UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Honorable Jorge L. Alonso

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR MOTION *IN LIMINE* NO. 2

I. INTRODUCTION

The retrial in this case is limited to loss causation, "the amount of per share damages, if any, to which plaintiffs are entitled," and defendants' proportionate responsibility for plaintiffs' economic loss. Despite the narrow issues to be determined at the retrial, much of the evidence plaintiffs used at the first trial to prove scienter, falsity, materiality and reliance is also relevant for purposes of proving the issues that must be retried. Thus, evidence of defendants' fraud is relevant to loss causation, damages and proportionate responsibility, but will not be used by plaintiffs to relitigate scienter, falsity, materiality and reliance. The same cannot be said for defendants. Any evidence defendants would adduce at trial that they contend is necessary to avoid a "lopsided presentation" of evidence would, in actuality, be a second bite at liability. Given the Seventh Circuit's mandate and this Court's ruling, any attempt by defendants to re-litigate scienter, falsity, materiality and reliance – under the guise that it is necessary to "contextualize" plaintiffs' relevant evidence – would violate the law of the case. Defendants should be precluded from doing so. Further, all of the findings set forth in plaintiffs' Motion *in Limine* No. 2 (Dkt. No. 2134 at 6-7) should be deemed uncontested, as they are binding legal and factual findings. Finally, the jury's rejection of 23 of 40 misstatements is entirely irrelevant to any of the issues to be determined at the retrial and does not relate to loss causation, as the Court of Appeals' analysis in this case makes abundantly clear, despite defendants' attempt to convince this Court otherwise. *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 423 (7th Cir. 2015). Accordingly, defendants should be precluded from referring to the fact that the prior jury did not find liability on 23 misstatements. Plaintiffs' motion should be granted in its entirety.

II. ARGUMENT

A. Defendants Should Be Precluded from Re-litigating Scienter, Falsity, Materiality and Reliance

Much of the evidence plaintiffs used at the first trial to prove scienter, falsity, materiality and reliance is relevant at the retrial for purposes of establishing loss causation and damages and for apportioning liability among the four individual defendants. *See, e.g.*, Plaintiffs' MIL No. 1 (Dkt. No. 2133); Opposition to Defendants' MIL No. 1 (Dkt. No. 2154). This evidence is critical to the

jury's understanding of these issues, including its determination of whether non-fraud information impacted Professor Fischel's models. Contrary to defendants' assertion, therefore, this evidence does not relate solely to scienter, falsity, materiality and reliance – elements plaintiffs have no need or intention to reprove at the retrial.

As set forth in plaintiffs' Motion *in Limine* No. 1, because evidence of defendants' fraud is relevant to loss causation, damages and proportionate responsibility, plaintiffs should be permitted to present it to the jury. Defendants should be precluded from responding "in kind" and should not be permitted to "contextualize this information" because allowing them to do so would violate the law of the case. *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991) (observing that the law of the case doctrine applies to issues decided either expressly or impliedly); *Roboserve, Inc. v. Kato Kagaku Co.*, 121 F.3d 1027, 1031 (7th Cir. 1997) ("'the most elementary application of the doctrine of law of the case'" requires the district court to "'comply with the rulings of the appellate court'").[1] Indeed, while defendants contend that evidence that negates their fraud is necessary to prevent a "lopsided presentation" of evidence, in truth defendants would use that evidence to take a second bite at liability. They should not be permitted to do so. Given the procedural posture of this case, *i.e.*, a jury verdict ***in favor of plaintiffs*** upheld by the Seventh Circuit on all but two narrow issues, presentation of the liability evidence at the retrial will necessarily show defendants' fraudulent conduct, whether through documents and testimony or the Court's statement of the prior proceedings, or (as favored by the Seventh Circuit), both. Just because the evidence will show that defendants committed fraud, however, does not mean that defendants automatically suffer unfair prejudice, or should be permitted to adduce evidence that seeks to disclaim culpability. Further, unlike evidence of defendants' fraud, which is directly relevant to loss causation, damages and proportionate responsibility, any evidence defendants would proffer at trial that attempts to disclaim culpability is entirely ***irrelevant*** to those issues and would unfairly prejudice plaintiffs and confuse the jury if admitted. Fed. R. Evid. 403; *Thompson v. City of Chicago*, 722 F.3d 963, 971 (7th Cir. 2013) (observing that the trial court has discretion to exclude relevant evidence if it will result in

[1] Here as elsewhere, unless noted otherwise, citations are omitted and emphasis is added.

confusion of the issues). Defendants should be precluded from making arguments or introducing evidence that contradicts the first jury's and the Seventh Circuit's findings with respect to the elements of falsity, materiality, scienter and reliance, or from otherwise suggesting that plaintiffs have not proven these elements.

