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 *IN LIMINE* TO PERMIT PLAINTIFFS TO OFFER CERTAIN PRIOR TRIAL TESTIMONY OF DR. MUKESH BAJAJ

PLAINTIFFS' MOTION *IN LIMINE* NO. 9

I. INTRODUCTION

Plaintiffs respectfully submit this motion *in limine* to permit plaintiffs to offer the prior trial testimony of defendants' former expert on loss causation and damages, Dr. Mukesh Bajaj ("Bajaj"), in plaintiffs' case-in-chief and in cross-examination of defendants' experts.

Bajaj's testimony at the first trial is relevant since it is at odds with defendants' three new loss causation/damages experts. For example, Bajaj admitted there was leakage of fraud-related information related to the Washington DFI report in 2002, a fact disputed by defendants' new experts. Bajaj also created a six-company peer group to Household, that is different than the peer groups created by defendants' experts' Ferrell and James.

As set forth herein, Bajaj's testimony is admissible both in plaintiffs' case-in-chief and for cross examination of defendants' three new loss causation/damages experts. Bajaj's testimony is relevant under Fed. R. Evid. 401, constitutes a party admission under Fed. R. Evid. 801(d)(2), and is admissible under the "former testimony" exception provided by Fed. R. Evid. 804(b)(1) since he is not available to be called as a witness at trial.[1]

Defendants made a tactical decision to replace their expert on loss causation and damages from the first trial. Despite this move, defendants must live with the testimony and opinions of Bajaj. Plaintiffs should be allowed to introduce his testimony at trial.

II. ARGUMENT

A. Plaintiffs Should Be Permitted to Call Bajaj in Their Case-In-Chief

Courts have repeatedly held that once an expert has given testimony at deposition, the opinions offered do not belong to anyone and are available for all parties to use at trial. *See SEC v. Koenig*, 557 F.3d 736, 744 (7th Cir. 2009) (a witness identified as a testimonial expert is available to either side); *NetAirus Techs., LLC v. Apple, Inc.*, No. LA CV10-03257 JAK (Ex), 2013 WL 9570686, at *3 (C.D. Cal. Nov. 11, 2013) ("Simply because the defendant had retained an expert does not 'somehow imbue defendant with absolute, exclusive dominion to control the circumstances

[1] The portions of Bajaj's testimony plaintiffs seek to admit are attached as Ex. 9 to the Declaration of Luke O. Brooks in Support of Plaintiffs' Motions *in Limine* ("Brooks Decl."), filed herewith.

and manner through which his testimony reaches the jury'") (citation omitted); *Kerns v. Pro-Foam of S. Ala.*, 572 F. Supp. 2d 1303 (S.D. Ala. 2007) (same). Thus, even where the party originally offering an expert's testimony no longer intends to call that expert as a trial witness, his adversary may call the witness in his case-in-chief. *See Bone Care Int'l, et al. v. Pentech Pharms., et al.*, No. 08-cv-1083, 2010 WL 3894444, at *9-*10 (N.D. Ill. Sept. 30, 2010) (permitting plaintiffs to call defense testimonial experts in their case-in-chief that the defendants did not call).

Defendants contend that, because they do not intend to proffer Bajaj as an expert witness at the second trial, his testimony is irrelevant. First, the relevance of Bajaj's testimony is not dependent on whether defendants intend to call him to testify in the second trial. *See* Fed. R. Evid. 401 (defining "relevant evidence" as evidence having "any tendency to make a fact more or less probable than it would be without the evidence"). Second, Bajaj's testimony could hardly be more relevant to the issues that will be addressed at the second trial. Bajaj served as defendants' designated testifying expert through years of litigation, purportedly spending 10,000 hours analyzing the economic evidence in this case. Bajaj submitted a 92-page expert report, a 24-page sur-rebuttal report in response to the arguments set forth in Professor Daniel R. Fischel's ("Fischel") original report, sat for a deposition and testified at trial – all on the topics of loss causation and damages. The fact that his testimony differs from the opinions offered by defendants' new loss causation and damages experts in material respects underscores the value of his testimony to the jury in evaluating the opinion evidence presented by defendants' experts.[2]

B. Bajaj's Trial Testimony Constitutes Non-Hearsay Under Federal Rule of Evidence 801(d)(2)

Further, Bajaj's prior testimony is admissible under Rule 801(d)(2), which provides an exception to the rule prohibiting hearsay where, as here, the out-of-court statements being offered are an opposing party's statements. *See* Fed. R. Evid. 801(d)(2). Statements made outside of the court room constitute party admissions, *inter alia*, if they are statements made by a person authorized

