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) <u>CLASS ACTION</u> Honorable Jorge L. Alonso

<u>PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS</u>

I. INTRODUCTION

As Plaintiffs demonstrated in their opening motion, this record $1.575 billion Settlement is not only fair, reasonable and adequate – it is nothing short of extraordinary. Yet, Kevin McDonald, the lone objector, dismisses Plaintiffs' remarkable achievement and disparages lead counsel's 14-year commitment, alleging: "Lead Counsel's interest at this point is not so much in obtaining an optimal result for the class as avoiding the risk that they will not collect as large a fee." *See* Objection to Proposed Settlement and Attorneys' Fee Request (Dkt. No. 2242) at 14. McDonald's bombast simply ignores the facts, which he fails to mention, much less address.

II. PLAINTIFFS' MOTION FOR APPROVAL OF THE SETTLEMENT AND THE PLAN OF ALLOCATION SHOULD BE GRANTED

The $1.575 billion recovery is the largest ever following a securities fraud class action trial, the largest securities fraud settlement in the Seventh Circuit and the seventh largest settlement ever in a post-PSLRA securities fraud case. This case was just the seventh securities fraud case tried to a verdict since the passage of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). The class's recovery far exceeds the percentage recovery of all the other securities settlements valued in excess of $500 million; Class Members will recover between 75% and 252% of their damages, depending on the damages model used. While he miscomprehends the damages in this case, and thus miscalculates the percentage recovery, McDonald completely ignores these other landmark achievements. Unsurprisingly, they appear nowhere in McDonald's 15-page submission.

McDonald also sidesteps entirely Lead Counsel's unremitting efforts during the 14 years of litigation. Lead Counsel achieved the record recovery only after guiding this case through seven years of pretrial litigation, which included filing over 40 motions to compel, taking or defending more than 70 depositions, and opposing multiple motions by Defendants to dismiss the case. After positioning the case for trial, Lead Counsel moved a team of approximately 20 attorneys, paralegals, forensic accountants, and support staff from California to Chicago for pretrial hearings and a six-week jury trial in 2009. At the trial, Lead Counsel elicited testimony from 22 witnesses and introduced over 200 exhibits into evidence. After two and one-half days of deliberation, the jury rendered a verdict in favor of Plaintiffs, concluding that both the CEO and the Company knowingly made false and misleading statements of material fact. ***At this point, the case was just at the halfway point; there would be seven more years of hard-fought litigation to go before Plaintiffs were able to achieve the record $1.575 billion Settlement***.

After trial, Lead Counsel successfully opposed Defendants' post-trial motions, obtained a judgment, completed Phase II discovery and defeated Defendants' presumption of reliance briefing. Lead Counsel also worked with the Court-appointed claims administrator to monitor claims administration and responded to the more than 30,000 objections Defendants had to the claims. During the claims process, Lead Counsel worked extensively with absent Class Members, third-party claims filers, brokers and custodial banks to protect and perfect Class Members' claims. When Defendants appealed the case to the Seventh Circuit Court of Appeals, Plaintiffs vigorously opposed Defendants' appeal, persuading the Court of Appeals to reject the bulk of Defendants' appellate arguments. On remand, Lead Counsel deposed Defendants' three new loss causation and damages experts and defeated Defendants' efforts to exclude Plaintiffs' loss causation and damages expert, Daniel Fischel.

Lead Counsel relentlessly prepared the case for retrial, once again moving a team of more than a dozen attorneys, forensic accountants, paralegals, and support staff from California to Chicago for the pretrial proceedings and retrial. Just hours before the second jury trial was scheduled to begin, the parties reached the $1.575 billion Settlement, which was the culmination of multiple mediations and months of arm's-length settlement negotiations between the parties with the substantial assistance of an experienced mediator, the Honorable Layn R. Phillips (Ret.). To call this case hard-fought would be an understatement. Lead Counsel ultimately litigated to a successful resolution one of the longest running and most complex securities cases ever litigated.

McDonald also insinuates that Plaintiffs faced no real risk at the retrial because the issues were limited to loss causation and damages. This contention betrays a complete misunderstanding of the factual and legal challenges that could have reduced the recovery significantly below the Settlement or even prevented any recovery at all. In fact, Plaintiffs faced substantial risks in proving causation and damages. At the retrial, the jury could have concluded that Plaintiffs failed to prove loss causation, selected the Specific Disclosures Model, or credited Defendants' expert's quantification of inflation, which ranged from $0 to $4.19 per share. Under any of these scenarios, the Class would have recovered nothing or substantially less than what it will recover as a result of the record-breaking Settlement in this case.

