

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

LAWRENCE E. JAFFE PENSION PLAN, On ) Behalf of Itself and All Others Similarly ) Situating, )  Plaintiff, )  vs. )  HOUSEHOLD INTERNATIONAL, INC., et ) al., )  Defendants. ) _____ )	)	Lead Case No. 02-C-5893 (Consolidated)  <u>CLASS ACTION</u>  Honorable Jorge L. Alonso
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**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION *IN LIMINE* NO. 3 TO  
EXCLUDE PLAINTIFFS' EXPERT FROM EXPRESSING OPINIONS NOT  
PREVIOUSLY DISCLOSED**

## **I. INTRODUCTION**

Defendants' Motion *in Limine* ("MIL") No. 3 (Dkt. No. 2148) to exclude plaintiffs' expert Professor Daniel R. Fischel ("Fischel") from expressing opinions not previously disclosed should be denied. Defendants claim that Professor Fischel indicated at his February 24, 2016 deposition that he would opine on additional specific disclosure and leakage dates that were not included in his prior reports. Defendants' argument is misplaced because Professor Fischel's deposition testimony was entirely consistent both with his opinions in his prior reports and his trial testimony.

With respect to the Specific Disclosures Model, Fischel testified at trial (and stated again in his post-trial report) that if he used the 93 additional fraud-related dates identified by defendants' prior loss causation expert (Bajaj), inflation per share would increase from \$7.92 to approximately \$15 per share. Fischel also testified that he could have used additional statistically significant fraud-related dates identified in his Second Supplemental Report in his Specific Disclosures Model but did not include them in the model. Thus, his deposition testimony that he could have used these additional disclosures in his Specific Disclosures Model is not new, and is consistent with his prior reports.

Defendants' contention that Fischel's testimony at his deposition that the leakage of defendants' fraud was "continuous," "a stream of information," and massive or extreme is somehow new and improper is also without merit since it is almost verbatim how he described leakage in two of his reports and at trial. Defendants had every opportunity to elicit each disclosure the "stream of information" included, but failed to do so and, in any event, they are all included in his reliance materials. Thus, Fischel is free to testify about them. Furthermore, in attempting to restrict Fischel to certain leakage disclosures, defendants fail to note many of the leakage disclosures identified in Fischel's reports and Household's own documents that Fischel referenced in his reports and at trial. Finally, Fischel discussed the leakage of the contents of the Washington DFI report over a period of time (not on particular dates), as well as leakage of a possible settlement with the State Attorney Generals over a period of time. Defendants' MIL to restrict Fischel's testimony is baseless and should be denied.

## II. ARGUMENT

Professor Fischel's statements at his February 26, 2016 deposition were consistent with the opinions he rendered in his six reports and trial testimony. Professor Fischel did not claim at his deposition that he was planning on testifying about anything that was not previously disclosed to defendants.

At the outset, defendants ignore a host of disclosure dates specifically identified by Fischel in his reports and trial testimony. Defendants fail to include additional leakage disclosures and events identified in ¶28 of the Report of Daniel R. Fischel (Dkt. No. 2067-3); ¶16 of the Rebuttal Report of Daniel R. Fischel (Dkt. No. 2067-5); and ¶¶13-16, 24-26, 34-35, 43, 47, 53-55, 62-63, 65, 83-85, 88-89, 90-93, 96-99 and 107 of the Second Rebuttal Report of Daniel R. Fischel (Dkt. No. 2067-1). Fischel's Second Rebuttal Report also points out that defendants admitted that the leakage of the fraud hurt Household's stock price and incorporated Household's own internal documents that attributed leakage to Household's stock price decline. Second Rebuttal Report at 6 & n.13. Fischel testified at trial about the Investor Relations reports and other Household documents that support leakage (Trial Tr. at 4311:17-4319:4),<sup>1</sup> and incorporated that and all of his trial testimony into his Second Supplemental Report at page 1 n.1. *See* Second Supplemental Report of Daniel R. Fischel (Dkt. No. 2067-2) at 4-5 n.6.

