UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Honorable Jorge L. Alonso

PLAINTIFFS' MOTION TO PRECLUDE DEFENDANTS FROM SUBSTITUTING NEW EXPERTS

I. INTRODUCTION

On October 23, 2015, 13 years after the suit was filed, more than six years after the close of discovery and just months before the limited retrial of this case, defendants, without seeking leave of Court and without attempting to establish manifest injustice, filed Rule 26 expert reports from three new experts on the subject of loss causation.

Defendants' new experts should be excluded. A party seeking to designate new experts on retrial must demonstrate that exclusion of those experts would cause the party to suffer manifest injustice. Here, defendants have already designated a loss causation expert in this case, Mukesh Bajaj. Not surprisingly, therefore, defendants make no effort whatsoever to explain why they need three new experts to testify on loss causation, much less show manifest injustice that would flow if defendants' three new experts were excluded.

In fact, two of defendants' new experts directly contradict the testimony of defendants' loss causation expert at the first trial. But the desire to change trial theories, thus triggering the need to swap experts, does not rise to the level of manifest injustice. Defendants' third expert offers testimony that defendants knew about in advance of the first trial. Indeed, defendants offered a declaration from this expert before the first trial but after the close of expert discovery. Because defendants made a strategic decision not to designate this expert then, they cannot show manifest injustice if he is excluded on remand.[1]

II. ARGUMENT

"It is always easy in hindsight for counsel to realize there may be a better way to try a case the second time around." *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1449 (10th Cir. 1993).

[1] In the event that the Court denies this motion, plaintiffs intend to move at the appropriate time under *Daubert* and Fed. R. Evid. 702 to exclude Ferrell, Cornell and James, whose reports suffer from severe methodological defects and are impermissibly duplicative.

But on remand a court should not "allow either side to introduce totally new expert witnesses to bolster or impeach earlier evidence." *Id.* at 1449-50.

Rather, a party seeking to designate a new expert witness on retrial must demonstrate that "manifest injustice" would result if the new expert is not allowed ***and*** must make a "timely motion" to designate the new expert. *Id.* at 1450; *see also Little v. City of Richmond*, No. 13-CV-2067-JSC, 2015 WL 798544, at *1-*2 (N.D. Cal. Feb. 23, 2015) (declining to exercise discretion to allow new experts to testify on retrial because exclusion of new experts would not result in manifest injustice); *Steadfast Ins. Co. v. Auto Mktg. Network, Inc.*, No. 97 C 5696, 2003 WL 22902604, at *1-*2 (N.D. Ill. Dec. 8, 2003) (denying request to add an expert witness before retrial); *Whitehead v. K Mart Corp.*, 173 F. Supp. 2d 553, 565 (S.D. Miss. 2000) (denying request to designate new expert witnesses because this was a matter "which easily could have been pursued prior to the first trial of this case"); *Clark v. R.E.L. Prods., Inc.*, No. 90-4121-R, 1993 WL 100304, at *2 (D. Kan. Mar. 4, 1993) (affirming magistrate judge's decision to deny adding expert witness before retrial).[2] Here, defendants have failed to demonstrate any manifest injustice and have failed to make a timely motion to designate these new expert witnesses.[3]

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[2] In the Joint Status Report dated August 25, 2015, defendants cited *Smart Marketing Group, Inc. v. Publications Int'l, Ltd.*, No. 04-CV-00146, 2013 WL 2384248 (N.D. Ill. May 29, 2013) and *Roberts v. Sears, Roebuck & Co.*, No. 80 C 5986, 1988 WL 128696 (N.D. Ill. Nov. 21, 1988) for the proposition that the "practice in this district" is to allow new experts on remand. Defendants' cases are distinguishable, however, because they contain no analysis or citation to legal authority regarding whether to allow new experts on remand unlike *Steadfast Ins. Co.*, in which the District Court for the Northern District of Illinois concluded that there was no manifest injustice in precluding a party from introducing new experts at a second trial. 2003 WL 22902604, at *1-*3.

