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, Plaintiff, v. HOUSEHOLD INTERNATIONAL, INC., *et al.*, Defendants.	)	Case No. 02-C-5893 Judge Jorge L. Alonso

MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANT WILLIAM F. ALDINGER'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant William F. Aldinger ("Aldinger"), through his attorneys, respectfully submits this Memorandum of Law in Support of his Motion for Partial Summary Judgment (the "Motion"). In support of this Motion, Aldinger states as follows:

PRELIMINARY STATEMENT

On May 21, 2015, the Seventh Circuit reversed the judgment entered in this case and remanded with instructions to determine, among other things, whether under *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) ("*Janus*") Aldinger "made" the false statements in Household International Inc.'s ("Household's" or the "Company's") press releases and in the presentation given by David A. Schoenholz ("Schoenholz") at the Financial Relations Conference on April 9, 2002 (the "FRC"). *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 428 (7th Cir. 2015), reh'g denied (July 1, 2015) ("*Glickenhaus*").

Application of *Janus* to the facts in this case yields two conclusions with respect to Aldinger: 1. he did not have ultimate authority over, and thus did not "make," the Financial Relations Conference presentation (the "FRC Presentation" or the "Presentation"); and 2. he did "make" the statements at issue in the relevant Household press releases (the "Press Releases"), leaving no litigable issues for trial as to whether Aldinger was the maker of those statements.

PROCEDURAL HISTORY

Lead Plaintiffs in this action filed their initial complaint on August 19, 2002. [Dkt. 1]. That was eventually followed by the [corrected] Amended Consolidated Class Action Complaint, filed on March 13, 2003, which alleged that certain senior officers of Household, including its Chairman/CEO Aldinger, violated 15 U.S.C. §§ 78j(b) and 78t(a) (§§ 10(b) and 20(a) of the Securities Exchange Act of 1934) and 17 C.F.R. § 240.10.b-5 (Rule 10b-5). [Dkt. 54].

The initial action was tried by a jury in April 2009. The jury rendered a verdict in Plaintiffs' favor on May 7, 2009 [Dkt. 1611], and on October 4, 2013, the Court denied Defendants' post-trial motions and directed entry of final judgment (the "Final Judgment") against Defendants. [Dkt. 1887]. On October 17, 2013, the Court ordered that Household, Aldinger, and Schoenholz be held jointly and severally liable for principal damages in the amount of $1,476,490,844.21 and for pre-judgment interest in the amount of $986,408,772, totaling $2,462,899,616.21, exclusive of post-judgment interest and costs. [Dkt. 1898].

On November 12, 2013, Household, Aldinger, Schoenholz, and Gary Gilmer ("Gilmer") filed a Notice of Appeal with the United States Court of Appeals for the Seventh Circuit from the Final Judgment. [Dkt. 1906]. On May 21, 2015, the Seventh Circuit reversed the district court's Final Judgment and remanded the case for retrial on certain issues, including those noted above.

See Glickenhaus, 787 F. 3d 408. Aldinger files this Motion for partial summary judgment as to those issues.

APPLICABLE LEGAL STANDARDS

I. Standard for Summary Judgment Under Fed. R. Civ. P. Rule 56

Summary judgment is appropriate when a movant demonstrates that "there is no genuine dispute as to any material fact and [that] the movant is entitled to judgment as a matter of law." *Horsley v. Trame*, 808 F.3d 1126, 1128 (7th Cir. 2015) (quoting Fed. R. Civ. P. 56(a)). Federal Rule of Civil Procedure 56(c) requires that summary judgment be granted against a party who fails to make a "sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This requirement places a "'substantial burden' on the non-moving party to make known those material facts that are in dispute. Furthermore, a district court need not scour the record in search of material facts in dispute when the non-movant fails to make such a showing." *Nanophase Technologies Corp. v. Celox, Ltd.*, No. 02CV4340, 2003 WL 22220186, at *3 (N.D. Ill. Sept. 24, 2003) (Guzman, J.) (citations omitted).

