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' MOTION FOR PARTIAL RECONSIDERATION OF RULING REGARDING PURPORTED "FINDING OF FACT" BY THE SEVENTH CIRCUIT

Defendants respectfully move the Court to reconsider that portion of its pretrial rulings holding that the following statement by the Seventh Circuit in its opinion remanding for a new trial on loss causation shall be deemed an uncontested finding of fact at the new trial: "Professor Fischel's Leakage and Specific Disclosure Models controlled for market and industry factors—his regression analysis took care of that." This statement by the Seventh Circuit was not a finding of fact—nor could it have been, since appellate courts typically are not empowered to make findings of fact. Thus, deeming the statement to be uncontested would be plain legal error that would provide a ground for reversal on appeal of any judgment in favor of Plaintiffs. Given the manifest error that would arise from such a construction of the Seventh Circuit's opinion and mandate, Defendants respectfully submit that correction is warranted. In support of this motion, Defendants further state:

1. In their pretrial motions, Plaintiffs argued that the following "finding" by the Seventh Circuit should be deemed binding at the retrial: "Fischel's models controlled for market

and industry factors and general trends in the economy—the regression analysis took care of that." Dkt. No. 2128 at 8 (quoting *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 421 (7th Cir. 2015).); Dkt. No. 2134 at 5-6; Dkt. No. 2136 at 3.

2. At the Pretrial Conference on May 18, 2016, the Court agreed with Plaintiffs that "[t]he appellate court did make that finding" and that the jury will be instructed on that finding:

> I agree that it is a finding. I agree that it's been established. It's an implicit one. And I think had it not been so, I think that the court would have rejected Dr. Fischel's testimony completely. So I think it's an implicit finding. And the jury will be instructed and we'll take care of it by way of a jury instruction.

Tr. at 78:25-79:5; *see also* Tr. 22:4-10; 71:24-72:4.

3. The Court should, at this time, reconsider this determination and the related rulings because it would be legal error to treat the Seventh Circuit's statement about Professor Fischel's regression analysis as a binding "finding of fact." Fact finding is the province of juries and district judges, not appellate courts. Controlling Supreme Court precedent leaves no doubt on this score. In *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986), the Supreme Court reversed the judgment of the Ninth Circuit because the Ninth Circuit had made its own finding of fact as to a particular issue. The Supreme Court explained:

> We think that the Court of Appeals was mistaken to engage in such factfinding. . . . If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were "clearly erroneous" within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. *But it should not simply have made factual findings on its own.*

Id. at 714 (emphasis added); *accord Amadeo v. Zant*, 486 U.S. 214, 228 (1988) (reversing judgment of Eleventh Circuit and admonishing that "[t]he District Court's lack of precision,

however, is no excuse for the Court of Appeals to ignore the dictates of Rule 52(a) and engage in impermissible appellate factfinding.").

4. The Seventh Circuit is well aware that it is not permitted to make findings of fact. *See, e.g., Burns Philp Food v. Cavalea Cont'l Freight*, 135 F.3d 526, 530 (7th Cir. 1998) ("It is not our place to play factfinder, *see Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 89 L. Ed. 2d 739, 106 S. Ct. 1527 (1986))"); *In re Marchiando*, 13 F.3d 1111, 1114 (7th 1994) (explaining that *Icicle Seafoods* reserves to the district court "a finding on a *disputed* fact"). And the Seventh Circuit's opinion gave no indication that it was taking the extraordinary step of breaking from the normal division of judicial authority.

5. On the contrary, the statement culled by Plaintiffs from the Seventh Circuit's opinion involves a disputed factual matter that precedent directs is one for the jury to decide. Under settled Supreme Court and Seventh Circuit precedent, the probative value that should be accorded Professor Fischel's regression analyses, his selection of the S&P 500 and the S&P Financials indices as the "independent variables" used to measure "market and industry factors" in his regression analysis, and the degree to which news addressing a subset of peer companies similar to Household had an effect on Household's stock price that is not captured by (or is disproportionate to) the variables selected, are disputed *factual* questions for the jury to assess. As the Seventh Circuit explained in *Manpower, Inc. v. Insurance Co. of Pennsylvania*, 732 F.3d 796 (7th Cir. 2013):

> [T]he choice of independent variables to include in any regression analysis is critical to the probative value of that analysis. Nevertheless, *the Supreme Court and this Circuit have confirmed on a number of occasions* that the selection of the variables to include in a regression analysis is normally a question that goes to the probative weight of the analysis rather than to its admissibility. [citation to Supreme Court and Seventh Circuit precedent omitted] . . . . *These precedents teach that arguments about how the selection of data inputs affect the merits of*

