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. 4

I. INTRODUCTION

Defendants' Response to Plaintiffs' Motion *in Limine* No. 4 fails to justify defendants' repeated violations of Federal Rule of Civil Procedure 26(a)(2) or to overcome the fact that this Court has already rejected the evidence that defendants now wish to provide the jury. Because defendants have not sustained their burden, evidence concerning purportedly firm-specific, non-fraud information and its claimed effect on Fischel's models is inadmissible. In addition, defendants' failure to disclose expert reliance materials was not harmless; this evidence, too, should be excluded at the retrial.

II. ARGUMENT

A. Defendants Have Failed to Identify Any Company-Specific, Non-Fraud Information That Distorted Fischel's Models

When the Seventh Circuit remanded this action for retrial, it limited the issues to be retried to two: loss causation (specifically, the impact of "firm-specific, nonfraud related information") and the maker of certain misstatements under *Janus*.[1] *See Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 413 (7th Cir. 2015) ("*Glickenhaus*") ("The remaining challenges fail. A new trial is warranted on these two issues only."). The Seventh Circuit found that Fischel's leakage model adequately controlled for industry and market-wide factors, but that his opinion was too conclusory with regard to the firm-specific, nonfraud-related information that defendants insisted must certainly exist. Under the Seventh Circuit's prescribed plan for the retrial, defendants had the burden of demonstrating that firm-specific, nonfraud-related information distorted Fischel's leakage model. This Court concluded that defendants failed to shoulder this burden, identifying ***no*** firm-specific, non-fraud information that would distort Fischel's leakage model. *See* 2/1/16 Order (Dkt. No. 2102).

Nevertheless, defendants contend that they should be given yet another bite at the apple. Regardless of the Court's prior ruling that evidence of the type defendants intend to proffer is neither firm-specific nor non-fraud, defendants claim they are entitled to present evidence to the second jury

[1] The determination of proportionate liability is the only portion of the *Janus* issue that remains.

that firm-specific, non-fraud information distorted Fischel's leakage model. *See* Defs' Opp. to MIL No. 4 at 2 (Dkt. No. 2163). Defendants argue that this Court's rulings on the existence of company-specific, nonfraud-related information were only preliminary, and do not constitute "ultimate factual findings." *See id.* at 3. In so arguing, defendants improperly minimize the Court's role as the gatekeeper of expert testimony. This Court must make pretrial determinations of admissibility pursuant to FRE 104(a). *See Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 705 (7th Cir. 2009); Fed. R. Evid. 104(a) ("The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible."). Whether the Court adopts its prior holding or performs the analysis a second time, the conclusion remains the same: defendants failed to identify firm-specific, non-fraud information that distorts Fischel's models. Because defendants failed to identify any non-fraud, firm-specific information that distorted Fischel's model, evidence and testimony to the contrary would mislead the jury, unfairly prejudice plaintiffs and confuse the issues. After all, this evidence would not have probative value.[2]

Moreover, defendants' assertion that the Seventh Circuit's opinion envisions admission of such evidence as a critique of Fischel's peer index is baseless. *See* Defs' Opp. to MIL No. 4. at 4. As an initial matter, the Seventh Circuit did ***not***, as defendants claim, hold "only that Fischel's regression analysis accounted for the effect of market and industry factors as reflected by the price movements in *Fischel*'s selected market and industry indices – the S&P 500 Index and the S&P Financials Index." *See id.* Such an interpretation requires distorting the plain language of the Opinion. Rather, the Seventh Circuit held that Fischel's models accounted for industry factors, without qualification. *See* 787 F.3d at 421 ("Fischel's models controlled for market and industry factors and general trends in the economy – the regression analysis took care of that.").[3] This

[2] *Stollings v. Ryobi Techs., Inc.*, 725 F.3d 753, 765 (7th Cir. 2013) does not suggest otherwise. Unlike in *Stollings*, where the Seventh Circuit ruled that ***relevant*** expert evidence should have been admitted, defendants' evidence of company-specific, non-fraud information is ***irrelevant*** because it is neither. *See* Fed. R. Evid. 402.

