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. 7

Defendants should be precluded from calling James Glickenhaus as a witness or seeking to admit class members' trading records and related information. Any such evidence is irrelevant to the issues that remain in this matter, and plaintiffs would be unfairly prejudiced by its admission at trial.[1]

In their response to plaintiffs' motion, defendants provide a long-winded explanation regarding the "***class-wide*** issues of loss causation and damages" (Defs' Opp. at 1-2) (Dkt. No. 2166),[2] yet they fail to show how testimony from "only one investor" is relevant to these issues. Defs' Opp. at 3.[3] Indeed, defendants simply ignore the fact that "class-wide issues" are "proved on a class-wide basis," *see Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 423 (7th Cir. 2015), and fail to address Judge Nolan's holding that discovery of co-lead Plaintiff PACE's "investment history is irrelevant ***to any class-wide liability issues***." *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, No. 02 C 5893, 2005 WL 3801463, at *4 (N.D. Ill. Apr. 18, 2005). Defendants also quote Professor Fischel for the proposition that the jury must determine "whether or not investors learned of the fraud through [leakage]" (Defs' Opp. at 2), but price changes provide the best aggregate market view, reflecting the behaviors of all market participants rather than of one investor. In short, what Mr. Glickenhaus believed and why he traded has nothing to do with loss causation.

Defendants cite no authority to refute the principle that "the measure of damages" in a Rule 10b-5 case is "'susceptible of a ***class-wide*** answer,'" "***without reference to any individual class members***." *Ludlow v. BP, P.L.C.*, 800 F.3d 674, 688 (5th Cir. 2015), *cert. denied*, _ S. Ct. _, 2016 WL 361661 (May 2, 2016). As Judge Nolan stated over a decade ago:

> [T]he value of the stock if the full truth were known, or the fair value of the stock, is the subject of expert analysis. "The determination of damages sustained by individual

[1] Defendants have not subpoenaed Mr. Glickenhaus, and as a resident of New York, he is beyond the Court's subpoena power. Defendants deposed Mr. Glickenhaus, as a representative of the Lead Plaintiff, on March 23, 2011. However, defendants have not designated any of his testimony for use at trial.

[2] Unless otherwise noted, all emphasis is added and citations are omitted.

[3] Defendants' attempt to distract by touting the supposed "novel[ty]" of the leakage model is unproductive because – in addition to the prior rulings in this case – a "leakage theory" has been used before. *See Silversman v. Motorola, Inc.*, 259 F.R.D. 163, 171, 174 (N.D. Ill. 2009) (granting class certification when plaintiffs used a "leakage theory").

> class members in securities class action suits is often a mechanical task involving the administration of a formula determined ***on a common basis*** for the class[.]"

Lawrence E. Jaffe Pension Plan v. Household Int'l., Inc., No. 02 C 5893, 2004 WL 2108410, at *1 (N.D. Ill. Sept. 21, 2004) (quoting Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §10.8 (4th Ed. 2002)). Further, issues of individual class members' reliance have already been determined. *See Glickenhaus*, 787 F.3d at 430. Defendants also cannot provide any authority to overcome the fact that loss causation is an issue that is "appropriate for ***class-wide resolution***," *see id.*, *i.e.*, that it "can be demonstrated by class-wide proof." *See Billhofer v. Flamel Techs., S.A.*, 281 F.R.D. 150, 164 (S.D.N.Y. 2012).

Because Mr. Glickenhaus's testimony and records are irrelevant to the issues that remain in this case, defendants desperately grasp at straws. First, they quote Judge Nolan as saying that "there may be circumstances when ***discovery*** into a single plaintiff's investment history is appropriate" (Defs' Opp. at 4-5), while ignoring that "the Court believe[d] ***this is not such a situation***." *Lawrence E. Jaffe*, 2005 WL 3801463, at *3.

