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.	)	

REPLY IN SUPPORT OF
DEFENDANTS' MOTION *IN LIMINE* NO. 1
TO EXCLUDE EVIDENCE NOT RELEVANT TO CAUSATION OR INFLATION

Plaintiffs cannot—and do not—dispute that wide swaths of the evidence they seek to introduce in the partial retrial of this matter are relevant, if at all, only to proving scienter or the existence of material misstatements, elements that are not at issue in this partial retrial. Yet Plaintiffs argue that they should be permitted to introduce that evidence in this partial retrial on loss causation and damages, as well as other irrelevant and unfairly prejudicial evidence, some of which was excluded at the first trial, because the jury needs to consider this evidence to understand the fraud and each Defendant's role in the fraud. Plaintiffs are incorrect.[1]

[1] Four of the nine categories of evidence that Defendants seek to exclude through their Motion *In Limine* No. 1 were admitted at the first trial *solely* on the basis that they were relevant to demonstrating the misrepresentation or scienter elements of Plaintiffs' securities fraud claim. *See* Dkt. 1516 at 9 (admitting Dennis Hueman "training" video on the ground that "[t]his evidence is probative as to the scienter element of the securities fraud claim"); *id.* at 11 (admitting evidence relating to consultant Andrew Kahr because "Kahr's suggested methodologies are evidence from which a reasonable jury could infer Household's intent to engage in predatory lending"); *id.* at 12 (admitting evidence relating to Wells Fargo's due diligence and decision not to acquire Household as "highly probative of scienter"); admitting evidence Household's amendment of its 2001 Form 10-K as "highly relevant to proving whether there was a misstatement in the original financial statement and whether the misstatement was material"). Two other categories of evidence that Defendants seek to exclude—evidence regarding Household's consent decree *(cont'd)*

First, Plaintiffs ignore the crucial fact that this partial retrial will address a narrower set of issues than the first trial. For that reason, the fact that certain evidence was admitted at the first trial—for example, to prove scienter or materiality—is of no consequence. Plaintiffs urge reliance on what they call "law of the case," but the case has narrowed since the first trial, rendering much of Plaintiffs' evidence irrelevant in the partial retrial. Plaintiffs' invocation of the "law of the case" doctrine also fails for numerous additional reasons explained in Defendants' Response To Plaintiffs' Motion *In Limine* No. 3. *See* Dkt. 2162; *Avita v. Metropolitan Club of Chicago, Inc.*, 40 F.3d 1219, 1227 (7th Cir. 1995).

Second, Plaintiffs ***do not dispute*** that their loss causation expert, Professor Fischel, does not rely on the evidence addressed by this motion in his expert reports. *See* Opp. 2 n.3. Plaintiffs suggest that evidence not relied upon by their expert to prove loss causation or damages could somehow still be relevant to the jury's decisions on that score, but they do not explain how, and such a scenario is difficult to imagine when determining loss causation and damages requires expert testimony, as it does here. *See Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 412 (7th Cir. 2015) (observing that proving loss causation "takes sophisticated expert testimony"). Plaintiffs point out that their experts on predatory lending and financial statement misstatements relied on some of this evidence, Opp. 2 n.3, but that simply proves Defendants' point. Such evidence is relevant only to the existence of material misstatements and scienter, and even Plaintiffs' own loss causation expert finds it irrelevant to the issues before the jury in this partial retrial.

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with the SEC and evidence regarding state civil and regulatory settlements and negotiations—were excluded as inadmissible by Judge Guzmán at the first trial. *Id.* at 4 (granting Household's motion "to bar references to its Offer of Settlement and SEC Consent Decree"); *id.* at 5 (barring evidence of state settlements on the ground that it could result in unfair prejudice).

Third, Plaintiffs' argument in favor of the relevance of this evidence is based largely on the proposition that the jury will need to understand the fraud and each Defendant's role in it in order to determine loss causation and damages and to allocate responsibility among the Defendants. But, as Defendants have explained in their Response To Plaintiffs' Motion *In Limine* No. 1, the proper way to present that information to the jury is for the Court to instruct the jury about the necessary findings from the first trial rather than admitting contested evidence about the fraud. *See* Dkt. 2160; *MCI Communications Corp. v. AT&T Corp.*, 708 F.2d 1081, 1168 (7th Cir. 1983). The Court can inform the jury about what constitutes the fraud, the reasons that certain statements were false or misleading, and the particular misstatements for which each Defendant is responsible (and with what state of mind).[2] There is no reason why the jury would need to consider any of the nine categories of evidence covered by this motion to determine proportionate liability, and allowing the retrial jury to rely on this contested evidence, rather than the findings of the first jury, would invite the retrial jury to improperly second-guess the first jury's findings, particularly as to the element of scienter.

Indeed, the evidence covered by this motion is highly contested and none of it was essential to the first jury's verdict (least of all the evidence that the district court actually excluded from the first trial). If Plaintiffs are allowed to introduce any of the nine categories of evidence covered by this motion, Defendants will be entitled to contest that evidence, with the result that this partial retrial will spiral into a full-fledged retrial of the entire case. That is not what the Seventh Circuit or this Court has ordered.