Additionally, while defendants claim they have no intention of revisiting the truth-on-the-market defense at the retrial, they apparently hope to back-door evidence relating to the truth-on-the-market defense under the guise that it is relevant to loss causation. *See* Defs' Opp. at 5 (Dkt. No. 2161). The jury rejected defendants' truth-on-the-market defense at the last trial, a finding which the Seventh Circuit left undisturbed. *See Glickenhaus*, 787 F.3d at 430 (discussing defendants' truth-on-the-market defense, which was "rejected by the jury in Phase I"); *see also id*. at 413 (Household's stock price declined once the truth was revealed). Defendants should not be able to re-litigate the truth-on-the-market defense under the pretense that it relates to "[w]hen certain information was known to the market." Defs' Opp. at 5. Further, defendants never appealed or obtained reversal on the issue they raise now, which is that the stock price declines in this case were purportedly caused by stale information. Having failed to challenge the verdict on the grounds that Professor Fischel relied upon stale information, defendants cannot relitigate that issue, which is completely distinct from the issue that caused the remand. *United States v. Barnes*, 660 F.3d 1000, 1006 (7th Cir. 2011) (under the law of the case doctrine, "[i]f this Court remands to correct a 'discrete, particular error that can be corrected . . . without . . . a redetermination of other issues, the district court is limited to correcting that error'") (quoting *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996)).

B. The Findings from the Prior Proceedings Should Be Deemed Uncontested

Defendants do not object to the first jury's findings of fact being deemed uncontested, but argue that the statements from the Seventh Circuit's opinion and this Court's order denying defendants' motion to exclude Professor Fischel do not constitute binding findings of fact, and therefore cannot be considered uncontested. Defendants are wrong. The Court should deem uncontested all of the findings from the prior proceedings identified in plaintiffs' Motion *in Limine* No. 2. *See* MIL No. 2 at 6-7.

Defendants would have the Seventh Circuit's 47-page opinion reduced to a nullity except for its conclusion that the case is reversed and remanded. But defendants misconstrue the court's opinion. In reality, the Court of Appeals' opinion lays out the legal and factual foundation for its decision largely denying defendants' multifaceted challenge of the jury's verdict.[2] Defendants also incorrectly characterize the Seventh Circuit's legal and factual findings as mere "statements regarding factual questions pertinent to loss causation that the jury will be asked to determine on remand." Defs' Opp. at 6. Rather, the Seventh Circuit was clarifying the ***law*** on loss causation, which was necessary to do in part because of defendants' "fundamental misconception about the leakage model." *Glickenhaus*, 787 F.3d at 417; *see* MIL No. 2 at 6 (enumerating the Seventh Circuit's legal findings on loss causation). The Seventh Circuit then applied the law to the relevant facts. It would be error to allow defendants to ignore the Court of Appeals' decision and perpetuate their "fundamental misconception" in the retrial.

Defendants also contend that the Seventh Circuit's factual narrative is not the law of the case and is not binding on remand. Defs' Opp. at 7. However, plaintiffs ask this Court to deem uncontested those findings the Court of Appeals made in rejecting defendants' "broad[] attack [on] the expert's loss-causation model," such as the findings that "[t]he best way to determine the impact of a false statement is to observe what happens when the truth is finally disclosed and use that to work backward," that "[h]ow the stock became inflated in the first place is irrelevant because each subsequent false statement prevented the price from falling to its true value and therefore caused the price to remain elevated," and that Professor "Fischel's models controlled for market and industry factors and general trends in the economy – the regression analysis took care of that." *Glickenhaus*, 787 F.3d at 413, 415, 418, 421. These findings were necessary to the Seventh Circuit's holdings and

[2] Defendants rely on out-of-circuit authority, *Bankers Tr. Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 950 (3d Cir. 1985), for the proposition that, when an issue is remanded, it "there stands for a new determination of the issues presented as though they had not been determined before." Defs' Opp. at 6. However, even in the Third Circuit it is well-settled that the issue must be determined consistent with the findings of the Court of Appeals. *Bankers Tr.*, 761 F.2d at 949 ("the trial court must proceed in accordance with the mandate and the law of the case as established on appeal"). Thus, here, the Court is bound by the Seventh Circuit's legal findings on loss causation, which should be deemed uncontested. Defendants' arguments to the contrary run afoul of the Seventh Circuit's rule that the court is limited to correcting the error identified by the Court of Appeals. *Barnes*, 660 F.3d at 1006.

cannot be revisited on retrial. *United States v. Adams*, 746 F.3d 734, 744 (7th Cir. 2014); *Barnes*, 660 F.3d at 1006.