> *the conclusions produced by an accepted methodology should normally be left to the jury.*

Id. at 808 (emphases added). The "selection of the variables to include in a regression analysis" and "how the selection of data inputs affect the merits of the conclusions produced" are central issues of *disputed fact* regarding the loss causation element of Plaintiffs' securities fraud claim and the proper measure of inflation. The Seventh Circuit did not render, and indeed could not have rendered, a finding of fact on this issue. *Icicle Seafoods*, 475 U.S. at 714; *Amadeo*, 486 U.S. at 228. Plaintiffs' argument, therefore, requires this Court to assume that the Seventh Circuit "implicit[ly]" committed plain legal error, in violation of binding Supreme Court precedent and its own precedential decision in *Manpower*. Tr. 79:1. But the Seventh Circuit did no such thing.

6. Instead, when it made the statement that Plaintiffs wish to enshrine as undisputed, the Seventh Circuit was evaluating Professor Fischel's prior testimony under a deferential standard of review in which all of his testimony was to be considered in a light most favorable to sustaining the jury verdict. *See Glickenhaus*, 787 F.3d at 414. Although the Seventh Circuit thus accepted for purposes of applying this standard of review that Professor Fischel's regression analysis adequately accounted for market and industry factors—that is, it accepted that the previous jury could reasonably have reached that conclusion (not that the jury *had to* reach that conclusion)—the Court nonetheless found Professor Fischel's testimony insufficient to establish loss causation in accordance with the Supreme Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). *See Glickenhaus*, 787 F.3d at 423. As this Court previously held, the Seventh Circuit accordingly reversed for a retrial on the *entire element* of loss causation, as well as the amount of inflation caused by each of the 17 misrepresentations at issue. Dkt. 2042.

7. Thus, the Seventh Circuit's view of Professor Fischel's model under the deferential standard of review required on appeal does not bind the new jury's assessment of

Professor Fischel's model on retrial. Where, as here, a prior judgment has been reversed and a fundamental element of liability is to be retried, underlying factual matters pertaining to that reversed element are "annulled" and have "no continuing force." *Bright v. Hill's Pet Nutrition, Inc.*, 342 F. App'x 208, 209 (7th Cir. 2009) (noting that "it is regrettable to try any suit three times, but here it is necessary"). For this reason, as the Seventh Circuit has explained, "'the general rule [is] that upon a reversal and remand for further consistent proceedings the case goes back to the trial court and there stands for determination of the issues presented as though they had not been determined before, pursuant, of course, to the principles of law enunciated in the appellate court's opinion which must be taken as the law of the case at the new trial.'" *Pickett v. Sheridan Health Care Ctr.*, 813 F.3d 640, 645 (7th Cir. 2016) (quoting *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1207 (7th Cir. 1989)). While the legal principles set forth in the Seventh Circuit opinion are binding on this retrial, no underlying disputed factual issues regarding the reversed element of loss causation are to be taken as a binding "fact" found by the Seventh Circuit.

8. If the Court's ruling on this point is not corrected, and Plaintiffs prevail at the retrial, the Court's ruling will provide a basis for reversal of any judgment entered in Plaintiffs' favor. The Court, therefore, should take this opportunity to correct this manifest error of law. *See, e.g., Wilkins v. Just Energy Grp., Inc.*, No. 13 C 5806, 2016 U.S. Dist. LEXIS 36711, at *2-3 (N.D. Ill. Mar. 22, 2016) ("A motion to reconsider an interlocutory order. . . allows a party to direct the court's attention to manifest errors of fact or law, a significant change in the law or facts, the court's misunderstanding of a party's argument, or party's contention that the court ruled on an issue that was not properly before it.")

WHEREFORE, Defendants respectfully request that the Court reconsider and correct that portion of its pretrial rulings holding that the following "finding" by the Seventh Circuit shall be deemed uncontested at the retrial: "Professor Fischel's Leakage and Specific Disclosure Models controlled for market and industry factors—his regression analysis took care of that." Factual issues concerning the regression analyses presented by the experts—and the probative value of variables selected, the data inputs and the conclusions produced—should be evaluated by the jury in accordance with the Seventh Circuit's decision in *Manpower*.

Dated: May 20, 2016

Respectfully submitted,

/s/ R. Ryan Stoll

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CERTIFICATE OF SERVICE

R. Ryan Stoll, an attorney, hereby certifies that on May 20, 2016, he caused true and correct copies of the foregoing Defendants' Motion for Partial Reconsideration of Ruling Regarding Purported "Finding of Fact" by Seventh Circuit to be served via the Court's ECF filing system on the following counsel of record in this action:

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