On remand, a trial is not always required. *See Publisher's Res., Inc. v. Walker-Davis Publ'ns, Inc.*, 762 F.2d 557, 559-60 (7th Cir. 1985) ("Where no material factual issues are present, a summary judgment proceeding is the functional equivalent of a new trial; under such circumstances a full-scale trial is neither necessary nor helpful."). Nor is a district court obligated to reopen discovery to allow a party to cure deficiencies on remand: given the available evidentiary record, if no reasonable jury could return a verdict in favor of the nonmoving party, summary judgment is required. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

II. Standard for Personal Liability Under § 10(b) of the Exchange Act and Rule10b-5

Pursuant to Rule 10b–5, it is unlawful for any person, directly or indirectly, "[t]o make any untrue statement of a material fact" in connection with the purchase or sale of securities. 17 CFR § 240.10b–5(b). The Supreme Court has narrowly defined the term "maker" in order to keep "narrow dimensions" on the implied private right of action under Rule 10b–5. *U.S. S.E.C. v. Carter*, No. 10 C 6145, 2011 WL 5980966, at *2 (N.D. Ill. Nov. 28, 2011). For Rule 10b-5 purposes, "the *maker* of a statement is the person or entity with *ultimate authority* over the statement . . ." *Janus*, 131 S. Ct. at 2302 (emphasis added). Ordinarily, attribution within a statement itself, or implied from the surrounding circumstances, is strong evidence that the statement "was made by—and only by—the party to whom it is attributed." *Id*. This is tantamount to the relationship between a speechwriter and a speaker: "[e]ven when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes credit—or blame—for what is ultimately said." *Id*.

With respect to Rule 10b-5 claims against corporate officers, *Janus* restricts liability to "instances in which . . . those officers—as opposed to the corporation itself—had 'ultimate authority' over the statement." *U.S. S.E.C.*, 2011 WL 5980966, at *2 (citation omitted). A defendant has "ultimate authority" over a particular statement (and thus qualifies as a maker of that statement) when he or she has control over the content of the statement *and* whether and how to communicate it. *Janus*, 131 S. Ct. at 2302; *see also Hawaii Ironworkers Annuity Trust Fund v. Cole*, No. 3:10CV371, 2011 WL 3862206, at *3 (N.D. Ohio Sept. 1, 2011) ("*Hawaii Ironworkers*"), as amended (Sept. 7, 2011); *S.E.C. v. Radius Capital Corp.*, No. 2:11-CV-116-FTM-29, 2012 WL 695668, at *7 (M.D. Fla. Mar. 1, 2012) ("*Radius Capital*").

The Seventh Circuit applied this same reading of *Janus* to the present case on appeal: "as we understand *Janus*, [the purported maker of a statement] must have actually exercised control over the content of [the statements at issue] and whether and how they were communicated." *Glickenhaus*, 787 F.3d at 427.

ARGUMENT

I. There Is No Genuine Issue of Material Fact that Aldinger Did Not "Make" the Statements Contained in the FRC Presentation.

This is not a case in which the Court is asked to decide between competing factual accounts of the events at issue. In this case, the evidentiary record points in only one direction: Aldinger did not "make" the statements in the FRC Presentation as contemplated by *Janus.* That is because none of the statements in that Presentation were attributable to him, he did not control the content of the Presentation, and he did not control how (or whether) any of the statements in the Presentation were communicated. (*See* Local Rule 56.1(A)(3) Statement of Material Facts in Support of Aldinger's Motion for Partial Summary Judgment, ¶¶ 13-17 (hereafter "SOF")). Indeed, as the Seventh Circuit noted on appeal, Schoenholz concedes that he "made" the Presentation's statements. *See Glickenhaus*, 787 F.3d at 428.

A. Statements made in the FRC Presentation were not attributed, either explicitly or implicitly, to Aldinger.

In *Janus*, the Supreme Court stressed the importance of a statement's attribution, express or implied, when determining its maker: "in the ordinary case, attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by—*and only by*—the party to whom it is attributed." *Janus*, 131 S. Ct. at 2302 (emphasis added). It stands to reason, then, that the most obvious place to look for clues as to a statement's attribution is the statement itself.

