UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' RENEWED MOTIONS FOR JUDGMENT AS A MATTER OF LAW PURSUANT TO RULE 50(b) OR, IN THE ALTERNATIVE, FOR A NEW TRIAL PURSUANT TO RULE 59

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. LEGAL STANDARDS GOVERNING DEFENDANTS' MOTIONS 2

A. The Standard for Defendants' Rule 50(b) Motion 2

B. The Standard for Defendants' Rule 59 Motion for New Trial 3

III. PLAINTIFFS HAVE PROVEN LOSS CAUSATION 3

A. The Specific Disclosures and Leakage Model Were Proper to Show Loss Causation under Supreme Court and Seventh Circuit Case Law 3

B. Fischel's Leakage Model Was Proper to Show Loss Causation and Economic Loss, and Was Supported by Clear Evidence of Leakage 7

IV. THE JURY HAD A REASONABLE BASIS TO ADOPT FISCHEL'S LEAKAGE MODEL TO AWARD DAMAGES 12

A. Case Law Supports a Jury Finding Damages Attributable to the Fraud that Are a "Reasonable and Probable Estimate" 12

B. Fischel's Leakage Model Provided the Jury with a "Reasonable and Probable Estimate" of Damages that Included Only Fraud-Related Disclosures 12

V. DEFENDANTS' OTHER ATTACKS ON THE LEAKAGE MODEL ARE MERITLESS 16

A. Fischel Identified How Household's Stock Was Inflated Due to Defendants' 17 Statements the Jury Found Were False 16

B. Fischel Did Not Provide a "New" Leakage Model at Trial or Improperly Instruct the Jury to "Partially" Implement His Model 19

C. The Leakage Model Did Not Result in Irrational Verdicts 19

VI. THE EVIDENCE ESTABLISHES LIABILITY FOR THE RESTATEMENT 21

VII. THE EVIDENCE ESTABLISHES LIABILITY FOR PREDATORY LENDING 24

A. The Court Did Not Commit Error by Finding Defendants' Concealment of Household's Predatory Practices Was Actionable 24

B. The Jury Properly Rejected Defendants' Truth-on-the-Market Defense Regarding Household's Practices 27

Page

C. There Is More than Sufficient Evidence to Support the Jury's Verdict as to Defendants' Predatory Lending Fraud....29

VIII. THE EVIDENCE ESTABLISHES LIABILITY FOR HOUSEHOLD'S CREDIT QUALITY CONCEALMENT....31

IX. THE COURT'S JURY INSTRUCTIONS AND VERDICT FORM WERE PROPER....35

A. The Court's Jury Instructions Do Not Entitle Defendants to a New Trial....35

1. The Court's Jury Instruction Regarding the Making of a False Statement Does Not Entitle Defendants to a New Trial....35

2. The Court's Scienter Instruction Was Proper....45

B. The Court's Jury Verdict Form Was Correct....47

1. The Court Properly Excluded Arthur Andersen from the Verdict Form....48

2. The Verdict Form Was Appropriate for Rule 20(a)....50

C. Defendants Waived Any Objection to the Alleged Inconsistent Verdicts....52

X. THE COURT'S EVIDENTIARY RULINGS WERE PROPER....53

A. The Court Properly Ruled on Expert Testimony....53

1. The Court Properly Admitted the Testimony of Plaintiffs' Expert Catherine Ghiglieri....54

2. The Court Properly Admitted the Testimony of Charles Cross....56

3. Devor's Opinion Was Properly Admitted....57

4. The Court Properly Instructed the Jury Regarding Consideration of Expert Testimony....58

B. The Court's Judicial Rulings Do Not Entitle Defendants to a New Trial....59

XI. THE COURT PROPERLY ADJUDICATED RELIANCE DURING THE PHASE II PROCEEDINGS....63

XII. CONCLUSION....65

TABLE OF AUTHORITIES

Page

CASES

ABM Marking, Inc. v. Zanasi Fratelli, S.R.L.,
353 F.3d 541 (7th Cir. 2003) 3

Allianz Risk Transfer v. Paramount Pictures Corp.,
No. 08-CV-10420, 2010 WL 1253957
(S.D.N.Y. Mar. 31, 2010) 42

Am. Nat'l Bank & Trust Co. of Chicago v. Reg'l Transp. Auth.,
125 F.3d 420 (7th Cir. 1997) 3

American Network Leasing Corp. v. Peachtree Bancard Corp.,
No. 93-C-3109, 1996 U.S. Dist. LEXIS 11253
(N.D. Ill. Aug. 2, 1996).....50

Amgen Inc. v. Conn. Ret. Plans & Trust Funds,
133 S. Ct. 1184 (2013).....18, 50

Anchor Bank, FSB v. Hofer,
649 F.3d 610 (7th Cir. 2011) 4

Banks v. Yokemick,
214 F. Supp. 2d 401 (S.D.N.Y. 2002).....49

Barrie v. Intervoice-Brite, Inc.,
409 F.3d 653 (5th Cir. 2005) 43, 44

Basic, Inc. v. Levinson,
485 U.S. 224 (1988).....35, 63

Bularz v. Prudential Ins. Co.,
93 F.3d 372 (7th Cir. 1996) 48

Bullock v. Sheahan,
519 F. Supp. 2d 760 (N.D. Ill. 2007) 54

Butler v. Sears, Roebuck & Co.,
No. 11-8029, 2013 U.S. App. LEXIS 17748
(7th Cir. Aug. 22, 2013).....21

Caremark, Inc. v. Coram Healthcare Corp.,
113 F.3d 645 (7th Cir. Ill. 1997).....25

Christmas v. City of Chi.,
682 F.3d 632 (7th Cir. 2012) 60

Page

Chu v. Sabratek Corp.,
100 F. Supp. 2d 815 (N.D. Ill. 2000) 24, 31

City of Pontiac Gen. Emples. Ret. Sys. v. Lockheed Martin Corp.,
875 F. Supp. 2d 359 (S.D.N.Y. 2012).....37, 38, 42, 43

CIVIX-DDI, LLC v. Cellco P'ship,
387 F. Supp. 2d 869 (N.D. Ill. 2005) 15

Comcast Corp. v. Behrend,
133 S. Ct. 1426 (2013).....7, 12, 21

Cruz v. Town of Cicero,
275 F.3d 579 (7th Cir. 2001) 48

Dabertin v. HCR Manor Care, Inc.,
68 F. Supp. 2d 998 (N.D. Ill. 1999) 50

Daubert v. Merrell Dow Pharms., Inc.,
509 U.S. 579 (1993)..... *passim*

Deputy v. Lehman Bros., Inc.,
345 F.3d 494 (7th Cir. 2003) 58

Diarama Trading Co. v. J. Walter Thompson U.S.A.,
No. 01-CIV.-2950 (DAB), 2005 U.S. Dist. LEXIS 19496
(S.D.N.Y. Sept. 6, 2005).....49

DiLeo v. Ernst & Young,
901 F.2d 624 (7th Cir. 1990) 32

Drebing v. Provo Group, Inc.,
519 F. Supp. 2d 811 (N.D. Ill. 2007) 54

Dura Pharms. v. Broudo,
544 U.S. 336 (2005)..... *passim*

Durkin v. Equifax Check Servs., Inc.,
406 F.3d 410 (7th Cir. 2005) 54

Erica P. John v. Halliburton Fund, Inc. Co.,
131 S. Ct. 2179 (2011).....7

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976).....47

Page

Ernst. Sundstrand Corp. v. Sun Chem. Corp.,
553 F.2d 1033 (7th Cir. 1977) 47

FindWhat Inv-Grp. v. FindWhat.com,
658 F.2d 1282 (11th Cir. 2011) 17

Fla. State Bd. of Admin. v. Green Tree Fin. Corp.,
270 F.3d 645 (8th Cir. 2001) 46

Fort Howard Paper Co. v. Standard Havens, Inc.,
901 F.2d 1373 (7th Cir. 1990) 3

Frazer v. East St. Louis,
No. 09-CV-802, 2011 U.S. Dist. LEXIS 127185
(S.D. Ill. Nov. 3, 2011) 52

Freeland v. Iridium World Communs.,
545 F. Supp. 2d 59 (D.D.C. 2008) 7

Fulton Cnty. Emps. Ret. Sys. v. MGIC Inv. Corp.,
675 F.3d 1047 (7th Cir. 2012) 44

Ganino v. Citizens Utils. Co.,
228 F.3d 154 (2d Cir. 2000).....28, 29

Gile v. United Airlines, Inc.,
213 F.3d 365 (7th Cir. 2000) ..... *passim*

Gilford Partners L.P. v. Sensormatic Elecs. Corp.,
No. 96 C 4072, 1997 U.S. Dist. LEXIS 19032
(N.D. Ill. Nov. 12, 1997).....22

Goldberg v. 401 N. Wasbash Venture LLC,
No. 09 C 6455, 2013 U.S. Dist. LEXIS 54509
(N.D. Ill. Apr. 15, 2013) 16

Goldberg v. Household Bank F.S.B.,
890 F.2d 965 (7th Cir. 1989) 13

Gooden v. Neal,
17 F.3d 925 (7th Cir. 1994) 26, 52, 53

Greater Pa. Carpenters Pension Fund v. Whitehall Jewelers, Inc.,
No. 04-C-1107, 2005 U.S. Dist. LEXIS 376
(N.D. Ill. Jan. 10, 2005) 13

Page

Griffin v. Foley,
542 F.3d 209 (7th Cir. 2008) 60, 63

Harrison v. Dean Witter Reynolds, Inc.,
974 F.2d 873 (7th Cir. 1992) 51

Howard Indus., Inc. v. Rae Motor Corp.,
293 F.2d 116 (7th Cir. 1961) 12

In re Adelphia Communs. Corp. Sec. & Deriv. Litig.,
No. 03 MD 1529, 2005 U.S. Dist. LEXIS 43300
(S.D.N.Y. Aug. 22, 2005) 65

In re Allscripts, Inc. Sec. Litig.,
No. 00 C 6796, 2001 WL 743411
(N.D. Ill. June 29, 2001) 33

In re Anicom Inc. Sec. Litig.,
No. 00 C4391, 2001 U.S. Dist. LEXIS 6607
(N.D. Ill. May 18, 2001) 22

In re Bradley Pharms. Inc. Sec. Litig.,
421 F. Supp. 2d 822 (D.N.J. 2006) 6

In re Cabletron Sys., Inc.,
311 F.3d 11 (1st Cir. 2002) 22

In re Comshare Inc. Sec. Litig.,
183 F.3d 542 (6th Cir. 1999) 22

In re Countrywide Fin. Corp. Sec. Litig.,
588 F. Supp. 2d 1132 (C.D. Cal. 2008) 26, 28

In re Discovery Zone Sec. Litig.,
943 F. Supp. 924 (N.D. Ill. 1996) 22

In re Enron Corp. Secs., Deriv. & ERISA Litig.,
No. H-01-3624, 2003 U.S. Dist. LEXIS 1668
(S.D. Tex. Jan. 28, 2003) 30

In re Enron Corp. Sec. Litig.,
MDL No. 1446, 2005 U.S. Dist. LEXIS 41240
(S.D. Tex. Dec. 22, 2005) 6

Page

In re Enron Corp. Secs. Deriv. & ERISA Litig.,
236 F.R.D. 313 (S.D. Tex. 2006).....48, 49

In re Flag Telecom Holdings, Ltd. Sec. Litig.,
No. 07-4017-cv-L, 2009 U.S. App. LEXIS 16080
(2d Cir. July 22, 2009).....5, 9

In re Innovative Constr. Sys., Inc.,
793 F.2d 875 (7th Cir. 1986).....36, 52, 53

In re James Wilson Assoc.,
965 F.2d 160 (7th Cir. 1992).....58

In re JPMorgan Chase & Co. Sec. Litig.,
MDL No. 1783-C.A., No. 06 C 4674, 2007 U.S. Dist. LEXIS 93877
(N.D. Ill. Dec. 18, 2007).....23, 30

In re Merck & Co., Sec., Deriv. & "ERISA" Litig.,
No. 05-1151, 2011 U.S. Dist. LEXIS 87578
(D.N.J. Aug. 8, 2011).....37, 38

In re Metawave Commc'ns Corp. Sec. Litig.,
298 F. Supp. 2d 1056 (W.D. Wash. 2003).....23

In re MicroStrategy, Inc. Sec. Litig.,
115 F. Supp. 2d 620 (E.D. Va. 2000).....22

In re Motorola Sec. Litig.,
505 F. Supp. 2d 501 (N.D. Ill. 2007).....5, 6

In re MTBE Product Liability Litig.,
379 F. Supp. 2d 348 (S.D.N.Y. 2005).....49

In re NTL Sec. Litig.,
No. 02 Civ. 3013, 2006 U.S. Dist. LEXIS 5346
(S.D.N.Y. Feb. 14, 2006).....6

In re Par Pharm., Inc. Sec. Litig.,
733 F. Supp. 668 (S.D.N.Y. 1990).....27

In re Pfizer Inc. Sec. Litig.,
No. 04-CV-9866, 2012 WL 983548
(S.D.N.Y. Mar. 22, 2012).....42

Page

In re Pfizer Inc. Sec. Litig.,
No. 05-MD-1688, 2013 U.S. Dist. LEXIS 49333
(S.D.N.Y. Mar. 28, 2013) 39, 43

In re Providian Fin. Corp. Sec. Litig.,
152 F. Supp. 2d 814 (E.D. Pa. 2001) 25, 27

In re Satyam Computer Servs. Secs. Litig.,
915 F. Supp. 2d 450 (S.D.N.Y. 2013).....38

In re Scholastic Corp. Sec. Litig.,
252 F.3d 63 (2d Cir. 2001).....46

In re Seitel Sec. Litig.,
447 F. Supp. 2d 693 (S.D. Tex. 2006) 6

In re Sotheby's Holdings, Inc. Sec. Litig.,
00 CIV. 1041 (DLC), 2000 U.S. Dist. LEXIS 12504
(S.D.N.Y. Aug. 31, 2000),
aff'd, 31 Fed. App'x 762 (2d Cir. 2002) 27

In re Van Der Moolen Holding N.V. Sec. Litig.,
405 F. Supp. 2d 388 (S.D.N.Y. 2005).....27, 28

In re Vivendi Universal, S.A. Sec. Litig.,
765 F. Supp. 512 (S.D.N.Y. 2011).....17

In re Wellcare Mgmt. Group Sec. Litig.,
964 F. Supp. 632 (N.D.N.Y. 1997).....23

In re Williams Sec. Litig.-WCG Subclass,
558 F.3d 1130 (10th Cir. 2009) 5, 9

In re Winstar Comm.,
No. 01-CV-3014, 2006 U.S. Dist. LEXIS 7618
(S.D.N.Y. Feb. 27, 2007).....6

Indiana Bell Tel. Co. v. Ward,
No. 02-0170-C-H/K, 2005 U.S. Dist. LEXIS 12939
(S.D. Ind. June 24, 2005) 53

Jackson v. Bunge Corp.,
40 F.3d 239 (7th Cir. 1994) 3

Page

Janus Capital Group, Inc. v. First Derivative Traders,
131 S. Ct. 2296 (2011) ..... *passim*

Johnson v. Gen. Bd. of Pension & Health Benefits,
No. 02-C-5221, 2012 U.S. Dist. LEXIS 24918
(N.D. Ill. Feb. 23, 2012) 52

Jones v. Lincoln Elec. Co.,
188 F.3d 709 (7th Cir. 1999) 60

Jordan v. City of Chi.,
No. 08 C 6902, 2012 U.S. Dist. LEXIS 9906
(N.D. Ill. Jan. 27, 2012) 16, 55

Kadas v. MCI Systemhouse Corp.,
255 F.3d 359 (7th Cir. 2001) 56

Kerr v. Exobox Techs. Corp.,
No. H-10-4221, 2012 U.S. Dist. LEXIS 7523
(S.D. Tex. Jan. 23, 2012) 45

Kumho Tire Co., Ltd. v. Carmichael,
526 U.S. 137 (1999) 54

Laperriere v. Vesta Ins. Group, Inc.,
526 F.3d 715 (11th Cir. 2008) 52

Lapsley v. Xtec, Inc.,
689 F.3d 802 (7th Cir. 2012) 15, 16, 19, 58

Latino v. Kaizer,
58 F.3d 310 (7th Cir. 1995) 3

Lerch v. Angell,
No. 06-C-454, 2007 U.S. Dist. LEXIS 69333
(E.D. Wis. Sept. 17, 2007) 49

Loeffel Steel Prods. Inc. v. Delta Brands, Inc.,
387 F. Supp. 2d 795 (N.D. Ill. 2005) 58

Makor Issues & Rights, Ltd. v. Tellabs, Inc.,
437 F.3d 588 (7th Cir. 2006), *rev'd on other grounds*,
551 U.S. 308 (2007) 26, 31, 46

Page

Makor Issues & Rights, Ltd. v. Tellabs Inc.,
513 F.3d 702 (7th Cir. 2008) 37, 40, 46

Malone v. ReliaStar Life Ins Co.,
558 F.3d 683 (7th Cir. 2009) 48

Maresca v. Mancall,
135 Fed. App'x 529 (3d Cir. 2005).....50

Matrixx Initiatives, Inc. v. Siracusano,
131 S. Ct. 1309 (2011).....11, 26

McCloud v. Goodyear Dunlop Tires N. Am., Ltd.,
No. 04-cv-1118, 2008 U.S. Dist. LEXIS 43265
(C.D. Ill. June 2, 2008) 54

McCroy v. Ill. Dept. of Corrections,
No. 02-C-3171, 2008 U.S. Dist. LEXIS 43266
(C.D. Ill. June 2, 2008) 52

McKinnon v. Berwyn,
750 F.2d 1383 (7th Cir. 1984) 44

Mesman v. Crane Pro Services,
512 F.3d 353 (7th Cir. 2008) 47

Miksis v. Howard,
106 F.3d 754 (7th Cir. 1997) 54

Miley v. Oppenheimer & Co.,
637 F.2d 318 (5th Cir. 1981) 48

Minasian v. Standard Chartered Bank, PLC,
109 F.3d 1212 (7th Cir. 1997) 55

Nathenson v. Zonagen Inc.,
267 F.3d 400 (5th Cir. 2001) 17

No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Corp.,
320 F.3d 920 (9th Cir. 2003) 29

Norfolk Cty. Ret. Sys. v. Ustian,
No. 07 C 7104, 2009 U.S. Dist. LEXIS 65731
(N.D. Ill. July 28, 2009).....6, 13

Page

Ocampo v. Paper Converting Machine Co.,
No. 02-C-4054, 2005 U.S. Dist. LEXIS 17107
(N.D. Ill. Aug. 12, 2005).....52

Ong v. Sears, Roebuck & Co.,
No. 03-C-4142, 2005 U.S. Dist. LEXIS 20391
(N.D. Ill. Sept. 14, 2005) 46

Oran v. Stafford,
226 F.3d 275 (3d Cir. 2000).....25

Oto v. Metropolitan Life Ins. Co.,
224 F.3d 601 (7th Cir. 2000) 54

Ottaviani v. State University of New York,
679 F. Supp. 288 (S.D.N.Y. 1988),
aff'd, 875 F.2d 365 (2d Cir. 1989).....14

Pa. Pub. Sch. Emples' Ret. Sys. v. Bank of Am. Corp.,
874 F. Supp. 2d 341 (S.D.N.Y. 2012).....45

Petersen v. Gibson,
No. 97-C-4123, 2002 U.S. Dist. LEXIS 133
(N.D. Ill. Jan. 7, 2002) 44

Pickett v. Prince,
5 F. Supp. 2d 595 (N.D. Ill. 1998) 64

Porter v. Whitehall Labs, Inc.,
9 F.3d 607 (7th Cir. 1993) 54

PR Diamonds, Inc. v. Chandler,
364 F.3d 671 (6th Cir. 2004) 46

Premium Plus Partners L.P. v. Davis,
653 F. Supp. 2d 855 (N.D. Ill. 2009).....14

Provenz v. Miller,
102 F.3d 1478 (9th Cir. 1996) 22

Pugh v. Tribune Co.,
521 F.3d 686 (7th Cir. 2008) 37

Rapold v. Baxter Int'l, Inc.,
708 F.3d 867 (7th Cir. 2013) 39

Page

Ray v. Citigroup Global Mkts.,
482 F.3d 991 (7th Cir. 2007) 4

Reeves v. Sanderson Plumbing Prods., Inc.,
530 U.S. 133 (2000).....2, 30

Richard v. Northwest Pipe Co.,
No. C-09-572, 2011 U.S. Dist. LEXIS 96200
(W.D. Wash. Aug. 26, 2011) 23

Robin v. Arthur Young & Co.,
915 F.2d 1120 (7th Cir. 1990) 47

Rowe v. Maremont Corp.,
850 F.2d 1226 (7th Cir. 1988) 12, 35, 47

RRK Holding Co. v. Sears, Roebuck & Co.,
563 F. Supp. 2d 832 (N.D. Ill. 2008) 8

Sadowski v. Bombardier, Ltd.,
539 F.2d 615 (7th Cir. 1976) 47

Schleicher v. Wendt,
529 F. Supp. 2d 959 (S.D. Ind. 2007).....31

Schleicher v. Wendt,
618 F.3d 679 (7th Cir. 2010) 5, 17

Schmude v. Sheahan,
No. 00-C-4580, 2004 U.S. Dist. LEXIS 7167
(N.D. Ill. Apr. 23, 2004) 64

Schobert v. Ill. Dept. of Transp.,
304 F.3d 725 (7th Cir. 2002) 51

Searls v. Glasser,
64 F.3d 1061 (7th Cir. 1995) 47

SEC v. Benger,
No. 09-C-676, 2013 U.S. Dist. LEXIS 39203
(N.D. Ill. Mar. 21, 2013).....38, 43

SEC v. Carter,
No. 10-C-6145, 2011 U.S. Dist. LEXIS 136599
(N.D. Ill. Nov. 28, 2011).....38, 43, 44

