No. 13-3532

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GLICKENHAUS INSTITUTIONAL GROUP,
Plaintiff-Appellee,
vs.
HOUSEHOLD INTERNATIONAL, INCORPORATED, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Case No. 1:02-cv-5893
The Honorable Ronald A. Guzman, District Judge

PLAINTIFFS-APPELLEES' ANSWERING BRIEF

ROBBINS GELLER RUDMAN
& DOWD LLP
MICHAEL J. DOWD
SPENCER A. BURKHOLZ
DANIEL S. DROSMAN
JOSEPH D. DALEY
MAUREEN E. MUELLER
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
LUKE O. BROOKS
JASON C. DAVIS
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545
415/288-4534 (fax)

Lead Counsel for Plaintiffs-Appellees
[Additional counsel appear on signature page.]

CIRCUIT RULE 26.1 AND FED. R. APP. P. 26.1
DISCLOSURE STATEMENT

The undersigned counsel for Plaintiffs-Appellees furnishes the following statement in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1:

1. The full name of every party that the attorney represents in the case:

On behalf of themselves and all others similarly situated, Glickenhaus & Company; PACE Industry Union Management Pension Fund; and The International Union of Operating Engineers Local No. 132 Pension Plan.

2. The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this Court:

Robbins Geller Rudman & Dowd LLP, and Miller Law LLC.

3. If the party is a corporation, (i) identify all of its parent corporations, if any, and (ii) list any publicly held company that owns 10% or more of the party's stock:

N/A.

s/ Michael J. Dowd

Counsel for Plaintiffs-Appellees

CIRCUIT RULE 34(F) AND FED. R. APP. P. 34(A)(2) STATEMENT REGARDING ORAL ARGUMENT

Given that the underlying securities-fraud litigation spanned several years and culminated in a 24-day jury trial, Plaintiffs-Appellees respectfully suggest that the Court's resolution of this appeal would be significantly aided by oral argument.

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I. PRELIMINARY STATEMENT

After a 24-day trial, the jury found defendants liable for securities fraud. Plaintiffs proved that defendants pumped up Household's stock price in a failed effort to sell the company and personally cash out for nearly $150 million. The evidence showed that defendants grew the company by engaging in predatory-lending practices, hid the negative effects of those practices on the quality of Household's loan portfolio, and inflated net income through improper accounting. As the truth about defendants' fraud was revealed to the market, investors lost billions.

During and after trial, defendants made a series of strategic decisions that backfired. Defendants vouched for plaintiffs' expert – Professor Daniel Fischel – and told jurors he was "the preeminent expert" who "wrote the book" on securities-fraud damages. Having exalted Fischel, defendants failed to cross-examine him about the testimony about which they now complain. Defendants waived any claim that the verdict was inconsistent when they declined to move for the verdict's resubmission to the jury for reconciliation. In Phase II, defendants failed to pursue discovery diligently and decided not to use all of their allotted depositions. Rather than any procedural unfairness, defendants lost because of the overwhelming evidence, exacerbated by their tactical choices.

Having lost a fair trial on the merits, defendants resort to attacks upon class action cases in general – grousing about "hydraulic" settlement pressure that supposedly flows after class certification is granted in "meritless cases." Of course, in this case defendants stipulated to class certification, and a jury of defendants' peers concluded that they defrauded investors – two inconvenient facts that eviscerate defendants' big picture concerns.

Ignoring the evidence at trial, defendants seek a second bite at the apple with a new expert and a new audience to hear their case. But, it is too late for defendants to change experts. It is too late for defendants to conduct cross-examinations they should have undertaken at trial. It is too late for defendants to demand resolution of alleged inconsistencies they never gave the jury a chance to resolve. And, it is too late for defendants to pursue the discovery they chose not to take in Phase II.

The issues defendants raise utterly fail to reach the standards required to obtain a new trial or judgment as a matter of law. The judgment should be affirmed.

II. JURISDICTIONAL STATEMENT

Defendants-Appellants' ("defendants") jurisdictional statement is complete and correct.

III. COUNTERSTATEMENT OF THE ISSUES

1. Whether the jury had a legally sufficient basis to conclude defendants' fraud was a substantial factor in causing plaintiffs' losses.

2. Whether defendants waived their argument for a new trial based on alleged inconsistencies between the general securities-fraud verdict and the special answers accompanying it, given their failure to move for the verdict's resubmission to the jury.

3. Whether the district court abused its discretion in denying defendants' motion for a new trial where the damages estimate had a reasonable basis and was rationally connected to the evidence.

4. Whether the district court abused its discretion in denying each defendant's motion for a new trial where the jury was properly instructed on what it means to make a misstatement, each defendant was legally responsible for the misstatements, and no defendant can show prejudice.

5. Whether the district court abused its discretion in managing Phase II discovery.

6. Whether defendants rebutted the presumption of reliance on a class-wide basis where the jury found each actionable statement was material and impacted the stock price.

IV. COUNTERSTATEMENT OF THE CASE

A. Pre-Trial Proceedings

The operative Complaint, filed on March 13, 2003, alleges violations of §§10(b) and 20(a) of the Securities Exchange Act of 1934. A1-A158. Plaintiffs alleged defendants Household International, Inc., CEO William Aldinger, CFO David Schoenholz, and Vice-Chairman/President of Consumer Lending Gary Gilmer defrauded investors by making a series of false statements and omissions about Household's lending practices, asset quality, and reported earnings. *Id*.

The parties stipulated to certify a class of persons who purchased or otherwise acquired Household securities between October 23, 1997 and October 11, 2002, with respect to the §§10(b) and 20(a) claims. CD182.[1] The district court, the Hon. Ronald Guzman presiding, granted certification. CD194. Defendants also stipulated that Household's stock traded in an efficient market. PSA708.

During six years of pre-trial litigation, the district court decided repeated motions to dismiss, dozens of discovery motions, and held over two dozen hearings

[1] "CD__" refers to Clerk's Docket materials not reproduced in the parties' appendices. "PSA__" refers to Plaintiffs' Supplemental Appendix.

and status conferences. Before trial, defendants moved for summary judgment on the loss-causation issue, and both sides filed *in limine* and *Daubert* motions.[2] Following an eight-day pre-trial conference, the court issued 14 written orders, granting some of each side's motions *in limine* and denying others.[3] Additionally, the court granted, in part, one of defendants' *Daubert* motions, curtailing the opinions of plaintiffs' accounting expert. CD1528.

Defendants' summary judgment and *Daubert* motions directed at plaintiffs' loss-causation and damages expert, Fischel, both advanced the same loss-causation arguments. The court rejected these arguments by denying defendants' motion to exclude Fischel's testimony. A216-A218. The court noted, "Fischel's report, rebuttal report and documents underlying those reports establish that Fischel analyzed in detail the causal relationship between defendants' conduct and investors' losses." A216.

The court also rejected objections to Fischel's methodologies, observing that "an event study is '[t]he gold standard, which is accepted by both courts and economists,'" and "Fischel's methodologies involve precisely the kind of analysis that finds extensive support in economic, legal and financial articles." A217-A218. Specifically, "Fischel's regression analysis calculates the amount of artificial inflation

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[2] CD1227, 1312, 1317, 1321, 1325, 1330, 1335-36, 1338-1343, 1345-46, 1356, 1361.

[3] CD1501-03, 1505-07, 1509-11, 1514-16, 1527-28.

resulting from an alleged omission on any day during the class period." A218. Fischel's testimony was held admissible "because he evaluated the causal connection between defendants' conduct and investors' loss via a reliable methodology that accounts for non-fraud explanations." *Id*.

B. The Trial

1. Defendants' Fraud

At trial, plaintiffs proved that defendants engaged in predatory-lending practices to drive Household's growth, lied about the quality of Household's loan portfolio, and inflated the Company's net income through improper accounting.[4] Defendants knew that if Household conveyed the appearance of growth, the Company's stock price would dramatically increase. PSA32:12-PSA33:5, PSA441, PSA454. Gilmer told his subordinates that Household's stock should trade at least "22 dollars a share" higher and if they could convince Wall Street of their growth prospects, Household's stock, trading at $39-$40, would skyrocket to $53-$66. PSA454, PSA442. Gilmer said that failing to grow would have "unthinkable consequences." PSA455.

In their efforts to grow at all costs, defendants hired Andrew Kahr, a predatory-lending specialist, who suggested "initiatives" designed to deceive customers.[5]

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[4] PSA2:9-23, PSA3:10-15:18, PSA21:1-25, PSA25:6-28:7, PSA85:25-86:12, PSA87:14-19, PSA88:6-17, PSA91:5-9, PSA93:21-94:10, PSA101:3-10, PSA103:5-25.

[5] PSA76:13-24, PSA254:4-13, PSA443, PSA446, PSA453, PSA456-PSA457.

Defendants, working with Kahr, caused Household to undertake predatory practices, driving loan originations and resulting in unprecedented growth.[6] As Gilmer predicted, Household's stock price soared, reaching $69 in July 2001. PSA616.

By 2002, state Attorneys General concluded that Household was engaged in "widespread lending patterns and practices that violate both state and federal law," which were "national in scope." PSA468. The Attorneys General tied Household's growth to its predatory practices:

> [W]e note that several of the most insidiously deceptive sales practices which attracted regulatory attention to Household practices at the outset relate to products and practices initiated by Household in 1999.... [S]ince 1999, Household's originations have nearly doubled. Almost assuredly, the misleading sales practices the states have identified have contributed to that growth.

PSA479.

In October 2002, Household settled the Attorneys General predatory-lending charges for $484 million.[7] Household got a sizeable discount via this agreement, having reaped $3.2 billion in revenue from predatory practices between 1999 and Q2 2002. PSA87:14-88:17. Predatory lending accounted for between 28% and 36% of Household's net income during that time. PSA89:18-90:22.

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[6] CD1656:22-23; PSA476, PSA18:14-19:7, PSA16:17-17:6, PSA21:1-25.

[7] PSA238:20-23, PSA249:2-4, PSA250:19-251:15, PSA253:5-23, PSA259:20-260:14.

Defendants intentionally destroyed evidence of their predatory practices. On March 12, 2001, Schoenholz instructed Household's Office of General Counsel to collect "all Andrew Kahr memoranda" and destroy them. PSA487. Schoenholz later ordered the destruction of Kahr-related e-mails. PSA488. Similarly, in summer 2001, Gilmer ordered his Consumer Lending Unit to undertake a "branch purge" and destroy evidence of predatory sales tactics. PSA480, PSA481, PSA482, PSA262:22-263:26. Aldinger knew of Schoenholz's spoliation orders. PSA488.

The truth about defendants' predatory practices began leaking into the market on November 15, 2001 when California sued Household for overcharging customers.[8] Subsequently, news that the Washington Attorney General was investigating Household for its lending practices began leaking into the market. Household claimed its problems were limited to one branch office, but later disclosures confirmed the practices were national in scope. This series of partial truthful disclosures caused inflation to dissipate from Household's stock price from November 15, 2001 to October 11, 2002 ("Disclosure Period").[9] By October 2002, Household's stock price had fallen *below* the level it traded before defendants' scheme began. PSA623.