First, there is no "attribution within a statement" to Aldinger anywhere in the FRC Presentation, which consists of statements and charts contained in PowerPoint slides. *Janus*, 131 S. Ct, at 2302; (SOF ¶ 15). Indeed, there is no evidence that Schoenholz, who delivered the Presentation, quoted or otherwise attributed any statement to Aldinger during the course of his presentation, and Aldinger's name and signature do not appear anywhere in the Presentation itself. (*Id*.); *see WM High Yield Fund v. O'Hanlon*, No. CIV.A. 04-3423, 2013 WL 3231680, at *3 (E.D. Pa. June 27, 2013) ("*O'Hanlon*") (applying *Janus* and finding that defendant did not "make" statements in audit opinions because, among other reasons, they did not bear his signature). Nor does the record reflect any testimony by Schoenholz attributing any part of the Presentation to Aldinger. Furthermore, the record is bereft of evidence that Aldinger endorsed or adopted as his own any of the Presentation's statements. *See O'Hanlon*, 2013 WL 3231680, at *8. In short, there is no evidence that any of the allegedly misleading statements in the Presentation were explicitly or publicly attributed to Aldinger. *See id*. at *4.

Likewise, none of the statements in the FRC Presentation are implicitly attributable to Aldinger. It was Schoenholz alone—not Aldinger—who delivered the Presentation at the FRC. (SOF ¶¶ 13, 17-18). And the Presentation bore a single name on its title page: Schoenholz's. (*Id*. ¶ 15). As *Janus* recognized, "the content [of a speech] is *entirely* within the control of the person who delivers it." *Janus*, 131 S. Ct. at 2302 (emphasis added). The presence of Schoenholz's handwritten notes, which were scattered throughout the Presentation, further underscores that it was Schoenholz—and not Aldinger—who controlled the Presentation:

> Q: "Throughout the [FRC Presentation], on most of the pages, there are handwritten notes. Were those notes written to guide you in your presentation?"
>
> A: "Those *were my notes* . . . the way I prepared to give this presentation, since I didn't use a script, prior to the presentation, *I would go through and write myself notes and review the notes before I gave the presentation*."

(SOF ¶ 17) (emphasis added). There is no evidence that Aldinger had any part in this process or that he made any contribution, direct or otherwise, to the Presentation's content.

The evidence also demonstrates that Aldinger's involvement with the Presentation was quite limited: Aldinger attended parts of Schoenholz's presentation but not all of it, he took no part in delivering the Presentation, and he did not introduce Schoenholz at the FRC. (SOF ¶¶ 13, 16). Rather, Aldinger's role was limited to conducting a "Q and A" with investors after Schoenholz delivered the Presentation and to providing an "overview of the company." (*Id.* ¶ 18). Plaintiffs presented no evidence of any allegedly false or misleading statements made by Aldinger during this Q and A, nor did the first jury assess liability against Aldinger for any statements made during the Q and A. (*Id.*). These circumstances further demonstrate that the statements at issue were made by, and only by, Schoenholz. *Janus*, 131 S. Ct. at 2302; *see O'Hanlon*, 2013 WL 3231680 (holding that an audit partner was not the maker of statements contained in audit reports where no false or misleading statement was publicly attributed to him and where the surrounding circumstances did not inform investors that he had anything to do with the audit opinions); *see also In re Fannie Mae 2008 Sec. Litig.*, 891 F. Supp. 2d 458, 472 (S.D.N.Y. 2012) (holding that underwriter-defendant did not have "ultimate authority" over misstatements when they were not attributed to it, despite any involvement defendant may have had in drafting the misstatements).

B. Aldinger did not have ultimate authority over the content of the FRC Presentation.

To hold Aldinger personally liable for misrepresentations made in the FRC Presentation not expressly attributed to him, Plaintiffs must show that he possessed ultimate authority over the content of those statements. *Janus*, 131 S. Ct. at 2302; *In re Pfizer Inc. Sec. Litig.*, 936 F. Supp.

2d 252, 268 (S.D.N.Y. 2013) ("*In re Pfizer*"). Plaintiffs cannot carry that burden because there is no evidence in the record to support it. In fact, the evidentiary record is to the contrary.

