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

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION *IN LIMINE* NO. 2

Plaintiffs' Motion *in Limine* No. 2 argues, in essence, that all evidence, statements, or inferences favorable to Plaintiffs in this retrial should be presented to the jury devoid of context, and that any evidence, statement, or inference favorable to the Defendants must be precluded. That unprincipled request should be rejected.

Plaintiffs first seek to preclude Defendants from relitigating the elements of falsity, materiality, scienter, or reliance. To be clear, Defendants agree that *neither* party should be permitted to relitigate these issues. Consistent with the guidance of the U.S. Court of Appeals for the Seventh Circuit and of this Court, the retrial is limited to the issues of loss causation; the amount of per share damages, if any; and the allocation of responsibility among the four defendants. *See Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 423, 429 (7th Cir. 2015); Dkt. 2042 at 2 (Order).[1] The introduction of evidence not relevant to those elements would unfairly prejudice Defendants, waste time, and mislead and confuse the jury. *See* Dkt. 2145 (Defendants' Motion *In Limine* No. 1).

Plaintiffs, however, seek to introduce numerous exhibits and witness testimony relevant only to those elements that already were decided by the first jury, parading before the new jury a slew of irrelevant, misleading, and confusing evidence, seemingly intended only to prejudice Defendants. *See, e.g.*, Dkt. 2133 (Plaintiffs' Motion *In Limine* No. 1); *see also* Dkt. 2151-4 (Plaintiffs' Proposed Statement of the Prior Proceedings To Be Read and Given to the Jury). At the same time, Plaintiffs seek to preclude Defendants from introducing any evidence that would put Plaintiffs' proposed presentation into context. The Court should not admit the irrelevant

[1] The Seventh Circuit also contemplated a retrial on the issue of whether the three individual defendants "made" certain misstatements. *Glickenhaus*, 787 F.3d at 429. That issue has been resolved by stipulation. Dkt. 2122 (Stipulation); Dkt. 2123 (Minute Entry).

evidence Plaintiffs seek to introduce. *See* Dkt. 2145. But if it does, fundamental fairness requires that Defendants be allowed to present their own evidence, not to challenge the previous jury findings, but to ensure that the jury is presented with a balanced view of the evidence.

Plaintiffs also ask the Court to deem the "findings from the prior proceedings" uncontested and to permit Plaintiffs "to rely on them for any purpose at the retrial." Dkt. 2134 at 5 (Plaintiffs' Motion *In Limine* No. 2).[2] Defendants agree that the actual *express findings* from the prior proceedings—namely, the findings by the jury on the verdict form, including both those statements the jury determined were false and made with scienter and those it did not—along with stipulations agreed upon by the parties for purposes of the retrial, should be deemed uncontested and presented to the jury. Defendants oppose, however, Plaintiffs' mischaracterization of statements in the Seventh Circuit's opinion and this Court's *Daubert* opinion as additional or supplemental "findings" that are binding on the second jury. None of these statements constitutes "findings," and it would be highly prejudicial and confusing to allow the Plaintiffs to present them as such to the jury.

A. Neither Party Should Be Permitted to Relitigate the Elements of Falsity, Materiality, Scienter, or Reliance.

The elements of a claim for violation of Section 10(b) of the Securities Exchange Act and Rule 10b-5 are "(1) a material misrepresentation or omission by the defendants; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Glickenhaus*, 787 F.3d at 414 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct.

[2] It is unclear for what purpose Plaintiffs intend to use this information at the retrial. Defendants reserve their rights to object to Plaintiffs' use of stipulated factual findings should they attempt to do so in a manner that is unfairly prejudicial, misleading, confusing, wastes time, or otherwise violative of the Federal Rules of Evidence.

2398, 2407 (2014)). Rulings of the Seventh Circuit and this Court leave no question as to which of these elements are at issue in the retrial: loss causation and economic loss—or "the amount of inflation caused by each of the 17 misrepresentations at issue." Dkt. 2042 at 1 (Order).[3] What is *not* at issue is equally clear: scienter, reliance, and the fact that the jury found that 17 out of 40 alleged misstatements were false and material, and the remaining 23 were not. *Id.*; *see MCI Commc'ns Corp. v. AT&T Co.*, 708 F.2d 1081, 1168 (7th Cir. 1983) (explaining that, in a partial retrial, "[i]t is critical to realize what issues have not been remanded"). These findings are law of the case. *See, e.g.*, *Roboserve, Inc. v. Kato Kagaku Co., Ltd.*, 121 F.3d 1027, 1031 (7th Cir. 1997) (observing that "the most elementary application of the doctrine of law of the case" is "to comply with the rulings of the appellate court" (citation omitted)).