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[8] PSA133:14-140:4, PSA685.

[9] PSA172:14-185:6, PSA300:21-302:5, PSA305:8-307:4.

Household also falsified its reported "2+ statistics" – the percentage of Household's loan portfolio that was more than two months delinquent. PSA23:24-24:15, PSA91:5-9, PSA93:21-95:12. Defendants knew investors relied upon 2+ statistics to evaluate Household's loan quality and stock price.[10] Unsurprisingly, predatory loans were more likely to end up delinquent, as recipients were unlikely to pay back the loans on time, if at all. PSA25:22-28:7. To mask the problem, defendants engaged in "loan quality concealment techniques," such as re-aging and restructuring loans, designed to make delinquent loans appear current, thereby improperly reducing the percentage of 2+ delinquent loans reported in Household's financial statements.[11]

In December 2001, the market began questioning the quality of Household's loan portfolio and its re-aging policies.[12] Aldinger confessed at trial that defendants responded by making materially false representations about Household's re-aging policies in the Company's 2001 10-K. PSA247:24-248:16. Defendants also took to the street and lied about their loan portfolio and re-aging policies at a December 2001 Goldman Sachs conference and again in April 2002 at their annual Financial Relations

[10] PSA54:9-18, PSA55:5-10, PSA91:11-92:19, PSA219:17-19, PSA220:12-15.

[11] PSA23:24-24:4, PSA91:5-9, PSA93:21-95:12, PSA97:2-4, PSA98:9-13.

[12] PSA239:3-240:3, PSA64:9-11, PSA240:5-24, PSA241:17-242:19.

Conference ("FRC") for Wall Street analysts, supplying phony statistics regarding re-aging and its impact on Household's loan portfolio. PSA335, PSA330, PSA495, PSA356; CD1656:27-28.

Defendants were motivated to lie about Household's loan portfolio because they were trying to sell the Company to Wells Fargo.[13] During due diligence, Wells Fargo noted "major systemic issues in [Household's] policies and procedures" including "aggressive" re-aging policies. PSA514. It determined that Household used re-aging to mask losses, concluding "it is hard to imagine that they are not also being employed to boost earnings." *Id.*; *see also* PSA511. Ultimately, Wells Fargo walked away. PSA100:23-101:2, PSA778:4-20, PSA779:4-6. Had the deal gone through, Aldinger, Gilmer, and Schoenholz would have collected as much as $150 million in cash distributions and parachute payments. PSA489, PSA533.[14]

After the fraud came to light, defendants sold the Company to HSBC for less than half of the price Household and Wells Fargo discussed in 2002. PSA255:12-258:11, PSA776:14-777:13.

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[13] PSA771:21-772:16, PSA773:16-774:10, PSA775:5-12, PSA776:14-777:13.

[14] Defendants also falsified their financial statements by improperly recording revenue and expenses in connection with four credit-card agreements – overstating Household's net income by $386,000,000. PSA101:3-104:4, PSA440. In August 2002, Household conceded its accounting for these transactions violated GAAP, and restated its financial statements. PSA440.

2. The Evidence of Loss Causation and Quantification of Damages

In 2001, as a result of defendants' fraud, Household's stock price substantially outperformed the market and its peers: the company's share price increased 5.3%, while the market declined 13%, the S&P Financials Index fell 10.5% and Household's self-identified peers fell 21.9%. PSA303:12-304:4, PSA485.[15]

In contrast, when the truth leaked out in late 2001 and 2002, Household's shares plummeted, falling from $60.90 to $28.20 due to disclosures from November 15, 2001 to October 11, 2002 – a 53% decline compared to the 20% and 25% declines experienced by Household's peers and the market. PSA177:9-179:10, PSA618, PSA623, PSA684. From January-October 2002, when the bulk of the truth was disclosed, Household's underperformance was even more pronounced – its stock price declined 59%, compared to 22.8% for the market, and 11% declines for the S&P Financials and Household's internal peer group. PSA304:5-19, PSA436. During the Disclosure Period, Household was the fourth-worst-performing company out of 70 in the S&P Financials.[16] PSA197:20-198:12, PSA293:19-294:8.

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[15] In its SEC filings, Household identified the S&P Financials Index as its peer group. *Id.* Internally, Household compared itself to a smaller group of peers. *Id.*

[16] Defendants erroneously focus on Household's performance during the entire class period (AOB8), but the appropriate assessment for loss causation is Household's performance against the market and its peers during the Disclosure Period – when the truth emerged.

a. Fischel's Trial Testimony

Fischel testified that Household's inaccurate statements "caused there to be significant inflation in Household stock price for much of the relevant period." PSA124:6-14. And, when that inflation was removed, Household investors "suffered very significant losses as a result of Household's defective disclosures." *Id*. Fischel explained:

> [D]uring the period Household was touting its growth model and denying any wrongdoing, it vastly outperformed the peer groups that Household itself identified that it should be compared against.
>
> Once Household's denials began to be more suspect, less believed by the market, as the complaints, the investigations, the lawsuits, et cetera, analysts' criticisms began to pile up after November 15, 2001, Household vastly underperformed the peers that it itself said it should be judged against.

PSA305:15-306:3.

Fischel presented the jury with two methods to measure the inflation in Household's stock: "Specific Disclosures Quantification," and "Leakage Quantification." PSA294:9-297:2. Both models quantified "how much Household's stock price would have fallen had there been correct disclosures at all points in time." PSA296:7-15. Fischel testified:

> [I]f Household had made truthful and accurate disclosure at the beginning, its stock price … would have been lower because investors would have realized the growth strategy is not sustainable, the accounting is not reliable, there [are] questions about the integrity of

> management and financial reporting. All those things would have caused the stock price to be lower. That's what constitutes the inflation. That's what I tried to quantify under my two different methods.

PSA296:19-297:2.

Both models supported Fischel's loss-causation opinion: Household's "inaccurate disclosures caused there to be significant inflation in Household stock price for much of the relevant period" (PSA192:10-22, PSA124:6-14), which was then removed when a steady stream of "negative information" publicly revealed defendants' fraud during the Disclosure Period. PSA172:14-173:15, PSA176:21-177:8.

Both damages models employed an event study and regression analysis to isolate fraud-related disclosures and eliminate price declines due to non-fraud factors.[17] Fischel's models worked backward, measuring inflation as it came out of Household's stock price, because "the only way that you can judge the value of the information is to look at what the market reaction was when the markets learned" about the impact of defendants' fraud. PSA207:22-209:5; *see also* PSA212:7-17. Thus, Fischel measured the amount of inflation introduced by a false statement or

[17] PSA126:21-130:2, PSA131:11-21, PSA172:14-173:15, PSA181:13-185:6, PSA700, PSA536, PSA606, PSA624.

omission based on stock-price declines – net of non-fraud factors – when the truth was revealed.[18]

Fischel's analysis was not contingent on the jury finding that *all* of the false statements were actionable. To the contrary, his models allowed the jury to "quantify[] the amount of inflation" in Household's stock "on any given day and subsequent days, provided that the jury finds that as of that date a false and misleading statement has been made." PSA194:20-195:24.

While Fischel correctly left the question of falsity to the jury, the inflation "quantification" was "a product of [Fischel's] own analysis."[19] Fischel did not assume inflation entering or leaving the stock; instead, as he repeatedly explained, the price was inflated on the first day the jury found an actionable false statement, and dissipated due to fraud-related disclosures. PSA194:20-195:24, PSA294:9-297:2.

Furthermore**,** each fraudulent statement caused Household's stock to trade at a higher price than it would have had the truth been known.[20] Had truthful information been disclosed, Household's share price would have fallen to its true value, as ultimately occurred. *Id.*

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[18] PSA294:9-297:2, PSA193:21-194:19, PSA212:7-17.

[19] PSA209:7-18, PSA203:24-204:2.

[20] PSA210:21-212:17, PSA193:21-194:19, PSA294:9-297:2, PSA299:10-300:7.

For his Specific Disclosures Quantification, Fischel identified the 14 fraud-related disclosures that caused single-day statistically significant price changes. PSA131:11-21. The quantification isolated the fraud-related disclosures and excluded all non-fraud factors (market, industry, and company-specific) for a total net inflation of $7.97 per share. *See* PSA131:10-171:2, PSA698.

The Specific Disclosure Quantification captured just $7.97 of Household's stock-price decline during the Disclosure Period by including only single-day statistically significant stock-price declines; because it failed to pick up "behind the scenes" leakage about predatory lending (PSA174:4-175:15), it underestimated inflation.[21] Thus, Fischel opined, the Leakage Quantification model provided the "better estimate of the inflation" because it "takes into account the economic reality" that negative news came out slowly over time. PSA199:8-23.[22]

Fischel's Leakage Quantification model followed a commonly accepted approach – an event study and regression analysis – analyzing and quantifying disclosures of Household's fraud during the Disclosure Period.[23] By removing all market and peer-group price declines, and accounting for non-fraud declines due to

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[21] PSA172:14-173:15, PSA176:21-179:10.

[22] *See also* PSA172:14-185:6, PSA300:21-302:5, PSA305:8-307:4, PSA684, PSA699, PSA700.

[23] PSA181:13-182:23, PSA192:23-194:19, PSA285:1-10, PSA606, PSA700.

other Household disclosures, Fischel quantified the inflation in Household's stock price caused by defendants' misstatements.[24] Compared to Household's overall decline of $48 from its Class Period high, the maximum amount of inflation under the Leakage Quantification was $23.94.[25]

To avoid capturing inflation unrelated to defendants' fraud, Fischel carefully analyzed the non-fraud Household-specific disclosures during the Disclosure Period – and concluded they did not impact his Leakage Quantification. PSA184:13-185:6. As Fischel testified, there were some non-fraud Household-related disclosures that resulted in price increases *and* decreases, but they cancelled each other out, having no impact on the final quantification. *Id*.

Tellingly, defendants did not cross-examine Fischel about this conclusion, and introduced no contrary evidence. Their expert did not dispute it. Instead, defendants praised Fischel, noting he is "if not the preeminent, one of the preeminent experts in this field" (PSA200:18-201:24), who "wrote the book in this area literally." PSA213:16-22.

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[24] PSA181:13-182:23, PSA192:23-199:23, PSA300:9-302:5.

[25] The disclosures and declines in inflation captured by the Specific Disclosure Quantification were also incorporated into the Leakage Quantification. PSA301:6-302:5.

b. Bajaj's Admissions

Mukesh Bajaj, defendants' loss-causation and damages expert at trial, made numerous admissions that both reinforce Fischel's conclusions and conflict with defendants' appellate arguments:

- Bajaj conceded inflation can enter a company's stock on the date of a false statement even if its price does not move. PSA278:2-6.
- Bajaj testified that inflation begins when there is a misstatement (PSA270:22-24) – "before there is [a] first actionable misstatement, there must be zero inflation." PSA271:21-272:9.
- Bajaj agreed the jury, not experts, must determine which particular statements are false and misleading. PSA282:8-12.
- Bajaj testified that the proper measure of inflation into a stock price from false statements or omissions is calculated by the stock-price declines (net of market and industry) when the truth is revealed. PSA271:10-16.
- Bajaj admitted inflation may remain constant so long as the market does not know the truth, and the inflation will remain in the stock until it is all removed through disclosures of the fraud. PSA271:1-12.
- Bajaj agreed inflation can be removed absent disclosures admitting fraud. PSA279:4-8.
- Bajaj admitted that there was evidence that fraud-related information leaked into the market during the Disclosure Period. PSA283:19-284:13.

