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. 5

Plaintiffs' Motion *In Limine* No. 5 asks the Court to strike "Question One" and "Defendants' Specific Disclosures Model" from Defendants' Proposed Jury Verdict Form. Mot. at 1. The Court should deny Plaintiffs' Motion because: (i) this Court already has decided, correctly, that the jury must determine whether each of the 17 misstatements found by the first jury caused any loss to class members; and (ii) there is no basis to preclude the jury from considering Defendants' Specific Disclosures Model.

ARGUMENT

A. This Court Already Correctly Held that the Jury Must Determine Whether Each of the 17 Misstatements Caused Household's Stock Price To Be Inflated.

Plaintiffs ask this Court to strike "Question One" from Defendants' proposed Verdict Form. "Question One" asks the jury to answer the following question with respect to each of the 17 established misstatements: "Have plaintiffs proven that defendants' misstatements or omissions caused plaintiffs' economic loss?" Dkt. 2157-27. The Court should deny Plaintiffs' request to strike "Question One" because the Court already held, correctly, that the jury must

determine whether each of the 17 misstatements caused economic loss.

Following the Seventh Circuit's remand, this Court asked the parties to submit their views regarding the scope of the retrial. Dkt. 2032. Plaintiffs argued that the retrial should be limited to a determination by the new jury of: (1) whether Plaintiffs' loss causation expert, Daniel Fischel, "adequately accounted for company-specific non-fraud factors," and (2) the amount of damages Plaintiffs could prove for March 23, 26, and 27, 2001. Dkt. 2042 at 1. Defendants contended that the issues to be tried were: (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 rejected Plaintiffs' position and unambiguously stated: "The court agrees with defendants." *Id*.

The Court's ruling is correct as a matter of law. The plain language of the Private Securities Litigation Reform Act (the "PSLRA"), and the Supreme Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336 (2005), make clear that loss causation must be pleaded and proven with respect to *each* misstatement or omission. *See* 15 U.S.C. §78u-4(b)(4) ("In any private action arising under this chapter, the plaintiff shall have the burden of proving that *the act or omission* of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages." (emphasis added)); *Dura*, 544 U.S. at 341-42 (defining "loss causation," as "a causal connection between *the material misrepresentation* and the loss" (emphasis added)).

In accordance with the PSLRA and *Dura*, courts require securities fraud plaintiffs to plead and prove loss causation as to *each* material misrepresentation or omission. *See, e.g.*, *Alpha Mgmt. Inc, v. Last Atlantis Capital Mgmt., LLC*, No. 12 C 12 C 4642, 2012 WL 5389734, at *5 (N.D. Ill. Nov. 2, 2012) (stating that, on a motion to dismiss, "the court will evaluate

whether each . . . statement was material, whether it was made in connection with the sale or purchase of the Share Class I-2 investments, and whether Alpha has adequately pleaded scienter, reliance, *and loss causation in connection with each statement*" (emphasis added)); *In re Northfield Labs., Inc. Sec. Litig.*, No. 06 C 1493, 2008 WL 4372743, at *6 (N.D. Ill. Sept. 23, 2008) ("The Court considers, next, whether plaintiffs have adequately plead loss causation with respect to each of the statements plaintiffs have adequately alleged to be materially false or misleading."); *see also, e.g.*, *In re Colonial Bancgroup, Inc. Sec. Litig.*, 9 F. Supp. 3d 1258, 1270 (M.D. Ala. 2014) ("Pursuant to the PSLRA, Plaintiffs must also shoulder the burden of proving that each alleged misrepresentation or omission caused the loss for which Plaintiffs seek to recover damages." (citing 15 U.S.C. §78u-4(b)(4))); *Sood v. Catalyst Pharm., Partners Inc.*, No. 13-cv-23878-UU, 2014 WL 1245271, at *5 (S.D. Fla. Mar. 25, 2014) ("The Court must determine whether Plaintiffs sufficiently allege all six element[s] as to each of the five alleged misrepresentations."); *Prissert v. Emcore Corp.*, 894 F. Supp. 2d 1361, 1374 (D.N.M. 2012) ("The sixth element of a private securities fraud action, loss causation, requires that a plaintiff show that each alleged misrepresentation or omission proximately caused the plaintiff's economic loss." (citing 15 U.S.C. § 78u-4(b)(4))).

