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, - against - HOUSEHOLD INTERNATIONAL, INC., ET AL., Defendants.	Lead Case No. 02-C5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman

APPENDIX OF UNREPORTED AUTHORITIES
IN OPPOSITION TO PLAINTIFFS' MOTIONS *IN LIMINE* NOS. 1-10

CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005
(212) 701-3000

EIMER STAHL KLEVORN & SOLBERG LLP
224 South Michigan Avenue
Chicago, Illinois 60604
(312) 660-7600

Attorneys for Defendants Household International, Inc., Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer, and J.A. Vozar

APPENDIX OF UNREPORTED AUTHORITIES

TAB 1

HOnly the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
Irma ALEXANDER, Special Administrator of the Estate of Christen Crutcher, deceased, Plaintiff,
v.
MOUNT SINAI HOSPITAL MEDICAL CENTER OF CHICAGO and Sinai Health System d/b/a Mount Sinai Medical Center of Chicago; Sinai Medical Group; Godwin Onyema; and Joseph Rosman, Defendants.
No. 00 C 2907.

Jan. 14, 2005.

Jason Ayres Parson, Anderson, Bennett & Partners, Chicago, IL, William C. Anderson, III, Michael J. Morrissey, Cassiday, Schade & Gloor United States Attorney's Office, Chicago, IL, for Defendants.
Paul G. Hardiman, Chicago, IL, for Plaintiff.

MEMORANDUM OPINION

KOCORAS, Chief J.
***1** Before the court are various motions *in limine* brought by the respective parties. For the reasons set forth below, Mount Sinai's motion *in limine* No. 3 is granted, motion Nos. 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15 are denied, and motion Nos. 1 and 4 are granted in part and denied in part. Dr. Rosman's motion *in limine* Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25 are denied, and motion No. 1 is granted in part and denied in part. Sinai Group's motion Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25 are denied.

BACKGROUND

In September 1999, Plaintiff, Irma Alexander ("Alexander"), Special Administrator of the Estate of Christen Crutcher, brought suit against the Defendants [FN1] in the Circuit Court of Cook County, Illinois. The complaint sought damages for alleged medical negligence that resulted in the death of Christen Crutcher ("Ms.Crutcher").

FN1. For purposes of this opinion, Mount Sinai Hospital Medical Center of Chicago and Sinai Health System will be referred to collectively as "Mount Sinai." Joseph Rosman, M.D. will be referred to as "Dr. Rosman" and Sinai Medical Group will be referred to as "Sinai Group."

Ms. Crutcher underwent surgery on October 2, 1997, to remove a tumor from the right side of her pelvis. Her surgery was performed by Godwin Onyema, M.D. ("Dr.Onyema"). Several days after the surgery, hospital residents suspected that she had a post-operative infection and pneumonia. On October 9, a CT scan revealed that Ms. Crutcher had an abdominal abscess. Her physicians opted to drain the abscess with a CT-guided needle rather than subject her to general anesthesia and surgery. Despite this drainage, Ms. Crutcher's clinical condition worsened, and on October 16, she underwent exploratory surgery. During this surgery, it was discovered that Ms. Crutcher had a bowel perforation. Ms. Crutcher died on November 13, 1997. Alexander claims that the United States' agent, Dr. Onyema, was negligent in allegedly: (1) failing to recognize signs and symptoms of a perforated bowel in a timely fashion; (2) failing to order a surgical consultation sooner; (3) failing to order an infectious disease consultation sooner; and (4) failing to order a CT scan sooner.

Under the Federally Supported Health Care Assistance Act of 1992, 42 U.S.C. § 233(g)-(n), federally supported health centers, their employees, and certain contractors are provided coverage under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, *etseq.,* for acts or omissions that occurred either on or after January 1, 1993, or when the health center was deemed eligible for coverage, whichever is later. Sinai Family Health Centers was deemed eligible for coverage under the Act on July 1, 1997. At all times relevant to the complaint, Dr. Onyema was considered a federal employee by virtue of his contract with Sinai Family Health Centers.

A civil action that is commenced in state court, which is based upon a tort claim against a federal employee acting within the scope of employment, is removable to federal court at any time before trial, and the

United States is substituted as the defendant. 28 U.S.C. § 2679(d)(2). Pursuant to 28 U.S.C. § 1441, this case was removed from state court to this court on May 12, 2000, by the United States. Discovery has been completed and the case is poised for trial. The parties have filed various motions *in limine*.

LEGAL STANDARD

***2** A federal district court's authority to manage trials includes the power to exclude evidence pursuant to motions *in limine*. *Falk v. Kimberly Services, Inc.*, 1997 WL 201568, *1 (N.D.Ill.1997). However, a court has the power to exclude evidence *in limine* only when that evidence is clearly inadmissible on all potential grounds. *Hawthorne Partners v. AT & T Technologies, Inc.*, 831 F.Supp. 1398, 1400 (N.D.Ill.1993). A district court should be mindful that some proposed evidentiary submissions cannot be accurately evaluated in a pretrial context via a motion *in limine*. *Tzoumis v. Tempel Steel Co.*, 168 F.Supp.2d 871, 873 (N.D.Ill.2001). For this reason, certain evidentiary rulings should be deferred to trial so that questions of foundation, relevancy, and potential prejudice may be resolved in proper context. *Hawthorne Partners*, 831 F.Supp. at 1400. Denial of a motion *in limine* does not automatically mean that all evidence contemplated by the motion will be admitted at trial. *Id.* at 1401. Instead, the court will entertain objections to individual proffers as they occur at trial. *Id.* In any event "the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling." *Luce v. U.S.*, 469 U.S. 38, 41-42, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984). With these principles in mind, we turn to the present motions.

DISCUSSION

A. Mount Sinai's Motions *in Limine*

Motion in Limine No. 1

Mount Sinai's first motion *in limine* consists of various parts. We address each in turn. First, Mount Sinai moves to bar witnesses other than the parties from the courtroom during the testimony of any witness or the presentation of arguments of any party to the court. This motion is denied to the extent that it seeks to exclude all witnesses, whether parties, experts, or the like from the courtroom.

Next, Mount Sinai moves to bar Alexander from attempting to elicit, from any retained witness on direct examination, any opinion other than those previously expressed in depositions [FN2] or through Fed.R.Civ.P. 26 disclosures. Further, Mount Sinai moves that each party advise his or her retained witnesses, on direct examination, to confine their opinions to those expressed in their respective depositions or through Fed.R.Civ.P. 26 submissions. This aspect of the motion is granted.

> FN2. Mount Sinai specifically refers to discovery depositions in its motion. Because the Federal Rules of Civil Procedure make no such distinction, we treat all depositions taken in the present matter the same.

Mount Sinai also moves to bar Alexander from eliciting testimony from any physician, nurse, Defendant or retained witness regarding the number of malpractice suits in which they have been named as a defendant. Mount Sinai argues that this testimony would only serve to confuse and inflame the jury and is inadmissible. Crucial to any reasonable analysis of this argument is the purpose for which the elicited testimony in question is being offered. At first glance, the danger of unfair prejudice could implicate Fed.R.Evid. 403. However, when offered for another purpose (to cure improper bolstering of the witness on direct or for impeachment purposes, for example), the testimony may become sufficiently probative to support its admissibility. The necessary context is absent without the fuller framework of trial. Thus, this aspect of the motion is denied. Before any such question is asked, however, any attorney must present a request to do so at a sidebar conference.

***3** Mount Sinai also moves to bar Alexander from presenting any photographs, motion pictures, videotapes, or slides depicting Ms. Crutcher and/or her family that have not been provided to the Defendants prior to trial and to which the Defendants have not had the opportunity to object. This aspect of the motion is granted.

Finally, Mount Sinai moves to bar any argument before the jury regarding the existence of any professional liability insurance covering the Defendants. Under Fed.R.Evid. 411, evidence that a person was or was not insured against liability is not admissible

upon the issue whether the person acted negligently or otherwise wrongfully. Rule 411 does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness. *Id.* The purpose of this type of evidence can be better addressed in the fuller framework of trial. Thus, this aspect of the motion is denied.

Motion in Limine No. 2

Mount Sinai's second motion *in limine* seeks to bar Alexander from eliciting testimony regarding a physician or a retained witness's personal preferences or routines in treating, diagnosing, and evaluating patients like Ms. Crutcher. Mount Sinai contends that testimony regarding personal preferences, routines, and practices does not bear upon the issue of medical negligence and that these types of statements are irrelevant. Differences of opinion are consistent with the exercise of due care and the variance of a physician's conduct from the norm does not *per se* constitute breach of the standard of care. *See Campbell v. United States,* 904 F.2d 1188, 1192 (7th Cir.1990). However, absent the development of this type of testimony in the fuller context of trial, we consider it premature to assess what is acceptable in this area. Specific objections can be raised in the more complete framework of trial. Accordingly, we deny Mount Sinai's second motion *in limine.*

Motion in Limine No. 3

Mount Sinai next wishes to bar counsel and any witness from eliciting testimony or commenting on his or her opinions, beliefs, impressions, or conclusions regarding the veracity, believability, consistency or lack thereof, conceivability, or credibility of any statement or testimony offered by any other witness, including the quality of memory of any other witness. The credibility and veracity of a witness's testimony is a determination reserved exclusively for the trier of fact; accordingly, we grant Mount Sinai's motion.

Motion in Limine No. 4

Mount Sinai seeks to bar Alexander's retained witnesses from offering any opinions not previously expressed in their depositions or Fed.R.Civ.P. 26 disclosures. Fed.R.Civ.P. 26(a)(2) requires a retained witness to provide a report containing his or her opinions as well as the basis and reasons for those opinions. *See Walsh v. McCain Foods Ltd.,* 81 F.3d 722, 727 (7th Cir.1996). Subsections (a)(2)(C) and (e)(1) require that disclosures be supplemented if there are any modifications or additions to the information previously disclosed. *Id.* Pursuant to Fed.R.Civ.P. 37, "[a] party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use evidence at trial, at a hearing, or on a motion any witness or information not so disclosed."Fed.R.Civ.P. 37(c)(1). Therefore, unless a party in the present matter seeking to introduce evidence that was not timely disclosed under Rule 26(a) can show that the discovery violation was either justified or harmless, such evidence will be excluded.

Motion in Limine No. 5

***4** Mount Sinai seeks to bar Dr. Klotz, one of Alexander's retained witnesses who is board-certified in internal medicine and pulmonary disease, from offering an opinion as to the standard of care for obstetric/gynecology physicians or residents. The substantive law of the state where the injury occurred governs actions brought under the FTCA. *Buscaglia v. United States,* 25 F.3d 530, 534 (7th Cir.1994). Mount Sinai correctly asserts that in Illinois medical malpractice cases, it is the plaintiff's duty to establish the proper standard of care to be applied to a defendant doctor's conduct, a breach of that standard, and a resulting injury proximately caused by the breach of the standard of care. *Northern Trust Co. v. Moran,* 213 Ill.App.3d 390, 406, 157 Ill.Dec. 566, 572 N.E.2d 1030 (1st Dist.1991). Unless the alleged negligence is so grossly apparent or within the ken of the average juror, expert testimony is required to establish the standard of care and its breach. *Id.*

Here, while Illinois substantive law applies with regards to the tort claim, the Federal Rules of Evidence control concerning admissibility determinations. In support of its motion, Mount Sinai improperly cites to Illinois state cases and frames its entire argument based upon Illinois evidence standards. In the present case, we are bound to follow the standards embodied in Fed.R.Evid. 702, which establishes two admissibility requirements for expert testimony. *See generally Daubert v. Merrell Dow Pharms.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 119 S.Ct.

1167, 143 L.Ed.2d 238 (1999). We frame our analysis accordingly.

Under *Daubert* and *Kumho Tire,* the expert must be qualified, and the subject matter of the proposed testimony must consist of specialized knowledge that will be helpful or essential to the trier of fact in deciding the case correctly. *See*Fed.R.Evid. 702; *see also Buscaglia,* 25 F.3d at 533.

Essentially, Mount Sinai criticizes Dr. Klotz's qualifications due to his purported lack of knowledge regarding residents' duties and what actions they should or should not take under particular circumstances. While Dr. Klotz is not board-certified in obstetrics/gynecology, an expert's qualifications to testify are not solely dependent on whether he or she is a member of the same speciality as the defendant. *See*Fed.R.Evid. 702 advisory committee's note. A witness may qualify as an expert on the basis of knowledge, skill, training, education, or experience. *Id.* Courts have not required a party to show that the witness is an outstanding expert, or to show that the witness is well-known or respected in the field; these are generally questions of weight, not admissibility. *Id.* Whether a witness is qualified as an expert can only be determined by the nature of the opinion offered. The respective parties may raise specific competency objections at trial, including expertise sufficient to base an opinion in the non-specialty area of the witness. The motion is denied without prejudice at this time.

Motion in Limine No. 6

***5** Mount Sinai seeks to bar Dr. Klotz from offering an opinion as to the standard of care for surgeons or infectious disease specialists. The present motion is denied for the same reasons stated in our ruling regarding Mount Sinai's Motion *in Limine* No. 5. The respective parties may raise specific competency objections at trial.

Motion in Limine No. 7

Mount Sinai seeks to bar Dr. Berman, Alexander's second retained witness who is board-certified in obstetrics/gynecology, from offering an opinion as to the standard of care for surgeons or infectious disease specialists. Mount Sinai claims that various deficiencies in Dr. Berman's deposition and his Fed.R.Civ.P. 26 submissions warrants the imposition of sanctions, under Rule 37(c)(1), in the form of barring him from proffering expert opinions on the subject at trial. Even assuming that there are deficiencies in Dr. Berman's deposition and Rule 26 submissions, the party to be sanctioned is still afforded the opportunity to show that its alleged violation of Rule 26 was either justified or harmless. Fed.R.Civ.P. 37(c)(1). Accordingly, we deny the present motion. The respective parties may raise specific objections at trial if they become necessary.

Motion in Limine No. 8

Mount Sinai seeks to bar criticism of Drs. Moran and Siddiqui for not reordering an infectious disease consult after October 5, 1997. Essentially, Mount Sinai's argument presupposes that Alexander's retained witnesses will not sustain the requirements that are required for a plaintiff to prove a medical malpractice case. These requirements include that the plaintiff establish, via expert testimony when necessary, the proper standard of care to be applied to a defendant doctor's conduct, a breach of that standard, and a resulting injury proximately caused by the breach of the standard of care. *Northern Trust Co.,* 213 Ill.App.3d at 406, 157 Ill.Dec. 566, 572 N.E.2d 1030. This request mirrors one of Mount Sinai's more general requests set forth in its first motion *in limine.*In its first motion *in limine,* Mount Sinai requested that opinions that are to be expressed at trial be supported by competent factual evidence and a retained witness' testimony establishing to a reasonable degree of medical certainty that the Defendant's alleged negligence was a proximate cause of Ms. Crutcher's injuries. We granted that aspect of Mount Sinai's motion as that is the appropriate threshold requirement of such testimony. We will not however bar specific testimony that presupposes that the threshold requirements will not be met. Accordingly, the present motion is denied.

Motion in Limine No. 9

Mount Sinai seeks to bar criticism of Drs. Smith and Moran for not requesting Dr. Onyema to see Ms. Crutcher on October 4 and 5, 1997. The present motion is denied for the same reasons stated in our ruling regarding Mount Sinai's Motion *in Limine* No. 8.

Motion in Limine No. 10

Mount Sinai seeks to bar criticism of Drs. Smith, Moran, and Siddiqui for not ordering a surgical consultant on and after October 5, 1997. The present motion is denied for the same reasons stated in our ruling regarding Mount Sinai's Motion *in Limine* No. 8.

Motion in Limine No. 11

***6** Mount Sinai seeks to bar criticism of Dr. Smith, Dr. Moran, and the hospital for the alleged failure to order or perform a CT scan until October 9, 1997. The present motion is denied for the same reasons stated in our ruling regarding Mount Sinai's Motion *in Limine* No. 8.

Motion in Limine No. 12

Mount Sinai seeks to bar Dr. Berman from opining that the residents' alleged negligence lessened the chance of Ms. Crutcher's chance of survival. Assuming Dr. Berman's competency to testify at trial, if he does opine, to a reasonable degree of medical certainty, as to what the difference in Ms. Crutcher's chances of recovery would have been if she had undergone surgery earlier, the issue is for the trier of fact to determine. This motion is denied.

Motion in Limine No. 13

Mount Sinai seeks to bar Dr. Klotz from opining that the residents' alleged negligence lessened Ms. Crutcher's chance of survival. We deny the present motion for the same reasons stated in our ruling regarding Mount Sinai's Motion *in Limine* No. 12.

Motion in Limine No. 14

Mount Sinai seeks to bar Alexander's retained witnesses from offering any criticism of residents other than Drs. Smith, Moran, and Siddiqui. Mount Sinai's proposed reasoning calling for the exclusion of such testimony deals with Alexander's Fed.R.Civ.P. 26 submissions, which has been previously addressed in this opinion. Accordingly, we deny the present motion for the same reasons stated in our ruling regarding Mount Sinai's Motion *in Limine* No. 7.

Motion in Limine No. 15

Mount Sinai seeks to bar Alexander and her retained witnesses from opining that Ms. Crutcher experienced conscious pain and suffering after October 5, 1997. Mount Sinai's proposed reasoning calling for the exclusion of such testimony deals with Alexander's Fed. R. Civ. Proc. 26 submissions, which has been previously addressed in this opinion. Accordingly, we deny the present motion for the same reasons stated in our ruling regarding Mount Sinai's Motion *in Limine* No. 7.

B. Dr. Rosman's Motions *in Limine*

Motion in Limine No. 1

Dr. Rosman's first motion *in limine* consists of various parts, all of which are identical to the various aspects of Mount Sinai's motion *in limine* No. 1, and we accordingly grant or deny the various aspects of the present motion for the same reasons.

Motion in Limine No. 2

Dr. Rosman seeks to bar counsel from questioning potential jurors during *voir dire* regarding specific amounts of monetary damages. We deny the motion as this matter is more appropriately dealt with in the proposed *voir dire* questions that counsel for all parties are required to submit to the court.

Motion in Limine No. 3

Dr. Rosman next seeks to bar reference to the fact that Dr. Rosman is protected by insurance or some other indemnity agreement. Under Fed.R.Evid. 411, evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. Rule 411 does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness. *Id.* The purpose of this type of evidence can be better addressed in the fuller framework of trial. Thus, the motion is denied.

Motion in Limine No. 4

***7** Dr. Rosman seeks to exclude lay witness testimony based only upon speculation, conjecture, and

lack of expertise. The determination of the proper foundation of testimony can be more sufficiently addressed in the fuller framework and context of trial. Thus, the present motion is denied.

Motion in Limine No. 5

Dr. Rosman's fifth motion *in limine* seeks to bar allegedly cumulative testimony. The determination of what constitutes cumulative testimony can be more sufficiently addressed in the fuller framework and context of trial. Thus, the present motion is denied.

Motion in Limine No. 6

Dr. Rosman seeks to bar evidence not previously tendered and produced to him pursuant to Illinois Supreme Court Rules 214, 237, and 213. Under the *Erie* doctrine, state procedural rules are inapplicable in federal proceedings, so the cited rules are irrelevant to the case at hand. Accordingly the present motion is denied.

Motion in Limine No. 7

Dr. Rosman seeks to bar Alexander's retained witnesses from relying on or referring to any medical text, journal, treatise, document, article, or literature not expressly enumerated in Alexander's answers to interrogatories, Fed.R.Civ.P. 26 submissions, Illinois Supreme Court Rule 237, or depositions. Under the *Erie* doctrine and as stated above, we ignore the inapplicable rules that Dr. Rosman has cited. The Federal Rules of Evidence will govern the propriety of questions and the admissibility of answers. We deny the present motion.

Motion in Limine No. 8

Dr. Rosman seeks to exclude reference to deviations of the standard of care without testimony that the deviation proximately caused injury to Ms. Crutcher. The present motion is too broad and vaguely seeks to bar evidence without specific references to proffered testimony. Specific objections can be raised in the fuller framework and context of trial. Accordingly, the present motion is denied.

Motion in Limine No. 9

Dr. Rosman's next motion *in limine* is identical to one of the aspects of Mount Sinai's motion *in limine* No. 1, regarding prior lawsuits, and we deny the motion for the same reasons.

Motion in Limine No. 10

Dr. Rosman's next motion *in limine* seeks to bar reference to whether Dr. Rosman's retained witnesses have ever been named as defendants in medical malpractice or other litigation. Parties are afforded the opportunity to probe into the credibility, interest, and possible bias of a retained expert through cross examination. Specific objections can be raised in the fuller framework and context of trial. Accordingly, the present motion is denied without prejudice.

Motion in Limine No. 11

Dr. Rosman seeks to bar testimony regarding whether it is easier to review medical legal matters on behalf of defendants as well as any testimony regarding whether Drs. Berman or Klotz turned down another case reviewed on behalf of Alexander's counsel or his law firm. Again, parties are afforded the opportunity to probe into the credibility, interest, and possible bias of a retained expert through cross-examination. Further, Dr. Rosman has not provided us with any cognizable evidentiary basis or rationale as to why such evidence should be excluded. Specific objections can be raised in the fuller framework and context of trial. Accordingly, the present motion is denied.

Motion in Limine No. 12

***8** Dr. Rosman's next motion contains various aspects, all of which have been addressed in previous motions above. We deny the present motion in its entirety to the extent that it does not conflict with other rulings contained herein.

Motion in Limine No. 13

Dr. Rosman's next motion *in limine,* entitled "precautionary rulings," is a general motion, raising various issues, some of which involve fundamental evidentiary principles, most of which are vague, and others that are simply redundant. The parties can raise specific objections in the fuller framework of trial. The

present motion is denied.

Motion in Limine No. 14

Dr. Rosman seeks to bar Dr. Klotz from testifying regarding causation. The present motion is denied for the same reasons stated in our ruling regarding Mount Sinai's Motion *in Limine* No. 8.

Motion in Limine No. 15

Dr. Rosman's next motion involves the use of medical literature at trial. Nowhere in the motion is there any specific mention regarding what evidentiary ruling Dr. Rosman requests this court to render. The motion, which only cites to Illinois state cases that we are not bound to follow as precedent, instead reads as a tutorial regarding the topic of medical literature. We accordingly deny the present motion.

Motions in Limine Nos. 16-17

Dr. Rosman's next two motions seek to bar various references that he anticipates opposing counsel will make during opening statements and closing arguments. We deny both motions. Specific objections can be made in the fuller context of trial.

Motion in Limine No. 18

Dr. Rosman's motion *in limine* No. 18 is identical to Mount Sinai's motion *in limine* No. 2, and we accordingly deny it for the same reasons.

Motion in Limine No. 19

Dr. Rosman's motion *in limine* No. 19 is identical to Mount Sinai's motion *in limine* No. 3, and we accordingly grant it for the same reasons.

Motion in Limine No. 20

Dr. Rosman adopts Mount Sinai's Motion *in Limine* No. 4, regarding the adequacy of Alexander's Fed.R.Civ.P. 26 disclosures, in its entirety. Unless a party in the present matter seeking to introduce evidence that was not timely disclosed under Rule 26(a) can show that the discovery violation was either justified or harmless, such evidence will be excluded.

Motion in Limine No. 21

Dr. Rosman's motion *in limine* No. 21 is identical to Mount Sinai's motion *in limine* No. 6, and we accordingly deny the it for the same reasons.

Motion in Limine No. 22

Dr. Rosman's motion *in limine* No. 22[FN3] is identical to Mount Sinai's motion *in limine* No. 7, and we accordingly deny it for the same reasons.

> FN3. Dr. Rosman apparently misnumbered his motions *in limine;* two motions are labeled "Motion *in Limine* No. 21," and none are designated "Motion *in Limine* No. 25." We have adjusted the numbering of the motions accordingly.

Motion in Limine No. 23

Dr. Rosman's motion *in limine* No. 23 is identical to Mount Sinai's motion *in limine* No. 13, and we accordingly deny it for the same reasons.

Motion in Limine No. 24

Dr. Rosman's motion *in limine* No. 24 is identical to Mount Sinai's motion *in limine* No. 14, and we accordingly deny it for the same reasons.

Motion in Limine No. 25

***9** Dr. Rosman's motion *in limine* No. 25 is identical to his motion *in limine* No. 22 and Mount Sinai's motion *in limine* No. 7, and we accordingly deny it for the same reasons.

C. Sinai Group's Motions *in Limine*

Motion in Limine No. 1

Sinai Group's first motion seeks to exclude all non-party witnesses from the courtroom during the trial proceedings at times when they are not testifying. This motion is denied to the extent that it seeks to exclude all witnesses, whether parties, experts, or the like from the courtroom.

Motions in Limine Nos. 2-13

Sinai Group's motions *in limine* Nos. 2-13 are identical to Dr. Rosman's motions *in limine* Nos. 2-13.Therefore, we deny the present respective motions consistent with our rulings regarding Dr. Rosman's corresponding motions.

Motion in Limine No. 14

Sinai Group's next motion involves the use of medical literature at trial. The present motion essentially raises the same points addressed in Dr. Rosman's motion *in limine* No. 15.While Sinai Group's motion specifically requests this court for relief whereas Dr. Rosman's motion did not, we deny the present motion for the reasons stated with regard to Dr. Rosman's motion *in limine* No. 7.

Motions in Limine Nos. 15-16

Sinai Group's motions *in limine* Nos. 15-16 are identical to Dr. Rosman's motions *in limine* Nos. 16-17.We accordingly deny them for the same reasons.

Motion in Limine No. 17

Sinai Group's motion *in limine* No. 17 is identical to Dr. Rosman's motion *in limine* No. 14, and we accordingly deny it for the same reasons.

Motions in Limine Nos. 18-24

Sinai Group's motions *in limine* Nos. 18-24 are either repetitive or identical to Dr. Rosman's motions *in limine* Nos. 18-25.Therefore, we deny them consistent with our rulings regarding Dr. Rosman's motions *in limine* Nos. 18-25.

Motion in Limine No. 25

Sinai Group's final motion seeks to bar Alexander from presenting any evidence against it, other than through the conduct and participation of Dr. Rosman as its agent. Absent the fuller context of trial, we deny this motion.

CONCLUSION

Based on the foregoing analysis, Mount Sinai's motion *in limine* No. 3 is granted, motion Nos. 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15 are denied, and motion Nos. 1 and 4 are granted in part and denied in part. Dr. Rosman's motion *in limine* Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25 are denied, and motion No. 1 is granted in part and denied in part. Sinai Group's motion Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25 are denied.

N.D.Ill.,2005.
Alexander v. Mount Sinai Hosp. Medical Center of Chicago
Not Reported in F.Supp.2d, 2005 WL 3710369 (N.D.Ill.)

END OF DOCUMENT

TAB 2

United States District Court, N.D. Illinois, Eastern Division.

AMERICAN HARDWARE MANUFACTURERS ASSOCIATION, Plaintiff,
v.
REED ELSEVIER INC., et al., Defendants.
REED ELSEVIER INC., a Massachusetts corporation, Counter-plaintiff,
v.
AMERICAN HARDWARE MANUFACTURERS ASSOCIATION, a Delaware not-for-profit corporation, Timothy Farrell, and William P. Farrell, Sr., Counter-defendants.

No. 03 C 9421.

Feb. 13, 2007.

William Patrick Farrell, Jr., Michael Anthony Nicolas, Scott Jared Fisher, Neal, Gerber & Eisenberg, Gordon B. Nash, Jr., Drinker BiddleGardner Carton, Chicago, IL, for Plaintiff.
Michael I. Rothstein, John Matthew Fitzgerald, Karina H. Dehayes, Rachel Nicole Cruz, Reema Kapur, Tabet Divito & Rothstein, LLC, Benjamin J. Randall, Randall & Kenig LLP, Timothy A. Hudson, Jenner & Block LLP, Anthony Joseph Carballo, Aren Lance Fairchild, Garry L. Wills, Freeborn & Peters, Chicago, IL, for Counter-plaintiff and Defendants.

MEMORANDUM OPINION AND ORDER

JAMES B. MORAN, Senior District Judge.
***1** Enter Memorandum Opinion And Order.

[For further detail see separate order(s).]

Plaintiff American Hardware Manufacturers Association ("AHMA") brought suit against Reed Elsevier, Inc., Reed Exhibitions, and Association Expositions & Services (collectively "Reed"), and Freeman Decorating Co., and Freeman Decorating Services, Inc. (collectively "Freeman"), alleging various counts of common law and statutory breaches stemming from the breakdown of plaintiff's business relationships with defendants.[FN1] Subsequently, Reed filed counterclaims against AHMA and Timothy S. Farrell and William Farrell ("Farrells"). In April 2005, the matter was referred to Magistrate Judge Levin for all discovery motions and supervision, and, subsequently, was reassigned to Magistrate Judge Mason. Since then, Judge Mason has presided over extensive motion practice regarding discovery disputes. Today we deal with a series of objections to Judge Mason's rulings. Specifically, Reed and Freeman (collectively "defendants") object to the magistrate judge's related orders of July 24, 2006, September 14, 2006, and September 18, 2006, and related orders of September 26, 2006, and October 17, 2006.

FN1. For a complete factual background, see *American Hardware Manufacturers Association v. Reed Elsevier, Inc.,* 2004 U.S. Dist. LEXIS 28007 (N.D.Ill.2004).

The first set of objections state defendants' contention that the magistrate judge erred in granting plaintiff's motion to compel Reed to produce documents regarding commissions received in connection with all of Reed's trade shows, granting plaintiff's motion to compel the production of Reed's general financial documentation without limiting the disclosure to Reed Exhibitions, and denying Reed's motion to compel documents reflecting the payments and perks given to family members of counter-defendants William and Timothy Farrell. The second set of objections assert that the magistrate judge again erred in limiting defendants to a combined 15 depositions.

The orders at issue deal with discovery disputes and are non-dispositive. *Phillips v. Raymond Corp.,* 213 F.R.D. 521, 525 (N.D.Ill.2003); *Bobkoski v. Board of Educ. of Cary Consol. School Dist. 26,* 141 F.R.D. 88, 90 (N.D.Ill.1992). Thus, the standard of review for considering whether to set aside the magistrate judge's orders is governed by Federal Rule of Civil Procedure 72(a), which sets a clearly erroneous standard of review. *Nat'l Educ. Corp. v. Martin,* 1994 WL 233661, *1 (N.D.Ill.1994).[FN2] A more extensive review would frustrate the purpose of referring discovery to a magistrate judge. *See id.*"Clearly erroneous" has been defined as a determination that upon assessing the evidence the reviewing court is " 'left with the definite and firm conviction that a mistake has been committed." ' *Bobkoski,* 141 F.R.D. at 90-

91 (citing *United States v. United States Gypsum,* 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)).*See also Thornton v. Brown,* 47 F.3d 194, 196-97 (7th Cir.1995) (defining "clearly erroneous" for Fed.R.Civ.P. 52(a) analysis, and noting that "[t]he trial court's choice between two permissible views of the evidence cannot be considered clearly erroneous").[FN3]

> FN2.Fed.R.Civ.P. 72(a) reads, in pertinent part: "The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law."
>
> FN3. Defendants point to *Holland v. Island Creek Corp.,* 885 F.Supp. 4 (D.D.C.1995) to argue that "it is incumbent on this Court to review adopted findings against the record 'with particular, even painstaking care' where, as here, the Magistrate did not offer a reasoned explanation for his decision and merely adopted plaintiff's argument."(Reed's brief in support of objection to Magistrate Judge's discovery orders of July 24, 2006, September 14, 2006, and September 18, 2006). While *Holland* does, in fact, make such a statement, *Holland* was decided in a different district, guided by different circuit court precedent. Defendants have not pointed us, nor have we found in our own search, similar language in the Seventh Circuit. The closest is Judge Shadur's suggestion that "[m]uch as the district judge should defer to the magistrate judge's decisions ... he or she should not be hamstrung by the clearly erroneous standard.... [A]lthough an abuse-of-discretion attitude should apply to many discovery and related matters, it need not curtail the power of the district judge to make needed modifications in the magistrate judge's directives." *Phillips,* 213 F.R.D. at 525 (N.D.Ill.2003).

***2** We begin with defendants' contention that plaintiff should not be entitled to all documents related to Reed and Freeman's nationwide agreement. In his order of July 24, 2006, Judge Mason granted plaintiff's motion to compel defendants to produce all documents (including financial information reflecting any payments/exchanges, "commissions," in-kind benefits or signing bonuses) relating to Reed and Freeman's nationwide agreement(s) and any documents discussing such agreements. Judge Mason found that such documents were reasonably calculated to lead to the discovery of admissible evidence. In the same order Judge Mason denied plaintiff's motion to compel Reed's agreements with other associations or owners affiliated with trade shows, where Freeman paid Reed "commissions" and in-kind benefits, finding plaintiff's arguments insufficient to show that such discovery was reasonably calculated to lead to admissible evidence. In clarifying his order of July 24, 2006, in recognition of the "enormous amount of responsive material Reed and Freeman would have to collect, review and produce," Judge Mason limited plaintiff's discovery to financial information reflecting any payments/exchanges, "commissions," in-kind benefits and signing bonuses, omitting from discovery routine performance communications. He also limited the discovery to the years 1997 and 1998, noting in a footnote that the court would revisit the import of additional discovery if and when AHMA demonstrated its benefit. Defendants ask this court to reverse Judge Mason's order granting plaintiff's motion to compel with respect to defendants' other trade shows, and to quash plaintiff's subpoenas to the other associations involved in such shows.

Reed argues that "[t]he mere fact that Reed and Freeman were parties to nationwide agreements does not entitle plaintiff to documents and information from Reed's other trade shows" (Reed's brief, at 7). Freeman contends that because there is no overlap between the commissions that Freeman paid for the National Hardware Show and the commissions for any other Freeman/Reed show, plaintiff cannot show that discovery of the nationwide agreements is reasonably calculated to lead to admissible evidence. In support, Freeman submitted the declaration of Linda Pilgrim, who was in charge of calculating the commission payments from Freeman to Reed in the years in question. Ms. Pilgrim averred: "My calculations of the commission payments for the individual Freeman/Reed Shows, including the National Hardware Show ("NHS"), were solely based upon the Exhibitor Billing amounts for that particular show.... As a result, the calculation of the commissions for the NHS is separate from, and entirely unrelated to, anything to do with any of the other Reed/Freeman shows."Plaintiff's response suggests that defendants' are over-simplifying the rationale for plaintiff's re-

quest. Plaintiff clarifies that it seeks more than financial information necessary to trace the commissions allocated to Freeman by Reed with regard to the National Hardware Show. Rather, plaintiff desires such discovery to evidence that Reed leveraged the National Hardware Show to entice Freeman into the nationwide agreements. Plaintiff continues, "if AHMA is not permitted full discovery in connection with the Reed/Freeman agreements, AHMA will be left to essentially accept Reed and Freeman's litigation position on the impact and implications of their conduct" (plf's response, at 4-5).

***3** Rule 26(b)(1) permits discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party ... The information sought need not be admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."For discovery purposes, relevance is broadly construed. *Behnia v. Shapiro,* 176 F.R.D. 277, 280 (N.D.Ill.1997) (citing *AM Int'l Inc. v. Eastman Kodak Co.,* 100 F.R.D. 255, 257 (N.D.Ill.1981)). Defendants have admitted that Freeman paid Reed commissions pursuant to a nationwide agreement (*see, e.g.,* plf's response, exh. B, at ¶ 3). Freeman, in fact, noted that "it paid lawful commissions to Reed in certain years pursuant to a 1998 nationwide contract that based the amount of the lawful commissions on the total of the net exhibitor billings for all of the Reed/Freeman shows, including the National Hardware Show."(*Id.,* at ¶¶ 34, 35). Plaintiff has introduced evidence that the Reed/Freeman contracts were negotiated at a national, rather than individual, level (plf's response, exh. D, at 30). Therefore, plaintiff has submitted sufficient evidence to support Judge Mason's ruling that it is entitled to discovery of documents related to the nationwide agreement. *But cf.Cadillac Ins. Co. v. American Nat'l Bank,* 1992 U.S. Dist. LEXIS 2815 (N.D.Ill.1992) (conclusory allegation of commingling accounts was insufficient to persuade the court to broaden the scope of discovery by requiring production of otherwise irrelevant documentation). As the parties do not address the burden of production, and Judge Mason has already undertaken a balancing analysis, we will not disturb his order with respect to exactly what must be produced. In light of this, we also uphold Judge Mason's order regarding the seven subpoenas plaintiff issued to trade associations covered by the Reed/Freeman nationwide agreements.

We turn next to the dispute over the discovery of defendants' financial information. In Judge Mason's order of July 24, 2006, he granted plaintiff's motion to compel financial information relating to the National Hardware Show, Reed Exhibitions and Reed Elsevier, Inc., and Freeman Decorating Company. On September 14, 2006, upon consideration of defendants' motion to reconsider, Judge Mason limited plaintiff's discovery of Reed's financials to "information incorporating Reed Exhibitions" for 1997 and 1998. The magistrate judge again noted that discovery for additional years may be revisited in the future upon plaintiff's demonstration of good cause.

Reed now argues that Judge Mason's order remains unclear and asks this court to amend it to limit plaintiff's discovery to financial documents that "expressly mention Reed Exhibitions." Reed asserts: "In one sense, all of Reed Elsevier Inc.'s financial documents 'incorporate' Reed Exhibitions, since Reed Exhibitions is merely a division of Reed Elsevier Inc. In addition, most often, Reed's overall financial documents do not break out Reed Exhibitions' information. The information is simply an unidentified and non-segregated component of total numbers on Reed's general financial statements."

***4** We do not find Reed's objections persuasive. Plaintiff's second amended complaint is replete with allegations that Reed concealed the alleged kickbacks, commissions, and bribes from AHMA. (*See* 2d am.cplt., at ¶¶ 56, 87, 88, 90, 93, 94, 152). The allegations further note that such payments were concealed in Reed's accounting and financial data. (*See id.,* at ¶¶ 89, 95, 103, 154, 156). As Reed admits that Reed Elsevier Inc.'s financial documents account for and incorporate the financials of Reed Exhibitions, it is incumbent on Reed to produce such documents to plaintiff. Judge Mason has already weighed the balance of hardships, and in light of the massive amount of financial information documentation, limited the production to 1997 and 1998. We think such a limitation is sufficient.[FN4]

FN4. We note that any financial documents that have no reflection of Reed Exhibitions financials are outside the scope of plaintiff's discovery. Therefore, a financial statement of a division of Reed (*e.g.,* LexisNexis) that does not incorporate Reed Exhibitions is not

> discoverable. But financial documents of Reed Elsevier Inc., incorporating Reed Exhibitions, even if they do not expressly mention Reed Exhibitions, are discoverable.