It follows, therefore, that each party's argument and presentation of evidence should be limited to that which pertains to loss causation or inflation. *See, e.g.*, *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 16 (2d Cir. 1996) (finding that, during a trial on damages, "[o]nly evidence relevant to that issue should have been admitted"). Indeed, Defendants have filed a motion to preclude Plaintiffs from introducing evidence that is not relevant to loss causation or inflation, Dkt. 2145, and are prepared to abide by the same rule. Nor have Defendants provided any indication that they intend to "suggest that plaintiffs have not proven" falsity, materiality, scienter, and reliance. Dkt. 2134 at 4. To the contrary, Defendants have submitted a stipulated statement to be read to the jury that would summarize the findings and evidence regarding the issues of falsity, scienter, materiality, and reliance, obviating the need for live testimony or argument on these issues. *See* Defendants' Opposition to Plaintiffs' Motion *In*

[3] The jury will also be asked to allocate responsibility among the four defendants. *Glickenhaus*, 787 F.3d at 429.

Limine No. 1, Ex. A.[4] This approach is consistent with the Seventh Circuit's suggestion that, in a partial retrial, "stipulations be heavily relied upon by the parties." *MCI Commc'ns*, 708 F.2d at 1168.

Plaintiffs, on the other hand, argue they should be permitted to introduce *any and all* evidence they wish, relating to any element of their claim, while Defendants alone should be hamstrung in their presentation of evidence. *See* Dkt. 2133; Dkt. 2134. They contend that Defendants "should be precluded from making arguments or introducing evidence that contradicts the first jury's and the Seventh Circuit's findings" and claim that a significant number of Defendants' exhibits are designated for this purpose. Dkt. 2134 at 4-5. Plaintiffs have it backwards. As explained, Defendants *only* intend to introduce evidence related to falsity, materiality, scienter, or reliance if Plaintiffs are permitted to introduce evidence of these same elements of the fraud.[5] If Plaintiffs are allowed to adduce such information, however, Defendants must be permitted, in kind, to present the jury with a fair picture of the basis for the first jury's findings.

Upon reading Plaintiffs' submissions, one would think that the jury in the first trial gave no weight to the defense presentation, and found all of Plaintiffs' allegations to be true. That is not the case. That jury found that Plaintiffs had demonstrated that fewer than half—17 out of 40—of the alleged misstatements were false and material. *See* Dkt. 1611 (Jury Verdict Form).

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[4] Plaintiffs have submitted their own Statement of the Prior Proceedings To Be Read and Given to the Jury *as a supplement to*, not in place of, the introduction of evidence and argument regarding these issues. Dkt. 2151-4. As explained in the Opposition to Plaintiffs' Motion *In Limine* No. 1, Defendants object to this statement as unfairly prejudicial, misleading, and confusing to the jury. Defendants further object to this statement being read and given to the jury in addition to the presentation of evidence.

[5] If Plaintiffs are precluded from introducing such evidence, Defendants do not intend to use 103 of the exhibits currently included on their exhibit list. *See* Dkt. 2151-8 ([Proposed] Final Pretrial Order, Ex. C-2).

The jury further found that Defendants Gilmer, Schoenholz, and Aldinger were responsible only for certain misstatements, and that only Household and Aldinger acted knowingly with respect to a single misstatement. *See id.* In light of the jury's mixed findings, if Plaintiffs are permitted to introduce evidence and make arguments regarding the scope and motivation for the fraud, Defendants must be allowed to contextualize this information. *See* Defendants' Opposition to Plaintiffs' Motion *In Limine* No. 1. To hold otherwise would be unfairly prejudicial and misleading, as the jury in the retrial would be presented with a lopsided presentation, with a thumb on the Plaintiffs' side of the scales, rather than the complete picture on which the first jury based its decision.

Plaintiffs further seek to preclude Defendants from "adducing evidence, testimony, or making arguments concerning the truth on the market." Dkt. 2134 at 4. Defendants have no intention of revisiting the truth-on-the-market defense at the retrial—that is, they will not offer evidence or argument to prove that "a misrepresentation is immaterial" because "the information is already known to the market." *Ganini v. Citizens Utilities Co.*, 228 F.3d 154, 167 (2d Cir. 2000). When certain information was known to the market is also pertinent to loss causation, however. If the revelation of fraud occurred long before or after a statistically significant stock price drop, for example, that information could be probative of what caused investors' losses. *See, e.g.*, *Tricontinental Indus., Ltd. v. Anixter*, 313 F. Supp. 2d 788, 789-90 (N.D. Ill. 2004) (finding no loss causation when a stock price drop occurred long after the revelation of fraud). Defendants should be permitted, therefore, to present evidence concerning when certain information was known to the market to the extent that such evidence concerns loss causation.