Finally, by attributing Household's stock-price decline to predatory-lending "headline risk," Bajaj tied Household's underperformance to the truth about Household's fraud slowly leaking into the market. PSA273:19-22, PSA274:21-275:7.

As Fischel explained, there is no "meaningful difference between headline risk and the fraud that creates the headlines. It's not a separate factor." *Id*. at PSA286:11-23.

Incredibly, defendants never even mention Bajaj. Instead, they rely heavily upon Bradford Cornell – *but Cornell did not testify at trial*. Not only was Cornell's analysis mistaken, Cornell was not disclosed as an expert under Rule 26; did not produce an expert report; was not deposed; and his opinions were not subjected to cross-examination, scrutinized for admissibility, or accepted by the court or jury.

c. Additional Evidence of Loss Causation and Damages

The jury heard evidence that market participants confirmed Household's price decline was caused by a steady stream of information related to defendants' fraud leaking into the market. Household's stock price declined as analysts increasingly believed Household would have to pay a fine or restitution and discontinue its predatory practices, reducing future earnings growth.[26] Defendants' predatory-lending denials became increasingly unbelievable as the true facts were revealed during the Disclosure Period. PSA177:9-179:10, PSA606.

Defendants' internal documents corroborated Fischel's leakage opinion. Household's Investor Relations Reports ("IRR") contemporaneously analyzed the

[26] *See, e.g.*, PSA645, PSA667, PSA672, PSA669, PSA172:14-175:15, PSA189:2-190:17.

impact of "significant events affecting the stock price," agreeing that leakage of fraud-related information impacted Household's stock price.[27] Household even sought to use the $20/share price decline between May 2002 (when news of the Washington DFI Report detailing Household's nationwide predatory-lending practices first started to leak) and August 2002 (when the full report was published) to convince the Attorneys General that Household had already paid a "good price" for its predatory-lending sins following "the announcements of the Washington report." *See* PSA494; *see also* PSA620, PSA622.

As Aldinger testified, "[c]learly" market concerns about the regulatory response to Household's predatory-lending scheme "were dragging [Household's] stock price down." PSA237:12-22.

C. The Jury's Verdict

The jury returned a mixed verdict. Jurors found no liability for the first 13 alleged false statements, but concluded defendants committed securities fraud in connection with 17 misstatements beginning on March 23, 2001. A219-258.

The jury first decided the overriding issue of securities-fraud liability (necessarily including loss causation and economic loss) (Question 1), and for statements where the securities-fraud elements were met, determined the appropriate

[27] PSA430-PSA433, PSA483-PSA485, PSA43:7-50:5.

damages model (Question No. 4). The jury selected the Leakage Quantification model, and determined the inflation-per-share for each relevant day between March 23, 2001 and October 11, 2002. A259, A301-313. They concluded that the 17 statements created and maintained the inflated stock price, until the inflation dissipated through partial truthful disclosures. A232-258, A301-313. The jury also answered additional factual interrogatories, including categories of misrepresentations, defendants' states of mind, and percentages of responsibility. A219-258, A260-61.

D. Post-Trial Proceedings: Phase II

In addressing Phase II issues, the district court recognized that the jury rejected defendants' attempts at trial to rebut the reliance presumption on a class-wide basis. PSA718-PSA721, PSA755-PSA756. Nevertheless, the court allowed defendants an opportunity to rebut the presumption as to particular class members, if they could sever the link between the misrepresentations and the price paid by a plaintiff. PSA757. The court thus required class claimants to answer a reliance-related interrogatory on their proof-of-claim forms. CD1721:Ex. 2:8, PSA742-PSA743, PSA768.

In addition to the reliance interrogatory, defendants were permitted to take reliance-related discovery. PSA783-PSA784, PSA731. Between January 13, 2011

and May 24, 2011, defendants served discovery on 131 entities including the plaintiffs, custodian banks, absent class members, and class members' outside investment advisors. CD1766:1-4; PSA753. Based on defendants' pre-trial representation that depositions of 10 to 15 large institutional investors would suffice, the court allowed defendants 15 depositions. PSA734-PSA735. They took just 12. CD1766:1-4; PSA753.

Following discovery, and after full merits briefing on a summary judgment determination of reliance, the court concluded defendants had raised a triable issue of fact only as to class members who either answered "Yes" to the reliance interrogatory, provided conflicting answers, or submitted multiple claims with different answers. PSA763. Based on the court's rulings, the claims of 12,000-plus class members who failed to answer the reliance interrogatory will be rejected. PSA766; CD1860:2-4, CD1886; PSA786-PSA787. Because defendants failed to raise a triable fact, the remaining class members were entitled to entry of judgment, barring any ministerial objections to their claims. PSA767.[28]

[28] After applying Fischel's quantification and the court's damages formula (PSA723-PSA729), total damages for the class were approximately $2.2 billion. CD1790, ¶8 and Ex. B thereto. In addition to the $1.45 billion in damages awarded to plaintiffs-appellees, the district court is presently addressing the claims of approximately 30,000 other class members with damages of approximately $700 million. CD1860:2-3, CD1800:15, CD1802:51.

V. SUMMARY OF ARGUMENT

Having lost at trial, defendants now cast themselves as victims of procedural unfairness. In support, defendants advance waived arguments, present opinions from an expert who never testified, and criticize testimony they failed to explore at trial. Defendants' gambit fails, for they fall woefully short of the exacting criteria required to obtain judgment as a matter of law or a new trial.

First, plaintiffs' evidence established that defendants' false statements and omissions caused Household's stock to trade at artificially inflated prices, causing plaintiffs' losses as the truth was disclosed. Fischel testified that specific disclosures and evidence of leakage both demonstrated loss causation. His defense counterpart, Bajaj, made a series of admissions undercutting defendants' arguments on appeal, and defendants' internal documents and trial testimony provide even more evidence supporting the jury's loss-causation finding.

Second, defendants waived any arguments seeking a new trial based on the jury's purportedly inconsistent application of Fischel's Leakage Quantification model. To preserve those arguments, defendants were required – but failed – to move to resubmit the verdict for reconciliation before the jury's discharge.

Defendants' Leakage Quantification merits arguments fare no better. Defendants praised Fischel at trial and failed to cross-examine him about his

methodologies – yet now they claim he overestimated damages. The evidence tells another story: The jury's damages conclusion was well supported by both Fischel's statistical analysis and volumes of additional evidence tying truthful leakage to Household's stock-price decline and dramatic underperformance compared to the market and its peers.

Third, defendants' *Janus* arguments are much ado about nothing. The district court correctly instructed the jury, but even assuming there was error, defendants cannot demonstrate prejudice: Household remains liable for every actionable statement, and the same is true for Aldinger and Schoenholz – who both concede making 15 statements found actionable, and who also are liable as control persons under §20(a) for all 17 actionable statements. Moreover, the evidence disproves the individual defendants' attempts to disclaim the misstatements for which they were held liable.

Finally, defendants failed to rebut the presumption of reliance on a class-wide basis. Their Phase II discovery-related complaints are belied by the record, and fall well short of establishing abuse of discretion. To the contrary, defendants were afforded more class-member discovery than they assured the district court was needed – but they failed to use it.

The judgment should be affirmed.

VI. ARGUMENT

A. Defendants' Motion for Judgment as a Matter of Law Was Properly Denied

1. Standard of Review

A party seeking to overturn a jury verdict "assumes a Herculean burden." *Gile v. United Airlines, Inc.*, 213 F.3d 365, 372 (7th Cir. 2000). "Judgment as a matter of law is proper only where there is no legally sufficient basis for a reasonable jury to find for the nonmoving party." *Zimmerman v. Chicago Bd. of Trade*, 360 F.3d 612, 623 (7th Cir. 2004); *accord Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149 (2000).

Although denial of a motion for judgment as a matter of law is reviewed *de novo*, this Court must "view the evidence in the light most favorable to the nonmoving party, and must draw all reasonable inferences in that party's favor." *Zimmerman*, 360 F.3d at 623. This Court may not weigh the evidence, pass on witnesses' credibility, or substitute its view of contested evidence for the jury's. *Id*.

2. The Jury's Loss-Causation Verdict Was Supported by Legally Sufficient Evidence

Defendants contend plaintiffs' loss-causation evidence was not legally sufficient, but they fail to carry their "Herculean burden." *Gile*, 213 F.3d at 372.

Plaintiffs can establish loss causation by showing defendants' misrepresentations "'became generally known,'" and "'as a result'" share value

"'depreciate[d].'" *Tricontinental Indus. v. PricewaterhouseCoopers*, 475 F.3d 824, 843 (7th Cir. 2007) (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 344 (2005)). If the misrepresentation artificially inflated the stock price and the stock's value declined as the market learned of the deception, then "defendant's actions had something to do" with that drop and loss causation is established. *See Ray v. Citigroup Global Mkts.*, 482 F.3d 991, 994-95 (7th Cir. 2007). In an instruction not challenged here, the jury was told that plaintiffs' burden was to "prove that the defendant's particular statement or omission was a substantial cause of the economic loss plaintiffs suffered." A345. Furthermore, "[p]laintiffs [did] not have to prove that any statement or omission was the *sole* cause of plaintiffs' loss." *Id.*[29]

The loss-causation evidence was overwhelming: Fischel's testimony, Bajaj's admissions, internal Household documents, defendants' admissions, and contemporaneous analyses by knowledgeable market participants all supported the verdict. *See infra*. The sum of this evidence shows that defendants' fraud artificially inflated Household's stock, and plaintiffs suffered losses when that inflation was removed as news of defendants' fraudulent activity entered the market.

Fischel used an event study and regression analysis to identify 14 fraud-related disclosures during the Disclosure Period that caused single-day statistically significant

[29] Throughout this Brief, *emphasis* is added and internal citations omitted unless otherwise noted.

price changes, and that did not include any non-fraud factors (market, industry, or company-specific). *See* PSA131:11-23. Fischel testified at length how all 14 disclosures demonstrated loss causation. PSA131:22-170:3, PSA685-PSA698. The disclosures clearly related to the 17 false statements found by the jury concerning Household's lending and re-aging practices, and its financial statements. PSA131:11-PSA132:11.

These disclosures alone proved loss causation – but there was more.