[3] The case was originally tried to a jury in April 2009 and the jury reached a verdict on May 7, 2009. Defendants appealed and obtained a limited remand based on what the Seventh Circuit found to be conclusory testimony on the impact of firm-specific, nonfraud information. After remand, defendants never sought to alter or amend the Court's Rule 16 Scheduling Order to allow for the designation of new experts. Prior to naming the three new experts, defendants did not seek leave of the Court or attempt to make any showing of good cause to designate additional expert witnesses, as they were required to do. *See Cleveland*, 985 F.2d at 1450 ("[I]f a party makes a timely motion to produce new and material evidence which was not otherwise readily accessible or known, the court should, within the exercise of discretion, consider whether denial of the

To begin, defendants already have designated a loss causation expert in the case, Mukesh Bajaj. After spending 10,000 hours over the course of more than two and one-half years analyzing the economic evidence in the case, Bajaj (with the assistance of 25 colleagues) submitted a 92-page loss causation expert report on December 10, 2007. Ex. 1[4] at 4083:4-12; Ex. 2. On March 3, 2008, Bajaj also submitted a sur-rebuttal report in response to the arguments made by plaintiffs' loss causation expert, Daniel Fischel. Ex. 3. On March 25, 2008, plaintiffs' counsel deposed Bajaj. Ex. 4. At trial a year later, defendants called Bajaj as an expert witness, and he testified for the better part of a day on loss causation. Ex. 1. Even following the trial, defendants submitted Bajaj's declaration in response to plaintiffs' Motion for Entry of Judgment. Not surprisingly, Bajaj's testimony included criticism of Fischel's analysis of firm-specific, nonfraud factors – the sole basis for the remand. *See, e.g.*, Ex. 2 at 11, 13-15, 47, 62, 64-5, 67, 71; Ex. 4 at 28:4-10, 31:2-10, 148:3-13, 150:12-151:15; Ex. 1 at 4119:23-4120:18, 4151:6-13.

Thus, defendants have not even attempted to demonstrate that manifest injustice will occur if they are precluded from calling their newly disclosed expert witnesses at trial. Nor can they. Indeed, defendants can continue to use Bajaj to testify that Fischel's model was significantly distorted by firm-specific, nonfraud information. Simply put, new experts are not needed to testify about the same issues on which Bajaj has already testified. Nor is there any reason that Bajaj cannot submit a supplemental report consistent with the Seventh Circuit's mandate, as Fischel has done. *See Martin's Herend Imports, Inc. v. Diamond Gem Trading United States of America Company*, 195 F.3d 765, 775-76 (5th Cir. 1999) (holding that the district court's discretion in managing trials

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new evidence would create a manifest injustice."). They simply submitted Rule 26 reports from three new experts. Accordingly, the Court should preclude defendants from calling new expert witnesses.

[4] All exhibits referenced throughout are attached to the Declaration of Daniel S. Drosman in Support of Plaintiffs' Motion to Preclude Defendants from Substituting New Experts, filed herewith.

"'extends on remand to all areas not covered by the higher court's mandate'") (citing *Cleveland*, 985 F.2d at 1449).

The only thing that has changed since the first trial is that Household has retained new counsel, who would like to present this case to the jury in a different manner than previous counsel. With hindsight as their aid, defendants evidently recognize errors they made in the first trial and seek to correct them by having three new experts contradict Bajaj's testimony. While "[i]t is always easy in hindsight for counsel to realize there may be a better way to try a case the second time around," new trials are not meant to give litigants a second chance to correct their errors at a former trial. *See Cleveland*, 985 F.2d at 1449.

For example, defendants' new experts contradict Bajaj's testimony that fraud-related disclosures pervade the disclosure period. Bajaj testified that, in addition to the 14 specific disclosure dates used by Fischel, there were 166 additional days with disclosures that "resulted in the market learning the truth about Household's fraud." Ex. 1 at 4237:13-4238:7. At trial, Bajaj used a demonstrative exhibit to show the hundreds of dates on which disclosures related to the fraud occurred, testifying under oath: "And when you look at the evidence, it is very clear, so-called predatory lending and other practices were no secret to the market. That was part of being in this business." *Id.* at 4238:20-4239:10. Bajaj also included an exhibit to his expert report entitled "Household News Chronology," in which he summarized all news related to Household during the period July 30, 1999 to October 11, 2002.[5] Summarizing the relevant news on each day of the 228-day disclosure period (November 15, 2001 to October 11, 2002), Bajaj established that ***more than half*** of those days (125 days) included disclosures related to the fraud. *See* Ex. 5. Bajaj's conclusion that fraud-related disclosures permeated the disclosure period contrasts sharply with