[2] Plaintiffs' current argument that their fraud evidence is relevant to allocating responsibility among the Defendants is inconsistent with their previous position before this Court that "resolution of this [allocation] question is . . . academic since Household is liable for every statement." Joint Status Report, Dkt. 2035 at 13 n.4.

Fourth, these nine categories of evidence are even more unfairly prejudicial in this partial retrial than they would have been in the first trial of this matter, because their probative value to the issues before the jury (if any) has decreased significantly. Plaintiffs' assertion that this evidence is not prejudicial because it "resulted in the first jury's finding of liability" is incorrect; none of this evidence was essential to the first jury's verdict. Opp. 6. Admitting this evidence would unfairly prejudice Defendants, would confuse the jury, and would waste time. The Court should exclude all nine categories of evidence set forth in Defendants' motion.

A. Evidence Related to Consultant Andrew Kahr

Plaintiffs' effort to argue that evidence related to consultant Andrew Kahr is somehow relevant to the issues in this partial retrial is unavailing. Plaintiffs generically argue that evidence about Kahr will "help the jury understand defendants' predatory lending fraud," but for the reasons explained above and in Defendants' Response To Plaintiffs' Motion *In Limine* No. 1, the jury should be informed about the fraud, not presented with hours of conflicting evidence as though the jury could reach its own conclusions about the scope of the fraud at this point. In any event, introducing evidence about Kahr's memoranda would be a highly tangential way of describing the fraud to the jury. Plaintiffs' assertion that the evidence is "critical" to allocating responsibility among the Defendants also fails, as the jury will be provided with all of the information it needs to make that determination based on the findings of the first jury and evidence about loss causation. Arguments about "Schoenholz's awareness of the possible impact" of Kahr's memoranda relate to scienter—which the first jury decided and which this jury will be informed about in deciding how to allocate responsibility—not to loss causation or the nature of the causal relationship between a Defendant's conduct and the loss incurred. Opp. 7.

B. Unapproved "Training" Video

Plaintiffs' argument in support of admitting the internal and unapproved "training" video created by former low-level Household employee Dennis Hueman is paper thin. Plaintiffs merely assert, in conclusory fashion, that the evidence is "relevant to the jury's understanding of defendants' predatory lending fraud" and apportionment. Opp. 8. Their inability to articulate any manner in which this evidence could assist the jury in deciding loss causation, damages, or allocation of responsibility is fatal to their effort to introduce this irrelevant and highly prejudicial evidence.

C. Evidence Regarding the Compensation or Stock Transactions of Defendants Aldinger, Schoenholz, and Gilmer

Plaintiffs argue that evidence regarding the compensation or stock transactions of the individual Defendants is relevant because (1) it demonstrates Defendants' motivation to commit the fraud and the benefits they would derive from it, and (2) the documents contain other relevant evidence like Household's selection of peer companies. The first point relates entirely to issues that will be not be decided by this jury: whether the individual Defendants made misstatements and with what state of mind. Defendants' motivation and alleged benefits from the fraud have no bearing on whether their conduct caused Plaintiffs to incur loss, the extent of that loss, or the nature of the causal relationship between each Defendant's conduct and the loss. As for the second point, if Plaintiffs wish to introduce exhibits that contain both relevant evidence and irrelevant and prejudicial compensation or stock transaction evidence, then Plaintiffs should be required to excerpt the relevant portions and introduce only those parts of the exhibits to the jury. In addition to these arguments, the individual Defendants have filed a separate reply to Plaintiffs' separate opposition on the issue of their financial condition, *see* Dkt. 2153 (Plaintiffs' Opp.), and Defendants incorporate that reply by reference here.

D. Evidence Regarding Household's Post-Class-Period Amendment of Its 2001 Form 10-K

Plaintiffs have no answer to the fact that the amendment of Household's 2001 Form 10-K occurred ***after*** the close of the class period and therefore can have ***no*** bearing on loss causation or inflation during the class period. Indeed, Plaintiffs appear to admit that this evidence is relevant only to proving the existence of a misstatement, but they argue that the jury "must have an understanding" of Defendants' misstatements and which Defendants made them. Opp. 9. This Court will inform the jury about the misstatements found by the first jury and about which Defendants made which misstatements. Evidence regarding Household's post-class-period amendment of its 2001 Form 10-K is not necessary for that task and is not relevant to the issues to be decided in this partial retrial.