To begin with, Aldinger did not draft the FRC Presentation, as Schoenholz confirmed in his deposition: "[the FRC Presentation was prepared] primarily by the Corporate Finance people with input from Treasury, and was prepared heavily by the Corporate Credit Risk people, who would have had to work with the business units to compile that material . . ." (SOF ¶ 14). For instance, the Presentation contained an overview of Household's re-aging and charge-off policies (*id*. ¶ 15), which, according to Schoenholz, "would have been based on the input that we had from the Financial People and Credit Risk people in preparing this deck and reviewing this deck." (*Id*. ¶ 14). Similarly, information regarding "Restructuring Controls" was supplied by "the Credit Risk people who had prepared this portion of the presentation." (*Id*.). So too for key definitions used in other portions of the Presentation. (*Id*.) ("[T]he Credit Risk people chose that definition [of Recidivism], and to me it seemed like a reasonable definition.").

Indeed, the evidence makes clear that Aldinger had only a tenuous understanding of what the FRC Presentation contained. He was not involved in discussions related to the FRC. (SOF ¶ 15). He *might* have reviewed some of the presentations made at the FRC, but probably not all. (*Id*.). And while he was in favor, "at a very high level," of making more disclosures in the FRC Presentation, Aldinger did not decide—or direct others to decide—which specific disclosures to make. (*Id*.).[1] As Schoenholz himself testified, "*I would have had final approval* over what I presented." (*Id*. ¶ 17) (emphasis added).

[1] Even if Aldinger had been aware of alleged misrepresentations contained in the FRC Presentation, which he was not, Rule 10b-5 does not impose an obligation to correct such errors. *See Fulton Cty. Employees Ret. Sys. v. MGIC Inv. Corp.*, 675 F.3d 1047, 1051-52 (7th Cir. 2012) (holding that that Section 10(b) does not impose liability for a failure to correct another's

This set of facts comes nowhere close to the standard articulated by *Janus*—that the defendant must have "ultimate authority" over the statement's content. *Janus*, 131 S. Ct. at 2302. Consistent with that standard, courts since *Janus* have disallowed Rule 10b-5 claims against defendants who were far more involved in misstatements than Aldinger was here. As the court explained in one recent case rejecting Rule 10b-5 liability, it is not enough that a defendant "merely requested, influenced, helped create, or supplied information for the relevant false or misleading statements." *In re CytRx Corp. Sec. Litig.*, No. CV 14-1956-GHKPJWX, 2015 WL 5031232, at *6 (C.D. Cal. July 13, 2015) ("*In re CytRx*") (citing *Fulton County,* 675 F.3d at 1051 ("rejecting claim that 'by inviting Williams and Draghi to speak [on investor call] MGIC effectively "made" their statements itself'") and *Ho v. Duoyuan Global Water, Inc.*, 887 F.Supp.2d 547, 576 (S.D.N.Y.2012) (finding that auditor "had the final authority to decide whether an audit opinion was released to the public," while parent company's "sanctioning power [was] more consistent with mere influence rather than ultimate authority.")).

Aldinger did not do even *that* much with respect to the FRC Presentation. There is no evidence that he "requested, influenced, helped create, or supplied information" for the FRC Presentation—the record shows that he did not—let alone that Aldinger had ultimate authority over the Presentation itself. *See In re CytRx*, 2015 WL 5031232, at *7 (holding that "[w]ithout *specific allegations* about each [Defendant's] purported level of control over the drafting and release of each of the [published third-party articles], we cannot conclude that these Defendants had ultimate authority over the potentially actionable false statements . . .") (emphasis added). In short, Aldinger was not "ultimately responsible" for the FRC Presentation's content and therefore did not make any statements contained therein for purposes of Rule 10b-5 liability. *See*

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misrepresentations) ("*Fulton County*"); *Pomeroy v. GreatBanc Trust Co.*, No. 14 C 6162, 2014 WL 7177583, at *3 (N.D. Ill. Dec. 16, 2014), appeal dismissed (May 18, 2015) (same).

Hawaii Ironworkers, 2011 WL 3862206, at *5 (holding that complaint did not state a claim for primary liability under *Janus* because defendants did not have ultimate control over the content of the statement at issue).