Fischel testified that, in addition to the 14 statistically significant disclosures, a steady stream of negative fraud-related information caused additional artificial inflation to leak from Household's stock price during the Disclosure Period. Both *Dura* and Seventh Circuit precedent support the use of leakage evidence to prove loss causation. *See Dura*, 544 U.S. at 342 ("relevant truth begins to leak out"); *Schleicher v. Wendt*, 618 F.3d 679, 686-87 (7th Cir. 2010) ("[T]ruth can come out, and affect the market price, in advance of a formal announcement.").

Fischel's analysis was bolstered by evidence from defendants themselves. For example, in May 2002 defendants obtained a court order sealing a Washington state regulatory report that found Household engaged in nationwide predatory-lending practices. However, news of the report and its contents leaked into the market from May-August 2002. PSA172:14-175:15, PSA642. At trial, Bajaj admitted the report

leaked out during that time frame (PSA283:19-284:13), and Aldinger conceded that regulatory responses to Household's lending practices "dragg[ed] [Household's] stock price down." PSA237:15-22. Household executives attributed the $20 decline in Household's stock price from May-August 2002 to the gradual leakage of the report's contents. PSA494, PSA620-PSA622. Household's IRRs also attributed Household's stock-price declines during this period to a series of partial disclosures concerning Household's lending practices. PSA431.

So did financial observers. In May 2002, a Sanford Bernstein analyst "raised concerns about the legal threat to Household's sales practices," and "spread word" that Washington state would issue a predatory-lending report and pursue legal action against Household. PSA431. A May 31, 2002 *American Banker* article noted that Household enjoined the report's release, but a Wall Street analyst concluded there could be "material risk to Household's earnings" if the predatory lending was "more widespread" than Household represented. PSA669, PSA189:1-190:17. On August 27, 2002, the media noted that "in recent weeks, copies of the [Washington DFI] report *have been leaked* to every news organization." PSA642, PSA173:16-175:15.[30]

[30] Other evidence of leakage included an April 10, 2002 Legg Mason report stating that Household's re-aging policies discussed in the 2001 10-K and April 9, 2002 FRC "overstate reported EPS [earnings per share]" (PSA354, PSA287:18-290:3); and a Summer 2002 CFRA report concluding Household's "reaging may obscure its credit quality picture." PSA464, PSA190:18-191:25.

Market participants confirmed Household's stock-price decline was caused by disclosures about Household's illegal practices.[31] *See Schleicher*, 618 F.3d at 686-87 ("Market professionals ... regularly conduct their own investigations to discover why a stock's price has moved, net of general market movements."). Analysts lowered Household's expected growth rate given concerns its predatory practices would be halted, and also anticipated a significant fine stemming from its misconduct. PSA645, PSA666, PSA162:20-165:9. No market participant blamed Household's stark underperformance on any *non*-fraud reason. This evidence of leakage, in addition to the 14 specific disclosures, more than sufficed for a rational jury to find loss causation and economic loss.

With no support in the trial record, defendants challenge the loss-causation evidence by trundling out an "expert" they never called, along with snippets of deposition testimony and interrogatory responses that the jury never saw. A208-215, A376-399, A413-428.[32] Their tactics fail: Given that this Court "'must disregard all evidence favorable to the moving party that the jury [was] not required to believe'" (*Passananti v. Cook County*, 689 F.3d 655, 659 (7th Cir. 2012)), surely it cannot

[31] PSA292:1-293:17, PSA667, PSA672, PSA669.

[32] Defendants make assertions concerning plaintiffs' interrogatory responses without any citation to the record. AOB10-11. Although irrelevant, contrary to defendants' representation, plaintiffs' responses identified several types of evidence in addition to Fischel's reports that supported loss causation. PSA788-PSA841.

utilize evidence that the jury *never saw*. *See Third Wave Techs. Inc. v. Stratagene Corp.*, 405 F. Supp. 2d 991, 997 (W.D. Wis. 2005) ("a party cannot obtain judgment as a matter of law or the grant of a new trial in reliance on evidence that was never admitted at trial").

3. Defendants' Remaining Loss Causation Challenges Are Meritless

a. Fischel Accounted for Non-Fraud Company-Specific Factors

Defendants contend no rational jury could find loss causation because Fischel failed to account for non-fraud, firm-specific explanations for Household's stock-price decline. This contention rests on an incorrect assumption and misstates the record.

First, defendants assume that by adopting Leakage Quantification as a measure of damages, the jury ignored other evidence of loss causation, including Fischel's testimony about specific disclosures. There is no basis for this implication, which is one of several attempts by defendants to conflate loss causation and damages.[33] Defendants do not contest Fischel's testimony that there were 14 statistically significant fraud-related disclosures. In finding loss causation, the jury properly considered both those specific disclosures and the leakage evidence – it only had to pick between the two in *quantifying* damages.

[33] Defendants' conflation is deliberate, contradicting their assurances at trial that loss causation is "not damages." PSA314:7-315:5.

With respect to leakage evidence, Fischel analyzed and accounted for firm-specific non-fraud disclosures. There were some such disclosures that resulted in price increases *and* decreases, but they cancelled each other out and had no impact on the inflation's final quantification. PSA184:13-185:6.

Despite cross-examining Fischel extensively, defendants asked few questions about Leakage Quantification. Defendants never asked Fischel to identify the non-fraud-related Household disclosures, or challenged his conclusion that they cancelled each other out. Defendants gloss over this tactical error by asserting that plaintiffs were required to introduce at trial each underlying fact and data point supporting Fischel's opinion. AOB38 n.4. However, F.R.E. 705 says the opposite: "Unless the Court orders otherwise, an expert may state an opinion, and give reasons for it without first testifying to the underlying facts or data on cross-examination." *See United States v. Havvard*, 260 F.3d 597, 601 (7th Cir. 2001) (Rule 705 allows an expert to present a naked opinion; "uncovering the basis for that opinion was a matter for cross-examination"); *see also Symbol Techs., Inc. v. Opticon, Inc.*, 935 F.2d 1569, 1575 (Fed. Cir. 1991) (party that "chose not to expose [expert's] testimony to the glaring light of cross-examination ... cannot here recoup for its failed litigation strategy") (collecting cases).

Defendants' failure to cross-examine Fischel about offsetting price movements torpedoes their argument, for once an expert satisfies *Daubert* standards, a failure to cross-examine on supposed infirmities in the expert's opinion forecloses a later request for judgment as a matter of law. *Lapsley v. Xtec, Inc.*, 689 F.3d 802 (7th Cir. 2012).[34] Defendants do not appeal the court's *Daubert* order concerning Fischel.

Even where an expert ignores data altogether, this Court holds that the failure to challenge the expert's opinion with cross-examination or contrary evidence is fatal. *See Lapsley*, 689 F.3d at 813 n.4 (where expert assumed certain effects were insignificant and could be ignored, defendants should have cross-examined the expert or introduced contrary evidence); *see also Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 808 (7th Cir. 2013) (the "reliability of data and assumptions used in applying a methodology is tested by the adversarial process and determined by the jury"). Defendants are now bound by their trial tactics.

Defendants cite several cases for the broad proposition that an expert has to account for non-fraud factors. AOB37-AOB38. But even putting aside all other evidence of loss causation, Fischel did just that in his leakage analysis. In fact, defendants' cases highlight their failure to identify any company-specific disclosures

[34] Citing *Daubert*, *Lapsley* holds that the accuracy of the expert's opinion is to be tested at trial with the familiar tools of "'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'" *Id.* at 805.

that Fischel failed to take into account. In *United States v. Ferguson*, 584 F. Supp. 2d 447 (D. Conn. 2008), for example, defendants successfully challenged a leakage analysis by identifying five disclosures of non-fraud company-specific information that negatively impacted the company's stock price. *Id*. at 453 & n.7. Here, defendants did not identify at trial a *single* non-fraud decline that Fischel did not account for in his quantification of leakage – because there were none. In the end, the only evidence the jurors heard about Household-specific non-fraud disclosures was Fischel's uncontroverted testimony that "[t]hey cancel each other out." PSA184:13-185:6.

In re Williams Sec. Litig., 558 F.3d 1130 (10th Cir. 2009) does not help defendants, for it acknowledges that, if done correctly, leakage evidence may support loss causation. *Id.* at 1138. In *Williams*, however, the expert performed no regression analysis to remove industry and market factors, and thus captured as damages 98% of the stock drop for the entire class period. *Id*. at 1135. Similarly, *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29 (2d Cir. 2009), cited by defendants, also acknowledged the viability of using leakage evidence to support loss causation. *Id*. at 41 n.5. [35]

[35] Although defendants cite *Remec* for the proposition that a leakage model was rejected, its specific multi-disclosures model was rejected under a *Daubert* analysis for several different reasons. *In re Remec Inc. Sec. Litig.*, 702 F. Supp. 2d 1202, 1273-75 (S.D. Cal. 2010). In defendants' other

In contrast, Fischel showed how the truth was revealed by undisputed evidence of leakage from disclosures by third parties, accounted for and removed any market- or peer-related declines through an event study and regression analysis, and included no non-fraud declines in his net quantification of inflation. *See supra*. His conclusions were correctly accepted by the jury.

b. Plaintiffs Proved When and How Inflation Entered Household's Stock

Fischel testified that Household's stock price was inflated when the jury determined the first false or misleading statement.[36] The jury thus "pin[ned] down when the stock's price was affected by the fraud" when it found an actionable statement on March 23, 2001, and 16 additional actionable statements thereafter. *Schleicher*, 618 F.3d at 687. The amount of inflation "into" a stock price from a false statement or omission is calculated by the stock-price declines (net of market and industry) when the truth is revealed.[37] *Dura*, 544 U.S. at 347; *Ray*, 482 F.3d at 994-

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cases, the experts (unlike Fischel) simply did not properly address non-fraud events. *Nuveen Mun. High Income Opportunity Fund v. City of Alameda*, 730 F.3d 1111, 1123-24 (9th Cir. 2013); *Fener v. Operating Eng'rs Constr. Indus. & Misc. Pension Fund*, 579 F.3d 401, 409-10 (5th Cir. 2009); *In re Omnicom Grp., Inc. Sec. Litig.*, 541 F. Supp. 2d 546, 552-54 (S.D.N.Y. 2008).

[36] *See* PSA192:10-22, PSA194:20-196:7, PSA202:15-21, PSA203:24-204:2, PSA205:10-206:9, 294:9-297:2.

[37] PSA294:9-297:2, PSA212:7-17, PSA181:17-182:6.

95; *Schleicher*, 618 F.3d at 687. Notably, defendants' trial expert Bajaj agreed. PSA271:10-16. So does their new expert, upon whom they improperly rely.[38]

Further, each time defendants made a fraudulent statement and failed to disclose the truth about Household's improper practices, the stock price was impacted because it continued to trade at an inflated price.[39] If the adverse information had been revealed, the share price would have dropped to its true value, as it did during the Disclosure Period. *Id*. Indeed, Fischel testified that Household's stock price did not need to increase or have a statistically significant reaction for a false statement or omission to introduce inflation; rather, inflation can exist due to a false statement or omission that prevents a stock decline.[40] Again, Bajaj agreed ("you can have inflation when the company fails to tell the truth, thereby preventing a decline in stock price").[41] So do the relevant precedents. *Schleicher*, 618 F.3d at 683; *FindWhat Inv. Group v. FindWhat.com*, 658 F.3d 1282, 1315 (11th Cir. 2011) (citing *Schleicher*).