Further, the primary (out-of-circuit) case on which defendants' rely, *Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1288-89 (11th Cir. 2010), expressly states the general rule that appellate courts' "findings of fact" are binding on remand: "It is true that '[u]nder the "law of the case" doctrine, the ***findings of fact*** and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the trial court or on a later appeal.'" *Id*.[3] But, in *Norelus*, the Eleventh Circuit had specifically directed the district court to "'accept the magistrate judge's basic findings of fact' or 'conduct its own hearing' before making its own findings of fact." 682 F.3d at 1289. So, the court held that under the "mandate rule," the prior panel's recitation of the facts was not intended to be binding: "***Seen in that light***, [the prior panel's] factual narrative did not operate as law of the case to bind the district court on remand or us in this appeal."[4] *Id*. at 1288-89. The Seventh Circuit in this case did not direct the district court to revisit the facts concerning defendants' fraudulent conduct set forth in its opinion. As such, *Norelus* is inapposite.

Next, defendants argue it would be inappropriate for plaintiffs to present the Seventh Circuit's statements to the jury, as the Court is the only source of the law in a jury trial. Defs' Opp. at 7. This argument is a red herring, as plaintiffs do not intend to quote directly from the Seventh Circuit opinion. Instead, if the legal and factual findings from the Seventh Circuit's opinion are deemed uncontested, plaintiffs would use them at trial just as they would any other stipulated or

[3] *See also Kelly v. Dun & Bradstreet, Inc.*, No. 15-11888, 2016 WL 370539, at *2 (11th Cir. Feb. 1, 2016) ("the district court and this court are bound by ***findings of fact*** and conclusions of law made by this court in an earlier appeal of the same case") (citing *Ash v. Tyson Foods, Inc.*, 664 F.3d 883, 891 (11th Cir. 2011)).

[4] In *Norelus*, the court described the "mandate rule" as a "'specific application of the "law of the case" doctrine' requiring that '[a] trial court, upon receiving the mandate of an appellate court, may not alter, amend, or examine the mandate, or give any further relief or review, but must enter an order in strict compliance with the mandate.'" *Id.* at 1288.

undisputed facts, but would not represent to the jury that the Seventh Circuit made the factual and legal findings.[5]

Finally, defendants contend that plaintiffs incorrectly characterize this Court's finding that there was no firm-specific, non-fraud related information that significantly distorted Professor Fischel's models. Defs' Opp. at 9. Defendants' argument is misplaced, as it ignores the Court's role and responsibility as a gatekeeper.[6] In performing this function, the Court does not, as defendants claim, usurp the jury's role. All courts must make pretrial determinations of admissibility which are "governed by the principles of Rule 104(a)." *Lewis v. CITGO Petroleum Corp.*, 561 F.3d 688, 705 (7th Cir. 2009). Under Rule 104(a), "***[t]he court must decide any preliminary question*** about whether a witness is qualified, a privilege exists, or evidence is admissible." Fed. R. Evid. 104(a). In finding that defendants failed to shoulder their burden of identifying some significant, firm-specific, non-fraud related information that could have affected Household's stock price, the Court was properly exercising its gatekeeping responsibilities. There is no basis to contest the conclusion at the retrial.

C. Defendants Should Be Precluded from Referring to the 23 Statements for Which the Prior Jury Did Not Find Liability

Defendants claim that the jury's rejection of 23 statements is relevant to loss causation because (according to defendants) Professor Fischel should have modified his quantifications of inflation to account for the first jury's findings. Defs' Opp. at 8-9. Specifically, defendants contend that because Professor Fischel's loss causation opinions assume that defendants made false statements, the 23 rejected misstatements are relevant to "the jury's assessment of Professor Fischel's opinions and the assumptions on which they are based." *Id*. at 9. But the first jury's non-

[5] As discussed in plaintiffs' *Daubert* motion, if defendants' experts are permitted to testify, they should be subject to cross-examination using the Seventh Circuit's opinion because they explicitly relied on the opinion in their expert reports. *See* Dkt. No. 2128 at 13-15.

[6] *Stollings v. Ryobi Techs., Inc.*, 725 F.3d 753, 765 (7th Cir. 2013), merely stands for the uncontroversial proposition that the jury "must still be allowed to play its essential role as the arbiter of the weight and credibility of expert testimony." *Id*. The Court's finding that defendants' failed to identify significant, non-fraud, firm-specific information does not rob the jury of its duty to weigh the credibility of defendants' experts' testimony (assuming they are even permitted to testify), despite defendants' argument to the contrary.

liability findings with regard to the 23 statements have no bearing whatsoever on the issue of loss causation, despite defendants' attempt to convince the Court otherwise. Accordingly, defendants and their witnesses should be barred from referring in any way to the prior jury's finding that 23 of the 40 alleged misstatements were not actionable.

