IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, on Behalf of Itself and All Others Similarly Situated, Plaintiff,	)	Case No. 02 C 5893
	)	Judge Jorge L. Alonso
v.	)	
HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	)	

RESPONSE TO PLAINTIFFS' MOTION TO PRECLUDE DEFENDANTS FROM SUBSTITUTING NEW EXPERTS

Defendants respectfully submit this response in opposition to Plaintiffs' motion to preclude Defendants from "substituting" new experts.

INTRODUCTION

On May 21, 2015, the Seventh Circuit reversed and remanded this case for a new trial on loss causation. *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408 (7th Cir. 2015). The Seventh Circuit assigned to Plaintiffs' expert, Daniel Fischel, the threshold burden of providing nonconclusory testimony to support his opinion that "no firm-specific, nonfraud related information contributed to the decline in [Household's] stock price." *Id.* at 422. On September 22, 2015, in accordance with the Seventh Circuit's framework for the proceedings on remand and the schedule set forth in this Court's Order dated September 8, 2015 (Dkt. No. 2042), Plaintiffs served Fischel's Second Supplemental Report. (Dkt. No. 2060-1.)

On October 23, 2015, Defendants served the reports of the three experts they have retained to respond to Fischel's new testimony and to testify at the new trial on loss causation—

Professor Allen Ferrell, a Professor at Harvard Law School who also holds a Ph.D. in economics from the Massachusetts Institute of Technology, and who is the author of the article cited in the Seventh Circuit's opinion regarding the proper manner of accounting for firm-specific, nonfraud-related information, *see Glickenhaus*, 787 F.3d at 422-23; Professor Christopher James, a Professor of Finance and Economics at the University of Florida who has held positions with the Federal Deposit Insurance Corporation, the U.S. Department of the Treasury Office of the Comptroller of the Currency, and the Federal Reserve Bank of San Francisco; and Bradford Cornell, a Visiting Professor of Financial Economics at the California Institute of Technology and the co-author of the article on which Fischel purported to base his "leakage" model of loss causation. (Dkt. Nos. 2060-2, 2062-3 2062-4.)

On November 23, 2015, Plaintiffs served Fischel's Second Rebuttal Report, in which Fischel responded to the reports of Professors Ferrell, James and Cornell. (Dkt. No. 2067-1.) The next day, Plaintiffs filed their motion to preclude Defendants from "substituting" Professors Ferrell, James, and Cornell as testifying experts at the new trial. (Dkt. No. 2068.)

Plaintiffs contend that Defendants' appeal resulted in a "limited remand," requiring only a "limited [trial]," and that Defendants have failed to meet a supposed requirement to move the Court and demonstrate that they would suffer "manifest injustice" if not allowed to designate new experts for the retrial. (Pls.' Mot. at 1, 2 & n.3.)[1]

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[1] Plaintiffs' do not base their motion on an argument that the testimony of Professors Ferrell, James, and Cornell is cumulative. Such a motion would be premature. *See, e.g.*, *Cage v. City of Chicago*, No, 09 C 3078, 2003 WL 22902604, at *3 (N.D. Ill. Nov. 14, 2012) (explaining that such an argument does not apply "at the motion practice stage of the case, but rather the trial stage of the case" (internal quotations and citations omitted)). Plaintiffs assert that, if the Court denies their instant motion, they will move "at an appropriate time" to exclude the testimony of Professors Ferrell, James, and Cornell on the ground, among others, that it is "impermissibly duplicative." (Pls.' Mot. at 1 n.1.) There is no basis for such a motion. As their reports show, Defendants' experts will testify about distinct issues *(cont'd)*

Plaintiffs' motion simply rehashes arguments that this Court already rejected. Defendants, furthermore, did not have an obligation to move the Court and demonstrate "manifest injustice" before designating their new experts. In any event, it would be manifestly unjust under the circumstances here to restrict Defendants from designating new experts. Finally, Plaintiffs' argument that the reports of Professors Ferrell and James "contradict" the testimony of Defendants' former loss causation expert, and the testimony of Defendants Aldinger and Schoenholz, is baseless.