Freeman also objects to plaintiff's request for the production of Freeman's tax returns and documentation related to the finances of the corporation as a whole. Freeman suggests that plaintiff's request is "purely and simply a fishing expedition," is irrelevant to plaintiff's claims or defendants' counterclaims, and is unduly burdensome. (Freeman's brief, at 8-10). Citing *Fields v. General Motor Corp.*, 1996 WL 14040, *4 (N.D.Ill.1996), Freeman argues that a taxpayer should not be compelled to disclose its income tax return information merely because it is a party to a lawsuit (*id.,* at 7). Freeman correctly notes that courts have been reticent to require parties to produce such documentation unless the litigant puts its income at issue. *Fields*, 1996 WL 14040 at *4. *See also Payne v. Howard,* 75 F.R.D. 465, 470 (D.D.C.1977) (denying motion to compel defendant's tax returns where plaintiff, not defendant, put defendant's income at issue). Courts have looked to 26 U.S.C. §§ 6103 and 7213(a) to suggest that public policy warns against forcing disclosure of income tax returns, especially where the necessary information can be disclosed through other means. *Id .; Federal Sav. & Loan Ins. Corp. v. Krueger,* 55 F.R.D. 512, 514 (N.D.Ill.1972) (noting that the policy is "grounded in the interest of the government in full disclosure of all the taxpayer's income which thereby maximizes revenue"). Traditional public policy and privacy concerns, however, are not at the forefront of this dispute. Generally, one party seeks its opponents tax returns to use the opponent's amount of income against him. Where, as here, plaintiff seeks Freeman's tax returns to show how Freeman concealed payments to Reed as deductible business expenses, disclosure of Freeman's tax returns "would not hinder the public policy of full and accurate disclosure of a taxpayer's income." *Houlihan v. Anderson-Stokes, Inc.,* 78 F.R.D. 232, 234 (D.D.C.1978).*See also Shaver v. Yacht Outward Bound,* 71 F.R.D. 561 (N.D.Ill.1976). Additionally, the parties have entered into a series of protective orders, under which Freeman's tax returns can be disclosed. *See American Air Filter Co., Inc. v. Kannapell,* 1990 WL 137385, *4 (D.D.C.990) (noting that privacy concerns were abated where plaintiff offered to sign a confidentiality stipulation whereby defendant's tax returns would not be disclosed to anyone other than counsel).

***5** Like Judge Mason, we find Freeman's tax returns relevant to plaintiff's claims. For example, plaintiff's second amended complaint asserts, "Freeman's deceptive course of conduct, which included (a) paying undisclosed kickbacks-disguised as commissions or rebates-to Reed in return for being hired as general contractor for the Show, ... (c) paying bribes to Reed in exchange for the lucrative general contractor position for the Show, and (d) the concealment, suppression and omission of material facts from AHMA, with the intent that AHMA rely upon the concealment, suppression or omission of such material facts, constitutes deceptive practices under the Consumer Fraud Act and is the type of conduct that the Act was created to remedy."(2nd am.cplt., ¶ 104). Also noting the deposition testimony of Mr. Beaudin, Freeman's 30(b)(6) witness, indicating that (1) Freeman Decorating Services, Inc. does not file a federal tax return, (2) Freeman Decorating Company does file a federal tax return, (3) Freeman Decorating Company's tax return reflects the accounts and performance of Freeman Decorating Services, Inc., and (4) Freeman treated the commissions it received from Reed as tax deductible business expenses (Beaudin dep, at pp. 71-72), we find that plaintiff is entitled to discover Freeman's tax returns for the relevant years.

Freeman's objection to produce financial documentation related to the company as a whole is also rejected. Freeman's argument centers on the burden it will face in producing such documents, compared to the limited benefit to plaintiff. Judge Mason accounted for such a burden and limited the production to the years 1997 and 1998. We see no reason to disturb his finding. *See American Dental Ass'n Health Foundation v. Bisco, Inc.,* 1992 WL 107299, *3 (N.D.Ill.1992) (a magistrate judge's failure to articulate his or her reasoning is, by itself, insufficient to require a remand, especially when there is no evidence that the analysis was conducted in anything but a careful manner).

Next, we turn to defendants' objections to Judge Mason's order denying defendants' motion to compel with respect to (1) documents reflecting AHMA's payments or perks to other Farrell family members, and any entities in which they were shareholders, partners or employees; and (2) documents reflecting the amount of legal fees paid to a law firm at which William Farrell, Sr.'s son, William Farrell, Jr., was a

partner. In Judge Mason's order of July 24, 2006, he denied defendants' requests to obtain discovery from the family members of the individual counter-defendants as irrelevant to the issues presented in the case. Defendants assert that the judge erred in his relevancy determination, arguing that the payments and perks to counter-defendants' families are relevant to defendants' defamation counterclaim, specifically to individual counter-defendants' bad faith motive in filing this suit. Defendants further argue that the payments to William Farrell, Jr.'s law firm are relevant to bias and damages.

***6** Plaintiff argues that defendants' objections are untimely, as they were filed on September 29, 2006, in response to Judge Mason's order of July 24, 2006. The Federal Rules of Civil Procedure require that any objections to a magistrate judge's order be filed within ten days of the order (Rule 72(a)). We are, however, persuaded that where, as here, the magistrate judge was considering a motion to clarify or reconsider, the ten days should not begin to run until the magistrate judge comes to a final conclusion. *See Epperly v. Lehmann Co.,* 161 F.R.D. 72, 74 (S.D.Ind.1994) (relying on *Comeau v. Rupp,* 142 F.R.D. 683, 685-86 (D.Kan.1992)). Therefore, defendants would be granted ten days from the date of Judge Mason's order on reconsideration, filed September 14, 2006. Defendants argue that they properly excluded weekends and the date of ruling to arrive at the September 29, 2004 objection filing date. Defendants incorrectly note that Judge Mason filed his reconsideration order on September 15, 2006. Rather, he filed the order on September 14, 2006. Discounting weekends, defendants' objections were due September 28, 2004.

Because the magistrate judge's order was mailed to the parties, however, Rule 6(e) adds three mailing days onto the length of time necessary to object. Not counting weekends and holidays, that would allow defendants until October 3, 2006, to object. Counting holidays and weekends, defendants' objections would be timely on or before September 27, 2006. There is a debate over whether the ten-day period includes weekends and holidays where, as here, the magistrate judge mailed his order to counsel of record. The issue involves an analysis of the interplay between Rules 72(a), 6(a), and 6(e). In *THK America. Inc. v. NSK Ltd.,* 157 F.R.D. 651 (N.D.Ill.1994), Judge Norgle held that where the magistrate judge mailed his order to counsel, the application of Rule 6(e) extended the time to file objections to 13 days. This, Judge Norgle noted, took the defendants' objections out of Rule 6(a), and therefore the 13-day time period included holidays and weekends. Other courts disagree, and commence the ten-day period at the end of the three-day mailing period. *See Epperly,* 161 F.R.D. at 75-76. While both sides have persuasive arguments, because Judge Mason's order did not clearly state the filing deadlines for objections (*but cf. THK America, Inc.,* 157 F.R.D. at 654), we will proceed to address the merits of defendants' objections.

Defendants contend that counter-defendants put the disputed discovery at issue in asserting the affirmative defense of business judgment rule and right of fair comment on a matter of public interest to defendants' defamation counterclaim. Defendants assert that they are "entitled to defeat these affirmative defenses by demonstrating that AHMA and its officers, the Farrells, abused the privilege through bad faith and improper motivation" (Reed's brief, at 11). Specifically, defendants contend that they are entitled to discovery to prove "that AHMA's motivation in filing the lawsuit was to defame Reed in order to protect the Farrell family's receipt of payments and perks" (Reed's brief, at 11).

***7** In Illinois, a party defending against a defamation suit may be entitled to a qualified or conditional privilege. In *Kuwik v. Starmark Star Marketing and Administration, Inc.,* 156 Ill.2d 16, 188 Ill.Dec. 765, 619 N.E.2d 129 (Ill.1993), the Illinois Supreme Court rejected the previously used two-part test for conditional privilege, whereby (1) the judge determined, as a matter of law, whether defendant acted in good faith by applying a five-part test (including a determination of good faith) to determine whether the privilege applied, and then (2) the fact-finder determined whether the defendant acted with malice to defeat the privilege. Instead, the *Kuwik* court held that the judge should determine whether the occasion was conditionally privileged and then the fact-finder should determine whether the defendant abused such a privilege. *Id.* For our practical purposes, the change means that the *Kuwik* court took the good faith determination out of the initial determination and wrapped it into the jury's determination of abuse of privilege. The *Kuwik* court explained, "to prove an abuse of the qualified privilege, the plaintiff must show 'a direct intention to injure another, or * * * a

reckless disregard of [the defamed party's] rights and of the consequences that may result to him." ' *Id.,* at 135-36 (quoting *Bratt v. Int'l Business Machines Corp.,* 392 Mass. 508, 467 N.E.2d 126, 131 (Mass.1961)). The Illinois Supreme Court continued: "Thus, an abuse of a qualified privilege may consist of any reckless act which shows a disregard for the defamed party's rights, including the failure to properly investigate the truth of the matter, limit the scope of the material, or send the material to only the proper parties." *Id.*

Essentially, defendants argue that (1) counter-defendants defamed Reed by filing this lawsuit; (2) the suit was filed in bad faith and with improper motivation to protect counter-defendants' and their families' perks and payments associated with the hardware show; (3) the bad faith defeats counter-defendants' affirmative defenses of qualified or conditional privileges; and (4) thus the amount of the perks and payment (the self-enrichment) is relevant to defendants' counterclaims or at least likely to lead to admissible evidence. Specifically, Reed asserts, "[t]he lengths to which AHMA and its officers would go to protect the Farrell family fortune can only be explored by determining through discovery how much AHMA paid to all family members-whether it was in salary, gifts, perks, cars, or legal fees paid to the firm in which William Farrell, Jr. was a partner. The higher the amount AHMA stood to lose if its 2004 show failed and Reed's 2004 National Hardware Show succeeded, the more likely it is that this litigation was filed only to allow AHMA to defame Reed and attempt to hide behind the veil of various conditional privileges to defamation" (Reed's brief, at 13).

Under *Kuwik,*"it is the province of the trier of fact to determine whether the qualified privilege has been abused by examining the facts of a particular case, including whether the defendant acted in good faith." *Girsberger v. Kresz,* 261 Ill.App.3d 398, 198 Ill.Dec. 940, 633 N.E.2d 781, 794 (Ill.App.Ct.1993). As we noted above, Rule 26 permits comprehensive discovery, and relevance is construed broadly. It is our view that it is possible that discovery of the payments and perks to the Farrell family members could lead to admissible evidence helpful to a jury in determining whether counter-defendants abused their conditional privilege as to Reed's defamation claims. Therefore, we reverse Judge Mason's denial of defendants' motion to compel.

***8** Finally, we turn to defendants' motions objecting to Judge Mason's order restricting their depositions. The procedural history of this motion is complicated and very well briefed. After an inability to agree on the number of depositions due each side, plaintiff (AHMA) and counter-defendants (Farrells) moved to collectively take 30 depositions. Without response from Reed, Judge Mason determined that the number of depositions taken in the case should be limited to 45. Confusion regarding the allocation of the 45 depositions ensued, and Reed and Freeman moved for clarification.[FN5]Judge Mason, in an order dated September 26, 2006, clarified: AHMA was entitled to 15 depositions, Farrells to 15 depositions, and Reed and Freeman, collectively, to 15 depositions. On October 12, 2006, Reed and Freeman filed two motions, one before this court and the other before the magistrate judge. The motion before this court was an objection to Judge Mason's September 26, 2006, order. The motion before Judge Mason was an affirmative request from Reed and Freeman to increase the number of their depositions to 30. On October 17, 2006, Judge Mason denied Reed and Freeman's request for additional depositions, but noted: "Nevertheless, if, after taking fifteen depositions allotted, Reed and Freeman demonstrate that good cause exists to exceed fifteen depositions, we will revisit the issue."In the meantime, the parties briefed Reed and Freeman's objections to Judge Mason's September 26, 2006, order. Before we had an opportunity to take a look at those briefings, Reed and Freeman filed their objections to Judge Mason's October 17, 2006, order, to be consolidated with their objections filed to his September 26, 2006, order. An opposition brief filed by AHMA and Farrells arrived on November 11, 2006, and the issues became ripe for determination.

> FN5. Reed and Freeman believed Judge Mason awarded them, collectively, 25 depositions, and AHMA and Farrells, collectively, 20 depositions. AHMA and Farrells understood Judge Mason's order to grant AHMA 15 depositions, Farrells 15 depositions, and Reed and Freeman, collectively, 15 depositions.

A lot of paperwork boils down to a small number of arguments from Reed and Freeman that Judge Mason's decision to restrict their depositions to 15 was clearly erroneous. None is persuasive. First, defen-

dants argue that because Judge Mason did not wait for a response to AHMA and Farrells' request for 30 depositions before he ruled, the September 26, 2006, order was clearly erroneous. We disagree. Rule 26(b)(2) allows the court to alter the number of depositions (ten) guaranteed under Rule 30(a)(2)(A). The Advisory Committee notes from 1983 state, "The court may act on motion, or its own initiative."Furthermore, Reed and Freeman subsequently filed an affirmative request for 30 depositions, which was considered and rejected by Judge Mason. Their arguments have been given their fair due.

Second, defendants argue that the allocation of depositions is unfair. Their inequity argument, in addition to asserting a general sense of unfairness, indicates that because their interests are not as aligned as AHMA and Farrells' are, they should be entitled to at least as many depositions. We do not find Judge Mason's ruling clearly erroneous. The 1983 Advisory Committee notes regarding Rule 26(b)(2) state: "The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse.... But the court must be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case."We think Judge Mason conformed to both sentences, without error. He limited the parties' depositions to fifteen each,[FN6] and allowed Reed and Freeman the opportunity to revisit the issue in the future upon a showing of good cause. No more is necessary. Further, Reed and Freeman have generally presented a united front in approaching their defense. Therefore, although they may be separate entities, their interests are generally aligned.

> FN6. Rule 30(a)(2)(A) defines the deposing parties to be (1) plaintiffs, (2) defendants, and (3) third party defendants. Here, AHMA is the plaintiff, Reed and Freeman are the defendants, and Farrells are the third party defendants. Judge Mason granted each party 15 depositions, and specified that AHMA and the Farrells could not share their allocation. Defendants assert that Judge Mason's conformance with the Federal Rules of Civil Procedure elevates form over substance. We disagree.

***9** Third, defendants contend that the extent and complexity of the case requires extra depositions. We must weigh the benefit to defendants of additional discovery against the cost and burden to all of the parties of participating in such discovery. Judge Mason is well aware of the issues and claims in this case, as well as the resources and requests of each party. He is in the best position to weigh the benefits against the burdens, and we see no reason to reverse his determination. Therefore, we deny defendants' objections to the magistrate judge's order restricting their depositions to 15. Each party should pay its own costs associated with this motion.

CONCLUSION

For the reasons stated herein, we affirm the magistrate judge's orders with respect to plaintiff's motion to compel Reed to produce documents regarding commissions received in connection with all of Reed's trade shows, plaintiff's motion to compel the production of Reed's general financial documentation, without limiting the disclosure to Reed Exhibitions, and defendants' motion for leave to take 30 depositions. We reverse the magistrate judge's orders with respect to Reed's motion to compel documents reflecting AHMA's payments and perks given to family members of counter-defendants William Farrell, Sr. and Timothy Farrell.

N.D.Ill.,2007.
American Hardware Mfrs. Ass'n v. Reed Elsevier Inc.
Not Reported in F.Supp.2d, 2007 WL 1610455 (N.D.Ill.)

END OF DOCUMENT

TAB 3

HOnly the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
In re BALLY TOTAL FITNESS SECURITIES LITIGATION.
Nos. 04 C 3530, 04 C 3634, 04 C 3713, 04 C 3783, 04 C 3844, 06 C 3936, 04 C 4697, 04 C 1437.

July 12, 2006.

MEMORANDUM OPINION

JOHN F. GRADY, United States District Judge.
***1** Before the court are defendants' motions to dismiss the consolidated class action complaint. For the reasons explained below, the motions are granted.

BACKGROUND

Plaintiffs have filed several related securities fraud putative class actions against Bally Total Fitness Holding Corporation ("Bally"); three of its current or former officers and directors, Lee S. Hillman, John W. Dwyer, and Paul A. Toback; and Bally's former auditor, Ernst & Young, LLP, for violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission (the "SEC"), 17 C.F.R. 240.10b-5. Plaintiffs allege that defendants violated federal securities laws by publicly disseminating false and misleading corporate reports, financial statements, and press releases primarily through "two related fraudulent techniques": improperly recognizing revenue prematurely and improperly delaying the recordation of expenses. (Consolidated Class Action Complaint ("CCAC") ¶ 5.)

We previously granted the parties' motions for consolidation of the cases for all purposes and directed that the consolidated cases be referred to as "In re Bally [Total] Fitness Securities Litigation."(Minute Order of Sept. 8, 2004.) [FN1]We also appointed Cosmos Investment Company, LLC ("Cosmos") as lead plaintiff (Memorandum Opinion of March 15, 2005), and appointed lead and local counsel (Minute Order of May 23, 2005). On January 3, 2006, Cosmos filed a consolidated class action complaint on behalf of a class consisting of those who purchased or acquired Bally securities during the period of August 3, 1999 through and including April 28, 2004. The complaint alleges the following facts, which are taken as true for purposes of the instant motions.

FN1. The consolidated cases are as follows (abbreviating defendants to "Bally"): *Petkun v. Bally,* 04 C 3530; *Marcano v. Bally,* No. 04 C 3634;*Garco Invs., LLP v. Bally,* No. 04 C 3713;*Salzmann v. Bally,* No. 04 C 3783;*Rovner v. Bally,* No. 04 C 3844;*Koehler v. Bally,* No. 04 C 3936;*Eads v. Bally,* No. 04 C 4697; and *Levine v. Bally,* 06 C 1437.

Strougo v. Bally, No. 04 C 3864, was voluntarily dismissed on March 15, 2005, and *Rosenberg v. Bally,* No. 04 C 4342, was voluntarily dismissed on April 7, 2005.

Defendant Bally is a corporation that operates hundreds of fitness centers throughout North America with approximately four million members. Bally's securities are publicly traded on the New York Stock Exchange. During the time period relevant to this action, defendant Dwyer was Bally's Chief Financial Officer ("CFO"), Executive Vice President, and a member of Bally's Board of Directors (the "Board"); defendant Hillman was Chief Executive Officer, President, and Chairman of the Board until December 2002. Defendant Toback is Bally's current Chief Executive Officer, President, and Chairman of the Board. We will refer to Hillman, Dwyer, and Toback collectively, where appropriate, as the "Individual Defendants." The accounting firm Ernst & Young, LLP ("E & Y") was Bally's outside auditor until it resigned the engagement on March 31, 2004.

From August 3, 1999 through April 2004, Bally issued press releases and filed 8-K, 10-K and 10-Q forms with the SEC stating its financial results for various time periods. Some of the SEC filings contained certifications by Dwyer and Hillman, or Dwyer and Toback, pursuant to the Sarbanes-Oxley Act of 2002. In the Sarbanes-Oxley certifications, the

Individual Defendants attested that they had reviewed the contents of the particular report to confirm that it did not contain any untrue statement of material fact or omit a material fact necessary to make the statements not misleading.

***2** Plaintiffs allege that Bally's financial statements were materially false and misleading because, contrary to defendants' representations, they had not been prepared in conformity with Generally Accepted Accounting Principles (GAAP). Bally is alleged to have violated GAAP in the following ways:

- improperly recognizing membership revenue
- deferring costs incurred in signing up members instead of recognizing membership acquisition expenses, thereby reflecting the costs as an asset
- establishing accruals for unpaid dues on inactive membership contracts instead of writing them off as uncollectible
- improperly accounting for payment obligations in relation to the acquisition of a business
- improperly classifying proceeds from the sale of a future revenue stream
- recognizing cash received in advance of the performance of personal training services as fees earned instead of as deferred revenue
- improperly separating multiple-element bundled contracts for health club services, personal training services, and nutritional products into multiple accounting units, resulting in premature revenue recognition
- failing to estimate the ultimate cost of settling self-insurance claims for workers' compensation, health and life, and general liability, thereby materially understating its liability for these claims
- improperly capitalizing costs incurred to develop internal-use software
- failing to record and assign a fair value to certain separately identifiable acquired intangible assets
- establishing a practice of amortizing goodwill over forty years when this amortization period was inconsistent with the maximum reasonable and likely duration of material benefit from the acquired goodwill
- ignoring “trigger events” and other conditions which, at various dates, indicated that the carrying amounts of fixed assets were impaired, and failing to perform any impairment analyses or recognize impairment losses
- reporting the dollar amount of uncashed checks as income instead of as escheatment liabilities;
- capitalizing advertising costs and amortizing those costs over the estimated life of the advertising campaign instead of expensing them when the first advertisement took place
- adding maintenance costs to the costs of property and equipment and then depreciating this improperly established “asset”
- improperly deferring costs associated with start-up activities, such as rent
- failing to properly compile and record inventory on a periodic basis and failing to match appropriate costs with revenues in order to make a proper determination of the realized income
- failing to accrue obligations as of the end of each accounting period even though transactions and events giving rise to the obligations arose during the accounting period
- failing to recognize gains and losses from various foreign currency transactions that affected individual assets, liabilities, and cash flows

***3** • failing to recognize rent expense on club leases with escalating rent obligations using the required straight-line method; failing to reflect lease incentives as reductions of rental expense over the term of the lease; and improperly reflecting tenant allowances as a reduction to property and equipment and depreciating these amounts

• reflecting deferred tax assets and valuation allowances based upon improperly-determined taxable income and without having performed a realistic and objective assessment as to whether it was more likely than not that some or all of the deferred tax asset would not be realized

(CCAC ¶¶ 121-174.)

Plaintiffs also allege that E & Y, in its capacity as Bally's outside auditor during most of the relevant time period, played a role in the fraud. E & Y issued several unqualified audit opinions on Bally's consolidated financial statements for the years 1999-2003. Plaintiffs maintain that E & Y diverged from Generally Accepted Auditing Standards (GAAS) when auditing Bally in that it either identified and ignored flagrant multiple violations of GAAP or recklessly failed to identify these violations.

The complaint alleges that "[t]he truth concerning [Bally's] chronic accounting improprieties began to emerge on April 28, 2004."(CCAC ¶ 8.) On that day, Bally issued a press release announcing that its CFO, Dwyer, had resigned "pursuant to the terms of a separation agreement" and that "[s]eparately, the Company announced" that the SEC had commenced an investigation connected to Bally's recent restatement regarding the timing of recognition of prepaid dues.[FN2](*Id.* ¶ 8 (quoting from press release).) In plaintiffs' view, the press release "cast serious doubt on the accuracy and reliability of Bally's financial statements, and, significantly, on the integrity of Bally's management."(*Id.* ¶ 9.)

FN2. On April 2, 2004, Bally had issued an initial restatement of previously-reported 2003 financial results. (CCAC ¶ 8 n. 1.)

Plaintiffs assert that in response to the April 28, 2004 announcement, the price of Bally common stock fell from $5.40 per share on April 28 to $4.50 per share on April 29, a 16.6% drop. In the period of ninety trading days following the April 28 disclosure, the stock reached a mean trading price of $4.56 per share.

When Bally found out that it was being investigated by the SEC, it initiated an internal investigation of its accounting practices, spearheaded by its Audit Committee. On November 15, 2004, Bally announced that based on the internal investigation, the Audit Committee had concluded that Bally's financial statements for the years 2000 through 2003 (including the initial restatement of 2003 that had been issued on April 2, 2004) and the first quarter of 2004 could no longer be relied upon and should be restated. Bally also announced that it would be unable to issue any financial statements for the remainder of 2004 or for 2005 until it had completed the restatements, which were expected to be issued in July 2005 (but were not actually issued until November 2005).

***4** On February 8, 2005,[FN3] Bally issued a press release announcing the findings of the Audit Committee. Bally announced that it was suspending the severance pay of Hillman and Dwyer (the former CEO and CFO, respectively), who, in the Audit Committee's view, "were responsible for multiple accounting errors and creating a culture within the accounting and finance groups that encouraged aggressive accounting."(CCAC ¶ 14.) Bally also stated that it had identified deficiencies in its internal controls over financial reporting.

FN3. Plaintiffs state in their briefs that the complaint incorrectly refers to this date as February 10, 2005. (Plaintiffs' Response to E & Y's Mot. at 4 n. 2, Plaintiffs' Response to Bally Defs.' Mot. at 6 n. 3.)

On November 30, 2005, Bally filed a restatement that comprehensively restated its financial results for 2000, 2001, 2002, and 2003, and first reported results for 2004 and the first three quarters of 2005 (the "Restatement"). The adjustments in the Restatement resulted in an increase in previously-reported net loss of $96.4 million for the year 2002 and a decrease in net loss of $540 million for the year 2003. Bally also increased the January 1, 2002 opening accumulated stockholders' deficit by $1.7 billion to recognize the effects of corrections in financial statements prior to 2002.

The first of these related cases was filed on May 20, 2004. The consolidated class action complaint of January 3, 2006 contains two counts. In Count I, plaintiffs allege that the defendants violated § 10(b) of the Securities Exchange Act and Rule 10b-5. Count II is a "control person" claim in which plaintiffs allege that the Individual Defendants violated § 20(a) of the Securities Exchange Act. Plaintiffs seek

compensatory damages as well as attorney's fees, costs, and expenses.

Four separate motions to dismiss the consolidated class action complaint have been filed by (1) Bally and Toback; (2) Hillman; (3) Dwyer; and (4) E & Y. Those motions are now fully briefed.

DISCUSSION

Section 10 (b) of the Securities Exchange Act makes it unlawful for a person "[t]o use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe."15 U.S.C. § 78j(b). Among those rules is Rule 10b-5, which "prohibits the making of any untrue statement of material fact or the omission of a material fact that would render statements made misleading in connection with the purchase or sale of any security." *In re HealthCare Compare Corp. Sec. Litig.*, 75 F.3d 276, 280 (7th Cir.1996).[FN4] To prevail on a Rule 10b-5 claim, a plaintiff must establish that the defendant: (1) made a false statement or omission, (2) of material fact, (3) with scienter, (4) in connection with the purchase or sale of securities, (5) upon which the plaintiff justifiably relied, and (6) that the false statement or omission proximately caused the plaintiff's injury. *Otto v. Variable Annuity Life Ins. Co.*, 134 F.3d 841, 851 (7th Cir.1998).

FN4. Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.
>
> 17 C.F.R. § 240.10b-5.

The heightened pleading requirements of Federal Rule of Civil Procedure 9(b) apply here because plaintiffs' claims are based on securities fraud. *See Sears v. Likens*, 912 F.2d 889, 893 (7th Cir.1990) ("Rule 9(b)... governs claims based on fraud and made pursuant to the federal securities laws.").Rule 9(b) requires plaintiffs to plead with particularity the factual bases for averments of fraud, including "the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff."*Id.* (citation omitted); *see also DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir.1990) (stating that the plaintiff must plead the who, what, when, where, and how of the alleged fraud).

***5** Plaintiffs' claims are also subject to the heightened pleading requirements of the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4*et seq.*,[FN5] which the Seventh Circuit recently described:

> FN5. The PSLRA "was designed to curb abuse in securities suits, particularly shareholder derivative suits in which the only goal was a windfall of attorney's fees, with no real desire to assist the corporation on whose behalf the suit was brought." *Green v. Ameritrade, Inc.*, 279 F.3d 590, 595 (8th Cir.2002).

> Unlike a run-of-the-mill complaint, which will survive a motion to dismiss for failure to state a claim so long as it is possible to hypothesize a set of facts, consistent with the complaint, that would entitle the plaintiff to relief, the PSLRA essentially returns the class of cases it covers to a very specific version of fact pleading-one that exceeds even the particularity requirement of [Rule] 9(b). Under the PSLRA, a securities fraud complaint must (1) "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the

> statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed" and (2) "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."15 U.S.C. § 78u-4(b)(1), (2). In other words, plaintiffs must not only plead a violation with particularity; they must also marshal sufficient facts to convince a court at the outset that the defendants likely intended to deceive, manipulate, or defraud.
> *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588, 594 (7th Cir.2006) (citations and some internal quotation marks omitted).

Defendants contend that plaintiffs have failed to plead their claims with the required particularity and that plaintiffs have failed to adequately plead the elements of scienter and loss causation.

A. *Scienter*

To satisfy the scienter requirement of § 10(b) and Rule 10b-5, a plaintiff must demonstrate that a defendant either had the "intent to deceive, manipulate, or defraud," *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976), or a "reckless disregard for the truth of the material asserted, whether by commission or omission," *Ambrosino v. Rodman & Renshaw, Inc.*, 972 F.2d 776, 789 (7th Cir.1992) (internal quotation marks omitted)."[R]eckless conduct may be defined as a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it."*Sundstrand Corp. v. Sun Chem. Corp.,* 553 F.3d 1033, 1045 (7th Cir.1977), *cited in* *Makor Issues,* 437 F.3d at 600.

"Congress did not, unfortunately, throw much light on what facts will suffice to create [a strong inference of scienter]. Currently three different approaches toward the way to demonstrate the required 'strong inference' exist among the courts of appeals." *Makor Issues,* 437 F.3d at 601. One approach is to allow plaintiffs to state a claim by pleading either motive and opportunity or strong circumstantial evidence of recklessness or conscious misbehavior. The second approach declines to adopt the "motive and opportunity" analysis and imposes a more onerous burden of pleading in great detail facts constituting strong circumstantial evidence of deliberately reckless or conscious misconduct. *See id.*(summarizing case law). In *Makor Issues,* the Seventh Circuit chose the middle ground, which neither adopts nor rejects particular methods of pleading scienter, such as alleging facts showing motive and opportunity, but instead requires plaintiffs to plead facts that together establish a strong inference of scienter. *See id.*"[T]he best approach is for courts to examine all of the allegations in the complaint and then to decide whether collectively they establish such an inference. Motive and opportunity may be useful indicators, but nowhere in the statute does it say that they are either necessary or sufficient."*Id.*

***6** Another concern discussed in *Makor Issues* is the degree of imagination we can use in deciding whether a complaint creates a strong inference of scienter. The Seventh Circuit held: "Instead of accepting only the most plausible of competing inferences as sufficient at the pleading stage, [FN6] we will allow the complaint to survive if it alleges facts from which, if true, a reasonable person could infer that the defendant acted with the required intent ."*Id.* at 602.

> FN6. The Court was referring to the Sixth Circuit's pronouncement in *Fidel v. Farley,* 392 F.3d 220, 227 (6th Cir.2004), that the "strong inference" requirement creates a situation where plaintiffs are entitled only to the most plausible of competing inferences. The Seventh Circuit declined to express a view on whether the Sixth Circuit's approach is constitutional, but stated: "[W]e think it wiser to adopt an approach that cannot be misunderstood as a usurpation of the jury's role." *Makor Issues,* 437 F.3d at 602.

The Seventh Circuit also held in *Makor Issues* that the "group pleading doctrine," pursuant to which scienter allegations made against one defendant could be imputed to all other defendants in the same action, did not survive the heightened pleading requirements of the PSLRA. *See id.* at 603. "While we will aggregate the allegations in the complaint to determine whether it creates a strong inference of scienter, *plaintiffs must create this inference with respect to each individual defendant* in multiple defendant cases."*Id.* (emphasis added).

Defendants contend that plaintiffs have failed to plead any particularized facts sufficient to give rise to any inference, much less the requisite strong inference, of scienter. Defendants point out that plaintiffs have failed to allege any particular "red flags" that should have warned defendants of accounting problems or any particular conversations, meetings, or documents. Moreover, the complaint fails to allege that the Individual Defendants sold any stock during the class period and thereby benefited from the allegedly inflated stock prices. Defendants also argue that the complaint is problematic because it expressly relies on the "group pleading doctrine," which was rejected in *Makor Issues.*[FN7]

> FN7. The complaint states: "It is appropriate to treat the Individual Defendants as a group for pleading purposes ...." (CCAC ¶ 33.)

In their responses [FN8] to defendants' motions, plaintiffs submit that they have met their burden of pleading scienter by alleging the following, taken collectively: (1) the "admissions" in Bally's press release of February 8, 2005; (2) the characteristics of the Restatement; (3) "motive and opportunity" allegations; and (4) Bally's violation of its own internal accounting policies.[FN9]We will address each category in turn and then address each of the defendants.

> FN8. Plaintiffs filed two responsive briefs to defendants' motions. One brief responds to the motions of Bally and Toback, Hillman, and Dwyer; the second brief responds to the motion of E & Y.

> FN9. Plaintiffs categorize their allegations slightly differently, but we have reorganized them to facilitate our discussion.

Plaintiffs first point to Bally's press release of February 8, 2005, which announced the findings of Bally's Audit Committee, and quote extensively in their briefs from that press release. (The press release is also attached as an exhibit to plaintiffs' briefs.) The press release included, *inter alia,* the following statements: there had previously been numerous accounting errors; Bally had taken "aggressively optimistic positions" on accounting policies "without a reasonable empirical basis"; Hillman and Dwyer, who had both resigned by then, had been responsible for a culture of "aggressive accounting"; Dwyer had made a "false and misleading" statement to the SEC; as a result of the findings, Hillman and Dwyer's severance pay was being discontinued; two employees (who are not defendants in this action) had engaged in unspecified "improper conduct"; E & Y had "made several errors" in its audit work; and Bally's "internal controls" had numerous deficiencies. (Plaintiffs' Response to Bally Defs.' Mot. at 6-7.)

***7** Plaintiffs maintain that through these statements, Bally "admitted its own scienter." If that is the case, we find it curious that the complaint refers to the press release in only two paragraphs and quotes from it only in relation to the statement regarding Hillman and Dwyer creating a culture of "aggressive accounting." (CCAC ¶¶ 14-15.) Plaintiffs argue that they are permitted to allege additional facts in response to a motion to dismiss so long as those facts are consistent with the complaint's allegations. The cases they cite for this proposition, however, were not cases where fact pleading was required, as it is here.

Nevertheless, for purposes of this motion and so we do not have to revisit this issue, we will consider the complaint as incorporating the press release. We do not believe it assists the plaintiffs in raising an inference of scienter. First of all, the findings are vague and unspecific, and many of the terms, such as "aggressive accounting" and "aggressively optimistic," are imprecise. None of the alleged errors, aggressively optimistic positions, improper conduct, or deficiencies in controls constitute particularized allegations. And contrary to plaintiffs' argument, the fact that Bally acknowledged that false statements were made is not equivalent to admitting scienter. A false statement is one element of a securities fraud claim; scienter is a wholly separate element. The Audit Committee's findings are essentially of negligence, but not scienter. It is important to remember that simple negligence and even "inexcusable negligence" does not amount to scienter. What is required to be shown is an *extreme* departure from the standards of ordinary care. The findings do not rise to this level. Another reason why the press release does not support an inference of scienter is that the findings are simply hindsight conclusions. They do not assist in determining the state of mind behind the misstatements at the time they were made. *See generally* *DiLeo,* 901 F.2d at 628 ("There is no 'fraud by hindsight' ...."); *Sundstrand,* 553 F.2d at 1045 n. 19

("[T]he circumstances must be viewed in their contemporaneous configuration rather than in the blazing light of hindsight."); *Davis v. SPSS, Inc.*, 385 F.Supp.2d 697, 714 (N.D.Ill.2005) ("Permutations of 'fraud by hindsight' do not create an inference, much less a strong inference, of *scienter."*).

The second factor relied on by plaintiffs is the Restatement and its characteristics. Plaintiffs assert that the Restatement "totaled 438% of the aggregate pre-restatement net income" and that we can infer scienter from the magnitude of the Restatement, combined with the high number and repetitiveness of the GAAP violations and the simplicity of the accounting principles that were violated. (Plaintiffs' Response to Bally Defs.' Mot. at 14-16.)

The Seventh Circuit has observed that even a very large restatement is not itself evidence of scienter:

> ***8** Four billion dollars is a big number, but even a large column of big numbers need not add up to fraud.
>
> ...
>
> The story ... is familiar in securities litigation. At one time the firm bathes itself in a favorable light. Later the firm discloses that things are less rosy. The plaintiff contends that the difference must be attributable to fraud. "Must be" is the critical phrase .... Because only a fraction of financial deteriorations reflects fraud, plaintiffs may not proffer the different financial statements and rest. Investors must point to some facts suggesting that the difference is attributable to fraud.

DiLeo, 901 F.2d at 627 (citing, *inter alia*, *Goldberg v. Household Bank, F.S.B.*, 890 F.2d 965, 967 (7th Cir.1989), which noted: "Restatements of earnings are common.").*See also* *Fidel v. Farley*, 392 F.3d 220, 231 (6th Cir.2004) ("Allowing an inference of scienter based on the magnitude of fraud ... would ... allow the court to engage in speculation and hindsight, both of which are counter to the PSLRA's mandates."); *Davis*, 385 F.Supp.2d at 713 ("Restatements establish that misleading statements were made, but ... provid[e] no assistance in determining the intent behind the misstatements."); *Chu v. Sabratek Corp.*, 100 F.Supp.2d 815, 824 (N.D.Ill.2000) ("A company's overstatement of earnings, revenues, or assets in violation of GAAP does not itself establish scienter.").

We are not prepared to say that the magnitude of a restatement could never contribute to an inference of scienter. But this is not such a case, especially considering that the SEC filings and press releases at issue did not consistently overstate revenues and income or consistently understate losses. Rather, the revenue for some quarters was at times understated and losses for some quarters were at times overstated during the class period. On these facts, it is clear that significant mistakes were made, but we cannot infer scienter. The same can be said for plaintiffs' argument that the number and repetitiveness of the GAAP violations and the purported simplicity of the pertinent accounting principles support an inference of scienter. These "characteristics" of the Restatement are simply another way of saying that multiple accounting errors were made, but they are not facts tending to show that defendants acted with the required intent.