[2] *See United States v. Schaudt*, No. 07 C 0895, 2009 WL 1218605, at *3 (N.D. Ill. Apr. 30, 2009) (emphasizing that juries are instructed to consider all of the evidence presented, regardless of which party presented it, and that jurors "are not advised to only consider plaintiff's testimony in a manner in which it helps plaintiff's case, or vice versa").

by the party to make a statement concerning the subject. Fed. R. Evid. 801(d)(2)(C). Trial testimony by a party's expert witness constitutes a party admission, as experts are authorized by the party engaging them to make trial statements, and by the time the litigation has reached the trial stage, the expert is representing the position of the party retaining them. *See In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1016 (9th Cir. 2008) (expert testimony offered by party in first trial was admissible at second trial as a party admission); *Glendale Fed. Bank v. United States*, 39 Fed. Cl. 422, 424-25 (Fed. Cl. 1997) ("[A]t the beginning of trial we may hold the parties to a final understanding of their case and hence an authorization of their expert witnesses who have not been withdrawn"); *United States v. Ala. Power Co.*, 773 F. Supp. 2d 1250, 1258 n.10 (N.D. Ala. 2011) (prior trial testimony of plaintiffs' expert witness in another Clean Air Act case with same plaintiff constituted party admission and was admissible); *Bone Care*, 2010 WL 3894444, at *10 (even deposition testimony of defense experts previously designated as testifying experts likely admissible as party admission).

Here, plaintiffs seek to present certain portions of Bajaj's testimony to the first jury that he was specifically authorized to give by the defendants. *See* Brooks Decl., Ex. 9. For example, the testimony proffered addresses whether a company's stock price could become inflated because of something the company failed to disclose (*i.e.*, a fraudulent omission);[3] his selection of an index of Household's peers;[4] how inflation can enter and leave a stock price,[5] and that there was evidence of leakage.[6] Each of these topics is squarely within the scope of Bajaj's assignment from defendants, and defendants made a fully-informed decision to call Bajaj to testify. After all, by the time Bajaj testified at trial, he had submitted two reports and been thoroughly deposed on his opinions. Defendants were thus well aware of and had adopted the opinions Bajaj presented to the jury at the first trial. For this reason, Bajaj's testimony from the first trial is admissible as a Rule 801(d)(2)(C)

[3] Trial Tr. at 4090:13-16, 4091:23-4092:2, attached as Ex. 4 to the Brooks Decl.

[4] Trial Tr. at 4112:21-4113:18.

[5] Trial Tr. at 4244:2-6, 4245:4-7.

[6] Trial Tr. at 4267:19-4268:13.

party admission at the second. *See Hanford*, 534 F.3d at 1016 (party cannot exclude testimony from a second trial that it had proffered in the first, as the expert's testimony constituted a party admission).

C. Bajaj's Prior Testimony Is Admissible Under Federal Rule of Evidence 804(b)(1)

Alternatively, Bajaj's prior trial testimony is also admissible under the "former testimony" exception provided by Rule 804(b)(1). Rule 804(b)(1) permits a party to offer prior trial testimony of an unavailable witness, so long as that testimony is being offered against a party who originally had an opportunity and similar motive to develop it by direct, cross-, or redirect examination. Fed. R. Evid. 804(b)(1). A potential witness is considered unavailable for purposes of Rule 804(b)(1) if he is absent from the trial or hearing and the party seeking to offer the witness' testimony has not been able, by process or other reasonable means, to procure the proposed witness' attendance. Fed. R. Evid. 804(a)(5).

The present circumstances satisfy each of these requirements. As an initial matter, plaintiffs are unable to compel Bajaj to testify live at trial. Bajaj lives outside the Court's 100-mile subpoena power, and divides his time between New York and California. *See* Brooks Decl., Ex. 10. *See also* Fed. R. Civ. P. 45(c)(1). Further, defense counsel have refused plaintiffs' request that they accept service of process on Bajaj's behalf, and have agreed that he is unavailable. *See* Brooks Decl., Ex. 11. Further, defendants unquestionably had an opportunity to develop Bajaj's testimony in the first trial. Indeed, Bajaj was a key witness in their case-in-chief and defendants questioned him for the better part of a day. *See* Trial Tr. at 4077:1-4242:1. With each element of Rule 804(b)(1) satisfied, Bajaj's trial testimony should be admitted.

III. CONCLUSION

For the reasons stated above, plaintiffs respectfully request an order permitting them to present certain relevant trial testimony from defendants' former loss causation and damages expert, Dr. Mukesh Bajaj, in plaintiffs' case-in-chief and to use for cross-examination of defendants' experts.