Because Plaintiffs have failed to present any valid reason why the Court should refuse to allow Defendants to use these experts to address the fundamental matters presented by Fischel's remand reports and the loss causation elements which the Seventh Circuit has directed to be addressed on remand, the Court should deny Plaintiffs' motion.

ARGUMENT

I. Plaintiffs' Motion Revisits Arguments that This Court Previously Rejected.

On August 25, 2015, the parties submitted a Joint Status Report, in which they set forth their competing proposals for "the conduct of this case going forward." (Dkt. No. 2035 at 1.) With respect to the retrial of the loss causation element of Plaintiffs' securities fraud claim, Plaintiffs argued that the case had been remanded for a determination by the new jury of the

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> regarding the flaws in Fischel's loss causation models. Professor Ferrell will testify about the methodological flaws in Fischel's leakage model that cause it to wildly overstate inflation, as well as more limited, flaws in Fischel's specific disclosures model; Professor James will address issues regarding the manner in which certain economic events differentially impact financial institutions in the subprime lending sector; and Professor Cornell will explain to the jury how Fischel misapplied the methodology described in Professor Cornell's article. The testimony of Defendants' experts is not cumulative. *See, e.g.*, S*unstar, Inc. v. Alberto-Culver Co., Inc.*, Case No. 01 C 0736, 2004 WL 1899927, at *25 (N.D. Ill. Aug. 20. 2004) ("Only one of Alberto's experts will be permitted to testify at trial on each subject of Japanese law. This does not mean that Alberto is limited to one testifying expert regarding Japanese law; it is limited to one testifying expert on each subject of Japanese law.")

limited issues of "the impact, if any, of 'non-fraud company-specific' information and the damages on March 23, 26, and 27, 2001." (*Id.* at 7.)

In accordance with their position about the "limited" scope of the remand, Plaintiffs also asserted that Defendants should be restricted to using the loss causation expert they had used at the first trial, Dr. Mukesh Bajaj. (*Id.* at 15 n.5.) In support of this position, Plaintiffs cited the very same authorities on which they now rely—the Tenth Circuit's decision in *Cleveland v. Piper Aircraft Corp*., 985 F.2d 1438, 1499-50 (10th Cir. 1993), and Judge Lefkow's decision in *Steadfast Insurance Co. v. Auto Marketing Network, Inc.*, No. 97 C 5696, 2003 U.S. Dist. LEXIS 22217 (N.D. Ill. Dec. 8, 2003). (*Id.*)[2]

Defendants, on the other hand, contended that the case had been remanded for a new trial on the entire element of loss causation. (*Id.* at 8-9.) Defendants also proposed a schedule by which Plaintiffs' expert would submit a supplemental report in accordance with Seventh Circuit's framework for the proceedings on remand, and "defendants [would] then serve responsive expert report(s)." (*Id.* at 16.)

In its September 8 Order, the Court summarized the parties' respective arguments about the proper scope of the proceedings on remand and unambiguously stated: "*The Court agrees with defendants*." (Dkt. No. 2042 at 1 (emphasis added).) The Court explained:

> The Seventh Circuit held that, in his testimony about the leakage model, Dr. Fischel did not adequately opine that "no firm-specific, nonfraud related information contributed to the decline in [Household's] stock price." *Glickenhaus & Co. v. Household International, Inc.*, 787 F.3d 408, 422 (7th Cir. 2015). *That flaw, the court clearly said, "warranted [a new trial] on the loss-causation issue*." *Id*. at 423. Thus, in the new trial, plaintiffs must prove that defendants' misrepresentations were "a substantial cause of the economic loss plaintiffs suffered." (See Jury Instructions at 32.)

