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.	)	

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION *IN LIMINE* NO. 3

Plaintiffs contend that this Court should adopt the evidentiary rulings from the 2009 trial (except those rulings with which they disagree) because the "law of the case doctrine" applies. But Plaintiffs place far more weight on that doctrine than it can bear. The case at retrial is much different, and far narrower, than at the first trial. Falsity, materiality, reliance, and scienter—issues central to the first trial—were all decided at that time. Only loss causation and damages are in dispute now. Yet Plaintiffs would like the retrial to proceed as if nothing had changed. Because the new trial is on a narrow subset of the issues from the 2009 trial, and the law of the case doctrine has only limited applicability in the context of evidentiary rulings, the doctrine does not apply here. And even if the doctrine did apply, there are ample reasons why it should not bind the Court's decisions on evidentiary rulings in the new trial. In any case, Plaintiffs are incorrect that much of the evidence they seek to introduce is admissible in the new trial, as Defendants discuss in their Motions *in Limine*. However, in the interests of streamlining this dispute, Defendants agree several of the prior rulings should apply on their own merits (as opposed to via the law of the case doctrine) to the upcoming trial.

A. Law of the Case Doctrine

Plaintiffs rest their argument on only one legal basis: the law of the case doctrine. Dkt. 2135. According to Plaintiffs' reasoning, if the judge in the first trial ruled on the admissibility of evidence, those rulings must govern the admissibility of the same evidence in a later trial, even if the new trial has a different and narrower scope. Plaintiffs are incorrect. "[T]he general rule [is] that upon a reversal and remand for further consistent proceedings the case goes back to the trial court and there stands for determination of the issues presented ***as though they had not been determined before***, pursuant, of course, to the principles of law enunciated in the appellate court's opinion which must be taken as the law of the case at the new trial." *Graefenhain v.*

Pabst Brewing Co., 870 F.2d 1198, 1207 (7th Cir. 1989) (quoting *United States v. Iriarte*, 166 F.2d 800, 803 (1st Cir. 1948)) (emphasis added).

At the threshold, the law of the case doctrine "is no more than a presumption, one whose strength varies with the circumstances; it is not a straitjacket." *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1227 (7th Cir. 1995). "[A]nd ***when the ruling concerns the admissibility of evidence the presumption is either nonexistent, or weak, since issues of admissibility are often highly contextual and evidence at a second trial will often deviate significantly from that at the first***." *United States v. Boyd*, 208 F.3d 638, 642–43 (7th Cir. 2000) *judgment reinstated by United States v. Green*, 6 F. App'x 377 (7th Cir. 2001) (internal citations omitted and emphasis added); *see also Menzer v. United States*, 200 F.3d 1000, 1004–05 (7th Cir. 2000) ("The law of the case doctrine does not bar a trial court from revisiting its own evidentiary rulings."); *United States v. Williams*, 205 F.3d 23, 34 (2d Cir. 2000) (expressing doubt that law of the case doctrine applies to evidentiary rulings and finding, even if it does, it did not preclude trial court from reconsidering rulings from the first trial); *United States v. Todd*, 920 F.2d 399, 403 (2d Cir. 1990) (holding because "a trial judge has broad discretion on evidentiary rulings," trial judge in second trial has "broad discretion" on "evidentiary ruling[s] made during the course of trial"); *United States v. Akers*, 702 F.2d 1145, 1147–48 (D.C. Cir. 1983) ("[T]he fact that the photographs were admitted in the first trial does not compel either admission in the new trial . . . especially since the judge's exercise of his broad discretion on an evidentiary ruling (which ultimately pertains to relevancy) must turn upon the evidence as developed in the particular trial."). The law of the case doctrine simply cannot sustain Plaintiffs' arguments concerning the evidentiary rulings rendered by the Court prior to and during the first trial, including in the pretrial order and motions *in limine*.