DATED: April 22, 2016

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
MICHAEL J. DOWD (135628)
SPENCER A. BURKHOLZ (147029)
DANIEL S. DROSMAN (200643)
LUKE O. BROOKS (90785469)
LAWRENCE A. ABEL (129596)
HILLARY B. STAKEM (286152)

s/ Luke O. Brooks
LUKE O. BROOKS

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

ROBBINS GELLER RUDMAN
& DOWD LLP
MAUREEN E. MUELLER
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: 561/750-3000
561/750-3364 (fax)

Lead Counsel for Plaintiffs

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 SERVICE

I hereby certify that on April 22, 2016, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses for counsel of record denoted on the attached Service List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 22, 2016.

s/ Luke O. Brooks

LUKE O. BROOKS

ROBBINS GELLER RUDMAN
& DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101-8498
Telephone: 619/231-1058
619/231-7423 (fax)

E-mail: LukeB@rgrdlaw.com

Jaffe v. Household Int'l, Inc., No. 02-5893 (N.D. Ill.)
Service List

Counsel	E-mail address
Stewart Theodore Kusper Giovanni Antonio Raimondi THE KUSPER LAW GROUP, LTD. 20 North Clark Street, Suite 3000 Chicago, IL 60602 (312) 204-7938 Tim S. Leonard JACKSON WALKER L.L.P. 1401 McKinney Street, Ste. 1900 Houston, TX 77010 (713)752-4439	Stewart.Kusper@Kusperlaw.com Giovanni.Raimondi@Kusperlaw.com tleonard@jw.com
Counsel for Defendant David A. Schoenholz	
Dawn Marie Canty Gil M. Soffer KATTEN MUCHIN ROSENMAN LLP 525 West Monroe Street Chicago, Illinois 60661 (312)902-5253	dawn.canty@kattenlaw.com gil.soffer@kattenlaw.com
Counsel for Defendant William F. Aldinger	
David S. Rosenbloom C. Maeve Kendall McDERMOTT WILL & EMERY, LLP 227 West Monroe Street Chicago, IL 60606 (312) 984-2175	drosenbloom@mwe.com makendall@mwe.com
Counsel for Defendant Gary Gilmer	
R. Ryan Stoll Mark E. Rakoczy Andrew J. Fuchs Donna L. McDevitt Patrick Fitzgerald SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP 155 North Wacker Drive Chicago, IL 60606 (312)407-0700	rstoll@skadden.com mrakoczy@skadden.com Andrew.Fuchs@skadden.com Donna.McDevitt@skadden.com Patrick.Fitzgerald@skadden.com pclement@bancroftpllc.com zhudson@bancroftpllc.com TKavaler@cahill.com Jhall@cahill.com dbutswinkas@wc.com sfarina@wc.com

Counsel	E-mail address
Paul D. Clement D. Zachary Hudson BANCROFT PLLC 1919 M Street NW, Ste. 470 Washington, DC 20036 (202)234-0090 Thomas J. Kavaler Jason M. Hall CAHILL GORDON & REINDEL LLP 80 Pine Street New York, NY 10005 (212)701-3000 Dane H. Butswinkas Steven M. Farina Leslie C. Mahaffey Amanda M. MacDonald WILLIAMS & CONNOLLY LLP 725 Twelfth Street NW Washington DC 20005 202-434-5000 Luke DeGrand Tracey L. Wolfe DEGRAND & WOLFE, P.C. 20 South Clark Street Suite 2620 Chicago, Illinois 60603 (312) 236-9200 (312) 236-9201 (fax)	lmahaffey@wc.com amacdonald@wc.com twolfe@degrandwolfe.com ldegrand@degrandwolfe.com
Counsel for Defendant Household International Inc.	

Counsel	E-mail address
Michael J. Dowd Spencer A. Burkholz Daniel S. Drosman Luke O. Brooks Hillary B. Stakem ROBBINS GELLER RUDMAN & DOWD LLP 655 West Broadway, Suite 1900 San Diego, CA 92101 (619)231-1058 619/231-7423 (fax) Jason C. Davis ROBBINS GELLER RUDMAN & DOWD LLP Post Montgomery Center One Montgomery Street, Suite 1800 San Francisco, CA 94104 (415)288-4545 (415)288-4534 (fax) Maureen E. Mueller ROBBINS GELLER RUDMAN & DOWD LLP 120 East Palmetto Park Road, Suite 500 Boca Raton, FL 33432 (561)750-3000 (561)750-3364 (fax)	miked@rgrdlaw.com spenceb@rgrdlaw.com dand@rgrdlaw.com lukeb@rgrdlaw.com hstakem@rgrdlaw.com jdavis@rgrdlaw.com mmueller@rgrdlaw.com
Lead Counsel for Plaintiffs	
Marvin A. Miller Lori A. Fanning MILLER LAW LLC 115 S. LaSalle Street, Suite 2910 Chicago, IL 60603 (312)332-3400 (312)676-2676 (fax)	Mmiller@millerlawllc.com Lfanning@millerlawllc.com
Liaison Counsel for Plaintiffs	