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[2] The Westlaw cite for *Steadfast* is 2003 WL 22902604.

(*Id.* (emphasis added). Regarding damages, this Court further stated:

> Plaintiffs must also prove "the amount of per share damages, if any, to which plaintiffs are entitled." (*See id.* [*Glickenhaus*] at 34.) By holding that Dr. Fischel's leakage model testimony did not establish loss causation, the Seventh Circuit necessarily, if not explicitly, rejected the amount of damages per share that he calculated based on that testimony. Because the amount of per share damages the jury found in the first trial came directly from the table Fischel prepared based on his leakage model testimony, *Glickenhaus*, 787 F.3d at 417, those findings cannot stand.

(*Id.* at 2.) In its September 8 Order, furthermore, the Court did not restrict Defendants to using Dr. Bajaj as their expert at the new trial. (*Id.* at 6.)

Because Plaintiffs simply rehash arguments that this Court already has rejected, the Court should deny their motion to preclude Defendants from "substituting" new experts.[3]

II. Defendants Were Not Required To Move The Court and Demonstrate Manifest Injustice Before Designating New Experts.

Citing the Tenth Circuit's decision in *Cleveland*, Plaintiffs suggest that Defendants violated an established rule of procedure by "fail[ing] to make a timely motion to designate the[ir] new expert witnesses" and "fail[ing] to demonstrate any manifest injustice" if they are not allowed to designate new expert witnesses. (Pls.' Mot. at 2.) There is no merit to this suggestion.

First of all, Defendants timely served the reports of their experts in accordance with the schedule set forth in this Court's September 8 Order. (Dkt. No. 2042 at 6.) And as discussed

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[3] Despite the Court's explicit rejection of Plaintiffs' argument about the "limited" scope of the remand, Plaintiffs advanced this same argument in subsequently opposing Defendant Household's motion to recover its costs of posting the supersedeas appeal bond. In opposition to Household's motion, Plaintiffs argued that the Seventh Circuit reversed on loss causation on the "narrow issue" of "the specificity of plaintiffs' expert's opinion with respect to price declines caused by company-specific non-fraud factors." (Dkt. No. 2050 at 1.) Once again, the Court *rejected* this argument. (Dkt. No. 2061 at 2-3 ("Plaintiffs . . . contend that such an award is inappropriate because defendant did not achieve total victory on appeal. The Court disagrees. Though the Seventh Circuit rejected many of defendant's appellate arguments, it ultimately agreed that the judgment had to be entirely reversed.").) Plaintiffs' efforts to recycle the same argument for a third time should fare no better than their first two attempts that the Court rejected.

above, in issuing that Order, the Court refused to accept Plaintiffs' argument that Defendants should be restricted to using their former loss causation expert at the new trial.

Cleveland, furthermore, did not establish a rule of procedure that requires a party who wishes to use a new expert on retrial to move the court and demonstrate that the party would suffer "manifest injustice" if not allowed to do so. To the extent Plaintiffs contend otherwise, their arguments mischaracterize the Tenth Circuit's holding in *Cleveland.*

In *Cleveland*, the jury in the first trial returned a verdict in favor of the plaintiff. 985 F.2d at 1440. The Tenth Circuit reversed because "the special verdict form improperly restricted jurors from allocating fault to all potentially responsible parties." *Id.* On remand, the defendant sought to produce new witnesses (all but one of whom was an expert) and new exhibits. *Id.* at 1449. The trial judge ruled that only the witnesses and exhibits presented in the first trial could be introduced in the second trial. *Id.* at 1440. Because of the importance of this issue, however, the trial judge certified this ruling for interlocutory appeal, and the Tenth Circuit accepted the appeal. *Id.*