For the same reasons, Plaintiffs' assertion is incorrect that "opening the door" to evidence about civil and regulatory settlements during the last trial enables them to introduce the same evidence in the new trial. Dkt. 2135 at 4–5. The Court originally precluded that evidence, even when the trial involved all of the elements of the claim asserted. Dkt. 1516. If anything, the law of the case doctrine should apply to the Court's order precluding the evidence because, as Plaintiffs concede, the evidence was admitted only when Defendants opened the door during the first trial. Furthermore, the Court's actions in the first trial bolster the proposition that this Court should not be bound by the initial rulings on admissibility because the requirements of the case may change at a moment's notice. Regardless, Defendants have no intention of inquiring into the civil and regulatory settlements in the new trial, other than with respect to the public announcements regarding the Attorney General settlement, nor will they have the opportunity to do so if the Court properly declines to permit Plaintiffs to relitigate the liability issues in the new trial. Therefore, there will be nothing for the Plaintiffs "to rebut" with this evidence. *Id.* at 5 n.6. And even were Defendants to somehow "open the door," the Court can always permit Plaintiffs to introduce the evidence. In other words, the law of the case doctrine simply does not prohibit this Court from determining the admissibility of evidence at the new trial.[1]

The Seventh Circuit's mandate, which prescribed a much narrower scope for the new trial in this case, also undermines Plaintiffs' argument. This Court may adjudicate only within the scope of the mandate, which this Court found restricts the new trial to two issues: "(1) whether plaintiffs have 'proven loss causation?'; and (2) 'If so, what is the amount of inflation caused by each of the 17 misrepresentations at issue?'" Dkt. 2042. The parties agree that they cannot

[1] The same reasoning also applies to Plaintiffs' argument that Defendants failed to include certain exhibits in the appendix to their motion *in limine* in the first trial, such as Plaintiffs' Exhibit 550. In any case, Defendants did include that exhibit in the appendix to their Motion *in Limine* To Exclude Evidence Not Relevant to Causation or Inflation. Dkt. 2145, Ex. A at 6.

deviate from that limited mandate in order to relitigate issues decided at the first trial, such as falsity, materiality, reliance, and scienter. *Donohoe v. Consolidated Operating & Production Corp.*, 30 F.3d 907, 910 (7th Cir. 1994) (holding law of the case doctrine "requires a district court to follow an appeals courts' mandate on remand"); *Kovacs v. United States*, 739 F.3d 1020, 1024 (7th Cir. 2014) ("A court to which a case has been remanded may address only the issue or issues remanded, issues arising for the first time on remand, and issues that were timely raised but which remain undecided."); *see also Sibbald v. United States*, 37 U.S. 488, 492 (1838) ("The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it . . . or intermeddle with it, further than to settle so much as has been remanded."); 5 Am. Jur. 2d Appellate Review § 736 ("Where a remand limits the issues for determination, the court on remand is precluded from considering other issues . . . . [and] the lower tribunal is only authorized to carry out the appellate court's mandate."); 5 C.J.S. Appeal and Error § 1167 ("In cases where the appeal is taken with respect to only a particular issue or issues, there can usually be no retrial after remand of issues previously tried and determined and not appealed from."). Plaintiffs' argument should be rejected to the extent they deploy the law of the case doctrine to encourage this Court to exceed the Seventh Circuit's mandate.

Even if the Court finds that the law of the case doctrine applies with full force here, the doctrine contains an exception that applies in this case: the Court may revisit an earlier ruling if there are compelling reasons to do so. *Kathrein v. City of Evanston, Ill.*, 752 F.3d 680, 685 (7th Cir. 2014). The Seventh Circuit remanded for a new trial on loss causation and inflation. *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 423 (7th Cir. 2015). As a result, both

parties intend to adduce new evidence related to these issues. That is a sufficiently compelling reason not to apply the law of the case doctrine to the evidentiary rulings from the first trial.

Plaintiffs cite to a number of cases to support their argument, Dkt. 2135 at 6–7, but none of those cases address the context here, where an appellate court has remanded only a small subset of issues to the district court for retrial and the district court must determine how the tighter scope of the new trial affects the relevance and admissibility of certain evidence.[2] Even Plaintiffs' citations to district court opinions on motions *in limine* in a retrial miss the mark, in part because each of those cases involved a retrial of exactly the same scope as the trial before.[3] Plaintiffs also cite *Janopoulos v. Harvey K. Walner & Assocs.*, No. 93 C 5176, 1995 WL 107170 (N.D. Ill. Mar. 7, 1995), for the proposition that courts will not entertain amendments to pretrial orders except for good cause, but because there had been a mistrial in *Janopoulos*, the new trial was to be governed by the same pretrial order. The same is not true in this case. Dkt. 2151, [Proposed] Final Pretrial Order; *see also United States v. Birney*, 686 F.2d 102, 107 (2d Cir.