Nor can Aldinger be deemed to have made the FRC Presentation by virtue of his presence in the room. Plaintiffs failed to appreciate this during closing arguments at the original trial, where they acknowledged that Schoenholz made the FRC Presentation's statements and noted as to Aldinger only that he was in the room: "[s]o, ladies and gentlemen, that's April 9th, 2002 [the FRC]. *Mr. Schoenholz* absolutely makes false statements about a host of things. Guess who's sitting there? Aldinger and Gilmer. They're watching." (SOF ¶ 16) (emphasis added). As set forth above, Aldinger's presence in the room at the conference is not a basis for Rule 10b-5 liability.

C. Aldinger did not have ultimate authority to determine whether or how statements contained in the FRC Presentation were made.

Aldinger also did not have ultimate authority to determine how or whether statements contained in the FRC Presentation would be made. As noted, Schoenholz testified that much of the information contained in the Presentation came from the corporate Credit Risk and Financial Departments (SOF ¶ 14), and there is no evidence that Aldinger played any role in determining how this material would be presented. Instead, the lack of a script and Schoenholz's handwritten notes on the Presentation suggest that Aldinger had nothing to do with its structure, content, or whether Schoenholz would deliver the Presentation at the FRC. (*Id*. ¶ 17); discussion *infra* at 5-10.

Finally, in analyzing whether an alleged maker has ultimate authority under *Janus*, some courts have required plaintiffs to identify a defendant's *specific role* regarding the false or misleading statements at the pleading stage (a burden that Plaintiffs cannot carry here even after

the close of discovery and the completion of trial). In *Radius Capital*, for example, the court dismissed a complaint that alleged a Rule 10b-5 claim against an executive for, among other things, making false statements in company prospectuses. 2012 WL 695668, at *1. The court identified the complaint's pleading deficiencies, noting that it failed to explain the "process by which prospectuses are issued and distributed [and]. . . [*m*]*ost glaringly, the Complaint does not explain the defendants' specific roles in this process*." *Id*. at *7 (emphasis added). Here, no evidence has been adduced to explain Aldinger's specific role with respect to the FRC Presentation or to any of the statements it contains. Consequently, there is no evidence that Aldinger had ultimate authority over those statements, and he is entitled to a summary judgment finding that he did not make them for purposes of Rule 10b-5 liability.

II. Aldinger "Made" the Household Press Releases in Question and, Therefore, There Is No Litigable Issue as to Whether Aldinger Was the Maker of Those Statements.

Courts interpreting *Janus* have consistently held company executives responsible for statements in press releases and public filings when such statements are made pursuant to the executives' responsibility and authority to act as agents of the company. *See In re Merck & Co., Inc. Sec., Derivative, & ERISA Litig.*, No. CIV.A. 05-1151 SRC, 2011 WL 3444199, at *25 (D.N.J. Aug. 8, 2011); *see also In re Pfizer*, 936 F. Supp. 2d at 268-69 (allowing claim to proceed based on allegations that company executive made statements in press releases); *In re Rocket Fuel, Inc. Sec. Litig.*, No. 14-CV-3998-PJH, 2015 WL 9311921, at *10 (N.D. Cal. Dec. 23, 2015) (same); *S.E.C. v. E-Smart Techs.*, Inc., 74 F. Supp. 3d 306, 319-20 (D.D.C. 2014), appeal dismissed (May 6, 2015) (holding that CEO made press-release statements where she approved them before they were issued). Similarly, here Aldinger is quoted throughout the Press Releases, in his role as Chief Executive Officer, discussing the state of the Company. (SOF

¶ 19). Aldinger therefore concedes that he "made" the statements attributed to him in the Press Releases under *Janus* and its progeny. Because application of the *Janus* standard does not change the first jury's conclusion that Aldinger "made" the statements in the Press Releases, no triable issue of fact remains with respect to whether Aldinger was the maker of those statements.

CONCLUSION

Accordingly, Aldinger asks this Court to enter an order of partial summary judgment finding that 1. Aldinger did not "make" the statements contained in the FRC Presentation; and 2. Aldinger "made" the Press Release Statements, leaving no remaining triable issue with respect to whether Aldinger was the maker of those statements.

Dated: February 24, 2016

Respectfully submitted,

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