E. Evidence Regarding State Civil and Regulatory Settlements and Negotiations

Plaintiffs' argument that nonpublic evidence of state civil and regulatory settlements, settlement-related refunds, and settlement-related policies and practices is "critical to the jury's understanding" of the fraud and provides "some of the best evidence" of the fraud is nonsensical because the district court ***excluded*** this evidence from the first trial. Opp. 10-11. Plaintiffs offer no reason for this Court to disagree with the prior district court's ruling that the evidence must be excluded pursuant to Rule 408.[3] Indeed, Plaintiffs admit that some of this evidence "quantifies Household's financial exposure," which is precisely the type of use prohibited by the Rule. Opp. 11; *see* Fed. R. Evid. 408(a) (evidence not admissible "to prove or disprove the validity ***or amount*** of a disputed claim (emphasis added)). The fact that the district court allowed one such document into evidence in the first trial after finding that Defendant Aldginer's testimony had

[3] Elsewhere, Plaintiffs argue that this Court should apply the evidentiary rulings from the first trial to the partial retrial. Doing so would require exclusion of this evidence. *See* Plaintiffs' Motion *In Limine* No. 3 To Request That The Court Apply Evidentiary Rulings From The First Trial To The Retrial, Dkt. 2135.

opened the door does not change the analysis under Rule 408 or Rules 401 and 403 for this retrial; Defendants have no intention of opening the door to this evidence in the partial retrial.

F. Evidence Regarding the SEC Consent Decree

For similar reasons, the Court should reject Plaintiffs' arguments in support of admitting evidence regarding the SEC consent decree. Plaintiffs do not dispute that, at the first trial, the district court excluded evidence of the SEC consent decree, Household's related offer of settlement, and any portion of a document that restated or paraphrased those documents pursuant to Rule 408. The consent decree, therefore, quite clearly is not relevant to the retrial jury's understanding of the fraud found by the first jury, as Plaintiffs contend. The SEC consent decree also occurred after the end of the class period and therefore could have no bearing on loss causation or inflation during the class period. Plaintiffs have separately addressed this evidence in their Motion *In Limine* No. 3, therefore Defendants incorporate by reference Defendants' Response to Plaintiffs' Motion *In Limine* No. 3, Dkt. 2162, in further support of the continued exclusion of this evidence.

G. Due Diligence and Related Documents Concerning Household's Potential Transaction with Wells Fargo

Plaintiffs' arguments about the supposed relevance of nonpublic documents relating to a proposed merger explored by Household and Wells Fargo in 2002 are unavailing. First, Plaintiffs cannot dispute (and do not even acknowledge) that the district court excluded the opinions and observations expressed by the Wells Fargo due diligence team from the first trial because they are inadmissible hearsay. Second, Plaintiffs argue that the evidence is relevant to loss causation because "once the market learned the same facts Wells Fargo had discovered during its due diligence," the price of Household's stock dropped. Opp. 13. That argument merely demonstrates that *public* information is relevant, not that nonpublic documents regarding

a nonpublic potential merger are relevant. Third, Plaintiffs suggest that the evidence is relevant to allocation of responsibility because Aldinger and Schoenholz "drove the discussions" with Wells Fargo, while Gilmer "had limited involvement." Opp. 13. But the merger discussions were not fraud, so the Defendants' respective roles in those conversations have no bearing on the causal relationship between each Defendant's fraudulent conduct and any loss incurred. Finally, the unfair prejudice to Defendants from introduction of this evidence is even greater now than in the first trial, because the probative value of the evidence, if any, has greatly diminished.

H. Evidence Regarding an Alleged "Purge"

Plaintiffs' entire argument about evidence regarding an alleged "purge" of unauthorized documents and training materials relates to how such evidence would demonstrate the existence of misstatements and Defendants' scienter. *See* Opp. 14. But those issues have already been decided and may not be reconsidered by the jury at this partial retrial. Plaintiffs offer no explanation of how this evidence, which is entirely internal to Household, could be relevant to proving loss causation or inflation during the class period. Nor do Plaintiffs offer any explanation of how such evidence could relate to proving the causal connection between any Defendant's fraudulent conduct and the loss incurred, if any. Introduction of this evidence is indefensible.

I. Other Nonpublic Documents Regarding Predatory Lending or Re-aging Practices

In addition to the eight categories of evidence described above, Plaintiffs seek to introduce other nonpublic documents regarding predatory lending or re-aging practices. Plaintiffs generically contend that these documents "will help the jury understand" the fraud, but as Defendants have explained, introducing disputed evidence from the first trial is not the proper way to inform the jury about the fraud as found by the first jury. Plaintiffs also contend that these

documents will help the jury understand "the market's reaction" once the fraud was revealed, but these documents were not public and therefore plainly did not reveal the fraud or factor into the market's reaction to the fraud. The Court should exclude internal documents regarding predatory lending or re-aging practices and any testimony regarding those documents.

CONCLUSION

Defendants respectfully request that the Court exclude the foregoing evidence, which is not relevant to causation or inflation, from the trial of this matter.

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Respectfully submitted,

/s/ R. Ryan Stoll

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CERTIFICATE OF SERVICE

R. Ryan Stoll, an attorney, hereby certifies that on May 13, 2016, he caused true and correct copies of the foregoing Reply in Support of Defendants' Motion *In Limine* No. 1 to be served via the Court's ECF filing system on the following counsel of record in this action:

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