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[38] Bradford Cornell, *Collateral Damage and Securities Litigation*, 2009 Utah L. Rev. 717, 719 (2009) ("[m]ore commonly, misstatements involve expected announcements, half-truths, and omissions ... Inflation occurs because the stock price should have fallen to its 'true value' had the correct financial information been disclosed" and "inflation cannot be measured simply by looking at the residual return on the day of the misrepresentation").

[39] PSA210:21-212:17, PSA192:16-194:19, PSA294:9-297:2, PSA299:10-300:16.

[40] PSA210:21-211:6, PSA212:7-17, PSA125:2-19.

[41] PSA268:11-16.

c. Defendants' Argument About Pre-Class Period Inflation Is Irrelevant

The jury did not find any false statement or inflation from the Class Period's beginning (July 30, 1999) to March 22, 2001. Instead, the jury found that the first false statement on March 23, 2001, introduced inflation into Household's stock price. A301. Each of the 17 false statements, starting on that date, *independently* constituted a separate §10(b) violation and introduced and/or maintained inflation in Household's stock price. *Cf. United States v. Schiff*, 538 F. Supp. 2d 818, 830 (D.N.J. 2008) ("each proven misstatement constitutes a separate violation of Section 10(b)"), *aff'd*, 602 F.3d 152 (3d Cir. 2010).

Whether plaintiffs could have relied on pre-Class Period inflation, though an interesting question, has no relevance to the jury's verdict. *FindWhat*, 658 F.3d at 1314-16 (defendants may be liable for maintaining pre-Class Period inflation).

B. Defendants' Motion for a New Trial Was Properly Denied, and They Have Waived the Argument in Any Event

1. Standards of Review

The denial of a motion for a new trial is reviewed for abuse of discretion. Motions for new trial are not intended to "'secure a forum for the relitigation of old matters or to afford the parties the opportunity to present the case under new theories; instead, the motion is a device properly used to correct manifest errors of law or fact

or to present newly discovered evidence.'" *Fort Howard Paper Co. v. Standard Havens, Inc.*, 901 F.2d 1373, 1380 n.4 (7th Cir. 1990). A new trial should be granted "only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience." *Latino v. Kaizer*, 58 F.3d 310, 315 (7th Cir. 1995). A jury verdict cannot be set aside if a reasonable basis exists in the record to support it. *Jackson v. Bunge Corp.*, 40 F.3d 239, 244 (7th Cir. 1994).

"'Because damage calculations are essentially an exercise in fact finding,'" this Court's review of a damage award is deferential. *Am. Nat'l Bank & Trust Co. v. Reg'l Transp. Auth.*, 125 F.3d 420, 437 (7th Cir. 1997). "Appellate courts must of course be mindful that the district judge who approves a damages award has witnessed the 'congeries of intangibles that no stenographic transcript can convey.'" *Pincus v. Pabst Brewing Co.*, 893 F.2d 1544, 1554 (7th Cir. 1990) (quoting *United States v. Bruscino*, 687 F.2d 938, 940-41 (7th Cir. 1982)). Accordingly, this Court "'demand[s] a particularly persuasive showing of excessiveness when the initial fact-finder – the jury – and the judge – who monitored the proceedings – agree that the award is appropriate.'" *Dresser Indus. Inc. v. Gradall Co.*, 965 F.2d 1442, 1446 (7th Cir. 1992).

The Seventh Circuit reviews challenges to jury instructions "in two steps." *United States v. Dickerson*, 705 F.3d 683, 688 (7th Cir. 2013). First, the Court reviews *de novo* whether the jury instructions accurately summarize the applicable law. *Id*. Second, the Court "examine[s] the district court's particular phrasing of the instruction for abuse of discretion." *Id*. The Court reverses "'only if it appears both that the jury was misled *and* that the instructions prejudiced the defendant.'" *Id*.

2. Defendants Waived Their Arguments Urging a New Trial as to "Leakage Quantification"

By permitting the jury's discharge despite complaining that the just-read verdicts and accompanying factual answers were "fatally flawed" and "internally inconsistent," defendants waived any arguments seeking a new trial based on the Leakage Quantification model.

a. The Jury Rendered a General Verdict With Special Answers

When a jury returns a verdict in a civil trial, "[t]here are only three logical possibilities: it is a general verdict for someone; it is several special verdicts pursuant to [Fed. R. Civ. P.] 49(a); or it is a general verdict accompanied by answers to interrogatories pursuant to Rule 49(b)." *Turyna v. Martam Constr. Co.*, 83 F.3d 178, 180-81 (7th Cir. 1996).

General verdicts "simply ask the jury to answer the question 'who won'" – and if the winner is entitled to a monetary award, to decide "'how much.'" *Id*. at 181. Special verdicts, on the other hand, "contemplate a 'special written finding upon each issue of fact.'" *Id*. And Rule 49(b) "blends the devices of the general verdict and the special verdict," giving the jury both a general verdict form and "written interrogatories on particular issues of fact." *Id*.

The present matter presents a paradigmatic example of that blended option. In the verdict form, the jury first decided the ultimate question – the four defendants' securities-fraud and controlling-person liability under §§10(b) and 20(a). Verdict Form, Question Nos. 1 (A219-A258), 6-8 (A261). But the jury did not stop there; it also answered a series of factual questions. *See, e.g.*, Question No. 2 (category of misrepresentation) (A219-A258); Question No. 3 (state of mind) *id*.; Question No. 4 and Table B (appropriate damages model and inflation per share) (A259, A288-A313); Question No. 5 (percentage of responsibility) A260.

Plainly, the 95-page verdict form comprised a general verdict with accompanying answers to written interrogatories. It went far beyond "who won" and "how much." *Cf. Turyna*, 83 F.3d at 181.

b. Defendants Committed Waiver By Permitting the Jury's Discharge Despite Purported Inconsistencies

This Circuit holds that litigants complaining of inconsistencies between a general verdict and a jury's special findings accompanying that verdict *must* move to resubmit the verdict and findings to the jury for reconciliation before the jury's discharge; failing to do so results in a waiver of objections to any purported inconsistencies. *See., e.g., Cundiff v. Washburn*, 393 F.2d 505, 507 (7th Cir. 1968) ("[W]e hold that appellant waived any objection to the verdict on grounds of inconsistency with the special finding by failing to move the resubmission of the verdict and finding to the jury."); *Barnes v. Brown*, 430 F.2d 578, 580 (7th Cir. 1970) (same). Waiver also results when a litigant allows the jury's discharge despite complaining that the answers to special questions are inconsistent among themselves. *See, e.g., Strauss v. Stratojac Corp*., 810 F.2d 679, 682-83 (7th Cir. 1987).

Applying that precedent, defendants waived their arguments concerning the jury's use of Fischel's leakage model. Following the court's recitation of the general verdicts and fact answers in the jury's presence, defense counsel proclaimed the verdicts and answers irreconcilable – and yet allowed the jury's discharge. *See* PSA326:25-327:14. In the jury's presence, defense counsel carped that the verdict was "fatally inconsistent in number of ways," but in the same breath told the court,

"*I'm not sure if you need the jury to be present*. Obviously it's up to you." PSA326:25-327:3. Moments later, after reiterating that defendants regarded the verdict as "fatally flawed and internally inconsistent" (PSA327:9-10) and noting "primarily it's the interspersal of the yeses and nos when juxtaposed again[st] Professor Fischel's leakage model" (PSA327:4-5), defense counsel nonetheless punted: "*We have other things we'll say at the appropriate time*, but that is something which I thought should be mentioned *before the jury retires*." PSA327:12-14. The judge then discharged the jury. PSA327:20-21, PSA328:18-21. Defendants contend those spoken objections preserved the issue of inconsistent verdicts requiring a new trial, but this Circuit holds otherwise. *See Cundiff*, 393 F.2d at 507; *Barnes*, 430 F.2d at 580; *see also* F.R.C.P. 49(b)(3)(B) (court may "direct the jury to further consider its answers and verdict"); F.R.C.P. 51(b)(3) (court may instruct jury up to time of discharge).

Importantly, defendants' failure to move for the verdict's resubmission was not cured by the district court's comment, *after the jury was discharged*, that defendants had "reserv[ed] any issues" they wished to raise later by "written motion." PSA329:17-18. The onus is upon the complaining party.

For example, in *Carter v. Moore*, 165 F.3d 1071 (7th Cir. 1998), neither the parties nor the district court noticed a key jury instruction was missing – even after the

jury flagged the missing instruction. *Id*. at 1076-77. The court's involvement did not excuse the complaining litigant's waiver: Despite the error "*clearly committed by the District Court*," this Court could not "look past the demonstration of mutual inattention, and, in effect, reward" it by "ordering a new trial." *Id*. at 1077.

Similarly, in *Cundiff*, the district court noted "a discrepancy between the answer to the interrogatory and the verdict," and asked the parties' attorneys if they desired the matter explained to the jury for further deliberations. 393 F.2d at 506. Receiving negative responses, the court then entered judgment. Notably, the court's flagging of the apparent inconsistency and its decision nonetheless to discharge the jury did not mean a new trial was warranted; it was the *appellant's* failure to move for resubmission that resulted in waiver. *Id*. at 507.

On Reply, defendants will likely raise the same non-waiver argument they employed in their Rule 50/59 motion's reply. CD1882. Relying upon language from *Carter*, defendants asserted that this Circuit "has 'never specifically endorsed' the view that an objection to inconsistent verdicts prior to the jury's discharge is required." CD1882:13-14 (partially quoting *Carter*, 165 F.3d at 1079-80). But defendants are mistaken, for their selective quotation omits a key qualifier that both explains the Court's comment and harmonizes it with waiver here.

Carter spoke only to waiver vis-à-vis inconsistent *general* verdicts – a discrete situation not involving answers to fact questions accompanying a general verdict. *See Carter*, 165 F.3d at 1079 (noting "the failure to object to an *inconsistent general verdict*"); *see also id.* (citing this Court's decision in *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 678 n.6 (7th Cir. 1985), which "not[ed] that the question of waiver with respect to *inconsistent general verdicts* remains open").

But *Carter* did not address situations where general verdicts are accompanied by answers to factual questions. Other Seventh Circuit precedent makes that distinction clear. *See Will*, 776 F.2d at 678 n.6 ("*Barnes* and *Cundiff* hold that a request to have the jury resume its deliberations is the only appropriate response to special verdicts that are inconsistent with general verdicts, *see* Rule 49(b), and that if a party does not act in time he waives any later challenge.").

Moreover, defendants' current argument that the jury's finding of $23.94 of inflation from the first false statement on March 23, 2001 is inconsistent because it was only a predatory-lending statement is waived for the additional reason that defendants' counsel did not object to the verdict on that basis. PSA326:25-327:14. Instead, defendants objected that the verdict was inconsistent for a *different* reason – that the jury found some statements actionable and others not. *Id.*

In sum, defendants waived any arguments for a new trial based on purported verdict inconsistencies.