There is no merit to Plaintiffs' suggestion that Seventh Circuit in this case held that loss causation need not be established with respect to each misstatement. Mot. at 2. Plaintiffs assert that the Seventh Circuit in this Court stated that "loss causation can be proven by showing that 'the price of the securities [plaintiffs] purchased was "inflated". . . and that it declined once the truth was revealed.'" *Id.* (quoting *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 415 (7th Cir. 2015).) By this partial quote, Plaintiffs try to eliminate the requirement that the decline in a company's stock price be tied to a misrepresentation. But what the Seventh Circuit actually

stated was that, to prove loss causation, "the plaintiffs had the burden to establish that the price of the securities they purchased was 'inflated'—that is, it was *higher than it would have been without the false statements*—and that it declined once the truth was revealed." *Glickenhaus*, 787 F.3d at 415 (emphasis added). The Seventh Circuit followed this statement with a quote from its earlier decision in *Ray v. Citigroup Global Mkts., Inc.*, 482 F.3d 991, 995 (7th Cir. 2007): "'[P]laintiffs must show *both* that the defendants' alleged misrepresentations artificially inflated the price of the stock and that the value of the stock declined once the market learned of the deception.'" *Glickenhaus*, 787 F.3d at 415 (emphasis added). The Seventh Circuit's decision, therefore, does not depart from the requirement that loss causation must be show with respect to each misstatement or omission.

The fact that the misstatements and omissions in this case allegedly "maintained" inflation, as opposed to introducing or increasing inflation, does not alter the fundamental requirements for pleading and proving loss causation. As the Seventh Circuit admonished it its opinion in this case, "theories of 'inflation maintenance' and 'inflation introduction' are not separate legal categories." *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 418 (7th Cir. 2015). Even under a maintenance theory, therefore, Plaintiffs have the burden of proving that *each* of the 17 misstatements at issue maintained inflation in Household's stock price and that this inflation was removed when the truth was revealed.

Plaintiffs further argue that Defendants requested a similar jury verdict form in the previous trial and the court rejected their request. Mot. at 1. Judge Guzmán did not hold that the jury did not need to find loss causation with respect to each statement it found to be false and misleading. Rather, in response to defense counsel's argument that the jurors needed to find all elements of a securities fraud claim, including loss causation, with respect to each separate

alleged misstatement, the court *agreed* defense counsel. Judge Guzmán, however, stated that the question on the jury form asking, with respect to each of the 40 statements listed on the form, whether plaintiffs had prevailed on their securities fraud claim, in conjunction with the jury instruction on the elements of a securities fraud claim, informed the jury that "they must find that plaintiffs have proved by a preponderance of the evidence each of the four elements [including loss causation] included in that instruction." Trial Tr. (Dkt. 1923-2) at 4364:8-4365:11.

It also is necessary to determine loss causation with respect to each misstatement because one of the other issues that remains to be decided by the new jury is the apportionment of liability among Household and the three Individual Defendants. Although Plaintiffs and Defendants have stipulated as to which Individual Defendants made each of the 17 misstatements within the meaning of the Supreme Court's decision in *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), *see* Dkt. 2122, Ex. A, there would be no liability with respect to a misstatement if the jury were to find that Plaintiffs failed to meet their burden of proving loss causation with respect to that statement. For example, under the parties' stipulation, Defendant Gary Gilmer is the "maker" of only one statement—a statement by Gilmer quoted in the March 23, 2001 edition of *Origination News*. If the jury were to find no loss causation with respect to that statement, Mr. Gilmer would be out of the case entirely and liability would be apportioned only among the three remaining Defendants. And if the jury were to find loss causation lacking with respect to any of the remaining 16 misstatements, this could affect their view as to how liability should be apportioned among any of the other three Defendants.