The risk that the jury would select the Specific Disclosures Model was especially acute in light of the Court's ruling that the jury could not select a daily inflation amount other than one set forth in a damages model. *See* 5/23/16 Hrg. Tr. at 163:18-19, 164:19-23. Pursuant to this ruling, had the jury concluded the Leakage Model captured firm-specific nonfraud inflation on ***any*** day, there was a substantial risk that the jury would have rejected the entire Leakage Model. This was a real possibility. As just one example, at a pretrial conference on May 31, 2016, Defendants' counsel argued that the Leakage Model captured firm-specific nonfraud information on July 17, 2002. *See* 5/31/16 Tr. at 221:10-226:24. On that day, the Wall Street Journal and Reuters both reported that government regulators, in an effort to shore up reserves at subprime lending companies, had instructed Capital One to bolster its reserves. *Id.* at 221:16-223:14. Although Household reported quarterly earnings that met expectations, its stock declined $3.73 or 8% as a result, according to Defendants' counsel, of the nonfraud news about regulatory action. *Id.* at 223:20-224:1. On that same day, the S&P 500 and the S&P Financials – the two indices used by Fischel in the Leakage Model – rose by .56% and declined by .81%, respectively. *Id.* at 224:2-11. Thus, Defendants' counsel argued that the Leakage Model ascribed more than $3.00 of inflation to July 22, but the decline on that date was actually due to a nonfraud event (regulatory action against Capital One) that impacted only Household and a handful of other subprime lenders. Defendants similarly challenged several other declines on the grounds that they were caused by nonfraud related information. Had the jury accepted Defendants' argument as to any one of these dates, it could have rejected the entire Leakage Model.

McDonald's claim that the Notice "misleads class members concerning the risk presented by proceeding to a second trial" because it contains Defendants' denial of wrongdoing is a *non sequitur*. Objection at 14. The Notice could not be clearer. The only elements at issue in the retrial were loss causation and damages.[1] The Notice also enumerated all of the areas that would have been contested in the second trial, including "the appropriate economic model for determining the amount by which the price of Household common stock was allegedly artificially inflated (if at all) during the Class Period" and "the amount by which the price of Household common stock was allegedly artificially inflated (if at all) during the Class Period." *Id.* at 2. Nor are Defendants' denials of liability misleading. Loss causation is an element of Plaintiffs' claim under Section 10(b) and Rule 10b-5. If Defendants were successful in persuading a jury at the retrial that there was no loss causation, Defendants would not be liable for securities fraud. Thus, the Notice was not misleading; it accurately represented the issues to be retried and the risks stemming from continued litigation.

Equally unpersuasive is McDonald's conjecture that value of the Class's claims "must be" larger than represented. Contrary to McDonald's musings, the total damages are nowhere close to $5 billion. Rather, the Leakage Model "would have resulted in total damages of $2,093,807,983." *See* Declaration of Mishka Ferguson Regarding Settlement Notice Dissemination, Publication, Objections Received to Date, and Analysis of Calculated Claim Damages ("Ferguson Declaration"), ¶18 (Dkt. No. 2228). The Specific Disclosures Model "would have resulted in a damage award of approximately $624,285,676." *Id.*, ¶19. Therefore, the $1.575 billion Settlement would allow eligible Class Members to recover approximately 75% of their damages if the jury had adopted the Leakage Model and approximately 252% if the jury had adopted the Specific Disclosures Model. *Id.*, ¶¶18-19.

McDonald's spurious claim that Plaintiffs "downplay the value of the class's claims" is based on two fallacies. Objection at 13. First, because the partial judgment of $1,476,490,844.21 was based on 10,902 claims, McDonald speculates that the 30,000 outstanding claims "must be" valued at "several times" that figure. *Id.* McDonald's supposition is demonstrably false. Had McDonald bothered to read the Ferguson Declaration, he would have discovered that the approximately 23,000

[1] *See* Notice at 11 (Dkt. No. 2213-3) ("On May 21, 2015, the Court of Appeals reversed the judgment and remanded the case for a new trial on three issues: (1) loss causation; (2) damages; and (3) whether the three Individual Defendants 'made' certain statements under the Supreme Court's decision in *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011). . . . The parties subsequently reached a stipulation regarding which Individual Defendants 'made' which statements . . . .").

outstanding claims were just a fraction of the dollar value of the claims that comprised the partial judgment. In fact, the outstanding claims were valued at just slightly more than $617 million (total damages of $2,093,807,983 minus the partial judgment of $1,476,490,844.21). Rather than being valued at "several times" the partial judgment, the outstanding claims were in fact ***less than half*** the value of the claims comprising the partial judgment.