3. The Jury Reasonably Adopted Fischel's Leakage Quantification to Award Damages

Beyond waiver, defendants' attack on the leakage model fails on the merits.

Having found a §10(b) violation, the jury was required to estimate plaintiffs' damages. Question 4. The jury adopted Leakage Quantification, which reasonably "estimate[d]" damages (A259) and was "rationally connected to the evidence." *Pincus*, 893 F.2d at 1554. Fischel's event study and regression analysis eliminated the effect of peer or market declines, and Fischel ruled out any impact from firm-specific non-fraud declines. PSA536, PSA181:13-182:6, PSA183:3-184:16. Defendants provided no alternative estimate of damages for the jury's consideration.

Defendants now seek to overturn the *entire* verdict and get a second trial, simply because the jury found $23.94 of inflation on March 23, 2001. Defendants insist they are entitled to that drastic remedy because this amount overestimates inflation connected with their fraudulent denial that Household engaged in predatory lending. This inflation, they say, was attributable to all three theories of fraud – but the statement on that date related only to predatory lending.

Defendants' argument fails for several reasons.

First, defendants never raised this issue prior to or during trial, and thus waived it by waiting until their post-trial Rule 50/59 motion.[42] *Kerry Coal Co. v. United Mine Workers*, 488 F. Supp. 1080, 1105 (W.D. Pa. 1980) (rejecting defendants' contention that jury's inconsistent interrogatory answers required new trial: "[T]he issue was raised for the first time in the defendants' [motion for JNOV or new trial] and need not be considered."), *aff'd*, 637 F.2d 957 (3d Cir. 1981).

Second, predatory lending was the primary source of Household's stock-price inflation and, when disclosed, the primary driver of its decline. Among three alternatives, inflation of $23.94 was most rationally connected to the trial evidence.[43] As Fischel testified, the other two choices– $7.97 and $0 – drastically *under*stated damages. PSA172:14-173:15, PSA175:16-177:8. Further, even defendants attributed Household's stock-price decline to leakage concerning their predatory-lending practices. *See* §VI(A)(2), *supra*. The jury also heard that analysts connected the 2002 stock decline primarily to predatory-lending concerns. PSA672 ("Household's stock

[42] The verdict form objection defendants rely on raised only the prospect of the jury finding no inflation "on any given date." *Compare* AOB19 *with* PSA317:12-14 ("I'm trying to be very, very specific in this objection to this particular question asking the jury that if no loss was caused on any date, write none.").

[43] Although defendants criticize the district court for restricting the jury to one of three choices (AOB18-19), defendants themselves insisted on the restriction. PSA308:24-309:18. Plaintiffs responded that the jury should be permitted to record any reasonable damages amount on the inflation table, but the court sided with defendants. PSA309:19-310:24.

has been under pressure due to concern about accusations of unfair and predatory lending practices."); *see also* PSA431, PSA667, PSA669. And, the jury heard about the connection between Household's predatory practices and its troubled loan portfolio, which directly led to a series of misstatements about re-aging policies and 2+ delinquency statistics. *See* §IV(B)(1), *supra*. Given this evidence, the jury rationally concluded that $23.94 was a reasonable estimate of inflation on March 23. Even if that estimate lacks precision it must be upheld, for damages need not be proven with absolute certainty. *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1161 (7th Cir. 1983) ("the Supreme Court has been willing to accept a degree of uncertainty in the calculation of damages"); *Howard Indus., Inc. v. Rae Motor Corp.*, 293 F.2d 116, 119 (7th Cir. 1961) (same). Indeed, it is far more appropriate to give defrauded plaintiffs the benefit of any imprecision than to allow defendants to reap a windfall. *Randall v. Loftsgaarden*, 478 U.S. 647, 663 (1986).

Finally, even if defendants' argument had any merit, it impacts only three trading days (March 23, 26, and 27) – for the jury found another false statement on March 28, 2001 relating to *all three* fraud theories. A233. That March 28 statement independently caused Household's stock price to be inflated by $23.94, because had the full truth been known the stock would have fallen by that amount. Thus, if necessary, the Court has the power to modify the verdict by either excising the first

three days, or ordering a remittitur and reducing inflation for those days. *See* 28 U.S.C. §2106; *Am. Nat. Bank*, 125 F.3d at 436. A finding that *all* damages for the March 23 statement were unsupported does not invalidate the remainder of the verdict:

> Yet the court, *having found an irrational part of the verdict, does not annul the rest* on the ground that the jury has displayed ecumenical inability or unwillingness to follow its instructions. *Instead the court excises the offending verdict while enforcing the remainder*.

American Casualty Co. v. B. Cianciolo, Inc., 987 F.2d 1302, 1305-1306 (7th Cir. 1993).

Defendants' attempt to stretch *Comcast Corp. v. Behrens*, 133 S. Ct. 1426 (2013) to fit this case ignores the record. In *Comcast*, the Supreme Court reversed an order affirming the grant of class certification where the district court had rejected class certification on three of the four theories of liability, but accepted the lone class-wide damages theory that depended on all four theories. *Id*. at 1434.

Here, the jury found defendants liable for *all three* types of fraudulent statements supporting the damages model; that is consonant with *Comcast*. *See id*. ("This methodology might have been sound ... if all four of those alleged distortions remained in the case."); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013) ("Unlike the situation in *Comcast*, there is no possibility in this case that

damages could be attributed" to defendants' acts "that are not challenged on a class-wide basis.").

Defendants' next argument, that the Leakage Quantification model cannot work because the jury found defendants liable for only some of the alleged false statements, ignores trial evidence and distorts Fischel's analysis. Fischel testified his model can be used to measure inflation "on any given day and subsequent days" so long as there existed a false and misleading statement as of that day. PSA195:12-196:7. Fischel explained that if the jury did not find the first alleged false statement actionable, his inflation chart "should be read as beginning" on the first date the jury found a false statement was made.[44] Utilized this way, the model remained accurate because the inflation chart (PSA606) was a product of back-casting – it reflected the inflation calculation based on *later* truthful disclosures that had been omitted from false statements. PSA212:7-17. Bajaj agreed that this is the correct way to measure inflation, and also that inflation "must be zero" before the first actionable statement. PSA271:19-22, PSA268:17-269:2. Thus, the jury implemented Fischel's model precisely the way it was designed, entering "0" – signifying no inflation – for each day until the first actionable statement. A288-A301.

[44] PSA195:12-196:7, PSA205:10-206:9.

Defendants nonetheless contend the verdict is irrational, arguing the March 23 statement introduced only $0.67 of inflation, and the 16 remaining statements introduced none.[45] This argument again ignores Fischel's testimony that inflation begins with the first false statement and the amount of inflation does not need to increase with each additional false statement since all false statements can cause or maintain inflation – the inflation remains in the stock until truthful disclosures remove all of it.[46]

Defendants have no basis for their attack's linchpin – *i.e.*, the assumption that the jury deemed the March 23 statement the "sole cause" of inflation in Household's stock throughout the entire period. In fact, *each* of defendants' 17 fraudulent statements caused inflation by preventing Household's stock from falling to its true value: "[W]hen an unduly optimistic statement stops a price from declining (by adding some good news to the mix): once the truth comes out, the price drops to where it would have been had the statement not been made." *Schleicher*, 618 F.3d at 683.

Consistent with *Schleicher*, Fischel measured inflation by looking at how much the stock would have fallen if defendants had disclosed the truth: "[I]f Household had

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[45] The $0.67 change between March 22 and 23, as well as the decline in inflation between July 5 and 15, 2002, are simply modeling results from the application of the constant-percentage component of the Leakage Quantification. Defendants have never challenged Fischel's use of the constant-percentage method.

[46] PSA299:3-300:7.

made truthful and accurate disclosure" its share price "would have been lower because investors would have realized the growth strategy is not sustainable, the accounting is not reliable and there [are] questions about the integrity of management and financial reporting." PSA296:19-24. Given this evidence, plaintiffs need not show a bump in inflation each time defendants committed fraud. Indeed, "fraudulent misstatements that prolong inflation can be just as harmful to subsequent investors as statements that create inflation in the first instance." *FindWhat*, 658 F.3d at 1315-16. For this reason, there is no "legal distinction between fraudulent statements that wrongfully prolong the presence of inflation in a stock price and fraudulent statements that initially introduce that inflation." *Id.* at 1316 (collecting cases). Consistent with *Schleicher* and *FindWhat*, Fischel's inflation chart reflects his quantification of "how much Household's stock would have fallen had there been correct disclosures at all points in time." PSA296:12-15.

In short, the jury adopted Fischel's model and followed his instructions on how to use it properly. That was perfectly rational – after all, defendants insisted that Fischel "wrote the book" on measuring inflation, "literally" (PSA213:16-22) – and warrants this Court's deference. *Cf. Am. Nat'l Bank*, 125 F.3d at 437.

4. The District Court's Jury Instructions Do Not Entitle Defendants to a New Trial

The district court correctly denied defendants' motion for a new trial complaining of one jury instruction. SA4-SA5. As the court held, the instruction was proper, *Janus* does not change the analysis, and – even if the court's instruction was erroneous – defendants cannot show prejudice.

a. The District Court Properly Instructed the Jury

At the close of evidence, the district court summarized one element that plaintiffs would have to prove to prevail on their Rule 10b-5 claim:

> [T]he defendant made, approved or furnished information to be included in a false statement of fact or omitted a fact that was necessary, in light of the circumstances, to prevent a statement that was made from being false or misleading during the relevant time period between July 30, 1999, and October 11, 2002.

PSA319:5-10.[47] Citing *Janus*, defendants contend that the overall instructions were erroneous because that summary included the words "approved or furnished." AOB50-AOB56.

But defendants omit that the district court then addressed each individual element – and in its specific instruction for the first element, *did not* use the "approved or furnished" language onto which defendants latch. PSA319:22-320:1 (plaintiffs must prove that "the defendant made a false or misleading statement of fact or omitted

[47] The summary instruction was taken from *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 708 (7th Cir. 2008). PSA187:2-24, PSA265:3-4, PSA266:2-11.

a fact"). Nor did the court's instructions on the remaining elements include the complained-of "approved or furnished" language. PSA321:12-15 (materiality); PSA322:5-12 (scienter).

Taken together, the full instructions conveyed the correct standards to the jury "'reasonably well'" (*Lewis v. City of Chicago Police Dept.*, 590 F.3d 427, 433 (7th Cir. 2009)) so that defendants are not entitled to a new trial.

b. *Janus* Did Not Change the Relevant Analysis

Janus did not adopt a rule insulating all non-speaking corporate executives from liability. Rather, the Supreme Court addressed whether a *third party* – a mutual fund advisor – may be primarily liable under the federal securities laws for statements made by one of its clients. *Janus Capital Group, Inc. v. First Deriv. Traders*, 131 S. Ct. 2296, 2299 (2011). The Court concluded that because the investment advisor did not have "ultimate authority" over its client's statements, it did not "make" the statements. *Id*. at 2302 n.6

The fact that the entities involved were legally distinct was critical. The Court emphasized that the case involved "separate legal entit[ies]" with distinct owners, and that the mutual fund's board of trustees was independent from its advisor. *Id*. at 2299, 2304. The Court thus declined to "disregard the corporate form" to hold one entity liable for another's statements. *Id*. at 2304.