[2] *Best v. Shell Oil Co.*, 107 F.3d 544 (7th Cir. 1997) (trial reassigned to new judge after pre-trial proceedings); *Mendenhall v. Mueller Streamline Co.*, 419 F.3d 686 (7th Cir. 2005) (same); *Redfield v. Continental Cas. Corp.*, 818 F.2d 596 (7th Cir. 1987) (discussing doctrine in context of "when a state court action is removed to federal court"); *Gertz v. Robert Welch, Inc.*, 680 F.2d 527 (7th Cir. 1982) (holding "[t]he Court's mandate clearly includes retrial on all liability issues"); *Roboserve, Inc. v. Kato Kagaku Co.*, 121 F.3d 1027 (7th Cir. 1997) (holding after only one trial that "one-sentence requests" to district and appellate courts were insufficient to "trigger the law of the case").

[3] *Mays v. Springborn*, No. 01-cv-1254, 2014 WL 1420232 (C.D. Ill. Apr. 11, 2014) (implementing broad mandate "to conduct new trial" from appellate court in *Mays v. Springborn*, 719 F.3d 631, 635 (7th Cir. 2013)); *CERAbio, LLC v. Wright Med. Tech., Inc.*, No. 03-C-092-C, 2006 WL 641466 (W.D. Wis. Mar. 10, 2006) (noting court of appeals "remanded the case for retrial" because of incorrect evidentiary ruling); *Bright Harvest Sweet Potato Co. v. H.J. Heinz Co.*, No. 1:13-cv-00296-BLW, 2016 WL 552455 (D. Id. Feb. 10, 2016) (finding appellate court "grant[ed] a new trial" without condition); *Apple Inc. v. Samsung Elecs. Co.*, No. 5:11-cv-01846-LHK (N.D. Cal. Sept. 1, 2015) (finding that "[t]he instant retrial will be the parties' . . . second damages retrial"); *Watts v. UPS*, No. 1:03-cv-00589, 2013 WL 4776976 (S.D. Ohio Sept. 5, 2013) (implementing mandate to retry "Watts's ADA claim," which had already been retried on its own once, *Watts v. UPS*, 701 F.3d 188, 190 (7th Cir. 2012)).

1982) ("Thus in deciding whether to admit the proffered evidence the trial record to that point should be the decisive factor, not a pre-trial order of another judge.").

And Plaintiffs' reliance on *Watts v. Laurent*, 774 F.2d 168, 181 (7th Cir. 1985), to suggest that they are permitted to offer evidence related to elements not at issue in the new trial is misplaced. First, the court of appeals in *Watts* commanded the district court on remand to use a "strong presumption that evidence from the liability phase may be relevant in some way to damages." *Id.* The Seventh Circuit did not include such guidance on evidentiary admissibility in its opinion in this case. And second, the *Watts* court encouraged the use of stipulations and summaries to streamline the case. *Id.* Defendants are amenable to, and have proposed, such stipulations and an appropriate summary to be presented to the jury. *See* Defendants' Opposition to Plaintiffs' Motion *In Limine* No. 1, Ex. A.

B. Prior Evidentiary Rulings

Using the law of the case presumption, Plaintiffs seek to apply several rulings to the new trial. Defendants do not object to certain of these rulings, and would consent to the Court adopting them in the new trial on their own merits. These include: (1) Plaintiffs receive the same number of peremptory challenges as Defendants combined; (2) Plaintiffs may examine witnesses identified with Defendants with leading questions; and (3) percipient witnesses to whom Federal Rule of Evidence 615 applies will be excluded from the courtroom.[4]

Defendants request only minor modifications to three more of the prior rulings. First, Plaintiffs ask the Court to preclude Defendants from introducing live testimony from persons unavailable to them and introducing deposition testimony of persons in their control. None of

[4] To clarify, Defendants understand that "percipient witnesses" does not include witnesses testifying under Federal Rule of Evidence 702 as experts.

the witnesses in this case are under the control of Household because it no longer exists as an entity and none of the witnesses is employed by any affiliate of Household. Accordingly, this ruling (if adopted by the Court) would not apply to Household in the new trial.

