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' OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION OF RULING REGARDING PURPORTED "FINDING OF FACT" BY THE SEVENTH CIRCUIT

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I. INTRODUCTION

At the May 18, 2016 Pretrial Conference, this Court agreed that the Seventh Circuit meant what it said when it found that "Professor Fischel's Leakage and Specific Disclosure Models controlled for market and industry factors – his regression analysis took care of that." In light of the Seventh Circuit's finding on this issue, which this Court correctly found is the law of the case, the Court stated it would instruct the jury "that in determining loss causation and damages . . . they should disregard evidence about market and industry factors and general trends in the economy." Hr'g Tr. at 22:7-10. Defendants now contend that instructing the jury on a finding ***they did not dispute***, and in fact, ***conceded on appeal***, would constitute "manifest error" that would "provide a ground for reversal." Defendants are wrong.

First, defendants wrongly contend that whether Fischel's models controlled for market and industry factors is a "disputed" factual matter, which automatically precluded any conclusive finding (express or implied) on that issue by the Seventh Circuit. To the contrary, in their appellate brief, defendants conceded multiple times that Fischel's models "controlled only for market and sector movements." Brief for Defendants-Appellants, Case No. 13-3532, Dkt. No. 52 at 13, 16.[1] Given defendants' admissions and the jury's verdict, the Seventh Circuit conclusively decided the issue defendants improperly seek to re-litigate on retrial – that Fischel's models accounted for the impact on Household of industry, market and general economic factors.

Second, defendants' efforts to characterize the Seventh Circuit's finding as a purely factual one should be rejected, as the finding is more appropriately considered a mixed legal-factual issue and there is nothing extraordinary (or impermissible) about a Court of Appeals applying its statement of the law to the facts of a case. Thus, defendants' argument that the Court of Appeals is precluded from making purely factual findings, and the cases they cite in support of that proposition, have no bearing here. Further, defendants' insistence that *Manpower* requires that they be allowed a second bite at the apple on the question of whether Fischel's models accounted for market and

[1] Defendants' Seventh Circuit brief is attached as Ex. 1 to the Declaration of Luke O. Brooks in Support of Plaintiffs' Opposition to Defendants' Motion for Reconsideration of Ruling Regarding Purported "Finding of Fact" by the Seventh Circuit ("Brooks Decl.").

industry factors is similarly misguided. *Manpower* did not involve the law of the case doctrine and provides no guidance on how district courts should interpret and apply mandates from the Seventh Circuit on remand.

Finally, recognizing they can produce ***no evidence*** of firm-specific, non-fraud information that distorted Fischel's models (despite convincing the Seventh Circuit to reverse and remand on that very issue), defendants now contend that firm-specific, non-fraud information really means information with a firm-specific "effect," such as information that disproportionately affected Household and other subprime companies. Defendants' reformulation of "firm-specific, non-fraud information" is directly contrary to the Seventh Circuit's plain language. In any event, at the last trial defendants tried, but failed, to convince the jury that Fischel's models did not account for market and industry factors.

In short, defendants point to no new law or facts. Nor can they explain any supposed "manifest error" that warrants reconsideration of the Court's ruling. Defendants' motion should be denied.

II. MOTION FOR RECONSIDERATION STANDARD

Defendants fail to acknowledge the relevant standard on a motion for reconsideration. According to the Seventh Circuit:

> A motion for reconsideration performs a valuable function where "the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error . . . of apprehension. A further basis . . . would be a controlling or significant change in the law or facts since the submission of the issue to the Court. Such problems rarely arise and the motion to reconsider should be equally rare."

Bank of Waunakee v. Rochester Cheese Sales, Inc., 906 F.2d 1185, 1191 (7th Cir. 1990). Defendants' own authority illustrates that "[a] motion to reconsider an interlocutory order serves a limited purpose in federal litigation; it is not a vehicle to rehash an argument the court has already rejected or to present legal arguments that were not presented earlier." *Wilkins v. Just Energy Grp., Inc.*, No. 13 C 5806, 2016 WL 1106855, at *1 (N.D. Ill. Mar. 22, 2016).

Here, defendants do not point to any new law or new facts, nor can they explain any supposed "manifest error," as they do not explain how the Court might have misunderstood their

arguments. Instead, they take issue with the fact that the Court already understood and rejected their position. Defendants now seek to: (a) revisit an argument already rejected by this Court, and (b) raise arguments that belonged in their earlier opposition. Neither is a proper basis for reconsideration. *See Wilkins*, 2016 WL 1106855, at *1.