That reasoning does not apply to cases like this one, involving a *single* corporate entity and its *own* corporate officers:

> [*Janus*] addressed only whether third parties can be held liable for statements made by their clients. Its logic rested on the distinction between secondary liability and primary liability ... and has no bearing on how corporate officers who work together in the same entity can be held jointly responsible on a theory of primary liability.

City of Pontiac Gen. Emples. Ret. Sys. v. Lockheed Martin Corp., 875 F. Supp. 2d 359, 374 (S.D.N.Y. 2012). Numerous courts have since rejected the contention that corporate insiders cannot be held liable for "approving" false statements they themselves did not make. *See*, *e.g.*, *SEC v. Benger*, 931 F. Supp. 2d 908, 911 (N.D. Ill. 2013) ("ultimate authority" established where defendants "'approved, adopted, and collectively implemented'" the challenged statements "in concert with the other defendants"); *SEC v. Daifotis*, 874 F. Supp. 2d 870, 881 (N.D. Cal. 2012) ("in the wake of *Janus*, an executive who indisputably exercises authority over his own non-casual statements with the intent and reasonable expectation that such statement would be relayed to the investing public, should be deemed to be the person who 'made' the statements"); *In re Satyam Computer Servs. Secs. Litig.*, 915 F. Supp. 2d 450, 477 n.16 (S.D.N.Y. 2013) (distinguishing *Janus* where defendants were "charged with responsibility for false statements made by the Company itself").

Defendants nonetheless insist that *Janus* must also apply to corporate insiders because *Janus* cited to *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994), which proscribed aiding-and-abetting liability. Their insistence is misplaced: *Central Bank*, like *Janus*, rejected an attempt to hold one corporate entity responsible for the statement of another. *Id*. at 167-69. Also, the Court expressly distinguished between primary violators who engage in securities fraud either "directly *or indirectly*," and aiders and abettors who do not engage in the proscribed activities but give aid to those who do. *Id*. at 176. The former are still liable for securities fraud in *Central Bank*'s wake.

c. Defendants Cannot Demonstrate Prejudice

Assuming *arguendo* that the jury instructions did not accurately convey the law, defendants fail to satisfy their "onerous burden" of establishing prejudice. *Gile*, 213 F.3d at 375. Tacitly acknowledging this failure, defendants proffer *Dawson v. New York Life Ins. Co.*, 135 F.3d 1158 (7th Cir. 1998) for the notion that an incorrect jury instruction is perforce prejudicial. But that conflates the issue of whether an instruction is *erroneous* with the distinct issue of whether the error was *prejudicial*. Even if an instruction contains errors, the error requires reversal only if prejudice results. *Dickerson*, 705 F.3d at 688.

All four defendants made the false statements for which they were found liable. Household stipulated that it *made* all of the alleged false statements in Household's 10-Ks, 10-Qs, and press releases (PSA708) – and defendants do not contest Household's responsibility for any of the 17 actionable statements. AOB50-AOB56.

Aldinger does not dispute that he made 15 of the statements found actionable. *Id*.[48] The jury also found Aldinger liable as a controlling person under §20(a) for all 17 statements. A261; *see also* PSA324:3-7 (Aldinger stipulated that he "actually exercised general control over the operations of Household").

Putting aside that Aldinger is indisputably liable for 15 §10(b) violations and 17 §20(a) violations, he also made the two statements he now disputes. As for the March 23, 2001 statement, the evidence shows that Aldinger crafted the statement and ordered Household officials – including Gilmer – to repeat it in response to media questions about predatory lending.[49] At trial, Aldinger admitted that he "sent [this statement] to a bunch of people, including Mr. Gilmer," and "approve[d] of that statement." PSA232:10-234:5. Unsurprisingly, Gilmer hewed to Aldinger's statement word-for-word when he spoke publicly. Under *Janus*, Aldinger had "ultimate authority over the statement, including its content and whether and how to

[48] *See also* PSA246:5-11, PSA708.

[49] *Compare* PSA673 & PSA675 *with* PSA509.

communicate it," and was properly found liable for it. 131 S. Ct. at 2302; *see Daifotis*, 874 F. Supp. 2d at 881.

Likewise, Aldinger is liable for Schoenholz's misrepresentations at Household's April 2002 FRC. Aldinger attended the FRC, gave presentations, "provided information to analysts and investors," participated in a question-and-answer session, and watched as Schoenholz lied to attendees about Household's re-aging practices and statistics.[50] These actions trigger §10(b) liability. *See In re Fannie Mae 2008 Sec. Litig.*, 891 F. Supp. 2d 458, 473 (S.D.N.Y. 2012) ("In the post-Janus world, an executive may be held accountable where the executive ... ratified and approved the company's statement."). Additionally, as noted *supra*, the jury found Aldinger liable under §20(a) for each of Gilmer and Schoenholz's misrepresentations, including those at the FRC and on March 23, 2001.

Schoenholz also does not deny that he made 15 of the actionable statements. *Id.*[51] Schoenholz is liable as a controlling person for all 17 statements. A261; *see also* PSA324:3-7 (Schoenholz stipulated that he "actually exercised general control over the operations of Household"). In addition, Schoenholz is liable under §10(b) for Aldinger's false statements during the December 4, 2001 Goldman Sachs conference.

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[50] PSA51:14-52:2, PSA60:1-62:4, PSA228:1-229:19, PSA356; CD1656:27-28.

[51] *See also* PSA57:21-59:2, PSA81:24-83:2, PSA708.

Aldinger testified that he and Schoenholz plotted Household's response to an unflattering *Barron's* article in an emergency Sunday meeting. PSA222:17-223:14. At the conference, with Schoenholz present, Aldinger presented false information about Household's re-aging practices that he and Schoenholz had prepared. PSA224:23-25, PSA225:2-7. Further, Schoenholz is liable under §20(a) for Aldinger's misrepresentations at the Goldman conference. A261.

Given that Household, Aldinger, and Schoenholz would be subject to the same liability, each fails to "demonstrate that *substantial harm* flowed from the [disputed] jury instruction," *Gile*, 213 F.3d at 375, and cannot establish prejudice.

Gilmer, too, cannot establish prejudice because he plainly made the statements he now challenges. For example, at the FRC, Gilmer *reaffirmed Schoenholz's false statements during his own presentation*, telling attendees that Household's "policies and practices" concerning re-aging were the same as those that "Dave [Schoenholz] did talk about ... this morning." *See* PSA414-416 ("these re-ages will move from time to time depending on the economic circumstances").[52] As for the false statements at the Goldman conference, Gilmer can hardly complain that an incorrect jury instruction was responsible for the verdict against him, when his defense counsel

[52] *See also* PSA384 (Gilmer told the FRC audience that he was repeating the same information that "Dave [Schoenholz] eluded to … earlier when he talked about ... strengthening the portfolio").

argued that "*all* [of Aldinger's] senior guys [got] together in the office Sunday," "decide[d that] at the conference Bill is going to respond to the Barron's article," and "prepare[d] extra slides for [Aldinger's] PowerPoint" presentation at the Goldman conference. PSA312:22-313:6.

Equally unpersuasive is Gilmer's contention that he is not liable for statements in the SEC filings and press releases because his participation was supposedly limited to furnishing information to others for inclusion in those documents. AOB55-AOB56. That argument disregards the evidence at trial. Gilmer headed Household's largest division and reported directly to Aldinger. PSA30:1-6, PSA32:1-11, PSA37:1-41:10, PSA230:16-24. He was among the five highest-ranking executives at Household (PSA226:16-227:8), a Household "senior executive," and appointed Vice-Chairman in 2002.[53] His executive role extended to corporate-wide initiatives, including participation in senior management meetings and consultation with Schoenholz regarding Household's re-aging policies.[54] Gilmer not only provided information for Household's SEC filings, but reviewed, edited, and approved them prior to issuance.[55] Schoenholz, who signed the filings, took comfort in this process. PSA80:21-82:24.

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[53] *See* PSA35:21-36:2, PSA677, PSA679-PSA680, PSA682.

[54] PSA65:1-21, PSA67:21-24, PSA68:17-75:24, PSA454, PSA458, PSA492.

[55] PSA701, PSA243:16-22, PSA77:11-78:25, PSA80:18-20, PSA81:15-23.

As a result, Gilmer "certainly had a responsibility to shareholders." PSA35:3-36:2; *see Lockheed*, 875 F. Supp. 2d at 375 (non-speaking defendant liable under *Janus* as "maker" of false projections where she was in charge of division where misconduct arose, and among company's "'[l]eadership'").

As a fallback, defendants attack Aldinger's scienter for the March 23 statement, claiming the jury's determination that Aldinger and Household acted "'knowingly'" in making the March 23, 2001 statement while Gilmer acted "'recklessly'" – a Verdict Form option to which defendants never objected – is "legally impossible," and purportedly demonstrates that the approved-or-furnished language "infected the jury's assessment of scienter." AOB55. That argument is waived, and ignores that Aldinger drafted the statement and ordered Gilmer to deliver it.[56] PSA322:5-323:7. Defendants' assertion that the jury ignored the *scienter* instruction – which omitted the "furnish or approve" language – and judged Aldinger and Household's states of mind based on a summary *falsity* instruction is rank speculation (*Gile*, 213 F.3d at 375), and ignores a presumption that the jury followed the court's instructions. *United States v. Lee*, 558 F.3d 638, 649 (7th Cir. 2009).

[56] Aldinger and Household waived these arguments by failing to: (1) challenge this statement in a 50(a) motion; (2) object to Aldinger's name next to this statement on the Verdict Form; and (3) object to the "knowing" option next to Aldinger's name. *McKinnon v. Berwyn*, 750 F.2d 1383, 1387-88 (7th Cir. 1984).

Furthermore, contrary to defendants' contention, Household's state of mind is not contingent on whether Aldinger made the statement. *Janus* did not impose an additional requirement "that an individual whose scienter is imputed to [the corporation] must also be the 'maker' of the false or misleading statement at issue." *Pa. Pub. Sch. Emples' Ret. Sys. v. Bank of Am. Corp.*, 874 F. Supp. 2d 341, 371 (S.D.N.Y. 2012). Nor is the jury's conclusion irrational; the jury rationally concluded that Gilmer recklessly disregarded that his representations were false, while Aldinger and Household *knew* those representations were false.[57]

Finally, invoking *Fulton Cnty. Emps. Ret. Sys. v. MGIC Inv. Corp.*, 675 F.3d 1047 (7th Cir. 2012), defendants argue they are not liable for failing to correct a misstatement made by another defendant. AOB53. This argument distorts the record and the law. Defendants did not merely look idly on while others misspoke. To the contrary, as discussed *supra*, Aldinger crafted the March 23 statement and ordered Gilmer to parrot it to the media, Gilmer repeated Schoenholz's misrepresentations at the FRC, and Schoenholz worked with Aldinger to plot the false statements at the Goldman conference. Defendants' purported *in*actions were deliberate actions.