Second, Plaintiffs seek to prevent counsel from "communicating with [a] witness about the witness' trial testimony after the witness [is] sworn in and before the witness' testimony [is] complete, and from discussing other witnesses' trial testimony with witnesses who ha[ve] yet to start or finish testifying." Dkt. 2135 at 2. Because Defendants will be calling rebuttal expert witnesses specifically to counter experts called by the Plaintiffs, defense experts must be able to discuss the testimony of Plaintiffs' experts with Defendants' rebuttal experts before they testify in order for Defendants' rebuttal experts to offer opinions on the stand that directly address the relevant issues. To prevent Defendants' experts from learning about what Plaintiffs' experts said to the jury would unnecessarily hamper Defendants' ability to mount a proper defense, as well as confuse the jury with needless testimony and pointlessly lengthen the trial. Plaintiffs, in their motion *in limine* in the first trial, explicitly requested the communications ban only for percipient witnesses. Dkt. 1336 at 9–10. Defendants therefore suggest a slight modification: counsel may not communicate with a witness about the witness' trial testimony during the witness' cross examination by the opposing counsel, and may not discuss other witness' trial testimony with percipient witnesses who have yet to start or finish testifying.

Third, Plaintiffs request the Court exclude "evidence of and reference to a former partner and the Lexecon/Milburg Weiss settlement" as irrelevant. Dkt. 2135 at 2. The evidence related to a "former partner" references the fact that "William Lerach, who initially served as plaintiffs' lead counsel, was convicted in 2007 of conspiring to obstruct justice by paying people to be named plaintiffs in shareholder derivative suits." Dkt. 1505. Defendants do not intend to offer

this evidence in the new trial. However, evidence related to the fact that the company owned by Professor Daniel Fischel—Plaintiffs' damages expert—reached a settlement with Plaintiffs' counsel would go to Professor Fischel's motivations and bias for testifying for Plaintiffs in this case. Because revealing Professor Fischel's potential bias would counter the inference that Professor Fischel chose to testify for Plaintiffs even though Defendants "tried to hire" him, Defendants would potentially seek to offer this evidence only in the event the Court denies their Motion *in Limine* to Exclude Evidence Concerning Expert Witnesses that is Unrelated to Their Opinions or Testimony. Dkt. 2149.

Plaintiffs also contend that the rulings regarding Defendants' "omnibus" motion *in limine* in the first trial should apply to the new trial. Dkt. 2135. Specifically, Plaintiffs identify rulings related to: (1) evidence of Household's Offer of Settlement and the SEC Consent Decree; (2) evidence of federal and state regulators' reports of examination and related documents; (3) evidence of complaints in other litigation and individual customer complaints; (4) testimony from Elaine Markell; (5) a video created by Dennis Hueman; (6) a deposition of Charles Cross from another case; (7) evidence related to Andrew Kahr; (8) evidence related to Wells Fargo's proposed merger with Household; and (9) Household's amendment of its 2001 Form 10-K. As discussed above, the law of the case doctrine does not support applying the rulings above to the new trial. And, as Defendants discuss in more detail in their Motion *in Limine* to Exclude Evidence Not Relevant to Causation or Inflation, almost all of the above items are either irrelevant to the loss causation and damages issues at issue in this trial, unfairly prejudicial, or inadmissible for another reason. Dkt. 2145. The Court should not permit Plaintiffs to apply rulings from the prior trial that were based on theories of relevance that are wholly incompatible with the more limited issues in the new trial.