III. PROCEDURAL BACKGROUND

In the first trial, defendants levied numerous attacks on Professor Fischel's models, his analysis and his conclusions. Defendants and their expert Bajaj asserted, among many other arguments, that Fischel's models: (1) do not comport with the academic literature; (2) violate accepted economic standards; (3) use the wrong peer group; and (4) use the wrong estimation window. Brooks Decl., Ex. 2 at 4133-4145. For example, Bajaj testified that "what is missing in [Fischel's] regression equation is a benchmark that's close to Household's business. That's the consumer finance business." *Id*. at 4138:12-14. Bajaj also opined that his index was more "precise" than Fischel's because "the economic environment during this time that explained Household's [stock price] return was being felt by consumer finance companies that had similar clientele to Household." *Id*. at 4139:4-4140:3. And Bajaj testified his model is more precise than Fischel's because he included the "most appropriate" peer group and "a more appropriate estimation window" than Fischel. *Id*. at 4140:23-4141:3. The jury rejected these arguments, and all of defendants' other attacks on Fischel's models, and instead agreed with Professor Fischel that his application of the leakage model was the best way to measure damages. Dkt. No. 1611.

On appeal, defendants again "broadly attack[ed] the expert's loss-causation model." *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 413 (7th Cir. 2015). In their appellate brief's Statement of Facts, defendants wrote: "Plaintiffs' leakage model calculated the amount of artificial inflation in the stock price simply by measuring the difference between Household's stock performance from November 15, 2001 through October 11, 2002 and the performance of the S&P 500 and Financial Indexes during that same time frame, and then performing a regression analysis that ***controlled*** only ***for market and sector movements***." Brooks Decl., Ex. 1 at 13.[2] Defendants

[2] Here, as elsewhere, emphasis is added and citations omitted.

also told the Seventh Circuit that in their 2009 *Daubert* brief they had "stressed that Plaintiffs' loss causation report made no effort to account for, much less exclude, any non-fraud firm-specific explanations for the decline in the price of Household's stock price, but instead treated the impact of all information ***not attributable to general market or industry-wide forces*** as resulting from the alleged fraud." *See id*. at 16.[3] Defendants then argued that to establish loss causation the model ***itself*** must account for and exclude all firm-specific non-fraud information, and that because it does not, judgment should be entered for defendants. *Id*. at 36-37. They reiterated that basis for reversal at the oral argument: "We are looking for a ruling that would foreclose the use of a model that doesn't account for non-fraud, firm-specific information." Brooks Decl., Ex. 3 at 4.

Ultimately, the Court of Appeals rejected that argument and all of defendants' other loss causation arguments except for one. 787 F.3d at 422. The panel vacated the judgment because it viewed Professor Fischel's opinion with respect to firm-specific, non-fraud related information as too conclusory, stating:

> In light of *Dura*, however, we conclude that the evidence at trial did not adequately account for the possibility that ***firm-specific***, nonfraud related ***information*** may have affected the decline in Household's stock price during the relevant time period. As things stand, the record reflects only the expert's general statement that any such information was insignificant. That's not enough.

Id. at 423. In reaching its final determination, the Court of Appeals also reached the conclusion at issue in this motion:

> Fischel's models controlled for market and industry factors and general trends in the economy – the regression analysis took care of that.

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[3] During oral argument before the Seventh Circuit on May 29, 2014, defendants conceded the point again:

> "What they do, I think it's quite simple, is they look at the overall price drop of the stock, they ***adjust for the overall drop in the stock market*** as a whole, and then they ***adjust for an industry index***, and then they're done."
>
> * * *
>
> "I'll just sum up with this, I think what you have here, is you have exactly what the Supreme Court was worried about in *Dura*, you have a price drop, and it's just not good enough to say, okay well ***I'm going to take out the fact that the whole market dropped and I'm going to take out the fact that the industry dropped*** and everything that's left, I get to count as my inflation."

Brooks Decl., Ex. 3 at 3, 8.

Id. at 421. This was the first step in "isolat[ing] the extent to which a decline in stock price is due to fraud-related corrective disclosures and not other factors." *Id.* (citing *Hubbard v. BankAtl. Bancorp, Inc.*, 633 F.3d 713, 725-26 (11th Cir. 2012); *Miller v. Asensio & Co., Inc.*, 364 F.3d 223, 232 (4th Cir. 2004)).

