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. 7

Plaintiffs move to exclude the testimony and trading records of Lead Plaintiff Glickenhaus & Co. because, according to them, such evidence goes to reliance and the truth-on-the-market defense, neither of which is at issue in the current trial. But Plaintiffs ignore the probative value of Lead Plaintiff's testimony and trading records with respect to class-wide issues of loss causation and damages, which are the subject of the retrial. For this purpose, this evidence is relevant and admissible under Federal Rules of Evidence 401, 402, and 403.

In the retrial, Plaintiffs must prove "the amount of per share damages, if any, to which plaintiffs are entitled." Dkt. 2042, Sept. 8, 2015 Order, at 1. Plaintiffs, through their expert Professor Daniel Fischel, seek to do so by advancing two alternative models: a specific disclosure model and a leakage model. Professor Fischel explained that his models reflect "two different methodologies measuring inflation in two different ways ***based on different assumptions of when market participants learn about fraud***." Fischel Feb. 24, 2016 Dep. Tr. at

40:13-17 (emphasis added); *see also id.* at 29:14-19 (the models are "measuring different things using different methodologies for reasons based on the factual circumstances in the case").

Professor Fischel opines that his leakage model assumes that a "series of events and disclosures" caused "market participants to believe over time that Household's initial disclosures as well as denials of the existence of fraudulent practices were inaccurate and the truth came out over that leakage period." Fischel Feb. 24, 2016 Dep. Tr. at 65:18-66:4; *see also* Fischel Expert Report ¶ 19 ("As information regarding Defendants' lending practices leaked out during the latter part of the Class Period, ***market participants reassessed the risks of investing in Household stock***.") (emphasis added). According to Professor Fischel, the jury's determination as to which of his two models is appropriate depends on whether or not investors learned of the fraud through the gradual "leakage" of information:

> If you believe that there's no leakage, then I think one methodology is better than the other. If you believe that there is leakage, then the second methodology is preferable. So I think they both can be right based on whatever factual determination is made about whether or not leakage is occurring during this particular period of time.

Fischel Feb. 24, 2016 Dep. Tr. at 42:7-16; *see also id.* at 30:15-23 ("[O]ne is assuming that there's continuous leakage of information . . . as market participants learn the massive fraud by Household and its executives, and the other is not making that assumption."). Central to the jury's assessment of Professor Fischel's models, therefore, is which of Professor Fischel's admittedly "different assumptions" as to market participants' discovery of the fraud is correct.[1]

[1] Professor Fischel also espouses his own view of how market participants interpreted certain pieces of information. *See, e.g.*, Fischel Mar. 21, 2008 Dep. Tr. at 70:4–7 (discussing "the reaction of market participants at various points in time to the quality of Household's disclosures with respect to its reaging practices"); *id.* at 140:23–141:5 ("Household was much less profitable than market participants originally thought, as a result of market participants learning more and more about Household's true financial condition, as its true financial condition became known as less profitable, less valuable than it was earlier *(cont'd)*

Lead Plaintiff's testimony and trading records are probative as to which of Professor Fischel's models, which are based upon different assumptions as to when and how investors learned "the truth" about Defendants' misstatements, is correct. Specifically, Defendants will offer evidence of how Lead Plaintiff responded to Household's supposed disclosures not to demonstrate reliance, but as probative as to which theory of loss causation and inflation is consistent with the behavior of actual investors. According to Professor Fischel, application of his leakage model is appropriate if the jury finds that "leakage" of information regarding the fraud caused "market participants [to] reassess[] the risks of investing in Household stock." Fischel Expert Report ¶ 19. To the extent Lead Plaintiff's conduct and trading activity is inconsistent with such a finding, it is directly probative of whether or not Professor Fischel's leakage model is correct. Because it is relevant to live issues in the retrial, Defendants should be permitted to offer evidence tending to show that Professor Fischel's novel theory—which has never been used in another securities class action—is inconsistent with the actions of investors, represented by Lead Plaintiff. *See* Fed. R. Evid. 401.