Another category of allegations relied upon by plaintiffs can be deemed the "motive and opportunity" allegations. One allegation is that the Individual Defendants had the opportunity to commit fraud based on their positions in the company and their access to financial information. Scienter, however, may not rest on the inference that defendants must have been aware of a misstatement based simply on their positions within the company. *See* *Davis*, 385 F.Supp.2d at 713-14 (quoting *Johnson v. Tellabs, Inc.*, 262 F.Supp.2d 937, 957 (N.D.Ill.2003) and *Abrams v. Baker Hughes Inc.*, 292 F.3d 424, 432 (5th Cir.2002)). Plaintiffs assert that they have not pled scienter based merely on the Individual Defendants' positions in the company, but also on the Individual Defendants' personal responsibility for the accounting errors and aggressive accounting as well as their signed Sarbanes-Oxley certifications attesting that they had evaluated the company's internal controls. As noted above in relation to the Audit Committee's findings, the assertion that the Individual Defendants were personally responsible for the errors and "aggressive accounting" is conclusory; there are no facts alleged to bolster this allegation. Nor are any particular facts alleged as to what internal controls the Individual Defendants were familar with and how these related to the accounting misstatements.

***9** Plaintiffs also emphasize their allegation that the accounting misstatements were related to Bally's "core business" and contend that we can therefore infer scienter because senior executives are presumed to know facts critical to a company's core operations. They also assert that we can infer scienter from Hillman and Dwyer's backgrounds in accounting. These arguments are attempts at an end-run around the requirement that plaintiffs set forth particularized facts to suggest that defendants acted knowingly or recklessly. Plaintiffs cannot rely on a "must have known" theory. *See* *Friedman v. Rayovac Corp.*, 295 F.Supp.2d 957, 995 (W.D.Wis.2003) (stating that the inference that officers and directors are aware of the corporation's "core business matters" relies on a "must have known" logic that the Seventh Circuit has rejected even under Rule 9(b)) (citing *DiLeo*, 901 F.2d at 629).

Plaintiffs' "motive" allegations are twofold: (1) defendants were motivated to misstate Bally's financial results in order to obtain financing, refinance outstanding debt, and complete acquisitions; and (2) the Individual Defendants were motivated to misstate financial results in order to earn bonuses contingent on financial performance and stock awards pursuant to incentive plans. We will first address these allegations in relation to the Individual Defendants and will then return to the first category of allegations in relation to Bally.[FN10]

> FN10. These allegations have no relevance to the scienter of E & Y.

Neither category of "motive" allegations is evidence of scienter as to the Individual Defendants. "Motives that are generally possessed by most corporate directors and officers do not suffice; instead, plaintiffs must assert a concrete and personal benefit to the individual defendants resulting from the fraud." *Kalnit v. Eichler*, 264 F.3d 131, 139 (2d Cir.2001). We cannot infer scienter on the part of the Individual Defendants merely from their general desire for their corporation to appear profitable and thereby obtain financing and engage in mergers or acquisitions. *See id.*; *Davis*, 385 F.Supp.2d at 714 (increased company buying power afforded by an overvalued stock is a broad motive that easily applies to a majority of corporate executives and is insufficient to establish scienter); *Malin v. IVAX Corp.*, 17 F.Supp.2d 1345, 1361 (S.D.Fla.1998) (motive of maintaining a stock price in order to facilitate mergers and acquisitions "can be ascribed to virtually all corporate officers and directors" and thus fails to raise a strong inference of scienter).

Regarding the motive to earn bonuses and awards, we agree with the view of numerous courts that these allegations are too common among corporations and their officers to be considered evidence of scienter. *See, e.g.*, *Abrams*, 292 F.3d at 434 ("Incentive compensation can hardly be the basis on which an allegation of fraud is predicated.... It does not follow that because executives have components of their compensation keyed to performance, one can infer fraudulent intent."); *Sandmire v. Alliant Energy Corp.*, 296 F.Supp.2d 950, 959 (W.D.Wis.2003) ("Motivations to keep stock prices high to increase personal salaries and to boost financial standing to gain regulatory approval are so common among corporations and their officers that allowing them to satisfy the scienter allegation requirement would be tantamount to eliminating it."). As the court in *Davis* observed:

> ***10** The complaint alleges that [defendants] shared certain motives to inflate the stock price-increased compensation for the officers, an ability to meet analyst expectations, and increased company buying power afforded by an overvalued stock. Just as these broad motives apply to [defendants], they easily apply to a majority of corporate executives. The desire to increase the value of a company and attain the benefits that result, such as meeting analyst expectations and reaping higher compensation, are basic motivations not only of fraud, but of running a successful corporation. Were courts to accept these motives as sufficient to establish *scienter,* most corporate executives would be subject to such allegations, and the heightened pleading requirements for these claims would be meaningless.

Davis, 385 F.Supp.2d at 714.

As for defendant Bally, some courts (largely in the Eastern District of Pennsylvania) have held that stock-based acquisitions that occurred at the time of alleged misrepresentations can support an inference of scienter in some circumstances. *See, e.g.*, *In re NUI Sec. Litig.*, 314 F.Supp.2d 388, 412 (D.N.J.2004); *Marra v.. Tel-Save Holdings, Inc.*, No.

Master File 98-3145, 1999 WL 317103, at *8-10 (E.D.Pa. May 18, 1999). We do not believe that these allegations give rise to a strong inference of scienter here. It is not alleged that the two acquisitions that were completed during the class period were strictly for stock only, as is the situation in most of the cases where such transactions have been held to give rise to an inference of scienter. Moreover, there are no allegations that any particular financial results were misstated in order to effectuate any particular acquisition. Instead, plaintiffs allege generally that defendants were motivated to misstate results in order to artificially inflate Bally stock, and that defendants then "took advantage of th[e] artificial inflation" to obtain financing and effectuate acquisitions. (CCAC ¶ 272.) These allegations, at most, give rise to only a very weak inference of scienter on the part of Bally.

A final allegation on which plaintiffs rely in support of scienter is that Bally violated its own internal accounting policies. This allegation is similar to the allegations of GAAP violations in that it only goes toward establishing that misstatements were made. Allegations that GAAP or Bally's internal accounting policies were violated do not establish that the misstatements were made with the requisite intent. *See In re BISYS Sec. Litig.*, 397 F.Supp.2d 430, 448 (S.D.N.Y.2005).

So, where do these allegations leave us with respect to each defendant? We will begin with the Individual Defendants-Hillman, Dwyer, and Toback. None of the allegations discussed *supra* have raised a strong inference of scienter with respect to them. In addition, there are no allegations of circumstances suggestive of scienter, such as large insider stock sales or specific meetings during which particular financial representations were discussed. Plaintiffs emphasize that we have to consider the allegations in their totality. This is indeed the correct standard, see *Makor Issues*, 437 F.3d at 603 ("[W]e will aggregate the allegations in the complaint to determine whether it creates a strong inference of scienter ...."), and it is the one that we are employing. Nonetheless, even under this standard, plaintiffs' allegations fall far short of adequately pleading scienter with respect to the Individual Defendants. The complaint relies largely on conclusory allegations, speculation, and a "must have known" approach. Plaintiffs have simply failed to allege with particularity facts giving rise to a strong inference that Hillman, Dwyer, or Toback acted with the required intent or recklessness.[FN11]

> FN11. We note that Hillman also argues that he is not responsible for statements made after his retirement on December 11, 2002. Plaintiffs concede that Hillman is not responsible for any statements made after his retirement. (Plaintiffs' Response to Bally Defs.' Mot. at 25 n. 10.)

***11** Plaintiffs contend, without explanation, that even if the complaint fails to allege scienter against the Individual Defendants, it still sufficiently alleges scienter against Bally. (Plaintiffs' Response to Bally Defs.' Mots. at 27 n. 14.) Plaintiffs argue that scienter on Bally's part can be alleged based on the "collective knowledge of its employees." (*Id.* at 12.) We disagree. The Seventh Circuit has expressed doubt about an "independent corporate scienter theory." *See Caterpillar, Inc. v. Great Am. Ins. Co.*, 62 F.3d 955, 963 (7th Cir.1995); *see also Higginbotham v. Baxter Int'l, Inc.*, Nos. 04 C 4909, 04 C 7906, 2005 WL 1272271, at *8 (N.D.Ill. May 25, 2005) (rejecting the theory and noting that the Fifth Circuit and the Ninth Circuit have also rejected it)."A corporation can only 'know' those things known by persons acting on its behalf." *Ong ex rel. Ong IRA v. Sears, Roebuck & Co.*, 388 F.Supp.2d 871, 901 n. 19 (N.D.Ill.2004). Plaintiffs have failed to allege facts giving rise to a strong inference that *anyone* acting for Bally had the requisite state of mind, let alone the Individual Defendants. In addition, as stated *supra,* Bally' s acquisitions that were partly paid for in stock give rise to only a very weak inference of scienter. In any event, even if we accepted plaintiffs' argument that "collective knowledge" allegations are sufficient, there is virtually nothing in the complaint suggesting with particularity what that "collective knowledge" was.

As for E & Y, it was Bally's outside auditor, and as applied to outside auditors, "recklessness means that the accounting firm practices amounted to no audit at all, or to an egregious refusal to see the obvious, or to investigate the doubtful, or that the accounting judgments which were made were such that no reasonable accountant would have made the same decisions if confronted with the same facts." *Chu*, 100 F.Supp.2d at 823 (internal quotation marks omitted). E & Y argues that the section of the complaint setting forth plaintiffs' principal scienter allegations fails to state any facts regarding E & Y and that the complaint

fails to point to any "red flags" suggesting recklessness.

Plaintiffs first contend that we can infer scienter from the fact that the press release announcing the Audit Committee's findings stated that Bally believed that E & Y had made several errors in the course of its auditing work. (CCAC ¶ 16.) In plaintiffs' view, they are "entitled to an inference that the press release reveals conduct by E & Y that was at least reckless, if not fraudulent."(Plaintiffs' Response to E & Y's Mot. at 9.) Plaintiffs are incorrect. As discussed *supra,* possible accounting errors alone do not raise an inference of scienter. *See, e. g., Fidel,* 392 F.3d at 231 (holding that a subsequent revelation of the falsity of previous statements does not imply scienter by an outside auditor); *In re Ikon Office Solutions, Inc.,* 277 F.3d 658, 673 (3d Cir.2002) ("[T]he discovery of discrete errors after subjecting an audit to piercing scrutiny post-hoc does not, standing alone, support a finding of intentional deceit or of recklessness.").

***12** Aside from allegations about the characteristics of the restatement and Bally's violation of its internal accounting policies, which we have discussed and rejected *supra* as sufficient bases for an inference of scienter, the only other argument proffered by plaintiffs regarding E & Y's scienter is that E & Y was "indifferent" to red flags during its audits. (Plaintiffs' Response to E & Y's Mot. at 10-14.) In their response brief, plaintiffs list twelve red flags that "should have prompted E & Y to exercise greater professional skepticism during its audits."(*Id.* at 12-14.) The problem is that plaintiffs fail to describe these red flags in the complaint. Plaintiffs cite cases for the proposition that we may consider facts alleged in their brief if those facts are consistent with the complaint's allegations, but those cases are inapposite because they involved notice pleading, not fact pleading as required by the PSLRA.

For the sake of judicial economy, however, we will consider the twelve "red flag" items listed in plaintiffs' brief as if they had been included in the complaint.[FN12]Although allegations of obvious "red flags" or warning signs that financial reports are misstated can give rise to a strong inference of scienter in some circumstances, *see Chu,* 100 F.Supp.2d at 824, plaintiffs' allegations are insufficient to raise a strong inference that E & Y acted with scienter. Plaintiffs' "red flags" are largely reconstituted versions of their allegations couched in the context of the Audit Standards of the American Institute of Certified Public Accountants. Four items deal with what was "revealed" in the Audit Committee's investigation. The Audit Committee's findings involve hindsight; they do not shed light on what E & Y knew at the time of the audits. Therefore, they do not constitute red flags relevant to scienter. *See, e.g., Davis,* 385 F.Supp.2d at 713-14 (red flags cannot arise out of later discoveries).

> FN12. Plaintiffs have requested leave to amend the complaint in the event that defendants' motions are granted. Plaintiffs would undoubtedly amend the complaint to include the "red flag" allegations, and the scienter issue would arise again. Better to resolve it sooner than later and avoid duplication of efforts.

None of the remaining items raises a strong inference of scienter. Five items are problematic because they are not based on facts that are actually alleged. Plaintiffs assert that the following situations constitute "red flags": where "significant portions" of management's compensation are contingent upon achieving aggressive financial targets; where management has "significant" financial interests in the entity; where a company "needs" to obtain additional debt or equity to stay competitive; where a company has an "active" merger or acquisition calendar; and where a company has "unusually rapid growth or profitability." Plaintiffs have not alleged, though, that Bally's management had incentives or financial interests that were "significant" in that they were much larger than executives at comparable entities. Nor have plaintiffs alleged that Bally needed to obtain the financing it obtained or complete the acquisitions that it did in order to stay competitive, or that Bally's merger calendar was more active than comparable entities, or that Bally had unusually rapid growth compared to other companies. It is not evident that any of these five red flags actually existed on the facts that have been alleged.

***13** The three remaining purported "red flag" items are too weak to raise a strong inference of scienter. One is management's failure "to correct known reportable conditions on a timely basis."(Plaintiffs' Response to E & Y's Mot. at 14.) Plaintiffs contend that E & Y stated in 2004 that it had been aware of

material weakness in "internal accounting control" for the years 2001-2003 and took that into account in performing its audits. We do not believe that it follows from this allegation that there was a failure to correct a "known reportable condition" on a timely basis. It is not even clear what constitutes a "known reportable condition."

The final two items are not even characterized by plaintiffs themselves as red flags. One is that Bally inadequately disclosed its accounting policies and therefore E & Y should have been alerted to the risk of fraud. The other is that each of the Individual Defendants worked for E & Y prior to joining Bally and that therefore E & Y should have exercised "increased audit skepticism." These items do not strike us as red flags; rather, they are risk factors."[S]o-called 'red flags', which should be deemed to have put a defendant on notice of alleged improprieties, must be closer to 'smoking guns' than mere warning signs." *Nappier v. Pricewaterhouse Coopers LLP,* 227 F.Supp.2d 263, 278 (D.N.J.2002) (citation and some internal quotation marks omitted). Plaintiffs have failed to identify any true red flags, which are "specific, highly suspicious" facts or circumstances available to E & Y at the time of its audits. *Riggs Partners, LLC v. Hub Group, Inc.,* No. 02 C 1188, 2002 WL 31415721, at *9 (N.D.Ill. Oct. 25, 2002). E & Y argues that plaintiffs have attempted to "cherry-pick a handful of very generalized risk factors, label them as 'red flags,' and stitch them together to show scienter."(E & Y's Reply at 13.) We agree. Plaintiffs have failed to allege facts tending to show that E & Y acted with the requisite scienter.

Because plaintiffs have failed to allege particularized facts sufficient to give rise to a strong inference that any of the defendants acted with the requisite intent or recklessness, Count I of the consolidated class action complaint, the § 10(b) claim, will be dismissed. Count II, the § 20(a) "control person" claim against the Individual Defendants, will also be dismissed because if there is no actionable underlying violation of the securities laws, there can be no control person liability. *See Sequel Capital, LLC v. Rothman,* No. 03 C 678, 2003 WL 22757758, at *17 (N.D.Ill. Nov. 20, 2003); *In re Allscripts, Inc. Sec. Litig.,* No. 00 C 6796, 2001 WL 743411, at *12 (N.D. Ill. June 29, 2001).

Plaintiffs have requested leave to amend the complaint in the event of a dismissal. Plaintiffs will be granted leave to amend; therefore, the dismissal will be without prejudice.

B. *Loss Causation*

We could have ended our discussion by stating that it is unnecessary to address defendants' loss causation arguments because we are dismissing on scienter grounds. But plaintiffs have requested, and we will grant, leave to amend the complaint. In light of the possibility of another motion to dismiss, it is useful to take up the loss causation issue now.

***14** Plaintiffs suing under the PSLRA must plead and prove that the defendant's purported fraudulent statement or omission was the cause of their loss. *See*15 U.S.C. § 78u-4(b)(4); *Dura Pharm., Inc. v. Broudo,* 544 U.S. 336, 347 (2005). Pursuant to *Dura,* the complaint must provide defendants "with some indication of the loss and the causal connection that" plaintiffs have in mind. *Id.* The complaint in *Dura* alleged that the price of the stock plaintiffs had purchased was inflated because of defendants' misstatements, but not that the share price had fallen after the truth became known. The Supreme Court held that the complaint was insufficient because an inflated purchase price does not itself constitute or proximately cause economic loss. *Id.*

Here, as in *Dura,* it is alleged in the complaint that as a result of defendants' false and misleading statements, Bally stock traded at artificially inflated prices during the class period. (CCAC ¶¶ 274-79.) But what it also alleges distinguishes this case from *Dura:* that when the truth became known by virtue of the April 28, 2004 announcement, the price of Bally stock "fell precipitously" and, as a result, plaintiffs suffered economic loss. (CCAC ¶¶ 280-81.)

Defendants maintain that plaintiffs have failed to plead loss causation because the "truth" actually became known in an earlier announcement indicating that Bally was planning on issuing a restatement of certain financial results. Defendants also argue that the price of Bally stock had already greatly declined over the course of the class period and thus the announcement was not the cause of plaintiffs' loss. Defendants frame their position as a *Dura* argument, but in reality it goes to the merits of plaintiffs' case. The essence of defendants' arguments is that plaintiffs

cannot *prove* loss causation. But that is not an appropriate consideration on a motion to dismiss. It is axiomatic that on a motion to dismiss, we accept as true all factual allegations in the complaint. *See Hentosh v. Herman M. Finch Univ. of Health Sciences,* 167 F.3d 1170, 1173 (7th Cir.1999). Plaintiffs have sufficiently alleged loss causation in accord with *Dura,* and that is all that is required of them at this juncture.

CONCLUSION

For the foregoing reasons, the following motions to dismiss the consolidated class action complaint are granted: (1) the motion of Lee S. Hillman; (2) the motion of John W. Dwyer; (3) the motion of Bally Total Fitness Holding Corporation and Paul A. Toback; and (4) the motion of Ernst & Young, LLP. The consolidated class action complaint is dismissed without prejudice.

Plaintiffs may file an amended consolidated class action complaint by August 14, 2006.

A status hearing is set for September 13, 2006, at 10:00 a.m.

N.D.Ill.,2006.
In re Bally Total Fitness Securities Litigation
Not Reported in F.Supp.2d, 2006 WL 3714708 (N.D.Ill.)

END OF DOCUMENT

TAB 4

H

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern Division.

BASF CORPORATION, Plaintiff,

v.

THE OLD WORLD TRADING COMPANY, INC., Defendant.

No. 86 C 5602.

Sept. 8, 1992.

MEMORANDUM OPINION AND ORDER

LEINENWEBER, District Judge.

***1** On May 25, 1992, the court made Findings of Fact and Conclusions of law upon which judgment was entered in favor of the plaintiff, BASF Corporation ("BASF"), in the amount of $2,498,726, together with prejudgment interest and attorney's fees. BASF now seeks to alter or amend the judgment pursuant to Federal Rules of Civil Procedure 59(e) and to amend the Findings of Fact and Conclusions of Law pursuant to Rule 52(b).

Rule 59(e) Motion

1. BASF points out that on the Rule 58 judgment order entered by the court, the last sentence inadvertently ends with the words "this case is dismissed in its entirety." What the court meant to say was that all of BASF's claims had been dealt with and disposed of. The last sentence of the Rule 58 judgment order is hereby amended to read as follows:

> "The court has previously granted Old World's motion for summary judgment on Count II. The court reserves jurisdiction over the award of costs, attorney's fees, and prejudgment interest."

2. BASF next contends that the court erroneously failed to award BASF its profits on lost customer sales occurring in the 1988 antifreeze year, i.e., the period between April 1, 1987 and March 31, 1988. With respect to lost customer sales for the 1988 antifreeze year, the court made Finding of Fact No. 36 that defendant, Old World Trading Company, Inc. ("Old World"), terminated its business relationship with Dearborn Chemical Company ("Dearborn") with the conclusion of the 1987 antifreeze year which was March 31, 1987, and did not purchase inhibitor chemicals from Dearborn after that date. The court, therefore, declined to award BASF any lost profits due to lost 1988 antifreeze sales. BASF asks the court to amend the judgment to include damages for at least a portion of 1988 because it contends that Old World continued to blend the Dearborn formula up to at least July 24, 1987.

The basis for the court's Finding of Fact was the testimony of George Beck ("Beck") and other witnesses called by BASF, and the absence of any direct evidence of sales of the Dearborn formula to Old World customers in 1988, even though there was some evidence that Old World continued to blend the Dearborn formula at some of its blending stations.

Specifically, Beck, a salesman for Dearborn in charge of the Old World account, testified that Dearborn lost the Old World account for the 1988 season, when Old World went exclusively with the Peak formula and gave Dearborn no more orders (Tr. 1225-1226). Richard Tumm, Dearborn's director of sales, testified in a similar vein (Tr. 444 and 458-459). John Hurvis, Old World's chairman, testified that the relationship with Dearborn ended on or about that date (Tr. 612 and 632-633). The evidence to the contrary consisted of blending records which indicate some blending may have occurred after April 1, 1987 (presumably with leftover Dearborn inhibitors in stock). There was also testimony of Larry Birch ("Birch") of Citgo attempting to interpret a reference in a memorandum to the effect that Old World was holding 90,000 gallons of the Dearborn formula for sale by Citgo. However, in

the same memo, Birch is advised of the BASF lawsuit against Old World based on the formula failing to met Ford's specifications. There was no evidence that Citgo ever sold or even took possession of this product.

***2** BASF next argues that the records Old World produced and identified through Jeff Grizzle at his deposition show that all of Old World's blenders continued to blend the Dearborn formula for varying periods of time after April 1, 1987, up until July, 1987. However, these records were to the best of the court's knowledge not submitted to the court as part of the record in the case. These records, at least the summary prepared and submitted by BASF, does not tell to whom the antifreeze was sold. The evidence was that the heaviest call for antifreeze commenced in late July or early August (Tr. 458). Finally, the customers claimed lost by BASF were aware of BASF's pending lawsuit against Old World and the charge that the Old World antifreeze did not meet its claims. It is hard to believe that BASF lost any sales because of the false claims of Old World after April 1, 1987.

3. BASF also claims that the court's market share analysis improperly used the entire antifreeze market instead of just the private label market. It contends that its share of the non-Old World private label market was 28 percent in 1985 and rose to 34 percent in 1988, instead of the 15.6 percent to 21.2 percent of the total antifreeze market utilized by the court in its damage calculations. However, BASF did not introduce evidence of the respective market shares in the private label market.

BASF in its reply brief explained how it computed its percentage of the private label market. It deducted the market share percentage of Union Carbide, manufacturer of Prestone, from the total market and computed BASF's percentage share of that remaining on the theory that all of Union Carbide's market share was in the branded market. However, the evidence disclosed that Union Carbide was a strong player in the private label market and did not exit this portion of the antifreeze market until near the end of the 1987 antifreeze year [FN1] (Finding of Fact No. 20). Thus, during the damage period as established by the Findings of Fact, Union Carbide was a strong competitor of BASF in the private label market. *See* Defendant's ex.D. It may well have been the competition provided by Old World that led Union Carbide to the decision to get out of the private label market, which, of course, greatly benefited those that remained in it, such as BASF and Old World. Therefore, in the absence of direct testimony on the subject, to conclude what the respective market shares are of the private label market would require the court to undergo a great deal of speculation, which the court is unwilling to do.

It can be argued that the court in awarding damages to BASF based on market share of the total antifreeze market has already engaged in speculation. *See* Findings of Fact and Conclusions of Law, p. 24, n. 2. However, the court had no choice but to speculate in order to award BASF some damages, which the court felt was deserved. Some speculation is always required when it is necessary to construct a world absent some offending conduct. This is usually referred to as requiring the wrongdoer to bear the risk of the uncertainty which his wrong created. *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.*, 754 F.2d 738 (7th Cir.1985). BASF's trial strategy was to go for the “home run” and shoot for 100 percent of the business that went from BASF to Old World and ignore the probability that some or most of the business would go elsewhere. This forced the court to devise its own formula for the award of damages and, in doing so, the court used the best available evidence introduced at trial.

***3** It was clear from the testimony of representatives of each of the customers in question who were called to testify by BASF and Old World, that each was angered at BASF because of perceived price inflexibility, that each had a relationship with one or more of BASF's other private label competitors before it purchased from Old World, that each considered others at the time it was considering purchasing from Old World, and that some of them did

purchase a portion of their requirements from others besides Old World. In fact, both Citgo and Phillips had actually terminated BASF as a supplier before awarding the business to Old World. Phillips said it would not have purchased from BASF under any circumstances. Findings of Fact Nos. 50 and 51. The court rejected Old World's argument that it should award BASF nothing for these accounts (and the five others to which there was no testimony) because it was possible in a market where Old World was not making misrepresentations that BASF might well have been more competitive (Finding of Fact No. 54). However, being competitive is not the same as getting orders. It is not enough to say that the accounts had they not gone to Old World would have gone (or remained) with BASF. "*Post hoc ergo propter hoc* will not do...." *Schiller & Schmidt, Inc. v. Nordisco Corporation*, Nos. 91-2195, 91-2781, slip op. 10-11(7th Cir. July 23, 1992). The short of the matter is that BASF presented damage opinion evidence that gave the court no alternative short of total victory, to which it was clearly not entitled. The court attempted to fashion as fair an award as possible under the circumstances and the evidence. This is all it was required to do. *Otis Clapp*, at 744. The court declines to alter the award of damages or the Findings of Fact in support of them.

4. BASF complains next about the court's failure to order disparagement of profits, enhancement, or punitive damages. Under the Lanham Act, an award is governed by equitable principles. The court exercised its discretion in declining to apply any of these three elements to the award. The court sees no reason to alter these portions of the court's Conclusions.

5. BASF was awarded prejudgment interest to "be compounded annually." The year is the anti-freeze year, i.e., April 1 to March 31. The prejudgment interest is to continue until the judgment is final. BASF's two calculations are rejected and it is ordered to submit a third.

Old World's Counterclaim

The court found in favor of Old World on its claim against BASF for product disparagement. There was evidence that BASF employees told customers that Old World used reclaimed glycol or "bottoms." The court found that this charge was not true. Accordingly, the court will not disturb the counterclaim.

Rule 52(b) Motion

Request to Amend Findings

Finding No. 4

The court fails to see any inaccuracy in Finding No. 4.

Finding No. 37

The evidence at the trial disclosed that the engine by which Janeway Engineering was conducting the Dynamometer test overheated, which the court equated with equipment failure.

Finding No. 33

***4** The court found that Old World had misrepresented its product by claiming that it met certain specifications for which it had not tested. The purpose of quality control it to insure that a product is within certain specifications. Since the Old World product was not within specifications, quality control is irrelevant, unless it claimed that it performed to a certain quality control level, which Old World did not.

Finding No. 17

BASF attempted to call as witnesses certain individuals who were dissatisfied with the Old World

product. The court disallowed this evidence partially on the basis of Rule 403. The court felt, and continues to feel, that anecdotal evidence, unless accompanied by testimony that such evidence was statistically significant, was irrelevant and would consume too much time. The court did suggest that BASF compile a list of consumer complaints and, if accompanied by testimony that the number of complaints was statistically significant, the court would consider the evidence. BASF did not provide the court with the statistical significance of the number of complaints. Admission of such evidence would invite Old World to call satisfied customers and the trial would still be going on.

Finding No. 34

The court found that the Old World product met the Cummins' specification. By that, the court meant to find that the Old World product met the Cummins' low silicate level. Accordingly, the court will amend the last sentence of Finding No. 34 to read as follows:

> "The court, therefore, finds that Old World did not make a misrepresentation to the extent that it claimed that its AF met the Cummins' low silicate specification."

Finding Nos. 37 and 38

The court declines to make any changes in Finding Nos. 37 and 38.

CONCLUSION

The court amends the Rule 58 judgment entered in the case as described in paragraph 1 above. The court also amends the last sentence of Finding of Fact No. 34. The remainder of BASF's motion is denied.

IT IS SO ORDERED.

FN1. It should be recalled that the anti-freeze year runs from April 1 of the previous year to March 31 of the year in question. *See* Findings of Fact and Conclusions of Law, p. 4 n. 1.

N.D.Ill.,1992.
BASF Corp. v. Old World Trading Co., Inc.
Not Reported in F.Supp., 1992 WL 232078 (N.D.Ill.)

END OF DOCUMENT

TAB 5

LEXSEE 2007 U.S. DIST. LEXIS 42754

MARY COLLEEN BROESKI, Plaintiff, vs. PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, Defendants.

No. 06 C 3836

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

2007 U.S. Dist. LEXIS 42754

June 8, 2007, Decided
June 8, 2007, Filed

COUNSEL: [*1] For Mary Colleen Broeski, Plaintiff: Edward M Kraus, LEAD ATTORNEY, Chicago-Kent College of Law, Illinois Institute of Technology, Chicago, IL.

For Provident Life and Accident Insurance Company, Defendant: Michael J. Smith, LEAD ATTORNEY, Attorney at Law, Chicago, IL; W. Sebastian von Schleicher, Michael J. Smith & Associates, Chicago, IL.

JUDGES: SIDNEY I. SCHENKIER, United States Magistrate Judge. Judge Robert Gettleman.

OPINION BY: SIDNEY I. SCHENKIER

OPINION

MEMORANDUM OPINION AND ORDER

Plaintiff has filed this ERISA action, pursuant to *29 U.S.C. § 1132(a)(1)(B)*, seeking an award of disability benefits pursuant to a group policy for long term disability ("LTD") benefits issued by defendant Provident Life and Accident Insurance Company ("Provident Life"). [1] Plaintiff alleges that as a result of injuries she suffered during a battery, plaintiff was unable to continue her employment as a registered nurse and thus began receiving LTD benefits beginning on November 28, 2000. Under the terms of the group policy, after a two year period, plaintiff was eligible for continued LTD benefits only if she were unable to work not only in her occupation as a registered [*2] nurse, but more broadly in any occupation for which she was or may become suited by education, training or experience. By letters dated December 22, 2003 and January 27, 2004, Provident Life concluded that plaintiff did not meet that standard, and thus terminated plaintiff's LTD benefits. Provident Life reaffirmed that decision in a letter dated July 14, 2004.

1 The complaint also named as a defendant UnumProvident Corporation ("Unum"), which plaintiff alleges is the parent corporation of Provident Life (Compl., PP 6-7). By an order dated October 3, 2006, the presiding district judge dismissed the complaint as to Unum (doc. # 15).

In this lawsuit, plaintiff challenges the decision by Provident Life to discontinue her LTD benefits. Plaintiff seeks a judgment requiring payment of benefits since the date of discontinuation (with prejudgment interest); a judgment requiring continued LTD benefits to be paid into the future so long as plaintiff meets the requirements for eligibility; and attorneys' fees and costs. [*3] There appears to be no dispute that the group policy grants Provident Life discretionary authority to make benefit decisions (Def.'s Resp., Ex. A, at 27), with the result that Provident Life's decision to discontinue plaintiff's LTD benefits must be reviewed under an arbitrary and capricious standard -- "the least demanding form of judicial review of administrative action." *Semien v. Life Ins. Co. of North America, 436 F.3d 805, 812 (7th Cir. 2006)* (quoting *Trombetta v. Cragin Fed. Bank for Savings Employee Stock Ownership Plan, 102 F.3d 1435, 1438 (7th Cir. 1996))*. Under that standard, "when there can be no doubt that the application was given a genuine evaluation, judicial review is limited to the evidence that was submitted in support of the application for benefits, and the mental processes of the Plan's administrator are not legitimate grounds of inquiry any more than they would be if the decisionmaker were an administrative agency." *Perlman v. Swiss Bank Corp. Comprehensive Disability*

Protection Plan, 195 F.3d 975, 982 (7th Cir. 2000). Thus, in suits seeking judicial review of benefit decisions under an arbitrary and capricious [*4] standard, discovery will rarely be permitted. *See Semien, 436 F.3d at 814*.

But, rarely does not mean never. And, in the motion now before the Court, plaintiff argues that this is a case in which limited discovery is appropriate because she has alleged that the decision denying benefits was affected by bias or misconduct. Based on this theory, plaintiff seeks leave to conduct discovery (doc. # 30). Specifically, plaintiff seeks leave to serve eight interrogatories and eleven document requests on Provident Life. Provident Life resists the motion, arguing that plaintiff's allegations are insufficient to open the door to discovery. For the reasons set forth below, we agree with Provident Life, and therefore deny plaintiff's motion for leave to conduct discovery.

I.

The Seventh Circuit has explained that "[a]lthough discovery is normally disfavored in the ERISA context, at times additional discovery is appropriate to insure that Plan administrators have not acted arbitrarily and that conflicts of interest have not contributed to any unjustifiable denial of benefits." *Semien, 436 F.3d at 814-15*. In *Semien,* the Court held that "[a] claimant [*5] must demonstrate two factors before limited discovery becomes appropriate. First, a claimant must identify a specific conflict of interest or instance of misconduct. Second, a claimant must make a *prima facie* showing that there is a good cause to believe limited discovery will reveal a procedural defect in the Plan administrator's determination." *Semien, 436 F.3d at 815*. The *Semien* court commented that "[w]hile this standard essentially precludes discovery without an affidavit or factual allegation, we believe that this approach is the only reasonable interpretation of ERISA." *Id. at 815*.

We analyze below the two allegations that plaintiff makes in an effort to satisfy the *Semien* test. We conclude that neither of the allegations warrants the discovery under *Semien*.

A.

Prior to the decision to discontinue LTD benefits, Provident Life sent plaintiff to Dr. Marshall Matz for an independent medical examination ("IME"). As a result of that IME, Dr. Matz wrote a seven-page letter analyzing plaintiff's condition and concluding that, "[f]rom a neurosurgical perspective, I find no restrictions or limitations with regard to [plaintiff] [*6] returning to work in her prior capacity" (Def.'s Resp., Ex. D, at 7). Plaintiff alleges that Dr. Matz's opinion was the only report that Provident Life cited for the decision to discontinue LTD benefits (Compl. P 29). Plaintiff further alleges that Dr. Matz is regularly retained by insurers, disability plans or other institutional defendants "to provide medical opinions and testimony in support of the position that a particular individual is not disabled;" that, as a result of that work, Dr. Matz "has a bias for insurers/defendants in disability matters and against plaintiffs seeking to prove that they are disabled;" and that Provident Life was aware that Dr. Matz "was not truly an independent and unbiased medical examiner at the time that they selected him to review Plaintiff's claim" (Compl., PP 30-31). These allegations of bias by Dr. Matz are insufficient to trigger discovery under *Semien*.

First, these allegations are conclusory, and are not supported by affidavit or factual allegations (*i.e.,* evidence) as required by *Semien*. The fact that a doctor is regularly consulted by an insurance company (or defense interests more generally) does not, *ipso facto,* render [*7] the doctor biased. Were that the case, any time an insurer used in-house doctors in deciding eligibility for benefits, a plaintiff challenging a denial of benefits could claim bias and open the door to discovery. Such a result would make discovery in those cases the rule and not the exception, which plainly is not the law. *Davis v. Unum Life Ins. Co. of America, 444 F.3d 569, 575 (7th Cir.)*, *cert. denied, 127 S. Ct. 234, 166 L. Ed. 2d 147 (2006)* (rejecting a claim that an administrator's use of in-house doctors creates a conflict of interest).

Second, plaintiff's reference to a letter she wrote complaining about Dr. Matz's conduct during the IME (Pl.'s Mem. at 6-7) fails to provide *prima facie* evidence of bias or misconduct. We understand that a claimant, who was denied LTD benefits, such as plaintiff here, naturally would be dissatisfied with the doctor who opined that she was not disabled. Indeed, we think it would be a rare plaintiff who would not be unhappy with a doctor under those circumstances. That reality underscores why a plaintiff's criticism of a doctor as "biased" is not sufficient to satisfy the *Semien* standard for opening the door to discovery; [*8] again, were it otherwise, discovery plainly would be the norm and not the exception. Moreover, in this case, there is an additional reason to find that the plaintiff's criticisms of Dr. Matz are insufficient to meet the *Semien* standard. She did not raise any of the criticisms she now levels against Dr. Matz, including the criticisms of his conduct toward plaintiff during the IME, until after Dr. Matz had issued his opinion.

Third, plaintiff fails to address the evidence offered by Provident Life that Dr. Matz's opinion did not stand alone. Dr. Thomas reviewed Dr. Matz's IME and found it to be "credible": he stated that the conclusions reached by Dr. Matz "appear to be based upon reasonable review of the information and are consistent with the evaluation"

(Def.'s Resp., Ex. E). In addition, after Dr. Matz's review, Dr. Sternbergh found that "medical evidence, to a reasonable degree of medical certainty, would support the claimant's ability to do sedentary work, with accommodation to prevent repetitive flexions/extensions of the cervical spine, as well as repetitive reaching or overhead work with the left upper extremity" (*Id.,* Ex. F, at 4). Plaintiff does not suggest that [*9] either Dr. Thomas or Dr. Sternbergh were biased, and their views either agreed with that of Dr. Matz (in the case of Dr. Thomas) or, despite some differences, nonetheless would support denial of LTD benefits (in the case of Dr. Sternbergh). This evidence -- offered in defendant's response and ignored in plaintiff's reply -- further undermines plaintiff's ability to make a *prima facie* showing that the discovery sought as to Dr. Matz would reveal "a procedural defect in the Plan administrator's determination." *Semien, 436 F.3d at 815*.

B.

In support of her request for discovery, plaintiff also alleges that a governmental investigation, which resulted in a "regulatory settlement agreement," "raises significant concerns relating to systematic unfair claims adjudication practices by UnumProvident and its subsidiaries identical to the ones presented in this matter and during the same time period" (Compl., P 33). This reference to the regulatory settlement agreement, even when coupled with the conclusory assertion that it raises "significant concerns relating to systemic unfair claims adjudication practices," does not satisfy plaintiff's obligation under *Semien* [*10] to offer a *prima facie* showing of misconduct. A settlement agreement is not an adjudication (or even evidence of) misconduct. Indeed, the regulatory settlement agreement upon which plaintiff relies specifically makes this point: it states that the settlement is without any admission of fault or liability, and that the settlement may not be offered as evidence of any admission of liability or wrongdoing (Pl.'s Mem., Ex. 1, PP 11-12). Moreover, the settlement agreement specifically provides that it may not be interpreted to create any rights of participants in ERISA-covered plans, "including any appeal or review rights under the Plan" (*Id.* P 13).