However, the Court of Appeals also found that "[i]f during the relevant period there was significant negative ***information about Household*** unrelated to these [fraud-related] corrective disclosures (***and not attributable to market or industry trends***), then the model would overstate the effect of the disclosures and in turn of the false statements." *Id.* at 419. Thus, because "the leakage model, which the jury adopted, didn't account for the extent to which ***firm-specific***, nonfraud related ***information*** may have contributed to the decline in Household's share price" (*id.* at 421), and Fischel's testimony that he had accounted for that limitation was too "general," the case was remanded. *Id.* at 421-22, 433. This ruling came despite the fact that, at the first trial, defendants never challenged Fischel's opinion with respect to firm-specific, non-fraud information either on cross-examination or through a contrary opinion from their expert Bajaj. *Id.* at 422 ("And the defendants haven't identified any firm-specific nonfraud related information that could have significantly distorted the model.").

The Court of Appeals expressly held that "[t]he remaining challenges fail. A new trial is warranted on these two issues ***only***."[4] *Id.* at 413. Thus, the only ***issue*** left open for the loss causation retrial is the impact of "***firm-specific***, nonfraud related ***information***." *Id.* at 421.

On remand, defendants moved to exclude Fischel's testimony and once again failed to present evidence of significant firm-specific, non-fraud related information. 2/1/16 Order (Dkt. No. 2102).

[4] After setting forth the "middle ground" approach to addressing the issue of whether firm-specific non-fraud-related information contributed to the decline in Household's stock price, the Seventh Circuit held: "A new trial is warranted on the loss causation ***issue*** consistent with the approach we've sketched in this opinion." *Id.* at 423. The only other issues remanded were the "simple solution" calculation of inflation for the first three days of the Class Period and the *Janus* issue (since disposed of). *Id.* at 423-24.

IV. THE SEVENTH CIRCUIT'S STATEMENT THAT FISCHEL'S MODELS CONTROL FOR MARKET AND INDUSTRY FACTORS AND GENERAL TRENDS IN THE ECONOMY IS THE LAW OF THE CASE

A. Defendants Conceded on Appeal that Fischel's Models Accounted for Market and Industry Stock-Price Movements

Defendants' entire motion – and their repeated incantation of "reversible error," "plain error," and now "manifest error" – is based on the erroneous assertion that whether Fischel's models control for market and industry factors is a "***disputed*** factual matter that precedent directs is one for the jury to decide." Defs' Mem. at 3 (Dkt. No. 2192). It is not. Defendants conceded on appeal that Fischel's regression model did the very thing they want to challenge this time around – it "***controlled*** only ***for market and sector movements***." Brooks Decl., Ex. 1 at 13. Additionally, in criticizing Fischel's model for failing to account for company-specific non-fraud information, defendants reiterated that the models ***did*** control for the impact of stock-price movements "attributable to general market or industry-wide forces." *Id.* at 16. In short, defendants admitted to the Court of Appeals the very fact they now contend is hotly contested. Having made this concession, defendants are barred from changing course on remand, for the Seventh Circuit "does not remand issues to the district court when those issues have been waived or decided." *United States v. Husband*, 312 F.3d 247, 250 (7th Cir. 2002). Defendants "may not now use the opportunity created by the remand" to re-raise this settled issue before the new jury. *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869, 891 (7th Cir. 2013).

B. The Court Rejected the Attack Defendants Now Want to Bring

Since defendants' admission was express – and was presented more than once as ***fact*** in defendants' opening appellate brief – waiver in this case cannot be disputed. Even if defendants dispute waiver, the only other possibility is that the Seventh Circuit conclusively decided the issue they now wish to raise with the jury. *Husband*, 312 F.3d at 251; *see also Barrow v. Falck*, 11 F.3d 729, 731 (7th Cir. 1993) ("Whether the argument was rejected sub silentio or was surrendered, it was unavailable on remand.").

As the Seventh Circuit found in *Husband*:

> There are two major limitations on the scope of a remand. First, any issue that could have been but was not raised on appeal is waived and thus not remanded . . . . Second, any issue conclusively decided by this court on the first appeal is not remanded. To determine whether an issue falls within the second limitation the opinion needs to be looked at as whole. The court may explicitly remand certain issues exclusive of all others; but the same result may also be accomplished implicitly.

Husband, 312 F.3d at 251.