Page

SEC v. Caserta,
75 F. Supp. 2d 79 (E.D.N.Y. 1999) 24

SEC v. Goldfield Deep Mines Co.,
758 F.2d 459 (9th Cir. 1985) 24

SEC v. Jakubowski,
150 F.3d 675 (7th Cir. 1998) 47

SEC v. Landberg,
836 F. Supp. 2d 148 (S.D.N.Y. 2011).....43

SEC v. Michel,
521 F. Supp. 2d 795 (N.D. Ill. 2007) 30

SEC v. Sys. Software Assocs., Inc.,
145 F. Supp. 2d 954 (N.D. Ill. 2001) 22

Serafinn v. Local 722, Int'l Bd. of Teamsters,
597 F.3d 908 (7th Cir. 2010) 39

Short v. Belleville Shoe Manufacturing Co.,
908 F.2d 1385 (7th Cir. 1990) 13

Silverman v. Motorola, Inc.,
259 F.R.D. 163 (N.D. Ill. 2009).....13

Silverman v. Motorola, Inc.,
798 F. Supp. 2d 954 (N.D. Ill. 2011) 8, 17

Simmons, Inc. v. Pinkerton's, Inc.,
762 F.2d 591 (7th Cir. Ind. 1985) 40

Sims v. Mulcahy,
902 F.2d 524 (7th Cir. 1990) 52

Smith v. Ford Motor Co.,
215 F.3d 713 (7th Cir. 2000) 53

Steiner v. MedQuist Inc.,
No. 04-5487 (JBS), 2006 U.S. Dist. LEXIS 71952
(D.N.J. Sept. 29, 2006) 25, 27

Page

Stollings v. Ryobi Techs.,
No. 12-2984, 2013 U.S. App. LEXIS 16055
(7th Cir. Aug. 2, 2013).....16, 55, 56

Story Parchment Co. v. Paterson Parchment Paper Co.,
282 U.S. 555 (1931).....12

Stransky v. Cummins Engine Co.,
51 F.3d 1329 (7th Cir. 1995).....35

Strauss v. Stratojac Corp.,
810 F.2d 679 (7th Cir. 1987).....20, 44, 53

Swack v. Credit Suisse First Boston,
383 F. Supp. 2d 223 (D. Mass. 2004).....6

Tellabs Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007).....23, 37

TIG Ins. Co. v. Giffin, Winning, Cohen & Bodewes, P.C.,
No. 00 C 2737, 2002 WL 31870528
(N.D. Ill. Dec. 20, 2002).....50

Traharne v. Wayne Scott Fetzer Co.,
156 F. Supp. 2d 717 (N.D. Ill. 2001).....53

Tricontinental Indus. v. PricewaterhouseCoopers,
475 F.3d 824-43 (7th Cir. 2007).....4

TSC Indus. Inc. v. Northway, Inc.,
426 U.S. 438 (1976).....35

Turyna v. Martam Constr. Co.,
83 F.3d 178 (7th Cir. 1996).....53

U.S. v. Dack,
987 F.2d 1282-84 (7th Cir. 1993).....39

U.S. v. Ferguson,
584 F. Supp. 2d 447 (D. Conn. 2008).....13, 14

U.S. v. Wynn,
845 F.2d 1439 (7th Cir. 1988).....25, 61

Page

Umpleby v. Potter & Brumfield, Inc.,
69 F.3d 209 (7th Cir. 1995) 48

United States v. Anifowoshe,
307 F.3d 643 (7th Cir. 2002) 63

United States v. Battista,
646 F.2d 237 (6th Cir. 1981) 30

United States v. Erickson,
601 F.2d 296 (7th Cir. 1979) 24

United States v. Lee,
558 F.3d 638 (7th Cir. 2009) 45, 59

Vaughn v. Willis,
853 F.2d 1372 (7th Cir. 1988) 39, 40

Wakeen Doll Co., Inc. v. Ashton Drake Galleries,
272 F.3d 441 (7th Cir. 2001) 35, 46

Will v. Comprehensive Accounting Corp.,
776 F.2d 665 (7th Cir. 1985) 53

Wilson v. Williams,
182 F.3d 562 (7th Cir. 1999) 54

Wilson v. Williams,
83 F.3d 870 (7th Cir. 1996) 35, 39

Zimmerman v. Chicago Bd. of Trade,
360 F.3d 612 (7th Cir. 2004) 2, 28, 30

STATUTES, RULES AND REGULATIONS

15 U.S.C.
§78j(b) ..... *passim*
§78t(a) 50, 52
§78u-4(f)(3)(A) 53

17 C.F.R.
§240.10b-5 .....22, 34

Page

Federal Rules of Civil Procedure
Rule 12(b)(6).....64
Rule 26.....15, 25
Rule 49(b).....53
Rule 50.....2, 7, 64, 65
Rule 50(a).....26, 31, 51, 53
Rule 50(b).....2
Rule 51(c)(1).....52
Rule 56.....63, 64
Rule 59.....3, 7, 64, 65
Rule 59(a).....3, 64

Federal Rules of Evidence
Rule 103(a).....54
Rule 702.....58
Rule 703.....57
Rule 803(8).....60

SECONDARY AUTHORITIES

9A C. Wright & A. Miller,
Federal Practice and Procedure (1995)
§2524.....2

Bradford Cornell & R. Gregory Morgan,
Using Finance Theory to Measure Damages in Fraud on the Market Cases (1990)
37 UCLA L. Rev. 883.....11, 13

Merrit B. Fox,
After Dura: Causation in Fraud-on-the-Market Actions (2006)
31 J. Corp. L. 829, 851.....6

Restatement (Second) of Torts
§548A cmt.....6

Seventh Circuit Pattern Instruction No. 1.09
Federal Civil Jury Instructions of the Seventh Circuit.....59

I. INTRODUCTION

After eight days of pre-trial hearings and 26 days of trial, the jury returned a verdict finding defendants liable for securities fraud and determined the per-share damages on a daily basis from March 23, 2001 to October 11, 2002. During the trial, defendants and their counsel made a series of concessions that backfired and made tactical decisions not to object to certain evidence and testimony. Now, having lost, defendants seek a second bite at the apple. Unfortunately for defendants, trial is not a preseason game, where they can try different approaches, see how it goes, and adapt for the regular season. They lost, and the issues they raise on these motions utterly fail to reach the standards required to obtain a new trial or judgment as a matter of law.

Defendants assert that Fischel's testimony is based on a legally defective model. However, it was defendants' counsel who vouched for Fischel at trial – telling the jurors that Fischel was "The Man" and that he "wrote the book" on securities damages. Defendants can hardly claim at this stage that the jurors should have rejected his testimony. This Court's prior orders found Fischel's leakage model appropriate and that the jury properly found loss causation and damages based on the evidence. Recent Supreme Court decisions do not alter the analysis.

Defendants claim the evidence was insufficient for the jurors to return a verdict for the plaintiffs on the restatement issues. As set forth below, there was plenty of evidence adduced by plaintiffs in support of this claim. Defendants made the odd choice not to call their accounting expert, their outside auditors, or even the internal Household accountants to give their side of the story. Their strategic blunder left the jurors with little choice but to render a decision for plaintiffs.

Defendants prevailed on a motion *in limine* to exclude certain evidence regarding their settlement with the Attorneys General. Inexplicably, defendants thereafter opened the door to the admission of that evidence. Their decision blew up in their faces, and now they attempt to distort the record and blame plaintiffs and the Court for their silly stratagem.

Defendants attempt to manufacture errors in the Verdict, Verdict Form, Jury Instructions and certain evidentiary rulings, ignoring the stringent legal requirements that they must meet to obtain a new trial or judgment as a matter of law based on their factually and legally unsound arguments. Defendants also try to rehash their failed arguments regarding damages, puffery, *Daubert* rulings and post-trial reliance rulings. Again, defendants are flat-out wrong.

As set forth below, defendants are not entitled to a new trial or judgment as a matter of law. Defendants' curious decisions at times almost made it seem as if they knew that a jury of their peers would find that they were liable and that they preferred to try their case in the Seventh Circuit Court of Appeals. Since their motions are meritless, plaintiffs respectfully ask that this Court deny the motions in their entirety and send defendants packing toward their inevitable appeal.

II. LEGAL STANDARDS GOVERNING DEFENDANTS' MOTIONS

A. The Standard for Defendants' Rule 50(b) Motion

A party seeking to overturn a jury verdict "assumes a Herculean burden." *Gile v. United Airlines, Inc.*, 213 F.3d 365, 372 (7th Cir. 2000). The motion "should be granted cautiously and sparingly" because it "deprives the party opposing the motion of a determination of the facts by a jury." 9A C. Wright & A. Miller, *Federal Practice and Procedure*, §2524, at 252 (1995). "Judgment as a matter of law is proper only where there is no legally sufficient basis for a reasonable jury to find for the nonmoving party." *Zimmerman v. Chicago Bd. of Trade*, 360 F.3d 612, 623 (7th Cir. 2004); *see Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149 (2000). "[T]he court is required to view the evidence in the light most favorable to the nonmoving party, and must draw all reasonable inferences in that party's favor." *Zimmerman*, 360 F.3d at 623 (citing, *inter alia*, *Reeves*, 530 U.S. at 150-51). "We may not weigh the evidence or pass on the credibility of witnesses, nor may we substitute our view of the contested evidence for the jury's." *Zimmerman*, 360 F.3d at 623. By this standard, defendants' Rule 50 motion fails.

B. The Standard for Defendants' Rule 59 Motion for New Trial

Under Rule 59(a), defendants bear the burden of demonstrating their entitlement to a new trial. Rule 59(a) is not intended to "'secure a forum for the relitigation of old matters or to afford the parties the opportunity to present the case under new theories; instead, the motion is a device properly used to correct manifest errors of law or fact or to present newly discovered evidence.'" *Fort Howard Paper Co. v. Standard Havens, Inc.*, 901 F.2d 1373, 1380 n.4 (7th Cir. 1990).[1]

A new trial should be granted "only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience." *Latino v. Kaizer*, 58 F.3d 310, 315 (7th Cir. 1995); *see also ABM Marking, Inc. v. Zanasi Fratelli, S.R.L.*, 353 F.3d 541, 545 (7th Cir. 2003). Courts will not set aside a jury verdict as long as a reasonable basis exists in the record to support the verdict. *Jackson v. Bunge Corp.*, 40 F.3d 239, 244 (7th Cir. 1994). A jury award must be "'monstrously excessive, born of passion and prejudice, or not rationally connected to the evidence'" to grant a new trial. *Am. Nat'l Bank & Trust Co. of Chicago v. Reg'l Transp. Auth.*, 125 F.3d 420, 437 (7th Cir. 1997). "Because damage calculations are essentially an exercise in fact-finding, our review of the jury's award is deferential." *Id*.

In this trial, the jury rationally concluded that defendants were liable for 17 false statements and awarded damages supported by the evidence. Here, the jury's answers on the Verdict Form are completely consistent. Moreover, the jury was correctly instructed on the law on every issue.

III. PLAINTIFFS HAVE PROVEN LOSS CAUSATION

A. The Specific Disclosures and Leakage Model Were Proper to Show Loss Causation under Supreme Court and Seventh Circuit Case Law

The jury found the elements of loss causation and economic loss met when it found a 10b-5

[1] Here, as elsewhere, unless otherwise noted, citations are omitted and emphasis is added.

violation for 17 of the alleged false statements. Verdict Form, Question No. 1 (Dkt. 1611). As instructed, in answering Question No. 4, the jury then determined that plaintiffs' leakage model "reasonably estimates plaintiffs' damages." Verdict Form at 41. The instruction asked the jury to "write the amount of loss per share, if any, that, according to the model you have chosen, any defendant's conduct ***caused*** plaintiffs to suffer on each of the dates set forth in Table B. (If no loss was caused on any date, write 'none' or 'O.')." *Id*. The jury properly put an "O" for each date on Table B prior to the date they found the first 10b-5 violation by defendants on May 23, 2001 that caused plaintiffs' damages.

Yet, defendants once again argue that plaintiffs failed to prove loss causation. This Court already rejected these same arguments on defendants' *Daubert* Motion of Fischel and Phase II briefing, since plaintiffs proved loss causation by establishing a causal connection between defendants' false statements and the loss suffered. *Dura Pharms. v. Broudo*, 544 U.S. 336, 341 (2005). *See* Dkt. 1527 (Fischel *Daubert* Order). *See* Dkt. 1822 at 1, 4-5. Although an inflated purchase price alone is insufficient under *Dura*, a plaintiff can establish loss causation when the defendants' misrepresentation "became generally known, and "as a result" share value "depreciate[s]." *Tricontinental Indus. v. PricewaterhouseCoopers*, 475 F.3d 824-43 (7th Cir. 2007) (quoting *Dura*, 544 U.S. at 344). As the Seventh Circuit explained in *Ray*, *Dura* did not change the standard for proving loss causation in the Seventh Circuit: that is, the defendants' alleged misrepresentation artificially inflated the stock price and the value of the stock declined once the market learned of the deception, and "the defendants' actions had something to do with the drop in value" of the stock. *See Ray v. Citigroup Global Mkts.*, 482 F.3d 991, 994-95 (7th Cir. 2007); *see also Anchor Bank, FSB v. Hofer*, 649 F.3d 610, 618 (7th Cir. 2011) ("we do not require that a plaintiff plead that ***all*** of its loss is necessarily attributed to the actions of the defendant") (emphasis

in original).[2]

The use of a leakage theory to establish loss causation does not run afoul of *Dura* or Seventh Circuit precedent. Defendants admit (*see* Defs' Brf. at 14) (Dkt. 1867) that the Seventh Circuit has recognized that a leakage theory is sufficient to prove loss causation. Judge Easterbrook in *Schleicher v. Wendt*, 618 F.3d 679, 686-87 (7th Cir. 2010), acknowledged the viability of the leakage theory: "Yet truth can come out and affect the market price in advance of a formal announcement."

Although "[l]oss causation is easiest to show when a corrective disclosure reveals the fraud to the public as the price subsequently drops . . . . *Dura* did not suggest that this was the only or even the preferred method of showing loss causation . . . it acknowledged that the relevant truth can 'leak out,' *Dura*, 544 U.S. at 342, which would argue against a strict rule requiring revelation by a single disclosure." *In re Williams Sec. Litig.-WCG Subclass*, 558 F.3d 1130, 1137 (10th Cir. 2009). The Tenth Circuit in *Williams* found that the leakage theory *per se* did not "run afoul" of *Dura* so long as there was ***evidence*** of leakage and "some mechanism for [disclosing] how the truth was revealed." *Id*. at 1138. *See* Dkt. 1527 at 3 n.1. In *Flag*, the Second Circuit agreed that a "leakage theory" was viable post-*Dura* but simply found no evidence of leakage. *See In re Flag Telecom Holdings, Ltd. Sec. Litig*., No. 07-4017-cv-L, 2009 U.S. App. LEXIS 16080, at *31-*32 n.5 (2d Cir. July 22, 2009). The *Motorola* court stated in language applicable here:

> As a practical matter, however, the truth that a misrepresentation or omission conceals can make its way into the market, resulting in dissipation of a fraudulently inflated share price, long before a company issues a formal "corrective" announcement, and by a variety of other ways. As one commentator points out:
>
> > Prior to an unambiguous public announcement, the operation of one or more phenomena may lead to complete market realization of the truth. One way is a series of earlier, smaller disclosures by the issuer ***or others*** that gradually leads market participants whose actions set price to conclude that the misstatement was false.

[2] Jury Instructions at 32 (Dkt. 1614) stated, "plaintiffs must prove that the defendant's particular statement or omission was a substantial cause of the economic loss plaintiffs suffered."

In re Motorola Sec. Litig., 505 F. Supp. 2d 501, 543 (N.D. Ill. 2007) (quoting Merrit B. Fox, *After Dura: Causation in Fraud-on-the-Market Actions*, 31 J. Corp. L. 829, 851 (2006)), *aff'd*, 644 F.3d 511 (7th Cir. 2011). These decisions are not surprising since *Dura* held that one way to prove loss causation is to show that the "relevant truth" about the "financial condition of a corporation" previously misrepresented or concealed became "generally known" and "as a result" the share value "depreciate[s]." *Dura*, 544 U.S. at 342-44 (quoting *Restatement (Second) of Torts* §548A cmt.b (1977)).[3]

At trial, defendants' expert Bajaj did not criticize any particular aspect of Fischel's adoption of the Cornell and Morgan leakage approach, or provide any alternative quantification of leakage. Rather, Bajaj offered an unsupported and conclusory opinion that the leakage model is "not a recognized method." Trial Transcript ("Tr.") 4150:4-10.[4] Yet, the Supreme Court and the Seventh Circuit have acknowledged the validity of the leakage theory, other courts have accepted a leakage approach when evidence of leakage is present (*see infra*), and the leakage approach is accepted in the

[3] Besides a formal disclosure by a defendant, "the market may learn of possible fraud [from] a number of sources: e.g., from whistleblowers, analysts' questioning financial results, resignations of CFOs or auditors, announcements by the company of changes in accounting treatment going forward, newspapers and journals, etc." *In re Enron Corp. Sec. Litig.*, MDL No. 1446, 2005 U.S. Dist. LEXIS 41240, at *59 (S.D. Tex. Dec. 22, 2005); *see also In re Winstar Comm.*, No. 01-CV-3014, 2006 U.S. Dist. LEXIS 7618, at *45 (S.D.N.Y. Feb. 27, 2007) ("*Dura* did not set forth any requirement as to who may serve as the source of the information, nor is there any requirement that the disclosure take a particular form or be of a particular quality."); *In re Bradley Pharms. Inc. Sec. Litig.*, 421 F. Supp. 2d 822, 828 (D.N.J. 2006) ("*Dura* did not address what types of events or disclosures may reveal the truth. Nor did *Dura* explain how specific such disclosure must be."). A number of other trial courts post-*Dura* have accepted the leakage theory for loss causation. *See Norfolk Cty. Ret. Sys. v. Ustian*, No. 07 C 7104, 2009 U.S. Dist. LEXIS 65731, at *19-*21 (N.D. Ill. July 28, 2009) (leakage of information over seven months showed loss causation under *Dura*); *Bradley*, 421 F. Supp. 2d at 829 (truth "leak[ed] out" over 2 month period); *Motorola*, 505 F. Supp. 2d at 543 (citing with approval the leakage approach in *Bradley* as consistent with Seventh Circuit's *Tricontinental Industries*' decision); *In re Seitel Sec. Litig.*, 447 F. Supp. 2d 693, 710 (S.D. Tex. 2006) (company revenue recognition began to be questioned by Wall Street analysts and share price declined over two months sufficient under *Dura* to show "truth to begin to 'leak out' and 'make its way into the marketplace'"); *Swack v. Credit Suisse First Boston*, 383 F. Supp. 2d 223, 243 (D. Mass. 2004) ("market learned the truth gradually"); *In re NTL Sec. Litig.*, No. 02 Civ. 3013, 2006 U.S. Dist. LEXIS 5346, at *33 n.14 (S.D.N.Y. Feb. 14, 2006) (collecting cases and upholding leakage theory to show loss causation).

[4] For the Court's convenience, all trial exhibits and trial transcript references are attached in separate appendices, filed herewith.

field. *See* Dkt. 1527 at 2-3.

Defendants' claim that the law on loss causation has changed since the parties' briefing on defendants' initial Rule 50/59 Motion is without merit. The Court's holding in *Halliburton* was simply that loss causation does not need to be proven by plaintiffs at class certification. *Erica P. John v. Halliburton Fund, Inc. Co.*, 131 S. Ct. 2179 (2011). The *Halliburton* Court reaffirmed *Dura's* loss causation holding that a plaintiff has to prove that defendants' deceptive conduct caused their claimed economic loss and if "other intervening causes . . . were responsible for the loss or part of it, a plaintiff would not be able to prove loss causation, ***to that extent***." *Id.* at 2186. Defendants' other new authority, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013), held only that "at the class certification stage (as at trial), any model supporting a 'plaintiffs' damages case must be consistent with its liability case,'" which is exactly what the evidence showed at trial since the jury found the defendants liable for all three types of statements. *See* §§V.-VIII., *infra*.

B. Fischel's Leakage Model Was Proper to Show Loss Causation and Economic Loss, and Was Supported by Clear Evidence of Leakage

As this Court recognized, Fischel did not "assume" inflation, but rather used an event study and regression analysis to analyze the disclosures of Household's fraud from 11/14/01 to 10/11/02 ("Disclosure Period") and to quantify the inflation in Household's stock price due to defendants' misrepresentations and omissions – which, is the "gold standard" to establish materiality and causation. Dkt. 1527 at 1-2; *see also* Tr. 2680:17-2681:6. Fischel properly assumed that inflation would exist on the first day the jury found a false statement (3/23/01). Tr. 2921:10-2922:9; 2870:24-2871:2.[5] This inflation and the 16 subsequent false statements found by the jury maintained that

[5] As a damages expert, Fischel is ***not*** supposed to opine on whether defendants' statements were false or misleading and is expected to assume liability. In fact, no expert should opine on an issue that is within the province of the jury. *See Freeland v. Iridium World Communs.*, 545 F. Supp. 2d 59, 88 (D.D.C. 2008) ("It is not [the expert's] responsibility to prove [defendants] committed fraud; [the expert] is only proposing to illustrate how disclosures correcting that fraud affected the stock price" and defendants' complaints went to the credibility, not admissibility.). Furthermore, experts are allowed to make certain assumptions based on

inflation until partial disclosures of the truth dissipated all the inflation. Defendants incorrectly assert that the inflation in Household's stock is measured by Household's stock price reaction on the date the false statement was made, when in fact inflation is measured by the stock price reaction when the truth was disclosed during the Disclosure Period. *See* Tr. 2965:7-17; 2849:21-2850:19; *see also Motorola*, 798 F. Supp. 2d at 976 ("[T]o establish loss causation a plaintiff must allege . . . that the misstatement or omission concealed something from the market that, when disclosed, negatively affected the value of the security."). In quantifying inflation, Fischel used two models. Fischel's "Specific Disclosures" model only included 14 fraud-related disclosures that caused single-day "statistically significant" price declines and did not include any non-fraud factors (market, industry or company-specific). These 14 disclosures amounted to $7.97 of inflation per share even though Household's stock price declined $32 during the Disclosure Period. Of course, this approach alone was sufficient to establish the element of loss causation and economic loss.

However, Fischel opined that relying only upon statistically significant declines under this approach did not capture relevant disclosures of the fraud on other dates – a "cascade of negative information that came out about Household," according to Fischel. Tr. 2671:14-2672:15; 2675:21-2676:8. The inflation of $7.97 per share in the Specific Disclosures model underestimated inflation per share since Household's stock price vastly underperformed the market and its peer group during the Disclosure Period – declining 53% ($32 per share) while its peers and the market declined approximately 20%-25% ($12-$15 per share). Tr. 2676:13-2678:10; 4309:8-20.[6]

---

the facts of the case. *RRK Holding Co. v. Sears, Roebuck & Co.*, 563 F. Supp. 2d 832 (N.D. Ill. 2008) (no grounds for exclusion where expert assumed certain facts).