The Tenth Circuit began its analysis by noting that the district court's "broad discretion" to control and manage trials "extends on remand to all areas not covered by the higher court's mandate." *Id.* at 1449 (citing *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939)). The Tenth Circuit continued: "Notwithstanding the recognition of the trial court's broad discretionary authority over such issues, its rulings nevertheless must be balanced with constitutional fairness so as not to prejudice the basic rights of the parties." *Id.* Although the Tenth Circuit acknowledged that the trial court was most familiar with the proceedings, the Tenth Circuit stated: "We do not feel, however, that the trial court's ruling should be inflexible." *Id.* at 1450. The Tenth Circuit further explained:

> Clearly, if the trial court perceives in limiting evidentiary proof in a new trial, a manifest injustice, to one side or the other, the court must retain broad latitude and may with proper notice allow additional witnesses and relevant proof. In this regard, if 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 new evidence would create a manifest injustice.

Id. The Tenth Circuit added: "Technical rulings should never preclude new and material proofs; common sense should control." *Id.* In light of these principles, the Tenth Circuit *declined to affirm* the trial court's decision to exclude the defendant's new witnesses and exhibits, and instead remanded for reconsideration by the trial court of its order, "with the understanding that parties may move for the admission of new evidence and use of new witnesses upon a showing of manifest injustice in the denial of their use." *Id.*.[4]

Thus, rather than establishing a rule of procedure for the admission of new expert witnesses, as Plaintiffs suggest, the Tenth Circuit's decision in *Cleveland* simply supports the well-settled principle that a district court should exercise its broad discretion to manage trials in a manner that does not "prejudice the basic rights of the parties," *id.* at 1449, and, therefore, should not exclude relevant evidence, including expert testimony, where doing so would result in manifest injustice. *Id.* at 1450; *accord Steadfast*, 2003 WL 22902604, at *2 (citing *Cleveland*).[5]

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[4] It is unclear from the *Cleveland* opinion whether the defendants' motion to designate new expert witnesses was made after the entry of the pretrial order. As noted in one of the cases addressing *Cleveland* that Plaintiffs cite in their motion, Federal Rule of Civil Procedure 16(e) provides that the pretrial order "'shall be modified only to prevent manifest injustice.'" *Little v. City of Richmond*, No. 12-cv-02067-JSC, 2015 WL 798544, at *1 (N.D. Cal. Feb. 23, 2015) (citation omitted). The pretrial order with respect to the retrial in this case has not yet been issued.

[5] In *Steadfast*, the trial *court* granted the counter-plaintiff's motion for a new trial after concluding that the court had erred in excluding the testimony of the counter-plaintiff's expert witnesses at the first trial. 2003 WL 22902604, at *1. The counter-defendant (which had not designated any experts to respond to the counter-plaintiff's experts at the first trial) then moved to designate new experts to respond to the counter-plaintiff's experts in the second trial. *Id.* In ruling on the counter-defendants' *(cont'd)*

III. It Would Be Manifestly Unjust To Preclude Defendants from Designating New Experts To Respond to Fischel's New Testimony.

Although, for the reasons set forth above, Defendants do not concede that they have any burden to establish "manifest injustice" to support admission of the testimony of their new experts, it is plain that, *under the circumstances presented here*, it would be manifestly unjust to preclude Defendants from designating new experts.

In accordance with the Seventh Circuit's directive that Fischel provide nonconclusory testimony to support his opinion that "no firm-specific, nonfraud related information contributed to the decline in [Household's] stock price." *Glickenhaus*, 787 F.3d at 422, Fischel served a Second Supplemental Report on September 22, 2015 (Dkt. No. 2060-1) and a Second Rebuttal Report on November 23, 2015. (Dkt. No. 2067-1.) Defendants' new experts were retained to respond to Fischel's *new* testimony, as well as to address his earlier testimony and reports (which Fischel incorporated by reference in his reports on remand). As discussed above, *see* n.1, *supra*, each of Defendants' experts will testify about distinct issues that demonstrate the multiple defects in Plaintiffs' loss causation models (and in particular the fatally flawed leakage model)—defects that have been made patent by the new reports Fischel has filed on remand.