To the extent that plaintiff uses the regulatory settlement agreement to establish misconduct by Provident Life, that effort flies in the face of these provisions making clear that the settlement did not include an admission of liability (as might be the case in a consent decree or judgment). In addition, plaintiff's attempted use of the regulatory settlement agreement is at odds with at least the spirit of *Federal Rule of Evidence 408*, which provides that evidence of a settlement agreement cannot [*11] be used to prove liability. Allowing plaintiff to use the settlement agreement in this fashion would run contrary to the intent of the parties to the agreement, and could create disincentives toward entering into settlement agreements.

Finally, the sense of plaintiff's argument is that the settlement agreement shows that Provident Life routinely deprives claimants of fair consideration of their benefits requests. Thus, were we to accept plaintiff's effort to obtain discovery based on this settlement agreement, that would open the door to allowing discovery in every case challenging a Provident Life decision denying benefits. A voluntary settlement agreement that contains no findings or admissions of misconduct cannot bear this weight that plaintiff seeks to place upon it. [2] For all of these reasons, we conclude that plaintiff's allegation concerning the regulatory settlement agreement does not entitle her to discovery under the standards set forth in *Semien*. [3]

2 In a further effort to establish that Provident Life routinely deprives claimants of fair consideration, plaintiff cites a number of cases in which conduct by Unum or Provident Life has been criticized (Pl.'s Mem. at 9-10). Defendant responds by citing cases finding that Unum and Provident Life and related subsidiaries provided "full and fair" review in the exercise of discretionary authority (Def.'s Resp. at 10). We agree that the cases cited by plaintiff do not satisfy their burden under *Semien* of making a *prima facie* showing of a conflict of interest or instance of misconduct with respect to the LTD benefit denial at issue here.

[*12]

3 Plaintiff cites to a number of decisions outside this circuit which have allowed discovery to proceed (see, *e.g.,* Pl.'s Mem. at 8). We conclude that those cases reflect an approach to discovery in ERISA cases different than that set forth in *Semien*, which is controlling Seventh Circuit authority that we are bound to follow.

CONCLUSION

For the foregoing reasons, plaintiff's motion for leave to conduct discovery (doc. # 30) is denied. The matter is set for a status conference on June 21, 2007, at 9:00 a.m.

SIDNEY I. SCHENKIER

United States Magistrate Judge

Dated: June 8, 2007

TAB 6

LEXSEE 2008 U.S. APP. LEXIS 20987

GERALDINE CHAN, as administratrix of the Estate of Randy Brewer, deceased, and on behalf of the heirs at law and beneficiaries of Randy Brewer, deceased., Plaintiff-Appellant v. ROGER COGGINS, Boyd Bros. Transportation, Inc., Defendants-Appellees

No. 07-60792

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

294 Fed. Appx. 934*; *2008 U.S. App. LEXIS 20987

October 2, 2008, Filed

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Southern District of Mississippi. USDC No. 3:05-CV-00254.

Chan v. Coggins, 2007 U.S. Dist. LEXIS 69138 (S.D. Miss., Sept. 17, 2007)

COUNSEL: For GERALDINE CHAN, as administratrix of the Estate of Randy Brewer, deceased, and on behalf of the heirs at law and beneficiaries of Randy Brewer, deceased, and on behalf of the heirs at law and beneficiaries of Randy Brewer, deceased, Plaintiff - Appellant: Donnie Herbert Evans, Jackson, MS.

For ROGER COGGINS, BOYD BROTHERS TRANSPORTATION INC, Defendants - Appellees: William Hugh Gillon, IV, Upshaw, Williams, Biggers, Beckham & Riddick, Ridgeland, MS.

JUDGES: Before REAVLEY, STEWART, and OWEN, Circuit Judges.

OPINION

[*935] PER CURIAM: *

* Pursuant to *5TH CIR. R. 47.5*. the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in *5TH CIR. R. 47.5.4*

Plaintiff Geraldine Chan ("Chan") appeals the district court's grant of motions to strike expert testimony and for summary judgment filed by defendants Roger Coggins ("Coggins") and Boyd Brothers Transportation, Inc ("Boyd Brothers"). We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

On August 7, 2001, Coggins was traveling on Interstate-20 ("I-20") West, operating an 18-wheel tractor trailer [**2] owned by Boyd Brothers. He exited off I-20 and proceeded along the off-ramp toward the intersection with Gallatin Street.The ramp splits at the intersection, and a separate lane curves to the right for traffic heading northbound onto Gallatin Street.

Two pedestrians, Randy Brewer and Marshall Allen, were panhandling at the intersection. Both had been drinking heavily that day, and Brewer was "pretty drunk" at the time of the events at issue. Confined to a wheelchair, Allen was positioned in the street on the right side of the ramp as Coggins approached the intersection. Brewer stood on the island separating the right and left turn lanes. Coggins drove into the right lane, and to avoid Marshall, moved the tractor-trailer to the left side of the right lane. He brought his [*936] truck to a stop at the intersection and waited at the light to proceed north on Gallatin Street. Brewer then approached Coggins's cab, coming within approximately one foot of the driver's side door, and asked for money. Without rolling down the window, Coggins told Brewer that he did not have money and motioned for Brewer to back away from the truck.

There is conflicting testimony about what followed. Coggins testified [**3] that after waiving Brewer off, he watched Brewer take a step away from the truck, he engaged his truck, and he moved toward northbound Gallatin Street. Coggins further testified that after he began to move forward, Brewer moved toward the back

of the truck and was struck by the trailer tires. Joseph Pettit, a motorist who witnessed the accident while he was stopped on Gallatin Street, testified that Brewer was about a foot away from Coggins's truck, that Coggins waived Brewer to back away, and that Brewer then took about a half a step back from the truck. Brewer testified that he turned his back as he began to step away from the truck and was pulled under the wheels as the truck moved forward. Coggins drove forward a short distance and the rear wheels of the tractor cab struck Brewer. The wheels ran over Brewer's feet, legs, and buttocks. He later died of those injuries.

After the accident, Brewer filed suit against Coggins and against Boyd Brothers on a theory of respondeat superior, alleging Coggins's negligence was the cause of his injuries. The case was dismissed when Brewer died. The administratrix of Brewer's estate, Geraldine Chan, initiated the present diversity action for wrongful [**4] death caused by the alleged negligence of Coggins and Boyd.

Chan retained Victor Holloman, an accident reconstruction expert, to testify as to how Brewer could have been struck by the tractor-trailer without moving himself in front of the truck. He planned to do so primarily through reference to the concept of "off-tracking." Off-tracking refers to the extent to which the rear wheels of a truck deviate from the path of the front wheels while turning. Holloman reviewed the depositions of Brewer, Coggins, and Pettit, the Mississippi Uniform Accident Report for the incident, and photographs related to the case. He did not have access to the tractor-trailer Coggins drove in the accident. He did not conduct any tests to reconstruct the events of the accident. In his expert report and in deposition, Holloman stated his conclusion that after Brewer asked for money, he turned to his left but before he could step away from the truck, he was struck from behind by the truck because Coggins failed to maintain a proper lookout. He acknowledged that he did not have any evidence to rely on that contradicted Coggins's testimony that he watched Brewer step away from the vehicle before he started to [**5] move the truck forward. He asserted that due to off-tracking, Coggins would have moved the truck to the left as he moved forward in order to correct for the trailer's off-tracking as he turned right.

Coggins and Boyd moved to strike Holloman's testimony and for summary judgment. After reviewing Holloman's report and conducting a hearing on his proposed testimony, the district court granted the defendants' motion to strike Holloman. The court then granted summary judgment in favor of Coggins and Boyd. Chan appeals both rulings.

DISCUSSION

I. Holloman's Expert Testimony

a. Standard of Review

This Court reviews the decision to admit or exclude expert testimony for abuse of discretion. *General Electric Co. v. Joiner,* [*937] *522 U.S. 136, 139, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997)*. This standard applies to both (1) how the trial court evaluates the expert testimony, and (2) the trial court's ultimate determination whether or not to admit the expert testimony. *Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*. The trial court enjoys wide latitude in determining the admissibility of expert testimony, "and the discretion of the trial judge and his or her decision will not be disturbed on appeal unless manifestly erroneous." [**6] *Smith v. Goodyear Tire & Rubber Co., 495 F.3d 224, 227 (5th Cir. 2007)* (internal quotations and citations omitted). If we determine that the district court abused its discretion by excluding evidence, we evaluate whether the error was harmless, "affirming the judgment, unless the ruling affected substantial rights of the complaining party." *Bocanegra v. Vicmar Servs., Inc., 320 F.3d 581, 584 (5th Cir. 2003)*.

b. Analysis

The district court determines the admissibility of expert testimony under *Fed. R. Evid. 702* according to the directions of *Fed. R. Evid. 104(a)*. *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592-93, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. In short, the court must find that the expert testimony is both relevant and reliable before it will be admitted. *Id. at 589*. To do this, the court determines whether the reasoning and methodology underlying the expert's testimony is scientifically valid and can be properly applied to the facts of the case. Evaluating the reliability of proffered expert testimony, the district court looks beyond credentials and makes sure that there is an adequate "fit" between data and opinion. *See Moore v. Ashland Chemical Inc., 151 F.3d 269, 276 (5th Cir. 1998)*. While *Daubert* [**7] lists several factors that may be considered in assessing the reliability of expert testimony, the Supreme Court has since emphasized that the analysis is a flexible one. Particular *Daubert* factors may be more or less pertinent to the district court's inquiry, depending on the nature of the issue, the particular expertise, and the subject of the expert's testimony. *Kumho Tire, 526 U.S. at 150*. The objective is that the district court make certain that an expert, "whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id. at 152*.

Chan argues that the district court abused its discretion in striking Holloman's testimony because Holloman's credentials and experience in accident reconstruction qualify him to provide expert testimony about the cause of the accident. She further argues that Holloman adequately validated his hypothesis by reference to the scientific concept of off-tracking, and the district court erred by making improper factual determinations to reject the expert's conclusion. Coggins responds that the district court properly [**8] exercised its discretion in ruling that Holloman's testimony lacked a scientific basis and was based on insufficient facts.

Holloman's credentials, previous testimony in a distinguishable case, and Chan's citation of one Pennsylvania case allowing expert testimony regarding off-tracking do not persuade us that it was an abuse of discretion for the trial court to determine that his expert opinion in this case was not reliable. "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Moore, 151 F.3d at 277*. Although the district court's opinion does not provide a lengthy review of its analysis of Holloman's expert testimony or the reasoning behind the court's conclusion [*938] that it lacked scientific basis, there was no abuse of discretion in striking the testimony. A review of the record amply supports the district court's conclusion that because Holloman's opinion about the cause of the accident lacked a scientific basis and was contrary to the facts in evidence, Holloman was not qualified under *Rule 702* to opine whether Coggins negligently ran over Brewer.

Chan relies heavily on the fact that Holloman has previously testified as [**9] an expert witness, pointing to *Luckett v. Choctaw Maid Farms, Inc., 307 F. Supp. 2d 826, 830-31 (S.D. Miss. 2004)*. Although Holloman was qualified as an expert in the case, Chan's reliance on this fact is misplaced. Holloman testified regarding improperly functioning brakes, not off-tracking, and based his opinion on, among other facts, the brake maintenance records for the truck in question. *Id.* Clearly his factual basis and analytical methodology were more directly tied to the subject of his testimony. In any event, being qualified as an expert in thecircumstances of one case does not qualify one as an expert in all future cases.

Chan cites one case in which an expert testified about off-tracking to support her argument that off-tracking is a judicially-recognized and accepted phenomenon, and therefore the district court abused its discretion by excluding Holloman's testimony. In *Lebesco v. Southeastern Pennsylvania Transportation Authority, 251 Pa. Super. 415, 380 A.2d 848, 850 (Pa. 1977)*, the state court allowed expert testimony regarding off-tracking, reasoning that it would aid the jury in determining whether it was a factor in the accident giving rise to the suit. Beyond *Lebesco,* research uncovered [**10] only two other instances in federal or Mississippi case-law that discussed expert testimony of off-tracking, both clearly distinguishable from this context. [1] The fact that off-tracking has been discussed in other cases is not persuasive on the issue of whether the district court abused its discretion in either the manner of evaluating Holloman's proposed testimony or the district court's ultimate conclusion that Holloman's discussion of off-tracking did not provide a sufficient scientific basis for his opinion.

1 *Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 436, 98 S. Ct. 787, 54 L. Ed. 2d 664 (1978)* (expert testifying that double trailers safer than singles due to reduced off-tracking, among other factors); *Henderson v. Norfolk So. Corp., 55 F.3d 1066, 1068, 1070 (5th Cir. 1995)* (expert testifying that extreme off-tracking of trailer caused by defective slide assembly).

Chan explains that the amount of off-tracking increases with the length of the vehicle and sharpness of the turn, apparently arguing that because the concept is relevant to the case it was an abuse of discretion for the district court to disallow the testimony. This argument does not undermine the district court's finding that Holloman's testimony [**11] lacked scientific basis. [2] Even if the concept is relevant, it does not necessarily follow that Holloman's application of the concept to the facts of the case is a proper "fit". [3] "(N)othing in [*939] either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Kumho Tire, 526 U.S. at 157* (rejecting expert's assertion that his own methods were accurate) (internal citation omitted).

2 Further, the record shows that off-tracking was not the cause of the accident. Brewer was on the outside of the cab's turning radius, not inside where he might have been struck by off-tracking wheels of the trailer. Even if the front wheels of the truck's cab were turned sharply left to correct for additional off-tracking, he was parallel to the cab at the time and was not struck by the front wheels.>

3 The record demonstrates that Holloman did not follow the basic analytic framework of the scientific method, conduct any basic tests of his assumptions, or work with concrete facts about positioning, speed, tire direction, etc., despite his assertion that these were among the factors that led to his conclusion [**12] that it was Coggins's driving errors that caused the accident.

Finally, Chan argues that while portions of Holloman's opinion were contrary to Coggins's testimony, they

were consistent with Brewer's testimony. On the contrary, a review of the witnesses' depositions, Holloman's deposition, and his expert report demonstrates that Holloman's reconstruction of the accident also conflicts with Brewer's testimony of his position at the time of the accident.

II. Summary Judgment

a. Standard of Review

This Court reviews the district court's grant of summary judgment *de novo,* applying the same standards as the district court. *McLaurin v. Noble Drilling (US) Inc., 529 F.3d 285, 288 (5th Cir. 2008)*. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*; *Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 874 (5th Cir. 2000)*. A fact is "material" if it "might affect the outcome of the suit under governing law." *Bazan v. Hidalgo County, 246 F.3d 481, 489 (5th Cir. 2001)* (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))*. Evaluating a motion for summary judgment, the court [**13] views the facts and the inferences to be drawn from them in the light most favorable to the nonmoving party. *Moore, 233 F.3d at 874*. But conclusory allegations, unsubstantiated assertions, or a mere "scintilla of evidence" will not defeat summary judgment. *Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994)* ("We do not, however, in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts."). Summary judgment is mandated if the nonmoving party fails to make a showing of evidence sufficient to establish the existence of an element essential to its case on which it bears the burden of proof at trial. *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

b. Discussion

Chan asserts that even without Holloman's testimony, there is conflicting testimony about the events of the accident and sufficient circumstantial evidence to support a jury finding of negligence by Coggins under Mississippi law. Coggins and Boyd argue that they are entitled to summary judgment because the case contains no evidence that Coggins was negligent.

Under Mississippi law the elements of negligence are: duty, breach, causation, and damages. *Magnusen v. Pine Belt Inv. Corp., 963 So.2d 1279, 1282 (Miss. Ct. App. 2007)*. [**14] Negligence may be proved by circumstantial evidence, "provided that the circumstances are sufficient to take the case 'out of the realm of conjecture and place it within the field of legitimate inference.'" *Thomas v. Great Atlantic & Pacific Tea Co., Inc., 233 F.3d 326, 329-30 (5th Cir. 2000)* (quoting *K-Mart Corp. v. Hardy, 735 So. 2d 975, 981 (Miss. 1999))*. The jury must be able to make a reasonable or reliable inference about negligence from the circumstantial evidence. *Mississippi Dep't of Transp. v. Cargile, 847 So. 2d 258, 263 (Miss. 2003)*.

Chan has not offered a scintilla of evidence of negligence on the part of Coggins. No one disputes that Coggins's truck came to a complete stop before Brewer ever approached the truck. Brewer then either took a small step away or [*940] began to turn. [4] Brewer was not on the inside of the turning radius of the truck, so any off-tracking by the trailer wheels did not threaten him. Furthermore, he was struck by the wheels of the truck, not the off-tracking trailer. None of the witnesses place Brewer in front and to the left of the cab of Coggins's truck, the only position where a forward movement with the wheels turned extremely to the left might have [**15] struck Brewer. Brewer himself testified that he was even with the door of Coggins's truck. Indeed, the two had just finished communicating with each other when Coggins engaged the truck to pull away.

> 4 Although Coggins and Pettit testified that he stepped into the path of the truck, defendants argue that, even ignoring that testimony, Chan has not provided evidence explaining how Coggins could have struck Brewer, who was at least a foot or two away from the cab before Coggins saw him step back.

All parties agree that Brewer was standing to the side of the truck, at least a foot away from the cab door, at the time that the truck began moving. Coggins's uncontested testimony is that he watched Brewer in his side mirror as he engaged the truck and began to move. Chan has not put forward sufficient evidence to support a finding that Coggins breached a duty of care to Brewer, a pedestrian already outside of the path of the truck and standing to the side of the vehicle. Chan has not provided evidence that would take this case out of the realm of conjecture. *See Thomas, 233 F.3d at 330*. Because there is no evidence that Coggins breached any duty to Brewer to cause the accident, Chan cannot establish [**16] the elements of negligence. Brewer was already out of the truck's path, and plaintiff has put forward no evidence of any negligent operation of the truck by Coggins. Because there are no material facts at issue, we affirm the district court finding of summary judgment for the defendants.

CONCLUSION

For the foregoing reasons, the judgment of the district court isAFFIRMED.

TAB 7

LEXSEE 2000 U.S. DIST. LEXIS 7165

DR. GERARD J. CICERO, an individual, Plaintiff, vs. THE PAUL REVERE LIFE INSURANCE COMPANY, a Massachusetts corporation, Defendant.

98 C 6467

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

2000 U.S. Dist. LEXIS 7165

March 22, 2000, Decided
March 23, 2000, Docketed

DISPOSITION: [*1] Defendant's motion to bar testimony of Plaintiff's experts denied.

COUNSEL: For GERARD J CICERO, Dr., plaintiff: Gene L. Armstrong, Jon Allan Duncan, Gene L. Armstrong & Associates, P.C., Oak Park, IL.

For GERARD J CICERO, Dr., plaintiff: Joseph J. Dorlack, Robert W. Roth, Roth and Binn Attorneys at Law, Brookfield, WI.

For PAUL REVERE LIFE INSURANCE COMPANY, THE, defendant: Christopher John Robison, Michael J. Smith & Associates, Chicago, IL.

For PAUL REVERE LIFE INSURANCE COMPANY, THE, defendant: Michael J. Smith, Attorney at Law, Chicago, IL.

For PAUL REVERE LIFE INSURANCE COMPANY, THE, defendant: Patrick Justin McGuire, Patrick J. McGuire P.C., Chicago, IL.

JUDGES: Charles P. Kocoras, United States District Judge.

OPINION BY: Charles P. Kocoras

OPINION

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter comes before the Court on Defendant's motion to bar the testimony of two expert witnesses for failing to comply with *Federal Rule of Civil Procedure 26(a)(2)(B)*. For the reasons set forth below, the Court denies Defendant's motion.

BACKGROUND

Plaintiff Gerard J. Cicero ("Cicero") named himself and his accountant, Robert H. Lewin ("Lewin") as [*2] experts in his action against Defendant Paul Revere Life Insurance Company ("Paul Revere"). This Court gave Cicero until February 14, 2000 to tender the relevant *Rule 26* reports of his experts. On February 14, 2000, Cicero gave Paul Revere two letters. In one of the letters, Cicero writes that his expertise is in the area of chiropractic medicine and that he will offer his opinion about "what the case contingencies are that contribute to the chiropractic practice." Cicero also provides that he will adopt and use the definition of chiropractic in *Steadman's Medical Dictionary*, which he includes in the letter.

The other letter is written by Lewin. In it, Lewin states that he has been Cicero's accountant for over 10 years and that he will testify regarding the business expense Cicero incurred as a result of his disability. Lewin also writes that he met with Cicero in 1993 following his accident and discussed hiring a chiropractor to help Cicero since Cicero would be unable to perform many of his chiropractic duties. They also discussed the measures that would need to be taken and costs associated with hiring a chiropractor. Lewin proceeds to state that at that time he cannot give [*3] an accurate figure of the costs because the pertinent files are with Defendant's attorney,

but that the costs were at least $ 40,000-$ 50,000 per year.

DISCUSSION

In this motion, Paul Revere moves to bar the expert testimonies of Cicero and Lewin, arguing that Cicero has failed to comply with the *Rule 26* requirements for experts by failing to tender satisfactory proof of qualifications and reports regarding the proposed expert testimonies. Cicero argues that Lewin's and his February 14, 2000 letters satisfy *Rule 26* given the circumstances. Cicero also contends that *Rule 26(a)(2)(B)*, which requires an expert to submit a signed written report regarding his proposed testimony, does not apply to the expert testimonies of Cicero and Lewin.

The Court agrees that *Rule 26(a)(2)(B)* does not require Cicero or Lewin to tender expert reports. Not all experts are required to submit reports under *Rule 26(a)(2)(B)*. *Rule 26(a)(2)(A)* sets out which witnesses must be identified, and *Rule 26(a)(2)(B)* provides which witnesses must submit a report and what that report must contain. Specifically, the rules state:

> (A) In addition to the disclosure required by paragraph (1), a party shall disclose [*4] to other parties the identity of any person who may be used at trial to present evidence under *Rules 702*, *703*, or *705 of the Federal Rules of Evidence.*
>
> (B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. *Fed.R.Civ.P. 26(a)(2)(A)*, *(B)*.

Rule 26(a)(2)(B) only requires a witness "who is retained or specially employed [*5] to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony" to provide a report. *See Sircher v. City of Chicago, 1999 U.S. Dist. LEXIS 11869*, No. 97 C 6694, 1999 WL 569568, at *2 (N.D. Ill. July 28, 1999); *Garza v. Abbott Laboratories, 1996 U.S. Dist. LEXIS 12506*, No. 95 C 3560, 1996 WL 494266, at *1 (N.D. Ill. Aug. 27, 1996); *see also Fed.R.Civ.P. 26(a)(2)*, 1993 Advisory Committee Notes.

Neither Cicero or Lewin fit the definition of an expert who is required to provide a report under *Rule 26(a)(2)(B)*. Cicero did not retain or specially employ himself to provide expert testimony in the case, and he did not have duties as an employee of himself to regularly give expert testimony. Cicero seeks to simply offer testimony on his Chiropractic practice as it relates to this litigation. Further, Lewin does not propose to testify as a witness who is retained or specially employed to provide expert testimony in the case, and his duties as Cicero's accountant do not regularly include giving expert testimony. Rather, Lewin seeks to testify regarding knowledge acquired as Cicero's personal accountant relating to business costs incurred as a result [*6] of Cicero's disability. *Cf. Sircher, 1999 U.S. Dist. LEXIS 11869, 1999 WL 569568*, at *2. As such, neither Cicero and Lewin are required to tender a report pursuant to *Rule 26(a)(2)(B)*.

However, the substance of the testimony governs whether the witness will be required to tender a report and not the status of the person. *See Zarecki v. Nat'l Railroad Passenger Corp., 914 F. Supp. 1566, 1573 (N.D. Ill. 1996)*, *citing Patel v. Gayes, 984 F.2d 214, 218 (7th Cir. 1993)*. Thus, should the subject matter of the testimony change, the Court may have to revisit this *Rule 26(a)(2)(B)* issue. *Cf. Richardson v. Consolidated Rail Corp., 17 F.3d 213, 218 (7th Cir. 1994)*, *quoting Patel v. Gayes, 984 F.2d 214, 218 (7th Cir. 1993)*; *Sircher, 1999 U.S. Dist. LEXIS 11869, 1999 WL 569568*, at *2; *Hunt-Golliday v. Metropolitan Water Reclamation District, 1998 U.S. Dist. LEXIS 12791*, No. 94 C 3559, 1998 WL 513087, at *4 (N.D. Ill. Aug. 13, 1998).

CONCLUSION

For the reasons set forth above, the Court denies Defendant's motion to bar the testimony of Plaintiff's experts.

Charles P. Kocoras

United States District Judge

Dated: [*7] March 22, 2000

TAB 8

LEXSEE 2006 U.S. DIST. LEXIS 80397

CINERGY COMMUNICATIONS COMPANY, Plaintiff, v. SBC COMMUNICATIONS, INC., et al., Defendants.

CIVIL ACTION Case No. 05-2401-KHV-DJW

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

2006 U.S. Dist. LEXIS 80397

November 2, 2006, Decided
November 2, 2006, Filed

PRIOR HISTORY: *Cinergy Communs. Co. v. SBC Communs., Inc., 2006 U.S. Dist. LEXIS 36971 (D. Kan., June 6, 2006)*

COUNSEL: [*1] For Cinergy Communications Company, Plaintiff: Hal D. Meltzer, LEAD ATTORNEY, Baker, Sterchi, Cowden & Rice, L.L.C. - OP, Overland Park, KS; Marcos Barbosa, LEAD ATTORNEY, Baker, Sterchi, Cowden & Rice, L.L.C. - KC, Kansas City, MO.

For SBC Communications, Inc., Indiana Bell Telephone Co., doing business as Ameritech Indiana, Defendants: Melanie N. McIntyre, LEAD ATTORNEY, ATT&T Services, Inc., Topeka, KS; Michael R. Fruehwald, LEAD ATTORNEY, Teresa E. Morton, LEAD ATTORNEY, Barnes & Thornburg LLP, Indianapolis, IN.

JUDGES: David J. Waxse, United States Magistrate Judge.

OPINION BY: David J. Waxse

OPINION

MEMORANDUM AND ORDER

Plaintiff filed this action for damages, declaratory judgment, and equitable relief arising out of a dispute over billing and payment for telecommunications services. This matter is presently before the Court on Plaintiff's Motion to Strike Defendants' Expert Witnesses (doc. 48). Plaintiff requests that the Court exclude three of Defendants' designated expert witnesses and prohibit them from testifying at trial based on Defendants' failure, without explanation and substantial justification, to timely provide written reports prepared and signed by these witnesses [*2] pursuant to *Fed. R. Civ. P. 26(a)(2)(B)*. For the reasons explained below, Plaintiff's Motion to Strike Defendants' Expert Witnesses is denied.

I. Relevant Background Facts

Under the provisions of the December 15, 2005 Scheduling Order in this case, Plaintiff's deadline to serve its *Rule 26(a)(2)* disclosures, including reports from retained experts, was June 1, 2006, and Defendants' deadline to serve their disclosures and reports was July 1, 2006. [1] On June 1,2006, the Court entered a Supplemental Order extending the parties' respective expert disclosure deadlines. Plaintiff's deadline was extended to July 1, 2006, and Defendants' deadline was extended to August 1, 2006. [2]

1 *See* Dec. 15, 2005 Scheduling Order (doc. 16) at P 2g.

2 *See* June 1, 2006 Supplemental Order (doc. 30).

Plaintiff served its Designation of Expert Witnesses Pursuant to *Fed. R. Civ. P. 26(a)(2)(A)* on June 30, 2006, [3] and Designation [*3] of Expert Witnesses Pursuant to *Fed. R. Civ. P. 26(a)(2)(B)* on July 14, 2006. [4] Defendants requested and received an additional extension of their deadline to submit their expert designation under *Fed. R. Civ. P. 26(a)(2)(B)*. [5] Defendants served their Disclosure of Expert Witnesses on August 15, 2006, which designated four experts: Jo Shotwell, June A. Burgess, Roman A. Smith, and Chris Read. [6] Defendants' Disclosure of Expert Witnesses was accompanied by only one written report, prepared by Jo Shotwell. No reports were provided for the other three designated experts.

3 *See* Plaintiff's Notice of Service (doc. 38).
4 *See* Plaintiff's Notice of Service (doc. 39).
5 *See* July 18, 2006 Order (doc. 43).
6 *See* Defendants' Notice of Service (doc. 46).

Upon receiving Defendants' Disclosure of Expert Witnesses, Plaintiff's counsel e-mailed defense counsel on August 23, 2006 and raised the issue of Defendants' [*4] failure to provide written reports for three of the identified experts. Defendants' counsel responded the next day that Defendants would consider Plaintiff's request and respond in due course. On August 28, 2006, Plaintiff served its Objections to Defendants' Expert Witnesses [7] and filed its Motion to Strike Defendants' Expert Witnesses currently pending before the Court.

7 *See* Plaintiff's Notice of Service (doc. 49).

II. Discussion and Analysis

Plaintiff requests that the Court exclude three of Defendants' designated experts and prohibit them from testifying at the trial of this matter based upon Defendants' failure to provide written reports prepared and signed by these witnesses pursuant to *Fed. R. Civ. P. 26(a)(2)(B)*. Defendants argue in response that they do not need to provide written reports for these witnesses because their duties do not regularly involve giving expert testimony under *Fed. R. Civ. P. 26(a)(2)(B)* [*5] . Defendants state that the three witnesses at issue are employees of companies affiliated with defendant Indiana Bell Telephone Company Incorporated ("Indiana Bell") who perform services on behalf of Indiana Bell. June A. Burgess is the Area Manager of Finance for AT&T Services, Inc. Roman A. Smith is the Associate Director - AT&T Wholesale, for Southwestern Bell Telephone, L.P. Chris Read is the Senior Business Manager, IT Project Management, for AT&T Services, Inc.

Defendants assert that these employees are expected to testify as fact witnesses about transactions and communications between Plaintiff and Defendant Indiana Bell as to how the Alternate Billed Services traffic at issue has been handled, reported to Plaintiff, and invoiced by Defendant Indiana Bell. Defendants state they do not expect any of these witnesses to provide expert opinions within the meaning of *Fed. R. Evid. 702*, but the witnesses do have expertise and experience in their fields, which may come into play when they testify as to why matters were conducted by Defendant Indiana Bell as they were. Defendants assert that the employees were designated as potential experts in an [*6] abundance of caution to avoid a potential dispute that their testimony involves expertise of an expert not designated.

A. Report Requirements of *Fed. R. Civ. P. 26(a)(2)(B)*

Fed. R. Civ. P. 26(a)(2)(A) requires a party to disclose to other parties the identity of any person who may be used at trial to present evidence under *Federal Rules of Evidence 702*, *703* or *705*. *Subsection (B)* of *Rule 26(a)(2)* additionally requires that these expert disclosures be accompanied by a written report prepared and signed by any witness who is "retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony." [8] The report shall contain, *inter alia*, a complete statement of all opinions to be expressed and the basis and reasons therefor, along with the data or other information considered by the witness in forming the opinions. [9]

8 *Fed. R. Civ. P. 26(a)(2)(B)*.

[*7]

9 *Fed. R. Civ. P. 26(a)(2)(B)*.

The Court notes that there is a split of authority among courts that have interpreted the report requirement of *Fed. R. Civ. P. 26(a)(2)(B)*. [10] Some courts have construed the rule broadly to require written reports from all expert witnesses, regardless of the frequency with which any witness provides expert testimony, or whether they were specifically employed to provide expert testimony. [11] Conversely, other courts have adopted an interpretation that more closely tracks the plain language of the rule, and they interpret *Fed. R. Civ. P. 26(a)(2)(B)* as imposing a written report requirement only when an expert is retained or specially employed to provide expert testimony, or when the expert is an employee who regularly provides expert testimony. [12]

10 *Bowling v. Hasbro, Inc.,2006 U.S. Dist. LEXIS 58910, No. C.A. 05-229S, 2006 WL 2345941 at *1 (D.R.I. Aug. 10, 2006)* (examining the split among courts construing *Rule 26(a)(2)(B)*.

[*8]

11 *Id.*; *Adams v. Gateway, Inc., 2006 U.S. Dist. LEXIS 14413, No. 2:02 CV 106 TS, 2006 WL 644848 at *3 (D. Utah Mar. 10, 2006)*; *Duluth Lighthouse for the Blind v. C.G. Bretting Mfg. Co., 199 F.R.D. 320, 324 (D. Minn. 2000)*; and *Navajo Nation v. Norris, 189 F.R.D. 610, 613 (E.D. Wash. 1999)*.

12 *Bowling, 2006 U.S. Dist. LEXIS 58910, 2006 WL 2345941 at *1*; *McCulloch v. Hartford Life & Accidental Ins. Co., 223 F.R.D. 26, 28 (D. Conn. 2004)*; *KW Plastics v. U.S. Can Co., 199 F.R.D. 687, 688 (M.D. Ala. 2000)*; *Minn. Mining & Mfg. Co. v. Signtech, USA, Ltd., 177 F.R.D. 459, 461 (D. Minn. 1998)*; *Day v. Consol. Rail Corp., 1996 U.S. Dist. LEXIS 6596, No. 95 CIV. 968 (PKL), 1996 WL 257654 at *3 (S.D.N.Y. 1996).*

Although no District of Kansas case has expressly adopted or rejected either interpretation, the Kansas cases addressing the issue appear to require the expert to provide a written report only when the expert falls within the scope of the rule, i.e., when the expert "is retained or specially employed to provided expert testimony in the case or whose duties [*9] as an employee regularly involve giving expert testimony." [13] In accordance with these cases, the Court holds that Defendants need not provide a report for every witness they designate under *Fed. R. Civ. P. 26(a)(2)(A)*. Instead, Defendants need only provide the report required by *Fed. R. Civ. P. 26(a)(2)(B)* for those witnesses who are "retained or specially employed to provided expert testimony in the case or whose duties as an employee regularly involve giving expert testimony."

13 *See, e.g., Super Film of Am., Inc. v. UCB Films, Inc., 219 F.R.D. 649, 658 (D. Kan. 2004)* (holding that a designated expert witness, because he regularly gave expert testimony in the course of his employment, was within the scope of *Fed. R. Civ. P. 26(a)(2)(B)*); *Starling v. Union Pac. R.R. Co., 203 F.R.D. 468, 477 (D. Kan. 2001)* (explaining, in adherence to the plain language of *Fed. R. Civ. P. 26(a)(2)(B)*, that a treating physician constitutes an expert within the scope of *Fed. R. Civ. P. 26(a)(2)(B)* only if she is specially retained for the purpose); *Marek v. Moore, 171 F.R.D. 298, 299 (D. Kan. 1997)* (noting that *Fed. R. Civ. P. 26(a)(2)(B)* applies to specially retained experts, but declining to articulate the rule as generally applying to all experts); *Full Faith Church of Love West, Inc. v. Hoover Treated Wood Prods., Inc., 2002 U.S. Dist. LEXIS 25449, No. Civ. A. 01-2597-KHV, 2003 WL 169015 at *1 (D. Kan. Jan. 23, 2002)* (noting that every witness who offers expert testimony is not necessarily retained or specially employed to provide expert testimony).

[*10] **B. Burden of Proof**

Having determined that not every witness designated under *Fed. R. Civ. P. 26(a)(2)(A)* must provide a report, the Court must next determine which of the parties bears the burden of proof for the instant Motion, and whether that burden has been satisfied. In *Marek v. Moore*, [14] this Court held that "the moving party . . . bears the burden to show valid grounds for striking the designation of [an] expert witness" for failure to comply with *Fed. R. Civ. P. 26(a)(2)(B)*. The Court agrees that the moving party should bear the initial burden of showing a valid ground for striking the expert witness designation. If, however, the party designating the expert does not produce a report for its designated expert under *Fed. R. Civ. P. 26(a)(2)(B)*, then the burden should shift to the party designating the expert to demonstrate that its designated expert is not one "retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony." The party designating the [*11] expert should bear the burden because it is more likely to possess the information necessary to establish the status of the witness.

14 *171 F.R.D. 298, 302 (D. Kan. 1997)*.

In this case, the Court finds that Plaintiff has met its initial burden of showing a valid basis for striking Defendants' designation of June A. Burgess, Roman A. Smith, and Chris Read, by asserting that *Fed. R. Civ. P. 26(a)(2)(B)* requires written reports to be provided for expert witnesses of a certain description, and those reports have not been provided. The burden therefore should shift to Defendants to show that these designated expert witnesses are not within the scope of *Fed. R. Civ. P. 26(a)(2)(B)*.

Under this burden shifting framework, the Court finds that Defendants have failed to meet their burden of showing that three of their designated experts, June A. Burgess, Roman A. Smith, and Chris Read, are exempt from the report requirement set [*12] forth in *Fed. R. Civ. P. 26(a)(2)(B)*. Defendants have provided no evidence from which the Court may conclude whether any of the named experts fall within the scope of *Fed. R. Civ. P. 26(a)(2)(B)*. Defendants only assert that the *Rule 26(a)(2)(B)* requirement that these employees give "expert testimony" "regularly" does not "appear to be satisfied here." The basis for this assertion, however, is not revealed, and the information currently available to the Court does not allow it to determine whether the assertion is accurate. The Court cannot ascertain whether Defendants' experts are "retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony," and should thus be required to provide a written report prepared and signed by the witness. The Court therefore holds that Defendants have failed to meet their burden to show that their designated experts are exempt from the reporting requirements of *Fed. R. Civ. P. 26(a)(2)(B)*. Rather than strike Defendants' designations of these [*13] witnesses as requested by Plaintiff, the Court will require Defendants to serve revised expert designations. If Defendants intend to use Ms. Burgess, Mr. Smith, and Mr. Read to present evidence under *Fed. R. Evid. 702*, *703*, or *705*, then Defendants shall provide for each either: (1) the report required by *Fed. R. Civ. P. 26(a)(2)(B)*, or (2) an affidavit certifying that the witness' duties do not include regularly giving expert testimony and that the witness is not specially retained or employed

to provide expert testimony. Defendants shall serve their revised expert designations, along with the reports or affidavits for each expert witness Defendants continues to designate, no later than **twenty (20) days from the date of this Memorandum and Order**.

IT IS THEREFORE ORDERED THAT Plaintiff's Motion to Exclude Defendant's Expert Witnesses (doc. 48) is denied.

IT IS SO ORDERED.

Dated in Kansas City, Kansas on this 2nd day of November, 2006.

s/ David J. Waxse

United States Magistrate Judge

TAB 9

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Ninth Circuit.

Patrick CROSBY, Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR; Hughes Aircraft Company, Respondents,

No. 93-70834.