Here, the Court of Appeals conclusively decided that Fischel's models accounted for the impact on Household of industry, market and general economic factors. *Glickenhaus*, 787 F.3d at 421. The Court included that finding in its opinion and specifically limited the loss causation portion of the remand to the separate issue of Fischel's accounting for firm-specific non-fraud information. *Id.* at 413; *see also id*. at 423 ("A new trial is warranted on the loss-causation ***issue*** consistent with the approach we've sketched in this opinion."). Reading the opinion as a whole (and assuming, *arguendo*, no waiver), the court "conclusively decided" that Fischel's models account for the impact from non-fraud information except for company-specific information. There is no basis to re-litigate this issue, as doing so is not necessary to correct the "'discrete, particular error'" found by the court – Fischel's failure to adequately explain why the leakage model was not distorted by company-specific non-fraud information – and on remand "'the district court is limited to correcting that error.'" *United States v. Barnes*, 660 F.3d 1000, 1006 (7th Cir. 2011) (quoting *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996)).

In light of the Court of Appeals' conclusion, this Court correctly held during the May 18, 2016 pre-trial conference that "it is a finding. . . . had it not been so . . . the court would have rejected Dr. Fischel's testimony completely." Hr'g Tr. at 78:23-79:3; *see also id*. at 22:4. Although defendants try to shoehorn the Seventh Circuit's finding into a purely factual box, in reality, it is neither purely factual nor purely legal. Instead, as applied by the Court of Appeals, it is a mixed legal-factual issue – an affirmance of an evidentiary finding reached by the jury following testimony and challenges by both sides. The panel first laid out the legal rule from the Supreme Court's *Dura* decision ("So in order to prove loss causation, plaintiffs . . . need to isolate . . . ."), and then immediately explained how Fischel's models mostly accomplished that (albeit up to a point):

"Fischel's models controlled for market and industry factors and general trends in the economy – the regression analysis took care of that."[5] *Glickenhaus*, 787 F.3d at 421. There is nothing extraordinary about the Seventh Circuit's application of law to the facts. Absent the odd, purely legal holding handed down by an appellate panel, most rulings involve the application of settled law to a specific fact pattern in order to decide an issue on appeal – and it is settled law that lower courts are prohibited from revisiting on remand "an issue expressly or impliedly decided by a higher court." *United States v. Adams*, 746 F.3d 734, 744 (7th Cir. 2014); *see, e.g., United States v. Durham*, 630 Fed. App'x 634, 635 (7th Cir. 2016) (rejecting Ponzi scheme defendant's attempt to reopen loss-amount calculation at resentencing: "We considered and rejected Durham's challenge to the district court's loss-amount calculation in the earlier appeal."); *Ty, Inc. v. Publications Int'l., Ltd.*, 99 C 5565, 2003 WL 21294667, at *3-*4 (N.D. Ill. June 4, 2003) ("In light of the fact that it did not raise the issue in the first appeal, PIL should not be able to 'use the accident of remand' to raise it now.").

Defendants' use of *Bright v. Hill's Pet Nutrition, Inc.*, 342 Fed. App'x 208 (7th Cir. 2009) to argue that underlying factual matters post-judgment are "annulled" and have "no continuing force" (Defs' Mem. at 5) is misguided. *Bright* involved the set-aside of an entire judgment and all of the theories and evidence that had supported it, with express direction from the Seventh Circuit that on remand the plaintiff must be allowed to present "all" legal theories and evidence. *Id.* at 210. This case is much different. While it is true that the Court of Appeals reversed the judgment, it remanded for a new trial on just two discrete issues, and left the remainder untouched and free from re-litigation – important, fact-intensive issues like the number of (and identity of) specific misstatements, materiality, scienter, and that Fischel's models did account for certain factors. Those untouched issues are thus off limits on remand, whether the appellate panel "expressly or impliedly decided" them. *Adams*, 746 F.3d at 744.

Manpower, which reversed a district court's decision to exclude testimony under *Daubert*, and held that the appropriate selection of variables for a regression analysis is a fact-bound question

[5] The Court of Appeals also pointed out that plaintiffs proved at trial that "Household's share price declined after the truth came out, so the problem identified" in *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005) was not present in this case. 787 F.3d at 420.

