plaintiffs' unsupportable view, claimants with substantial claims of

over $250,000 automatically should be entitled to recover—as long as they ignored the Court-ordered requirement to answer the Claim Form's question.

As to the claimants that refused to comply with Defendants' discovery requests or provided incomplete answers to the requests, Plaintiffs argue that these claimants are entitled to recover because Defendants did not file a motion to compel. (*Id.* at 16 & n.10.) There is, however, no support for Plaintiffs' suggestion that a court may not draw negative inferences against a party that failed to respond to discovery *unless* the party's opponent first files a motion to compel. *See Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155 (7th Cir. 1998) (observing that "[w]hat remains" if a party fails to file a motion for sanctions under Rule 37 is "the possibility of an adverse inference"). Indeed, in the summary judgment context, the Court *must* draw all inferences in favor of the non-moving party, here Defendants. *Marr*, 2011 U.S. App. LEXIS 24134, at *6–7; *see also, e.g.*, *Atanus v. Perry*, 520 F.3d 662, 671 (7th Cir. 2008) ("All facts and reasonable inferences must be construed in favor of the non-moving party.").

The reasonable inference from the failure of certain claimants to respond to Defendants' discovery requests is that the evidence produced would have been adverse to these claimants. *See, e.g.*, *Chicago Architecture Found. v. Domain Magic, LLC*, No. 07 C 764, 2007 U.S. Dist. LEXIS 76226, at *18–19 (N.D. Ill. Oct. 12, 2007) (drawing negative inference from plaintiff's failure to respond to discovery requests); *accord Lincoln Diagnostics, Inc. v. Panatrex, Inc.*, No. 07-CV-2077, 2008 U.S. Dist. LEXIS 41649, at *34 (C.D. Ill. May 29, 2008). This negative inference precludes summary judgment in favor of claimants that failed to respond to Defendants' discovery requests. *See, e.g.*, *Chicago v. Reliable Truck Parts Co.*, 822 F. Supp. 1288, 1294 n. 6 (N.D. Ill. 1993) ("We note that since the City will be permitted to draw adverse inferences from defendants' refusal to respond to legitimate discovery requests . . . it would be difficult for

defendants to be successful on any motion for summary judgment that they might bring. Because of this ability to draw negative inferences there will almost always be a genuine issue of material fact.").

* * * * * *

To conclude, if the Court does not find that Defendants have rebutted the presumption of reliance as to all class members, as demonstrated in Section I, it nevertheless should hold that Defendants at least have demonstrated the existence of genuine issues of material fact as to certain groups of claimants and individual claimants. These genuine issues of material fact preclude summary judgment in favor of Plaintiffs, and must be presented to and resolved by a jury. To hold otherwise would abrogate Defendants' fundamental right to have a jury decide all issues of disputed fact, which "as declared by the Seventh Amendment to the Constitution . . . is preserved to the parties *inviolate*." Fed. R. Civ. P. 38(a) (emphasis added).

CONCLUSION

For the reasons set forth herein and in Defendants' opening brief, Defendants respectfully request that the Court hold that Defendants have rebutted the *Basic* presumption of reliance as to all class members and enter judgment in favor of Defendants and against Plaintiffs and the class. Alternatively, Defendants respectfully request that the Court hold that there exist genuine issues of material fact as to the reliance of certain groups of claimants and individual claimants and schedule a Phase II jury trial to resolve these disputed issues.

Dated: December 19, 2011

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CERTIFICATE OF SERVICE

R. Ryan Stoll, an attorney, hereby certifies that on December 19, 2011 he caused ed true and correct copies of the foregoing Defendants' Reply in Support of Their Submission Regarding Rebuttal of the Presumption of Reliance and the accompanying Appendix of Exhibits to be served via the Court's ECF filing system on the following counsel of record in this action:

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