Argued and Submitted April 7, 1995.
Decided April 20, 1995.

Petition to Review Decision of the Secretary of Labor, No. 0973-2.
DOL

PETITION DENIED.

Before: McKAY,[FN*] REINHARDT, and FERNANDEZ, Circuit Judges.

FN* Hon. Monroe G. McKay, Senior United States Circuit Judge, United States Court of Appeals for the Tenth Circuit, sitting by designation.

MEMORANDUM [FN**]

FN** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

***1** Patrick Crosby appeals the Secretary of Labor's adoption of an administrative law judge's recommended decision and order to the effect that Crosby was not discriminated against by his former employer, Hughes Aircraft Company, in violation of the whistleblower provisions of various federal environmental statutes.[FN1] The Secretary ruled that Crosby had not shown that Hughes had terminated him for protected rather than non-discriminatory business reasons. We deny the petition.

FN1. Originally, Crosby brought his action under the provisions of the Clean Air Act, 42 U.S.C. § 7622, and the Toxic Substances Control Act, 15 U.S.C. § 2622. The Secretary granted his post-trial motion to amend his complaint to include a cause of action under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610.

If an employee has made out a prima facie case of retaliatory discharge, the burden of production shifts to the employer to show that it had legitimate, non-discriminatory reasons for its actions.See St. Mary's Honor Ctr. v. Hicks, U.S. , , 113 S. Ct. 2742, 2747, 125 L. Ed. 2d 407 (1993). If it does so, the production burden shifts back to the plaintiff to show that those reasons were pretextual.Id. More to the point for purposes of this appeal, once an employment discrimination case has been tried, as this one has been, the only truly relevant question is whether the plaintiff has met his ultimate burden of proving to the trier of fact that he was the victim of intentional discrimination.See id. at , 113 S. Ct. at 2747-48.

The Secretary's decision should be upheld unless it is unsupported by substantial evidence or is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.5 U.S.C. § 706(2)(A), (E) (Administrative Procedure Act); Lockert v. United States Dep't of Labor, 867 F.2d 513, 516-17, 520 (9th Cir. 1989).

Here the Secretary determined that the reasons for Crosby's termination were that his work was not good and he was often insubordinate. Moreover, the final straw was his absolute refusal to work on the PPUP project because he did not like the protocol for the performance of that task. We understand that he sought to retract the refusal; alas, the decision had already been made.

Crosby does not contend that the actual working conditions related to the PPUP project were unsafe or unhealthy."Employees have no protection ... for re-

fusing to work simply because they believe another method, technique, procedure or equipment would be better or more effective."Pensyl v. Catalytic, Inc., Case No. 83-ERA-2, at 8 (Sec. Dec. Jan. 13, 1984). When an employee's refusal to work does not meet the Pensyl test, an employer may legitimately terminate the employee.Wilson v. Bechtel Constr., Inc., Case No. 86-ERA-34, at 12 (Sec. Dec. Jan. 9, 1988). The record is filled with evidence of incidents of Crosby's supervisors' dissatisfaction with his work, which began long before he engaged in any protected activities at issue here. From the very beginning of his work for Hughes he resisted completing assignments given to him, refused to work on certain projects and even refused to pass on information to those who were brought in to complete the projects. Finally, he was asked to perform work on PPUP. His reaction was characteristic. He objected to the whole thing and finally said he would not work on the project at all. In short, there is evidence that Crosby fairly bristled with antagonism, complaints, foot dragging, insubordination, and fractiousness. The ALJ and the Secretary decided that his termination was based upon that. There is substantial evidence to support the decision.

***2** It is noteworthy that the individuals who terminated Crosby did not even know of most of his alleged protected activity. While they did hear him complain about PPUP, they did not understand that he was complaining about a possible environmental problem related to a gas detector system if PPUP were used with that system. What they did understand was that Crosby was, once again, refusing to do work that he was directed to do. The Secretary did not err when he found that Crosby was discharged for proper reasons.[FN2]

> FN2. The parties spill much ink over whether Crosby spelled out a prima facie case. We, of course, recognize that a prima facie case is the first step in a trial of this kind. However, given the ultimate determination, there is no need for us to delve into the intricacies of prima facie case building.

Crosby, however, complains of the procedures used to reach a decision in this case. He says that he was entitled to a continuance because certain discovery was delivered late. But though that continuance was denied him, after two days of hearings the proceeding was adjourned for five weeks. Thus, he effectively got his continuance anyway. He also asked that adverse inferences be drawn against Hughes because of the lateness of the discovery and because Hughes asserted a privilege as to some discovery which was sought. But the issue of sanctions is left to the discretion of the ALJ, and we see no abuse of that discretion here.See29 C.F.R. § 18.6(d)(2)(i). Moreover, it is not appropriate to draw adverse inferences from the failure to produce documents protected by the attorney-client and work product privileges.SeeWigmore on Evidence § 291 (rev. 1979).

Crosby further complains that he did not get to examine certain subpoenaed witnesses after the district court refused to enforce a subpoena for them. He said that adverse inferences should have been drawn, but the ALJ determined that their testimony would have been immaterial. Moreover, Crosby did have an opportunity to examine the officials who actually fired him. We see no reversible error.

Finally, Crosby complains that certain offers of proof were improperly relied upon. Those were made when the ALJ refused to hear testimony from certain Hughes witnesses and allowed Hughes to protect the record by stating what the witnesses' testimony would have been. The ALJ did not rely upon the offers at all. While the Secretary did refer to them, those occasional references were not necessary to the final decision and were accompanied by references to proper evidentiary matter. We are unable to say that Crosby's substantial rights were affected by those stray, though improper, references.See29 C.F.R. § 18.103.

PETITION DENIED.

C.A.9,1995.
Crosby v. U.S. Dept. of Labor
53 F.3d 338, 1995 WL 234904 (C.A.9)

END OF DOCUMENT

TAB 10

HOnly the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
Carol DAHLIN and Gene Dahlin, Plaintiffs,
v.
EVANGELICAL CHILD AND FAMILY AGENCY, Defendant.
No. 01 C 1182.

Dec. 18, 2002.

MEMORANDUM OPINION AND ORDER

KENNELLY, J.
***1** The purpose of this Memorandum Opinion is to deal with the parties' motions *in limine.*

A. Defendant's motions *in limine*

Defendant Evangelical Child and Family Agency has filed nine motions *in limine,* entitling each one with a number, e.g., "Defendant's Motion *In Limine* Number 1." We will address each motion in turn.

1. Evidence of other lawsuits

Defendant Evangelical Child and Family Agency seeks to preclude evidence regarding other lawsuits against Evangelical. Plaintiffs Carol and Gene Dahlin refer to no other evidence of this type in the final pretrial order, nor do they cite any such evidence in response to defendant's motion. The motion is granted.

2. Evidence of Francie Dahlin's medical expenses after age 18

The Court denies Evangelical's motion to preclude evidence regarding the Dahlins' payment of their adopted daughter Francie's medical expenses after she turned eighteen. Defendant cites no authority for this motion. The Dahlins are entitled to offer evidence that they had an obligationeither legal or moral-to pay these expenses at least while Francie was in college.

3. Evidence of emotional distress damages

The Court denies Evangelical's motion to preclude evidence of emotional distress damages for the reasons stated in our recent ruling regarding defendant's motion to dismiss the second amended complaint. *See* *Dahlin v. Evangelical Child and Family Agency,* No. 01 C 1182, 2002 WL 31541618, at *3-4 (N.D.Ill. Nov. 6, 2002).

4. Evidence regarding propriety of Beverly Ozinga's communications with Francie Dahlin

In February 1998, Beverly Ozinga, an employee of Evangelical, spoke with Francie Dahlin by telephone concerning some of the same information about her biological parents and grandparents that the Dahlins say Evangelical had withheld and concealed from them at the time of the adoption and for years thereafter. Evangelical asks the Court to exclude evidence that Ozinga's disclosures to Francie upset her and them, as well as evidence that Ozinga acted inappropriately. The Court agrees with the Dahlins that evidence about the phone calls is admissible because it forms part of the factual backdrop for the Dahlins' eventual discovery of the truth about Francie and is thus relevant to issues such as explanation of the relationship between the Dahlins and Evangelical, proximate causation of certain of the Dahlins' claimed damages, and accrual of their claim for purposes of the statute of limitations. The Court does not, however, see how evidence of the *propriety* of Ozinga's disclosure bears on the merits of the Dahlins' claims against Evangelical, and the Dahlins have made little effort to provide an argument or explanation in this regard. Thus evidence (including expert testimony) on whether Ozinga acted properly is excluded. Finally, the Dahlins argue that this evidence tends to show that Evangelical was not actually acting out of concern for Francie's best interests. The Court reserves ruling on whether it will permit the Dahlins to take this position in closing argument; our ruling will depend on the evidence and argument offered by Evangelical along these lines.

5 & 6. Testimony of Dr. David Cline and Michael Franke

***2** In two separate motions, Evangelical seeks to preclude certain opinions that it anticipates will be elicited from two of the Dahlins' witnesses, psychiatrist Dr. David Cline and psychologist Michael Franke. Both Dr. Cline and Mr. Franke treated Francie from 1991 through 1993. It appears that both of these witnesses will testify, among other things, that Francie's mental illnesses may well have had a genetic component and that their treatment of her would have differed, and might have been more successful, had they known of the information about Francie's birth parents and grandparents that the Dahlins claim Evangelical withheld and concealed.

Evangelical argues that this testimony is unduly speculative. Though it concedes that certain mental illnesses may be genetically based, it argues that there is no evidence that Francie's birth parents or grandparents had any particular identifiable mental illness, and it also argues that the allegedly withheld information about Francie's background would not have permitted any prediction regarding the likelihood that she would develop a mental illness.

Evangelical's arguments may have a significant bearing on the weight to be accorded to Cline and Franke's testimony by the jury, but they do not affect its admissibility. At their depositions, both witnesses testified to a reasonable degree of scientific certainty that Francie suffered from disorders that have been shown to have a genetic component; both testified that family history information of the type withheld is necessary and significant in making a proper diagnosis and determining treatment; and both testified that they would have followed a different course of treatment had they known of the withheld information. Applying the factors set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and Federal Rule of Evidence 702, the Court finds that Dr. Cline's and Mr. Franke's testimony is reliably based on scientific knowledge and will assist the jury in understanding and determining facts that are in issue. Evangelical's motion to preclude this testimony is denied.

7. Testimony of Demosthenes Lorandos

Evangelical next moves to bar testimony by Demosthenes Lorandos, a clinical psychologist retained by the Dahlins to testify at trial. Lorandos' report describes nine opinions:

> 1) familiarity with scientific literature is necessary for the ethical practice of adoption and any behavioral science discipline;
>
> 2) as of the time of Francie's adoption, the readily available literature of behavioral genetics reported a genetic predisposition to psychological / psychiatric dysfunction;
>
> 3) at the time of the adoption, it should have been apparent to any minimally informed adoption or behavioral science professional that Francie's biological parents showed a genetically linked psychological / psychiatric dysfunction;
>
> 4, 5 & 6) it was fraud in the inducement, "fraud in factum," and a breach of the standard of care for behavioral science professionals for Evangelical's adoption workers to fail to inform the Dahlins of the dysfunction in Francie's biological parents and the possibility of a genetic predisposition to similar dysfunction in Francie;
>
> ***3** 7 & 8) Francie's and the Dahlins' psychological stress may have been ameliorated if Evangelical had made full disclosure to the Dahlins; and
>
> 9) Francie and the Dahlins were damaged as a result of Evangelical's fraud and breach of the standard of care.

Opinions 1, 2, and 3 are admissible only in part. At his deposition, Lorandos repeatedly testified to his lack of expertise in adoption practices. *See, e.g.,* Lorandos Dep. 20, 30, 37-38. Based on this admitted lack of expertise, Lorandos has no basis upon which to render an opinion that is specific to the adoption field. But as a licensed clinical psychologist, Lorandos appears qualified to testify regarding what applicable ethical standards required of behavioral science professionals, including psychologists and social workers, regarding familiarity with professional literature and on what the pertinent literature reflected at the relevant time. That testimony is relevant because at least some of Evangelical's adoption workers were social workers. Evidence that a reasonable adoption worker would have considered the withheld information significant is probative of the question

whether the information was material, an element of the Dahlins' fiduciary duty claim, *see, e.g.,* *Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 5000, 675 N.E.2d 584, 593 (1996), and the question whether Evangelical intended the Dahlins to rely on the concealed or withheld information, an element of their fraud claim. *See, e.g.,* *Siegel v. Levy Organization Development Co.*, 153 Ill.2d 534, 543, 607 N.E.2d 194, 198 (1992). Thus Lorandos may testify to opinions 1, 2 and 3, though he may not particularize these to the adoption context.

Lorandos may not testify regarding opinions 4 and 5-that Evangelical's actions constituted fraud. This is a quintessential jury determination on which the Court will instruct a jury concerning the factors it is to consider; Lorandos has nothing meaningful to contribute in his capacity as an expert in the field of clinical psychology.[FN1]A finding of fraud requires proof of the defendant's intent. *Siegel*, 153 Ill.2d at 542-43, 607 N.E.2d at 198.Even assuming that he had the qualifications to determine someone else's intent-an assumption not borne out in the materials submitted to the Court-and even though Federal Rule of Evidence 704(a) abrogates the common-law rule barring expert opinions on an "ultimate issue," we must nonetheless analyze whether an "expert" opinion on this topic would assist the jury and if so, whether its probative value is outweighed by its danger for unfair prejudice. *See*Fed.R.Evid. 704, Advisory Committee Notes ("The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day."). *See also* C. Mueller & L. Kirkpatrick, Federal Evidence § 361 at 708 (1994 & Supp.2001) (expert testimony that touches on an ultimate issue "remains excludable, not because it directly touches ultimate issues, but because it is not helpful. And FRE 704 is not an open sesame to all opinion."). Lorandos can render an opinion regarding Evangelical's intent only by drawing inferences from the evidence. The Dahlins have not persuaded the Court that Lorandos is any more qualified than an ordinary juror to draw those inferences. In *Woods v. Lecureux*, 110 F.3d 1215 (6th Cir.1997), the court held that expert testimony that conduct by warden was "deliberately indifferent" was properly excluded. It reasoned that "whether a prison official acted with deliberate indifference depends on that official's state of mind. Thus, by expressing the opinion that [the official] was deliberately indifferent, [the expert] gives the false impression that he knows the answer to this inquiry, which depends on [the official's] mental state." *Id.* at 1221.The court stated that "testimony that does little more than tell the jury what result to reach" is unhelpful and thus inadmissible, and testimony regarding intent-essentially an inference from other facts-"is even more likely to be unhelpful to the trier of fact."*Id.* [FN2] *See also, e.g.,* *Aerotech Resources, Inc. v. Dodson Aviation, Inc.*, No. 00-2099-CM, 2001 WL 474296 (D.Kan.2001) (striking expert's testimony regarding parties' intent in entering into a contract); *Tasch, Inc. v. Sabine Offshore Service, Inc.*, No. 97-15901 JAB, 1999 WL 596261 (E.D.La.1999) (same).*Cf.* *United States v. Benson*, 941 F.2d 598, 604 (7th Cir.1991) (holding inadmissible testimony of an IRS agent regarding the purpose of a transaction; "[m]uch of [his] testimony consists of nothing more than drawing inferences from the evidence that he was no more qualified than the jury to draw.").

FN1. Lorandos is also a licensed attorney, but that does not affect the outcome here, and the Dahlins do not argue (nor could they with a straight face) that this enables Lorandos properly to render an opinion regarding the intent of Evangelical's personnel.

FN2. In *West v. Waymire*, 114 F.3d 646, 652 (7th Cir.1997), the Seventh Circuit cited *Woods* with approval for the proposition that an expert witness is not allowed to draw "legal conclusion[s]."

***4** The Court also precludes Lorandos from testifying regarding Opinion 6-that Evangelical's workers did not comply with the "standard of care" that purportedly applied to adoption agencies at the time of the adoption and thereafter. First of all, as noted earlier, Lorandos repeatedly disavowed in his deposition any expertise in adoption agency practice. *Supra* at 5. Moreover, although "standard of care" testimony is common, and sometimes required, in professional malpractice cases in Illinois, *see, e.g.,* *Barth v. Reagan*, 139 Ill.2d 399, 407, 564 N.E.2d 1196, 1200 (1990) (legal malpractice); *Dolan v. Galuzzo*, 77 Ill.2d 279, 281, 396 N.E.2d 13, 15 (1979) (medical malpractice), this is not the usual professional mal-

practice case: the standard of care is a specific one which, as the Court determined in its recent ruling, is supplied by *Roe v. Catholic Charities,* 225 Ill.App.3d 519, 537, 588 N.E.2d 354, 365 (1992): the duty to provide "an honest and complete response to [the adoptive parents'] specific request concerning the characteristics of the potentially adoptable child." Lorandos is no more qualified than an ordinary juror to opine on whether Evangelical was honest and complete. His opinion that Evangelical breached this particular standard of care is not helpful to the jury and is therefore inadmissible with respect to the negligence claim.

The Court will permit Lorandos to testify that disclosure of the information would have led to different treatment of Francie and might have resulted in the amelioration of her condition (Opinion 7). There is no question that as a licensed clinical psychologist who has extensive experience treating patients, Lorandos is qualified to render this opinion. Evangelical argues that the testimony lacks foundation because the Dahlins cannot prove that Francie had a genetically-based condition; the Court rejects this argument for the reasons discussed with respect to the testimony of Francie's treating psychiatrist and psychologist, Dr. David Cline & Michael Franke. Though Lorandos' testimony in this regard overlaps with that of Cline and Franke, its cumulative effect does not substantially outweigh its probative value, *see*Fed.R.Evid. 403, because the treaters' testimony is subject to cross-examination for bias and interest based on, among other things, their long-standing relationship with Francie and the Dahlin family. At oral argument on this motion, Evangelical's counsel did not disavow the intention to pursue cross-examination and argument along those lines. Were Evangelical to stipulate that it would avoid such inquiry and argument, the balance would shift, and the Court would conclude that Lorandos' testimony on this topic is unduly cumulative and inadmissible under Rule 403.

Lorandos may not testify regarding the amelioration of the *Dahlins'* psychological stress. His testimony in this regard boils down to the proposition that if Francie's treaters had had the information that would have permitted them to treat her condition properly, it would have made things much easier and less stressful to her parents. Though the Dahlins' emotional distress and its cause is undeniably relevant, Lorandos' expertise as a psychologist adds nothing beyond what the jurors' own common sense will inform them.

***5** Finally, the Court bars Lorandos from testifying that Evangelical's conduct proximately caused the Dahlins' injury (Opinion 9). His testimony in this regard would amount to a legal conclusion and adds nothing proper beyond Opinion 7, his testimony that full disclosure would have enabled Francie's treaters to ameliorate her condition.

8 & 9. Mary Ann Maiser and Lynn Goffinet

The Dahlins propose to call Mary Ann Maiser, a licensed consulting social worker and a retained expert, to testify regarding standards of care in adoption agency practice at the relevant time. *See* Plaintiffs' Response to Defendants' Motion *In Limine* Number 8, pp. 1-3. They also propose to call Lynn Goffinet, who is also a fact witness, to testify regarding these same subjects. *See* Plaintiffs' Response to Defendants' Motion *In Limine* Number 9, p. 1.[FN3] Based on the parties submissions and the discussion at oral argument, it appears that the testimony of Maiser and Goffinet (the latter in her capacity as an expert) is entirely and unnecessarily duplicative. Pursuant to the Court's authority under Federal Rule of Evidence 403, the Court finds that the needlessly cumulative effect of this duplication would substantially outweigh the probative value of the second expert. The Dahlins will be required to choose between these two expert witnesses and should advise defendant of their selection no less than two weeks prior to the start of trial. *See also* N.D. Ill. LR Form 16.1.1, fn. 7 ("Only one expert witness on each subject for each party will be permitted to testify absent good cause shown."). (Goffinet may testify in her capacity as a fact witness irrespective of The Dahlins' election on the expert testimony.)

> FN3. Based on these witnesses' reports and depositions, Evangelical had moved to bar a number of other opinions that it believed they might offer. However, the Dahlins' response to these motions limited Maiser and Goffinet to the subject matter discussed above, and the Court will hold the Dahlins to that limitation.

Evangelical argues that the testimony of Maiser and Goffinet involves "inadmissible legal conclusions"

and "would invade the province of a jury."But the issue of the nature of the relationship between prospective adoptive parents and an adoption agency, which is at the core of the Dahlins' fiduciary duty claim, is largely dependent on facts, not law. As the Court discussed it its recent ruling permitting the Dahlins to proceed with their fiduciary duty claim, they are required to prove, based on the facts, that the relationship was one in which "confidence and trust is reposed on one side, resulting in dominance and influence on the other side." *Dahlin,* 2002 WL 31541618, at *3 (citing *Martin v. Heinold Commodities, Inc.*, 163 Ill.2d 33, 45-46, 643 N.E.2d 734, 740-412 (1994); *Dyblie v. Dyblie,* 389 Ill. 326, 332, 59 N.E.2d 657, 660 (1945)). These witnesses are not being offered to give opinions involving matters within the ken of an ordinary juror, and they will not be rendering an opinion on whether a fiduciary duty exists. Evangelical's objection is without merit.

B. Plaintiffs' motions *in limine*

1. Testimony of Dr. Peter Fink

The Dahlins have moved to exclude certain aspects of the anticipated testimony of Dr. Peter Fink, a psychiatrist. Among other things, Evangelical anticipates eliciting from Dr. Fink testimony that the Dahlins "were on notice that there would be difficulties with Francie's placement," in particular that she would have difficulty adjusting to the adoption-what Dr. Fink calls "attachment difficulties." Response to Plaintiffs' Motion *In Limine* Regarding Dr. Fink at 3. Evangelical argues that this "bears directly on the issue of liability and proximate cause on plaintiffs' claim that their efforts to obtain treatment for Francie were delayed because of [Evangelical's] failure to provide them with certain information about Francie.... While [Evangelical] does not agree that there was any such delay, if there was, the proximate cause was plaintiffs' own failure to seek treatment when they knew or should have known Francie would have attachment issues."*Id.* at 4.

***6** Accepting for purposes of discussion that what the Dahlins as adoptive parents should have understood is relevant to the issue of causation, Evangelical has provided no support for the proposition that Dr. Fink, testifying as an expert, has anything relevant to contribute on that issue. Not all testimony by an expert qualifies as admissible expert testimony. The significance *to a layperson* of the information known to the Dahlins does not appear to be a matter on which a jury requires expert testimony, or on which Dr. Fink has any particular expertise.

Dr. Fink likewise is not qualified to opine regarding whether the adoption workers at Evangelical ought to have understood the significance of the information they allegedly withheld; he is a psychiatrist, not an expert in adoptions or adoption ethics. He may, however, render an opinion regarding the significance of the withheld information in the treatment of Francie, as such testimony is both scientifically based and squarely within the scope of his expertise.

The Dahlins also seek to preclude Dr. Fink from using diagrams regarding certain genetic issues on the grounds that these were not disclosed in timely fashion. The Court is satisfied however, that these diagrams were contained within scientific literature that was produced to the Dahlins' counsel prior to Dr. Fink's deposition. That disclosure is sufficient to allow Dr. Fink to use the charts for the purpose of illustrating his opinions.

2. Testimony of Ron Nydam

The Dahlins have moved to bar the testimony of Ron Nydam, an expert retained by Evangelical to testify at trial. Nydam is a professor of pastoral care at Calvin Theological Seminary in Grand Rapids, Michigan; he was director of pastoral counseling for a counseling center in Denver, Colorado; and he served as the pastor of a church in Denver. He has a doctorate in "Religion and Psychological Studies," as well as a doctorate in ministry, and both of these degrees required him to obtain training in psychological theory and practice. He is a licensed "professional counselor" in Michigan and as such is permitted to and does conduct psychotherapy, evidently concentrating his practice in the counseling of adoptees and their families. His studies have focused in, among other areas, the history of adoption practices in this country.

In its response to the Dahlins' motion, Evangelical says that it plans to call Nydam to testify regarding the history of adoption practice; the level of understanding of, and the information available to, adoption professionals at the time of Francie's adoption; and "the evolution of the belief system of adoption professionals regarding the disclosure of negative

information about an adopted child."Amended Response to Motion *In Limine,* p. 1. Specifically, he will testify that the "old school" of adoption practice taught that disclosure of negative information about an adopted child's background would trigger stigma and shame and would make it harder for the adoptive family to bond with the child. *Id.* at 5-6.Nydam does not advocate this view-indeed he thinks it unwise-but he will testify that it was widely followed at the time of Francie's adoption. *Id.* Nydam's testimony in this regard is relevant in that it will put in context the testimony of Evangelical's personnel regarding their reasons for acting as they did. But although Nydam may testify that Evangelical's actions were consistent with common practice at the time, he may not attempt to characterize the reasons why Evangelical's personnel acted as they did, for to do so would be to render an opinion on their actual intent, a subject on which Nydam has no basis to render an opinion and on which his testimony would be entirely speculative.

***7** Nydam can also properly testify about the level of information available to adoption professionals at the relevant time regarding the relationship between genetics and mental health. Evangelical characterizes this as "expert historical testimony, not expert scientific testimony, and [as such] not subject to a *Daubert* analysis."Amended Response to Motion *In Limine,* p. 9. The characterization of testimony as "scientific" or "non-scientific," however, does not govern the applicability of *Daubert, see* *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 141 (1999), and in any event Federal Rule of Evidence 702, which essentially restates the *Daubert* criteria, applies to all expert opinions, not just "scientific" opinions. *See*Fed.R.Evid. 702, 2000 Adv. Comm. Notes.

Applying the *Daubert* / Rule 702 criteria, Nydam appears every bit as qualified as the Dahlins' expert Demosthenes Lorandos to testify regarding the nature and content of pertinent scientific information reasonably available to adoption workers at the relevant time. On the other hand, the Court will not permit Evangelical to elicit from Nydam an opinion regarding "the general beliefs of adoption agency professionals in 1978-79 regarding the importance of genetic information,"*see* Amended Response to Motion *In Limine,* p. 8, as his report and Evangelical's memorandum do not disclose a sufficient basis to permit the Court to conclude that this opinion is the product of reliable principles and methods reliably applied. *See*Fed.R.Evid. 702.

Finally, Evangelical proposes to elicit from Nydam an opinion that Francie suffered from "reactive attachment disorder," which Evangelical characterizes as "a condition prevalent among adopted children which makes then unable to form attachments with other people, including the adoptive parents who care for them."Amended Response to Motion *In Limine,* p. 10; *see* Diagnostic and Statistical Manual of Mental Disorders 116-18 (4th ed. 1994) ("DSM-IV"). Though not entirely clear from Evangelical's response to the motion *in limine,* its contention appears to be that many of Francie's problems following her adoption were attributable not to psychological dysfunction but rather to factors that are common among adopted children. *See* Amended Response to Motion *In Limine,* pp. 10-11.

Although Nydam has diagnosed and treated attachment disorder in many of his own counseling clients, his written report in this case, which was required to "contain a complete statement of all opinions to be expressed *...and the basis and reasons therefor [and] the data or other information considered* by [Nydam] in forming the opinions,"Fed.R.Civ.P. 26(a)(2)(B) (emphasis added), fails to set forth a sufficient foundation for him to render a diagnosis of Francie. His report essentially reflects that Francie, like other adopted children, *likely* faced significant hurdles in developing an attachment to her adoptive family. *See* Amended Response to Motion *In Limine,* Ex. 2 (Nydam report), pp. 7-8. But Nydam has never examined Francie, and his report references nothing in her medical records or any of the other evidence in the case that supports the proposition that she *actually* suffered from the disorder described in DSM-IV. In addition, though Nydam has extensive experience in pastoral counseling and in the counseling of adoptive children and families, he is neither a psychiatrist nor a clinical psychologist, and nothing in his report or in Evangelical's submission reflects that his training and experience enables him to diagnose an adopted child without examining or interviewing with her, but simply from reviewing her records. In sum, neither Nydam nor Evangelical has provided the Court with anything that even suggests, let alone shows, that Nydam's opinion regarding Francie's condition is "the product of reliable principles and methods" that "the witnesses has applied ... reliably to the fats of the case."Fed.R.Evid. 702. That opinion is therefore in-

admissible. *See* *Daubert,* 509 U.S. at 597 (district court must "ensur[e] that an expert's testimony rests on a reliable foundation").

***8** Nydam may, however, testify regarding the difficulties that commonly affect adoptive children in other words he may testify about attachment problems generally and how they manifest themselves. Rule 702 permits expert testimony that "educate[s] the fact finder about general principles, without ever attempting to apply those principles to the specific facts of the case."Fed.R.Evid. 702, 2000 Adv. Comm. Notes. Testimony on this point is relevant, as there is some evidence in the record that suggests Francie may have suffered from attachment difficulties (though not from the "disorder" described in DSM-IV). And Nydam appears by his education and experience to be qualified to testify in this regard.

3. Evidence of Evangelical's not-for-profit status

The Dahlins have moved to exclude evidence that Evangelical is a not-for-profit agency, arguing that this evidence is irrelevant and is offered only to engender sympathy among the jurors. Evangelical's first argument is that this evidence tends to show that it lacked a financial motive to fraudulently induce the Dahlins to adopt Francie. This is a *non sequitur;* the extent to which the cost of caring for Francie may have posed a financial burden on Evangelical if she was not adopted is unaffected by whether it was a for-profit or not-for-profit agency. Evangelical's second argument concerns the Dahlins' claim for punitive damages; it contends that evidence of its not-for-profit status would tend to undercut any argument by the Dahlins that Evangelical acted as it did in order to enrich itself. *See* *Jannotta v. Subway Sandwich Shops, Inc.,* 125 F.3d 503, 511 (7th Cir.1997) (punitive damages are available if the defendant intended to enrich itself without regard to the effect of its conduct on others). But at oral argument on the motion, the Dahlins' counsel disavowed any intention to make such an argument. For these reasons, the Dahlins' motion is granted.[FN4]

> FN4. Evidence regarding a defendant's financial status may be relevant on the issue of punitive damages; the amount of punitive damages needed to deter an impecunious defendant may differ from that needed to deter one that is flush with cash. *See, e.g.,* *Wilson v. Colston,* 120 Ill.App.3d 150, 152-53, 457 N.E.2d 1042, 1044 (1983). But the rule in Illinois seems to be that it is up to the plaintiff, not the defendant, to inject the defendant's finances into the case. *See, e.g.,* *Black v. Iovino,* 219 Ill.App.3d 378, 580 N.E.2d 139, 150 (1991). And in any event, simple intonation of the term "not-for-profit" has no probative value with regard to Evangelical's financial statue; to illustrate, the MacArthur Foundation, a not-for-profit entity, has an endowment in the billions. Evangelical has offered no financial statements or other evidence of its financial condition, and thus we need not address the admissibility of such evidence.

Conclusion

For the reasons stated above, defendant's motion *in limine* No. 1 [docket item 25-1] is granted; its motions *in limine* Nos. 2, 3, 5, and 6 [items 25-1, 26-1, 27-1] are denied; its motions *in limine* Nos. 4 and 7 [items 25-1 & 28-1] are granted in part and denied in part; and its motions *in limine* Nos. 8 and 9 [items 29-1 & 30-1] are granted only to the extent that plaintiffs are required to elect between expert witnesses Maiser and Goffinet. Plaintiffs' motion *in limine* regarding Dr. Fink [item 43-1] and their motion *in limine* regarding Ron Nydam [item 42-1] are is granted in part and denied in part, and their motion *in limine* regarding defendant's not-for-profit status [item 44-1] is granted. Motions 45-1 & 2 are terminated as moot.

N.D.Ill.,2002.
Dahlin v. Evangelical Child and Family Agency
Not Reported in F.Supp.2d, 2002 WL 31834881 (N.D.Ill.)

END OF DOCUMENT

TAB 11

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern Division.

Jane DOE, a Minor, by and through her Guardians and Next Friends, G.S. and M.S., Plaintiffs,
v.
TAG, INC., n/k/a Childserv, Susan Clement, and Robin and David Swaziek, Defendants.

No. 92 C 7661.

Nov. 18, 1993.

MEMORANDUM OPINION AND ORDER

CONLON, District Judge.

***1** Jane Doe, through her guardians and next friends G.S. and M.S. (collectively "the plaintiffs"), sues Tag/ChildServ ("Tag"), Susan Clement ("Clement"), a Tag supervisor, and Robin and David Swaziek, Doe's former foster parents ("the Swazieks"), for placing and keeping Doe in a foster home in which she allegedly suffered severe physical and psychological abuse.[FN1] The plaintiffs and defendants move *in limine* to exclude evidence.

DISCUSSION

1. Motions *In Limine*

The court excludes evidence on a motion *in limine* only if the evidence clearly is not admissible for any purpose. *Hawthorne Partners v. AT & T Technologies, Inc.*, 831 F.Supp. 1398, 1993 WL 330506 *1 (N.D.Ill.1993). Although the court may bar evidence before trial, motions *in limine* to exclude evidence are disfavored; a better practice is to deal with admissibility questions as they arise at trial. *See* *Scarboro v. Travelers Ins. Co.*, 91 F.R.D. 21, 22 (E.D.Tenn.1980). Unless evidence clearly is inadmissible, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy, and potential prejudice can be resolved in their proper context. *The Middleby Corp. v. Hussman Corp.*, No 90 C 2744, 1993 WL 15129 *1 (N.D.Ill. May 5, 1993); *see also* Charles A. Wright and Kenneth W. Graham, Jr., *Federal Practice and Procedure* ¶¶ 5037-5042 (1977 ed. & 1993 Supp.). Denial of a motion *in limine* does not mean that all evidence contemplated by the motion will be admitted at trial. Rather, denial of the motion means only that without the context of trial the court is unable to determine whether the evidence in question should be excluded. *See* *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir.1989) (citing *Luce v. United States*, 469 U.S. 38, 41 (1984)).

2. Current Medical Condition/Future Medical Needs

Clement moves to exclude all evidence concerning Doe's current medical condition and future medical needs. Clement contends that the plaintiffs did not disclose during discovery that their experts would testify regarding Doe's current or future medical state. Clement also asserts that the plaintiffs' experts are not qualified to testify concerning Doe's current or future medical condition because they have not treated Doe in three years.[FN2]

Clement's motion lacks merit. The plaintiffs clearly informed the defendants that their experts would testify about Doe's current medical condition and future medical needs. In response to Clement's interrogatories, the plaintiffs reported that their experts, Drs. Braun and Poznanski,[FN3] would testify on the following subject matter:

Ritualistic and sadistic abuse; multiple personality disorder diagnosis of Jane Doe while residing in the defendants Swazieks [sic] home; *and current prognosis of Jane Doe regarding need for future medical and or psychiatric treatment.*

Motion Ex. B at 3 (emphasis added). Furthermore, Clement's assertion that the experts would testify on mere surmise or conjecture is unfounded. Drs. Braun and Poznanski's expert opinions concerning Doe's prognosis are based on their clinical experience in addition to their work with Doe. Although they have not treated Doe in three years, Drs. Braun and Poznanski are qualified to state opinions concerning the prognosis in a case such as Doe's. *See* *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 2796 (1993) (expert witness is permitted "wide latitude to offer opinions, including those that are not based on first-hand knowledge").

The defendants of course may attempt to impeach the experts' credibility by cross-examining them concerning alleged prior inconsistent statements, and may make clear that the experts have not seen Doe in three years. However, the inadmissibility of testimony concerning Doe's current and future medical condition has not been established.

3. Standards of Practice In The Social Services Field

***2** Clement moves to exclude expert testimony concerning the standards of practice in the social services field. Clement establishes that none of the plaintiffs' three expert witnesses is an expert in the social services area. *See* Motion Exs. 1-3 (unmarked). Accordingly, Dr. Braun, Dr. Poznanski, and Dr. Alford may not testify as experts concerning standards or practices in the social services field.

4. Prior Abuse In The Swaziek Household

Clement moves to exclude evidence that Robin Swaziek and Christie Stimpson allegedly were abused "by a family member who did not reside with them." Clement argues that the evidence lacks foundation, is irrelevant, and would be unfairly prejudicial if admitted. However, all of Clement's arguments are highly conclusory; she simply does not establish any of her claims.[FN4] Therefore, Clement does not meet her burden on a motion *in limine* to show that the evidence clearly is not admissible for any purpose. *Hawthorne Partners v. AT & T Technologies, Inc.*, 831 F.Supp. 1398, 1993 WL 330506 *1 (N.D.Ill.1993).

5. Cumulative Testimony

Clement moves to exclude expert testimony by both Dr. Braun and Dr. Poznanski, contending that the evidence would be unnecessarily cumulative. *See*Fed.R.Evid. 403. She asserts that both doctors prepared a joint report in 1989, and are expected to testify to identical opinions. She argues that if both witnesses are permitted to testify, the defendants would be unfairly prejudiced by "an unfair aura of authority and confirmation to the joint opinion." Motion at 3.

Clement's motion lacks merit. Although the two experts may present some identical testimony, it would be to the jury's benefit to hear both doctors testify, particularly because their 1989 report is of central concern in this case. Furthermore, Clement apparently misperceives the purpose of Rule 403 of the Federal Rules of Evidence. She asserts that there is a risk of unfair prejudice to the defendants. However, Rule 403 permits the court to exclude relevant evidence only if its probative value is "substantially outweighed by the risk of unfair prejudice." Fed.R.Evid. 403. Clement does not establish-or even assert-that the probative value of the testimony is substantially outweighed. The plaintiffs may proffer the testimony of both experts.

6. Stanley Smith's Testimony

Tag moves to exclude the expert testimony of Stanley Smith, an economist, concerning Doe's future loss of enjoyment of life. Tag contends that Smith's testimony would lack proper foundation, and would fail to assist the trier of fact. Tag also asserts that the plaintiffs failed to disclose Smith's opinions in a timely manner. Smith's testimony must be excluded.

Expert testimony may be proffered if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed.R.Evid. 702. The court must assess "whether the reasoning or methodology underlying the testimony is scientifically valid," and whether "that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 2796 (1993). The court's inquiry is a flexible one. *Id.* at 2792. In this case, the plaintiffs intend to introduce Smith's testimony to establish-through economic principles-the value of Doe's future loss of enjoyment of life. There is no binding Seventh Circuit precedent suggesting that such economic testimony is sufficiently reliable to be admissible. *See Sherrod v. Berry*, 827 F.2d 195, 205 (7th Cir.1987) (permitting economic testimony concerning loss of life), *vacated*, 835 F.2d 1222 (7th Cir.1988). The court therefore follows the well-reasoned opinion of *Mercado v. Ahmed*, 756 F.Supp. 1097 (N.D.Ill.1991).