[3] While defendants assert that the jury should determine which expert's peer group is appropriate, they ignore the fact that Ferrell used Fischel's regression (including Fischel's peer group) to identify the statistically significant dates he then analyzed. *See* Ferrell Depo. Tr. at 218:22-219:4 (attached as Ex. 1 to the Declaration of Luke O. Brooks in Support of Plaintiffs' Replies in Further Support of Their Motions *in*

dispute is therefore ***not*** about the propriety of Fischel's peer indices. *See* 2/1/16 Order at 5 (noting that defendants' arguments regarding Fischel's peer indices were already rejected).

In any event, defendants did not challenge the propriety or reliability of Fischel's peer indices on appeal. They have, consequently, waived the right to challenge this aspect of Fischel's analysis in the retrial. *See Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991) (recognizing that under the law of the case doctrine, "once an appellate court either expressly or by necessary implication decides an issue, the decision will be binding upon all subsequent proceedings in the same case"); *United States v. Adams*, 746 F.3d 734, 744 (7th Cir. 2014) ("'The law of the case doctrine . . . prohibits a lower court from reconsidering on remand an issue expressly or impliedly decided by a higher court absent certain circumstances.'") (citation omitted); *Heller Int'l Corp. v. Sharp*, 85 C 3381, 1994 WL 386421, at *3 (N.D. Ill. July 19, 1994) (the law of the case doctrine gives "preclusive effect to rulings or findings that a party could have appealed, but did not appeal").

B. Defendants' Failure to Disclose *Institutional Investor* Magazine and Other Reliance Materials Is Not Harmless

Defendants concede that they failed to disclose expert reliance materials, including *Institutional Investor* magazine.[4] *See* Defs' Opp. to MIL No. 4 at 6. Defendants offer no justification for failing to disclose such obviously relevant information, stating only that it was "an inadvertent oversight." *Id.* Defendants also offer no excuse for including documents on their exhibit list that were never disclosed as expert reliance materials. *Id.* And defendants do not even acknowledge their failure to disclose the purported "academic literature" underlying Ferrell's reliance on *Institutional Investor* magazine. Instead of providing any explanation for their failure to comply with Rule 26(a)(2), defendants say that their violations were harmless, and so they should be permitted to put on the untimely disclosed evidence. *See id.* at 6-7. Defendants are wrong.

Limine) (emphasizing that Ferrell used the S&P 500 Financials Index used by Fischel). James did not utilize his peer group in any statistical test or to employ any "analytic strateg[y] widely used" (*Zenith Elecs. Corp. v. WH-TV Broad Corp.*, 395 F.3d 416, 419 (7th Cir. 2005)), so his testimony on that issue would be purely speculative. *See* James Depo. Tr. at 79:13; 76:2-3 (Dkt. No. 2130-9) (conceding that he did not perform any regression or event study using either of his peer groups).

[4] Defendants still have not disclosed the "academic literature" that led Ferrell to select his particular peer index.

Defendants' omission of *Institutional Investor* and the unspecified academic literature that led Ferrell to use *Institutional Investor* as a starting point for selecting his peer index was not harmless. *See* Ferrell Depo. Tr. at 227:8-228:11 (Dkt. No. 2130-2). Plaintiffs were blindsided by Ferrell's revelation of these materials at his deposition. While plaintiffs' counsel was able to ask Ferrell certain limited questions about his selection process, defendants' failure to disclose this information severely prejudiced plaintiffs. Plaintiffs' counsel had never read the magazine article or the unspecified academic literature and had no way to know whether Ferrell's assertion was even true. Nor was plaintiffs' counsel able to determine what the selection process was for the "star analyst" and whether it was adequate for the purposes for which Ferrell used the peer group. Critically, defendants ***still*** have not disclosed the "academic literature" that Ferrell claims supports picking a peer group identified by *Institutional Investor* Magazine's "star analyst." The rationale for Ferrell's selection of *Institutional Investor* magazine is necessary for an effective cross-examination. Without that information, it is impossible to fully explore whether and why *Institutional Investor* magazine is an adequate source. Indeed, defendants have designated an expert – Cornell – whose only purpose is to critique one article (among many) on which plaintiffs' expert's testimony is based.[5] Moreover, plaintiffs' expert did not have an opportunity to respond to the omitted materials or assess any impact they may have on the experts' analysis in his sur-rebuttal report. Defendants' failure to identify *Institutional Investor* magazine and the academic literature Ferrell cited as supporting its use was not harmless. Accordingly, defendants should be precluded from using it at the retrial. *See Paramount Media Grp., Inc. v. Vill. of Bellwood*, No. 13 C 3994, 2015 WL 5307483, at *5 n.4 (N.D. Ill. Sept. 10, 2015) (Alonso, J.) (excluding expert witness where failure to comply with Rule 26 was without substantial justification and not harmless); *Sloan Valve Co. v. Zurn Indus., Inc.*, No. 10-CV-204, 2013 WL 4506127, at *5 (N.D. Ill. Aug. 23, 2013) (failure to disclose reliance

