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 Honorable Jorge L. Alonso

PLAINTIFFS' MOTION *IN LIMINE* TO OBJECT TO DEFENDANTS' PROPOSED VERDICT FORM, INCLUDING THEIR "QUESTION ONE" AND THEIR ATTEMPT TO ADD "DEFENDANTS' SPECIFIC DISCLOSURES MODEL" AS AN OPTION FOR THE JURY TO SELECT IN DETERMINING DAMAGES

PLAINTIFFS' MOTION *IN LIMINE* NO. 5

Plaintiffs respectfully submit this motion *in limine* to object to defendants' proposed Verdict Form, including their "Question One" and their attempt to add "Defendants' Specific Disclosures Model" as an option for the jury to select in determining damages.

I. INTRODUCTION

The jury in this trial will be tasked with deciding loss causation, damages, and proportionate liability. *See Glickenhaus & Co. v. Household Int'l*, 787 F.3d 408, 424 (7th Cir. 2015) ("*Glickenhaus*"). Use of defendants' proposed jury verdict form will unnecessarily complicate these issues, confuse the jury, and unfairly prejudice plaintiffs. Rather than make a unitary determination of whether defendants' fraud caused plaintiffs' losses under §10(b), defendants claim that the jury must make seventeen separate determinations. This is unnecessary, contrary to the law, and confusing. In fact, defendants requested a similar verdict form in the prior trial, and the court rejected their request. *See* Defendants' Verdict Form, Dkt. No. 1546-6; Court-approved Verdict Form (Dkt. No. 1611), Pretrial Order, Ex. H-8, Question Nos. 1 and 4; Trial Tr. at 4060:7-4061:3 (Jury Instructions Conference). Question No. 1 in Plaintiffs' Verdict Form is both appropriate and all that is necessary.

Defendants also list "Defendants' Specific Disclosures Model" as an option for the jury to select in estimating damages. However, defendants' expert's model cannot be submitted to the jury because it lacks any inflation-per-share analysis for the first eight months of the class period and, in any event, was untimely disclosed on the eve of trial after 14 years of litigation. Thus, it will be of no use to the jury.

In light of the foregoing and the Seventh Circuit's prohibition against verdict forms that will confuse or mislead the jury,[1] defendants' proposed Question One and Defendants' Special Disclosures Model should be excised from the verdict form.

[1] *See Happel v. Walmart Stores, Inc.*, 602 F.3d 820, 828 (7th Cir. 2010) (reversing verdict where verdict form confused and misled the jury about damages).

II. ARGUMENT

A. Defendants' Proposed Question One Is Confusing and Unnecessary

Defendants' proposed Question One requires the jury to determine, for ***each*** of the 17 misstatements the first jury found to be false, material and made with scienter, whether plaintiffs proved that their losses were caused by that specific false and misleading statement or omission. *See* Pretrial Order, Ex. H-8. Defendants' question needlessly burdens the jury by asking it to make seventeen separate findings of fact, when all that is required at this second trial is one: a determination of whether plaintiffs have proved defendants' ***fraud*** caused their losses.

In its opinion remanding this action for a new trial, the Seventh Circuit stated clearly that loss causation can be proven by showing that "the price of the securities [plaintiffs] purchased was 'inflated' . . . and that it declined since the truth was revealed." *See Glickenhaus*, 787 F.3d at 415 (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342-44 (2005)). This inquiry focuses not on the specific false statements that concealed defendants' fraud – for which defendants have already been found liable[2] – but on the disclosures plaintiffs claim revealed the truth and their impact on Household's stock price.[3] *See Glickenhaus*, 787 F.3d at 415 ("The best way to determine the impact of a false statement is to observe what happens when the truth is finally disclosed and use that to work backward . . . .").

It will be up to the jury to determine whether Household's share price decline resulted from artificial inflation caused by Household's fraud leaving the stock price, or from something else. However, asking the jury to determine whether each of the false statements ***caused*** that inflation serves no purpose; once it is determined that the stock price declines during the disclosure period were substantially caused by the removal of fraud-related inflation, plaintiffs will have proven loss causation. *See Dura*, 544 U.S. at 338 (loss causation established where plaintiff proves that defendant's fraud caused an economic loss). The jury then will be asked to estimate plaintiffs'

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[2] *See Glickenhaus*, 787 F.3d at 424 ("The defendants do not challenge the jury's misrepresentation findings, so the 17 actionable false statements are fixed . . . .").