Although Lead Plaintiff is only one investor, its behavior is particularly probative because it has been deemed representative of the entire class. Plaintiffs represented to the Court that Glickenhaus & Company represents the class members on the common issue of "whether the members of the Class have sustained damages, and if so, the proper measure of such damages," and argued that Glickenhaus's claims were typical of those of the class. (Dkt. 161 at 12, 14).

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. . . ."); Trial Tr. at 2671:20-2672:5 (Fischel Direct Testimony) ("There was a cascade of negative information that came out about Household . . . when market participants, investors, analysts became to increasingly doubt Household's denials and started to really question whether or not Household's disclosures were accurate . . . ."). Here again, in rendering a verdict in the retrial, the jury will have to assess whether Professor Fischel's assumptions as to how and when investors learned of the fraud—and how they reacted—are correct.

Plaintiffs further represented that Lead Plaintiff would "zealously participate in the prosecution of the case." (Dkt. 161 at 2). The Court agreed and, based on these representations, appointed Glickenhaus & Company as Lead Plaintiff. (Dkt. 194).

Lead Plaintiff, unlike other class members, has been court-appointed explicitly to be involved in the litigation. *Cf. In re Lucent Techs. Inc. Secs. Litig.*, 2002 WL 32815233, at *2 (D.N.J. July 16, 2002) (denying discovery of non-lead plaintiffs, who are not class representatives, because such discovery would not establish proof of liability). A primary purpose of the Lead Plaintiff in a class action is to "establish the bulk of the elements of each class member's claims when they prove their own." *Ellis v. Elgin Riverboat Resort*, 217 F.R.D. 415, 428 (N.D. Ill. 2003). And a jury is entitled to assess to credibility of the class representative, as with any other witness, at trial on liability issues. *See Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 187 (N.D. Ill. 1992) ("credibility of class representative is left for trial"); *Abt v. Mazda Am. Credit*, 1999 WL 350738, at *4 (N.D. Ill. May 19, 1999) (holding that plaintiff's sophistication, while not relevant at class certification, is potentially relevant to actual damages).

Plaintiffs' argument that Lead Plaintiff's testimony and trading records are irrelevant to the retrial is based on the incorrect assumption that Defendants will use such evidence to revisit the issues of reliance or materiality. As explained above, Defendants intend to do no such thing. For the same reason, Plaintiffs' argument that Magistrate Judge Nolan already decided this issue fails. Judge Nolan ruled only that Plaintiffs' investment history could not be used to rebut reliance or to support a "truth on the market" defense. She did not, as Plaintiffs suggest, determine that the Lead Plaintiff was entirely off-limits for any purpose. In fact, Judge Nolan acknowledged that "there may be circumstances when discovery into a single plaintiff's

investment history is appropriate after class certification and before a determination of class-wide liability." *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, No. 02-C-5893, 2005 WL 3801463, at *3 (N.D. Ill. Apr. 18, 2005).

Nor do the testimony and trading records of Lead Plaintiff warrant exclusion under Federal Rule of Evidence 403. Not only is such evidence directly relevant to the central issue at trial, but questioning only the Lead Plaintiff—who Plaintiffs have chosen to represent the investor class—will save time and streamline the issue. Defendants seek to call a single witness—James Glickenhaus, whom Plaintiffs chose to represent Lead Plaintiff in a 30(b)(6) deposition in this case—and to introduce a handful of exhibits. No extraneous witnesses will be called, nor exhibits introduced. That the testimony and trading records undermine Plaintiffs' theory of loss causation is a reason to allow, rather than exclude, the evidence at the retrial.

For these reasons, the Court should deny Plaintiffs' Motion *In Limine* No. 7 and allow Defendants to call the Lead Plaintiff and introduce Lead Plaintiff's trading records.

Dated: May 6, 2016

Respectfully submitted,

/s/ R. Ryan Stoll

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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 Defendants' Response to Plaintiffs' Motion *In Limine* No. 7 to be served via the Court's ECF filing system on the following counsel of record in this action:

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