***3** In *Mercado*, the plaintiffs sought to introduce expert testimony by Smith concerning future loss of enjoyment of life for injuries sustained in a taxi accident. The court found that such economic testimony is not sufficiently reliable to be introduced as expert testimony because "there is no basic agreement

among economists as to what elements ought to go into life valuation." *Mercado,* 756 F.Supp. at 1103. The court noted that much of Smith's scientific data is based on surveys of others' views and attitudes. *Id.* Thus, it concluded that:

What is wrong here is not that the evidence is founded on consensus or agreement, it is that the consensus is that of persons who are no more expert than are the jurors on the value of the lost pleasure of life.

Id. Because Smith's testimony would not assist the trier of fact in reaching its decision, his testimony is irrelevant-and must be excluded.

7. Evidence Regarding James C.

Tag moves to exclude evidence concerning James C., a foster child who resided with the Swazieks before Doe did. When he was living with the Swazieks, James C. was admitted to the hospital with symptoms similar to malnutrition. After an investigation, it was found that the Swazieks did not abuse James C. Tag contends that evidence concerning James C. is irrelevant, and is outweighed by unfair prejudice to the defendants.

The evidence concerning James C. is clearly relevant. The mental and physical health of a child previously placed with the Swazieks obviously may shed light on the issues in this case. *See*Fed.R.Evid. 401. The harder question is whether the relevant evidence is "substantially outweighed by the danger of unfair prejudice" to the defendants. Fed.R.Evid. 403. The investigation of the Swazieks for James C.'s physical problems was dropped, and all records of the investigation were expunged. Therefore evidence of James C.'s illness may not be presented to establish that the Swazieks have abused their foster children in the past. However, the court excludes evidence on a motion *in limine* only when the evidence clearly is not admissible for *any* purpose. *Hawthorne Partners v. AT & T Technologies, Inc.,* 831 F.Supp. 1398, 1993 WL 330506 *1 (N.D.Ill.1993). The evidence may show that Tag was negligent in recommending the placement of another foster child with the Swazieks after James C.'s emotional and physical problems. This evidence would be highly probative for this limited purpose, and would not be substantially outweighed by any potential prejudice. Accordingly, Tag's motion *in limine* to exclude evidence concerning James C.'s placement in the Swazieks' home is denied.[FN5]

8. Evidence Regarding The Conviction Of Jean-Pierre Bourgignon

Tag moves to exclude evidence regarding the arrest and conviction of Dr. Jean-Pierre Bourgignon for sexually abusing a foster child. Tag contends that the evidence is irrelevant because the plaintiffs do not allege that Dr. Bourgignon abused Doe, and it nevertheless must be excluded because the probative value of the evidence is outweighed by the danger of unfair prejudice.

***4** The arrest and conviction of Dr. Bourgignon are clearly relevant. Although the plaintiffs do not allege that Dr. Bourgignon abused Doe, they certainly could impeach the credibility of any reports that he authored. *See, e.g.,* Motion Ex. A. However, the introduction of evidence concerning Dr. Bourgignon's arrest is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, [and] misleading the jury." Fed.R.Evid. 403. Tag notes that the plaintiffs do not allege that Tag was negligent for referring Doe to Dr. Bourgignon for an assessment, nor do the plaintiffs suggest that Dr. Bourgignon acted improperly with Doe. In fact, Dr. Bourgignon's role in this case is minimal-he simply prepared an initial assessment report. Thus, if evidence of Dr. Bourgignon's arrest were presented, the jury might believe Tag to be negligent for referring Doe to Dr. Bourgignon. Alternatively, the evidence could confuse the issues or shift the jury's focus from Tag's negligence to Dr. Bourgignon's behavior. *See Crawford v. Edmonson,* 764 F.2d 479, 484 (7th Cir.), *cert. denied,* 474 U.S. 905 (1985) (upholding exclusion of evidence of criminal acts which could lead jury to reach decision on improper basis); *Wallace v. Mulholland,* 957 F.2d 333, 336 (7th Cir.1992) (upholding exclusion of evidence that could shift jury's focus). Because evidence of Dr. Bourgignon's arrest and conviction is substantially outweighed by the risk of undue prejudice, it must be excluded.

9. The Plaintiffs' Motions

The plaintiffs move to exclude twenty-nine matters from evidence. The plaintiffs present no reasons for excluding evidence; they file no memorandum in

support of their motions. Because the plaintiffs clearly do not meet their burden to establish that the evidence is not admissible for any purpose, their motions *in limine* are denied.

CONCLUSION

For the foregoing reasons, plaintiff Jane Doe's motions *in limine* to exclude evidence are denied. Defendant Susan Clement's motion *in limine* to exclude expert evidence concerning current and future medical condition is denied. Defendant Susan Clement's motion *in limine* to exclude expert testimony concerning standards and practices of the social services field is granted. Defendant Susan Clement's motion *in limine* to exclude evidence of prior abuse is denied. Defendant Susan Clement's motion *in limine* to exclude cumulative testimony is denied. Defendant Tag/ChildServ's motion *in limine* to exclude the expert testimony of Stanley Smith is granted. Defendant Tag/Childserv's motion *in limine* to exclude evidence regarding James C. is denied. Defendant Tag/Childserv's motion *in limine* to exclude evidence regarding the conviction of Jean-Pierre Bourgignon is granted.

FN1. The complaint named the Illinois Department of Child and Family Services ("DCFS"), and caseworkers and administrators of the DCFS. These defendants have been dismissed from this action. *See* Memorandum Opinion and Order, No. 92 C 7661 (N.D.Ill. Feb. 23, 1993); Memorandum Opinion and Order, No. 92 C 7661 (N.D.Ill. Oct. 18, 1993).

FN2. The plaintiffs do not formally respond to Clement's motion. Instead, the plaintiffs offer to produce their expert witnesses for a deposition, without waiving their contention that the defendants simply failed to seek discovery concerning Doe's current and future medical needs.

FN3. The plaintiffs do not intend to call Dr. Alford to testify concerning Doe's current or future medical condition. Thus, Clement's arguments about Dr. Alford are moot.

FN4. In fact, it is not clear exactly what evidence Clement seeks to exclude.

FN5. Tag asserts that James C.'s testimony must be excluded, but does not move to exclude his testimony.

N.D.Ill.,1993.
Doe v. Tag, Inc.
Not Reported in F.Supp., 1993 WL 484212 (N.D.Ill.)

END OF DOCUMENT

TAB 12

United States District Court, N.D. Illinois, Eastern Division.

Ruth FIGUEROA, Plaintiff,
v.
CITY OF CHICAGO, a municipal corporation, Rudy Urian, and Maze Coburn, Defendants.

No. 97 C 8861.

April 24, 2000.

MEMORANDUM OPINION AND ORDER

CONLON, District J.

***1** Ruth Figueroa ("Figueroa") sues the City of Chicago ("City") for sexual harassment under Title VII, and Rudy Urian ("Urian") under 42 U.S.C. § 1983 for violation of her right to be free from sexual harassment under the equal protection clause. Figueroa also sues Urian and Maze Coburn ("Coburn") for intentional infliction of emotional distress, and Coburn for willful and wanton assault. The parties move *in limine* to exclude a substantial amount of evidence.

DISCUSSION

The background of the case is discussed in this court's order of March 1, 2000 granting partial summary judgment. Motions *in limine* are disfavored. *Hawthorne Partners v. AT & T Technologies, Inc.*, 831 F.Supp. 1398, 1400 (N.D.Ill.1993). Evidence should not be excluded *in limine* unless it is clearly inadmissible on all potential grounds. Evidentiary rulings should be deferred until trial so questions of foundation, competency, relevancy and potential prejudice may be resolved in proper context. *Middleby Corp. v. Hussmann Corp.*, No. 90 C 2744, 1993 WL 151290, at *1 (N.D.Ill. May 7, 1993); *General Electric Capital Corp. v. Munson Marine, Inc.*, No. 91 C 5090, 1992 WL 166963, at *1 (N.D.Ill. July 8, 1992).*See generally*21 Charles A. Wright, Kenneth W. Graham, Jr., Federal Practice and Procedure §§ 5037, 5042 (1977 & Supp.1993). Nevertheless, pursuant to their authority to manage trials, federal district courts may exclude evidence in advance of trial when the evidence is clearly inadmissible for any purpose. *Luce v. United States*, 469 U.S. 38, 41 n. 4 (1984).

I. CITY'S MOTIONS *IN LIMINE*

A. Contested Motions

First, the City (joined by Urian and Coburn) moves to bar evidence that the City will indemnify Urian or Coburn for compensatory damages. The City argues reference to indemnification is akin to a reference to insurance, which is precluded under Fed.R.Evid. 411. The City contends reference to its "deep pockets" is highly prejudicial under Fed.R.Evid. 403. Figueroa responds, without elaboration, that she would suffer prejudice if not allowed to question Urian or Coburn about possible indemnification. Figueroa presents no reasons why this evidence would be sufficiently probative to warrant introduction at trial. Accordingly, the court grants this motion because evidence of indemnification would be unfairly prejudicial under the balancing test of Fed.R.Evid. 403. *See Walker v. Saenz*, 1992 WL 317188, at *3 (N.D.Ill. Oct. 27, 1992) (Williams, J.).

Second, the City seeks to bar evidence that in December 1997 Figueroa moved for a temporary restraining order that defendants not retaliate against her. The City argues that this evidence would be unduly prejudicial under Rule 403 because the motion was ultimately resolved by the parties and because the motion related solely to Figueroa's allegations of retaliation and has no bearing on her Title VII hostile work environment claim against the City. Figueroa responds that the hearing is relevant despite entry of summary judgment in favor of the City on her Title VII retaliation claim because, as a result of her seeking the order, the City modified its practices in combating sexual harassment and distributed notices in the workplace cautioning against retaliation. Figueroa argues that the fact that some of the City's actions to alleviate sexual harassment and retaliation resulted from her efforts in this suit is relevant to defeating the City's affirmative defense under *Burlington Indust., Inc. v. Ellerth*, 524 U.S. 742 (1988).

***2** In *Ellerth,* the Supreme Court held that an em-

ployer may assert an affirmative defense to strict liability for a supervisor's sexual harassment of a subordinate when no tangible employment action is taken by showing (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Ellerth,* 524 U.S. at 765. Presumably, Figueroa believes the City's distribution of notices cautioning against retaliation indicates that the City's procedures for addressing sexual harassment at the time of her alleged harassment were not reasonable. However, Figueroa fails to state how evidence of the City's cautioning against retaliation is probative of the adequacy of its procedures in dealing with sexual harassment. Evidence that the City lacked appropriate safeguards against retaliation for complaining about sexual harassment is not probative of the adequacy or reasonableness of the City's safeguards for addressing sexual harassment in the first instance. Accordingly, Figueroa may not introduce evidence of her motion for a temporary restraining order.

Third, the City moves to bar evidence concerning discrimination or harassment of Figueroa or of any other employee based on national origin, heritage or race. Evidence of discrimination based on race, national origin, or ethnicity is not relevant to whether Figueroa was subject to a sexually hostile work environment. However, evidence of Urian and Coburn's racial or ethnic harassment of Figueroa may be relevant to Figueroa's intentional infliction of emotional distress claims against Urian and Coburn. Accordingly, this motion is denied. The relevance and potential prejudice of such evidence must be ascertained in the context of trial.

Fourth, the City moves (in two separate motions) to bar Figueroa from introducing any evidence other than evidence of sexually explicit graffiti to support her Title VII claim. Specifically, the City seeks to bar evidence of Urian's allegedly sexually harassing conduct. These motions are denied. The court determined in its March 1, 2000 order that Figueroa's Title VII claim against the City based on Urian's harassment is time-barred. The court also stated that "Figueroa may only pursue her Title VII harassment claim against the City to the extent it is based on sexually explicit graffiti."Mem. Op. at 15. However, this statement must be taken in context. The only allegedly harassing conduct at issue on summary judgment was the graffiti and Urian's sexual advances and threats. The City argued that Urian's conduct was time-barred and could not support the harassment claim. The court agreed. But the court was not presented with, nor was it asked to rule upon, all conduct potentially contributing to a sexually hostile work environment. Whether evidence of sexual harassment other than the explicit graffiti is admissible must be determined at trial. Moreover, the court noted in its March 1 order that Figueroa alleged conduct by Urian concerning his failure to respond to sexually explicit graffiti. The court concluded this conduct concerned Figueroa's graffiti claim and that the conduct was not time-barred. Accordingly, Figueroa may introduce evidence of Urian's failure to respond to the graffiti. Finally, "evidence of the time-barred acts is admissible as background evidence." *Berggruen v. Caterpillar, Inc.,* 1995 WL 708665, at *4 (N.D.Ill. Nov. 29, 1995) (Castillo, J.) (citing *Mathewson v. Nat'l Automatic Tool Co.,* 807 F.2d 87, 91 (7th Cir.1986) ("[I]t is well settled that evidence of earlier discriminatory conduct by an employer that is time-barred is nevertheless entirely appropriate evidence to help prove a timely claim")).

***3** *Fifth,* the City (joined in part by Urian) moves to bar evidence (1) that the City has a policy, pattern, or practice of sexual harassment of women; (2) that other employees believe they have been subject to sexual harassment or have filed sexual harassment complaints, including the number and nature of such complaints; and (3) evidence of sexually explicit conduct and material, such as pornographic photographs, to which Figueroa was not subjected. The City argues this evidence is irrelevant to Figueroa's own individual claim that she personally was subject to a sexually hostile work environment. This motion is denied. In general, the probative value of other discriminatory acts depends on their relevance to the plaintiff's complaints and the nature of the discrimination charge. *Hunter v. Allis-Chalmers Corp.,* 797 F.2d 1417, 1424 (7th Cir.1986). Evidence of a pattern or practice of discrimination is potentially relevant to Figueroa's Title VII claim. *Guzman v. Abbott Laboratories,* 61 F.Supp.2d 784, 786 (N.D.Ill.1999); *Hicks v. Gates Rubber Co.,* 833 F.2d 1406, 1415 (10th Cir.1987); *Vinson v. Taylor,* 753 F.2d 141, 146 & n. 40 (D.C.Cir.1985). Whether the evidence Figueroa wishes to offer on this point is probative of discrimination or unfairly prejudicial must be evaluated at

trial.

Sixth, the City seeks to bar evidence of harassment, racially derogatory comments, and profanity by Noel Murtagh ("Murtagh"). The City argues this evidence is not probative of sexual harassment against Figueroa. The City contends that, at most, this evidence demonstrates Murtagh's personal animosity toward Figueroa, but not his hostility toward Figueroa based on her gender. The City further contends that evidence Murtagh retaliated against Figueroa should be excluded because summary judgment was entered in its favor on Figueroa's retaliation claim.

This motion is granted in part. The court agrees that most of the evidence of Murtagh's alleged harassment is not sexual in nature. To the extent that evidence concerns race-based harassment or a general animosity toward Figueroa, it is irrelevant. However, Figueroa may offer evidence of harassment and derogatory comments by Murtagh to the extent the comments are probative of harassment sexual in nature. Acts of alleged retaliation by Murtagh are relevant only to the extent they are also probative of sexual harassment.

Seventh, the City moves to bar evidence of the political affiliations, connections, and contacts of various City employees. This motion is denied as conclusory and overbroad. This evidence is potentially relevant to Figueroa's attempt to overcome the second prong of the *Ellerth* affirmative defense. To overcome this prong, Figueroa must show her failure to take advantage of preventative or corrective measures offered by the City was reasonable. Although "an employee's *subjective* fears of confrontation, unpleasantness or retaliation do not alleviate the employee's duty under *Ellerth* to alert the employer to the allegedly hostile environment," *Shaw v. AutoZone, Inc.,* 180 F.3d 806, 813 (7th Cir.1999), those fears meet the second *Ellerth* prong to the extent they are reasonable. This evidence could show that Figueroa's failure to take advantage of the City's harassment complaint procedures was based on a reasonable belief that her supervisors could use their political connections and positions to institute adverse repercussions against her and her husband.

***4** *Eighth,* the City seeks to bar numerous types of evidence of retaliation resulting from Figueroa's complaints of sexual harassment. This motion is denied as conclusory and overbroad. The City claims such evidence is irrelevant because summary judgment was entered against Figueroa on her retaliation claim. However, the disputed conduct is potentially probative of sex-based discrimination as well as retaliation. The relevance and admissibility of this evidence must be determined at trial.

Finally, the City moves to bar Figueroa's health care providers from testifying as experts. The City argues that Figueroa has not identified any of her health care providers as expert witnesses and has not provided expert reports from those providers pursuant to Fed.R.Civ.P. 26(a)(2). However, Figueroa does not offer her treating physicians as "experts" within the meaning of Rule 26. Rule 26(a)(2)(B) requires an expert report only "with respect to a witness who is retained or specially employed to provide expert testimony in the case."Fed.R.Civ.P. 26(a)(2)(B). An expert report was not required of Figueroa's health care providers because they were not retained for the purpose of providing expert testimony. *See Richardson v. Consolidated Rail Corp.,* 17 F.3d 213, 218 (7th Cir.1994) ("A doctor is not an 'expert' if his or her testimony is based on ... observations during the course of treating; if testimony was not acquired or developed in anticipation of litigation or for trial and if the testimony is based on personal knowledge") (internal quotation marks omitted).*See also Harlow v. Eli Lilly & Co.,* 1995 WL 319728 at *3 (N.D.Ill. May 25, 1995) (Conlon, J.) (treating physician need not produce an expert report pursuant to Rule 26(a)(2)(B)). Accordingly, the City's motion is denied.

B. Uncontested Motions

The following motions by the City are not contested and are therefore granted: Motions to (1) bar reference to the City's attorneys as assistants corporation counsel or "the government"; (2) bar Figueroa from seeking punitive damages against the City; (3) bar reference to Murtagh, Rick Santella, or Eileen Joyce as "defendants" or "former defendants"; (4) bar evidence regarding general allegations of greed, corruption, or nepotism within the City or the department of fleet management; (5) bar evidence regarding investigation of Figueroa's sexual harassment complaints by the Inspector General's office and investigations of Joe Chiczewski by the Inspector General's office.

II. URIAN'S MOTIONS *IN LIMINE*

First, Urian moves to bar evidence of his alleged sexual harassment of Figueroa occurring prior to December 22, 1995 and after January 7, 1997. Urian claims such evidence is based on conduct that is time-barred and thus cannot be the basis of Figueroa's claims. This motion is denied. As discussed, evidence of the timebarred acts is admissible as background evidence.

Second, Urian moves to bar evidence that he has a reputation as a "womanizer" or that he sexually harassed other women. Urian contends this evidence constitutes unsubstantiated hearsay. Neither Urian nor Figuroa identify the evidence at issue, so the court is unable to determine whether it is inadmissable. The motion must be denied.

***5** *Third,* Urian moves to bar evidence that he intimidated, harassed, or threatened Figueroa for filing sexual harassment claims. This motion is denied. Although the court entered summary judgment in favor of the City on Figueroa's Title VII retaliation claim against the City, evidence of Urian's threats and retaliation following Figueroa's complaints of sexual harassment are relevant to the claim of intentional infliction of emotional distress against Urian. The evidence may also be relevant to Figueroa's § 1983 sexual harassment claim against Urian to the extent Figueroa shows Urian engaged in the conduct because of Figueroa's sex

Fourth, Urian moves to bar evidence of or reference to punitive damages as an element of Figueroa's claim for intentional infliction of emotional distress. This motion is moot. Figueroa does not seek punitive damages on her intentional infliction of emotional distress claim against Urian.

Fifth, Urian (joined by Coburn) moves to (1) bar evidence regarding alleged prior acts of their misconduct, and (2) bar Figueroa from arguing or commenting on allegations of misconduct by City employees. These motions are denied as vague and overbroad.

Sixth, Urian (joined by Coburn) moves to bar Figueroa from referring to or calling undisclosed witnesses or introducing undisclosed exhibits not identified in the pre-trial order. This motion is moot. Figueroa agrees to abide by the federal and local rules for introduction of witnesses and evidence.

III. COBURN'S MOTIONS *IN LIMINE*

First, Coburn moves to bar evidence that he is or is rumored to be a drug dealer. Figueroa wishes to introduce evidence that Coburn wrote a letter to Figueroa's supervisor accusing Figueroa of spreading rumors that Coburn is a drug dealer. Figueroa denies that she ever called Coburn a drug dealer. Coburn contends the letter is irrelevant, presumably because he wrote the letter after other employees told him that Figueroa was spreading the rumors, and not because he wished to accuse Figueroa as a form of harassment. The letter is relevant to the forms of harassment allegedly undertaken by Coburn, and Coburn's motivation in writing the letter involves a credibility determination properly left to the jury. Accordingly, this motion is denied.

Second, Coburn moves to bar evidence that he was kidnapped or car-jacked. This motion is moot, as Figueroa does not object.

IV. FIGUEROA'S MOTIONS *IN LIMINE*

A. Non-Confidential Motions

First, Figueroa moves to bar evidence that Urian and his wife acted as godparents of her daughter in mid-1995. Figueroa asserts this evidence would be used to show Urian acted in a respectable manner. Figueroa contends this evidence constitutes a specific instance of inadmissible character evidence under Fed.R.Evid. 608(b). Moreover, Figueroa argues the evidence is not probative of her truthfulness, because her husband made the decision to ask Urian to be a godparent and because the christening occurred prior to the alleged misconduct. The motion is meritless. It is not clear when the christening occurred, and whether it occurred after Urian's alleged harassment began. Evidence that Urian was a godparent to Figueroa's child is relevant to the nature and extent of the social and personal relationship between Figueroa and Urian.

***6** *Second,* Figueroa moves to bar evidence of the dates when she married her husband and when their children were born. This motion is denied. Although this evidence does not appear relevant, defendants assert that at least one incident of alleged harassment

occurred near the time of the Figueroas' wedding and involved references to the wedding. The admissibility of this evidence must be adduced at trial.

Third, Figueroa moves to bar any reference to her or her husband's prior marital history. This motion is denied. Figueroa states that she suffered physical abuse from a prior husband, but that this evidence is irrelevant and unfairly prejudicial. However, Figueroa claims she suffered pain, suffering, and emotional injury from defendants' conduct. Events in Figueroa's prior marital history that could cause pain, suffering, or emotional injury, such as physical abuse from a husband, are probative of whether or not defendants' actions caused the injuries and suffering at issue. *McCleland v. Montgomery Ward, Inc.,* 1995 WL 571324 (N.D.Ill. Sept. 25, 1995) (Conlon, J.).

Fourth, Figueroa moves to bar evidence of a verbal and physical altercation between Ruben Melendez and Garrick Mueller in August 1997, which resulted in transfer of Melendez out of the City garage where Figueroa worked. Apparently, Melendez will testify regarding the atmosphere at Figueroa's garage and that Mueller was the suspect creator of the graffiti. Figueroa contends the altercation between Melendez and Mueller is a collateral issue. However, evidence of the altercation between Melendez and Mueller is potentially probative of Melendez's possible bias or motive to fabricate testimony. Accordingly, this motion is denied.

Fifth, Figueroa moves to bar evidence of the 24-hour reports prepared at her worksite. This motion is denied. Figueroa contends this evidence is irrelevant to her harassment and hostile work environment claims, as it is simply a collateral attack on her work performance. However, Figueroa contends Coburn intentionally inflicted emotional distress by intensely scrutinizing her work and having hostile exchanges with her concerning her performance. Coburn contends these exchanges were based on Figueroa's role in the errors of the 24-hour reports. Consequently, evidence of the 24-hour reports may be probative of whether Coburn's criticisms of Figueroa had a basis in her performance, or whether they were intended only to harass and distress her.

Sixth, Figueroa moves to bar evidence that she did not attend an interview with the City's sexual harassment office in 1998 to discuss her allegations of harassment against Urian. This motion is denied. Figueroa claims that she viewed the sexual harassment office as an adversary at that time because she had already filed suit. Figueroa also claims she did not attend the interview on the advice of her attorney, and summarily asserts that introduction of this evidence would violate the attorney-client privilege. This conclusory statement does meet Figueroa's burden of establishing privilege. Moreover, evidence that Figueroa did not report Urian's harassment is potentially relevant as to whether Figueroa hindered the City's investigation of that harassment and whether the City is liable for that harassment.

***7** *Seventh,* Figueroa seeks to bar evidence from or concerning Leo Yoder, claiming prejudice and irrelevance. This motion is denied as vague. The subject matter of the testimony is simply not clear from the briefs.

Finally, Figueroa moves to bar references to the fact that a party does not have an expert on an issue and related reasons. Figueroa cites no legal authority for this proposition. The motion is denied.

B. Confidential motions

Figueroa also submits the following purportedly "confidential" motions *in limine:*

First, Figueroa moves to bar evidence of domestic violence between herself and her husband. This motion is denied. Figueroa contends defendants' actions caused physical and emotional injury. Evidence of domestic violence caused by Figueroa's husband is probative of the cause of Figueroa's injuries, and may be used to rebut her claim that defendants' caused her injuries.

Second, Figueroa moves to bar evidence that she gave two guns owned by her or her husband to Urian after her husband threatened her with one of the guns. Figueroa believes defendants will use this instance of approaching Urian for assistance to discredit her claim that she feared Urian. Figueroa argues this evidence is inadmissible because defendants cannot attack her credibility with specific instances of character evidence. Figueroa also argues that the court should bar cross-examination on this issue because it is not probative of her truthfulness. This motion is denied. Defendants contend the guns are relevant

because Figueroa destroyed them after receiving a discovery request for the guns. This action may be probative of Figueroa's credibility.

Third, Figueroa moves to bar evidence of her past psychiatric history and hospitalization in 1991. This motion is denied. As discussed, Figueroa's prior emotional injuries and medical condition are probative of whether her alleged injuries were caused by defendants' actions, or whether they stem from preexisting conditions.

Fourth, Figueroa moves to bar evidence that her husband stayed at the residence of Urian's mother for a month in 1996. This motion is denied. Evidence that Figueroa's husband stayed at Urian's mother's house after Urian began allegedly harassing Figueroa is probative of the relationship between Figueroa and Urian.

Finally, Figueroa moves to exclude evidence regarding Lesley Stephens' work performance and a violence in the workplace complaint made against Stephens in September 1999. Defendants state they do not intend to introduce this evidence. Accordingly, this motion is moot.

CONCLUSION

The motions *in limine* are granted in part and denied in part.

N.D.Ill.,2000.
Figueroa v. City of Chicago
Not Reported in F.Supp.2d, 2000 WL 520926 (N.D.Ill.)

END OF DOCUMENT

TAB 13

HOnly the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
James R. FULTZ, Plaintiff,
v.
FEDERAL SIGN, a division of Federal Signal Corporation, a corporation, Defendant.
No. 94 C 1931.

Feb. 17, 1995.

MEMORANDUM OPINION AND ORDER

GUZMAN, United States Magistrate Judge.
***1** The parties appeared by way of telephone conference on February 10, 1995 at 9:30 a.m. While in the midst of a deposition of the general counsel for the defendant Federal Sign, defense counsel had claimed privilege as to several questions asked by the plaintiff. The parties petitioned this Magistrate Judge for a ruling so that the deposition may continue. It appears that during the time period which led to the filing of his complaint, Mr. Fultz had a conversation with the assistant general counsel of the defendant company, Ms. Eckhardt, and advised her that if she had problems with sexual harassment and wage discrimination, that she should bring those problems to the president of the company.

Ms. Eckhardt apparently did just that. As a result of her conversation with the president of the company, a Max Brittain, who is in fact the head partner of the firm now representing the defendant, was brought in and conducted an investigation of Ms. Eckhardt's allegations. The investigation apparently took a mere three days and at the end of it, two reports were issued. The following day, Ms. Eckhardt was fired.

Plaintiff's counsel wishes to ask the general counsel for the defendant corporation what the conclusion of this investigation was, as well as who was interviewed and how the investigation was conducted in general. She argues that since her client is claiming retaliation for having brought up allegations of Title VII violations, that she intends to bring out during the course of the trial the fact that Ms. Eckhardt also was discharged shortly after voicing gender discrimination complaints to the president of the company.

Counsel for the defendant corporation argues that this investigation is irrelevant to Mr. Fultz' case. His case, she states, is one of retaliation under 704 of Title VII and "We think he is not going to be able to show a *prima facie* case as of complaining and we also think that he-that we are going to be able to prove that we had a legitimate nondiscriminatory reason for his discharge. So, certainly we would not anticipate having to use any of this because we agreed it is irrelevant." Ms. Slovak also argues that there are prior rulings in this case from Judge Williams on the privilege issue with regard to the in-house counsel to whom Ms. Daley refers and in that ruling throughout, Judge Williams sustained the defendant's argument that Ms. Eckhardt's communications were protected as privileged communications. The exact context in which those rulings were made, and the exact rulings themselves were not brought before this Magistrate Judge. Ms. Slovak further argues that Mr. Fultz was not the subject of the investigation that is being asked about. He was not interviewed and it did not involve any issue which Mr. Fultz has been identified with. There is therefore, no connection to him and the defense does not anticipate that any part of this investigation would be relevant to the lawsuit.

Counsel for the plaintiff, Ms. Daley, seeks, as an alternative to information regarding the results and the manner of this investigation, an agreement from Ms. Slovak that the defendant corporation will not use the investigation or its results as a defense or as any form of rebuttal to the plaintiff's allegations of retaliatory discharge. This Ms. Slovak refuses to do.

***2** Clearly, the manner in which the investigation and its results could become relevant in this case would be when the plaintiff, as Ms. Daley has represented the plaintiff will, presents evidence of Ms. Eckhardt's complaints of gender discrimination to the company, and her resulting discharge several days later. This evidence will be brought out to support the allegation that the company engaged in gender discrimination, refused to investigate it in good faith, and had on prior occasions retaliated against those who brought the discriminatory conduct to the attention of the company officers. It is at this point, that it would be-

come likely that the defense would bring out the results of the investigation and the manner in which it was conducted to prove that Ms. Eckhardt's discharge, several days after voicing a complaint as to gender discrimination, was not retaliatory discharge at all. But rather, that upon Ms. Eckhardt's complaints, the company had fully and completely investigated her allegations and found them to be unfounded. This of course, is why Ms. Slovak, is unwilling to stipulate that the investigation and the results of the investigation will not be used by her at trial in the defense of her client. But if the investigation or its results is to be used as evidence at trial, then clearly the privilege which it enjoys would be waived. One cannot assert the attorney/client privilege to keep an opponent from discovering facts about an investigation when the investigation is to be used at trial as a defense to defeat the opponent's allegations. This would be a classic case of using the attorney/client privilege not as a shield, but as a sword. Defense wishes to have its cake and eat it too. It argues that the investigation should be deemed privileged matter and therefore protected from any form of discovery, but at the same time wishes to reserve its right to use it to rebut the plaintiff's allegations. This I think would be an unfair advantage. While the investigation, having been conducted by retained counsel, would ordinarily be privileged, that privilege is lost once the claimant of the privilege asserts his right to use the investigation as part of his or her case in the litigation.

Defense counsel argues that the investigation ought not to be used, that it is irrelevant, and that it is not the intent of the defense counsel to use the investigation during the course of the trial. Yet, at the same time wishes to reserve the right to do so if she deems it appropriate at any time during the course of the trial. It is inconsistent to argue both that the investigation and its results are irrelevant, but that counsel will not agree not to use it during the course of the trial. In addition, it seems to me that the investigation will become relevant to this case the minute the plaintiff introduces evidence tending to establish that Ms. Eckhardt was discharged shortly after she complained of gender discrimination to the president of the corporation. At that point it will become necessary for the defendant corporation to show that Ms. Eckhardt's discharge had nothing to do with either her allegations of gender discrimination or the results of the investigation which those allegations spawned. The only way this situation can be avoided is by a ruling at this early stage that plaintiff will not be allowed to present evidence at trial of the fact that Ms. Eckhardt was fired shortly after the conclusion of an investigation into gender discrimination which was triggered by her allegations and complaints.

***3** In view of the fact that counsel for the defense is not willing to stipulate that it will not use this investigation, the conversations adduced during the investigation, or the results of the investigation as part of its defense, the privilege objection to the questions being asked is overruled. The deponent is ordered to answer the questions with regards to the investigation of the allegations of gender discrimination made by Ms. Eckhardt.

SO ORDERED.

N.D.Ill.,1995.
Fultz v. Federal Sign
Not Reported in F.Supp., 1995 WL 76874 (N.D.Ill.)

END OF DOCUMENT

TAB 14

LEXSEE 1996 U.S. DIST. LEXIS 12506

ELIZABETH T. GARZA, Plaintiff, v. ABBOTT LABORATORIES, Defendant.

No. 95 C 3560

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

1996 U.S. Dist. LEXIS 12506

August 26, 1996, Decided
August 27, 1996, DOCKETED

DISPOSITION: [*1] Abbott's motion to strike granted in part and denied in part

COUNSEL: For ELIZABETH T GARZA, plaintiff: James Gerard Bradtke, Jennifer Kay Soule, Kelly K. Lambert, Soule & Bradtke, Chicago, IL.

For ABBOTT LABORATORIES, defendant: James M. Gecker, Julie L. Helenbrook, Katten, Muchin & Zavis, Chicago, Il.

JUDGES: Ruben Castillo, United States District Judge

OPINION BY: Ruben Castillo

OPINION

MEMORANDUM OPINION AND ORDER

In this case involving claims of discrimination on the basis of disability in violation of the Americans with Disabilities Act, *42 U.S.C. § 12101 et seq.*, defendant Abbott Laboratories has moved to dismiss. In briefing that motion, the parties submitted statements of facts, and responses to those statements, pursuant to Rule 12(M) and 12(N), Local General Rules of the United States District Court for the Northern District of Illinois. Abbott has moved to strike several of the plaintiff's factual submissions, on a variety of grounds. For the following reasons, we grant this motion in part and deny it in part.

Dr. Steinwald's Affidavit

Abbott moves to strike several paragraphs of Garza's Statement of Additional Facts ("Additional Facts") and her Response to Defendant's [*2] Statement of Undisputed Facts ("Response") that are based upon the affidavit of Dr. Steinwald, one of Garza's treating physicians. Abbott argues that Dr. Steinwald's testimony must be barred because he was not clearly disclosed as an expert witness and no expert report for him was submitted. This argument is meritless. Dr. Steinwald was duly disclosed as one of several treating physicians for Garza, and Abbott was expressly notified that expert testimony might be elicited from such witnesses. *See* Pl.'s Resp. to Mot. to Strike, Ex. A (Pl.'s Supp. Ans. to Def.'s First Set of Interrogs.) at 2.

Further, no expert report regarding Dr. Steinwald's opinions was required by *Rule 26(a)(2)*, because he was not "retained or specially employed to provide expert testimony in the case." *FED. R. CIV. P. 26(a)(2)*. *See Richardson v. Consolidated Rail Corp., 17 F.3d 213, 218 (7th Cir. 1994)* ("A doctor is not an 'expert' if his or her testimony is based on . . . observations during the course of treating; if testimony was not acquired or developed in anticipation of litigation or for trial and if the testimony is based on personal knowledge.") (internal quotation marks omitted). *See also Harlow* [*3] *v. Eli Lilly & Co., 1995 U.S. Dist. LEXIS 7162*, No. 94 C 4840, 1995 WL 319728 at *3 (N.D. Ill. May 25, 1995) (treating physician used as an expert need not produce an expert report pursuant to *Rule 26(a)(2)(B)*); *FED. R. CIV. P. 26*, Advisory Committee's Note, 1993 Amendments (while anyone expected to be testify at trial under *FED. R. EVID. 702* should be identified as an "expert," those persons who were not retained specifically for purposes of litigation need not produce an expert report; for example, treating physicians need not submit expert reports). Dr. Steinwald has treated Garza since the first complaints of pain in her arms, long before litigation could have been contemplated, and the matters on which he testifies in his

affidavit are within his personal knowledge. Accordingly, this Court will not strike any portion of Dr. Steinwald's affidavit, nor those factual submissions by Garza which rely on that affidavit.

Ralph Samek Declaration and Report

Abbott also moves to strike those paragraphs of the Additional Facts, Response, and Garza's personal Declaration which rely on the testimony or opinions of Ralph Samek, her expert in the area of the feasibility of using voice-activated computer technology [*4] to enable Garza to perform her old job or similar jobs at Abbott. Abbott argues that Samek is not qualified to testify as an expert because he is unfamiliar with many aspects of the Abbott Order Processing System ("OPS," the mainframe program with which Garza worked all day in her former job) and the details of Garza's former job. Samek states that he is personally familiar with the implemention of voice-activated software in a variety of settings, and he relies on the deposition testimony of Abbott information systems employees who are familiar with OPS in reaching his conclusions about the feasibility of integrating voice-activated software with the OPS. *See* Response, Ex. 16.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, the Supreme Court stated: "Unlike an ordinary witness, *see* [*FED. R. EVID.] Rule 701*, an expert is permitted wide latitude to offer opinions, including those not based on first-hand knowledge or observation. . . . Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible [*5] evidence." *Id. at 2796, 2798*. This Court agrees with these observations, and further notes that most of Abbott's objections to Samek's qualifications go more to the weight to be given his opinions rather than their admissibility. The Court will not strike Samek's opinions nor the paragraphs submitted by Garza which rely on those opinions.

Inconsistencies With Prior Deposition Testimony

Abbott argues that several paragraphs of Garza's Declaration, Additional Facts, and Response must be stricken because they contradict or attempt to recast Garza's earlier deposition testimony. Our circuit court has correctly frowned upon belated "efforts to patch up a party's deposition with [her] own subsequent affidavit." *Russell v. Acme-Evans Co., 51 F.3d 64, 67 (7th Cir. 1995)*. Accordingly, where the affidavit and the deposition are in conflict, "the affidavit is to be disregarded unless it is demonstrable that the statement in the deposition was mistaken, perhaps because the question was asked in a confusing manner or because a lapse of memory is in the circumstances a plausible explanation for the discrepancy." *Id. at 68*. However, the affidavit should be disregarded only [*6] to the extent that it "contradict[s], as distinct from merely clarifying or augmenting" the deposition. *Id.*

After carefully reviewing Garza's deposition as well as her Declaration and her factual submissions, the Court finds that Garza's current submissions inaccurately summarize her other testimony in some of the instances cited by Abbott, but not in others. The Court strikes only Additional Facts P 5, to the extent that it states flatly that Garza is *unable* to do certain tasks--specifically, cleaning, carrying groceries, lifting wet laundry out of the washing machine, stirring food, chopping food, and washing the dishes by hand. Garza's Declaration and deposition state only that she has difficulty performing and sometimes cannot perform these tasks. While Additional Facts P 5 is thus in partial conflict with Garza's deposition and her Declaration, we find no conflict between these latter two documents. We therefore deny Abbott's additional request to strike portions of Garza's Declaration.