for resolution by the jury, does not change this result. *Manpower, Inc. v. Insurance Co. of Pennsylvania*, 732 F.3d 796 (7th Cir. 2013). The questions on this motion are: (1) whether having told the Court of Appeals that Fischel's models accounted for market, industry, and general economic trends defendants have waived their ability to contest this point; and (2) if there was no waiver, whether this Court may disregard the panel's finding that "the regression analysis took care of that," and its express instruction that the "only" issue for the retrial on loss causation is whether Fischel adequately accounted for the impact, if any, of significant firm-specific non-fraud information on Household's stock price. *Glickenhaus*, 797 F.3d at 413, 421; *Husband,* 312 F.3d at 251. *Manpower* does not touch upon either question. The decision makes no mention of the law of the case doctrine and contains no discussion of how district courts should interpret and apply mandates from the Seventh Circuit on remand. Factually, *Manpower* did not involve a jury's finding following experts' competing explanations as to whether and why the variables were proper, an admission on appeal that the regression did what it was designed to do, or a Court of Appeals decision finding the same thing. In short, *Manpower* does not compel – or even remotely support – reconsideration of this Court's prior ruling.

C. Defendants' Insistence That the Issue of Fischel's Models Is Fact-Intensive Does Not Undermine the Applicability of the "Law of the Case" Doctrine – Even if They Are Correct

Even if defendants had not conceded the point, and the Seventh Circuit had ruled upon an arguably fact-related issue, that would not prevent its ruling from being regarded as the final word on the issue that should not be revisited on remand. To the contrary, barring some factual "change" in Professor Fischel's view of the relevant market, industry, and general trend factors he applied to his models – which change has not occurred – the Seventh Circuit's observation that the regression analysis in his models adequately accounted for those specific factors remains valid and should not be cast aside; it is still the law of the case. *See, e.g., Teague v. Mayo*, 553 F.3d 1068, 1073 (7th Cir. 2009) ("As to issues of fact, given an unchanged record, 'law-of-the-case reluctance [to reconsider] approaches maximum force.'"); *Bradley v. Milliken*, 620 F.2d 1143, 1147-49 (6th Cir. 1980) (rejecting district court's finding as contrary to the law of the case established by earlier legal and

factual findings of another district court judge that were subsequently affirmed by the Sixth Circuit); *see also* 18B Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Proc.* §4478.5 (2d ed. 2009) ("If an attempt is made to press the same fact issue for a second time on an unchanged record, law-of-the-case reluctance approaches maximum force. This view may be taken with respect to mixed issues that blend fact with legal appraisal.").

Defendants' case law about inappropriate appellate-level "findings" does not support their claim of manifest error. First, the cases defendants cite are inapplicable because the "fact" defendants challenge here was conceded – not disputed – on appeal. Second, defendants ignore the context of their cases. It is not surprising that the precedents they cite frown on a reviewing court taking away a factual issue from a lower court in the aftermath of a ***bench trial***. In that situation, pursuant to Fed. R. Civ. P. 52(a), it is the lower court (not a jury) that makes factual findings that cannot be set aside unless "clearly erroneous." *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (focusing on the rule's strictures). In *Icicle,* it was thus improper for the Court of Appeals to independently review the facts and arrive at a different conclusion than the district court. *Id.* The Supreme Court held the Ninth Circuit "should not simply have made factual findings on its own." *Id.* at 714. The Supreme Court had a similar reaction, in *Amadeo v. Zant*, 486 U.S. 214, 223 (1988), when the Eleventh Circuit disregarded the district court's factual findings and made contrary ones in reversing a Habeas grant. And, when the district court in *Burns* presided over a bench trial but failed to resolve a factual dispute that later cropped up on appeal, again it is not surprising that the appellate court did not want to touch the dispute before remanding the matter. *Burns Philip Food v. Cavalea Continential Freight*, 135 F.3d 526, 530 (7th Cir. 1998) ("[i]t is not our place to play factfinder") (citing *Icicle*). Those situations are far different from this case – this is not the aftermath of a bench trial, the defendants here conceded the fact at issue, and the Court of Appeals' finding was consistent with the jury's.

D. Defendants' New Theory Conflicts With the Opinion's Plain Language

Although defendants' appellate strategy scored them a reversal, in the long run it does not help them because there is no company-specific non-fraud information that significantly distorted

Fischel's model. It simply does not exist. Defendants now want to take a different tack and argue to the new jury that Fischel's leakage model does not exclude the effect on Household's stock price of information that, they claim, disproportionately affected Household and other subprime companies. But this theory was tried in front of the first jury and rejected. S*ee, e.g.* Brooks Decl., Ex. 2 at 4137-4140. And it conflicts with what defendants told the Court of Appeals, and also with what the panel wrote in its opinion. At this point, "it is too late to turn the suit 90° and try again. 'An argument bypassed by the litigants, and therefore not presented in the court of appeals, may not be resurrected on remand and used as a reason to disregard the court of appeals' decision.'" *Health Care Service Corp. v. Brown & Williamson Tobacco Corp.*, 208 F.3d 579, 581 (7th Cir. 2000). "If [defendants] wanted to pursue" a different appellate theory as to why Fischel's models failed to account for nonfraud information "they should have told [the Seventh Circuit] so the first time." *Id.*

