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.	)	

REPLY IN SUPPORT OF DEFENDANTS' MOTION *IN LIMINE* NO. 2
TO PRECLUDE REFERENCE TO PRIOR PROCEEDINGS

Defendants have moved to preclude reference to the prior proceedings in this case other than as reflected in stipulations or the Court's instructions and statement of the case to the jury. Plaintiffs' arguments to the contrary are unavailing and demonstrate the problems that will ensue at trial if the Court does not limit use of the prior proceedings in this matter.

A. Testimony or Other Evidence From or About Dr. Mukesh Bajaj, Defendants' Loss Causation Expert from the First Trial

Plaintiffs cannot overcome the threshold hurdle to admission of Dr. Bajaj's testimony because neither party has proposed to offer him as an expert in this trial and he has no "personal knowledge" to offer as a fact witness. Fed. R. Evid. 602. Plaintiffs argue that Dr. Bajaj's opinions do not "belong" exclusively to either party. Opp. 2. That is true enough, but the party who would present those opinions to the jury must proffer Dr. Bajaj as an expert at trial and his opinions as expert opinions on the relevant subject matter. Plaintiffs do not intend to do so. Nor do Plaintiffs dispute that Dr. Bajaj's testimony cannot be offered as testimony of a fact witness. As neither a fact nor expert witness in this trial, Dr. Bajaj's testimony cannot be admitted.

Plaintiffs do not cite a single case to the contrary. ***None*** of the cases on which they rely purports to approve of admitting a former expert's testimony as anything other than the expert testimony adopted and promoted by the offering party. Plaintiffs' only argument on this score misleadingly cites *S.E.C. v. Koenig*, 557 F.3d 736 (7th Cir. 2009). *See* Opp. 3 n.3. In that case, the SEC introduced expert deposition testimony from the defendant's expert at trial. The defendant argued that the SEC violated Civil Rule 26(a)(2)(A) because the SEC did not list the expert on its list of potential witnesses; the Seventh Circuit rejected that argument, holding that the purpose of the disclosure rule was satisfied and, in any event, the error was harmless. *Koenig*, 557 F.3d at 744. In so ruling, the Court noted that advance notice from the SEC, which would have enabled the defendant to withdraw his expert, would not have helped the defendant because "[a] witness identified as a testimonial expert is available to either side; such a person can't be transformed after the report has been disclosed, and a deposition conducted, to the status of a trial-preparation expert whose identity and views may be concealed." *Id.* That statement does not help Plaintiffs here. The fact that a disclosed expert cannot be transformed into a concealed trial-preparation expert in no way suggests that a former expert's testimony can be transformed into the testimony of a fact witness when the offering party refuses to offer the witness as an expert. Because Plaintiffs refuse to embrace Dr. Bajaj's opinions as their own expert testimony, his testimony is inadmissible.

For similar reasons, Dr. Bajaj's testimony is irrelevant in this partial retrial. Plaintiffs do not intend to offer Dr. Bajaj's opinions as evidence about loss causation but rather as evidence that Defendants are using different experts in the retrial than in the original trial. Plaintiffs contend that they would use his testimony "to demonstrate that defendants' underlying analysis of loss causation and damages has changed and is inconsistent with their prior analysis," thereby

"impeach[ing]" Defendants "by their prior inconsistent testimony." Opp. 4. Even if it were true that Dr. Bajaj's testimony were inconsistent with that offered by Defendants' new experts (it is not), use of a different witness's testimony is not proper impeachment and does not make any fact of consequence more or less probable. It is well settled that an expert's testimony from a prior trial is not a statement by a party-opponent for purposes of a second trial because an expert typically is not a party's agent authorized to make admissions for the party. "Rule 801(d)(2)(C) requires that the declarant be an agent of the party-opponent against whom the admission is offered, and this precludes the admission of the prior testimony of an expert witness where, as normally will be the case, the expert has not agreed to be subject to the client's control in giving his or her testimony." *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 164 (3d Cir. 1995). An expert is hired to "giv[e] his or her expert opinion regarding the matter before the court," not to speak on behalf of, and make admissions for, the party-opponent. *Id.*; *see also SanDisk Corp. v. Kingston Tech. Co.*, 863 F. Supp. 2d 815, 818-19 (W.D. Wis. 2012) (rejecting argument that expert deposition testimony from prior cases between the same parties was an admission of a party-opponent and excluding the testimony as hearsay). Plaintiffs are simply wrong when they contend that Dr. Bajaj's prior testimony could be used to impeach Defendants' new experts "much as any other party can be impeached by their prior testimony." Opp. 4.