Factual Submissions Not Supported by the Record

When a motion for summary judgment is filed, Rule 12(M) and 12(N) of the Local General Rules of the United States District Court [*7] for the Northern District of Illinois require the parties to file statements of facts which they believe are undisputed, and which support their arguments regarding summary judgment. *See* LOCAL GENERAL RULE 12(M) and 12(N)(3). The factual submissions, and any responses to those submissions in which the respondent disputes the submission, must be supported by cites to accompanying exhibits of admissible evidence. *Id.; Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1109 & n.2 (5th Cir. 1991)* (en banc), *cert. denied*, *503 U.S. 912, 117 L. Ed. 2d 506, 112 S. Ct. 1280 (1992)* (materials relied upon in a summary judgment motion must be admissible at trial).

The Court must rely on the parties' Local Rule 12 statements and responses to determine whether factual disputes exist which would prevent summary judgment. Statements of fact that are not supported by the cited materials will be disregarded. In the same vein, the mere denial of a particular fact, without specific references to supporting material that allegedly establishes a factual dispute, is insufficient. Where a factual assertion is met with such a naked denial, the fact may be deemed admitted. *Flaherty v. Gas* [*8] *Research Inst., 31 F.3d 451, 453 (7th Cir. 1994)*. Local Rule 12 sets forth the form which denials must take. The Court may, and in this case does, strictly enforce the local rules, disregarding all factual submissions not properly supported and deeming all factual allegations not properly controverted as being

admitted. *See id.; Stewart v. McGinnis, 5 F.3d 1031, 1034 (7th Cir. 1993)*.

Abbott contends that many of Garza's factual submissions are not supported by the record. Here again the Court has carefully reviewed the submissions and the record, and finds as follows:

> 1. Additional Facts P 14 and Garza's Declaration P 23 are stricken to the extent that they state that Garza "unsuccessfully sought employment from the time she left Abbott," in that Garza has admitted that she obtained a retail job at Donna Karan, a women's clothing store, although she ultimately lost this job due to the impairment in her arms;
>
> 2. Additional Facts P 63 is stricken as unsupported by the exhibits;
>
> 3. Additional Facts P 73 is stricken as unsupported by the exhibits;
>
> 4. Additional Facts P 124 is stricken as unsupported by the exhibits;
>
> 5. Additional Facts P 148 is stricken as unsupported by [*9] the exhibits;
>
> 6. Response P 33 is stricken as unsupported by the exhibits; and
>
> 7. Response PP 37, 38, 40, and 41 are stricken insofar as they assert that it was not until the summer of 1994 that Becofske made an estimate that the implementation of voice recognition software would cost one million dollars;
>
> 8. Response PP 49, 51 and 52 are stricken as unsupported by the exhibits, in that it appears that Ralph Samek indeed made the statements attributed to him in these paragraphs;
>
> 9. Response P 58 is stricken as unsupported by the exhibits; and
>
> 10. Response P 76 is stricken as unsupported by the exhibits.

The Court finds that the other factual submissions challenged by Abbott as unsupported are indeed adequately supported by the exhibits.

Remaining Assertions

Abbott objects to a number of other factual submissions on a wide variety of grounds. While the Court will not go into each of these arguments here, it has reviewed the record and determined that the following material should be stricken:

> 1. Additional Facts P 50 is stricken to the extent that it states what "Abbott wanted";
>
> 2. Additional Facts PP 51-52 are stricken as irrelevant;
>
> 3. Additional Facts [*10] PP 64 and 108 are stricken as without adequate foundation. Statements of Abbott employees are probably not hearsay pursuant to *FED. R. EVID. 801(d)(2)*, but a foundation for the statements must still be laid in order for the statements to be admissible;
>
> 4. Additional Facts P 73 is stricken as unsupported by the exhibits;
>
> 5. Response P 16 is stricken as irrelevant; and
>
> 6. Response P 82 is stricken as irrelevant.

Abbott's motion as to submissions not specifically discussed above is denied.

For the foregoing reasons, Abbott's motion to strike is granted in part and denied in part as set forth more fully herein.

ENTER:

Ruben Castillo

United States District Judge

August 26, 1996

TAB 15

HOnly the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
Rhonda GROSS, Plaintiff,
v.
TOWN OF CICERO; Betty Loren-Maltese, former President of the Town of Cicero, in her official and individual capacity; Thomas Rowan, former Chief of Police, in his official and individual capacity; Chief of Police Wayne Johnson, in his official and individual capacity; and Jerald Rodish, in his individual capacity, Defendants.
No. 04 C 0489.

Sept. 28, 2005.

Dana L. Kurtz, Kurtz Law Offices, LLC, Lockport, IL, Christopher N. Mammel, Roy R. Brandys, Childress Duffy Goldblatt, Ltd, Chicago, IL, for Plaintiff.
Dennis E. Both, Town of Cicero, Cicero, IL, Devlin Joseph Schoop, Jennifer Anne Naber, Joseph Michael Gagliardo, Laner, Muchin, Dombrow, Becker, Keith L. Hunt, Keith L. RebeccaAnn Figler, Hunt & Associates, P.C., Michael Joseph Kralovec, Joseph R. Lemersal, Sara J. McClain, Nash, Lalich & Kralovec, Terence Patrick Gillespie, Genson and Gillespie, Chicago, IL, Lara A. Anderson, Moss & Bloomberg, Ltd., Bolingbrook, IL, for Defendants.

MEMORANDUM OPINION AND ORDER

DARRAH, J.
***1** Presently pending before the Court are: Defendants' Emergency Motion to Strike Plaintiff's Amended and Supplemental Rule 26(a) Disclosures, Defendants' Emergency Motion to Bar Certain Documents and Related Evidence for Plaintiff's Discovery Violations, Defendants' Motion for Leave to Serve Experts' Reports, Plaintiff's Motion to Bar Defendants' Experts, and Plaintiff's Motion for Reconsideration.

On December 2, 2004, by agreement of the parties, discovery was ordered closed on April 30, 2005, and trial scheduled for September 12, 2005. In July 2004, Plaintiff served her Rule 26 disclosures, identifying twenty-three witnesses. On May 26, 2005, Defendants' Joint Motion to Modify the Discovery Schedule was granted; and discovery was extended to August 12, 2005. On August 8, 2005, Plaintiff served "Amended Rule 26 Disclosures," naming 135 new witnesses.

On August 9, 2005, the Court, with the agreement of the parties, altered certain discovery dates, including that Plaintiff's expert witness's report was to be produced by September 22, 2005, and the expert's deposition was to take place on or before August 31, 2005. Later that same day, Plaintiff filed an emergency motion to reset the just-agreed-to discovery schedule because Plaintiff's expert would not be able to produce her report by August 22, 2005. On August 22, 2005, the Court granted Plaintiff's emergency motion and allowed Plaintiff until September 5, 2005, to produce her expert witness's report and until September 12, 2005, for the expert's deposition. Defendants' experts' reports were to be produced on or before September 12, 2005; and the Defendants' experts' depositions were to take place on or before September 16, 2005. The trial was also rescheduled to October 3, 2005, to accommodate Plaintiff's discovery extension request.

On August 26, 2005, Plaintiff faxed a letter to Defendants' counsel, indicating, for the first time, that certain documents were available to be copied. These documents included: (1) documents received from the Illinois State Police for Jerold Rodish; (2) public record documents regarding Rodish's criminal history; (3) Plaintiff's journal because Plaintiff was providing the journal to Plaintiff's expert (previously, Plaintiff refused to produce the diary, claiming it was privileged because it was kept only for counsel's benefit); and (4) documents recently obtained from third-party witnesses.

On September 8, 2005, Defendants moved to bar Plaintiff's expert witness for Plaintiff's failure to comply with the Court's orders for the production of Plaintiff's expert's report. Alternatively, Defendants sought additional time to produce Defendants' expert witnesses' reports and depositions because Defendants' experts had not received Plaintiff's expert's report in time to meet to complete their reports in the previously established schedule. On September 13,

2005, Defendants' Motion to Bar Plaintiff's Expert was granted. At that time, the Court did not address Defendants' request for additional time to produce their experts' reports.

***2** On September 16, 2005, Plaintiff produced a Second Supplemental Rule 26(a)(1) Disclosures. This supplement included five new witnesses. Subsequently, Plaintiff tendered her draft Final Pretrial Order to Defendants. On Plaintiff's proposed will-call list of witnesses, Plaintiff lists 31 witnesses-10 of which were disclosed in the August 8, 2005 Amended Rule 26(a) Disclosures, one of which was disclosed in the September 16, 2005 supplement, and one which was never disclosed. Of the 33 witnesses on Plaintiff's may-call list, 22 were not disclosed until August 8, 2005.

Defendants' Emergency Motion to Strike Plaintiff's Amended and Supplemental Rule 26(A) Disclosures

Federal Rule of Civil Procedure 26(e) imposes a duty on a party to supplement their disclosures to reveal incomplete or incorrect information to an opposing party. Fed. R. Civ. R. 26(e)(1). It is implicit in the Rule that the supplementation be timely. *See* *Pierson v. Kraucunas,* 2002 WL 734245 (W.D.Wis. Feb.20, 2002).

Federal Rule of Civil Procedure 37(c)(1) enforces the requirements of Rule 26. Rule 37(c)(1) provides, in pertinent part: "[a] party that without substantial justification fails to disclose information required by ...Rule 26(e)(1)... is not, unless such failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed."Fed.R.Civ.P. 37(c)(1)."[T]he sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a) was either justified or harmless." *David v. Caterpillar, Inc.,* 324 F.3d 851, 857 (7th Cir.2003)(*David*) (quoting *Salgado v. General Motors Corp.,* 150 F.3d 735, 742 (7th Cir.1998). Factors to guide the court in its discretion include: (1) the surprise or prejudice to the party against whom the evidence is offered, (2) the ability of the party to cure any prejudice, (3) the likelihood of disruption at trial, and (4) the bad faith or willfulness in not disclosing the evidence at an earlier date. *See* *David,* 324 F.3d at 857.

Defendants seek to strike Plaintiff's Amended Rule 26(a) Disclosures. This amendment was filed on August 8, 2005, before discovery had been ordered closed by the Court. While the amendment increased the number of individuals likely to have information, most of these witnesses had been previously disclosed by the Plaintiff or known by the Defendants.

Plaintiff's Supplemental Rule 26(a) Disclosures were filed on September 16, 2005, *after* discovery had been ordered closed by the Court. Plaintiff contends that the Supplemental Rule 26(a) Disclosures were made after discovery had closed because they are based on evidence that was not discovered until September 2, 2005, the date of Former Chief of Staff and Town Attorney Dennis Both's deposition. In light of the minimal changes between the Amended and Supplemental Rule 26(a) Disclosures, the lack of any identified prejudice and disruption at trial and the lack of evidence of bad faith or willfulness in not disclosing the evidence at an earlier time, Defendants' Emergency Motion to Strike Plaintiff's Amended and Supplemental Rule 26(a) Disclosures is denied.

Defendants' Emergency Motion to Bar Certain Documents and Related Evidence for Plaintiff's Discovery Violations

***3** Defendants seek to bar Plaintiff from using certain documents that were produced on August 26, 2005. These documents include: (1) documents received from the Illinois State Police for Jerold Rodish; (2) public record documents regarding Rodish's criminal history; (3) Plaintiff's journal because Plaintiff was providing the journal to Plaintiff's expert (previously, Plaintiff refused to produce the diary, claiming it was privileged because it was kept only for counsel's benefit); and (4) documents recently obtained from third-party witnesses.

Plaintiff's August 26, 2005 documents were produced after discovery had closed. Defendants contend that they did not have access to the documents, including those related to Rodish's criminal history. However, Rodish is a Defendant in the instant case and would be aware of his own criminal history. Furthermore, some of the documents were public record documents and were produced through Freedom of Information Requests.

Defendants also seek to bar Plaintiff's journal. Defendants were aware of Plaintiff's journal but were

not provided the journal earlier because Plaintiff previously refused to produce the journal, arguing that it was privileged because Plaintiff only kept it for her counsel's benefit. Plaintiff also refused to answer questions about the journal during her deposition. Plaintiff now belatedly produced the journal, indicating that any attorney-client privilege had been waived because the journal was provided to Plaintiff's expert.

Defendants were not previously provided Plaintiff's journal and were not allowed to question Plaintiff about the journal during her deposition. Plaintiff's belated decision to provide the journal prevents Defendants from questing Plaintiff about the journal. Allowing Plaintiff to use the journal at trial would be prejudicial to Defendants. Accordingly, Plaintiff is barred from using the journal at trial.

Plaintiff also produced "documents recently obtained from third party witnesses."These documents were untimely produced, and there is no indication that the documents were previously known to the Defendants or that they were public documents. Accordingly, these documents are barred.

Based on the above, Defendants' Emergency Motion to Bar Certain Documents and Related Evidence for Plaintiff's Discovery Violations is granted in part and denied in part, as set forth above.

Defendants' Motion for Leave to Serve Experts' Reports

Defendants seek leave to file their experts' reports after the September 12, 2005 deadline. Defendants produced their experts' reports on September 13 and 16, 2005. Defendants argue that the reports could not be produced prior to that time because Plaintiff's expert's report was late. Plaintiff argues that Defendants should not be allowed to produce their reports late just as she was unable to produce her report late. However, Defendants sought an extension of time to file their experts' reports prior to the time that such reports were due. Defendants sought leave prior to their deadlines to file their experts reports and were unable to meet their deadlines only because Plaintiff's expert's report was late. Defendants filed the instant motion after their disclosure deadlines had passed because the Court did not address this issue at the time it disposed of the previous motion (which, *inter alia,* sought such relief). Unlike Plaintiff, Defendants timely moved to file their experts' reports through leave of Court instead of simply not following the Court's orders.

***4** Based on the above, Defendants are granted leave to serve their experts' reports provided that the depositions of the Defendants' experts are taken on or before October 5, 2005.

Plaintiff's Motion to Bar Defendants' Experts

Plaintiff seeks to bar Defendants' experts' reports for failing to comply with the Court's order. As discussed above, the Defendants timely moved for an extension of time to serve their experts' reports as to not violate the Court's order. Accordingly, Plaintiff's Motion to Bar Defendants' Experts is denied.

Plaintiff's Motion for Reconsideration

Plaintiff also seeks reconsideration of the Court's order barring Plaintiff's expert's report. Motions for reconsideration serve a limited function of correcting clear errors of law or fact or to present newly discovered evidence which could not have been adduced during the pendency of the underlying motion. *See* *United States v. Dombrowski,* 1994 WL 577259 (N.D.Ill. Oct.18, 1994)(*Dombrowski*).

Plaintiff's motion asks the Court to re-evaluate its previous ruling. Plaintiff fails to identify any clear error of law or fact and fails to present newly discovered evidence. Accordingly, Plaintiff's Motion to Reconsider is denied.

CONCLUSION

For the foregoing reasons, Defendants' Emergency Motion to Strike Plaintiff's Amended and Supplemental Rule 26(a) Disclosures is denied; Defendants' Emergency Motion to Bar Certain Documents and Related Evidence for Plaintiff's Discovery Violations is granted in part and denied in part, as set forth above; Defendants' Motion for Leave to Serve Experts' Reports is granted, as set forth above; Plaintiff's Motion to Bar Defendants' Experts is denied; and Plaintiff's Motion for Reconsideration is denied.

N.D.Ill.,2005.
Gross v. Town of Cicero

Not Reported in F.Supp.2d, 2005 WL 2420372 (N.D.Ill.)

END OF DOCUMENT

TAB 16

HOnly the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
Tyrone HOLMES, Petitioner,
v.
Guy D. PIERCE,[FN1] Respondent.

FN1. The Court substitutes Joseph Mathy, the current warden of the Pontiac Correctional Center, for Guy D. Pierce, whom the parties named as the Respondent in previous filings.

No. 04 C 8311.

Jan. 7, 2009.

West KeySummary
Habeas Corpus 197 383

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)4 Sufficiency of Presentation of Issue or Utilization of State Remedy
197k380 Sufficiency of Presentation; Fair Presentation
197k383 k. Necessity and Sufficiency of Identification of Federal Constitutional Issue. Most Cited Cases

Habeas Corpus 197 490(5)

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k489 Evidence
197k490 Admissibility
197k490(5) k. Opinion Evidence. Most Cited Cases
The petitioner presented a noncognizable claim where it rested on a state court evidentiary ruling rather than on a violation of the Constitution or federal laws. The petitioner asserted that bite-mark testimony should not have been admitted at trial. The petitioner argued that the trial court erred in finding that the state had shown that certain injuries found on the victim's body were bite marks inflicted by him because he impeached the testimony of the state's expert. In arguing, the petitioner framed the bite-mark issue as an evidentiary, not a due process issue, and therefore could not raise it as a due process issue for the first time in his habeas petition.

Marc Richard Kadish, Sarah E. Streicker, Mayer Brown, LLP, Mohammed Ghulam Ahmed, Winston & Strawn, LLP, Chicago, IL, for Petitioner.
Katherine D. Saunders, Chief of Criminal Appeals, Illinois Attorney General's Office, Chicago, IL, for Respondent.

MEMORANDUM OPINION AND ORDER

RONALD A. GUZMAN, District Judge.
***1** Before the Court is Tyrone Holmes' petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 that seeks to vacate his convictions for first degree murder and criminal sexual assault. For the reasons provided in this Memorandum Opinion and Order, the Court denies the petition.

Facts

In 1989, Holmes was convicted of first degree murder and criminal sexual assault of Lajauina Camel. (Gov't Ex. A, *People v. Holmes*, 234 Ill.App.3d 931, 176 Ill.Dec. 287, 601 N.E.2d 985, 986 (Ill.App.Ct.1992).) Holmes appealed his convictions and sentence. He argued that: (1) he was deprived of his right to a speedy trial, in violation of the Illinois statute and the Sixth Amendment to the U.S. Constitution; (2) the trial court erred in finding that the State had shown that certain injuries found on the victim's body were bite marks inflicted by Holmes because Holmes had impeached the testimony of the State's bite-mark experts and the court erred in relying upon opinion testimony regarding muddy shoe prints that had been stricken from the record; (3) the State failed to prove his guilt beyond a reasonable doubt as to criminal sexual assault; and (4) his sentence was excessive in light of his steady employment record and other mitigating factors. (*Id.* at 989-

99.)

On September 8, 1992, the appellate court affirmed Holmes' convictions and sentence. (*See generally id.*)Holmes filed a petition for leave to appeal to the Illinois Supreme Court that raised the same issues that he raised on direct appeal. (Gov't Ex. B, Pet. Leave Appeal 8-34.) On October 6, 1993, the Illinois Supreme Court denied the petition for leave to appeal. (Gov't Ex. C, *People v. Holmes,* No. 75594, slip op. at 1 (Oct. 6, 1993).)

On November 5, 1993, Holmes filed the first of five petitions for relief pursuant to the Illinois Post-Conviction Hearing Act, 725 Ill. Comp. Stat. 5/122-1 *et seq.*, and/or 735 Ill. Comp. Stat 5/2-1401 for relief from judgment, arguing that: (1) trial counsel was ineffective for failing to challenge Holmes' arrest; (2) trial counsel was ineffective for failing to present a witness who would testify that Holmes was not the last person in the building where the victim was found; (3) trial counsel was ineffective for being absent during the bite mark expert's examination of Holmes; (4) Holmes was denied due process of law because the state-ordered tests of his blood and saliva were never conducted; (5) he was denied an impartial judge because the judge was aware of Holmes' prior conviction for rape; (6) trial counsel was ineffective for failing to impeach Jacqueline Wilson's testimony; (7) Detective Vucko's testimony regarding a police report was inadmissible hearsay because he did not author the report and Holmes was deprived of due process because he was unable to cross-examine Detective Summerville, the author of the report; (8) he was denied due process of law when the court permitted Dr. Kenney to remain in the courtroom in contravention of the court's earlier order excluding witnesses from the courtroom; and (9) prosecutorial misconduct. (Gov't Ex. D, Pet. Post-Conviction Relief; Gov't Ex. E, Supplemental Pet. Post-Conviction Relief.) In addition, the Public Defender also filed a supplemental post-conviction petition to compel genetic marker testing. (Gov't Ex. F, Pet. Compel Genetic Marker Testing.) The State moved to dismiss Holmes' pro se post-conviction petition, his pro se supplemental post-conviction petition and the Public Defender's supplemental petition, which were treated collectively as one petition. (*See* Gov't Ex. I, *People v. Holmes,* No. 1-96-1046, slip op. (June 5, 1998).) On February 1, 1996, the trial court granted the State's motion to dismiss the petition because Holmes had not established a denial of effective assistance of counsel or due process. (*See id.*)

***2** Holmes appealed the dismissal of his first post-conviction petition. (Gov't Ex K, Pet'r-Appellant's Br. 4.) However, he raised only one issue: Holmes was entitled to have genetic marker testing conducted where DNA testing was not available at the time of his trial; (2) the evidence was impounded and is available for testing; and (3) DNA testing could conclusively exclude petitioner as the offender. (*Id.*) On June 5, 1998, the appellate court affirmed the dismissal of Holmes' petition. (*See* Gov't Ex. I, *People v. Holmes,* No. 1-96-1046, slip op. (June 5, 1998).) Holmes did not request leave to appeal to the Illinois Supreme Court. (Gov't Ex. M, Letter from J. Hornyak to C. Hulfachor of 3/15/05 (stating that records do not show petition for leave to appeal to the Illinois Supreme Court was filed).)

On April 21, 1999, Holmes moved for forensic testing that was not available at trial. (Gov't Ex. FF, Updated Certified Stmt. Conviction/Disposition.) On May 13, 1999, the trial court granted the motion. (*Id.*) On October 14, 1999 and November 1, 1999, Cellmark Diagnostics issued reports analyzing the victim's vaginal swab for the presence of semen and spermatazoa and Holmes' coat, pants and boots for the presence of blood. (Gov't Ex. N, Pet. Post-Conviction Relief, Exs. B & C.)

On April 19, 2000, Holmes filed a second petition for post-conviction relief with aid of counsel, as well as a motion for relief from judgment pursuant to 735 Ill. Comp. Stat. 5/2-1401. (Gov't Ex. N, Pet. Post-Conviction Relief.) In both, Holmes argued that he had newly discovered evidence (obtained from court-ordered testing of the evidence) that serologist Pamela Fish testified falsely regarding blood stains on Holmes' pants, coat and boots. (*Id.*) On November 27, 2000, the court dismissed both the post-conviction petition and the motion for relief from judgment. (Gov't Ex. P, H'rg Tr. of 11/27/00.) Holmes' appeal of his second petition for post-conviction relief was consolidated with his appeal of his third petition for post-conviction relief. (Gov't Ex. S, *People v. Holmes,* Nos. 1-01-0496 and 1-01-3210, slip op. at 2 (Mar. 19, 2003).) However, on appeal, Holmes abandoned the issues raised in his second petition for post-conviction. (*See id.*)

On April 13, 2001, Holmes filed a third petition for post-conviction relief. (Gov't Ex. Q, Pet. Post-Conviction Relief.) He argued that, pursuant to *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), his Sixth and Fourteenth Amendment rights were violated when the trial court sentenced him to an extended term sentence of natural life for "brutal and heinous behavior indicative of wanton cruelty," a factor that was not proven to a jury beyond a reasonable doubt. (*See id.* 2.) On July 6, 2001, the trial court dismissed the third petition for post-conviction relief. (Gov't Ex. R, *People v. Holmes,* No. 87-CR-6274, slip op. at 1 (July 5, 2001).) Holmes appealed the dismissal and raised the same issue on appeal. (Gov't Ex. S, *People v. Holmes,* Nos. 1-01-0496 and 1-01-3210, slip op. at 2-3 (Mar. 19, 2003).) On March 19, 2003, in the consolidated appeal, the appellate court affirmed the dismissal of Holmes' second and third petitions for post-conviction relief. (*Id.* at 3.) The appellate court held that *Apprendi* did not apply retroactively. (*Id.*) Holmes filed a petition for leave to appeal to the Illinois Supreme Court. (Gov't Ex. W, Pet. Leave Appeal.) On October 7, 2003, the Illinois Supreme Court denied the petition for leave to appeal. (Gov't Ex. X, *People v. Holmes,* No. 96116, slip op. 1 (Oct. 7, 2003).)

***3** On July 1, 2002, Holmes filed a fourth petition for post-conviction relief. (*See* Gov't Ex. Y, *People v. Holmes,* No. 87-CR-6274, slip op. 1 (Aug. 20, 2002).) On August, 20, 2002, the trial court dismissed the fourth petition for post-conviction relief because the issues raised were barred by res judicata, waived or frivolous. (*Id.*) Holmes appealed the dismissal, arguing that (1) the State knowingly introduced false testimony at trial and withheld exculpatory evidence; both his trial attorney and the trial court erroneously believed he was eligible for the death penalty; and (3) his appellate counsel was ineffective for failing to raise these issues on direct appeal. (*Id.* 1-2.)The appellate court affirmed the dismissal of the fourth petition for post-conviction relief and held that the issues raised were waived. (Gov't Ex. Z, *People v. Holmes,* No. 1-02-3303, slip op. 7-11 (June 16, 2004).) Holmes filed a petition for leave to appeal to the Illinois Supreme Court and argued that the fundamental miscarriage of justice exception to the waiver rule should apply to permit Holmes' fourth petition for post-conviction relief where: (1) due to constitutional error, petitioner was wrongfully found to be "death eligible," but the death sentence was not imposed; (2) he has a free-standing claim of actual innocence based upon the State's failure to disclose serologist Pamela Fish's handwritten notes and her false trial testimony; and (3) his life sentence was unlawful, even though the court found "brutal and heinous behavior indicative of wanton cruelty," because trial counsel and the court erroneously believed he was eligible for the death penalty. (Gov't Ex. DD, Pet. Leave Appeal 3.) On November 24, 2004, the Illinois Supreme Court denied the petition for leave to appeal. (Gov't Ex. EE, *People v. Holmes,* No. 99013, slip op. 1 (Nov. 24, 2004).)

In December 2004, Holmes filed a petition for relief from judgment pursuant to 735 Ill. Comp. Stat. 5/2-1401. (Gov't Ex. GG, Pet. Relief J.) He argued that his life sentence is void due to the following: (1) criminal sexual assault is not listed as an aggravating factor whereby a defendant can be found death-eligible; and (2) although Holmes was sentenced to natural life, the trial court's erroneous belief that Holmes was eligible for the death penalty requires resentencing because the trial judge had the wrong sentencing range in mind. (*Id.* 1-7.)On January 25, 2005, the trial court dismissed the petition as frivolous. (Gov't Ex. FF, Updated Certified Stmt. Conviction/Disposition.) On February 17, 2005, Holmes moved to reconsider the motion, and on March 31, 2005, the court denied the motion to reconsider.(*Id.*)

On December 16, 2004, Holmes filed a pro se petition for habeas corpus. The petition argues that: (1) Holmes is actually innocent based on newly-discovered evidence that the State failed to turn over the handwritten notes of serologist Pamela Fish regarding preliminary test results for the presence of blood on petitioner's clothing; (2) the same conduct constitutes a *Brady* violation; (3) the prosecutor knowingly used the false testimony of Pamela Fish; (4) his trial counsel provided ineffective assistance by failing to convince the court that Holmes was not death-eligible, and thus not eligible for a natural life sentence; (5) the trial court erred when it found Holmes death-eligible; (6) his appellate counsel provided ineffective assistance of counsel by failing to raise the following issues on direct appeal: the court's finding of death eligibility, the prosecutor's failure to provide notice of the intention to seek the death penalty, the prosecutor's misrepresentation of the charged felony at the sentencing hearing, the court's misunderstanding of state sentencing law and the capital

eligibility hearing itself; and (7) his post-conviction counsel provided ineffective assistance of counsel. (Pet. Writ Habeas Corpus.)

***4** On April 24, 2006, Holmes, with the aid of appointed counsel, amended his petition for writ of habeas corpus. The amended petition raises the following claims: (1) the State failed to turn over the handwritten notes of serologist Pamela Fish, the prosecution used Fish's perjured testimony and Holmes is actually innocent; (2) bite-mark testimony should not have been admitted at trial; and (3) once the blood evidence, bite-mark evidence and boot-print evidence is excluded, there is insufficient evidence to convict Holmes. (Am. Pet. Writ Habeas Corpus.)

Discussion

The Court can reach the merits of Holmes' claims only if he fairly presented them to the state courts for resolution and exhausted all available state-court remedies. *Bocian v. Godinez,* 101 F.3d 465, 468 (7th Cir.1996). Holmes exhausted his state-court remedies only if he gave "the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel,* 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999)."[F]or a constitutional claim to be fairly presented to a state court, both the operative facts and the 'controlling legal principles' must be submitted to that court." *Verdin v. O'Leary,* 972 F.2d 1467, 1474 (7th Cir.1992) (quoting *Picard v. Connor,* 404 U.S. 270, 277, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971)).

Further, a federal court is precluded from reviewing a claim if the state court disposed of it by "rest[ing] on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson,* 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)."This rule applies whether the state law ground is substantive or procedural."*Id.*

In addition, "[i]n conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire,* 502 U.S. 62, 68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). Because "federal habeas corpus relief does not lie for errors of state law," *Lewis v. Jeffers,* 497 U.S. 764, 780, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990), any claim that merely argues errors of state law is noncognizable on federal habeas review, *see United States ex rel. Lopez v. Uchtman,* No. 05 C 927, 2007 WL 273651, at *2 (N.D.Ill. Jan. 24, 2007).

Respondent argues that all three of Holmes' claims are procedurally defaulted or noncognizable.[FN2]The Court addresses each claim in turn.

> FN2. In addition, because the Court holds that Holmes' habeas claims are either noncognizable or procedurally defaulted and he cannot establish that which is required to excuse the default, the Court need not address the State's arguments regarding whether his claims are timely.

In claim 1, Holmes contends that (a) the State failed to turn over the handwritten notes of Pamela Fish, the serologist who tested his clothes for blood, (b) the prosecution used false testimony from Pamela Fish during trial, and (c) he is actually innocent. With regard to the second issue in claim 1, *i.e.,* the prosecution used false testimony from Pamela Fish during trial, Holmes raised this issue for the first time in his second post-conviction petition. (Gov't Ex. N, Pet. Post-Conviction Relief.) However, he abandoned it on appeal and in his petition for leave to appeal to the Illinois Supreme Court. (*See* Gov't Ex. S, *People v. Holmes,* Nos. 1-01-0496 and 1-01-3210, slip op. at 2 (Mar. 19, 2003); Gov't Ex. W, Pet. Leave Appeal.) Although Holmes also raised this issue, as well as the first issue of claim 1, *i.e.,* the State failed to turn over the handwritten notes of Pamela Fish, in his fourth post-conviction petition, the appellate court rejected both based on the independent and adequate state law ground of waiver when it held that Holmes provided no reason for his failing to raise these issues in his third post-conviction petition filed in April 2001. (*See* Gov't Ex. Z, *People v. Holmes,* No. 1-02-3303, slip op. 7 (June 16, 2004) (citing 725 Ill. Comp. Stat. 5/122-3, which states "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived"); *see id.*(holding that these issues were waived and Holmes failed to establish cause and prejudice to excuse the waiver).) Thus, the first two issues in claim 1 are procedurally defaulted. As for the third issue in claim 1, *i.e.,* that Holmes is actually innocent, this is not an independent ground for federal habeas relief. *See Herrera v.*

Collins, 506 U.S. 390, 400, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) ("[A] claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."). The Court will thus address his actual innocence argument within the fundamental-miscarriage-of-justice requirement below to determine whether it excuses the procedural default of Holmes' habeas claims.

***5** In claim 2, Holmes argues that the bite-mark testimony should not have been admitted at trial. The State argues that this is a noncognizable claim because it rests on a state court evidentiary ruling rather than on a violation of the Constitution or laws of the United States. "Unless the petitioner demonstrates that a specific constitutional right has been violated, a federal court can issue a writ of habeas corpus only when a state evidentiary ruling violates the defendant's due process rights by denying him a fundamentally fair trial." *Haas v. Abrahamson*, 910 F.2d 384, 389 (7th Cir.1990) (quotation omitted). Neither Holmes' original pro se habeas petition nor his amended petition for writ of habeas corpus argues that the admission of bite-mark testimony resulted in a denial of his right to due process of law.[FN3]Accordingly, the Court agrees with the State that claim 2 is not a cognizable claim under federal habeas review.

> FN3. After the State argued that claim 2 was not cognizable in its answer to the amended petition, Holmes attempted to re-characterize the claim as one based on a denial of due process for the first time in his reply brief. "It is well settled that issues raised for the first time in a reply brief are deemed waived." *Nelson v. La Crosse County Dist. Atty.*, 301 F.3d 820, 836 (7th Cir.2002). Therefore, the Court deems the due process argument waived.

In the alternative, even if the Court were to hold that this claim is cognizable and not waived, which it does not, Holmes has nonetheless procedurally defaulted this claim. On direct appeal, Holmes argued that the trial court erred in finding that the State had shown that certain injuries found on the victim's body were bite marks inflicted by him because he impeached the testimony of the State's expert. (Gov't Ex. A, *People v. Holmes*, 176 Ill.Dec. 287, 601 N.E.2d at 989-99.) In so arguing, Holmes framed the bite-mark issue as an evidentiary, not a due process, issue,[FN4] and therefore he cannot raise it as a due process issue for the first time in his habeas petition. *See Rodriguez v. Peters*, 63 F.3d 546, 555 (7th Cir.1995).

> FN4. The appellate court held that the credibility of the bite-mark testimony was a matter for the trier of fact and where the expert testimony was conflicting, it would not substitute its judgment for the trier of fact. (Gov't Ex. A, *People v. Holmes*, 176 Ill.Dec. 287, 601 N.E.2d at 993.)

In claim 3, Holmes argues that if the bite-mark, blood and boot print evidence is excluded, there is insufficient evidence to convict him. Although Holmes states that he raised individual arguments regarding the bite-mark, blood and boot print evidence in state court, Holmes concedes that he did not raise the due process issue regarding the cumulative effect of the inclusion of all such evidence on direct appeal or in his post-conviction proceedings. (Am. Pet. Writ Habeas Corpus 15-16.) Therefore, the Court deems this issue procedurally defaulted as well.

In sum, the following issues are procedurally defaulted because Holmes did not fairly present them to the state courts for resolution: (1) the State failed to turn over the handwritten notes of Pamela Fish, the serologist who tested his clothes for blood; (2) the prosecution used false testimony from Pamela Fish during trial; and (3) if the bite-mark, blood and boot print evidence is excluded, there is insufficient evidence to convict him.[FN5]With regard to the third issue of Claim 1 and Claim 2, the Court denies the petition as to these claims because they are noncognizable on federal habeas review.

> FN5. The Court has, as an alternative ground for denying the petition, stated that Claim 2 is also procedurally defaulted, and thus the analysis herein regarding Holmes' failure to excuse the default would apply equally to Claim 2 were the Court to have held that Claim 2 was a cognizable claim.

With regard to the procedurally defaulted claims, this does not end the analysis. Procedural default may be

overlooked if the petitioner can show good cause for the default and actual prejudice resulting therefrom, or demonstrate that the failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman,* 501 U.S. at 750.

***6** "Good cause for default is limited to an external objective impediment that prevented the petitioner from making the claim, such as interference by state officials or unavailability of a factual or legal basis for the claim at the time of filing the habeas petition." *United States ex rel. Williams v. Winters,* No. 01 C 4664, 2004 WL 1588269, at *3 (N.D.Ill. June 22, 2001); *see* *Murray v. Carrier,* 477 U.S. 478, 488 (1986).

Holmes argues that the ineffective assistance of post-conviction counsel prevented him from raising on appeal from the denial of his second post-conviction petition the arguments that: (1) the State failed to turn over the handwritten notes of Pamela Fish in his third post-conviction petition and (2) the prosecution used false testimony from Pamela Fish during trial. "Because there is no right to effective assistance of counsel in post-conviction hearings, any attorney error that led to the default of his claims in state court cannot constitute cause to excuse the default in federal habeas." *James v. Chambers,* No. 06 C 2349, 2008 WL 5142180, at *7 (N.D.Ill.Dec.4, 2008) (quotation omitted); *see* *Coleman,* 501 U.S. at 752; *Harris v. McAdory,* 334 F.3d 665, 668 (7th Cir.2003). Accordingly, any argument regarding ineffective assistance of post-conviction counsel does not establish cause to excuse the procedural default.

Holmes provides the following cause for the procedural default of the claim that the cumulative effect of the admission of the bite-mark, blood and boot print evidence denied him due process: the issue "became relevant only when the blood evidence, the bite mark evidence and the boot print evidence have been excluded from the trial."(Am. Pet. Habeas Corpus 15-16.) This particular reason is paradoxical and clearly does not constitute cause. Further, Holmes argues that he did not receive Fish's laboratory notes from the state until May 2000. However, to the extent that Holmes blames his post-conviction counsel for failing to raise the claim predicated on Fish's notes in April 2001 in his third post-conviction petition, as discussed above, Holmes cannot establish cause for the default. In addition, although Holmes argues that he did not learn of the investigations into the unreliability of bite-mark evidence until October 2004, this does not explain why he did not raise this argument in his fifth post-conviction petition.

For these reasons, Holmes has failed to establish cause for the procedural default of his claims. Because he must show both cause *and* prejudice to avoid the dismissal of his petition on procedural default grounds, the Court need not reach the issue of prejudice. *Buelow v. Dickey,* 847 F.2d 420, 425 (7th Cir.1988) ("The 'cause and prejudice' test ... is conjunctive: A petitioner's inability to demonstrate either prong results in dismissal of his habeas petition before the merits of his claims can be reached.")

Lastly, Holmes has not established that a failure to consider his procedurally defaulted claims will result in a fundamental miscarriage of justice. To show a fundamental miscarriage of justice, a petitioner must establish that a constitutional violation has "probably resulted in the conviction of one who is actually innocent."*Murray,* 477 U.S. at 495-96;*see* *Dretke v. Haley,* 541 U.S. 386, 393 n. 2, 124 S.Ct. 1847, 158 L.Ed.2d 659 (2004). To support a claim of actual innocence, a habeas petitioner must present "new reliable evidence ... that was not presented at trial" and must establish that "it was more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Gomez v. Jaimet,* 350 F.3d 673, 679 (7th Cir.2003) (quotations omitted).