C. SEC Consent Decree

Lastly, Plaintiffs argue that, although the ruling prior to the first trial unmistakably found that the Offer of Settlement and SEC Consent Decree and related documents were inadmissible (Dkt. 1516), they should be admissible now. Of course, that is contrary to their clear position that the law of the case doctrine governs all evidentiary matters in the new trial.[5]

Instead, Plaintiffs argue that the rationale for its exclusion—that it is a settlement document under Federal Rule of Evidence 408—is no longer applicable. Dkt. 2135 at 8–9. One struggles to understand how the SEC Consent Decree has suddenly transformed into something other than a settlement document in time for the Plaintiffs to use it during the new trial. Nevertheless, Plaintiffs point to the fact that the prior ruling found that the SEC Consent Decree was relevant only to show Household's liability, and then argue that "the policy concerns underlying Rule 408 are no longer at issue" because Defendants have been found to have made 17 misstatements. *Id.* Plaintiffs are wrong.

First, Plaintiffs all but admit that the SEC Consent Decree is irrelevant to the issues in dispute in the new trial. They concede that the prior ruling identified that the SEC Consent Decree would be used to show "Household's liability," but that the first trial already addressed this issue. *Id.* Additionally, the SEC Consent Decree occurred months after the class period in this action ended. Dkt. 2145 at 9–10. As such, admitting this document would make no fact at issue in the retrial more or less likely under Rules 401 and 402.

Second, Rule 408 prohibits using settlement documents "to prove or disprove validity," but also "the amount of a disputed claim." Given that this retrial involves only the issues of loss

[5] Plaintiffs also object to a large number of exhibits on Defendants' exhibit list that were introduced at the first trial. Their adherence to the law of the case doctrine apparently extends only to that evidence which is helpful for them.

causation and damages, the only alternative purpose the Plaintiffs could have for offering the SEC Consent Decree is to show causation or amount of damages. None of the exceptions in Rule 408 apply to this situation; there is no exception for "policy rationale" reasons. Rule 408 still governs the SEC Consent Decree as a settlement document and it should not be admissible.

Finally, Plaintiffs reveal their true motivation in seeking to admit the SEC Consent Decree when they note that it provides "a succinct, easy-to-understand explanation" of Household's practices and statements. Dkt. 2135 at 9. But that is not a sufficient reason to admit a document despite Rules 401, 402, or 408.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion *in Limine* No. 3 should be denied, and the Court should make evidentiary rulings for the new trial based on their relationship to the issues in dispute here.

Dated: May 6, 2016

Respectfully submitted,

/s/ R. Ryan Stoll
Patrick J. Fitzgerald
R. Ryan Stoll
Donna L. McDevitt
Andrew J. Fuchs
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
155 North Wacker Drive
Chicago, IL 60606
(312) 407-0700

Dane H. Butswinkas
Steven M. Farina

Amanda M. MacDonald
Leslie C. Mahaffey
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

Attorneys for Defendant
Household International, Inc.

Gil M. Soffer, Esq.
Dawn M. Canty, Esq.
KATTEN MUCHEN ROSENMAN LLP
525 West Monroe Street
Chicago, IL 60661

Attorneys for Defendant
William F. Aldinger

Tim S. Leonard, Esq.
JACKSON WALKER LLP
1401 McKinney Street
Suite 1900
Houston, TX 77010
Attorneys for Defendant
David A. Schoenholz

David S. Rosenbloom, Esq.
McDERMOTT WILL & EMERY, LLP
227 West Monroe Street
Chicago, IL 60606
(312) 984-7759
Attorneys for Defendant
Gary Gilmer

CERTIFICATE OF SERVICE

R. Ryan Stoll, an attorney, hereby certifies that on May 6, 2016, he caused true and correct copies of the foregoing Response to Plaintiffs' Motion *In Limine* No. 3 to be served via the Court's ECF filing system on the following counsel of record in this action:

Michael J. Dowd, Esq.
Daniel S. Drosman, Esq.
Spencer A. Burkholz, Esq.
ROBBINS GELLER RUDMAN & DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101

Marvin A. Miller, Esq.
Lori A. Fanning, Esq.
MILLER LAW LLC
115 South LaSalle Street, Suite 2910
Chicago, IL 60603

/s/ *R. Ryan Stoll*
R. Ryan Stoll