Defendants then conflate the standards for class certification and relevancy under Rule 401. For example, citing *Ellis v. Elgin Riverboat Resort*, 217 F.R.D. 415, 428 (N.D. Ill. 2003), defendants assert that "[a] primary purpose of the Lead Plaintiff [] is to 'establish the bulk of the elements of each class member's claims.'" Defs' Opp. at 4. Notwithstanding the fact that the *Ellis* court actually stated that "a primary purpose of a ***class action*** [is] to ***allow*** the named plaintiffs to 'establish the bulk of the elements,'" *see* 217 F.R.D. at 428, defendants' argument is misplaced here, as *Ellis* concerned the typicality requirement for class certification. *See id.* Similarly, defendants describe the Court's appointment of Lead Plaintiff in this case and what "[p]laintiffs represented to the Court" (Defs' Opp. at 3-4), but none of that procedural history suggests that Lead Plaintiff should testify at trial on issues such as loss causation, as to which Mr. Glickenhaus's testimony would be irrelevant.[4]

[4] Defendants took Mr. Glickenhaus's deposition during the Phase II proceedings in which defendants attempted to rebut the presumption of reliance. Defendants failed to rebut the presumption as to any claims filed by Glickenhaus & Co. (*see* 9/21/12 Order at 8-9 (Dkt. No. 1822)), and defendants' challenges to the Phase II procedures were overruled by the Court of Appeals. *See Glickenhaus*, 787 F.3d at 432-33.

Further, in relying on class certification cases, defendants neglect to mention the fact that they stipulated to class certification in this case. *See* Dkt. No. 182.

Defendants also fail to provide authority for the assertion that "a jury is entitled to assess to [sic] credibility of the class representative," apparently regardless of whether the class representative's testimony is relevant to the issues at trial. First, both cases defendants cite for this proposition are in the pre-certification context. *See Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 189 (N.D. Ill. 1992) (granting class certification); *Abt v. Mazda Am. Credit*, No. 98 C 2931, 1999 WL 350738, at *4 (N.D. Ill. May 19, 1999) (same). Second, these cases involved different causes of action, and thus different elements and triable issues. *See Scholes*, 143 F.R.D. at 183 (negligence, common law fraud, and breach of fiduciary duty in addition to 10b-5 claims); *Abt*, 1999 WL 350738, at *1 (federal Consumer Leasing Act and Illinois consumer laws).[5] Critically, neither are fraud-on-the-market cases where individual reliance is not an issue. *See Glickenhaus*, 787 F.3d at 429 (discussing the presumption of reliance in fraud-on-the-market cases). Mr. Glickenhaus' credibility simply has no relevance to the retrial.

Finally, even if somehow relevant to the issues of this trial, the evidence defendants wish to present would be unfairly prejudicial under Rule 403 if offered for the purpose defendants propose – to take the testimony of "only one investor" and extrapolate that to come to unfounded conclusions regarding what over 30,000 class members learned, when they learned it, whether they reassessed risks, "and how they reacted." *See* Defs' Opp. at 2-3 n.1. Defendants' own cited authority illustrates that it would be error to assume that Lead Plaintiff is identical to other class members in every regard. *See Scholes*, 143 F.R.D. at 185 ("'The fact that there is some factual variation among the class grievances will not defeat a class action. A common nucleus of operative fact is usually enough

[5] The *Scholes* court merely accepted the ***plaintiffs' argument*** that "credibility of class representative is left for trial," never addressing whether such testimony might be relevant in a 10b-5 action, let alone whether it could be relevant to loss causation or damages. 143 F.R.D. at 187. Similarly, the *Abt* court merely stated that the "plaintiff's sophistication" might be relevant to actual damages in the consumer suit, never addressing 10b-5. 1999 WL 350738, at *3. Further, the analog to the issue in *Abt* in the 10b-5 context would be the reliance issue, *see id.* ("plaintiff [had] read a book about leasing cars that specifically described disposition fees, and [] understood the leasing process [] completely"). Here, plaintiffs' reliance was already determined in the Phase II proceedings and affirmed on appeal by the Seventh Circuit. *See Glickenhaus*, 787 F.3d at 429-33.

to satisfy the commonality requirement . . . .'"); *id.* ("Typical does not mean identical. Rather, the court must 'look to the defendant's conduct and the plaintiffs legal theory to satisfy Rule 23(a)(3).'"). It would be unfairly prejudicial for defendants to examine the class representative solely in the hopes that the jury would make improper inferences regarding the class as a whole. And, once defendants' true intentions were learned, plaintiffs likely would be forced to call other class members in their rebuttal case, depending on the testimony that defendants solicited from Mr. Glickenhaus.

For the reasons set forth above, plaintiffs respectfully request the Court grant Plaintiffs' Motion to Preclude Defendants From Calling the Lead Plaintiff or Introducing Class Members' Trading Records and Related Information at Trial.

DATED: May 13, 2016

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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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