Defendants insist that the Seventh Circuit meant something other than what it wrote when it remanded for Fischel to address firm-specific non-fraud information. This argument is a diversion, and adopting defendants' interpretation would require this Court to distort the panel's plain language. For example, the Court of Appeals wrote: "Although [Fischel's] model accounts for the movement of the market generally, it does not account for company-specific information unrelated to fraud-corrective disclosures." 787 F.3d at 416. Defendants assert that the words ***company***-specific non-fraud related ***information*** – in this passage and everywhere else in the opinion – actually mean non-fraud factors that had industry-wide impact or "effect," and also impacted Household. But defendants have no support for their linguistic gymnastics, and the Seventh Circuit was clear that on remand Fischel must account for "significant negative information about Household unrelated to these corrective disclosures (and not attributable to ***market*** or ***industry*** trends)." *Id.* at 419; *id.* at 422-23 ("One possible way to address the issue is to simply exclude from the model's calculation any days identified by the defendants on which significant, ***firm***-specific, nonfraud related ***information was released***.").[6] Defendants' contention that whether information is

[6] *See also id.* at 421 ("But the leakage model, which the jury adopted, didn't account for the extent to which firm-specific, nonfraud related information may have contributed to the decline in Household's share price."); *id.* at 422 ("And the defendants haven't identified any firm-specific, nonfraud related information that could

firm-specific depends on which indices or peer groups are used by an expert in a regression analysis thus finds no support in the opinion.

Defendants' argument also fails the common-sense test. Defendants point to information that allegedly affected Household and other companies in the subprime market – which by its very definition means this information is ***not*** firm-specific. When asked during the May 23, 2016 hearing whether there were any "actual events" that give rise to their challenge, defense counsel cited "concerns about a double-dip recession and unemployment." May 23, 2016 Hr'g Tr. at 145:6-7. But as this Court has already recognized, rising unemployment is not firm-specific information, nor is a recession (*see* 2/1/16 Order); both impact the entire economy, and are thus disposed of by defendants' concession that Fischel's models "***controlled*** only ***for market and sector movements***" (Brooks Decl., Ex. 1 at 13), and excluded the impact of stock-price movements "attributable to general market or industry-wide forces" (*id.* at 16), and the Seventh Circuit's finding that "the regression analysis took care of that." *Glickenhaus*, 787 F.3d at 421.

Whether defendants were at one time entitled to show under *Dura* (or *BankAtlantic*) that Household was disproportionately impacted by such market-wide events in a way not captured by Fischel's models is not relevant to this motion. Defendants pitched that theory to the jury, which rejected it; then, in presenting their appeal, defendants conceded Fischel's leakage model ***did*** account for the factors they now want to challenge. The Court of Appeals found it did, too, and remanded for a new trial on a different question. Under the law of the case, the remand must focus on the issue defendants won on appeal: whether Fischel properly accounted for firm-specific non-fraud

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have significantly distorted the model."); *id*. ("if it's enough for a loss-causation expert to offer a conclusory opinion that no firm-specific, nonfraud related information affected the stock price during the relevant time period, then it may be far too easy for plaintiffs . . . ."); *id*. ("If the plaintiffs' expert testifies that no firm-specific, nonfraud related information contributed to the decline in stock price during the relevant time period and explains in nonconclusory terms the basis for this opinion, then it's reasonable to expect the defendants to shoulder the burden of identifying some significant, firm-specific, nonfraud related information that could have affected the stock price."); *id*. ("if they can, then the burden shifts back to the plaintiffs to account for that specific information or provide a loss-causation model that doesn't suffer from the same problem"); *id*. at 423 ("In light of Dura, however, we conclude that the evidence at trial did not adequately account for the possibility that firm-specific, nonfraud related information may have affected the decline in Household's stock price during the relevant time period.").

information. The Court's order was correct, and defendants' motion for reconsideration should be denied.

V. CONCLUSION

For the foregoing reasons, defendants' motion for reconsideration should be denied.

DATED: May 25, 2016

Respectfully submitted,

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I hereby certify that on May 25, 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 25, 2016.

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