Defendants contend that neither party should be allowed to present evidence at the retrial that is not relevant to loss causation or economic loss. Plaintiffs apparently disagree. If

Plaintiffs are permitted to do so, Defendants must be allowed to offer a complete picture of the underlying evidence related to falsity, scienter, materiality, and reliance.

B. The First Jury's Findings Should Be Deemed Uncontested and Presented to the Jury in the Retrial.

Plaintiffs next attempt to have this Court "deem[] uncontested" three types of statements they characterize as "findings from the prior proceedings": (1) statements from the Seventh Circuit opinion, (2) findings made by the jury in the first trial and not contested on appeal, and (3) a statement from this Court's Memorandum Opinion and Order denying Defendants' *Daubert* motion to exclude the testimony of Professor Daniel Fischel. Dkt. 2134 at 5-7. Only the statements in the second of these categories are properly characterized as findings of fact. The other two categories are not. Accordingly, Defendants do not object to all of the first jury's findings of fact being deemed uncontested—including the fact that the jury found that Plaintiffs failed to prove the falsity or materiality of 23 alleged misstatements—but oppose Plaintiffs' attempts to misconstrue other statements as factual findings.

First, the statements from the Seventh Circuit opinion that Plaintiffs seek to "deem uncontested" cannot be treated as binding in light of the fact that they all concern an issue that was *remanded* for a new trial. When a case is remanded with respect to a particular issue, "the case goes back to the trial court and there stands for a new determination of the issues presented as though they had not been determined before." *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 950 (3d Cir. 1985). The appellate court's statements of law, of course, become the law of the case, *id.*, but what Plaintiffs seek to introduce here are the appellate court's statements regarding factual questions pertinent to loss causation that the jury will be asked to determine on remand. Because both the Seventh Circuit and this Court found that "[a] new trial [was]

warranted on the loss-causation issue," the jury should be allowed a clean slate from which to make its loss-causation determinations. *Glickenhaus*, 787 F.3d at 423; Dkt. 2042 at 1-2.

Plaintiffs should also be precluded from utilizing the Seventh Circuit's statements for a separate and equally forceful reason: an appellate court's factual narrative is not the law of the case and is not binding on remand. *Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1289, 1293 (11th Cir. 2010). Plaintiffs offer no explanation why this Court should treat it as such.

Even if this Court determines that some of the Seventh Circuit statements Plaintiffs selectively highlight are "findings of . . . law," as they claim, it would be inappropriate for *Plaintiffs* to present them to the jury, and they have cited no case law that suggests otherwise. Dkt. 2134 at 5. It is axiomatic that the Court is the only source of the law in a jury trial. *See Federal Civil Jury Instructions of the Seventh Circuit*, Appendix, "Introductory Paragraphs" (2015) ("One of my duties is to decide all questions of law and procedure. From time to time during the trial and at the end of the trial, I will instruct you on the rules of law that you must follow in making your decision."). Allowing the Plaintiffs to quote from or otherwise use the Seventh Circuit opinion would confuse the jury about the proper roles of attorneys and the Court. *See United States v. Willis*, 277 F.3d 1026, 1033 (8th Cir. 2002) ("[I]ntroduction of . . . judicial opinions would have had a high potential to confuse the jury and conflict with the court's responsibility to instruct on the law."). For all of these reasons, statements from the Seventh Circuit opinion should not be "deemed uncontested," and Plaintiffs should not be "permitted to rely on them for any purpose at the retrial." Dkt. 2134 at 5.[6]

[6] Statements number 3 and 4 misquote the Seventh Circuit opinion. *See* Dkt. 2134 at 6. Without indicating that they did so, in statement number 3, Plaintiffs replaced the phrase "what the plaintiffs had to prove," *Glickenhaus*, 787 F.3d at 419, with "[a]t a prior proceeding, plaintiffs proved," Dkt. 2134 at 6. Likewise, without acknowledgement, in statement number 4, they replaced the phrase "[s]imilarly, every *(cont'd)*

Second, Defendants do not contest that the four findings affirmed by the Seventh Circuit that Plaintiffs highlight may be "deemed uncontested." *See* Dkt. 2134 at 6. In fact, Defendants include a number of these findings in their Proposed Short Description of Case To Be Read to Prospective Jurors. *See* Dkt. 2151-3 ([Proposed] Stipulated Pretrial Order, Ex. B-2). Defendants request, however, that the jury be presented with a full picture of the jury findings affirmed by the Seventh Circuit, including that the jury rejected 23 of 40 alleged misstatements. *Glickenhaus*, 787 F.3d at 429 ("Of course, the plaintiffs likewise can't relitigate the other 23 statements.").