[5] Because Ex. 8 to the Bajaj Report is 1,222 pages, plaintiffs are not attaching it to the Drosman Declaration, but will provide it to the Court upon request.

defendants' new experts' contention that there is no basis whatsoever to attribute the decline during the 228-day disclosure period to the disclosure of fraud. *See, e.g.*, Expert Report of Professor Allen Ferrell (Dkt. No. 2060-3), ¶17 ("Ferrell Report") and Expert Report of Christopher M. James (Dkt. No. 2060-4), ¶58 ("James Report").

Defendants' new experts also diverge from Bajaj on the appropriate indices for use in a regression analysis. Bajaj testified that Fischel properly used the S&P 500 Index and the S&P Financial Index in his regression analysis – "I don't say that he chose the wrong indices. In fact, in my report, I used the same two indices." Ex. 1 at 4139:3-4. Bajaj testified that Fischel also should have used a third peer group, the Consumer Finance Index, in order to make the regression analysis "more precise." *Id.* at 4137:16-4140:8. Defendants' new experts, however, criticize Fischel's use of the S&P 500 Index and the S&P Financial Index, which Bajaj also used in his regression analysis. Ferrell Report, ¶¶42-43; James Report, ¶¶21-23. Further, Ferrell abandons entirely the Consumer Finance Index used by Bajaj, replacing it with yet another index called the Credit Suisse First Boston Specialty Finance Universe. Ferrell Report, ¶43.[6]

Finally, defendants submit an expert report from Bradford Cornell asserting that an article that Cornell co-authored with Gregory Morgan does not support Fischel's leakage model. This is evidence, however, that easily could have been pursued in advance of the first trial. In fact, Cornell made these precise arguments in a declaration submitted before trial but after the deadline for designating experts. Defendants made a tactical choice not to designate Cornell or submit his Rule 26 expert report in advance of the first trial. Further, Bajaj devoted an entire section of his expert

[6] In addition to contradicting Bajaj, defendants' new experts offer opinions contradicting defendants' own trial testimony and theory of the case. For example, Ferrell and James criticize Fischel for failing to account for more stringent lending and capital restrictions stemming from guidelines imposed by the Federal Financial Institutions Examinations Council ("FFIEC"). Ferrell Report, ¶¶51, 55; James Report, ¶¶45-47, 55. But defendants Aldinger and Schoenholz testified under oath at trial that FFIEC applied only to banks and did not apply to consumer finance companies like Household. *See* Ex. 6 at 2172:8-2173:16, 3242:17-22.

report to a discussion of the Cornell and Morgan article, opining that "Cornell and Morgan themselves recognize that the Leakage model has a serious limitation." Ex. 2 at 72-75. When asked at trial whether he had looked at Cornell's work, Bajaj testified: "I know his work well, and I know Professor Cornell well." Ex.1 at 4150:13-14. Bajaj then concluded that Cornell's work did not support Fischel's leakage model. *Id.* at 4150:15-16. Yet, defendants make no effort at all to explain why they failed to designate Cornell for the first trial. Because defendants "knew or should have known that certain witnesses or evidence was necessary at the first trial, then the exclusion of those witnesses during the retrial will likely not be manifestly unjust." *Little*, 2015 WL 798544, at *2; *see also Steadfast*, 2003 WL 22902604, at *2-*3 (denying motion to augment expert witness list where Steadfast "made the strategic decision" not to designate an expert for the first trial).

III. CONCLUSION

Because defendants cannot establish that manifest injustice would result if their new experts are not allowed, defendants' new experts should be excluded during the retrial.

DATED: November 24, 2015

Respectfully submitted,

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I hereby certify that on November 24, 2015, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 24, 2015.

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