[6] Defendants once again improperly look at Household's stock price performance during the entire Class Period (July 30, 1999 to October 11, 2002) and compare it to the market and other companies to somehow conclude Household declines were similar. This is the incorrect analysis. Under *Dura* and all other loss causation authority, the declines are analyzed during the period of disclosures (11/15/01 to 10/11/02) to isolate the company stock declines due to the fraud coming out of the stock price as opposed to declines due to market or peer group declines. Household clearly underperformed the market and its peers during this time as the truth was disclosed about its fraudulent practices by declining from $60.90 on 11/14/01 to $28.20 on

Market participants attributed this underperformance to the truth slowly leaking out about Household's predatory lending, reaging criticisms, and Household's restatement of its prior financial results and ***not*** to any non-fraud company specific reason or ***any other non-fraud related reasons***. Tr. 2671:19-2672:15; *see also* Fischel Report, ¶¶28, 39-40.[7] Defendants failed to adduce any evidence at trial that Household's stock price underperformance and declines during the Disclosure Period were due to a non-fraud company specific reason.

Contrary to *Williams* or *Flag*, Fischel did not "assume" leakage. Rather, there was undisputed evidence of leakage in this case that caused some of Household's stock price decline. For example, although the defendants denied any systemic predatory lending issues and sought and obtained a court order sealing its publication, news of the Washington DFI Report finding that Household was engaged in systemic nationwide predatory practices leaked into the market along with other information about Household's predatory lending practices over a period of five months in the spring/summer of 2002. Tr. 2671:14-2674:15; PXs 1156; 1429.

In fact, a Household internal e-mail (PX 1156) attributed a $20 decline in Household's stock price during May 2002 to August 2002 to the gradual leakage of contents of the Washington DFI Report (an amount very similar to the quantification of leakage under Fischel's model). PX 1156 was prepared on August 30, 2002 when Household was negotiating a huge fine (which ended up being $488 million) with the Attorney Generals of various states. The document notes that Tom Detelich, Household's Managing Director of Consumer Lending, wanted to use the $19.36 per share

---

10/11/02 – a $32.70 decline compared to a $12-$15 decline experienced by its peers or the market. Plaintiffs' Trial Ex. ("PX") 1395 at 13, 18.

[7] Attached to Dkt. 1416-2. A July 18, 2002 Stephens Inc. analyst report noted the "***collapse in Household's stock price due to issues related to predatory lending issues***." A September 22, 2002 CIBC report commented that "building concerns regarding the company's predatory lending practices, which have been accused of being predatory in nature and is (sic) currently the subject of an investigation by the Washington Department of Financial Institutions, have dampened price performance." A September 12, 2002 Deutsche Bank analyst reported that "***Household stock has been under pressure due to concerns about accusations of unfair and predatory lending practices***." Fischel Report, ¶28.

decline in Household's stock from May 15, 2002 to August 30, 2002 "in arguing that we've already paid a good price to the states in the loss of our stock value" from "the ***announcements*** of the Washington report." *See* PX 1156; *see also* PX 1395 at 15, 17 for prices on dates. Even defendants' expert Bajaj conceded that "news media had leaked the contents of [the Washington State Regulatory] report." Bajaj Report at 57 (attached to Dkt. 1416-6-7); Tr. at 4267:19-25.

There was also evidence of leakage to the market that Household would have to pay a huge fine or restitution and discontinue its predatory lending practices, reducing future earnings growth. Analysts reduced their estimates of Household's future earnings growth as this and other information leaked into the market, contributing to Household's stock price decline. Tr. 2671:14-2674:15. Evidence of leakage was shown by reports questioning Household's predatory lending practices in light of rumors about the Washington DFI Report, Household's reaging practices, and the restatement. Household's own investor relations report from May-August 2002 acknowledged that on May 16, Howard Mason of Sanford Bernstein "spread word" that the Washington State Department of Financial Institutions was going to file a predatory lending report and ask the Attorney General to file suit against Household. PX 198 at 2. The report further noted that, between August 15 and August 20, negative news reports about Household's practices negatively impacted Household's stock price. PX 198 at 3.[8] All of this evidence of questioning by media and financial

[8] Other examples of leakage include the following: a May 30 *New York Post* article about Household's injunction against the release of the DFI Report and a similar story in the May 31 *American Banker*. PX 198 at 2; an *American Banker* article dated May 31, 2002 (PX 1446), which discussed Wall Street analysts analyzing Household's denials of widespread predatory lending and its contention that problems were limited to Bellingham, Washington, and stating that it could be a big problem if it were widespread (Tr. 2839:2-2840:17); an April 10, 2002 Legg Mason report which stated that Household's reaging policies discussed in the 2001 10-K and April 9, 2002 FRC "overstate reported EPS [earnings per share]" (PX 140 at HHS01942923); and two CFRA analyst reports issued in the summer of 2002, which also concluded that Household's prior disclosures on reaging were highly misleading (PX 515; *see also* PX 1435 (9/22/02 CIBC report); PX 1409 (12/01 *Barron*'s article); PX 1410 (12/11/01 Legg Mason report); PX 140 (4/10/02 Legg Mason report); Fischel Report Exs. 41, 42; Tr. 2840:18-2841:11; 2842:15-2843:2; 2845:7-18). This evidence of disclosures about reaging issues rebuts defendants' argument that plaintiffs did not prove loss causation with respect to the reaging statements at the 4/9/02 FRC statements.

analysts, and Household and their experts' admissions supporting leakage was considered by the jury and supported a finding of loss causation and economic loss.

Fischel testified that a leakage model was a more appropriate means to properly quantify inflation since, despite defendants' denials, there was clear evidence of continuous leakage of the truth during the Disclosure Period. Tr. 2855:13-23. In fact, the leakage theory is appropriate to address situations "in which fraud was revealed slowly over time, including one in which 'a slow flow of increasingly negative news fueled a rising tide of doubts and rumors' with the result that 'only a few dramatic announcements were associated with [statistically significant declines]'" and using residual price changes in those cases "'only on disclosure days will understate damages.'" Fischel Report, ¶38 (quoting Bradford Cornell & R. Gregory Morgan, *Using Finance Theory to Measure Damages in Fraud on the Market Cases*, 37 UCLA L. Rev. 883, 905-06 (1990)). *See also* Tr. 4273:7-10 (leakage theory accepted in the field); Dkt. 1527 at 2-3 (citing literature that event study "may underestimate the amount of inflation in certain circumstances, *e.g.*, when there is leakage of the true information," and holding that Fischel's approach "estimates the effect of the specific corrective disclosures and information leakage that caused dissipation of the artificial inflation"). The Supreme Court in *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1319 (2011), "note[d] that courts frequently permit expert testimony on causation based on evidence other than statistical significance." In sum, the evidence of leakage of the truth is further support for the jury's finding that the plaintiffs had proven the elements of loss causation and economic loss. The Court's conclusion that plaintiffs established loss causation and economic loss at trial is entirely valid. Dkt. 1822 at 4-5.

IV. THE JURY HAD A REASONABLE BASIS TO ADOPT FISCHEL'S LEAKAGE MODEL TO AWARD DAMAGES

A. Case Law Supports a Jury Finding Damages Attributable to the Fraud that Are a "Reasonable and Probable Estimate"

While plaintiff must still produce "evidence show[ing] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate, the calculations need not be exact. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).[9] As this Court held:

> Fortunately, the law does not require the impossible. Rather, it gives a jury discretion to determine a damages award, as long as the award has a reasonable basis in the evidence. [Citations omitted.] In this case, there were multiple statements and partial disclosures over an extended time period, and the parties' experts provided testimony in support of their positions regarding whether the stock price was affected by misrepresentations or omissions and the estimate of damages stemming therefrom, and the jury chose to credit Fischel's Leakage Model of damages (discounting industry, market or company-specific non-fraud declines unrelated to the actionable misstatements or omissions) over defendants' counter-arguments. Here, all of the evidence, including Fischel's testimony about the amount of artificial inflation, provided a reasonable basis for the jury's damages award.

Dkt. 1822 at 4-5. The jury's findings are a reasonable and probable estimate of the damages and should not be disturbed.

B. Fischel's Leakage Model Provided the Jury with a "Reasonable and Probable Estimate" of Damages that Included Only Fraud-Related Disclosures

Fischel's quantification of inflation under the leakage model was properly adopted by the jury since it was a "reasonable and probable estimate" of damages. Defendants provided no alternative estimate of damages for the jury to consider. Using an event study, Fischel identified

---

[9] *See also Comcast*, 133 S. Ct. at 1433 ("[c]alculations need not be exact," but damage model must be consistent with liability case); *Rowe v. Maremont Corp.*, 850 F.2d 1226, 1243 (7th Cir. 1988) (Individual action under 10b-5, judgment for plaintiff after bench trial affirmed; "A district court need not calculate damages with mathematical precision; it is enough that the evidence be sufficient to allow the district court to intelligently estimate damages."); *Howard Indus., Inc. v. Rae Motor Corp.*, 293 F.2d 116, 119 (7th Cir. 1961) ("'The amount [of damages] need not be proved with absolute certainty. It is enough if the evidence adduced is sufficient to enable the court or jury to make a fair and reasonable approximation.'").

corrective disclosures from 11/14/01 to 10/11/02 that revealed the truth. Dkt. 1527 at 1-3; Tr. 2627:11-2628:11; 2671:14-2672:15; 2680:17-2681:6. Fischel then used a regression analysis to remove any industry or market declines in Household's stock price. Tr. 2681:1-6; 2682:3-2683:16. Contrary to defendants' arguments, Fischel ruled out any non-fraud reasons for the declines. Tr. 2683:4-12; *see also* Fischel Rebuttal Report, ¶¶20-24.[10] Fischel's leakage model used the approach laid out by Cornell & Morgan and quantified varying levels of daily inflation between $.41 and $23.94, which was far less than Household's actual stock price decline of $32 per share during this period and strikingly consistent with the stock price decline of $19.36 that Household contemporaneously attributed to leakage in defendants' own internal documents. *See* PX 1156, 1395; Tr. 2682:3-2683:12; *see also* Fischel Report, ¶¶40-42. Household's own quantification of the impact of leakage on its stock price combined with other evidence of leakage strongly supports the jury's damage findings.

Defendants criticize Fischel's use of a 330-day observation window (11/15/01 to 10/11/02) (*see* Defs' Brf. at 21), yet Fischel's leakage approach is supported by Cornell & Morgan and case law approving the use of leakage models over a period of time.[11] By definition, a leakage model will have a longer observation window.[12] Defendants did not attack the specific mechanics of Fischel's

[10] Attached to Dkt. 1416-3.

[11] As laid out in Fischel's Report, ¶¶40-42: "Cornell and Morgan explain that one way to reduce the likely understatement in a case where fraud was revealed slowly over time is to extend the observation window (*i.e.*, the period over which a price reaction to an event is measured) surrounding the disclosure date and measure ***residual*** returns over time." Cornell and Morgan note that "[t]he length of the window depends on the facts of each specific case." 37 UCLA L. Rev. at 906. Indeed, when considering a leakage theory of loss causation in securities fraud litigation, courts in this District have endorsed leakage periods of many months. *See, e.g.*, *Silverman v. Motorola, Inc.*, 259 F.R.D. 163, 171 (N.D. Ill. 2009) (truth leaked out throughout the course of the entire "holiday season"); *Ustian*, 2009 U.S. Dist. LEXIS 65731, at *15-*17 (endorsing a leakage period of "seven months"); *Greater Pa. Carpenters Pension Fund v. Whitehall Jewelers, Inc.*, No. 04-C-1107, 2005 U.S. Dist. LEXIS 376, at *13-*14 (N.D. Ill. Jan. 10, 2005) (endorsing leakage period of nearly one year).

[12] The cases defendants cite do not support their argument. In fact, the two primary cases defendants cite – *Goldberg v. Household Bank F.S.B.*, 890 F.2d 965 (7th Cir. 1989), and *Short v. Belleville Shoe Manufacturing Co.*, 908 F.2d 1385 (7th Cir. 1990) – say nothing about the proper duration of an event study. And although the court in *U.S. v. Ferguson*, 584 F. Supp. 2d 447 (D. Conn. 2008), referred to the expert's "30-day

leakage quantification at trial.[13]

Defendants argue the "leakage theory" is untenable because Fischel failed to remove the effects of non-fraud company specific information. However, the amount of net inflation (or per-share damages) quantified by Fischel does ***not*** reflect any non-fraud company specific declines. Fischel analyzed ***all*** disclosures during the 11/15/01 to 10/11/02 period. The ***few*** non-fraud Household-specific disclosures included both ***increases or declines***, which Fischel analyzed, determined did not impact, and were thus ***not*** included in, his quantification of inflation under the leakage model:

> Q. Like your specific disclosure model, does this quantification use statistical methods to account for the market and industry influences on Household's stock prices?
>
> A. Yes, it does.
>
> Q. And did you also analyze whether company-specific factors unrelated to the alleged fraud can explain Household's stock price decline during this latter part of the relevant period?
>
> A. Yes, I did. ***I looked at that carefully***. I noticed that there were a lot of disclosures that had some fraud-related information in it and some other disclose – and part of the disclosure did not have – dealt with something other that was fraud related.
>
> There were some – some of those disclosures that had a positive effect, some had a negative effect; but overall it was impossible to conclude that the difference between the true value line and the actual price would have been any different had

---

window," the court rejected the expert's theory not because of any defect with the expert's event window but because the expert improperly "attribute[d] all non-market and non-industry related decline in [the] stock price to the [] fraud without accounting for other factors that may have contributed to that decline" and the defendants identified five disclosures of non-fraud company-specific information on other issues that negatively impacted the company's stock price. *Id*. at 453 & n.7. Here, because Fischel's quantification of inflation did not include non-fraud-related declines and defendants did not identify any non-fraud declines that were included in Fischel's quantification of leakage, *Ferguson* is inapposite.

[13] Defendants' argument about Fischel's use of a "one-tail" test is without merit. There is ample support for using either a one-tailed or a two-tailed test depending on the level of statistical significance used. *See* Fischel Report, ¶33; Fischel Rebuttal Report, ¶32 n.26; *Premium Plus Partners L.P. v. Davis*, 653 F. Supp. 2d 855, 866 (N.D. Ill. 2009) (either one or two-tailed test admissible); *Ottaviani v. State University of New York*, 679 F. Supp. 288, 308 (S.D.N.Y. 1988) (same), *aff'd*, 875 F.2d 365 (2d Cir. 1989). This argument was also raised and rejected in defendants' *Daubert* motion as an attack on the statistical significance of the specific disclosures model, not the leakage model, and was an issue for cross-examination at trial.

> there been no disclosures about non-fraud-related information during this particular period. Some positive, some negative. ***They cancel each other out***.

Tr. 2683:13-2684:6.

Fischel's testimony was clear – there were "a few" non-fraud Household-related disclosures that resulted in price increases ***and*** decreases (*see* Tr. 2960:10-11), but they cancelled each other out and had no impact on the final quantification of inflation. Tr. 2683:25-2684:6. Despite questioning Fischel extensively, defendants' counsel asked very few questions about Fischel's leakage model, and never asked Fischel what the "few" non-fraud related Household disclosures were or challenged his conclusion that they cancelled each other out. The only evidence the jury heard about company-specific non-fraud disclosures was Fischel's undisputed testimony that "[t]hey cancel each other out."[14]

In any event, defendants waived their arguments because they failed at trial to cross-examine Fischel on these issues or present any evidence that that leakage model included any non-fraud Household specific declines in the quantification of inflation. In *Lapsley v. Xtec, Inc.*, 689 F.3d 802 (7th Cir. 2012), the Seventh Circuit affirmed the denial of defendants' *Daubert* motion and motion for judgment as a matter of law, holding that once an expert satisfies *Daubert* admissibility standards, a failure at trial to cross-examine on supposed infirmities in the expert's opinion undermines a later request for judgment as a matter of law. The *Lapsley* court held that if the proposed expert testimony meets the *Daubert* threshold, the accuracy of the actual evidence is to be tested at trial with the familiar tools of "'vigorous cross-examination, presentation of contrary

[14] Defendants point to a late-filed affidavit submitted by their expert Cornell in connection with defendants' *Daubert* motion that criticizes Fischel's leakage model. Cornell did not testify at trial. Cornell was not a designated expert in the case subject to a Rule 26 report and deposition. As such his affidavit should not even be considered by the Court. *CIVIX-DDI, LLC v. Cellco P'ship*, 387 F. Supp. 2d 869, 884 (N.D. Ill. 2005) (striking untimely expert declaration). In any event, Cornell does not repudiate his article or criticize Fischel for adopting his approach or the ***method*** Fischel used in following Cornell's leakage approach. In fact, Cornell acknowledges that the leakage model is an accepted method, but incorrectly asserts that Fischel included non-fraud company-specific declines in his final net quantification of inflation.

evidence, and careful instruction on the burden of proof.'" *Id.* at 805 (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993)).[15] Defendants failed to cross examine Fischel on these supposed infirmities and should not be heard to complain now.

V. DEFENDANTS' OTHER ATTACKS ON THE LEAKAGE MODEL ARE MERITLESS

A. Fischel Identified How Household's Stock Was Inflated Due to Defendants' 17 Statements the Jury Found Were False

Defendants argue that plaintiffs did not show how defendants' 17 false statements inflated Household's stock price. Defs' Brf. at 8-10. However, Fischel testified that Household's stock price was inflated when the jury determined the first false or misleading statement. *See* Tr. 2848:10-22; 2850:20-2852:7; 2866:15-21; 2870:24-2871:2; 2921:10-2922:9; 2924:8-13; 2925:9-18; 2965:7-17; 4289:9-4292:2.

Unable to rebut this evidence, defendants argue that Fischel's leakage model assumed inflation in Household's stock price on the first day of the Class Period, 7/30/99, which was based on pre-Class Period inflation. But whether the jury theoretically could have relied on pre-Class Period inflation to find inflation on the first day of the Class Period is irrelevant. The jury did not find any inflation from the beginning of the Class Period (July 30, 1999) to March 22, 2001. The jury found that the first false statement on March 23, 2001 introduced inflation into Household's stock price. Defendants' arguments about pre-Class Period inflation are irrelevant, and the Court need not address them.

Defendants' arguments are also legally incorrect. Even if inflation entered the stock before

[15] *See also Stollings v. Ryobi Techs.*, No. 12-2984, 2013 U.S. App. LEXIS 16055, at *33 (7th Cir. Aug. 2, 2013) (reversing trial court's exclusion of plaintiffs' expert and noting that defendant was "free to use cross-examination to attack the assumption [that the judge thought faulty] and to ask [the expert] how altering the assumption would affect his analysis"); *Goldberg v. 401 N. Wasbash Venture LLC*, No. 09 C 6455, 2013 U.S. Dist. LEXIS 54509, at *13 (N.D. Ill. Apr. 15, 2013) (flaws in expert's factual basis "go to the weight the jury affords the testimony, not to its admissibility"); *Jordan v. City of Chi.*, No. 08 C 6902, 2012 U.S. Dist. LEXIS 9906 (N.D. Ill. Jan. 27, 2012) (same).

the Class Period, defendants would still be liable for fraudulently maintaining that inflation. In *FindWhat*, the Eleventh Circuit rejected the precise argument defendants make here, holding that "it is irrelevant to securities fraud liability that the stock price was already inflated before a defendant's first actionable misrepresentation; fraudulent misstatements that prolong inflation can be just as harmful to subsequent investors as statements that create inflation in the first instance." *FindWhat Inv-Grp. v. FindWhat.com*, 658 F.2d 1282, 1315 (11th Cir. 2011). Thus, "[d]efendants whose fraud prevents preexisting inflation in a stock price from dissipating" are liable regardless of when that inflation was first introduced. *Id*. at 1317.[16]

Defendants also argue that the amount of inflation did not increase with each of the 17 independent false statements. Defs' Brf. at 24-25. Defendants once again create a requirement where none exists. As this Court held:

> Defendants also argue that the jury verdict itself rebuts the presumption of market reliance as to the entire class because the dates on which the actionable misstatements/opinions occurred do not correspond to an increase in inflationary impact on Household stock. However, the expert testimony credited by the jury was that a misstatement or omission may cause inflation in the stock price merely by maintaining the market expectations or preventing them from falling further, even if the inflation does not increase on the date the misstatement or omission is made. (*See, e.g.*, Tr. at 2605 (plaintiffs' expert Fischel stating that stock is inflated where stock is prevented from falling to a lower level)); *see Schleicher v. Wendt*, 618 F.3d 679, 683 (7th Cir. 2010) (price can be inflated by false statement or omission when it stops price from declining); *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 419 (5th Cir. 2001) (statement actionable with no price increase); *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 512, 562 (S.D.N.Y. 2011) ("[A] statement can cause inflation by causing the stock price to be artificially maintained at a level that does not reflect its true value.").

Dkt. 1822 at 3-4; *see also Silverman v. Motorola, Inc.*, 798 F. Supp. 2d 954 (N.D. Ill. 2011) ("The relevant change in stock price occurs when the information is revealed to the market.") (citing *Dura*,

[16] Schoenholz's argument that the verdict should be vacated because he was found not liable for the 3/23/01 false statement should be rejected for the same reason. Defs' Brf. at 34. Schoenholz was found liable for the next false statement on 3/28/01 and other false statements that continued to artificially inflate Household's stock price.

544 U.S. at 347).

Defendants' incorrectly argue that the failure of other false statements to cause an ***increase*** in inflation means the other statements are not "material" under *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013). *Amgen* simply reaffirmed the concept that only statements that impact a stock price are material. *Id.* at 1195. As this Court noted in its Order (Dkt. 1822 at 3-4), price can be impacted by a false statement or omission that prevents a stock from declining to its true value. *Amgen* does not suggest anything to the contrary.

In fact, both experts testified that Household's stock price could be inflated by misrepresentations or omissions, even if Household's stock price did not increase thereafter. *See* Fischel (Tr. 2963:21-2964:6); Bajaj (Tr. 4244:2-6). Inflation is not measured by looking at Household's stock price reaction on each of the 17 dates. Inflation caused by those 17 statements is quantified by the residual stock price declines associated with the later disclosures of the truth. Tr. 4289:9-4292:2; 2921:10-2922:9; 2849:21-2850:19.[17] If the full amount of inflation (in this case, the $23.94 cap) is already in Household's stock price from the first false statement (3/23/01), subsequent false statements do not increase inflation but rather maintain it. Tr. 2852:8-15. Defendants argue that increases and decreases in daily inflation under the leakage model at various times during the Disclosure Period are contradictory since the amount of daily inflation increases or decreases even though there is no fraudulent statement or disclosure. Defs' Brf. at 13-14. Yet, defendants do not dispute that the variation in daily inflation throughout this period is due to Fischel's use of a modified constant percentage method similar to Cornell & Morgan's leakage model method, which is common in the field and takes into account leakage of information. Despite discussing the method

[17] Defendants take issue with the fact that some of the 14 false statements took place during the Disclosure Period. Defs' Brf. at 16 n.8. However, the disclosures were "partial" disclosures of the truth, and defendants' false statements (denying they were engaging in predatory lending or improper reaging practices) continued to artificially inflate Household's stock price.

numerous times, Tr. 2887:22-2888:2; 2890:17-2891:4; 2899:20-25; 2903:13-22; 2968:2-5, defendants never objected to or challenged Fischel's use of the modified constant percentage methodology at trial. This argument was waived. *Lapsley*, 689 F.3d at 805.