[5] Defendants' claim that the omission of *Institutional Investor* magazine from Ferrell's reliance materials was inadvertent or harmless is plainly incorrect. They themselves included two versions of that magazine on their exhibit list ***after*** Ferrell's deposition. [Proposed] Final Pretrial Order, Ex. C-2, Exs. DX0002, DX0077.

materials before deposition was not harmless, as adversary was not given opportunity to cross-examine expert on those materials).[6]

C. Defendants Agree Not to Present Expert Testimony Through Lay Witnesses

Defendants' representation that their "fact witnesses do ***not*** intend to offer expert testimony" (Defs' Opp. at 8) (emphasis in original), is belied by statements made in their Response to Plaintiffs' MIL No. 6, in which they assert that they intend to elicit testimony requiring specialized knowledge from fact witnesses. *See* Defs' Opp. to Pltfs' MIL No. 6 at 3 (Dkt. No. 2165) (suggesting that defendants' fact witnesses may offer testimony concerning nonfraud factors that may have impacted Household's share price); Fed. R. Evid. 701 (fact witnesses may present testimony ***not*** based on specialized knowledge). Such testimony would be wholly improper, as defendants have not disclosed any of their fact witnesses as experts, as required by Fed. R. Civ. P. 26, and any such testimony would be needlessly cumulative of defendants' experts. *See* Defs' Opp. to MIL No. 4 at 8. In the event that one of defendants' fact witnesses does attempt to offer testimony based on specialized knowledge, plaintiffs will object to that testimony.

III. CONCLUSION

In light of the foregoing, plaintiffs respectfully request an Order: (i) excluding testimony or evidence concerning allegedly firm-specific, non-fraud information that purportedly distorted Fischel's leakage and/or specific disclosures models; and (ii) precluding defendants from offering

[6] Defendants' reliance on *Rabin v. Cook County* is misplaced. *See* No. 09 C 8049, 2015 WL 1926420 (N.D. Ill. Apr. 27, 2015). In *Rabin*, the plaintiff claimed that the defendants' medical expert had failed to disclose information he relied upon. *Id.* at *4. The Court found that, to the contrary, the expert had disclosed, in detail, the records he had relied on, and that plaintiff's counsel had been able to thoroughly and extensively question the expert about his use of those materials. *Id.* The same is not true here, where Ferrell withheld key reliance materials, and plaintiffs were unable to conduct a thorough examination of all his opinions.

Ferrell's testimony with respect to peer groups based on his use of *Institutional Investor* magazine and yet-to-be disclosed academic articles because their failure to disclose this information prejudiced plaintiffs.

DATED: May 13, 2016

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
MICHAEL J. DOWD (135628)
SPENCER A. BURKHOLZ (147029)
DANIEL S. DROSMAN (200643)
LUKE O. BROOKS (90785469)
LAWRENCE A. ABEL (129596)
HILLARY B. STAKEM (286152)

s/ Luke O. Brooks
LUKE O. BROOKS

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
MAUREEN E. MUELLER
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: 561/750-3000
561/750-3364 (fax)

Lead Counsel for Plaintiffs

MILLER LAW LLC
MARVIN A. MILLER
LORI A. FANNING
115 S. LaSalle Street, Suite 2910
Chicago, IL 60603
Telephone: 312/332-3400
312/676-2676 (fax)

Liaison Counsel

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.

s/ Luke O. Brooks

LUKE O. BROOKS

ROBBINS GELLER RUDMAN
& DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101-8498
Telephone: 619/231-1058
619/231-7423 (fax)