[3] *See, e.g.*, Fischel Second Supplemental Report, ¶2 (Dkt. No. 2067-2) (noting that he would demonstrate loss causation by establishing that the revelation of the fraud caused Household's stock price to decline).

damages using the model that it believes most accurately estimates the fraud-related inflation in Household's share price for each day during the class period (beginning with defendants' first false statement on March 23, 2001). *See* Pretrial Order, Ex. H-8 (directing jurors, if they determine that ***any*** misstatement in defendants' proposed Question One caused plaintiffs' losses, to select a damages model to estimate damages). Fischel's damages models estimate what the true value of the stock price would have been had the truth about Household's fraudulent practices been known – in that way, whether one or ten of the actionable misstatements caused plaintiffs' losses, the inflation in the stock price would be fraud-related as soon as the first false statement was issued. *Glickenhaus*, 787 F.3d at 417 ("As soon as a lie is told, however, the inflation caused by the false statement becomes equal to the value of the truth (as measured by the model) because had the statement been truthful, the stock price would have done what it did do once the truth was revealed."); *id.* at 419 (noting that "Fischel's models calculated the effect of the truth, once it was fully revealed, and the jury found that the defendants concealed the truth through false statements. That is enough.").

The Seventh Circuit has already rejected defendants' divide-and-conquer approach to each of the statements found actionable by the jury:

> As soon as the first false statement was made, that overpricing became fully attributable to the false statement, even if the stock price didn't change at all, because had the statement been truthful, the price would have gone down by $23.94 – after all, that's what it did once the truth was fully revealed. Similarly, ***every subsequent false statement caused the full amount of inflation to remain in the stock price, even if the price didn't change at all***, because had the truth become known, the price would have fallen then.

Glickenhaus, 787 F.3d at 417-18 (emphasis added).

In its holding regarding the March 23, 2001 and March 28, 2001 statements, the Court of Appeals' analysis confirms that plaintiffs' proposed verdict form appropriately frames the issue for the jury. The Court of Appeals found that because the March 23rd statement only applied to predatory lending, the ***amount*** of the inflation-per-share on that date and the next two trading days should only include an estimate of disclosures related to predatory lending. *Id.* at 424. The Court also held that the March 28, 2001 false statement "covered all three bad practices." *Id.* at 423. Thus, once plaintiffs were able to show that the March 28, 2001 false statements covered all three bad

practices, there was no need to have a statement-by-statement parsing of loss causation. The fifteen false statements made after March 28, 2001 served only to maintain the inflation in Household's stock price. *See id.* at 417-18 ("every subsequent false statement caused the full amount of inflation to remain in the stock price, even if the [stock] price didn't change at all").[4] These rulings are the law of the case and cannot be challenged or re-litigated on remand – which is precisely what defendants' Question No. 1 tries to do. *United States v. Barnes*, 660 F.3d 1000, 1006 (7th Cir. 2011) (under the law of the case doctrine, "[i]f this Court remands to correct a 'discrete, particular error that can be corrected . . . without . . . a redetermination of other issues, the district court is limited to correcting that error'") (quoting *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996)). Even if the Seventh Circuit did not ***expressly*** state that on remand, a statement-by-statement loss causation finding would not be required; that notion is (at least) implicit in its overall discussion of the inflation – *i.e.*, the loss that defendants caused – being present once defendants made false statements about all three bad practices. *United States v. Adams*, 746 F.3d 734, 744 (7th Cir. 2014) (emphasis added) ("The law of the case doctrine . . . prohibits a lower court from reconsidering on remand an issue ***expressly or impliedly decided*** by a higher court absent certain circumstances.").