Dr. Bajaj's testimony is also irrelevant and inadmissible under Rule 403 for additional reasons explained more fully in Defendants' Response to Plaintiffs' Motion *In Limine* No. 9, Dkt. 2168, which addresses that issue exclusively and is incorporated by reference here. Put succinctly, it would unfairly prejudice Defendants, confuse the jury, and waste time to turn this partial retrial into a debate about the differences between the evidence offered in the first trial and the evidence offered in the partial retrial.

B. The First Jury's Acceptance of the Leakage Model and The Amount of Partial Judgment and Pretrial Interest Awarded After the First Trial

Plaintiffs have indicated that they "do not oppose defendants' motion on this issue as a general matter." Opp. 7. First, Plaintiffs have indicated that they do not intend to refer to the fact that the first jury found evidence of leakage or adopted Professor Fischel's leakage model. *Id*. Plaintiffs nevertheless contend that if Defendants "question[] Fischel regarding the first jury's findings," then Plaintiffs should be permitted to "respond in kind" by introducing this evidence. *Id.* That is incorrect. Defendants may question Fischel about whether he has accounted for the first jury's findings that remain in force and govern the scope of the fraud in this retrial, such as the finding that 23 of the 40 alleged misstatements were nonactionable. Such questioning does not authorize Plaintiffs to then refer to the ***vacated*** findings of the first jury regarding leakage. Defendants do not dispute that the retrial jury may be informed about the first jury's binding factual findings, but it would be entirely improper and prejudicial to allow either party to inform the jury about the vacated findings of the first jury on the precise issues that the retrial jury will be asked to decide.

Second, Plaintiffs have indicated that they do not intend to refer to the amount of the partial judgment or prejudgment interest that was awarded after the first trial, but they reserve the right to do so "if defendants are permitted to introduce evidence of aggregate damages." Opp. 8. As an initial matter, Defendants do not intend to introduce evidence of aggregate damages, as explained in Defendants' Response To Plaintiffs' Motion *In Limine* No. 8, Dkt. 2167. But, should the need to introduce evidence of aggregate damages arise, it would not authorize Plaintiffs to introduce evidence of the ***vacated*** partial judgment and prejudgment interest from the first trial. Again, the dispositive distinction between the two types of evidence is that Defendants'

evidence concerns factual findings that are binding in this case going forward and Plaintiffs' evidence concerns vacated findings that the retrial jury will be asked to decide anew.

C. Characterizations of the First Jury's Findings about the Fraud and Reference to Purported Misstatements Other Than the 17 Misstatements Found by the First Jury

As previously discussed, the jury in the first trial found that 17 of the 40 statements that Plaintiffs contended were false and misleading were actionable and the remaining 23 statements were not. In their response brief, Plaintiffs do not contest that only the 17 misstatements found by the first jury constitute the fraud and that Plaintiffs may not argue to the retrial jury that any other statements were fraudulent or were part of the fraud found by the first jury. This issue has therefore been conceded.[1]

As regards Plaintiffs or Professor Fischel characterizing the first jury's findings, Plaintiffs' response amply demonstrates the need to preclude such characterizations. Plaintiffs persist in describing the fraud found by the first jury as "massive," despite the fact that the first jury rejected ***over half*** of the alleged misstatements. Plaintiffs contend that the first jury in fact found a "massive" fraud, citing evidence from 1999-2001, ***before*** the first actionable misstatement found by the first jury (on March 23, 2001). *See* Opp. 8. These are exactly the type of mischaracterizations of the first jury's findings that the Court can expect to see from Plaintiffs if it does not preclude characterization of the first jury's findings, exclude irrelevant evidence, and itself inform the jury about the first jury's findings that are binding at this retrial.

[1] Plaintiffs object to the implication that the first jury's findings mean that the 23 other statements either were not false, material, or made with scienter because the jury's conclusion that those statements were nonactionable "may have resulted from findings that only one of § 10(b)'s six elements was not proven." Opp. 11. The "in connection" and reliance elements were not contested at the first trial, leaving only loss causation and damages. Thus, Plaintiffs appear to be arguing that the first jury could have determined that Plaintiffs had proven loss causation as to some, but not all, of the alleged misstatements. That assertion by Plaintiffs contradicts their motion *in limine* objecting to Question 1 of Defendants' Verdict Form, which question acknowledges that the jury must determine loss causation with respect to each misstatement. *See* Dkt. 2137; Dkt. 2164 (Defendants' Opp.).