E-mail: LukeB@rgrdlaw.com

Jaffe v. Household Int'l, Inc., No. 02-5893 (N.D. Ill.)
Service List

Counsel	E-mail address
Stewart Theodore Kusper Giovanni Antonio Raimondi THE KUSPER LAW GROUP, LTD. 20 North Clark Street, Suite 3000 Chicago, IL 60602 (312) 204-7938 Tim S. Leonard JACKSON WALKER L.L.P. 1401 McKinney Street, Ste. 1900 Houston, TX 77010 (713)752-4439	Stewart.Kusper@Kusperlaw.com Giovanni.Raimondi@Kusperlaw.com tleonard@jw.com
Counsel for Defendant David A. Schoenholz	
Dawn Marie Canty Gil M. Soffer KATTEN MUCHIN ROSENMAN LLP 525 West Monroe Street Chicago, Illinois 60661 (312)902-5253	dawn.canty@kattenlaw.com gil.soffer@kattenlaw.com
Counsel for Defendant William F. Aldinger	
David S. Rosenbloom C. Maeve Kendall McDERMOTT WILL & EMERY, LLP 227 West Monroe Street Chicago, IL 60606 (312) 984-2175	drosenbloom@mwe.com makendall@mwe.com
Counsel for Defendant Gary Gilmer	
R. Ryan Stoll Mark E. Rakoczy Andrew J. Fuchs Donna L. McDevitt Patrick Fitzgerald SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP 155 North Wacker Drive Chicago, IL 60606 (312)407-0700	rstoll@skadden.com mrakoczy@skadden.com Andrew.Fuchs@skadden.com Donna.McDevitt@skadden.com Patrick.Fitzgerald@skadden.com pclement@bancroftpllc.com zhudson@bancroftpllc.com TKavaler@cahill.com Jhall@cahill.com dbutswinkas@wc.com sfarina@wc.com

Counsel	E-mail address
Paul D. Clement D. Zachary Hudson BANCROFT PLLC 1919 M Street NW, Ste. 470 Washington, DC 20036 (202)234-0090 Thomas J. Kavaler Jason M. Hall CAHILL GORDON & REINDEL LLP 80 Pine Street New York, NY 10005 (212)701-3000 Dane H. Butswinkas Steven M. Farina Leslie C. Mahaffey Amanda M. MacDonald WILLIAMS & CONNOLLY LLP 725 Twelfth Street NW Washington DC 20005 202-434-5000 Luke DeGrand Tracey L. Wolfe DEGRAND & WOLFE, P.C. 20 South Clark Street Suite 2620 Chicago, Illinois 60603 (312) 236-9200 (312) 236-9201 (fax)	lmahaffey@wc.com amacdonald@wc.com twolfe@degrandwolfe.com ldegrand@degrandwolfe.com
Counsel for Defendant Household International Inc.	

Counsel	E-mail address
Michael J. Dowd Spencer A. Burkholz Daniel S. Drosman Luke O. Brooks Hillary B. Stakem ROBBINS GELLER RUDMAN & DOWD LLP 655 West Broadway, Suite 1900 San Diego, CA 92101 (619)231-1058 619/231-7423 (fax) Jason C. Davis ROBBINS GELLER RUDMAN & DOWD LLP Post Montgomery Center One Montgomery Street, Suite 1800 San Francisco, CA 94104 (415)288-4545 (415)288-4534 (fax) Maureen E. Mueller ROBBINS GELLER RUDMAN & DOWD LLP 120 East Palmetto Park Road, Suite 500 Boca Raton, FL 33432 (561)750-3000 (561)750-3364 (fax)	miked@rgrdlaw.com spenceb@rgrdlaw.com dand@rgrdlaw.com lukeb@rgrdlaw.com hstakem@rgrdlaw.com jdavis@rgrdlaw.com mmueller@rgrdlaw.com
Lead Counsel for Plaintiffs	
Marvin A. Miller Lori A. Fanning MILLER LAW LLC 115 S. LaSalle Street, Suite 2910 Chicago, IL 60603 (312)332-3400 (312)676-2676 (fax)	Mmiller@millerlawllc.com Lfanning@millerlawllc.com
Liaison Counsel for Plaintiffs	