[57] Even if Household were only recklessly liable for the first false statement, Household would still be liable for the entire judgment through basic principles of *respondeat superior*. *Tellabs*, 513 F.3d at 708.

Further, *Fulton County* involved statements made by an officer of a third-party entity that the defendant did not control (and, therefore, had no duty to correct). 675 F.3d at 1051. Here, in contrast, the defendants are all high-ranking officers of one company, and Aldinger and Schoenholz – who stipulated that they "actually exercised general control over the operations of Household" – are liable as controlling persons under §20(a).

Defendants cannot establish prejudice.

C. Defendants Failed to Rebut the Reliance Presumption

In arguing that they were deprived of any meaningful opportunity to rebut the presumption of reliance, defendants distort the record, omit their failure to object to key decisions below, and ignore their own shortcomings in pursuing discovery and demonstrating any disputed issue of fact.

1. Standard of Review

Discovery orders are reviewed for abuse of discretion. *Jones v. City of Elkhart*, 737 F.3d 1107, 115-16 (7th Cir. 2013). A district court does not abuse its discretion unless: (1) the record contains no evidence upon which the court could have rationally based its discretion; (2) the decision is based on an erroneous conclusion of law; (3) the decision is based on clearly erroneous factual findings; or (4) the decision clearly

appears arbitrary. *Id*. Furthermore, a court's discovery ruling cannot be reversed absent a clear showing that it resulted in actual and substantial prejudice. *Id*.

2. Defendants Were Given Ample Opportunities But Failed to Rebut Reliance

In *Basic*, the Supreme Court recognized that a defendant could rebut the reliance presumption by demonstrating either that: (1) "market makers" were privy to the truth; (2) the truth had "credibly entered the market and dissipated the effects of the misstatements;" or (3) something severed the link between the misstatements and the price paid by the plaintiff such that the plaintiff "could not be said to have relied on the integrity of a price he knew had been manipulated." *Basic Inc. v. Levinson*, 485 U.S. 224, 248-49 (1988).

Defendants litigated and lost the first two methods for rebutting the presumption on a class-wide basis. PSA718-PSA721, PSA755-PSA756. Therefore, the only question remaining was whether defendants could sever the link between the fraudulent statements and an individual plaintiff's decision to purchase Household stock. PSA757.

The district court ruled that proof-of-claim forms sent to class members would incorporate an interrogatory designed to ascertain reliance. PSA721-PSA722; CD1721:Ex. 2:8; PSA742-PSA743, PSA768. Defendants moved to reconsider and raised a number of objections to the ruling, but failed to suggest any specific changes

to the wording of the proposed interrogatory (CD1710, CD1711) – even when the court invited their suggestions. PSA781 ("our issue with the notice is not one of line editing").

Now, for the first time on appeal, defendants urge the very line edits that they refused to make before the notice went out to class members. They have waived this objection.

Beyond waiver, defendants' objection to the claim-form interrogatory's language is contrary to *Basic*. Relying on a portion of *Basic* that summarizes the Court of Appeal's decision, defendants argue that stock-price inflation is irrelevant to the inquiry. AOB59. In fact, *Basic* holds that both a plaintiffs' knowledge of the fraud and reliance on the market's integrity are critical to rebutting the presumption. *Basic*, 485 U.S. at 249. Ultimately, the inquiry boils down to whether the investor can "be said to have relied on the integrity of a price he knew had been manipulated." *Id*. Therefore, the claim-form interrogatory properly addressed both the concept of knowledge of the fraud and the consequent artificial price inflation.

Defendants' argument that the presumption was "baked" into the interrogatory ignores the entire premise of the fraud-on-the-market concept in *Basic* – that a stock's price incorporates defendants' representations: "When someone makes a false (or

true) statement that adds to the supply of available information, that news passes to each investor *through the price of the stock*." *Schleicher*, 618 F.3d at 682.

Defendants' assertion that the claim-form interrogatory "amounts to little more than a reading comprehension test, which predictably resulted in an avalanche of forms checking the 'NO' box," is demonstrably wrong. AOB61. There were approximately 45,000 class members with potentially valid claims; of those claimants, over 12,000 failed to answer the interrogatory – and all 12,000 have been (or will be) rejected. CD1790:¶8 and Ex. B thereto, CD1860:2-4, CD1886; PSA786-PSA787. Therefore, despite defendants' half-hearted efforts, the presumption of reliance *was* effectively rebutted as to over 26% of the class members with potentially valid claims. Further, the avalanche of "Nos" simply reflects common sense; as the Supreme Court observed, '"it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?"' *Basic*, 485 U.S. at 247.

In addition to the claim-form interrogatory, defendants were given the opportunity to take reliance-related discovery. PSA731. Defendants claim that the district court unduly limited the number or type of class members that they were permitted to serve with Phase II discovery. AOB58, AOB60. The truth is defendants were given substantial leeway.

First, the court asked defendants how much time they needed "to delve into whatever issues of reliance they wish to address" in discovery. PSA782. Defendants stated that "120 days of discovery ... sounds approximately correct." *Id*. The court gave defendants the full 120 days. PSA731. After discovery closed, defendants sought more time, but the court rejected their request while citing defendants' lack of diligence. PSA753 ("[T]hey have withdrawn and revised discovery requests, inexplicably failed to follow up on obvious avenues of discovery and have cancelled depositions.").

Second, the district court never restricted discovery "to a limited number of institutional investors." AOB58. Defendants had free rein to seek discovery of as many class members as they wished to pursue; ultimately, they served discovery on over 130 entities. CD1766:1-4; PSA753. True, Judge Guzman limited the number of *depositions* that defendants could take. PSA734-PSA735. However, defendants had assured him that they needed depositions of only 10-15 class members. *Id*. More importantly, defendants' carping about deposition limits rings hollow, given their choice to use only 12 of their allotted 15 depositions. PSA753.

Finally, defendants argue that the scope of discovery was unfairly limited. AOB60. To the contrary, the court properly exercised its discretion to focus defendants' discovery on reliance-related issues unique to individual class members,

as opposed to defendants' concerted effort to seek discovery on their already rejected truth-on-the-market defense. PSA733-PSA734. Defendants obtained discovery of class members' trading strategies, Household stock transactions and documents, and internal communications concerning non-public information about Household. PSA733-PSA734; CD1766:1-4; PSA751-PSA754, PSA759-PSA763. Nothing more was needed to test reliance; the court's discretion warrants deference.

Defendants' cherry-picked examples (AOB62-AOB64) cannot withstand reasoned scrutiny. The evidence showed that Glickenhaus, Davis Selected, and class members with pre-existing acquisition plans or computerized trading models were either price-reliant, unwilling to be defrauded, or both. PSA759-PSA763. In finding that defendants had failed to create a triable issue of fact as to these class members, the court pointed out that "index funds, which adjust their portfolios to match a target index, rely on investor opinion as reflected in the stock price each time they make an adjustment"; Davis Selected's representative testified that it was inappropriate to invest in companies run by "'crooked executives'" and that "'one of the biggest parts of an investment decision is the price of the stock and management's integrity and what they are telling you'"; and Glickenhaus testified that he relied on Household's statements. PSA760-PSA762. Despite extensive discovery, defendants failed to create a triable issue of fact as to reliance. PSA759-PSA763.

Defendants' reliance on *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) is misplaced. In *Wal-Mart*, the Supreme Court reversed a class-certification grant because plaintiffs failed to demonstrate common questions of law or fact. *Id*. at 2556-57. In addition, class certification was inappropriate under Rule 23(b)(2) because class members' claims for monetary relief could be compromised or adjudicated without notice to the class or an opportunity to opt out. *Id*. at 2557-59. In dictum, the Court noted that defendants also had statutory defenses to Title VII claims that would be lost if a class was certified. *Id*. at 2561. The Court stated that depriving defendants of their statutory defenses would run afoul of the Rules Enabling Act. *Id*.

Here, defendants *stipulated* to class certification, rendering *Wal-Mart* inapplicable.[58] Moreover, defendants were not deprived of any statutory defenses or rights, and point to none. Defendants were given a chance to contest reliance both at trial on a class-wide basis and as to individual class members, and utterly failed.

3. The Jury's Verdict Did Not Rebut Reliance

Finally, relying on their new expert, defendants argue that because the amount of the inflation in Fischel's Leakage Quantification model does not *increase* on 15 of the 17 dates on which the jury found false statements, they rebutted the presumption of reliance. AOB67. As discussed in §IV(B)(2)(a), Fischel testified that false

[58] Defendants gladly reaped the benefits of class certification when the claims of various class members were dismissed before trial or rejected at trial.

statements that *maintain* inflation "impact[s]" the stock price by preventing it from falling to its true value.[59] Defendants' expert agreed.[60] And the cases relied upon by defendants acknowledge that price impact from false statements can be shown by assessing stock-price declines following disclosure of the truth.[61]

Further, Defendants' "price impact" argument boils down to an attack on the "materiality" prerequisite to the fraud-on-the-market presumption. Yet trial testimony, including defendants' own admissions, established that all 17 actionable statements were material – and the jury agreed.[62]

In sum, the economic evidence, defendants' admissions, and the jury's verdict together establish that defendants never rebutted the presumption of reliance.

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[59] PSA125:10-19, PSA299:3-300:7; *see also Schleicher*, 618 F.3d at 683-84; *FindWhat*, 658 F.3d at 1314-15.

[60] PSA271:5-8.

[61] *In re DVI Inc. Sec. Litig.*, 639 F.3d 623, 638 (3d Cir. 2011); *Nathanson v. Zonagen Inc.*, 267 F.3d 400, 418 (5th Cir. 2001).

[62] PSA244:22-248:16, PSA54:13-18, PSA55:5-10, PSA214:25-215:18, PSA217:3-10, PSA107:22-108:12, PSA221:19-21, PSA235:10-12, PSA237:12-22.

VII. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the judgment be affirmed.

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Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
MICHAEL J. DOWD
SPENCER A. BURKHOLZ
DANIEL S. DROSMAN
JOSEPH D. DALEY
MAUREEN E. MUELLER

s/ Michael J. Dowd
MICHAEL J. DOWD

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

ROBBINS GELLER RUDMAN
& DOWD LLP
LUKE O. BROOKS
JASON C. DAVIS
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545
415/288-4534 (fax)

Lead Counsel for Plaintiffs-Appellees

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 COMPLIANCE

The undersigned counsel certifies that PLAINTIFFS-APPELLEES' ANSWERING BRIEF complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced Times New Roman typeface (14-point, footnotes 12-point) and complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the text of the brief comprises 13,960 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the word count provided by Microsoft Word 2010 word processing software.

s/ Michael J. Dowd
MICHAEL J. DOWD

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Michael J. Dowd
MICHAEL J. DOWD