B. Fischel Did Not Provide a "New" Leakage Model at Trial or Improperly Instruct the Jury to "Partially" Implement His Model

Defendants argue that the jury impermissibly introduced its own theory of damages by a partial adoption of Fischel's leakage model. Defs' Brf. at 22. As Fischel repeatedly explained, inflation was dependent on when the jury first found an actionable false statement or omission because absent such a finding, there is no inflation. Tr. 2850:20-2851:3. Fischel explained how to implement his inflation quantification chart (PX 1395) by replacing the daily inflation numbers with "zeros" on the Verdict Form until the first date the jury found an actionable false statement or omission. In fact, Question No. 4 to the Verdict Form instructed jurors to perform this task. Fischel's testimony was not an "alteration" of his model or a "different theory." Defs' Brf. at 22-23. Fischel's explanation of the application of his model to a jury finding of the first actionable false statement was consistent with his report. This actually resulted in a "consistent" verdict since the jury found in favor of defendants on all statements before March 23, 2001 and wrote "0" in the Verdict Form. The jury adopted Fischel's table and found Household's stock price was inflated by $23.94 on that first day of inflation. The jury properly followed Fischel's leakage model quantification. Moreover, as discussed herein, defendants waived any argument that their verdict was inconsistent by failing to object to the jury's dismissal.

C. The Leakage Model Did Not Result in Irrational Verdicts

Defendants argue that the Court-approved Verdict Form improperly instructed the jury on Question No. 4. However, Fischel's two damage models (Specific Disclosures and Leakage) were the only evidence of damages since defendants put forth ***no*** evidence of an alternate damages

method. Defendants' argument that there was an irrational verdict because the jury found some misstatements inflated Household's stock price but other alleged statements were not actionable is also without merit. The jury only had to find one misstatement to find inflation, and in fact found 17 misstatements. The fact that other alleged misstatements were rejected by the jury does not change the fact that Household's stock price was already inflated by the 17 false statements.

Defendants argue that the leakage model resulted in irrational verdicts because the $23.94 of inflation on 3/23/01 was attributable to all three theories of fraud but the statement on that date only related to predatory lending.[18] First, defendants did not object to the verdict on this basis and did not ask the Court to order the jury to return to deliberate and rectify the supposed conflict. As such, this argument is waived. *Strauss v. Stratojac Corp.*, 810 F.2d 679 (7th Cir. 1987). Second, the jury properly filled out the Verdict Form. Defendants did not put forth any alternative inflation amount for that date. Third, the jury properly considered the evidence as proving one integrated fraud with the sole purpose of inflating Household's stock – and all of the elements of the fraud were met for the first time on 3/23/01. Neither *Dura* nor any other authority requires the parsing exercise urged now by defendants. And defendants did not even attempt to do so at trial. As this Court held:

> As the evidence at trial demonstrated, the actionable misstatements or omissions on these three subjects were inextricably intertwined. The jury found that defendants made actionable misstatements about re-aging to cover up their predatory lending

[18] Defendants claim the March 23, 2001 statement is not actionable because it was similar to a prior statement 10 days earlier and immaterial "puffery." However, that statement is one of fact, not opinion. *See* Dkt. 1611, Table A, No. 14 (when asked if Household engaged in predatory practices, Gilmer stated, "[u]nethical lending practices of any type are abhorrent to our company, our employees and most importantly our customers"). Indeed, on the stand, Gilmer conceded as much. Tr. 1352:23-1353:3 (he believed it "an accurate statement of facts"). This Court already ruled that statements where defendants denied engaging in predatory lending were actionable. Dkt. 1502 at 2. Defendants raise another red-herring by improperly claiming that the March 23, 2001 statement only introduced $0.67 of inflation from the day before when in fact it clearly resulted in Household's stock price being inflated by $23.94 due to the calculation of inflation from ***later*** disclosures of the truth that were omitted from that first false statement. The $0.67 increase in inflation shown on Fischel's quantification for the entire Class Period is the change from 3/22/01 ($23.27) to 3/23/01 and is based on inflation already in Household's stock on that day if the jury found defendants liable for the prior statement (No. 13 on January 17, 2001), and the $0.67 change is simply a result of application of the constant percentage component of the model that was never challenged by defendants.

> practices and, in turn, made actionable Restatement misstatements to cover up their re-aging methods. Moreover, as Fischel explained, the inflated price of Household's stock at any given time reflected the ever-changing mix of information that was publicly available. Given the interdependence of the fraudulent statements and the volatility of the information mix, it would be virtually impossible to parse out the damages by topic.

Dkt. 1822 at 4. Finally, even if defendants' argument had any merit, it would impact only three days (March 23, 26 and 27, 2001) since the jury found that Household made another false statement on March 28, 2001, which clearly related to all three theories with inflation of $23.94.

Defendants' claim that the Supreme Court's decision in *Comcast* invalidates the jury verdict is without merit. The expert in *Comcast* included damages for four theories when three of these theories had been rejected by the Court. *Comcast*, 133 S. Ct. at 1433. Unlike in *Comcast*, the jury found defendants liable for all three different types of misstatements. *See also Butler v. Sears, Roebuck & Co.*, No. 11-8029, 2013 U.S. App. LEXIS 17748 (7th Cir. Aug. 22, 2013).

VI. THE EVIDENCE ESTABLISHES LIABILITY FOR THE RESTATEMENT

Plaintiffs introduced legally sufficient evidence demonstrating fraud with respect to the 8/14/02 restatement. Contrary to defendants' conclusory assertions, this evidence is more than simply the fact that Household restated. Plaintiffs' accounting expert's testimony was right on point. Devor defined the concept of an accounting error, and then explained that restatement is the appropriate response to material accounting errors. Tr. 2493:21-2494:19. Devor identified the accounting errors that required restatement of the financials. *Id.* at 2487:21-2489:25. Devor explained that the total amount of the restatement was $386 million, of which $230 million impacted the relevant period financials. *Id.* at 2490:5-2493:20. Using this manipulation, defendants overstated reported net income during the relevant period by as much as 6.5%. *Id.* at 2491:4-2493:20. Devor testified that it is ultimately the company's decision to restate its financials. *Id.* at 2495:1-9. Finally, after analyzing the documents and materials produced in the litigation, Devor

concluded that Household's accounting was not reasonable. *Id*. at 2538:17-22. In this situation, the evidence establishes that there was no grounds for a legitimate difference of opinion. *Id.* at 2539:9-15.[19]

Plaintiffs presented evidence regarding the magnitude and seriousness of the restated accounting. A GAAP violation is presumptively a material misstatement.[20] Defense counsel admitted in closing argument that the restatement was material: "I give him restatement is false. I give him material. No question. That's what a restatement is." Tr. 4540:25-4541:1.

The restatement also supports an inference of scienter.[21] Plaintiffs introduced other evidence of defendants' scienter relating to the restated financials. For example, in 1998, the OCC questioned and warned Household about its accounting for three of the four contracts at issue. PX 712 at HHS03117481. The OCC also pointed out "assumptions that need close review" including the

---

[19] Defendants argue that "Plaintiffs cannot show scienter from a restatement or GAAP violation standing alone." *See* Defs' Brf. at 35. "This general rule states the sensible and otherwise unremarkable proposition that the inferences that may be drawn for or against scienter from the mere fact that that a company misapplied GAAP and accordingly had to restate its financials are in equipoise, and, therefore that such allegations by themselves cannot give rise to a 'strong inference' of scienter." *In re MicroStrategy, Inc. Sec. Litig.*, 115 F. Supp. 2d 620, 635 (E.D. Va. 2000). But this rule does not "stand for the proposition that scienter cannot be inferred ***at all*** from such allegations and that the allegations are therefore ***irrelevant*** to the issue of scienter." *Id.* (emphasis in original). Furthermore, defendants' argument ignores the fact that the "strong inference" standard set forth in the PSLRA is a pleading standard that does not apply to proof of scienter at trial. *See, e.g., In re Comshare Inc. Sec. Litig.*, 183 F.3d 542, 548-49 (6th Cir. 1999) ("As courts have observed, the PSLRA did not change the scienter that a plaintiff must prove to prevail in a securities fraud case but instead changed what a plaintiff must plead in his complaint in order to survive a motion to dismiss.").

[20] *E.g., SEC v. Sys. Software Assocs., Inc.*, 145 F. Supp. 2d 954, 958 (N.D. Ill. 2001) ("[a] financial statement that . . . does not conform to the requirements of GAAP is presumptively a false or misleading statement of material fact under Rule 10b-5"); *Gilford Partners L.P. v. Sensormatic Elecs. Corp.*, No. 96 C 4072, 1997 U.S. Dist. LEXIS 19032, at *59 n.16 (N.D. Ill. Nov. 12, 1997) ("[A] company's violation of GAAP may often indicate a violation of Section 10(b).").

[21] *See In re Cabletron Sys., Inc.*, 311 F.3d 11, 39 (1st Cir. 2002) ("'Accounting shenanigans' are among the characteristic types of circumstances which may demonstrate scienter for securities fraud."); *Provenz v. Miller*, 102 F.3d 1478, 1490 (9th Cir. 1996) (violations of GAAP and company's revenue policy are circumstantial evidence of scienter); *In re Anicom Inc. Sec. Litig.*, No. 00 C4391, 2001 U.S. Dist. LEXIS 6607, at *16 (N.D. Ill. May 18, 2001) (allegations of GAAP violations, including the need for restatement, "raise a strong inference that the defendants knew or recklessly disregarded that [the company] was disseminating incorrect information"); *In re Discovery Zone Sec. Litig.*, 943 F. Supp. 924, 937 (N.D. Ill. 1996) ("[T]he alleged GAAP violations alone support an inference of fraudulent intent.").

"recapture of the $40 million advance payment to the AFL-CIO." *Id.* at HHS03117482. Aldinger admitted that Household received this document in 1998. Tr. 3057:2-4.[22]

Moreover, the individual defendants would not have met their bonus targets for 2000 without the ultimately restated net income. *See* PXs 231 and 759; Tr. 2051-52. Bonus compensation for the defendants during this period was up to five times their base salary. PX 772 at HHS03173760. Plaintiffs proved at trial that if defendants had correctly accounted for the credit card contracts, the company would have missed its EPS targets and defendants would have missed their bonus targets, and lost millions. *E.g.*, PX 759; Tr. 2052:9-2055:11. *See Richard v. Northwest Pipe Co.*, No. C-09-572, 2011 U.S. Dist. LEXIS 96200, at *13-*14 (W.D. Wash. Aug. 26, 2011) (scienter found where "'[p]erformance-based incentive compensation . . . made up a significant portion of defendants' compensation,'" and overstatement of income resulted in defendants' receiving "significant sums in incentive compensation"). They also used record earnings, bolstered by the accounting fraud, to dress up the company for sale to Wells Fargo which would have netted defendants massive payouts. "[T]he Seventh Circuit has established motive as a 'useful indicator,' and should not be taken lightly." *In re JPMorgan Chase & Co. Sec. Litig.*, MDL No. 1783-C.A., No. 06 C 4674, 2007 U.S. Dist. LEXIS 93877, at *24 (N.D. Ill. Dec. 18, 2007); *see also Tellabs*, 551 U.S. at 325 (explaining that "personal financial gain may weigh heavily in favor of a scienter inference").[23] This evidence provides a solid basis for any reasonable jury to conclude defendants acted with scienter under the totality of the circumstances. *See Tellabs Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321-22

[22] Household's accounting for these contracts was raised every year with the Audit Committee. PXs 176; 694. For example, the 11/13/00 Quality of Accounting presentation to the Audit Committee expressly discussed the GM, AFL-CIO and UP accounting and the Kessler contracts. PX 176 at HHS02018103-4. The Audit Committee presentation in 2001 also referenced the accounting for these three contracts. PX 694. Defendant Schoenholz testified that he reviewed these presentations. Tr. 1882:7-9.

[23] *See In re Metawave Commc'ns Corp. Sec. Litig.*, 298 F. Supp. 2d 1056, 1071 (W.D. Wash. 2003) ("Scienter can be established even if there were no sales of stock by officers during the class period, if there were other motives for fraud such as receiving benefits tied to the company's financial performance."); *In re Wellcare Mgmt. Group Sec. Litig.*, 964 F. Supp. 632, 639 (N.D.N.Y. 1997) ("[T]he Court will not disregard, as irrelevant, allegations that incentive compensation was affected by the alleged fraudulent conduct.").

(2007); *Chu v. Sabratek Corp.*, 100 F. Supp. 2d 815, 825 (N.D. Ill. 2000).

Defendants claim their reliance on Arthur Andersen precludes a finding of liability. However, there was ample evidence at trial that it was management's duty to file accurate financial statements. *See, e.g.*, Tr. 2179:6-14; 2523:22-25; 2495:2-3. This responsibility cannot be delegated to outside auditors. *United States v. Erickson*, 601 F.2d 296, 305 (7th Cir. 1979). Thus, it is simply incorrect that Andersen's clean audit opinions negate scienter. *Id.* ("If a company officer knows that the financial statements are false or misleading and yet proceeds to file them, the willingness of an accountant to give an unqualified opinion with respect to them does not negative the existence of the requisite intent or establish good faith reliance . . . ."). Nor is it "undisputed" that defendants relied in good faith on their external auditors. To the contrary, Devor testified that "Arthur Andersen was not comfortable with the accounting" for certain credit card contracts and told Household's management, "no, you can't do that." Tr. 2522:10-2523:9. Similarly, Devor testified that Andersen provided no advice as to whether to recognize income with respect to the Kessler contracts. Tr. 2544:14-16. Defendants who claim good faith based upon reliance on a professional must show they made a complete disclosure to the professional; requested the professional's advice as to the legality of the contemplated action; received advice that it was legal; and relied in good faith on that advice. *See SEC v. Goldfield Deep Mines Co.*, 758 F.2d 459, 467 (9th Cir. 1985); s*ee also SEC v. Caserta*, 75 F. Supp. 2d 79, 94-95 (E.D.N.Y. 1999) (collecting cases). The evidence shows defendants failed to make such a disclosure ***and*** Andersen advised Household that it was "not comfortable" with the accounting. Defendants' reliance on Andersen is misplaced.

VII. THE EVIDENCE ESTABLISHES LIABILITY FOR PREDATORY LENDING

A. The Court Did Not Commit Error by Finding Defendants' Concealment of Household's Predatory Practices Was Actionable

Defendants contend that they had no duty to disclose the existence and nature of their

predatory lending practices. Defs' Brf. at 36-37. However, defendants' duty to disclose was triggered by statements they made in conjunction with Household's earnings announcements. Certain press releases and 10-Ks put the company's ethics and the source of the company's record growth squarely "into play" and gave rise to actionable securities fraud violations.[24] During the Class Period, defendants expressly and repeatedly denied engaging in predatory lending practices. *See, e.g.*, Dkt. 1611, Ex. A at 9, 11, 15, 19, 22-24, 26.

At the 4/17/09 Jury Instruction hearing, the Court agreed that plaintiffs had identified language in Household's 2000 and 2001 10-K's and press releases sufficient to trigger defendants' duty to disclose Household's deceptive lending practices.[25] *See* Tr. 2716:10-2717:12. Both Household's 2000 and 2001 10-K's contain the following identical language:

> Management has long recognized its responsibility for conducting the company's affairs in a manner which is responsive to the interest of the employees, shareholders, investors and society in general. ***This responsibility is included in the statement of policy on ethical standards which provides that the company will fully comply with laws, rules and regulations of every community in which it operates and adhere to the highest ethical standards***. Officers, employees and agents of the company are expected and directed to manage the business of the company with complete honesty, candor and integrity.

---

[24] *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 650 (7th Cir. Ill. 1997) (upon choosing to speak, one must speak truthfully about material issues); *In re Providian Fin. Corp. Sec. Litig.*, 152 F. Supp. 2d 814, 824-25 (E.D. Pa. 2001) (statements that "attribute Providian's good fortunes to its 'customer focused approach' . . . . put[] the topic of the cause of Providian's success in play" and require Providian "to disclose information concerning the source of its success"); *Steiner v. MedQuist Inc.*, No. 04-5487 (JBS), 2006 U.S. Dist. LEXIS 71952, at *48 (D.N.J. Sept. 29, 2006) (§10(b) liability arises when defendants "know that statements putting the source of the company's revenue at issue are false or misleading, even though the financials themselves are otherwise accurate"); *Oran v. Stafford*, 226 F.3d 275, 285 (3d Cir. 2000) ('"By addressing the quality of a particular management practice, a defendant declares the subject of its representation to be material to the reasonable shareholder, and thus is bound to speak truthfully.'").

[25] Defendants did not object, citing tactical reasons. Tr. 2733:21-2734:10. Defendants previously failed to timely object when Devor testified that defendants' relevant period 10-Ks and 10-Qs were false because the filings omitted and/or failed to disclose Household's predatory lending practices, an opinion contained in Devor's Rule 26 report and not challenged by defendants in their *Daubert* motion. Tr. 2416:7-2422:6. Defendants' failure to raise the issue in their *Daubert* motion, object to Devor's testimony and state their position during the 4/17 hearing constitutes a waiver. *U.S. v. Wynn*, 845 F.2d 1439, 1443 (7th Cir. 1988) (courts are even more reluctant to find harmful error where failure to object was tactical decision).

See Defendants' Exhibits ("DX") 851 at 55; 852.[26] These statements, made in conjunction with the company's earnings announcements, gave rise to a duty to disclose Household's predatory practices.

The Court correctly ruled that defendants' statements are actionable.[27] *See* Dkt. 1502 at 2 (holding Statement No. 15 not puffery); Tr. 2723:13-25 ("I find them to be not puffery, but actual statements which could trigger the requirement for full disclosure."). They are assertions of fact intended to falsely convey Household's compliance with applicable law and commitment to ethical lending standards. *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588, 596 (7th Cir. 2006), *rev'd on other grounds*, 551 U.S. 308 (2007). Given the circumstances, moreover, there is no question that an investor would consider Household's deceptive lending practices an important fact in deciding whether to buy or sell its securities. *See Matrixx*, 131 S. Ct. at 1319 (rejecting "categorical rule [that] would 'artificially exclud[e]' information that 'would otherwise be considered significant to the trading decision of a reasonable investor'") (alterations in original); *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1144 (C.D. Cal. 2008) (finding the statement "high quality" actionable because Countrywide's "essential operations were so at odds with the company's public statements").[28]

The Court also correctly held that defendants' assurance (made in both the 2000 and 2001 10-Ks) that Household had "a process which we believe gives us a reasonable basis for predicting the credit quality of new accounts" (DXs 851 at 10; 852) triggered a duty to disclose the predatory practices given that "new accounts" clearly relate to loan originations. Tr. 2716:10-24.

---

[26] Although this portion of the 3/28/2001 10-K (Stmt. No. 15) is not listed as a separate false statement on the Verdict Form, the 10-K is in evidence and this statement, in connection with the statements listed on the Verdict Form, gave rise to an actionable duty to disclose Household's predatory practices. Tr. 2723:13-25 (holding exact same statement made one year later "trigger[ed] the requirement for full disclosure").

[27] Defendants never asserted that these statements were "puffery" in their Rule 50(a) motion. *See* 50(a) brief at 22-24. The argument is thus waived. *Gooden v. Neal*, 17 F.3d 925, 927 (7th Cir. 1994).

[28] The same is true for Gilmer's statement that "[u]nethical lending practices of any kind are abhorrent to our company, our employees and most importantly our customers," which Gilmer admitted was a "statement of facts." Tr. 1352:23-1353:3.

Furthermore, plaintiffs proved at trial that the rampant predatory lending led to a declining credit quality portfolio. *See, e.g.*, Tr. 698:10-18; 700:3-7; 773:13-20; 964:2-13. Household's failure to disclose the predatory practices contributed to the false impression that Household's credit quality exceeded its peers. Thus, Household's assertion that its process for predicting credit losses was reasonable created a duty to disclose the predatory practices. Tr. 2716:10-24.

The Court also correctly held that Household's press releases announcing periodic financial results gave rise to a duty to disclose. Tr. 2710:16-17. In their press releases, defendants announced record earnings to investors, attributed those record results to "strong growth," "quality earnings," and "strong demand for [its] loan products," and bragged to investors that Household's "business model generates superior results." PX 504 (Stmt. No. 16); PX 503 (Stmt. No. 18); PX 978 (Stmt. No. 21); PX 706 (Stmt. No. 24); PX 635 (Stmt. No. 29); PX 788 (Stmt. No. 36); PX 227 (Stmt. No. 37). When defendants made statements about Household's net income and growth and the reasons for the company's superior results, they had a duty to "speak truthfully and to make such additional disclosures as [were] necessary to avoid rendering the statements made misleading." *In re Par Pharm., Inc. Sec. Litig.*, 733 F. Supp. 668, 675 (S.D.N.Y. 1990); *In re Van Der Moolen Holding N.V. Sec. Litig.*, 405 F. Supp. 2d 388, 401 (S.D.N.Y. 2005).[29]

B. The Jury Properly Rejected Defendants' Truth-on-the-Market Defense Regarding Household's Practices

Defendants assert that notwithstanding their misrepresentations, the market and investors were aware of the truth. However, the jury rejected defendants' truth-on-the-market defense, finding that "the truth did not enter the market and dissipate the effects of defendants' false statements or omissions." Dkt. 1703 at 8. The Court already rejected defendants' attacks on the jury's conclusion,

[29] *See also Providian*, 152 F. Supp. 2d 814; *Steiner*, 2006 U.S. Dist. LEXIS 71952, at *53; *In re Sotheby's Holdings, Inc. Sec. Litig.*, 00 CIV. 1041 (DLC), 2000 U.S. Dist. LEXIS 12504, at *13 (S.D.N.Y. Aug. 31, 2000), *aff'd*, 31 Fed. App'x 762 (2d Cir. 2002).

stating that "defendants will not be afforded a second bite at the apple, regardless of how they frame the issue." *Id*. Nevertheless, defendants have gone bobbing again. Defendants' latest attempt to re-litigate the issue should be rejected. *Zimmerman*, 360 F.3d at 623.

A defendant can only prevail on a truth-on-the-market defense if the truth was "conveyed to the public 'with a degree of intensity and credibility sufficient to counter-balance effectively any misleading information created by' the alleged misstatements." *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 167 (2d Cir. 2000). The disclosures cited by defendants do not establish even that the concealed information was publicly available, much less "conveyed to the public" with the required level of "intensity and credibility" to overcome defendants' contemporaneous denials. *Id.* Additionally, the economic evidence demonstrates that market awareness of defendants' fraud did not begin until 11/15/01 and gradually increased through the end of the relevant period. As discussed below, each of these points is fatal to defendants' motion.