The situation here, therefore, is far different from that in *Cleveland*. That case was reversed because of a defect in the verdict form. 985 F.2d at 1440. The trial court reasoned that no new testimony or other evidence was necessary on remand to address this issue. (As discussed above, the Tenth Circuit remanded with instructions that the trial judge reconsider this ruling.)

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> motion, Judge Lefkow acknowledged *Cleveland*'s admonition that a court must exercise its broad discretion to manage trials in a manner that will ensure "constitutional fairness." *Id.* at *2. Judge Lefkow concluded, however, that *under the circumstances presented in that case*, it would not be unfair to preclude the counter-defendant from designating new experts.

Here, by contrast, the Seventh Circuit specifically directed Fischel to present new evidence to demonstrate the reliability of his leakage model. Defendants should be afforded a full and fair opportunity to respond to this new evidence using experts of their choice.[6]

IV. Contrary to Plaintiffs' Assertion, the Reports of Defendants' New Experts Do Not Contradict the Testimony of Dr. Bajaj or the Testimony of Messrs. Aldinger and Schoenholz.

Because Plaintiffs are unable to demonstrate any valid reason why the Court should not allow Defendants to designate new experts, Plaintiffs resort to asserting that the reports of Defendants' new experts *contradict* the testimony of Dr. Bajaj and Messrs. Aldinger and Schoenholz. (Pls.' Mot. at 4-5 & n.6.) This assertion is based on a wholesale mischaracterization of Dr. Bajaj's testimony and the testimony of Messrs. Aldinger and Schoenholz.

Plaintiffs first assert that Dr. Bajaj testified that there were "hundreds of dates on which disclosures related to the fraud occurred." (*Id.* at 4.) In fact, Dr. Bajaj did not testify that *any* disclosures were "fraud-related." Rather, as is evident from Plaintiffs' motion, Dr. Bajaj demonstrated that the disclosures that *Fischel* contended were fraud-related were similar to many other disclosures that Fischel did not contend were fraud-related, and that the information that Fischel contended was fraud-related was not hidden from investors, but rather was well-known to market participants. (*Id.*)

Equally baseless is Plaintiffs' assertion that Professors Ferrell and James "criticize" Dr. Bajaj's use of the S&P 500 Index and S&P Financial Index in his regression analysis. (*Id.* at 5.) As Plaintiffs themselves acknowledge, for purposes of his analysis, Dr. Bajaj used the same

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[6] Plaintiffs have failed to demonstrate that they will be prejudiced by Defendants' retention of new experts. Plaintiffs' counsel and counsel for Defendants already have scheduled the depositions of Professors Ferrell, James, and Cornell for January 2016 and the trial is not scheduled to begin until next June.

indices as Fischel, but explained that using an additional index that more accurately reflected price movements in the subprime-lending sector in which Household operated yielded more reliable results. (*Id.*) Professors Ferrell and James *agree* with Dr. Bajaj. (Ferrell Report (Dkt. No. 2060-3) ¶¶ 41-43; James Report (Dkt. No. 2060-4) ¶¶ 21-23.) Professor Ferrell's selection of an alternative sector index that he believes more accurately reflects price movements in the subprime sector than the one used by Dr. Bajaj in no way "contradicts" Dr. Bajaj's testimony. (Ferrell Report (Dkt. No. 2060-3, ¶¶ 41-43; James Report (Dkt. No. 2060-4, ¶¶ 21-23.)

Plaintiffs also assert that Professors Ferrell's and James's criticism of Fischel for failing to take into account the effect of new guidelines for banks issued by the Federal Financial Institutions Examination Council ("FFIEC") ignores the testimony of Messrs. Aldinger and Schoenholz that Household was not a bank and was not subject to the FFIEC rules. (Pls.' Mot. at 5 n.6.) Once again, Plaintiffs' representation is inaccurate. Mr. Schoenholz explained at trial that the FFIEC rules "applied to our credit card bank, but not to the other parts of the company." (Trial Tr. at 2172:14-15.) Mr. Aldinger testified that the FFIEC rules did not apply to a different Household unit—the consumer lending unit. (Trial Tr. (Dkt. No. 1922-1) at 3242:21-22.)