In short, there is no reason to subject each false statement to a separate inquiry with respect to loss causation. Requiring the jury to answer Question No. 1 for each false statement is unnecessary to establish loss causation or to estimate damages, risks confusing the jury and causing prejudice to plaintiffs, and contradicts the law of the case. It will also create a substantial risk of an inconsistent verdict. *See, e.g., Turyna v. Martam Constr. Co.*, 83 F.3d 178, 181 (7th Cir. 1996) (noting that general verdicts with special interrogatories "almost invite[] contradictory and inconsistent answers"); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 667 (7th Cir. 1985) ("As a rule civil juries must return consistent verdicts.").[5] Because defendants' proposed Question

[4] Thus, when the jury in the first trial found certain statements after March 28, 2001, to be inactionable, that determination had no impact whatsoever on the inflation.

[5] *See also Valley Air Serv. v. Southaire, Inc.*, No. 06 C 782, 2009 WL 2986376 (N.D. Ill. Sept. 15, 2009) (noting that inclusion of special interrogatories in addition to general verdict form invited inconsistency, and granting new trial because answers to special interrogatories conflicted with general verdict finding).

One runs afoul of the Court of Appeal's decision and will confuse the issue to be decided by the jury, it should be excluded from the verdict form.

B. Defendants' Specific Disclosures Model Does Not Fit the Purpose for Which It Is Being Tendered and So Should Not Be Included on the Verdict Form

As described above, once the jury finds that defendants' fraud caused plaintiffs' losses, it will then be asked to select a damages model created by Fischel, or alternatively to estimate plaintiffs' damages based on its review of the evidence. Specifically, the jury will determine what amount of inflation in Household's share price was caused by defendants' fraud on each of the days during the class period.[6] Defendants' Specific Disclosures Model will not allow the jury to make those determinations, as it cannot be applied to estimate damages across the entire class period; rather, Ferrell's Specific Disclosure Model omits inflation dates for eight months of the Class Period – March 23. 2001 to November 14, 2001.[7]

It is axiomatic that an expert's methodology must fit the facts of the case and the purpose for which it is being offered in order for that methodology to be presented to the jury. *See Hartman v. EBSCO Indus.*, 758 F.3d 810, 819 (7th Cir. 2014) (affirming exclusion of expert witness whose opinions did not "'fit the issue to which the expert [was] testifying'" and were not "'tied to the facts of the case'") (citation omitted); *Jones v. Nat'l Council of Young Men's Christian Ass'ns of the United States*, 34 F. Supp. 3d 896, 900-01 (N.D. Ill. 2014) (excluding expert testimony that was not "logically related to the factual context" of the case and so would not help factfinder decide claims);

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[6] If the jury selects either Plaintiffs' Leakage Model or Plaintiffs' Specific Disclosures Model, they will be directed to a table containing the per share losses for each day during the class period according to each model. *See, e.g.*, Proposed Pretrial Order, Ex. H-4, Question No. 2.

[7] Plaintiffs have separately moved to exclude Ferrell's opinions about his alternative damages model on the grounds that (1) his calculations are premised on assumptions that this Court has already rejected (namely, that company-specific, nonfraud related information was released during the disclosure period); (2) Ferrell first disclosed an alternative inflation calculation in his rebuttal report (he called it a "corrected" regression analysis which defendants now call their Specific Disclosure Model) making such opinion untimely and warranting exclusion under Rules 26(a) and 37(c); and (3) Ferrell failed to disclose the basis for selecting the peer group he used to perform the regression analysis that supports the model. *See* Plaintiffs' Omnibus Memorandum of Law in Support of Their Motion to Exclude Defendants' Experts (Dkt. No. 2128) at 5-10, 29-32. At the time plaintiffs' *Daubert* motion was filed, defendants had not expressed an intention to include Professor Ferrell's calculations on the jury verdict form as a damages model.

Kurncz v. Honda North Am., 166 F.R.D. 386, 390 (W.D. Mich. 1996) (excluding expert's damages opinion because "[t]he task faced by the jurors is defined by the instruction they will be given" and the expert's damages analysis did "not 'fit' that task"). Here, Defendants' Specific Disclosures Model satisfies neither "fit" requirement.