Defendants cite third-party allegations, principally made by ACORN, and a shareholder proposal to support their contention that investors knew that Household was engaged in predatory lending. *See* Defs' Brf. at 37-38. However, these disclosures, even when considered collectively, do not expose any of defendants' specific predatory sales practices, such as the effective rate presentation, the improper disclosure on the GFE, prepayment penalties in violation of state law, and insurance packing. Nor do they reveal that Household's growth was the product of billions of dollars generated by improper practices. Significantly, defendants continued to deny any predatory practices and shareholder proposals were rejected at management's recommendation.[30] *See Countrywide*, 588 F. Supp. 2d at 1159-60. As Fischel explained, third party disclosures are "not the same thing as Household itself telling investors about its own practices." Tr. 2838:8-9. At bottom,

[30] At trial, defendants specifically denied these practices. *E.g.*, Tr. 3043:22-3044:16; 3046:17-3047:12; 1891:18-1892:6; 1892:8-13; 1892:14-19; 1892:20-24; 1893:18-23. Defendants' truth-on-the-market defense cannot be reconciled with their position that no widespread predatory lending occurred.

none of the disclosures defendants cite conveyed the truth to the market with the force and credibility necessary to establish a truth-on-the-market defense, especially to the degree necessary to take the determination from a jury that has already decided to the contrary. DX 99.[31]

C. There Is More than Sufficient Evidence to Support the Jury's Verdict as to Defendants' Predatory Lending Fraud

The evidence demonstrated that defendants fraudulently concealed Household's predatory practices. Indeed, Ghiglieri's expert opinion that Household engaged in "systemic and companywide predatory lending practices" (Tr. 615:15-16) is enough by itself to support the jury's conclusion. Defendants ignore both this fact and the overwhelming evidence of defendants' widespread predatory lending fraud. This fraud involved misrepresenting interest rates,[32] charging prepayment penalties in violation of state law and hiding prepayment penalties in the loan terms,[33] insurance packing,[34] improper use of discount points,[35] loan flipping[36] and loan splitting.[37] As the Attorneys General stated, "the coast-to-coast usage of common forms and sales techniques belie[s]" defendants' contention that the company's "insidiously deceptive sales practices" were not widespread. PX 550 at HHS 02933757-58. And numerous state investigations "revealed that Household engage[d] in widespread lending patterns and practices that violate[d] both state and

---

[31] The economic evidence further undercuts defendants' truth-on-the-market claim. If defendants were correct that the truth was on the market as to the fraud alleged prior to 11/14/01, there would have been no negative market reaction to the later, post-11/14/01 disclosures. However, Fischel's testimony established and the jury concluded, that after 11/14/01 and continuing through the end of the relevant period, the market reacted negatively to the leakage of that truth into the market. *See* §III.A., *supra*. This fact is fatal to defendants' defense. *See Ganino*, 228 F.3d at 167-68; *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Corp.*, 320 F.3d 920, 935 (9th Cir. 2003).

[32] *See, e.g.*, PXs 348; 461; 1383; Tr. 2812:14-2830:22; 496:8-15; PXs 899; 903; 379; 901; 926; 799; 290; Cross Depo Tr. 139:1-20; PXs 900; 794; 828; 681.

[33] PXs 508; 965; 329; 585; 348; 533; 461; 447; 835; 681.

[34] PXs 967; 1204; 1205; 19; 290; 516; 1103; Tr. 437:2-6; PX 916 at HHS03421387; PX 898; Tr. 527:9-528:14; Cross Depo Tr. 130:8-131:6; PX 1095; Tr. 1778:13-1779:12; 493:6-10; PX 898; Tr. 437:11-24; 1016:22-24; PX 481 at HHS02911737; PX 269; Tr. 526:13-25; 557:3-10; PX 681.

[35] PX 285; Tr. 439:3-5; Cross Depo Tr. 150:22-151:8; PXs 290; 956; 445; 324; 964; 333; 516; Cross Depo Tr. 150:4-12; PXs 1205; 681.

[36] PXs 562; 1103;1589; 516; 681.

[37] PXs 901; 290; 516; 681.

federal law." PX 516 at HHS 029153308. "[T]he practices [were] national in scope and not confined to a single state or branch office." *Id.*

In response, defendants raise the same feeble arguments rejected by the jury – the number of internally tracked customer complaints was small and defendants were forthcoming about their practices. Defs' Brf. at 37. This argument is an improper attempt by defendants to "substitute [their] view of the contested evidence for the jury's." *Zimmerman*, 360 F.3d at 623 (citing, *inter alia*, *Reeves*, 530 U.S. at 150); *see SEC v. Michel*, 521 F. Supp. 2d 795, 828 (N.D. Ill. 2007). Viewed in the light most favorable to plaintiffs, the evidence presented clearly supports the jury's verdict.

The foregoing is enough to support the jury's scienter finding. But, plaintiffs also proved defendants had motive to commit fraud. This evidence includes defendants' incentive compensation, which was tied to the company's EPS,[38] and defendants' plan to sell the company while the price was still inflated, which would have netted defendants more that $100 million in termination payments and millions more due to early acceleration of options.[39] Plaintiffs also proved that Aldinger and Gilmer sold stock while Household's price was artificially inflated,[40] netting $19 million and $3 million respectively. Evidence of personal motive is an important consideration in determining scienter. *See JPMorgan*, 2007 U.S. Dist. LEXIS 93877, at *24. Plaintiffs also proved that defendants hired Kahr to develop growth initiatives that ultimately became some of defendants' most widespread and insidious practices.[41] Finally, plaintiffs proved defendants destroyed documents to cover up their fraud.[42] *United States v. Battista*, 646 F.2d 237, 244 (6th Cir. 1981) (document destruction probative of scienter); *In re Enron Corp. Secs., Deriv. & ERISA Litig.*, No. H-

[38] *E.g.*, PXs 772; 774; 759.
[39] *E.g.*, PX 1371; Tr. 2061:23-2063:13.
[40] *E.g.*, Tr. 3486:9-11; DXs 774; 775; Tr. 1429:24-1430:2; DXs 758; 759; 763.
[41] *E.g.*, PXs 458; 267; 347; Tr. 985:21-986:11.
[42] *E.g.*, Tr. 669:7-11; PXs 596; 796; 1007; 1026; Tr. 2089:12-2092:12; 2096:5-2098:24; 2091:16-19 ("Q. Okay. So, in other words, you wanted to get this Kahr evidence out of your files, right?" "A. We wanted to destroy it.").

01-3624, 2003 U.S. Dist. LEXIS 1668, at *61 (S.D. Tex. Jan. 28, 2003). These indicia of scienter, combined with defendants' awareness and/or reckless disregard of the company's predatory practices, support the jury's determination on scienter. *Tellabs*, 437 F.3d at 603; *Schleicher v. Wendt*, 529 F. Supp. 2d 959, 971 (S.D. Ind. 2007); *Chu*, 100 F. Supp. 2d at 822-23.

VIII. THE EVIDENCE ESTABLISHES LIABILITY FOR HOUSEHOLD'S CREDIT QUALITY CONCEALMENT

Plaintiffs alleged that defendants used improper reaging and credit quality manipulation practices to conceal the true level of delinquencies and mask the quality of Household's loan portfolio. Plaintiffs also alleged that Household failed to disclose – and later affirmatively misrepresented – Household's aggressive and improper restructuring policies that contributed to its understated delinquency and charge-off statistics. As a result of Household's undisclosed credit quality manipulation practices, the 2+ statistics and charge-off numbers reported in the company's financial statements made at the 4/9/02 Financial Relations Conference, and disclosures in Household's 2001 10-K, were false and misleading when made. And plaintiffs proved it at trial.

Defendants' assertion that plaintiffs failed to prove the falsity of Household's 2+ numbers is another attempt to distort plaintiffs' case.[43] Plaintiffs were not required to prove that Household's 2+ numbers were false in the literal sense or "restated," as defendants claim, but could prevail at trial by proving defendants made false ***or*** misleading statements, or omitted a fact that was necessary to prevent a statement that was made from being ***misleading***. *See, e.g.*, Tr. 4713:21-4716:11 (instructing the jury on the elements of plaintiffs' claim). The evidence demonstrated defendants' use of reaging and credit quality manipulation practices to artificially reduce the level of reported 2+ delinquent accounts. *See* Tr. 680:24-681:4; 689:10-13; 2199:21-2217:20; 2225:8-2229:18; 2235:14-

[43] Defendants raised the same arguments in their Motion for Judgment as a Matter of Law Pursuant to Rule 50(a). *See* Dkt. 1569-2 at 23-27. Accordingly, plaintiffs incorporate by reference their Memorandum of Law in Opposition to Defendants' Motion for Judgment as a Matter of Law Pursuant to Rule 50(a). *See* Dkt. 1581 at 22-30.

2263:23; 2214:16-24; PXs 118; 129; 180; 618; 1048; 1385; 1469; 313; 102; 710; 1351. The jury also heard expert testimony that Household's reported 2+ statistics and charge-off figures were misleading due to Household's failure to disclose its aggressive and constantly changing reaging and credit quality manipulation practices.[44] *See* Tr. 2443:17-2445:5; 2444:8-2445:3; PXs 654; 726.

Defendants next argue that the timing of management's decision to take charge-offs cannot give rise to liability. Defs' Brf. at 38. This too is a red herring. Plaintiffs never challenged or criticized the act of reaging itself. Plaintiffs did, however, challenge defendants' use of reaging and other credit quality concealment practices to manipulate Household's reported 2+ delinquency numbers and the nonexistent disclosures regarding those practices.

Defendants' characterization of Household's reaging practices as inactionable "management decisions" should be rejected. The evidence demonstrated defendants' deliberate manipulation of Household's delinquent accounts in order to report artificially low 2+ statistics to investors. Household accomplished its credit quality manipulation by reaging delinquent accounts – in some cases, over and over again. Household also modified its reaging criteria and implemented one-time skip-a-pays in order to "make" its targeted 2+ numbers at month end. Investors and analysts reviewing Household's reported 2+ statistics, a key metric considered in evaluating the quality of Household's loans, were completely unaware of defendants' aggressive reaging policies and other credit quality manipulation practices. Tr. 1883:8-1887:19; 1888:4-1891:17.[45]

Finally, defendants claim that the development of adequate loss reserves and disclosures regarding Household's probable loan losses negates any intentional credit quality concealment.

---

[44] Household's failure to disclose the company's reaging practices cannot be disputed. *See, e.g.*, Tr. 1883:8-1887:19; 1888:4-1891:17; 3043:7-3044:16; 3046:3-3047:12.

[45] Defendants' reliance on *DiLeo v. Ernst & Young*, 901 F.2d 624 (7th Cir. 1990), is inapposite. *DiLeo* involved an appeal from the district court's dismissal of plaintiffs' securities fraud action, in which plaintiffs alleged that defendants violated the securities laws by certifying fraudulent financial statements for Continental Illinois Bank ("Continental"). *Id*. at 626. Specifically, plaintiffs claimed that Continental failed to increase its reserves fast enough. *Id*. Unlike *DiLeo*, plaintiffs' allegations were not focused on reserves.

Defs' Brf. at 38-39. Defendants spent a significant amount of time during trial trying to convince the jury of the importance of Household's loan loss reserves and the adequacy of the company's reserves during the relevant period, but they lost.[46]

Plaintiffs demonstrated that Household's 2+ statistic was a key metric that both Wall Street and investors considered in evaluating the quality of Household's loans and the value of its stock. *See, e.g.*, PX 461; Tr. 3024:17-19; 3026:4-3028:11; 1897:12-18; 1898:5-10. Plaintiffs also presented evidence distinguishing Household's reserves, which are merely an estimate based on a future prediction, from Household's 2+ statistics, which are actual numbers reported based on current data. Tr. 2183:7-2184:11. The jury properly rejected defendants' argument.

Defendants' assertion that Household's reaging fraud amounted to "minor inaccuracies" (Defs' Brf. at 38) is particularly disingenuous given that Household's CEO ***admitted*** on the stand that the disclosures in the 2001 10-K were materially false and misleading. Tr. 3437:22-3441:16. After Aldinger's admission, it is of little surprise that the jury found Household's loan loss reserve disclosures unrelated to Household's misleading 2+ delinquency statistics and reaging disclosures.[47]

Moreover, defendants' contention that the reserves were adequate ignores uncontroverted expert testimony that the reserves were based on unreliable methods and "there were significant indications in the record that [the reserves were] also understated." Tr. 2564:12-2565:5. Devor left no doubt that Household's reserves were not adequate. *Id*. Viewed in the light most favorable to plaintiffs, Devor's testimony removes the lynchpin of defendants' argument – that Household's reserves were adequate. Indeed, other than the self-serving testimony of Aldinger and Schoenholz,

---

[46] Tr. 4581:17-4584:11; 4590:19-4591:2; 2122:25-2124:18; 2165:4-2172:7; 3112:12-3116:10; 3118:19-20; 3244:2-18; 2125:2-2126:8; 2129:11-2132:2; 2138:21-2139:3; 2141:7-14.

[47] *In re Allscripts, Inc. Sec. Litig.*, No. 00 C 6796, 2001 WL 743411 (N.D. Ill. June 29, 2001), does not support defendants' case. There, the court found that defendants had sufficiently disclosed in its public filings all risks associated with the company's new product. *Id.* at *6. The court further concluded that "any reasonable investor" would have easily spotted the company's "numerous frank disclosures." *Id*. Here, however, Household's disclosures respecting the company's reaging practices were insufficient, and as Aldinger admitted, materially false and misleading.

defendants presented no testimony to support their claim that the reserves were adequate.

Finally, defendants' false and misleading statements at the FRC were material. The difference between the figures presented at the FRC and the true percentage of loans reaged more than once amounted to approximately $3 billion in loans. PXs 175; 79; 1100; Tr. 1996:1-1998:4; 2184:22-2185:7. Defendants tried to downplay the $3 billion discrepancy as an innocent mistake or "clerical error."[48] Tr. 2158:1-6; 2159:15-16. At the FRC, defendants also presented false and misleading information about recidivism statistics broken down by product line. Tr. 1998:13-2010:9; PXs 79; 188. Defendants' recidivism disclosures were designed to mislead investors by falsely understating the percentage of accounts reaged once that subsequently went 2+ delinquent or were charged-off a year later. Tr. 1998:13-1999:15. For example, defendants told attendees at the FRC that Household's recidivism rate for real estate secured was only 13.1% when, in reality, the recidivism rate was 53.9%. *Id*. Defendants then concealed the corrected recidivism statistics from investors by failing to disclose the inaccuracies in the statistics presented at the FRC. *See* Tr. 2001:5-15. Defendants tried to explain away the differences as a simple "mistake," however, the jury rejected defendants' claims, finding that the statements made at the FRC violated §10(b) and Rule 10b-5. The evidence was more than sufficient to support the jury's verdict.

During trial, plaintiffs presented evidence demonstrating that leading up to the FRC, the markets became increasingly skeptical about Household's reaging practices. Defendants Aldinger and Schoenholz admitted, by the time of the FRC, they knew Household's reaging practices were already at the forefront of both defendants' and investors' minds. Tr. 3390:7-3391:3; Tr. 3391:5-25; 3396:17-3397:19; 1897:12-18; 1898:5-10. Any claim that the materiality of Household's reaging practices was not known to defendants prior to the FRC must be rejected.

[48] Defendants attempt to minimize the significance of the multiple reage discrepancy. Defs' Brf. at 39. Yet defendants' "error" amounted to approximately $3 billion in loans and a 75% understatement.

Moreover, a false statement or omission is material if a substantial likelihood exists that a ***reasonable investor*** would find the omitted or misstated fact significant in deciding whether to buy or sell a security. *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988); *Rowe*, 850 F.2d at 1233. A determination of materiality "requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him, and these assessments are ***peculiarly ones for the trier of fact***." *TSC Indus. Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976); *see also Stransky v. Cummins Engine Co.*, 51 F.3d 1329, 1333 (7th Cir. 1995). Thus, defendants' claim that the false reaging and recidivism statistics presented at the FRC were "patently immaterial as a matter of law" fails. The jury in this case, not defendants, properly determined that the $3 billion reaging discrepancy and the false recidivism statistics were material.

IX. THE COURT'S JURY INSTRUCTIONS AND VERDICT FORM WERE PROPER

A. The Court's Jury Instructions Do Not Entitle Defendants to a New Trial

"To win a new trial based on an erroneous jury instruction [defendants] must show that: (1) the instructions did not adequately state Seventh Circuit law and (2) [they were] prejudiced by the error because the jury was likely confused or misled." *Wakeen Doll Co., Inc. v. Ashton Drake Galleries*, 272 F.3d 441, 452 (7th Cir. 2001). In determining whether a jury instruction can be characterized as a "miscarriage of justice" sufficient to warrant a new trial, the Seventh Circuit held:

> In this review we avoid fastidiousness and inquire only whether the correct message was conveyed to the jury reasonably well. We will reverse only if it appears that "the jury was misled . . . [and its] understanding of the issue was seriously affected to the prejudice of the complaining party."

Wilson v. Williams, 83 F.3d 870, 874 (7th Cir. 1996).

1. The Court's Jury Instruction Regarding the Making of a False Statement Does Not Entitle Defendants to a New Trial

Defendants contend they are entitled to a new trial because the Court's instruction on the first

element of plaintiffs' claim – making a false or misleading statement – was erroneous under *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011). The Court's instruction was proper, and *Janus* does not change the analysis. Even if the Court's instruction was erroneous, there was no prejudice. The evidence shows each of the defendants made the statements for which they were held liable. Furthermore, defendants waived their objections.[49]

At the close of evidence, the Court summarized for the jury the four elements plaintiffs were required to prove to prevail on their 10b-5 claim. Tr. 4714:1-15. The Court then instructed the jury in detail regarding each separate element. In the summary instruction, the Court instructed the jury what plaintiffs must prove as to each defendant:

> [T]he defendant made, approved or furnished information to be included in a false statement of fact or omitted a fact that was necessary, in light of the circumstances, to prevent a statement that was made from being false or misleading during the relevant time period between July 30, 1999, and October 11, 2002.

Tr. 4714:1-10.[50] In the specific instruction for the first element, the Court excluded the "approved or furnished" language that defendants now highlight as objectionable:

> To meet the first element of their 10b-5 claim against any defendant, plaintiffs must prove that during the relevant time period, the defendant made a false or misleading statement of fact or omitted a fact that was necessary to prevent a statement that was being made from being misleading.

Tr. 4714:22-4715:1.[51] Still, defendants demand a new trial based on the words in the summary

---

[49] Having waived any and all objections to an inconsistent verdict (§IX.C., *infra*), defendants attempt to re-cast their argument into an one arising out of a single jury instruction, but their semantic machinations are unpersuasive. *See In re Innovative Constr. Sys., Inc.*, 793 F.2d 875, 882 (7th Cir. 1986) (rejecting as "unpersuasive" appellant's attempt to re-cast argument to circumvent waiver of objection to "the submission of the special verdict to the jury, or to the phraseology of the interrogatories").

[50] Defendants never sought or offered an instruction defining how a statement is made or directing the jury how it should determine responsibility for a representation.

[51] In its instructions on the remaining elements, the Court omitted the "approved or furnished" language. Tr. 4716:12-15 ("To meet the second element of their 10b-5 claim against any defendant, plaintiffs must prove that the false or misleading statement of fact that the defendant ***made***, or failed to make, was material."), Tr. 4717:5-12 ("Defendants . . . acted with the required state of mind in ***making*** a statement of material fact if he ***made*** the statement knowing that it was false or misleading or with reckless disregard for a substantial risk that it was false or misleading.").

instruction.

The Court's summary instruction was taken directly from controlling Seventh Circuit authority, *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702 (7th Cir. 2008). In *Tellabs*, the court recognized that a corporation is liable for statements made by employees acting with apparent authority to make them. *Id*. at 708. The Seventh Circuit then observed that the corporate scienter inquiry "requires 'look[ing] to the state of mind of the individual corporate official or officials who make or issue the statement (***or order or approve it or its making or issuance, or who furnish information or language for inclusion therein***, or the like).'" *Id*.; *see also Pugh v. Tribune Co.*, 521 F.3d 686, 697 (7th Cir. 2008) (same). As the Court recognized, this language also applied to the act of making a statement. Tr. 2797:17-20; 3850:3-4; 3858:2-6.

Citing *Janus*, defendants contend that the Court's instruction was erroneous because it included the words "approved or furnished." Contrary to defendants' suggestion, *Janus* did not adopt a rule insulating all non-speaking corporate executives from liability, or "alter the well-established rule that 'a corporation can act only through its employees and agents.'" *In re Merck & Co., Sec., Deriv. & "ERISA" Litig.*, No. 05-1151, 2011 U.S. Dist. LEXIS 87578, at *101-*103 (D.N.J. Aug. 8, 2011). Instead, in *Janus*, the Supreme Court addressed whether a ***third party*** – a mutual fund investment advisor – may be primarily liable under the federal securities laws for statements that were made by another, its mutual fund clients. *Janus*, 131 S. Ct. at 2299, 2307; *see also City of Pontiac Gen. Emples. Ret. Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359 (S.D.N.Y. 2012). The Court concluded that because the investment advisor did not have "ultimate authority" over the statements of its fund clients, it did not "make" the statements. *Janus*, 131 S. Ct. at 2305.

The fact that the entities involved (a family of mutual funds and their advisor) were legally distinct from each other was critical to the Court's decision. The Court emphasized that the case

involved "separate legal entit[ies]" with entirely distinct owners (*id.* at 2299) and that the family of funds was a "legally independent entity with its own board of trustees" (*id*. at 2305), which maintained "legal independence" from its advisor. *Id.* at 2299. Invoking the language of corporate veil-piercing, the Court stated that it would not "disregard the corporate form" to hold one entity (the investment advisor) liable for statements that had been issued by another (the family of funds). *Id*. at 2304. This analysis does not apply to cases like this one involving a single corporate entity and its corporate officers:

> [*Janus*] addressed only whether third parties can be held liable for statements made by their clients. Its logic rested on the distinction between secondary liability and primary liability . . . and has no bearing on how corporate officers who work together in the same entity can be held jointly responsible on a theory of primary liability.