Second, McDonald adds prejudgment interest to the damages in order to inflate the amount of the Class's losses. But the Class Members did not lose prejudgment interest. Adding prejudgment interest would skew any comparison between the percentage of recovery represented by the Settlement in this case and the percentage recovery of other cases with settlements in excess of $500 million because none of the other settlements include prejudgment interest.

Indeed, McDonald does not even challenge the majority of the factors that Courts in this Circuit consider when evaluating the fairness of a class action settlement. Nor could he. For example, there is no question that the complexity, length and expense of further litigation supports approval of the Settlement. As set forth *supra*, if not for this Settlement, Defendants had several grounds to mount a serious challenge to loss causation and damages at the retrial. Plaintiffs were clearly not guaranteed victory at trial, but even if Plaintiffs did prevail, there would inevitably be post-trial motions and appeals that would delay the resolution of the case for several years. In fact, ***more than six years*** elapsed between the time Plaintiffs obtained a favorable verdict at the first jury trial and the Seventh Circuit's decision reversing and remanding the case for a retrial. *See In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 961 (N.D. Ill. 2011) ("Were the Class Members required to await the outcome of a trial and inevitable appeal . . . they would not receive benefits for many years, if indeed they received any at all."). Of course, any subsequent appeal would introduce not only a lengthy delay, but considerable risk as well. *See Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 635 (7th Cir. 2011) ("The prospect of appellate review affects the risk and costs (in time and money) of the litigation."). The $1.575 billion Settlement represents an immediate and substantial tangible recovery without the considerable risk, expense and delay of trial and post-trial litigation.

Further, the reaction of Class Members supports settlement. The Court-appointed Claims Administrator, Gilardi and Co. ("Gilardi"), mailed copies of the Notice – advising Class Members of their right object to the terms of the Settlement and explaining how and when to do so – to more than 629,000 potential Class Members. Of the over 80,000 claims that Gilardi received, 33,871 Class Members are entitled to share in the recovery. Not a single one of those other Class Members objected to the Settlement, Plan of Allocation or request for attorneys' fees and expenses. Most telling, about 300 Class Members have an allowed loss exceeding $1 million dollars. None of these 300 Class Members have objected to anything. This paucity of objections, particularly from those Class Members who have the greatest stake in the litigation, underscores the fairness of the Settlement and weighs strongly in favor in granting approval. *See Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 959 (7th Cir. 2013) (observing that the lack of large institutional investor objections is significant because those investors have the greatest interest in the recovery); *see also* 2 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §11.48, at 11-116 (3d ed. 1992).

Notably, McDonald also neglects to mention that the Plaintiffs, institutional investors who were actively involved in the prosecution of the Litigation, believe that the Settlement is in the best interests of the Class. *See* Declaration of James Glickenhaus in Support of Motion for Award of Attorneys' Fees and Expenses and Reimbursement to the Class Representatives Pursuant to 15 U.S.C. §78u-4(a)(4), ¶¶7-8 (Dkt. No. 2230), and Declaration of Charles A. Parker in Support of Motion of Final Approval of Class Action Settlement and Award of Attorneys' Fees and Expenses Pursuant to 15 U.S.C. §78u-4(a)(4), ¶¶3-4 (Dkt. No. 2231). So, too, does the mediator himself, a former U.S. Attorney and U.S. District Court Judge. *See* Declaration of Layn R. Phillips in Support of Settlement, ¶9 (Dkt. No. 2229).

Likewise, McDonald does not contest that the stage of the proceedings and the amount of discovery completed militates in favor of approval. This was a case where – after 14 years of litigation, 70 depositions, a 26-day jury trial, an appeal and a preparation for a second jury trial – Plaintiffs had an uncommonly clear view of its strengths and weaknesses. Because the Settlement was negotiated with eyes wide open, Plaintiffs were able to ensure that that the Settlement was fair, reasonable and in the best interests of the Class.

In light of the record Settlement, Lead Counsel's 14-year struggle to vindicate the rights of the defrauded investors and the legal, factual and practical risks of continued litigation, McDonald's claim that Lead Counsel cared more about its fee than maximizing the recovery is irresponsible and deeply offensive. The Settlement, which is highly favorable for the Class, easily meets the Seventh Circuit standard for approval. McDonald has no objection to the Plan of Allocation of Settlement Proceeds. It, too, is fair and reasonable and warrants approval.

III. CONCLUSION

Despite McDonald's potshots, the Settlement is an outstanding result for the Class and the height of 14 years of arduous litigation. It is in the best interest of the Class and trades the considerable risk, expense and delay from continued litigation for the substantial, certain and immediate benefits of a Settlement. The Plan of Allocation is also fair, reasonable and adequate. Thus, the Court should approve the Settlement and Plan of Allocation.

DATED: September 29, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 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 September 29, 2016.

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