In the portion of Professor James's report that Plaintiffs cite, Professor James demonstrates that, during the period at issue, FFIEC had proposed tightening the rules as they related to subprime credit card companies. (James Report (Dkt. No. 2060-4) ¶¶ 45-47, 55.) At trial, Mr. Schoenholz was asked about the effect these more stringent rules would have if applied to Household and explained: "And the concern was if you applied these standards which were meant to apply to a bank's customer base and you applied them to a consumer finance customer base, you would actually increase the amounts of ultimate credit losses within the finance company." (Trial Tr. (Dkt. No. 1921-1) at 2173:5-9.) Mr. Schoenholz further explained that the

proposed rules would turn Household's business model "upside down": "I mean the reason you had a consumer finance company customer was that they didn't normally qualify to go to a bank. So it would make no sense to take that customer and now say, well, now I'm going to treat you like a bank customer." (*Id.* at 12-16.)

Thus, Plaintiffs' assertion that Professor Ferrell's and James's reports contradict the testimony of Dr. Bajaj and Messrs. Aldinger and Schoenholz is wholly without merit and provides no reason for this Court to preclude Defendants from using Professor Ferrell and James as testifying experts at the new trial.[7]

[7] There also is no reason to preclude Professor Cornell from testifying at the new trial. As this Court made clear in its September 8 Order, Defendants may raise any flaws in Fischel's leakage model "that were not raised before and rejected by Judge Guzmán." (Dkt. No. 2042 at 6.) Although Defendants submitted a declaration by Professor Cornell in support of their *Daubert* motion prior to the first trial, there is no evidence that Judge Guzmán considered Professor Cornell's declaration—much less rejected it. Plaintiffs urged Judge Guzmán not to consider Professor Cornell's affidavit, because Defendants had not designated Professor Cornell as an expert within the time frame Judge Guzmán had specified (Dkt. No. 1416 at 9 n.9.) Judge Guzmán's minute order denying Defendants' *Daubert* makes no mention of Professor Cornell's affidavit. (Dkt. No. 1527.) Regardless, the Seventh Circuit reversed and remanded based upon the impropriety of allowing Professor Fischel's leakage model to be admitted, given the conclusory nature of his testimony. Professor Cornell addresses this very issue— Fischel's conclusory and improper application of a leakage model in this context and the wholly unreliable (and grossly inflated) measure of inflation that its misapplication yields. Professor Cornell's current report was timely filed in accordance with the schedule set forth in this Court's September 8 Order. (Dkt. No. 2042 at 6.) As set forth in Defendants' *Daubert* filings, the leakage model should be excluded because of Fischel's failure to meet the admissibility requirements set forth by the Seventh Circuit; the plain unreliability of, and absence of support for, the model's application to the 228-day period at issue; and the improper inversion of the burden of proof that Fischel advocates in his Remand Report. In the event the leakage model is not excluded, as it should be in accordance with *Daubert*, certainly the jury should have the opportunity to hear from the author of the article upon which Fischel purported to base his leakage model that Fischel misapplied the concepts in the article and that the leakage model Fischel presents is inconsistent with the article and accepted economic principles.

CONCLUSION

For the reasons set forth herein, the Court should deny Plaintiffs' motion to preclude defendants from substituting new experts.

Dated: December 18, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

R. Ryan Stoll, an attorney, hereby certifies that on December 18, 2015, he caused true and correct copies of the foregoing Defendants' Response to Plaintiffs' Motion to Preclude Defendants from Substituting New Experts to be served via the Court's ECF filing system on the following counsel of record in this action:

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