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

LAWRENCE E. JAFFE PENSION PLAN, on behalf of itself and all others similarly situated,	)	**02 C 5893**
Plaintiff,	)	**Judge Jorge L. Alonso**
v.	)	
HOUSEHOLD INTERNATIONAL, INC., et al.,	)	
Defendants.	)	

ORDER

The parties have submitted a joint status report setting forth their views as to the substance and procedure of these remand proceedings. With respect to loss causation, plaintiffs contend that the issues to be tried are: (1) whether their "loss causation and damages expert adequately accounted for company-specific non-fraud factors?"; and (2) "[w]hat damages, if any, . . . plaintiffs [can] prove for March 23, 26 and 27, 2001?" (Jt. Status Rep. at 14.) Defendants say the issues to be tried are: (1) whether plaintiffs have "proven loss causation?"; and (2) "If so, what is the amount of inflation caused by each of the 17 misrepresentations at issue?" (*Id.*)

The Court agrees with defendants. The Seventh Circuit held that, in his testimony about the leakage model, Dr. Fischel did not adequately opine that "no firm-specific, nonfraud related information contributed to the decline in [Household's] stock price." *Glickenhaus & Co. v. Household International, Inc.*, 787 F.3d 408, 422 (7th Cir. 2015). That flaw, the court clearly said, "warranted [a new trial] on the loss-causation issue." *Id.* at 423. Thus, in the new trial, plaintiffs must prove that defendants' misrepresentations were "a substantial cause of the economic loss plaintiffs suffered." (*See* Jury Instructions at 32.)

Plaintiffs must also prove "the amount of per share damages, if any, to which plaintiffs are entitled." (*See id.* at 34.) By holding that Dr. Fischel's leakage model testimony did not establish loss causation, the Seventh Circuit necessarily, if not explicitly, rejected the amount of damages per share that he calculated based on that testimony. Because the amount of per share damages the jury found in the first trial came directly from the table Fischel prepared based on his leakage model testimony, *Glickenhaus*, 787 F.3d at 417, those findings cannot stand.

The Seventh Circuit also held that, in light of the Supreme Court's decision in *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), the court incorrectly instructed the jury "on what it means to 'make' a false statement in violation of the securities laws." *Glickenhaus*, 787 F.3d at 424; (*see* Jury Instructions at 25 (stating that the first element of a 10b-5 claim against any defendant is that "the defendant made, approved, or furnished information to be included in a false statement of fact").) The parties agree that the Seventh Circuit's opinion requires a retrial on whether the individual defendants "made" the following statements within the meaning of *Janus*:

Aldinger:	Nos. 16, 18, 21, 24, 28, 29, 36 & 37
Schoenholz:	Nos. 16, 18, 21, 23, 24, 29, 36 & 37
Gilmer:	Nos. 15-18, 20-24, 27-29, 32 & 36-38

(Jt. Status Rep. at 12-13); (*see* Verdict Form).

They disagree, however, as to whether the new jury must make findings on scienter, *i.e.*, that a defendant who made a statement did so knowing it was false or with reckless disregard for its truth or falsity rather than negligently or innocently. Plaintiffs argue that the first jury's scienter findings stand and the new jury must only determine with which of the two required states of mind–knowledge or recklessness–any defendant made a statement. Defendants contend that the new jury must

determine, as to any defendant who made a statement, *both* that he did so with scienter and the specific state of mind–knowledge or recklessness–with which he made it.

Defendants did not appeal the first jury's findings on scienter, (*see generally* Appellant's Br., *Glickenhaus & Co. v. Household Int'l, Inc.*, No. 13-3532 (7th Cir.), and the Seventh Circuit did not explicitly identify it as an issue to be tried, *see Glickenhaus*, 787 F.3d at 433. However, in the course of its opinion, the court makes a statement that can be, and defendants apparently have, construed as a direction to retry the existence of scienter: "The new trial should focus on whether the three executives 'made' the particular statements we've identified *and whether they did so knowingly or recklessly*." *Glickenhaus*, 787 F.3d at 429 (emphasis added).

Read in isolation, the italicized language could have the meaning defendants ascribe to it. However, the scope of the remand must be determined from the opinion as a whole, not just a single phrase, *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996), and the opinion as a whole suggests that the new jury must determine with which of the required mental states each defendant made a statement, not whether each defendant had the requisite intent. That conclusion is supported by the dearth of discussion in the opinion about the scienter findings, which are mentioned only once in forty-seven pages and are conspicuously absent from the summation of what is to be retried. *See Glickenhaus*, 787 F.3d at 433 ("In sum, the defendants are entitled to a new trial limited to the two issues we've identified here: loss causation and whether the three executives "made" certain of the false statements under *Janus's* narrow definition of that term. We reject all other claims of error.").

Moreover, what little the court did say about the findings also supports this Court's conclusion. Specifically, the Seventh Circuit said:

> The defendants contend that the question of prejudice must be considered in light of the jury's findings on scienter. They note, for example, that the jury found Household and Aldinger responsible for "making" the Gilmer statement *knowingly*, while Gilmer,

> who actually delivered it, was found to have made it *recklessly*. The defendants suggest that this kind of combination is impossible after *Janus*. We do not see why. Nothing in *Janus* precludes a single statement from having multiple makers. . . . And it's not illogical to conclude that Aldinger, who wrote the statement and instructed Gilmer to deliver it, acted knowingly, while Gilmer, who simply parroted it, was merely reckless as to its falsity.