Contrary to Plaintiffs' argument, Defendants are not suggesting that the jury should not be informed about the scope of the fraud, but rather that the parties should not be permitted to characterize what occurred or was found at the first trial because the retrial jury is not in a position to evaluate the truth of those characterizations. Nor is Defendants' request too vague to enforce: the parties should be limited to describing the first jury's findings in the way that this Court will describe them to the retrial jury, and the parties should be prohibited from embellishing with adjectives like "massive" that would suggest to the jury the existence of some other findings from the first trial, beyond those articulated by this Court.

D. The Seventh Circuit's Opinion and This Court's *Daubert* Ruling

In their response, Plaintiffs have suggested that they do not intend to present testimony from Professor Fischel about the Seventh Circuit's opinion in this case or this Court's *Daubert* ruling on remand unless Defendants "open the door" by "suggesting that leakage models had never before been approved of in litigation." Opp. 15 & n.17. As pertains to Fischel, then, this portion of Defendants' motion has, in large part, been conceded. It is important to note, however, that the Seventh Circuit's opinion and this Court's *Daubert* ruling do not determine the ultimate question of which model, if any, most accurately quantifies any loss caused by the fraud. That question is for the jury alone, and neither Plaintiffs nor Fischel should be permitted to suggest that either Court has expressed an opinion about which model the jury should choose.

As regards using the Seventh Circuit's opinion to cross-examine Defendants' experts, Plaintiffs' arguments miss the mark. First, Plaintiffs' arguments are based on an inaccurately narrow conception of what is at issue in this retrial. In its Order on the scope of the remand proceedings, this Court rejected Plaintiffs' argument that the only loss causation issue to be tried was whether their "loss causation and damages expert adequately accounted for company-specific non-fraud factors," and the Court instead adopted Defendants' broader proposal that the

question for remand was "whether plaintiffs have 'proven loss causation.'" Dkt. 2042 at 1. Plaintiffs simply rehash their rejected argument when they assert that the Seventh Circuit's opinion precludes Defendants from "relitigat[ing]" Fischel's leakage model aside from his supposedly "discrete, particular error" in failing "to adequately explain why the leakage model was not distorted by company-specific nonfraud information." Opp. 13.

Second, the Seventh Circuit's conclusion that certain aspects of Fischel's leakage model were not so deficient as to be legally inadmissible does not obligate the jury to accept Fischel's model. Plaintiffs argue that Defendants' experts offer opinions contrary to the Seventh Circuit's decision, but the Seventh Circuit's decision governs only the threshold question about the admissibility of Fischel's model, not the ultimate question of whether that model should be applied in this case. Furthermore, it is this Court's role, not that of Plaintiffs' attorneys on cross-examination, to determine whether Defendants' experts are abiding by the legal parameters set by the Seventh Circuit for expert testimony. In other words, this Court, not the attorneys, informs the jury about the law, and permitting Plaintiffs to use the Seventh Circuit's opinion at trial would confuse the jury by mixing those roles.

The fact that Defendants' experts cited the Seventh Circuit's opinion in their reports does not change the analysis. The experts rightly relied on the Court's opinion to set the parameters for their analysis and opinions. Plaintiffs' allegations that Defendants' experts have not complied with the law as set out in the Seventh Circuit's opinion is a matter for this Court, not the jury, to decide.

Finally, as previously explained, the Seventh Circuit's opinion did not make factual findings that are binding on remand. On this point, Defendants incorporate by reference Defendants' Response To Plaintiffs' Motion *In Limine* No. 2, Dkt. 2161.

CONCLUSION

Defendants respectfully request that the Court preclude Plaintiffs from introducing evidence or testimony about the prior proceedings in this case other than as reflected in stipulations or the Court's instructions to the jury.

Dated: May 13, 2016

Respectfully submitted,

/s/ R. Ryan Stoll

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CERTIFICATE OF SERVICE

R. Ryan Stoll, an attorney, hereby certifies that on May 13, 2016, he caused true and correct copies of the foregoing Reply in Support of Defendants' Motion *In Limine* No. 2 to be served via the Court's ECF filing system on the following counsel of record in this action:

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