First, in a futile attempt to demonstrate the relevance of the 23 statements to loss causation, defendants resurrect an argument rejected by Judge Guzmán before the last trial. Specifically, defendants previously sought to exclude Professor Fischel on the grounds that he merely assumes that defendants made material misstatements and omissions. *See* Dkt. No. 1364 at 12-15. Judge Guzmán rejected defendants' argument outright. *See* Dkt. No. 1527 at 1 ("Defendants argue that Daniel Fischel's testimony is inadmissible because his causation analysis is not useful to the fact finder in that he did not evaluate any causal connection, assumed his conclusion, thereby making his opinion regarding causation useless to the fact finder. . . . The Court disagrees."). Defendants should be precluded from re-raising this argument again, rendering the jury's rejection of 23 misstatements irrelevant.

Second, the last jury's verdict was based on a finding of liability for 17 misstatements, while it did not find that plaintiffs had met their burden with respect to each element of the other 23 misstatements. The jury applied Professor Fischel's model to the 17 misstatements; the same model Professor Fischel uses here. On appeal, defendants challenged the jury's application of Professor Fischel's model "to the 17 statements it found actionable, but not the other 23" and claimed that "[t]he results were a predictable (and predicted) disaster." *Glickenhaus*, No. 13-3532, Dkt. No. 52 at 22. Because the Seventh Circuit rejected defendants' argument, they should not be permitted to raise it again. *Glickenhaus*, 787 F.3d at 423. The Court of Appeals expressly held that the only required adjustment to Professor Fischel's model emanating from the jury's finding that some statements were actionable Rule 10(b) violations, and others were not, is for the first three trading days. *Id.* As the Seventh Circuit observed, "[t]he ***second*** actionable false statement came on March 28, 2001, only three trading days later, and it covered all three bad practices. Had this statement been true, the market would have been fully informed and the stock would have dropped to its true value." *Id.*

Finally, the Seventh Circuit's opinion forecloses any argument that Professor Fischel should have "materially change[d] either of his quantifications of inflation to account for the first jury's findings." Defs' Opp. at 8. Specifically, the Seventh Circuit observed that Professor Fischel's models:

> don't directly measure inflation caused by ***false statements***; instead they measure the value of the truth. . . . As soon as a lie is told, however, the inflation caused by the false statement becomes equal to the value of the truth (as measured by the model) because had the statement been truthful, the stock price would have done what it did do once the truth was revealed.

Glickenhaus, 787 F.3d at 416-17. Thus, the fact that the jury rejected 23 of the misstatements has no bearing on Professor Fischel's models, as those models "measure the value of the ***truth***" – how much the stock would have fallen if instead of making false statements, defendants would have fully disclosed the fraud and its impact – which was not affected in any way by the jury's findings at the first trial. *Id*. at 417 ("What the model measures is the effect the truth would have had on the price."); *id*. at 419 ("In short, what the plaintiffs had to prove is that the defendants' false statements caused the stock price to remain higher than it would have been had the statements been truthful. Fischel's models calculated the ***effect of the truth***, once it was fully revealed, and the jury found that the defendants concealed the truth through false statements. That is enough.").[7] Given that the 23 misstatements for which the jury failed to find liability are irrelevant to loss causation, defendants should be precluded from referring to the dismissed statements at trial. *See* MIL No. 2 at 7-9. Finally, defendants have failed to articulate any concrete prejudice that will result if the verdict regarding these 23 misstatements is excluded at the retrial.

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[7] As the Seventh Circuit explained:

> [S]ince the net sum of price declines due to corrective disclosures under [the leakage] model was $23.94, the stock was overpriced by that amount prior to those disclosures. As soon as the first false statement was made, that overpricing became fully attributable to the false statement, even if the stock price didn't change at all, because had the statement been truthful, the price would have gone down by $23.94 – after all, that's what it did once the truth was fully revealed. Similarly, every subsequent false statement caused the full amount of inflation to remain in the stock price, even if the price didn't change at all, because had the truth become known, the price would have fallen then.
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> *Glickenhaus*, 787 F.3d at 417-18.

III. CONCLUSION

For all of the reasons set forth in plaintiffs' Motion *in Limine* No. 2 and herein, plaintiffs' motion should be granted.

DATED: May 13, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 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 13, 2016.

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