In designing the model, defendants' expert Ferrell calculated the maximum daily inflation in Household's stock for the period November 15, 2001, when the first specific disclosure of Household's fraud occurred, through October 11, 2002. *See* Ferrell Rebuttal Report, Dkt. No. 2074-3, Exhibit 8 (purporting to calculate the "maximum alleged inflation using the specific disclosure model"); Ferrell Depo. Tr. at 101:21-24)[8] (acknowledging that his calculations do not extend to the beginning of the class period).[9] However, damages in this matter will be estimated as of the date of the first false statement – March 23, 2001 – and thus defendants' model offers no estimation for the first eight months of the class period. *See, e.g., Glickenhaus*, 787 F.3d at 415 ("The best way to determine the impact of a false statement is to observe what happens when the truth is finally disclosed and use that to work backward [to the false statement].").

Ferrell's deposition testimony demonstrates his model's inadequacy for this task. Ferrell testified that "to go back [to the beginning of the class period], one would need to allocate that inflation, the $4.19, to the various material misrepresentations and omissions." Ferrell Depo. Tr. at 102:1-9.[10] He also explained that he did not perform this necessary second step:

> Q. Why is it your understanding that one would need to allocate?
>
> A. So my understanding of the damages and inflation exercise is there's different misstatements occurring at different points in time. So the 17 are spaced over time, and there could be different inflation for different misrepresentations because they're

[8] Attached as Ex. 1 to the Declaration of Luke O. Brooks in Support of Plaintiffs' Motions *in Limine*, filed herewith.

[9] Nor can Ferrell further develop and apply the framework he suggests in his expert rebuttal report. Any such belated opinions are untimely and inadmissible. *See* Fed. R. Evid. 26(a)(2); Fed. R. Evid. 37(c); *Baker v. Indian Prairie Community Unit*, No. 96 C 3927, 1999 WL 988799, at *3 (N.D. Ill. Oct. 26, 1999) (striking untimely expert opinions and data where failure to disclose was neither justified nor harmless).

[10] *See also* Ferrell Rebuttal Report, ¶¶99-100 (suggesting that actual inflation would lie between $0 and $4.19 per share during the disclosure period, but that further calculations may need to be done to determine the amount of inflation in the share price at any given time).

> occurring at different points. So the level of inflation could potentially be different as of the first misrepresentation relative to the last misrepresentation, because – you know, because there's 17 by that point versus one. And the nature of the misrepresentation varies.
>
> Q. And you haven't looked at the nature of the misrepresentation to determine what's appropriate, is that right?
>
> A. That's correct.

Ferrell Depo. Tr. at 102:23-103:19.

Ferrell believed that it was not part of "his job" when responding to Fischel's Specific Disclosures Model to allocate share price inflation during the class period, and that it was, instead, plaintiffs' burden to do so.[11] Ferrell Depo. Tr. at 103:19-104:1; Ferrell Rebuttal Report, ¶100 (noting that neither inflation calculation he performs "attempts to allocate that inflation among different alleged misrepresentations"). However, it is not plaintiffs' burden to make defendants' flawed damages model usable for the jury. Because defendants' model will not provide the jury with ***any*** usable data on Household share price inflation for the first eight months of the class period, it does not fit the purpose for which it is being offered, and should be excluded. *See* Ferrell Rebuttal Report, Ex. 8. *See also ATA Airlines, Inc. v. Fed. Express Corp.*, 665 F.3d 882, 896 (7th Cir. 2011) (permitting flawed damages model to be presented to jury was reversible error because expert testimony "unintelligible to the trier or triers of fact has no place in a trial").

III. CONCLUSION

For the reasons stated above, plaintiffs respectfully request an Order rejecting defendants' Verdict Form, in particular defendants' proposed Question One and their insistence on providing the jury with an option to select Defendants' Specific Damages Model.

[11] From his testimony, it appears that Ferrell did not believe he was tasked by defendants with creating a ready-to-use damages model; instead, he performed his calculation with the goal of rebutting certain inflation figures put forth by Fischel. *See* Ferrell Depo. Tr. at 103:19-104:1 (claiming it was not his burden to perform an "allocation exercise" and that his "role was to assess . . . Professor Fischel's analysis").

DATED: April 22, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2016, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses for counsel of record denoted on the attached Service List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 22, 2016.

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