Lockheed Martin, 875 F. Supp. 2d at 374.[52]

Defendants in this case, unlike the defendants in *Janus*, are quintessential insiders. As insiders, defendants had a special relationship with Household's shareholders, giving rise to disclosure obligations beyond those owed by non-insiders, when speaking about the company. *Janus* cannot be read to call into question this long-accepted relationship between shareholders and the executives conducting the corporation's business – since the scope of that relationship was not at issue. Thus, numerous courts have rejected the contention that corporate insiders cannot be held liable for "approving" false statements they themselves did not make.[53] The inclusion of such

---

[52] *See also Merck*, 2011 U.S. Dist. LEXIS 87578, at *102 (distinguishing *Janus* because defendant "was at the time of each attributed statement an officer of Merck" who "made the statements pursuant to his responsibility and authority to act as an agent of Merck, not as in *Janus*, on behalf of some separate and independent entity"); *In re Satyam Computer Servs. Secs. Litig.*, 915 F. Supp. 2d 450, 477 (S.D.N.Y. 2013) ("*Janus Capital* addressed whether one corporate entity could be held liable for the false statements of another corporate entity, and thus is distinguishable on the facts from this case, as the AC Defendants here are charged with responsibility for false statements made by the Company itself.").

[53] *See SEC v. Carter*, No. 10-C-6145, 2011 U.S. Dist. LEXIS 136599, at *2-*3 (N.D. Ill. Nov. 28, 2011) (high ranking executive who approved releases before they went public had ultimate authority); *SEC v. Benger*, No. 09-C-676, 2013 U.S. Dist. LEXIS 39203, at *9 (N.D. Ill. Mar. 21, 2013) (allegation that defendant approved false statement enough to establish "ultimate authority" where defendants "'approved,

language in the summary instruction was not error; taken as a whole, the instruction conveyed the correct message to the jury "reasonably well," and defendants are not entitled to a new trial. *Wilson*, 83 F.3d at 874.

Even if the instruction was "patently incorrect," as defendants contend, defendants still bear the "onerous burden" of establishing that they were prejudiced by it. *Gile*, 213 F.3d at 374-75; *accord Serafinn v. Local 722, Int'l Bd. of Teamsters*, 597 F.3d 908, 916 (7th Cir. 2010). To meet this burden, each defendant must establish that "the jury was misled," that its "understanding of the issue was seriously affected" and that, as a result, they suffered prejudice. *Wilson*, 83 F.3d at 874; *see also U.S. v. Dack*, 987 F.2d 1282-84 (7th Cir. 1993) ("Reversal is mandated only if the jury's comprehension of the issues is so misguided that it prejudiced the complaining party.").

The determination of whether the challenging party was prejudiced by an erroneous instruction "must be based on a review of the record as a whole." *Vaughn v. Willis*, 853 F.2d 1372, 1377 (7th Cir. 1988). A party cannot establish prejudice where the record, viewed in its entirety, would support the verdict even if the correct instruction had been given. *Rapold v. Baxter Int'l, Inc.*, 708 F.3d 867, 876-77 (7th Cir. 2013). Under such circumstances, "a new trial would be mere waste and affirmance of the judgment is required." *Dack*, 987 F.2d at 1284. A defendant's mere speculation that the jury might have decided the case differently if the proper instruction had been given is insufficient to establish prejudice. *Gile*, 213 F.3d at 375.

Defendants fail to establish that any one of them suffered prejudice even if this Court's instruction on falsity was erroneous. The jury saw overwhelming evidence that defendants made the relevant false statements. Household concedes that it "made" every statement the jury found

---

adopted, and collectively implemented'" the challenged statements "in concert with the other defendants"); *In re Pfizer Inc. Sec. Litig.*, No. 05-MD-1688, 2013 U.S. Dist. LEXIS 49333, at *37-*40 (S.D.N.Y. Mar. 28, 2013) (rejecting argument that under *Janus* five corporate insiders could not be liable for statements made by others in company's press releases because they reviewed and had authority over them).

fraudulent.[54] Thus, even if all of defendants' *Janus* argument was accepted, Household still would be liable for the entire verdict.[55] Likewise, Aldinger and Schoenholz do not dispute that they had "ultimate authority" over a combined 30 (of 33) false statements spanning the entire relevant period.[56] Defs' Brf. 40-44. Thus, even under their best case scenario, Aldinger and Schoenholz would each find themselves liable for 15 10b-5 violations, would be subject to the same liability and fall well short of "demonstrat[ing] that ***substantial harm*** flowed from the [disputed] jury instruction."[57] *Gile*, 213 F.3d at 375 (denying new trial following change in law that rendered instruction materially incorrect because defendant did not demonstrate prejudice).

Further undercutting defendants' prejudice claim, the question of who "made" each statement simply was not an issue at the trial. *Vaughn*, 853 F.2d at 1376-77 ("We review a challenge to a jury instruction 'both in the context of the other instructions and in light of the allegations of the complaint, opening and closing arguments, and the evidence of record.'"). Rather than contest the

---

[54] Household stipulated that it made all of the alleged false statements in Household's 10-Ks, 10-Qs and press releases (Dkt. 1545, Ex. A, Undisputed Fact No. 12), and defendants' brief does not contest Household's responsibility for any statement the jury found to be fraudulent. Defs' Brf. 40-44.

[55] Household is jointly and severally liable for the entire verdict. Even if the Court accepted defendants' argument that Aldinger and Household could only be recklessly liable for the first false statement, Household would still be on the hook for the whole verdict through basic principles of *respondeat superior*. *Tellabs*, 513 F.3d at 708 ("A corporation is liable for statements by employees who have apparent authority to make them. . . . [T]he doctrines of respondeat superior and apparent authority remain applicable to suits for securities fraud."). Thus, Household is liable for the whole verdict no matter how the proportionate liability is divided up. *Id*.

[56] Aldinger testified "I signed the [10-K], so I'm accountable for what's in it." Tr. 3439:5-11. Schoenholz testified that there is "[n]o question" that he was responsible for the contents of Household's public filings. Tr. 1932:22-1934:3; *see also* Tr. 2111:25-2112:2; Dkt. 1545, Ex. A, Uncontested Fact No. 14. Aldinger and Schoenholz also stipulated that they exercised control over Household. Dkt. 1614 at 36.

[57] Defendants argue that the jury's findings on proportional liability may have been impacted by the Court's instruction. Defs' Br. at 43-44. First, this argument improperly assumes that the jury determined proportionate liability based on the number of false statements made rather than total fault, as instructed. Such speculation is irrelevant and inappropriate. *Gile*, 213 F.3d at 375; *Simmons, Inc. v. Pinkerton's, Inc.*, 762 F.2d 591, 599 n.3 (7th Cir. Ind. 1985) ("where instructions are such that a jury could have based its decision on one of two or more theories, one of which is valid and the others invalid, we cannot speculate about which theory the jury chose"). Second, Household, Aldinger and Schoenholz are all jointly and severally liable for the verdict, so the jury's finding on proportionate liability does not impact them. Finally, as a matter of logic, Aldinger and Schoenholz cannot claim prejudice based on the jury's finding that Gilmer was responsible for Household's SEC filings. If Gilmer were not liable for 16 of 17 statements as he claims, the proportionate liability of the other defendants would only be higher.

obvious – that defendants were responsible for the false statements – defendants sought to establish that all aspects of the alleged fraud were fully disclosed to the market, that the defendants did not have the requisite state of mind, and that plaintiffs did not suffer harm. *See, e.g.*, Defs' Demonstrative Ex. ("DDX") 477-01-03; DDX 567-01. Thus, defendants' counsel repeatedly elicited testimony from the individual defendants that they ***did*** make the alleged false statements, in an effort to convince the jury that they were candid and open about all aspects of Household's business. Tr. 1207:9-12; 1305:11-1306:4; 1307:19-1308:5; 2102:18-2103:9; 2111:26-2112:3; 2115:19-2116:26; 2118:2-4; 2142:16-2143:19; 3084:17-3086:16; 3097:22-3100:11; 3275:25-3276:1; 3277:4-24; 3134:25-3135:2. Consistent with their strategy, in their closing, defendants did not contest responsibility as "makers" of the statements.[58] Instead, with respect to the first element, counsel told the jury: "The part I want to focus there is 'during the relevant period.' It's very important." Tr. 4547:6-7.[59]

The evidence contradicts each of the defendants' attempts to manufacture prejudice. Gilmer contends that he is not liable for statements in the Form 10-K's and Form 10-Q's, arguing that he was merely "an officer of a corporate subsidiary." Defs' Brf. at 41. This is flat out wrong. Gilmer was a senior executive of Household, the parent company. Tr. 967:25-971:11. He made false and misleading statements directly, *see* PX 1307; Dkt. 1611, Table A, No. 14, and he is responsible for

[58] The closest defendants got in their closing argument was a brief (and incorrect) assertion that Gilmer had nothing to do with the restatement. Tr. 4599:21-25. This throw-away argument constituted ten lines of defendants' 106-page closing. Not once did counsel contest that Gilmer was responsible for the statements concerning re-aging or predatory lending that Gilmer now seeks to disclaim. Instead, he invited the jury to find Mr. Gilmer liable for those statements, "As Gary said, ***I take responsibility*** for anything we implemented. I don't care where it came from. Once we implement it, ***charge me with that***." Tr. 4560:2-5. Further, Gilmer has abandoned any argument that he cannot be liable for the restatement because it emanated from another business unit by failing to raise it in the Motion.

[59] During closing arguments, both sides presented the elements of plaintiffs' 10b-5 claim to the jury. Neither side used the "approved or furnished" language that defendants claim is objectionable. Tr. 4449:12-15 (plaintiffs); Tr. 4547:1-5 (defendants). Instead, the language used by both sides mirrored the Court's specific instruction on the first element, requiring plaintiffs to prove that "the defendants made a false statement of fact . . . ." *Compare* Tr. 4449:12-15 and Tr. 4547:1-5 *with* Tr. 4714:22-4715:1.

the false statements in Household's SEC filings and press releases. That Gilmer did not sign Household's SEC filings does not exculpate him because even under *Janus* attribution and control can be either express or "implicit from surrounding circumstances." *Janus*, 131 S. Ct. at 2302.[60]

Here, the surrounding circumstances plainly provide a sufficient basis for the jury's conclusion that Gilmer was responsible for making the misrepresentations in Household's SEC filings and press releases. Gilmer was the head of Consumer Lending – Household's largest division – and reported directly to Aldinger. Tr. 971:1-11. Under examination by his own counsel, Gilmer conceded that he was a "senior executive" of Household (the parent) and that as a result of Household's status as a public company he "certainly had a responsibility to the shareholders." Tr. 1189:3-1190:2. Aldinger testified that Gilmer's compensation was disclosed to investors because he was among the five highest ranking executives at Household (Tr. 3170:16-3171:8), and Gilmer was identified specifically in Household's false financial statements as an executive officer of Household – the parent company – until his "retirement" in the summer of 2002. *See* DX 850 at HHT0015419; DX 851 at HHT0015515; DX 852 at HHT0015666.[61] Gilmer's role extended to corporate-wide initiatives and other business units, including participation in the senior management meetings regarding the corporation's reaging policies. Tr. 2032:1-21; 2034:21-24; PXs 512; 1117. Additionally, Schoenholz consulted him as to matters involving Mortgage Services and other business units. *See* PXs 360; 1117. He was appointed Vice-Chairman of Household in early 2002. DX 852 at HHT015666.

---

[60] *See also Lockheed Martin Corp.*, 2012 WL 2866425, at *14 (it is not inconsistent with Janus Capital to presume that multiple people in a single corporation have the joint authority to "make" an SEC filing, such that a misstatement has more than one "maker"); *In re Pfizer Inc. Sec. Litig.*, No. 04-CV-9866, 2012 WL 983548, at *4 (S.D.N.Y. Mar. 22, 2012); *Allianz Risk Transfer v. Paramount Pictures Corp.*, No. 08-CV-10420, 2010 WL 1253957, at *6-*7 (S.D.N.Y. Mar. 31, 2010).

[61] Gilmer's attempt to re-classify Consumer Lending as a Household "subsidiary" is not only contradicted by the evidence, but also prohibited by his stipulation that Consumer Lending was a Household "Business Unit," and that HFC and Beneficial were simply the "brand names" under which Household operated that business. Dkt. 1545, Ex. A, Uncontested Fact Nos. 13, 20.

Furthermore, Aldinger and Schoenholz testified that the business unit managers (*i.e.*, Gilmer) not only provided information for Household's 10-K and 10-Q filings, but reviewed and approved them prior to issuance. Tr. 3427:16-22; 2106:21-2107:22; 2109:18-20; 2110:15-23; *see also* DDX 802-01. Given the evidence against him, Gilmer cannot establish prejudice. The verdict was not based on confusion, but instead strong evidence of the "surrounding circumstances" establishing Gilmer's responsibility for Household's fraudulent SEC filings *Janus*, 131 S. Ct. 2302-03. In *Lockheed*, 875 F. Supp. 2d at 375, the court found a non-speaking defendant liable under *Janus* as "maker" of false projections in financial statements and press releases because she was "1) the executive in charge of the division whose misconduct is at the heart of plaintiff's claims; 2) an officer of Lockheed; and (3) one of seven individuals listed as part of Lockheed's 'Leadership.'"[62] The "surrounding circumstances" are even stronger here.

Aldinger and Gilmer next challenge false statements made during Household's April 9, 2002, Financial Relations Conference ("FRC"). Both of them attended the conference, gave presentations, participated in a question and answer session, and sat by while Schoenholz executed the company's strategy, lying to investors about Household's reaging practices and statistics. Tr. 1665:18-1666:2, 1945-47; 3266:1-3267:19; PX0183. Thus, Aldinger and Gilmer are liable for the false statements at the FRC. *Barrie v. Intervoice-Brite, Inc.*, 409 F.3d 653, 656 (5th Cir. 2005) ("A high ranking company official cannot sit quietly at a conference with analysts, knowing that another official is making false statements, and hope to escape liability for those statements."). As *Carter*, 2011 U.S. Dist. LEXIS 136599 explained, *Janus* does not hold otherwise:

[D]efendant may not have authored the contents of the press releases but was made

[62] *See also SEC v. Landberg*, 836 F. Supp. 2d 148, 154 (S.D.N.Y. 2011) ("the SEC alleges adequate surrounding circumstances for a reasonable fact finder to conclude that the statements alleged to be fraudulent were implicitly attributed to Gould, which is 'strong evidence' that Gould was the 'maker' of those statements, thereby satisfying *Janus*"); *Carter*, 2011 U.S. Dist. LEXIS 136599, at *2-*3; *Benger*, 2013 U.S. Dist. LEXIS 39203; *Pfizer*, 2013 U.S. Dist. LEXIS 49333, at *37-*40.

> aware of them and knew that he would be held accountable. Thus, the allegation that defendant, as the company's CEO, approved the press releases is sufficient to make defendant the "speaker."

Id. at *6-*8 (citing *Janus*, 131 S. Ct. at 2302).

Similarly, Schoenholz and Gilmer are liable for Aldinger's false statements during the 12/4/01 Goldman Sachs conference. Defense counsel attributed the statement to Schoenholz and Gilmer, when he argued during closing that "***all*** [of Aldinger's] senior guys [got] together in the office Sunday," "decide[d that] at the conference Bill is going to respond to the Barron's article," and "prepare[d] extra slides for [Aldinger's] PowerPoint" presentation. Tr. 4618:22-4619:6. The jury also heard testimony from Aldinger that he and Schoenholz plotted Household's response to the article in an emergency Sunday meeting. Tr. 3093:17-3094:14. At the Goldman conference, with Schoenholz present, Aldinger presented the false information about Household's re-aging practices that he and Schoenholz had prepared.[63] Tr. 3101:2-7. Accordingly, they are liable. *Carter*, 2011 U.S. Dist. LEXIS 136599, at *6-*8; *Barrie*, 409 F.3d at 656.

Finally, Household and Aldinger contend that the jury acted inconsistently in finding that Aldinger and Household acted knowingly in making the 3/23/01 statement while Gilmer acted recklessly. Defs' Brf. at 42-43.[64] But the Court's scienter instruction did even not contain the

---

[63] Citing *Fulton Cnty. Emps. Ret. Sys. v. MGIC Inv. Corp.*, 675 F.3d 1047 (7th Cir. 2012), defendants argue that they may no longer be held liable for sitting idly by while other senior executives make false statements about the company. Defs' Br. at 41. They are wrong. In *Fulton County*, the statements were made by an officer of an entity (C-BASS) in which the defendant had a non-majority ownership interest, such that (unlike defendants here) the defendant did ***not*** have control over the entity or any ability to direct the statements of its officers. *Id.* at 1051 (finding speakers were "independent agents, speaking for themselves (and of course for C-BASS, over which as CEO and COO they had day-to-day control))." *Id.* As discussed, this case is much different. Plaintiffs do not seek to hold defendants liable for statements made by third parties. Instead, like *Barrie*, 409 F.3d at 656, this case involves a single company and the corporate insiders who controlled it.

[64] As set forth in §IX.C., *infra*, Aldinger and Household waived these arguments by (1) failing to challenge this statement in a 50(a) motion, (2) failing to object to inclusion of Aldinger's name next to this statement on the jury form, (3) failing to object to the "knowing" option next to Aldinger's name on the Verdict Form, and (4) failing to object to discharge of the jury. *Strauss*, 810 F.2d at 683-84; *McKinnon v. Berwyn*, 750 F.2d 1383, 1387 (7th Cir. 1984); *Petersen v. Gibson*, No. 97-C-4123, 2002 U.S. Dist. LEXIS 133, at *5 (N.D. Ill. Jan. 7, 2002).

"furnish or approve" language defendants object to under *Janus*. Tr. at 4717:5-4718:7. Defendants' assertion that the jury ignored the scienter instruction and judged Aldinger and Household's state of mind based on the Court's summary falsity instruction is pure speculation (*Gile*, 213 F.3d at 375), and ignores the presumption that the jury followed the Court's instructions. *United States v. Lee*, 558 F.3d 638, 649 (7th Cir. 2009). Furthermore, "*Janus* does not concern corporate scienter," *Pa. Pub. Sch. Emples' Ret. Sys. v. Bank of Am. Corp.*, 874 F. Supp. 2d 341, 371 (S.D.N.Y. 2012), and did not limit the attribution of scienter to those with "ultimate authority" over the statement. S*ee Kerr v. Exobox Techs. Corp.*, No. H-10-4221, 2012 U.S. Dist. LEXIS 7523, at *40 (S.D. Tex. Jan. 23, 2012) ("The Court finds no reason to read *Janus* to limit the liability of the corporation on grounds of scienter. Exobox 'made' the statements contained in the public filings under *Janus*; Plaintiffs need only assert that Sonfield furnished the information or language for inclusion in order to attribute his scienter to Exobox."). Nor is the jury's conclusion inconsistent or irrational. The jury rationally concluded that Gilmer was reckless in disregarding a substantial risk that his representations were false while Household and Aldinger knew the representations were false.

The jury's verdict was well supported by the evidence. Defendants' speculation that the inclusion of two words in the preliminary instruction on falsity caused the jury to render an irrational and unsupportable verdict is incorrect and insufficient to establish prejudice. *Gile*, 213 F.3d at 375 ("speculation that the jury might have decided the case differently if given the proper instruction is insufficient to establish prejudice").

2. The Court's Scienter Instruction Was Proper

The Court's scienter instruction directed the jury to find scienter if the defendant acted "knowing that it was false or misleading or with reckless disregard for a substantial risk that it was false or misleading." Dkt. 1614 at 29. It then specifically defined reckless conduct to be "an extreme departure from the standards of ordinary care and [the defendant] knows that it presents a

risk of misleading investors or the risk is so obvious that he had to have been aware of it." *Id.* This instruction undeniably set out the applicable law. *See Tellabs*, 513 F.3d at 704 (including "popular definition of recklessness").

Nevertheless, in an effort to manufacture error, defendants seize upon the following sentence: "A finding that any defendant acted with the required state of mind depends on what he knew or should have known when he made a particular statement or omission." Defs' Brf. at 44. This sentence properly limits the jury's scienter deliberations to information defendant knew or had available to him ***at the time***, *i.e.*, no fraud by hindsight. *Fla. State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 665 (8th Cir. 2001); *see also Tellabs*, 437 F.3d at 603 (citing *Green Tree*). Courts use the phrase "should have known" to describe this temporal aspect of scienter. *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 76 (2d Cir. 2001); *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 684 (6th Cir. 2004); *Ong v. Sears, Roebuck & Co.*, No. 03-C-4142, 2005 U.S. Dist. LEXIS 20391, at *55-*56 (N.D. Ill. Sept. 14, 2005). Not surprisingly, defendants cite no case law demonstrating that inclusion of this sentence was legally erroneous.

Instead, defendants contend that the sentence weakened the standard for recklessness to a negligence standard. Defs' Brf. at 44. This cannot be reconciled with the jury instructions as a whole nor the sentence itself. As noted above, the instruction commences with language requiring defendants' conduct to be either "knowing" or "reckless," with the latter defined in a way to preclude liability for mere negligence. The sentence cited by defendants does not alter the plain meaning of these portions of the instruction nor does it suggest there could be scienter as to a statement that a defendant "should have known" was false.

Additionally, under Seventh Circuit authority, the Court should not order a new trial based on an erroneous jury instruction where the correct legal standard was set forth in the Verdict Form or the parties' oral arguments. *Wakeen*, 272 F.3d at 454. Question No. 3 of the Court's Verdict Form

required the jury to determine whether the defendant acted "knowingly" or "recklessly." There was no improper "negligence" option. And the parties' arguments stressed that mere negligence was insufficient. Plaintiffs' counsel stated plainly: "We have to show that the defendants acted knowingly or recklessly." Tr. 4450:7-8. Defendants' counsel distinguished between intentional acts and mistakes: "if it wasn't intentional, if it was just a mistake, it doesn't matter, either." Tr. 4540:1-4; *see also id.* at 4540:13-18; 4540:25-4541:11; 4546:16-19; 4549:5-18; 4588:3; 4597:1-4598:19; 4599:10-11; 4600:20-22.