Finally, Fischel's leakage model could not be applied unless the jury found loss causation as to all 17 misstatements. If the jury found that some of the 17 misstatements caused Plaintiffs

and class members to suffer losses, and others did not, it would be impossible to apply Fischel's leakage model mechanically. There is no basis to believe that the jury would find that all 17 misstatements caused loss, particularly since the share price rose, rather than declined, on some of the days on which the misrepresentations were made. Accordingly, a determination of whether each of the 17 misstatements caused loss is necessary to the application of Fischel's leakage model.

In sum, the inclusion of "Question One" on Defendants' proposed Jury Verdict Form is consistent with the requirements of the PSLRA and *Dura*, is necessary for the jury properly to determine apportionment of liability among the four Defendants, and is necessary for application of Fischel's leakage model, should the jury chose that model. The Court, therefore, should hold that "Question One" on Defendants' proposed Jury Verdict Form should be included in the final Jury Verdict Form.

B. The Inflation Per Share Figures Resulting From Professor Ferrell's Specific Disclosures Model Can Easily Be Applied by the Jury If It Chooses that Model.

Plaintiffs seek to exclude Professor Ferrell's Specific Disclosures Model as an option on the Jury Verdict Form because Professor Ferrell did not provide a table, comparable to the table provided by Fischel, listing the inflation per share for each day of the class period. Mot. at 1. Professor Ferrell's analysis, however, addresses inflation for every day of the class period and easily could be applied by the jury.

In his Rebuttal Report Professor Ferrell explains that, under his Specific Disclosures Model (which corrects the flaws in Fischel's specific disclosures model), "the *maximum* inflation per share is $4.19" for the portion of the class period that precedes the start of the disclosure period on November 15, 2001. Ferrell Rebuttal Report (Dkt. 46), ¶ 98 (emphasis added).

The $4.19 consists of the corrected residual price changes on the six corrective disclosure days during the disclosure period of November 15, 2001, through October 11, 2002 that Professor Ferrell included in his Specific Disclosures Model (six of the 14 days included in Fischel's specific disclosures model):

November 15, 2001	($2.21)
July 26, 2002	($1.86)
August 14, 2002	($1.43)
August 16, 2002	($1.19)
September 23, 2002	($0.99)
October 10, 2002	$3.49
TOTAL	($4.19)

Id., Ex. 3a. As Professor Ferrell explains, $4.19 is the maximum per share inflation during the portion of the class period prior to the disclosure period because there is confounding information on July 26, 2002, August 14, 2002, August 16, 2002, and September 23, 2002 that is not accounted for by Fischel's specific disclosures model. *Id.*, ¶ 98. Exhibit 8 to Professor Ferrell's Rebuttal Report also shows how he maximum $4.19 per share inflation that existed before the beginning of the disclosure period on November 15, 2001 was dissipated during the disclosure period of November 15, 2001 through October 11, 2002, and shows the inflation per share for each day during the disclosure period. *Id.* Ex. 8.

There is no basis to preclude the jury from determining that Professor Ferrell's Specific Disclosures Model is the appropriate model to apply (as opposed to Plaintiffs' specific disclosures or leakage models). A corresponding table of inflation, if deemed necessary, would simply show $4.19 per share of inflation for each day of the class period prior to the start of the disclosure period on November 15, 2001, and the inflation amounts during the disclosure period beginning on November 15, 2001 and ending on October 11, 2002 as shown on Exhibit 8 to

Professor Ferrell's Rebuttal Report. Accordingly, the Court should refuse Plaintiffs' request to remove Professor Ferrell's Specific Disclosures Model as an option on the Verdict Form.

CONCLUSION

For the reasons set forth above, the Court should deny Plaintiffs' Motion *In Limine* No. 5.

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, caused true and correct copies of the foregoing Defendants' Response to Plaintiffs' Motion *In Limine* No. 5 to be served via the Court's ECF filing system on the following counsel of record in this action:

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