Defendants claim that Fischel said for the first time in his deposition that additional dates could be used in the estimate of per share inflation in his Specific Disclosures Model. Defs' MIL at 4. Yet, this testimony is consistent with his trial testimony that he was being "conservative" and could have included additional dates in his Specific Disclosures Model – including fraud-related dates identified by defendants' prior expert Bajaj. Trial Tr. at 2628:22-2629:12. Fischel expressly incorporated this testimony (and all of his other trial testimony) into his Second Supplemental Report (*see* page 1 n.1). Fischel's deposition testimony that additional statistically significant fraud-related dates identified in his September 22, 2015 Second Supplemental Report could have been

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<sup>1</sup> Relevant excerpts from the 2009 Trial Transcript are attached as Ex. 1 to the Declaration of Luke O. Brooks in Support of Plaintiffs' Oppositions to Defendants' Motions *in Limine*, filed herewith.

used in his Specific Disclosures Model is thus consistent with his reports and trial testimony. Fischel is not attempting to add additional dates to his Specific Disclosures Model or change the inflation under the Model, but nothing prohibits him from testifying that he could have used these dates but did not, and instead they support his Leakage Model.

Defendants' claim that Fischel first raised in his deposition his description of leakage as "continuous" or a "stream of information" or "extreme" (*i.e.*, substantial) is flat out wrong. One only has to look at his initial pretrial reports, served eight years ago, where he "provided numerous examples of news articles and commentary by market participants which demonstrate that a 'steady stream' and 'extensive' amount of incomplete information related to Defendants' alleged fraud was disclosed beginning at least as early as November 15, 2001." Fischel Rebuttal Report (February 1, 2008) at 2-3 (citing Fischel Report). Fischel also stated in his November 23, 2015 Second Rebuttal Report that there was "**substantial**" evidence of leakage of the fraud in this matter, including a "**continuous**" flow of information about the fraud that "occurred in the face of ongoing Company denials." Fischel Second Rebuttal Report at 4-5.<sup>2</sup> This opinion, and its admissibility, was unchallenged on appeal. It is supported by the scores of fraud-related disclosures cited in Fischel's six reports, and in the reliance materials disclosed in the reports and turned over to defendants.

Fischel's Second Rebuttal Report also stated: "[C]onsistent with a **continuous flow of fraud related leakage** and as I testified at trial, Defendants themselves produced an analysis at trial identifying 93 days on which fraud-related information was disclosed during the Leakage Period." *Id.* at 5 & n.12. Thus, defendants are wrong in claiming that Fischel never opined about "close to 100 fraud-related events" used by Bajaj at the trial. Fischel testified at trial about Bajaj's analysis of 166 fraud-related dates that were included in a demonstrative (D-799) that Bajaj used at trial (*see* Trial Tr. at 4237:13-4238:14), that would result in approximately \$15 of artificial inflation under the Specific Disclosures Model. *See* Trial Tr. at 2628:22-2629:9. Fischel also identified this analysis in

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<sup>2</sup> At trial, Fischel referred to the leakage as "pervasive," "so much leakage" (Trial Tr. at 2675:24-2676:8); "came across a lot of information" (*id.* at 2685:19-23); "a cascade of negative information that came out about Household" (*id.* at 2671:23-24); and "tremendous amount of leakage of information about the Washington Department of Financial Institutions report, about the possibility of a settlement, about the need for Household to reform its sales practices." (*id.* at 2672:7-15). Again, this testimony is part of Fischel's reports.

his Second Rebuttal Report, which included the fact that using the 93 of the 166 days identified by Bajaj at trial where fraud-related information was disclosed during the Leakage Period would increase inflation in his Specific Disclosures Model to \$15 per share. *Id.* at 5 n.12. Thus, defendants are flat out wrong that “this information [was not] included in any written report Professor Fischel has disclosed to Defendants.” *See* Defs’ MIL No. 3 at 4 n.2. The opposite is the case. Defendants know the 93 fraud-related dates since they are included on the demonstrative (D-799) they used at trial. Fischel testified that he did not include these fraud-related dates but if he did, inflation would have increased under his Specific Disclosures Model. In sum, Fischel’s deposition testimony is entirely consistent with his opinions in his reports and his testimony at trial. Defendants’ motion is without merit and should be denied.

### III. CONCLUSION

For the reasons set forth herein, defendants’ MIL should be denied.

DATED: May 6, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 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 May 6, 2016.

s/ Luke O. Brooks

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