Plaintiffs' contention that such information is irrelevant, prejudicial, or that Defendants would try to use such information to "improperly suggest to the jury that if some claims were insufficient, then others must be suspect as well," is unfounded. Dkt. 2134 at 8. Rather, the first jury's rejection of 23 alleged misstatements is relevant to a live issue in the retrial: loss causation. Specifically, the fact that Professor Fischel did not materially change either of his quantifications of inflation to account for the first jury's findings—including that certain alleged misstatements were not false—is relevant to the second jury's evaluation of Professor Fischel's opinions. Professor Fischel based his opinions regarding loss causation and inflation on the *assumption* that Plaintiffs' allegations of 40 misstatements were correct. *See, e.g.*, 2009 Trial Tr. 2602:18-23 ("I assumed that the defendants did make false statements during the relevant period in order to perform my quantifications."); *id.* at 2849:11-14 (Q. " . . . Now you assume, do you not, that plaintiffs can prove that Household's statement on August 16, 1999, was false or misleading?" A. "Correct. All of my opinions are based on that assumption."). Although the

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subsequent false statement," *Glickenhaus*, 787 F.3d at 418, with "[e]very false statement after March 28, 2001," Dkt. 2134 at 6.

first jury found that Plaintiffs had not met their burden with respect to 23 of the 40 alleged misstatements, Professor Fischel has not adjusted his quantifications of inflation. *See* Fischel Dep. Tr. 9:5-22:11 (Q. "So you haven't used this verdict form in any way in creating your damages models?" A. "I have not. My damages models predated the existence of this form."). Defendants are entitled to raise this defect in Professor Fischel's analysis during cross-examination. The 23 rejected alleged misstatements are therefore relevant to the jury's assessment of Professor Fischel's opinions and the assumptions on which they are based. *See Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 808 (7th Cir. 2013) ("The reliability of data and assumptions used in applying a methodology is tested by the adversarial process and determined by the jury . . . .").

Moreover, it is necessary to inform the jury of the entirety of the findings from the past trial to present a fair picture of the prior proceedings, rather than one that misleadingly favors Plaintiffs. Prejudice would be created, rather than ameliorated, by excluding the fact of the jury's rejection of 23 of 40 alleged misstatements.

Third, Plaintiffs attempt, once again, to usurp the role of the jury by falsely characterizing this Court's view, expressed in its *Daubert* opinion, as a "factual finding," and make it binding upon the jury. Dkt. 2134 at 7. But courts do not make factual findings in ruling on a *Daubert* motion. *See, e.g., Stollings v. Ryobi Techs., Inc.*, 725 F.3d 753, 765 (7th Cir. 2013). Instead, "[t]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions . . . are factual matters to be determined by the trier of fact, or, where appropriate, on summary judgment." *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000); *see also Manpower*, 732 F.3d at 808-10. For this reason, there is no basis for the Court to

"deem uncontested" any statement from the *Daubert* opinion, or to permit Plaintiffs to use it "for any purpose." Dkt. 2134 at 7.

CONCLUSION

Because the retrial is limited to two narrow issues—loss causation and economic loss—the Court should preclude all parties from introducing evidence that relates to any other issue. The Court should reject Plaintiffs' attempts to introduce any and all evidence that they wish regarding uncontested issues, while preventing Defendants from putting on a responsive case. Finally, this Court should categorize as uncontested factual findings *only* statements from the jury verdict form that were affirmed by the Seventh Circuit—including the fact that the jury rejected 23 of 40 alleged misstatements.

Dated: May 6, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

R. Ryan Stoll, an attorney, hereby certifies that on May 6, 2016, he caused true and correct copies of the foregoing Memorandum in Opposition to Plaintiffs' Motion *In Limine* No. 2 To (1) Preclude Defendants from Relitigating Falsity, Materiality, Scienter, and Reliance; (2) Deem the Findings from the Prior Proceedings Uncontested; and (3) Preclude Reference to Dismissed Statements to be served via the Court's ECF filing system on the following counsel of record in this action:

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