Id. at 427 (emphasis in original). Given the contents of the verdict form the jury completed, it is clear that this allusion to scienter refers to the jury's findings as to the type, not the existence, of scienter. The verdict form contained three questions the jury had to answer with respect to each defendant and each alleged misrepresentation, the first and third of which are relevant here. (*See* Verdict Form.) The first question was: "Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?" (*Id.*) A "yes" answer to this question meant that the jury found, among other things, that the defendant made a statement with scienter, *i.e.*, "knowing that it was false or misleading or with reckless disregard for a substantial risk that it was false or misleading." (Jury Instructions at 25, 29.) For each "yes" answer to question one, the third question asked the jury to identify the particular state of mind with which the defendant made the statement: "[I]ndicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement . . . ." (*See* Verdict Form) (emphasis in original). In other words, question one asked whether a defendant acted with the requisite state of mind, and question three (which was necessitated by the damages apportionment scheme set forth in the statute, *see* 15 U.S.C. § 78u-4(f)(2)) asked the jury to identify that state of mind specifically. Therefore, the appellate court's observation that the jury's findings on scienter as to one statement defendants made were that Household and Aldinger made it knowingly and Gilmer made it recklessly, had to be a reference to the findings on question three.

It is in this context, and just a few paragraphs later in the summary of its discussion on *Janus*, that the court said the second jury should determine whether the individual defendants "'made' the

[identified] statements . . . and . . . *did so knowingly or recklessly*." *Glickenhaus*, 787 F.3d at 429 (emphasis added). Thus, the most logical interpretation of that statement is that the second jury must render new findings on question three as to each defendant's particular state of mind, not the existence-of-scienter portion of question one.

In short, the Court agrees with plaintiffs that the existence-of-scienter findings from the first trial stand. If the second jury finds that one of the individual defendants "made" one of the identified statements, then the only scienter finding the jury must make is the specific state of mind–knowledge or recklessness–with which the defendant made the statement.

With respect to scheduling, the parties largely agree that the timetable should be short, with a goal of retrying this case in May or June 2016. They also agree that the first step in the pretrial process is the disclosure of Dr. Fischel's supplemental report, which plaintiffs will serve on defendants by September 23, 2015. They disagree, however, about what should happen next. Plaintiffs contend that all expert reports should be served and expert depositions should be taken, after which all pretrial motions, including any *Daubert* challenge to Dr. Fischel's supplemental report or testimony, should be filed. (Jt. Status Rep. at 15.) Defendants contend that their *Daubert* motion, if any, as to Dr. Fischel, should be filed and decided before they serve their expert report. (*Id.* at 16.)

The Seventh Circuit agrees with defendants:

> If the plaintiffs' expert testifies that no firm-specific, nonfraud related information contributed to the decline in stock price during the relevant time period and explains in nonconclusory terms the basis for this opinion, then it's reasonable to expect the defendants to shoulder the burden of identifying some significant, firm-specific, nonfraud related information that could have affected the stock price. If they can't, then the leakage model can go to the jury; if they can, then the burden shifts back to the plaintiffs to account for that specific information or provide a loss-causation model that doesn't suffer from the same problem, like the specific-disclosure model.

Glickenhaus, 787 F.3d at 422.

Consistent with the Seventh Circuit's instructions, the Court sets the following schedule:

September 23, 2015 - Plaintiffs serve Dr. Fischel's supplemental report

October 23, 2015 - Defendants (1) file a *Daubert* motion, if appropriate, explaining the perceived flaws in Dr. Fischel's analysis with respect to "firm-specific, nonfraud related information" and any other flaws that they perceive in his analysis that were not raised before and rejected by Judge Guzmán; and (2) serve their expert report responding to Dr. Fischel's supplemental report and, if appropriate, identifying "some significant, firm-specific, nonfraud related information that could have affected the stock price." *Id.*

November 23, 2015 - Plaintiffs (1) file their response to the *Daubert* motion with respect to Dr. Fischel, if any; and (2) serve their expert report in rebuttal to defendants' expert report, which, if appropriate, "account[s] for the specific information [identified by defendants] or provid[es] a[n] [alternate] loss-causation model" (*Id.*)

December 21, 2015 - Defendants (1) file a reply in support of their *Daubert* motion with respect to Dr. Fischel, if any; and (2) if plaintiffs provided an alternate loss-causation model in their rebuttal report, serve their expert's rebuttal to that report.

January 20, 2016 - Expert depositions are completed

February 10, 2016 - Remaining pretrial motions are filed

March 2, 2016 - Responses to remaining pretrial motions are filed

March 16, 2016 - Replies in support of remaining pretrial motions are filed

June 6, 2016 - Trial begins

SO ORDERED. **ENTERED: September 8, 2015**

JORGE L. ALONSO
United States District Judge