In sum, the jury could not have been confused into believing that negligence was enough. On the contrary, the Court's scienter instruction, whether considered alone or with the Verdict Form and the parties' arguments, required the jury to find that the defendants acted knowingly or with reckless disregard.[65]

B. The Court's Jury Verdict Form Was Correct

In seeking a new trial based on the Verdict Form, defendants bear a heavy burden. District courts have "considerable discretion as to the nature and scope of the issues to be submitted to the jury." *Sadowski v. Bombardier, Ltd.*, 539 F.2d 615, 622 (7th Cir. 1976) (denying motion for new trial based on use of general verdict form). "Whether or not to grant a party's request to submit special interrogatories (either on all issues or on a subset of issues like damages) is committed to the

[65] In contrast, it would have been legal error to adopt defendants' proposed scienter instruction, which required the jury to find "an intent to deceive, manipulate, or defraud." Defendants argue that their language must be correct since it comes from the Supreme Court's decision in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). However, after that case was decided, the Seventh Circuit, like every other circuit, concluded that scienter can also be shown "using the 'reckless' alternative," an issue left open in *Ernst*. *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1039-40 (7th Cir. 1977); *see also Rowe*, 850 F.2d at 1238; *SEC v. Jakubowski*, 150 F.3d 675, 681 (7th Cir. 1998) ("*Sunstrand* [] holds that reckless disregard of the truth counts as intent for this purpose."); *Searls v. Glasser*, 64 F.3d 1061, 1066 (7th Cir. 1995) ("intent to mislead or at least with recklessness so severe that it is the functional equivalent of intent"); *Robin v. Arthur Young & Co.*, 915 F.2d 1120, 1126 (7th Cir. 1990) ("the requirement of wrongful intent is satisfied by a showing of reckless conduct"). The Court's rejection of defendants' proposed language, therefore, was proper as that language is overly narrow and inconsistent with the "reckless" prong of scienter. *See Mesman v. Crane Pro Services*, 512 F.3d 353, 356-57 (7th Cir. 2008) (refusal to give "garbled" instruction not error).

sound discretion of the district court." *Cruz v. Town of Cicero*, 275 F.3d 579, 591 (7th Cir. 2001) (citing *Bularz v. Prudential Ins. Co.*, 93 F.3d 372, 377 (7th Cir. 1996)). "'As with other discretionary acts, this should not be reviewable, except, perhaps, for gross abuse, which can rarely be shown.'" *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 333-34 (5th Cir. 1981) (quoting 5A Moore's Federal Practice §49.03(1)). Defendants failed to establish error, let alone "gross abuse."[66] Their motion should be denied.

1. The Court Properly Excluded Arthur Andersen from the Verdict Form

At trial, defendants failed to adduce evidence that Arthur Andersen ("Andersen") committed a violation of the securities laws. On 4/29/09, the Court granted plaintiffs' motion to strike references to Andersen from the Verdict Form. *See* Dkt. 1601. The Court properly found that no "evidence introduced by either party, could reasonably support the conclusion that Andersen recklessly violated the securities laws." *Id*. at 2. Defendants seek to re-litigate the Court's decision.

The party seeking to designate "a non-party as potentially wholly or partially at fault . . . bear[s] the burden of proof demonstrating that the non-party violated the federal securities statutes." *In re Enron Corp. Secs. Deriv. & ERISA Litig.*, 236 F.R.D. 313, 319 (S.D. Tex. 2006). Notwithstanding their position that there was no scienter by any person as to the restatement, defendants argue that if the verdict against defendants is upheld, then Andersen necessarily committed securities fraud, *i.e.*, if one acted with scienter, both did. Defendants also contend that plaintiffs' Complaint allegations against Andersen constitute judicial admissions that Andersen violated the securities laws. Both arguments fail.

[66] The rulings in this case (none of which were in error) are distinguishable from those made in *Malone v. ReliaStar Life Ins Co.*, 558 F.3d 683 (7th Cir. 2009) and *Umpleby v. Potter & Brumfield, Inc.*, 69 F.3d 209 (7th Cir. 1995). Both of those cases granted new trials where errors in the jury instructions were compounded by errors on the special verdict form relating to the exact same point. Here, defendants' challenges to the Jury Instructions (making a statement and scienter) share no connection with their challenges to the Verdict Form (excluding Andersen on the Verdict Form and the presentation of plaintiffs' 20(a) claim).

Defendants' argument rests on the faulty premise that all of the evidence of defendants' fraud is "equally applicable" to Andersen. Defs' Brf. at 49. As discussed in §VI., *supra*, plaintiffs introduced proof of scienter against the defendants that had nothing to do with Andersen; plaintiffs adduced evidence of defendants' motive, but no evidence of Andersen's motive was adduced at trial. Similarly, in 1998, the OCC warned defendants that their accounting for the GM, AFL-CIO and UP contracts could be improper (PX 712); however, there is no evidence Andersen received this report, or was otherwise warned by government agencies that this accounting was incorrect.[67]

Defendants contend that plaintiffs' Complaint constitutes a judicial admission, requiring Andersen's inclusion on the Verdict Form. Defs' Brf. at 47-49. However, as the Court's 4/29 Order correctly notes, plaintiffs cannot make judicial admissions as to Andersen's state of mind. 4/29 Order; Dkt. 1601; *Banks v. Yokemick*, 214 F. Supp. 2d 401, 406 (S.D.N.Y. 2002) (holding "[g]eneral attributions of mental state" made in pleading do not constitute binding judicial admission). Nor do plaintiffs' allegations regarding Andersen's culpability and mental state constitute judicial admissions. Such allegations were based on information controlled by Household and Andersen.[68]

---

[67] Contrary to defendants' contention, moreover, Andersen was not "inextricably intertwined" with Household in preparing the false financial statements. Defs' Brf. at 48-49. The undisputed evidence establishes that the false financials were management's responsibility, not Andersen's. Tr. 2179:6-14 (Schoenholz); Tr. 3050:21-24 (Aldinger). Devor testified that "Auditors don't approve a company's accounting. . . . The accounting is the responsibility of the company and management." Tr. 2523:19-25. In fact, Andersen did not even review the revenue recognition issue that led to the restatement on the Kessler contract. Tr. 2544:14-16. Defendants offered no evidence that Andersen violated the securities laws. Under these facts, Andersen was properly excluded from the Verdict Form. *Enron*, 236 F.R.D. at 319.

[68] *Banks*, 214 F. Supp. 2d at 406 ("judicial admissions generally pertain to binding assertions of ***fact***, matters that a party unequivocally declares to be true because that party is uniquely positioned to know so and concede," as opposed to facts uniquely known or controlled by an adverse party); *In re MTBE Product Liability Litig.*, 379 F. Supp. 2d 348, 371 (S.D.N.Y. 2005) (holding that "plaintiffs' statements of impossibility are not judicial admissions because they pertain to facts peculiarly in the knowledge and control of defendants"); *Diarama Trading Co. v. J. Walter Thompson U.S.A.*, No. 01-CIV.-2950 (DAB), 2005 U.S. Dist. LEXIS 19496, at *29-*30 (S.D.N.Y. Sept. 6, 2005) (complaint allegation regarding privity of defendants did not constitute judicial admission where made on "information and belief" because facts not under control of plaintiff). Also these allegations are legal conclusions, *e.g.*, that Andersen violated the securities laws, and do not qualify as judicial admissions. *Lerch v. Angell*, No. 06-C-454, 2007 U.S. Dist. LEXIS 69333, at *16 (E.D. Wis. Sept. 17, 2007) (admission in answer that defendants acted "in violation of the Plaintiffs' Civil

Further, the Complaint was never admitted in evidence and is not a part of the trial record. *Maresca v. Mancall*, 135 Fed. App'x 529, 531-32 (3d Cir. 2005) (noting that plaintiff's expert's report was never admitted into the trial record and "thus could not be considered by the jury"). Including Andersen on the Verdict Form based on the Complaint allegations would have improperly invited the jury to ignore the Court's instruction that its "first duty is to decide the facts from the evidence in the case" and "[t]he evidence consists of the testimony of the witnesses, the exhibits admitted in evidence and stipulations." Tr. 4706:10-12; 4707:6-8; Jury Instructions at 1, 3.[69]

In their Answer, defendants denied each of the allegations they now seek rely on to establish Andersen's culpability. Household Defendants' Answer, ¶¶171, 172, 173, 176, 182, 186, 190 (Dkt. 156, filed 7/2/04). Thus, if the Court accepts defendants' argument, defendants themselves are bound by their Answer denying that Andersen committed securities fraud and Andersen's preclusion from the Verdict Form was appropriate.[70]

As defendants' judicial admission argument is fatally flawed, the Court need not reach the question of whether liability can be apportioned if Andersen acted knowingly. Defs' Brf. at 47-48. The record is devoid of any evidence that Andersen committed securities fraud and exclusion from the Verdict Form was appropriate.

2. The Verdict Form Was Appropriate for Rule 20(a)

Defendants ask this Court to overturn the jury's finding of liability for §20(a) because they claim that plaintiffs failed to offer sufficient proof of primary liability under §10(b). But the jury

---

Rights" was non-binding legal conclusion); *Dabertin v. HCR Manor Care, Inc.*, 68 F. Supp. 2d 998, 1000 (N.D. Ill. 1999) (legal conclusion not judicial admission).

[69] Even if the Complaint allegations could constitute a judicial admission, "'[a] trial judge has discretion whether to accept a judicial admission.'" *TIG Ins. Co. v. Giffin, Winning, Cohen & Bodewes, P.C.*, No. 00 C 2737, 2002 WL 31870528, at *5 (N.D. Ill. Dec. 20, 2002). The Court did not abuse its discretion by declining to treat the Complaint allegations as a judicial admission.

[70] *Amgen*, 133 S. Ct. at 1197 n.6 (defendants bound by factual assertion made in answer); *American Network Leasing Corp. v. Peachtree Bancard Corp.*, No. 93-C-3109, 1996 U.S. Dist. LEXIS 11253, at *14-*15 (N.D. Ill. Aug. 2, 1996) (question of fact existed where party seeking to assert judicial admission from opponent complaint denied the allegation in its own answer).

found each of the four defendants liable under §10(b) based on legally sufficient evidence. As a result, defendants' argument challenging the jury's verdict on §20(a) must also fail.

Equally meritless, defendants assert that they should have a new trial because the Verdict Form did not require a finding of 20(a) liability for each statement. To establish control person liability, a plaintiff must show that defendant: (1) exercised control over the operations of the company "***in general***," and (2) had the power to control the specific transaction, but "***need not prove that this later power was exercised***." *See Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, 877 (7th Cir. 1992) (emphasis in original); *see* Dkt. 1614 at 36 (instruction for control person liability mirrored the test in *Harrison*).

First, Aldinger was not only Gilmer's boss, but he and Schoenholz stipulated that they exercised authority over the entire company. Tr. 971:1-11; Dkt. 1614 at 36. Given this concession, defendants cannot dispute liability for all of Household's statements under 20(a), including those made by Household's agents. Further, by seeking evidence that Aldinger and Schoenholz "controlled the making of" Gilmer's statement, defendants ask too much. The law is clear that plaintiffs "need not prove that this . . . power was exercised." *Harrison*, 974 F.2d at 877.

Schoenholz contends that he cannot be liable as a control person as to Aldinger because Schoenholz reported to Aldinger. Defs' Brf. at 51. *Id.* But Schoenholz stipulated that he actually exercised control over Household, which necessarily includes actions taken by Aldinger on behalf of the company. *See* Dkt. 1614 at 36. In addition, the evidence shows that defendant Schoenholz had the power or ability to control the false statements the jury found actionable. *Id.* Nor do defendants cite any authority for their contention that Schoenholz cannot be liable for §20(a) as to Aldinger.[71]

[71] If, on the other hand, defendants' point is that Schoenholz's liability as a controlling person does not fit the facts of this case and should not have been included in the Verdict Form, defendants have waived this issue by failing to object at trial and to include it in their Rule 50(a) motion during trial. *See Schobert v. Ill.*

Even if there was error, it was harmless: Schoenholz is a control person of Household, which undeniably is liable for all of Aldinger's false statements.[72]

C. Defendants Waived Any Objection to the Alleged Inconsistent Verdicts

The defendants waived their objection to the supposed "irrational and unsupportable verdict" – whether couched as objections to jury instructions (§IX.A., *supra*) or the Verdict Form (§IX.B., *supra*) – in at least three separate ways. First, the individual defendants claim that they cannot have made one or more of the statements for which the jury found them liable. Defs' Brf. at 40-44. But, none of the defendants objected to inclusion of their names on the Verdict Form alongside the false statements they now claim they legally could not have made. As a result, their argument is waived. *See* Fed. R. Civ. P. 51(c)(1); *Innovative*, 793 F.2d at 882 ("[B]y failing at trial to object to the wording of the special interrogatories [appellant] waived any objections it might have had thereto.").[73] Similarly, Aldinger's objection that he cannot be knowingly liable for the 3/23/01

Dept. of Transp., 304 F.3d 725, 729-30 (7th Cir. 2002); *Gooden*, 17 F.3d at 927 ("a contention rooted in the facts of a case may not be raised for the first time after trial").

[72] Schoenholz asserts that the proportionate liability provisions of §10(b) somehow trump the joint and several liability provisions of §20(a). Defs' Brf. at 51 n.20. Defendants' argument misses the mark. Analyzing the joint and several liability provision of §20(a), the court in *Laperriere v. Vesta Ins. Group, Inc.*, 526 F.3d 715, 729 (11th Cir. 2008) explained: "We ought to avoid any interpretation of the statute that would treat controlling persons more harshly than the primary violator . . . ." Putting aside the fact that Schoenholz himself was found to be a primary violator, the jury found that defendant Schoenholz controlled Household, which was also a primary violator. *See* Dkt. 1611 at 43. Because the jury found that the primary violator (Household) acted knowingly, and is thus indisputably jointly and severally liable, joint and several liability also attaches to the controlling person (Schoenholz). *See* 15 U.S.C. §78t(a).

[73] *See also Sims v. Mulcahy*, 902 F.2d 524, 535-36 (7th Cir. 1990) (objection waived where plaintiff objected to special verdict but failed to raise the specific objection underlying request for new trial); *Frazer v. East St. Louis*, No. 09-CV-802, 2011 U.S. Dist. LEXIS 127185, at *7-*8 (S.D. Ill. Nov. 3, 2011) (defendants waived objection to mistake in verdict form by failing to state distinctly the matter objected to and the grounds for the objection, as required under Rule 51(c)(1)); *Johnson v. Gen. Bd. of Pension & Health Benefits*, No. 02-C-5221, 2012 U.S. Dist. LEXIS 24918, at *31-*33 (N.D. Ill. Feb. 23, 2012) (plaintiff waived objection to verdict form under Rule 51(c)(1) where she was in courtroom throughout jury instruction process but placed no objection on record to form); *McCroy v. Ill. Dept. of Corrections*, No. 02-C-3171, 2008 U.S. Dist. LEXIS 43266 (C.D. Ill. June 2, 2008) (defendant's failure to object to compensatory damages verdict form at jury instruction conference waived objection); *Ocampo v. Paper Converting Machine Co.*, No. 02-C-4054, 2005 U.S. Dist. LEXIS 17107, at *23 (N.D. Ill. Aug. 12, 2005) (defendant's failure to object at trial to line items in verdict form waived objection).

statement is waived because he did not object to the "knowingly" designation next to his name on the Verdict Form. *Id*.

Second, Aldinger and Schoenholz waived their argument that there is not sufficient evidence to hold them liable as makers of certain of the fraudulent statements because they did not make it in their Rule 50(a) motion. *Gooden*, 17 F.3d at 927 ("a contention rooted in the facts of a case may not be raised for the first time after trial"). Third, the Court presented the jury with a general verdict with interrogatories subject to Fed. R. Civ. P. 49(b).[74] Defendants waived all of their inconsistent verdict arguments because they did not, as required by Rule 49(b), object to discharge of the jury. *See Strauss*, 810 F.2d at 683; *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 678 n.6 (7th Cir. 1985) ("a request to have the jury resume its deliberations is the ***only*** appropriate response to special verdicts that are inconsistent with general verdicts, *see* Rule 49(b), and that if a party does not act in time he waives any later challenge"). Defendants' assert that they "objected" to the alleged jury inconsistencies. Defs' Brf. at 52 n.22. This is insufficient. Defendants were required to object to discharge of the jury. *See Strauss*, 810 F.2d at 683; *Will*, 776 F.2d at 678 n.6.

X. THE COURT'S EVIDENTIARY RULINGS WERE PROPER

A. The Court Properly Ruled on Expert Testimony

As the Seventh Circuit has stated, this Court plays a limited gatekeeping function with respect to expert testimony: "[W]e emphasize that the court's gatekeeping function focuses on an examination of the expert's methodology. The soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact . . . ." *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000); *see also Traharne v. Wayne Scott Fetzer Co.*, 156 F. Supp. 2d 717, 723 (N.D. Ill. 2001)

[74] *See Turyna v. Martam Constr. Co.*, 83 F.3d 178, 182 (7th Cir. 1996); *Indiana Bell Tel. Co. v. Ward*, No. 02-0170-C-H/K, 2005 U.S. Dist. LEXIS 12939, at *28 n.4 (S.D. Ind. June 24, 2005); *see also* 15 U.S.C.A. §78u-4(f)(3)(A) (requiring use of three interrogatories).

(Guzman, J.). "'The rejection of expert testimony is the exception rather than the rule, and the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.' Cross examination and the presentation of contrary evidence are the 'traditional and appropriate means' of attacking expert testimony." *Bullock v. Sheahan*, 519 F. Supp. 2d 760, 762 (N.D. Ill. 2007). In exercising the gatekeeping function, the Court has "broad discretion." *Miksis v. Howard*, 106 F.3d 754, 762 (7th Cir. 1997). As discussed below, the Court fulfilled its gatekeeping function.

1. The Court Properly Admitted the Testimony of Plaintiffs' Expert Catherine Ghiglieri

A motion for a new trial is not "a vehicle to relitigate old matters." *McCloud v. Goodyear Dunlop Tires N. Am., Ltd.*, No. 04-cv-1118, 2008 U.S. Dist. LEXIS 43265, at *10 (C.D. Ill. June 2, 2008); *see also Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000). For this reason, the Court should reject defendants' arguments regarding Ghiglieri's testimony, which are almost entirely recycled from their *Daubert* motion without significant alteration.[75]

In any event, the Court properly admitted her testimony as her methodology was reliable. 3/17/09 Minute Order (Ghiglieri Order), Dkt. 1515. It is undisputed that she performed the traditional analysis performed by regulators across the country. *Id.* at 2; *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 151 (1999); *Drebing v. Provo Group, Inc.*, 519 F. Supp. 2d 811, 817 (N.D. Ill. 2007). Further, as defendants' own expert conceded, this methodology often utilized "only . . . the materials reviewed by Ghiglieri." Ghiglieri Order at 2.[76] To be sure, the focus of

[75] Defendants' only new argument – regarding reaging (Defs' Brf. at 55) – is barred under FRE 103(a) because defendants failed to object to the testimony at issue during trial. *See Wilson v. Williams*, 182 F.3d 562, 567 (7th Cir. 1999).

[76] The cases cited by defendants are wholly inapplicable. Unlike in *Durkin v. Equifax Check Servs., Inc.*, 406 F.3d 410, 420 (7th Cir. 2005), where an English professor – who opined that certain letters "were difficult to read" and "confusing" – used no discernible methodology at all, Ghiglieri used a methodology that defendants' own expert agreed was standard. In *Porter v. Whitehall Labs, Inc.*, 9 F.3d 607, 614-16 (7th Cir. 1993), the court affirmed exclusion of one medical expert who conceded that she had "neither the time nor the inclination" to render an "analytical" opinion, another who "admitted that he could not state [his opinion] to a reasonable degree of scientific certainty," and a third who admitted he was required to "speculate" in order to

defendants' arguments here is not her methodology, but the factual underpinnings of her opinions. In its Order, the Court correctly noted: "If that is true, defendants have fertile ground for cross-examination, but it is not a basis for excluding Ghiglieri's testimony." *Id.*[77]

Further, Ghiglieri's opinions had overwhelming factual support. On direct, she discussed exhibits in the record regarding training,[78] insurance penetration targets (PX 898), branch office compensation (PX 269), inadequate internal controls (PX 717), Andrew Kahr's "growth initiatives,"[79] customer complaints[80] and regulatory reports from around the country.[81] And in their cross-examination of Ghiglieri, defendants elicited testimony regarding defendants' own internal refund estimates.[82] Ghiglieri had ample support for her opinions regarding defendants' widespread predatory lending practices.[83] Ghiglieri presented compelling testimony undercutting defendants' factual arguments, including (1) an explanation why regulators do ***not*** perform a complaint ratio analysis, but instead consider each complaint (Tr. 639:15-641:2; 654:24-655:2); and (2) that due to poor tracking of complaints, defendants themselves "did not have an idea of the magnitude of the complaints on any given issue." *Id.* at 659:7-22; *see also* PX 1148. In sum, the Court properly

---

reach his conclusions. The expert in *Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212, 1216 (7th Cir. 1997) offered opinions that were "economically ludicrous," "legally irrelevant," and belied by the plain language of the contract that was the subject of the litigation.

[77] *See, e.g.*, *Stollings*, 2013 U.S. App. LEXIS 16055, at *32-*33 (reversing the district court's decision to exclude expert testimony where the expert employed a valid methodology and the defendant "was free to use cross examination to attack the [expert's] assumption"); *Jordan*, 2012 U.S. Dist. LEXIS 9906, at *27 (denying *Daubert* challenge and holding that the movant could explore alleged weaknesses in expert's testimony "through vigorous cross examination at trial").

[78] PXs 379; 898; 899; 900; 1383; *see also* Tr. 939:12-942:9; 1462:2-12. These exhibits demonstrated not a "short-lived [effective rate] training program," *see* Defs' Brf. at 55 n.24, but a two-year nationwide effective rate training program.

[79] PXs 347; 348; 533; 835.

[80] PXs 276; 379; 1096.

[81] PXs 19; 290; 324; 333; 445; 550; 956; 965; 1013; 1205; 1333.

[82] Tr. 711:4-10 (effective rate presentation); *id.* at 718:25-719:4 (insurance packing); *id.* at 769:14-20 (loan flipping). It is disingenuous for defendants to claim that Ghiglieri undertook no effort to quantify customer harm. Defs' Brf. at 54. Ghiglieri's report "has a section about how much Household calculated the refunds at, their estimates of those types of practices." Tr. 895:14-20; *see also id.* at 897:1-898:4.

[83] In addition, there was evidence of Household's non-competitive interest rates. In a part of the Hueman videotape (PX 1383) shown to the jury, Hueman candidly noted Household's rates were higher than Household's competitors. PX 1383; *see* Tr. 717:14-21.

exercised its gatekeeping function given the reliability of Ghiglieri's methodology. In any event, defendants' erroneous factual arguments go to the weight, not admissibility, of her testimony.

2. The Court Properly Admitted the Testimony of Charles Cross

Defendants contend the Court committed error by admitting the deposition testimony of Charles Cross. Defs' Brf. at 56. Again, defendants recycle the same arguments the Court rejected in denying defendants' *Daubert* challenge. *See* 3/17/09 Order (Dkt. 1514). These arguments are no more persuasive the second time. For example, defendants' suggestion that Cross' opinions were derived from review of "about 20" complaints is incorrect. As the Court correctly noted, "Cross testified . . . that his conclusions were based not only on the investigation he conducted in Washington but on documents and information he received from regulators in thirty-nine other states."[84] Additionally, in forming his opinions, Cross reviewed and analyzed internal documents produced by Household;[85] solicited and evaluated responses from Household regarding the various issues raised;[86] evaluated Household's products and policies;[87] interviewed witnesses;[88] engaged in "mystery shopping";[89] and assessed the impact of Household's compensation scheme on lending practices.[90] The Court's conclusion that Cross employed a sound methodology was correct.[91]

Defendants' bias argument also fails. In conducting his examination, Cross considered

---

[84] 3/17/09 Order at 2 (citing Cross Depo Tr. 145-146); *see also* Cross Depo Tr. 120:13-121:23; 138:8-140:24; 142:7-21; 150:4-150:12; 178:24-179:7; Cross Luna Depo Tr. 479:17-480:17; 486:2-21; 488:8-20.

[85] Cross Depo Tr. 118:12-15; 119:1-7; 142:7-21; 178:24-179:7.

[86] PX 290 at 4; Cross Depo Tr. 135:23-137:10; 182:2-184:6.

[87] PX 290 at 63, 65-66; Cross Depo Tr. 129:19-131:19; 145; Cross Luna Depo Tr. 149-150.

[88] Cross Depo Tr. 117:22-117:25; 131:7-19.

[89] Cross Depo Tr. 118:4-11.

[90] PX 290 at 63, 66; Cross Depo Tr. 160:4-161:13.

[91] Defendants' factually inaccurate challenge should be rejected for the additional reason that it goes to the weight of Cross' opinions, not their admissibility. *See, e.g., Stollings*, 2013 U.S. App. LEXIS 16055, at *30 ("[T]rial judges acting as gatekeepers do not assume 'the role of St. Peter at the gates of heaven, performing a searching inquiry into the depth of an expert witness's soul' that would 'inexorably lead to evaluating witness credibility and weight of the evidence, the ageless role of the jury.'"); *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 362-63 (7th Cir. 2001) (observing that "admissibl[ity] under the *Daubert* standard is different from the weight to be accorded" the expert testimony).

documents produced by Household, evaluated management's responses and viewed the complaints in a neutral manner.[92] Ultimately, however, Household's credibility eroded to a point where "it was almost like stuff was being fabricated to convince us, and we didn't believe it any longer." Cross Depo Tr. 182:2-184:6. These facts do not establish bias. In any event, as the Court correctly held, "Cross' alleged bias, which defendants explored on cross-examination, goes to the weight of his testimony not its admissibility." 3/17/09 Order at 2. Cross' testimony was properly admitted.

3. Devor's Opinion Was Properly Admitted

Defendants contend that Devor's opinion regarding the amount of revenue attributable to improper lending practices should not have been received because it was based on evidence that was otherwise inadmissible. Defs' Brf. at 57-58. Defendants raised this issue in their *Daubert* motion as to Devor and lost. Nor has their argument become more persuasive with age. Devor's reliance on the refund amounts paid by Household to settle with the Attorneys General and the $3.2 billion in refunds calculated by Carin Rodemoyer (PX 681) was perfectly proper. As a starting point, experts may rely on inadmissible evidence in formulating their opinions. FRE 703. More importantly, the settlement amount was admitted for both damages purposes and to demonstrate the materiality of defendants' improper lending practices. As such, Devor was entitled to base his opinion on the undisputed number. Further, PX 681 was also ultimately received at trial once defendants – who successfully convinced the Court to exclude details regarding the settlement – inexplicably opened the door during Aldinger's cross-examination. Tr. 3330:22-3349:7. Defendants' claim that Devor's reliance on PX 681 constitutes complete speculation is nonsense. Clearly, defendants did their best to hide the significance of PX 681. *See* Dkt. 1358-1 at 18. However, there was never a real dispute about the purpose of PX 681. Rodemoyer's calculation, when placed next to PX 516, demonstrates she was calculating refunds for each of the predatory lending practices identified by the AGs.

[92] Cross Depo Tr. 118:12-15; 119:1-7; 125:15-19; 135:23-137:10.

Finally, the Court specifically held that defendants could test Devor's opinions regarding the revenue attributable to predatory lending on cross-examination. Dkt. 1528 at 2. However, defendants "did not lay a glove on that opinion in the adversarial testing of the jury trial." *See Lapsley*, 689 F.3d at 816 (although defendant Xtex now criticizes the expert's opinion, the opinion "was . . . completely unchallenged by Xtec during the trial. On appeal, Xtec now seeks to exclude what it did not challenge at trial").

4. The Court Properly Instructed the Jury Regarding Consideration of Expert Testimony

Defendants argue that this Court failed to instruct the jury properly with respect to consideration of expert testimony. Defs' Brf. at 60 n.28. This is patently false – this Court's jury instructions, which were either stipulated or pattern instructions, protected defendants from any possible undue prejudice arising from the testimony of plaintiffs' experts.

Defendants also contend that plaintiffs' experts misused expert testimony to prove that Household was a predatory lender. Defs' Brf. at 58-59. However, FRE 702 expressly allows the jury to consider expert testimony to understand the evidence or to determine a fact in issue. FRE 702; *see, e.g.*, *Deputy v. Lehman Bros., Inc*., 345 F.3d 494, 505 (7th Cir. 2003). The cases cited by defendants support not their contention, but only the narrow proposition that an expert's opinion based on inadmissible evidence does not prove the truth of that evidence.[93] And the Court's instructions did not allow the jury to consider inadmissible evidence cited by an expert for any purpose other than evaluating the expert's testimony.[94] These instructions were given not once as

---

[93] *See In re James Wilson Assoc.*, 965 F.2d 160, 172-73 (7th Cir. 1992); *Loeffel Steel Prods. Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 795, 808-09 (N.D. Ill. 2005).

[94] The Court also instructed the jury on how to evaluate expert testimony. That instruction, which is Seventh Circuit Pattern Instruction No. 1.21, addressed and removed the possibility that the jury might give experts undue credibility. *See Federal Civil Jury Instructions of the Seventh Circuit*, Committee Comments to Instruction No. 1.21 (citing cases).

defendants assert, but three times (pretrial,[95] in-trial[96] and post-closing[97]) and were either stipulated to by the parties (Tr. 419:23-427:4), or substantively identical to Seventh Circuit Pattern Instruction No. 1.09. *Federal Civil Jury Instructions of the Seventh Circuit*, Instruction No. 1.09. These instructions removed any risk that the jury would consider evidence cited by the expert for improper purposes. *See id.*, Committee Comments to Instruction 1.09 (citing cases). It is presumed that the jury will follow the Court's limiting instructions. *Lee*, 558 F.3d at 649.

In sum, defendants have no basis to contend that this Court's admission of the testimony of Ghiglieri, Cross or Devor, whether individually or collectively, warrants a new trial.[98] All of the challenged testimony was properly admitted, and the Court carefully instructed the jury on how to consider evidence admitted solely for the purpose of evaluating that testimony.

B. The Court's Judicial Rulings Do Not Entitle Defendants to a New Trial

Defendants moved *in limine* to exclude evidence of or reference to customer complaints and complaints filed in other civil cases, arguing that the complaints contained inadmissible hearsay. *See* Dkt. 1349-2. The Court denied defendants' motion, holding the complaints were relevant for the non-hearsay purpose of proving defendants' knowledge of the lending practices and to rebut defendants' argument that Household's predatory lending practices were geographically isolated and the result of a few rogue employees. Dkt. 1516 at 5, 8. The Court also instructed defendants to draft

---

[95] "During the course of the trial, I may instruct you that certain evidence is being admitted for a limited purpose only. When I do so, you must consider this evidence only for that limited purpose." Preliminary Instructions at 5; Tr. 238:15-18.

[96] "During the course of testimony by expert witnesses who you may hear, you may hear evidence regarding the category of documents I have already told you about. . . . The underlying information that you receive in this manner must not be considered by you for the purpose of determining – must not be considered by you as evidence of the truth of the information but rather is being admitted for the limited purpose of showing you – or assisting you to evaluate the expert witness' opinion and how sound that opinion is." Tr. 429:15-434:6.

[97] "Some evidence was admitted for the limited purpose of assisting you to evaluate an expert witness' opinion. Such evidence must not be used by you for any other purpose." Instructions at 6; Tr. 4709:5-7.

[98] Defendants cite two portions of plaintiffs' closing argument as probative of their prejudice. *See* Defs' Brief at 59. These statements were not objected to and are not objectionable, being summaries of the experts' prior testimony. *See* Tr. 4432:10-14 (statement of Court re purposes of closing argument).

an appropriate limiting instruction for the jury concerning the purpose for which the evidence should be considered. *Id*. at 5.

Defendants contend plaintiffs introduced customer complaints and complaints filed in other civil litigation for their truth and that "[p]laintiffs' experts presented the substance of these hearsay documents as fact." Defs' Brf. at 58.[99] Yet, defendants fail to identify where in the record they objected to the alleged improper use of the examination reports. Their failure to object is fatal. *See, e.g.*, *Christmas v. City of Chi.*, 682 F.3d 632, 640 (7th Cir. 2012) ("failure to timely and properly object constitutes waiver"); *Griffin v. Foley*, 542 F.3d 209, 218-19 (7th Cir. 2008) (same).

Moreover, the Court instructed the jury regarding the limited purpose of both the complaints and testimony of plaintiffs' expert witnesses. Tr. 433:16-434:6. Not only did defendants help draft the limiting instruction, defendants did not object to the instruction as given. Nor have defendants demonstrated that the jury disregarded the instruction and considered the complaints for something other than their limited purpose. *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 732 (7th Cir. 1999).

Defendants also moved *in limine* to preclude any reference to Household's settlements in civil lawsuits and regulatory agency actions, including the $484 million settlement with the State AGs. Dkt. 1349-2. In granting in part defendants' motion, the Court held that admission of the AG investigatory findings and civil complaints, rather than the civil and regulatory settlements, "reduces the risk of unfair prejudice to defendants and promotes the spirit of Rule 408." *See* Dkt. 1516 at 6. The Court further held that plaintiffs were entitled to prove loss causation through the use of public disclosures about the settlement, using only that "information sufficient to identify the date, time, means and nature of the disclosure." *Id*. The Court recognized that such information "can be introduced into evidence without requiring the introduction of any actual settlement documents or

[99] Defendants also argue plaintiffs relied on hearsay evidence contained in state and federal reports of examination. The Court properly rejected defendants' hearsay argument, ruling that the reports of examination were admissible under FRE 803(8). *See* Tr. 260:8-264:13.

any documents or testimony concerning allegations that were settled or the settlement terms or negotiations." *Id*.

Following the Court's *in limine* ruling, defendants asked the Court to limit the $484 million settlement's use in the trial to Devor's calculations or proof of loss causation. Pretrial Conf. Tr. 824:11-21. The Court responded as follows:

> I don't know that I can do that. I don't know what's going to happen during the trial. I mean, ***you may bring it up***. I don't know. ***Or you may open the door***. Or there may be some other legitimate function for it. . . . I'm not prepared to make an advisory ruling as to anything.

Id. at 824:22-825:3. The Court's admonitions made clear that settlement evidence would come in if defendants opened the door.

Yet, it was defendants themselves who first elicited testimony concerning the State AG settlement. *See* Dkt. 1551 at 6 ("in direct examination [Ghiglieri] was not asked and did not testify regarding the settlement itself or the terms of the settlement"). Indeed, Ghiglieri did not "gratuitously" "flout" the Court's order and did not testify about the fact or amount of the settlement until defendants themselves brought evidence of the settlement out on cross-examination. *See, e.g.*, Dkt. 1551 at 7 (holding defendants waived any objections to Ghiglieri's testimony by failing to object or move to strike at the time). Further, defendants make no attempt to excuse their failure to object to or move to strike what they now claim was a violation of the Court's 3/17/09 Order. This omission is unsurprising in light of defense counsel's admission during trial that he made a "tactical decision" not to object to Ghiglieri's testimony. *See* Tr. 873:9-876:24. A mistaken tactical decision does not result in a new trial. *United States v. Wynn*, 845 F.2d 1439, 1443 (7th Cir. 1988).

Moreover, by the time Devor testified, the jury had already heard testimony concerning the fact and amount of the $484 million State AG settlement. Thus, any claim that Devor violated the Court's 3/17/09 Order should be rejected. Defendants also improperly suggest that Devor violated

the Court's Order by using settlement-related documents to opine on the amount of revenue attributable to Household's predatory lending practice. Prior to trial, the Court ruled Devor could rely on otherwise inadmissible documents, such as PX 681, to quantify the amount of revenue attributable to the company's lending practices. *See* Pretrial Conf. Tr. 800:24-808:11 (overruling defendants' objection to Pltfs' Demonstrative Ex. No. 40). Defendants subsequently raised the same issue again in a sidebar with the Court before Devor testified. Tr. 2374:7-2377:12. The Court ruled Devor could "testify as to the bases for his opinions, including the figures that he took into account. He can testify as to the origin of those figures." Tr. 2376:23-25. Contrary to defendants' assertion, Devor's testimony was entirely proper and did not contravene the Court's Order.

If the door was not open by the time Aldinger testified, it was blown off its hinges afterwards. Defense counsel examined Aldinger concerning the motivation behind the decision to settle, the events leading to the settlement and Aldinger's involvement therein. Tr. 3330:22-3349:7. Immediately after this testimony, plaintiffs' counsel requested permission to use two previously excluded settlement-related exhibits. Tr. 3353:8-3373:15; *see also* PXs 681; 516. Defendants first tried to claim that they had "done nothing to open the door." Tr. 3353:25. The Court disagreed. Tr. 3385:1-3386:14 ("My ruling with respect to the Attorney Generals' settlement is that that door has been opened."). Defendants then made the same argument they raise now, claiming plaintiffs "undermined, eroded and chipped away" at the Court's 3/17/09 Order. The Court responded:

> I think the record is pretty clear on this. My rulings were very narrow and strict with respect to the use of that information. ***And they have been adhered to***. Only the experts have testified to [the settlement] and only then in order to indicate their support for their opinions. And the record will clearly also reflect that the very first time ***any*** of this came into the record was on ***your*** cross-examination of Ms. Ghiglieri. And I've already made a long and extensive ruling on how that happened and how it could have been avoided, had you not pressed and pressed and pressed her on that point. Tr. 3388:23-3389:9.

Defendants' efforts to distort the record must be rejected. Defendants first elicited details of

the settlement during ***defendants***' cross-examination of Ghiglieri (and defendants did not move to strike) and then ***defendants*** extensively cross-examined Aldinger about the settlement. The Court had the discretion to allow plaintiffs to use previously inadmissible settlement-related evidence in order to rebut Aldinger's testimony after defendants opened the door.[100] The Court's decision was entirely proper. *See United States v. Anifowoshe*, 307 F.3d 643, 649 (7th Cir. 2002); *Griffin*, 542 F.3d at 219. Any alleged prejudice defendants have suffered is the result of their own doing and does not entitle them to a new trial.

XI. THE COURT PROPERLY ADJUDICATED RELIANCE DURING THE PHASE II PROCEEDINGS

Following the trial, the only remaining issue was whether defendants could 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. 1703). Pursuant to Rule 56, the Court provided defendants an opportunity to rebut the presumption of reliance by establishing 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. *See* August 24, 2011 Order at 2 (Dkt. 1777) (noting that it is "incumbent on the defense to dispute the asserted fact of reliance by providing citations to the record which establish that the presumption does not apply to any given claim). After extensive briefing, the Court rejected each of the arguments that defendants repeat here, determining that defendants failed to raise a triable issue of material fact, and entered summary judgment in favor of plaintiffs on these issues. *See* September 21, 2012 Order (Dkt. 1822).

---

[100] *See* Tr. 3372:9-3373:5 ("Look, your client just testified for about 20 minutes as to the negotiations that went on in reaching the settlement agreement . . . [t]hey now have a right to rebut that. They have a right to bring out evidence to rebut what your client said about how the negotiations went down and what his motivation was for . . . reaching that settlement."); Tr. 3371:20-23 ("[Y]ou can't bring [evidence of the settlement] out and then say, 'Oh, because of [the Court's] prior ruling, they cannot now rebut the evidence you brought forth.'").

"A Rule 59(a) motion is inappropriate when a case, such as this, has been decided on the pleadings. . . . The logic is simple: no initial trial, no new trial." *Schmude v. Sheahan*, No. 00-C-4580, 2004 U.S. Dist. LEXIS 7167, at *6-*7 (N.D. Ill. Apr. 23, 2004). By their own admission, defendants now restate the arguments contained in their earlier Rule 56 motion, which amount to nothing more than a motion for reconsideration of the Court's denial of that motion disguised as a Rule 50/59 motion. *See* Defs' Brf. at 61-62 ("The Court previously addressed and rejected Defendants' challenges to the Phase II proceedings and the rebuttal of the presumption of reliance."). As such, it falls well short of the mark. The opinions of the Court "are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *Pickett v. Prince*, 5 F. Supp. 2d 595, 597 (N.D. Ill. 1998). When motions for reconsideration do nothing more than attempt to rehash arguments previously rejected, as defendants do here, they "'reflect a fundamental misunderstanding of the limited appropriateness of motions for reconsideration.'" *Id.*[101]

Throughout this new filing, just as they did in their Rule 56 submission, defendants persist in arguing that: (i) index traders used investment strategies unrelated to stock price; (ii) certain claimants did not rely on the efficient market hypothesis; (iii) the restatement was not significant to Davis Selected Advisors ("DSA"); and (iv) Lead Plaintiff Glickenhaus & Company did not rely on the March 23, 2001 statement. *Compare* Defs' Brf. at 62-64 *with* Defendants' Submission Regarding the Presumption of Reliance at 20-27 (Dkt. 1780). Plaintiffs addressed each of these arguments in their opposition to defendants' submission,[102] and the Court rejected these arguments

[101] Nor are losers in summary judgment proceedings permitted to advance new legal theories or facts. "Because a Rule 56 motion (unlike, say, a Rule 12(b)(6) motion) is really the equivalent of a trial – but one in which the movant asserts that no genuine issues of material fact that require a decision in factual terms – the loser should no more be entitled to adduce new facts or legal theories that were readily available earlier than a loser at trial can do so after the case is over and the verdict is in." *See Pickett*, 5 F. Supp. 2d at 597.

[102] *See* Plaintiffs' Opposition to Defendants' Submission Regarding Rebuttal of the Presumption of Reliance at 10-12 (Dkt. 1782) (index traders), 12-14 (efficient market hypothesis), 14 n.9 (DSA), 14-15 (Glickenhaus & Co.).

in its September 21, 2012 Order granting plaintiffs' summary judgment on these issues.[103] These arguments are no more persuasive now than when defendants first made them two years ago.[104]

Finally, defendants grouse that they were deprived of discovery, speculating that it may have enabled them to rebut the presumption of reliance.[105] Defendants are wrong. As plaintiffs explained in their reliance briefing, defendants had ample opportunity to conduct discovery to demonstrate that triable issues of fact existed as to certain class members.[106] Despite serving discovery on 131 institutional investors and taking a dozen depositions (making a tactical decision not to take all of the 15 allotted depositions) defendants were unable to identify ***any*** document, interrogatory response, testimony or other evidence establishing that ***any*** claimant bought its Household stock for a reason unrelated to its value as reflected by the market price. To the contrary, the extensive discovery record establishes that class members relied on the market price.

XII. CONCLUSION

For the foregoing reasons, defendants' motion for judgment as a matter of law or, in the alternative, for a new trial should be denied in its entirety.

---

[103] *See* September 21, 2012 Order at 5-6 ("Defendants have not, therefore, created a triable issue of fact as to the reliance of index investors . . . ."), 6-8 ("Given the parties' stipulation that 'Household common stock traded in an efficient market' (Final Pretrial Order, Ex. A, Uncontested Fact No. 10), whether these claimants fully subscribe to the efficient market theory is irrelevant."), 8 ("Defendants have not, therefore, raised a triable issue as to DSA's reliance on the Restatement misstatements."), 8-9 ("The Court, therefore, holds that defendants have not raised a triable issue of fact as to Glickenhaus' reliance.").

[104] Defendants repeat their claim that the presumption of reliance was rebutted by the jury's adoption of the leakage model. The Court previously rejected this contention as well (*see* Sept. 21 Order at 3-5), and plaintiffs address this argument in §§III.-V., *supra.*

[105] As a preliminary matter, defendants cite no authority at all that the level of discovery has any relevance to a motion brought pursuant to Rules 50 and 59. Defendants' reliance on *In re Adelphia Communs. Corp. Sec. & Deriv. Litig.*, No. 03 MD 1529, 2005 U.S. Dist. LEXIS 43300 (S.D.N.Y. Aug. 22, 2005) is misplaced. Unlike in this case, the court in *Adelphia* stayed ***all*** discovery pending resolution of the motions to dismiss and held simply that defendants should be entitled to take discovery before responding to a motion for summary judgment. *Id.* at *26-*27.

[106] *See* Plaintiffs' Opposition to Defendants' Submission Regarding Rebuttal of the Presumption of Reliance at 4-8; *accord* September 21, 2012 Order at 9-10 (quoting defendants' repeated representations that their discovery needs were slight).

DATED: August 30, 2013

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
MICHAEL J. DOWD (135628)
SPENCER A. BURKHOLZ (147029)
DANIEL S. DROSMAN (200643)
LAWRENCE A. ABEL (129596)
MAUREEN E. MUELLER (253431)

s/ SPENCER A. BURKHOLZ
SPENCER A. BURKHOLZ

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
LUKE O. BROOKS (90785469)
JASON C. DAVIS (253370)
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545
415/288-4534 (fax)

Lead Counsel for Plaintiffs

MILLER LAW LLC
MARVIN A. MILLER
LORI A. FANNING
115 S. LaSalle Street, Suite 2910
Chicago, IL 60603
Telephone: 312/332-3400
312/676-2676 (fax)

Liaison Counsel

LAW OFFICES OF LAWRENCE G. SOICHER
LAWRENCE G. SOICHER
110 East 59th Street, 25th Floor
New York, NY 10022
Telephone: 212/883-8000
212/355-6900 (fax)

Attorneys for Plaintiff

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 August 30, 2013, declarant caused to be served by electronic mail and by U.S. Mail to the parties the following document:

PLAINTIFFS' OPPOSITION TO DEFENDANTS' RENEWED MOTIONS FOR JUDGMENT AS A MATTER OF LAW PURSUANT TO RULE 50(b) OR, IN THE ALTERNATIVE, FOR A NEW TRIAL PURSUANT TO RULE 59

The parties' e-mail addresses are as follows:

Tkavaler@cahill.com	Zhudson@bancroftpllc.com
Pfarren@cahill.com	Mrakoczy@skadden.com
Dowen@cahill.com	Rstoll@skadden.com
Jhall@cahill.com	Mmiller@MillerLawLLC.com
Pclement@bancroftpllc.com	Lfanning@MillerLawLLC.com

and by U.S. Mail to:

Lawrence G. Soicher, Esq.
Law Offices of Lawrence G. Soicher
110 East 59th Street, 25th Floor
New York, NY 10022

I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of August, 2013, at San Diego, California.

s/ TERESA HOLINDRAKE
TERESA HOLINDRAKE