***7** Holmes argues that the following evidence establishes his actual innocence: (1) Fish's laboratory notes (Pet'r Ex. 2, P. Fish's Handwritten Lab Notes); (2) the Cellmark Diagnostics testing of the coat, pants, boots and vaginal swab (Gov't Ex. N, Pet. Post-Conviction Relief, Ex. B, Cellmark Report of Lab. Examination of 10/14/1999 at C23-C24; *id.,* Ex. C, Cellmark Report of Lab. Examination of 11/1/1999 at C26); (3) an October 19, 2004 Chicago Tribune article highlighting the ambiguity of bite-mark testimony and reporting that Dr. John Kenney, one of the State's two bite-mark experts in Holmes' case, in connection with an unrelated case in which he testified as a bite-mark expert, expressed concern that he might have played a role in a wrongful conviction in that case. (Pet'r. Ex. 9, F. McRoberts and S. Mills, *From the Start a Faulty Science,*CHI. TRIB.,, Oct. 19, 2004.)

First, with regard to Fish's handwritten laboratory

notes, they do not establish Holmes' actual innocence because they do not preclude a finding of guilt by a reasonable juror. According to Fish's testimony, the blood present on several articles of clothing was identifiable through chemical testing. (Pet'r Ex. 3, Tr. P. Fish's Trial Testimony.) She testified that she conducted a chemical test by rubbing a swab over various parts of the clothing and applying chemicals to the swab to determine whether a color reaction occurs to indicate that blood is present on that area of the garment. (*Id.* at 142.)She then testified that the chemical testing indicated that there was blood present on the trench coat, the pair of pants and the pair of boots near the laces.[FN6](*Id.*) She also testified that she did not do any further testing on the clothing relative to the blood present on the clothing because there was an insufficient amount of blood for her to do any further testing.(*Id.* at 143.)Fish's handwritten notes indicate as to the pants only: "no stains identifiable as blood," "several reddish brown stains," and "neg PT." (Pet'r Ex. 2, P. Fish's Handwritten Lab Notes 1.) It is unclear whether the notation "no stains identifiable as blood" is due to a visual inspection or testing. However, as to the coat, Fish's notes do not indicate the result of the preliminary testing, merely that the coat was tested. (*Id.*) With regard to the pair of boots, the handwritten notes indicate "pos PT by laces." (*Id.*) Even if Fish's handwritten laboratory notes had been made available to Holmes prior to trial, at best, the notes provide only impeachment evidence as to the pants, but not to the coat and boots, and accordingly, there is not a reasonable probability that the result of the trial would have been different. *See United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (stating that a *Brady* violation only occurs if material evidence is withheld, *i.e.,*"if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"). Further, given the following evidence presented at trial, Holmes has not established a probability that no reasonable juror would have convicted him in light of Fish's handwritten notes: (1) Holmes had changed his account of when he had last seen the victim; (2) Holmes' testimony about his having sexual intercourse with a girlfriend that evening was contradicted by the girlfriend's testimony; (3) Pam Fish testified that the swab of the victim's vagina showed the presence of semen; (4) an eyewitness testified that at 5:00 a.m., she saw Holmes in the stairwell of her apartment building with the victim, who was crying and had a fresh bruise on her chin; (5) that eyewitness also testified that she tried to speak to the victim but was prevented from doing so by Holmes who took her by the arm and walked her outside; (6) a different witness heard a thumping sound at approximately 5:30 a.m. and discovered the victim's body at 6:00 a.m. in the same apartment building's stairwell; (7) a bottle of liquor, which had on it defendant's fingerprint, another print not suitable for comparison and third print that was suitable for comparison but never matched, was found a few inches from her foot; and (8) two State bite-mark experts concluded, and two defense bite-mark experts refuted, that an injury on the right side of the victim's jaw was consistent with Holmes' lower teeth, an injury to the left side of the victim's jaw was consistent with defendant's upper teeth and the injury to the victim's right clavicle area was consistent with the right side of Holmes upper teeth. Fish's handwritten laboratory notes, when reviewed in and of themselves or in conjunction with all of the other evidence provided in record, including other new evidence, simply does not preclude a finding of guilt by a reasonable juror.

> FN6. Fish did not identify Holmes or the victim as the source of the blood and merely testified that human blood was present. (*See id.*)

***8** Next, Holmes argues that the Cellmark Diagnostics testing (performed ten years after trial) of the coat, pants, boots and vaginal swab of the victim establishes his actual innocence. (*See* Gov't Ex. N, Pet. Post-Conviction Relief, Ex. B, Cellmark Report of Lab. Exam. of 10/14/1999 at C23-C24.) First, the October 14, 1999 Cellmark report corroborates Fish's testimony that semen was present on the vaginal swab. (*Id.*) Accordingly, this new evidence does not tend to establish actual innocence. Second, the same Cellmark report states that, contrary to Fish's testimony that only semen was present, spermatazoa was also present on the vaginal swab. (*Id.*) However, that contradiction is tempered by the November 1, 1999 Cellmark report in which it concludes that Holmes "cannot be excluded as the source of the DNA obtained from the sperm fraction of the vaginal swab."(Gov't Ex. N, Pet. Post-Conviction Relief, Ex. C, Cellmark Report of Lab. Examination of 11/1/1999 at C26.) Thus, this new evidence does not establish Holmes' actual innocence either. Third, the October 14, 1999 Cellmark report also states that tests performed on numerous cuttings from the trou-

sers and coat and dry and wet rubbings from the boot did not show the presence of blood. (Gov't Ex. N, Pet. Post-Conviction Relief, Ex. B, Cellmark Report of Lab. Exam. of 10/14/1999 at C23.) These results are not surprising given that Fish had testified that she could not conduct any further tests on any of the items of clothing due to the insufficient amounts of blood present. (Gov't Ex. A, *People v. Holmes,* 176 Ill.Dec. 287, 601 N.E.2d at 989.) Therefore, the fact that Cellmark's testing of the items for the presence of blood produced negative results does not establish that no blood ever existed on the boots and coat. In sum, given all of the evidence in the habeas record (including new evidence), the Cellmark Diagnostics test results do not preclude a finding of guilt by a reasonable juror.

Finally, Holmes relies on an October 19, 2004 Chicago Tribune article questioning the reliability of bite-mark testimony and reporting that Dr. John Kenney, one of the State's bite-mark experts in Holmes' case, in connection with an unrelated case in which he testified as a bite-mark expert, expressed concern that he might have played a role in a wrongful conviction. In the article, Dr. Kenney is quoted as saying "You get pushed a little bit by prosecutors, and sometimes you say OK to get them to shut up" and with regard to the unrelated case, "I allowed myself to be pushed."(Pet'r. Ex. 9, F. McRoberts and S. Mills, *From the Start a Faulty Science,*CHI. TRIB.,, Oct. 19, 2004.) After considering the contents of the Chicago Tribune article by itself or with the other new evidence, the Court holds that it does not provide a basis for a colorable claim of factual innocence. First, the article and Dr. Kenney's quotes do not address Holmes' case. (*See id.*)Second, in this case, Dr. Kenney did not unequivocally testify that the bite marks were Holmes', but rather he identified similarities between the marks and certain of defendant's teeth. (Gov't Ex. A, *People v. Holmes,* 176 Ill.Dec. 287, 601 N.E.2d at 992.) Third, Dr. Kenney was not the only bite-mark expert to testify. The State's other bite-mark expert, Dr. Johnson, also testified that his findings were consistent with Dr. Kenney's final report. Given that Drs. Kenney and Johnson's testimony was sharply contradicted by the defense's two bite-mark experts, Drs. Pierce and Smith [FN7] and defendant argues that the State's bite-mark experts were discredited on cross-examination, it is difficult to discern how Dr. Kenney's quotes or the newspaper article as a whole sheds any new light on the issue of the bite-mark evidence because it is clear that the experts' opinions differed wildly. Accordingly, the Court holds that Holmes has failed to establish that it is more likely than not that no reasonable juror would have convicted him in light of the Chicago Tribune article on bite-mark evidence alone or in combination with the other new evidence.

> FN7. Dr. Smith testified that the injuries on the victim were either not bite marks at all or if they were bite marks, it would have been impossible for Holmes to have inflicted them. (*Id.* at 993.)

Conclusion

***9** For the foregoing reasons, the Court denies Holmes' petition for writ of habeas corpus. This case is hereby terminated.

SO ORDERED.

N.D.Ill.,2009.
Holmes v. Pierce
Slip Copy, 2009 WL 57460 (N.D.Ill.)

END OF DOCUMENT

TAB 17

HOnly the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
Edward HOLMES, Plaintiff,
v.
Dr. Kul SOOD, Defendant.
No. 02 C 7266.

July 11, 2006.

Jonathan I. Loevy, Amanda C. Antholt, Arthur R. Loevy, Jonathan A. Rosenblatt, Michael I. Kanovitz, Loevy & Loevy, Chicago, IL, for Plaintiff.
Bradford A. Burton, Cassiday, Schade & Gloor, Michael John Charysh, Richard A. Tjepkema, Scott W. Spaulding, Charysh & Schroeder, Ltd., Chicago, IL, for Defendant.

MEMORANDUM OPINION AND ORDER

BROWN, Magistrate J.
***1** Plaintiff Edward Holmes brings this action pursuant to 42 U.S.C. § 1983 against Dr. Kul Sood, alleging that Sood, a physician at the Will County Adult Detention Facility ("WCADF") was deliberately indifferent to his medical needs while Holmes was incarcerated at the WCADF. (Second Am. Compl. ¶¶ 1, 5-19.) [Dkt 33.] Particularly, Holmes claims that Sood's failure to treat Holmes' abdominal pain and distention properly necessitated subsequent surgery and treatment. (*Id.*) He seeks compensatory damages for medical expenses, physical and mental suffering and punitive damages. (Proposed Pretrial Order at 8.) [Dkt 125.]

DISCUSSION

This case comes before the court on the parties' respective motions in limine. All relevant evidence is admissible, unless there is some basis for exclusion, and evidence that is not relevant is not admissible. Fed.R.Evid. 402. The party moving in limine to exclude relevant evidence must demonstrate a basis for exclusion, consistent with Rule 402. *See Plair v. E.J. Brach & Sons, Inc.*, 864 F.Supp. 67, 69 (N.D.Ill.1994). The denial of a motion in limine does not mean that the evidence is necessarily admissible, rather, it means only that the party moving in limine has not demonstrated that there is no possible basis for the admission of the evidence. *See id.; Alexander v. Mt. Sinai Hosp. Med. Center of Chicago*, No. 00 C 2907, 2005 WL 3710369 at *2 (N.D.Ill. Jan.14, 2005) (Kocoras, J.). The denial of a motion in limine does not preclude a party from objecting to the admission of any evidence at trial. Any party who believes that evidence is being introduced that was excluded by a ruling on a motion in limine must object on that basis at the time that the evidence is being introduced.

I. Plaintiff's Motion to Bar Conviction Evidence

Holmes moves to bar evidence of any conviction other than the conviction for which he was jailed at the time of his injuries and to bar all evidence of the nature of the crime underlying any conviction. (Pl.'s First Mot. Lim.) [Dkt 87.] That motion is granted in part and moot in part.

Holmes has been convicted four times for possession of a controlled substance. (*Id.* at 2.) Three of those convictions occurred in 1990 and 1991 and are more than ten years old. (*Id.*) The fourth conviction is the conviction for which Holmes was incarcerated at the time of the events in this case. (*Id.*) Although the jury will know based on the nature of the case that Holmes was a prisoner at the time of the events at issue, Holmes moves pursuant to Fed.R.Evid. 403, 609(a)(1), and 609(b) to bar any underlying details about that conviction. (*Id.* at 1-2.)Holmes also moves to bar completely any evidence regarding the three convictions from 1990 and 1991, arguing that they have no relevance to the merits of his medical care claims or his veracity and may work to unfairly prejudice some jurors. (*Id.*)

Fed.R.Evid. 609(a)(1) governs the impeachment of a witness through evidence of a prior crime and provides in relevant part:

> ***2** For the purpose of attacking the credibility of a witness, evidence that a witness ... has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or im-

> prisonment in excess of one year under the law under which the witness was convicted....

Rule 609(b) provides a time limit for the use of evidence of convictions:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Evidence of prior convictions admissible under Rule 609 must also be considered in light of Rule 403, which provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

A. Three Prior Convictions

Holmes argues that his 1990 and 1991 convictions are more than ten years old and are presumptively barred by Fed.R.Evid. 609(b). Sood responds that he should be permitted to present evidence of those prior convictions because Holmes lied about them during his deposition. (Def.'s Resp. First Mot. Lim. at 5.) [Dkt 107.] Sood claims that, at his deposition, Holmes "denied, under oath, that he has three prior felony convictions" and argues that he (Sood) should be allowed to impeach Holmes with the prior false testimony. (*Id.*)

Holmes contends that he did not attempt to mislead at his deposition, but rather that his testimony represented his lay understanding of his convictions. (Pl.'s First Mot. Lim. at 4.) Holmes asserts that additional questioning revealed that there was a misunderstanding between Holmes and counsel, which was immediately corrected. (*Id.* at 5-6.)The deposition testimony at issue is the following:

> Q. I believe I was asking you before about other convictions. You have had at least one other conviction, correct?
>
> A. Just one.
>
> Q. Besides this case?
>
> A. One more, yes.
>
> ...
>
> Q. Okay. Now, on September 13, 2001, during that court appearance Judge Rozak talked about there being three separate convictions that resulted in one consolidated sentence. Did you have three separate possession charges, do you know? Do you remember him saying that?
>
> A. He said that. They had arrested me three times. So, they ran-all that they said three convictions. They put all that into one. I don't know how they do that. They are trying to railroad you.
>
> Q. So, as far as Judge Rozak was concerned, you had three convictions. As far as you are concerned, you had one conviction?
>
> ***3** A. They run it concurrently. It was three cases they ran concurrently.

(Pl.'s First Mot. Limine, Ex. A., Deposition of Edward Holmes at 190-91.)

Contrary to Sood's argument, Holmes' deposition testimony does not demonstrate a clear attempt to deceive counsel. Rather, it appears that he may have misunderstood the question or been confused about the explanation he initially provided when testifying that he had one other case. When asked for more details, Holmes explained that the three convictions were "put all ... into one" and ran concurrently. That deposition testimony does not provide a basis for admitting evidence of the earlier convictions. Holmes' motion to exclude evidence of those convictions is granted.

B. 2001 Conviction

Holmes argues that evidence about the conviction for which he was incarcerated at the time of the events in

this case should be barred because it involved a drug offense, not dishonesty or false statements under Fed.R.Evid. 609(a)(2) and that the probative value of the details regarding the 2001 conviction is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. (Pl.'s First Mot. Lim. at 2.) However, at the hearing on the motions in limine, Holmes' counsel conceded that if the court allows the jury to hear evidence about Holmes' substance abuse, Holmes' counsel will likely inform the jury about the circumstances surrounding the 2001 conviction. As will be discussed below, Holmes' motion in limine to preclude substance abuse evidence is being denied. Accordingly, the court understands that this portion of Plaintiff's First Motion In Limine is moot.

II. Plaintiff's Motion to Bar Prior Arrest Evidence

Holmes moves to bar reference to prior arrests, other than the arrest for which he was jailed in March 2001. (Pl.'s Second Mot. Lim.) [Dkt 89.] That motion is granted in part and denied in part.

Holmes moves to bar any references to his previous arrest record, but concedes that the jury must hear about his March 2001 arrest because he was seen by medical staff at that time and three pages of medical records were generated.(*Id.* at 1-2.)Those records were part of Holmes' medical chart when he was incarcerated in September 2001. (*Id.*) Holmes requests that the evidence be limited to the fact that he was at WACDF briefly in March following an arrest.(*Id.*) Sood does not object to the motion with regard to Holmes' prior arrests, except regarding the convictions that were subject to Holmes' First Motion in Limine. (Def.'s Resp. Second Mot. Lim. at 1.) [Dkt 108.] Because Holmes' motion was granted to exclude evidence of his earlier convictions, this motion is likewise granted to exclude evidence of Holmes' arrests on those earlier charges.

Holmes also moves to bar any evidence regarding the prior arrest of Tim Smith. (Pl.'s Second Mot. Lim. at 1-2.) Smith was incarcerated at the WCADF in September and October 2001, and may be called to testify about Holmes' medical condition during that time. (*Id.* at 1.) At oral argument, Holmes' counsel clarified that the jury should be informed only that Smith was an inmate with Holmes, without any reference to the fact that Smith was charged with murder and later acquitted. Sood's counsel responded that the jury should be informed that Smith was incarcerated for a serious charge for which he faced a serious sentence, to demonstrate Smith's bias against the individuals at the WCADF.

***4** When evaluating a witness's testimony, a jury is permitted to consider things such as ability to perceive and possible bias or sympathy. The circumstances surrounding Smith's incarceration, including the seriousness of the charge against him, may tend to show such bias. Accordingly, Holmes' second motion in limine is denied. However, if Sood's counsel presents evidence to the jury about Smith's murder charge, Holmes' counsel may present evidence about the circumstances surrounding the charge and Smith's subsequent acquittal.

III. Plaintiff's Motion to Bar Substance Abuse Evidence

Holmes moves to have any references to his prior substance abused barred pursuant to Fed.R.Evid. 402, on the ground that such evidence is not relevant and, alternatively, pursuant to Fed.R.Evid. 403, on the ground that any mention of addiction and substance abuse presents a serious danger that the case will be decided based on prejudice, rather than on the merits. (Pl.'s Third Mot. Lim.) [Dkt 91.] Holmes' motion to bar all references to his prior substance abuse is denied.

Holmes cites a number of cases to support his contention that courts are extremely cautious before letting evidence of substance abuse into a trial.(*Id.* at 2-3.)For example, in *U.S. v. Cameron,* 814 F.2d 403, 405 (7th Cir.1987), the Seventh Circuit affirmed the district court's refusal to admit evidence about a witness' prior drug use to impeach his credibility. While finding that use of illegal drugs may be probative of a witness' memory or mental capacity if it is a legitimate issue at trial, the Seventh Circuit held that "[a]t the same time, however, there is considerable danger that evidence that a witness has used illegal drugs may so prejudice the jury that it will excessively discount the witness' testimony." *Cameron,* 814 F.2d at 405. Thus, the court concluded that a court must "be chary in admitting such evidence when it is offered for the *sole purpose* of making a general character attack."*Id.* (emphasis added).

At oral argument on the motion, Sood's counsel stated that evidence of Holmes' substance abuse would *not* be used to attack Holmes' character or credibility, or to argue that Holmes' civil rights are in any way less worthy of protection because of substance abuse. Instead, Sood argues that Holmes' past illegal substance abuse may be used for impeachment because at his deposition Holmes admitted that during his sentencing, he lied to the state court judge about his drug use. (Def.'s Resp. Third Mot. Lim. at 3-4.) [Dkt 109.] It is not necessary for Sood's counsel to explore the extent of Holmes' illegal drug use in order to impeach him with that admission. If that were the only reason for the admission of Holmes' history of illegal drug use, Holmes' argument under Rule 403 might be well-taken. However, Sood also argues that Holmes' history of substance abuse is relevant evidence on the medical issues in the case.

Sood's position is that Holmes' gastrointestinal problems were caused, at least in part, by his prior narcotic and alcohol use. (Def.'s Resp. Third Mot. Lim. at I.) Sood cites testimony from Holmes' own expert witness, Dr. Franklin, that narcotic use may have been a factor in the chronic intestinal ileus from which Holmes suffered before his incarceration. (Def.'s Resp. Third Mot. Lim., Ex. A at 57.) In addition, Sood argues that the evidence of Holmes' history of narcotic use, both the prescribed narcotics that he took for a number of medical conditions and the illegal street narcotics, is relevant to rebut Holmes' claim that Sood's treatment was the cause of his subsequent medical problems. (Def.'s Resp. Third Mot. Lim. at 3.) Holmes responds that Sood cannot distinguish between the causative effect of the prescribed narcotics and the illegal drugs Holmes took, and further, that how Holmes developed ileus prior to his admission to the WCADF is irrelevant. (Pl.'s Third Mot. Lim. at 5-6.)

***5** The motion to bar the substance abuse evidence is denied. This is not a case in which a party seeks to bring in evidence of illegal drug use solely or primarily to discredit a witness. At trial, Holmes is seeking to recover for past medical treatment including surgery that he had to undergo, as well as future medical care that he may need, including possible additional surgery, allegedly because of Sood's deliberate indifference. Sood suggests that future medical care Holmes may need for his intestinal conditions was not caused by his (Sood's) actions, but would have been necessary regardless of his actions. (Def.'s Resp. Third Mot. Lim. at 3.) The evidence presented on the motion demonstrates that, according to the experts for both sides, Holmes' use of narcotics, both legal and illegal, may have played a role in the intestinal conditions which Holmes claims were aggravated by Sood's actions. The extent, including duration and amount, of Holmes' use of narcotics, both legal and illegal, is something the jury may consider in evaluating the parties' arguments regarding whether Holmes' damages were caused by Sood or are the result of the natural course of his disease.

IV. Plaintiff's Motion to Bar Evidence of Other Health Conditions

Holmes moves pursuant to Fed.R.Evid. 403 to bar evidence regarding his other health conditions, including his medical history of orthopedic treatment, arthritis, asthma, hemorrhoids, two hip replacement surgeries, and erectile dysfunction. (Pl.'s Fourth Mot. Lim. 1, 2, 4.) [Dkt 93.] At oral argument, Holmes' counsel withdrew this motion after Sood's counsel agreed not to present evidence regarding Holmes' erectile dysfunction. Accordingly, the motion is withdrawn.

V. Plaintiff's Motion to Bar Evidence about his Sentence

Holmes moves to bar reference to the length or details of the sentence for which he was incarcerated. (Pl.'s Sixth Mot. Lim.) [Dkt 97.] At oral argument, Holmes' counsel stated that this motion is based on his premise that the substance abuse evidence should not be admitted at trial. However, it is apparent that Holmes cannot put before the jury evidence that he wants the jury to hear-that Holmes was released after his initial sentencing and put on probation-without also allowing the jury to hear evidence about the reason why Holmes was eligible for a shorter sentence, that is, that his sentence was for possession of a controlled substance. Furthermore, as discussed above, the substance abuse evidence will not be excluded. At oral argument, Holmes' counsel conceded that there is no reason to bar explaining Holmes' sentence to the jury, and withdrew the motion, while still preserving Holmes' objection that the substance abuse evidence should not be admitted.

VI. Defendant's Motion to Bar Cumulative Expert

Witness Testimony

Sood moves to bar Holmes from presenting the testimony of both Dr. Ronald Himmelman and Dr. James Franklin regarding their criticism that Sood should have sent Holmes to the hospital for an obstructive series of x-rays. (Def.'s First Mot. Lim. ¶¶ 5-6.) [Dkt 101.] Holmes responds that Dr. Himmelman, an emergency room physician, and Dr. Franklin, a gastroenterologist, have different areas of expertise, bring different medical perspectives to the case, have reviewed the case for different purposes, and will address different subject matters in their testimony. (Pl.'s Resp. First Mot. Lim. at 1.) [Dkt 113.] Specifically, Holmes asserts that one expert will testify regarding the issue of liability, while the other will testify about causation and damages.(*Id.*)

***6** Sood cites *Hill v. Porter Mem. Hosp.*, 90 F.3d 220 (7th Cir.1996), as support for his argument that it is proper for a court to exclude cumulative evidence, even if the testimony comes from a medical expert. (Def.'s First Mot. Lim ¶ 4.) However, the expert witnesses in *Hill* were not excluded because their testimony was cumulative, but rather because their late disclosure violated the court's scheduling order. 90 F.3d at 222, 224. The Seventh Circuit affirmed the district court's decision, finding that counsel had not provided a persuasive explanation for the untimely disclosures. *Id* . at 224.The court noted that "the trial testimony of Drs. Cranberg and Rothenberg would have been largely, if not totally, cumulative of Mrs. Hill's other experts" in the context of showing that the plaintiff had not demonstrated prejudice from the decision to exclude. (*Id.*).

The only basis on which Sood argues that Dr. Himmelman and Dr. Franklin's opinions are cumulative is that the fact that they will both testify that Sood should have sent Holmes to the hospital for an obstructive series of x-rays. (Def.'s First Mot. Lim. ¶ 5.) Holmes, on the other hand, states that the experts will not be limited to the one question cited in Sood's motion; rather, they each will address different medical issues from different medical perspectives. (Pl.'s Resp. at 5.) The fact that their testimony and opinions may overlap to some extent does not demonstrate a sufficient basis of undue delay, waste of time, or needless presentation of cumulative evidence under Fed.R.Evid. 403 to bar the testimony of either witness. Defendant's First Motion In Limine to bar cumulative expert witness testimony is denied.

VII. Defendant's Motion to Bar Photographs

Sood moves to bar admission of five photographs of Holmes (identified as Pl.Ex. 1) taken by Holmes' wife, Marilyn.[FN1](Def.'s Third Mot. Lim.) [Dkt 103.]

> FN1. For the sake of clarity, Holmes' wife, Marilyn Holmes, will be referred to herein as "Marilyn."

On March 31, 2005, Marilyn submitted an affidavit regarding the photographs. In her affidavit, Marilyn stated that on October 14, 2001, she took Holmes directly from the WCADF to Silver Cross Hospital, and on the morning of October 15, 2001, she took the five photographs of Holmes. (Def.'s Third Mot. Lim., Ex. B, Affidavit of Marilyn Holmes ¶¶ 5-6.) She further stated that she was familiar with Holmes' appearance in September and October 2001 because she visited him almost daily while he was detained at WCADF, and that the photographs are a fair, accurate and true depiction of Holmes on October 14 and 15, 2001 and for at least approximately one week prior to his release. (*Id.* ¶¶ 3, 7.)

Sood objects that Holmes has not provided a proper foundation and that the photographs are irrelevant. (Def.'s Third Mot. Lim. ¶¶ 6, 8, 9, 10, 11.) Sood argues that photographs taken on October 15, 2001, following Holmes' major surgery on October 14, cannot accurately depict Holmes' condition on the days preceding the surgery.[FN2]Accordingly, Sood argues that the photographs cannot satisfy Fed.R.Evid. 901(a), which provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."However, Marilyn's affidavit provides a basis for her knowledge of Holmes' condition prior to his surgery, and states that the photographs represent Holmes' appearance prior to his release from the WCADF. Pursuant to Fed.R.Evid. 901(b)(1), the testimony of a witness with knowledge that a matter is what it is claimed to be is sufficient for authentication or identification under Rule 901. Sood's motion in limine cannot be granted on the basis of lack of foundation because, based on the affidavit, Marilyn may be able to lay a foundation at trial for the admission of the photo-

graphs.

> FN2. Holmes now states that the photographs were taken on October 13, 2001 (prior to his surgery), not October 15 as stated in Marilyn's affidavit. (Pl.'s Resp. Third Mot. Lim. at 5 n. 1.) [Dkt 117.] Holmes calls this a "typographical error" in the affidavit. (*Id.*) However, Holmes fails to include any factual support for his current statement, such as a supplemental affidavit from Marilyn. For purposes of this decision, the court will assume that the facts are as stated in Marilyn's affidavit.

***7** Sood also argues that the photographs are irrelevant because he last saw Holmes on September 26, 2001 (16 days prior to his release on October 12), and he never saw Holmes in the condition depicted in the pictures. (Def.'s Third Mot. Lim. ¶¶ 4, 5, 9.) Contrary to Sood's argument, if an adequate foundation is laid, the photographs may be relevant to the issues in this case, including Holmes' condition at the time he was released from the WCADF. According to Holmes, the evidence will establish that Sood was responsible for Holmes' medical treatment during his incarceration and that Sood was informed by the nursing staff Holmes' condition on at least five occasions after September 26, 2001. Holmes' condition at the time he was at the WCADF is relevant, and whether or not Sood was aware of that condition will be one of the factual issues for trial.

Accordingly, Defendant's Third Motion In Limine is denied without prejudice to any objection that Sood may make at trial.

VIII. Defendant's Motion to Bar Evidence of Other Claims

Sood moves to bar evidence of any prior or other claims. (Def.'s Fourth Mot. Lim. at 1.) [Dkt 104.] Because the hearing on this motion was continued, it will be addressed separately.

IX. Motions to Bar Rule 26(a) Testimony

Holmes moves to bar Rule 26(a)(2) testimony from Sood (Pl.'s Fifth Mot. Lim.) [dkt 95] and Sood moves to bar expert opinion testimony which has not been disclosed pursuant to Rule 26(a)(2) (Def.'s Second Mot. Lim.) [dkt 102]. As detailed below, Plaintiff's Fifth Motion in Limine is granted in part to bar Sood from giving testimony regarding causation, prognosis or future impact. Defendant's Second Motion in Limine is also granted in part, to the extent set out below.

In January 2003, Holmes disclosed Dottie Clark and the unknown nurses at the WCADF as persons with information pursuant to Fed.R.Civ.P. 26(a)(1). (Pl.'s Resp. Second Mot. Lim., Ex. A.) [Dkt. 115.] In his response to Defendant's first set of interrogatories in February 2003, Holmes disclosed Dr. Saeed Darbandi, Dottie Clark, the unknown nurses at the WCADF, and Julie (unknown last name), a counselor at the WCADF, as witnesses. (*Id.*) In March 2003, Holmes served a notice of deposition for Carleen Sloan, John Petrocelli, Christine Keenan, Mary Jo O'Sullivan, and Cindy Bost. (*Id.,* Ex. D.) In April 2003, Holmes served a notice of deposition for Nurse Petrocelli, Nurse Sloan, and Sood. (*Id.*) In September 2003, Holmes served a notice of deposition for Sood, John Petrocelli, Carleen Sloan, Mary Jo O'Sullivan, Chris Keenan, and Cindy Boston. (*Id.*)

On February 9, 2004, the parties filed a joint motion to amend the discovery schedule. (Def.'s Second Mot. Lim., Ex. B.) In that motion, Holmes stated that he intended to call his treating physicians to testify only to his treatment and that they would not provide testimony regarding causation, prognosis and future impact. (*Id.* at ¶ 3.) On April 6, 2004, Holmes provided defense counsel with an affidavit from Christine Keenan. (Pl.'s Resp. Second Mot. Lim., Ex. E.) On May 14, 2004, Holmes disclosed Dr. Franklin and Dr. Himmelman as expert witnesses and provided their expert reports. (Def.'s Second Mot. Lim., Ex. A.) In the proposed final pretrial order, Holmes stated that he would call Sood as a witness and may call Julie McCabe (Sterr), Christine Keenan, Dottie Clark, Mary Jo O'Sullivan, John Petrocelli, Cindy Boston, Carleen Sloan, Dr. Darbandi and Dr. Rotnicki as witnesses at trial. (Proposed Pretrial Order at 3-6.)

A. Treating Physicians

1. *Dr. Saeed Darbandi*

***8** Holmes asserts that Dr. Darbandi was disclosed as a non-opinion fact witness in his Rule 26(a)(1) dis-

closures and a letter dated February 18, 2004. (Pl.'s Resp. Second Mot. Lim. at 2.) However, Holmes' argument fails to recognize the distinction between a fact witness and a treating physician who may provide testimony that is based on "scientific, technical or other specialized knowledge" pursuant to Fed.R.Evid. 702. Although Dr. Darbandi was Holmes' treating physician, his testimony about his diagnosis and treatment of Holmes is based on his specialized knowledge. Pursuant to *Musser v. Gentiva Health Servs.,* 356 F.3d 751, 757-58 (7th Cir.2004), and this court's standing order (Standing Order as to Expert Disclosure and Discovery, *http://www.ilnd.uscourts.gov/JUDGE/BROWN/Expert.htm* (last updated Dec. 2003)), Holmes was required to make a formal disclosure pursuant to Rule 26(a)(2).

However, Holmes' counsel's February 18, 2004 letter advised Sood's counsel that Holmes might call Dr. Darbandi to testify at trial regarding his treatment of Holmes. (Pl.'s Resp. Second Mot. Lim., Ex. B.) Additionally, the parties' joint motion to amend the discovery schedule demonstrates that Sood was aware that Dr. Darbandi would be called as a witness to testify as to his treatment of Holmes. Furthermore, Dr. Darbandi was also deposed in this case, and Sood's counsel had an opportunity to question him regarding his qualifications and the testimony he would provide. Dr. Darbandi will be permitted to testify about his treatment of Holmes, but his trial testimony may not go beyond the testimony he provided at his deposition. Furthermore, because Dr. Darbandi failed to serve an expert report, he will be barred from testifying about causation, prognosis, or the future impact of Holmes' condition.

2. *Dr. Rotnicki*

Holmes has agreed to withdraw Dr. Rotnicki from his witness list. (Pl.'s Resp. Second Mot. Lim. at 3.)

3. *Dr. Kul Sood*

Ironically, both parties seek to exclude the testimony of Sood, while at the same time expecting to call him as a witness in their own case. (Pl.'s Fifth Mot. Lim. at 3-5; Def.'s Second Mot. Lim. ¶ 15)

Sood objects to his being called by Holmes because Holmes failed to serve any Rule 26(a)(2) disclosure listing Sood. (Def.'s Second Mot. Lim. ¶ 15.) Holmes responds that Sood will be called as the defendant in this case and he will not seek to elicit any "expert opinion testimony" from Sood. (Pl.'s Resp. Second Mot. Lim. at 3.) It is not entirely clear what Holmes' argument means. Certainly, any testimony Sood provides about his treatment of Holmes can be expected to be based on his specialized training. *See*Fed.R.Evid. 702.

Holmes, in turn, moves to bar Sood from providing expert testimony because he did not disclose himself as a witness under Fed.R.Civ.P. 26(a)(2)(A) or (B) and failed to submit an expert report regarding his opinions. (Pl.'s Fifth Mot. Lim. at 1-2, 3.) Holmes argues that, at a minimum, Sood should be barred from testifying about causation, prognosis, and future impact because he failed to serve an expert report as required by Rule 26(a)(2)(B).(*Id.* at 4.)

***9** Sood responds that, contrary to Holmes' argument, he was properly disclosed pursuant to Rule 26(a)(2)(A) in a letter dated August 4, 2004. (Def.'s Resp. Fifth Mot. Lim. at 1-2.) [Dkt 111.] That letter states that Sood will testify regarding, *inter alia,* Holmes' care and treatment, Holmes' symptoms and subjective complaints, the records he reviewed regarding Holmes' prior treatment, the chronic nature of Holmes' condition as it existed during Sood's treatment, and that the conservative course of care and treatment Holmes received was timely and appropriate in light of his symptoms and prior medical history. (*Id.,* Ex. A.) That disclosure satisfied the requirement of the court's standing order (Standing Order as to Expert Disclosure and Discovery, *http://www.ilnd.uscourts.gov/JUDGE/BROWN/Expert.htm*) and *Musser,* 356 F.3d at 757-58. Additionally, Sood sat for depositions, at which he discussed his educational background and the treatment that he provided to Holmes while he was incarcerated. From the motions, it appears that both parties intend to call Sood to testify regarding the topics listed in Sood's counsel's letter of August 4, 2004. Those subjects were thoroughly explored in discovery, and the motions are denied as to that testimony. It is undisputed that Sood did not provide a Rule 26(a)(2)(B) report. Accordingly, he may not testify about causation, prognosis, or the future impact of Holmes' condition. However, neither party suggests that it intends to call Sood to provide such testimony.

B. Nurses

Sood argues that the nurses who provided treatment to Holmes, including Christine Keenan, Dottie Clark, Mary Jo O'Sullivan, John Petrocelli, Cindy Boston, and Carleen Sloan, should have been disclosed under Rule 26(a)(2)(A) because the only relevant testimony they can provide is based on scientific, technical and specialized knowledge the nurses possess. (Def.'s Second Mot. Lim. ¶¶ 8, 16.) Holmes argues that these witnesses were not subject to disclosure under Rule 26(a)(2) because they are not expert witnesses, but rather were properly disclosed under Rule 26(a)(1) as fact witnesses. (Pl.'s Resp. Second Mot. Lim. at 3-6.)

1. Dottie Clark

Holmes contends that his sister, Dottie Clark, is a fact witness and was properly disclosed in his 2003 Rule 26(a)(1) disclosures and 2004 interrogatory responses. (Pl.'s Resp. Second Mot. Lim. at 3-4.) She was deposed in March 2003. (*Id.* at 4, Ex. C.) At her deposition, Ms. Clark testified that she has no knowledge about the medical care or treatment Holmes received while incarcerated and that she will not provide any opinions about the care he received. (Clark Dep. at 42-45, 54.) Rather, Holmes claims that Ms. Clark will testify about her observations and perception of her brother's injuries, pain and suffering. (Pl.'s Resp. Second Mot. Lim. at 4 n. 2.) That is lay witness testimony under Rule 701. *See* *Townsend v. Benya*, 287 F.Supp.2d 868, 875 (N.D.Ill.2003) (noting that lay testimony regarding "subjective symptoms including, but not limited to, pain from or the existence of bruises, cuts, and abrasions resulting from [a] beating is admissible because it does not require the knowledge of an expert witness").

***10** Because Ms. Clark's testimony will be based on her observations regarding Holmes' condition and pain, she was properly disclosed as a fact witness. As such, however, her testimony will be limited to her observations. Because Ms. Clark has specialized training as a nurse, any testimony regarding that training may improperly bolster her lay opinion in the eyes of the jury. Therefore, she will be limited to testifying that she is gainfully employed and may not mention her training as a nurse.

2. Other Wexford Nurses

Holmes asserts that in his January 2003 Rule 26(a)(1) disclosures and February 2004 interrogatory responses, he properly disclosed the "then-unidentified WCADF medical staff as witnesses...." (Pl.'s Resp. Second Mot. Lim. at 4.) The nurses who made entries in his medical records were later identified through discovery. (*Id.*) Those nurses include Christine Keenan, Mary Jo O'Sullivan, John Petrocelli, Cindy Boston, and Carleen Sloan. (*Id.*) In January 2004, Ms. O'Sullivan, Mr. Petrocelli, Ms. Boston and Ms. Sloan were produced for deposition. (*Id.* at 4-5, Exs. F, G, H, I.) When Holmes served the notice of deposition, Ms. Keenan was no longer employed at Wexford and Sood's counsel provided her last known address. (*Id.* at 5.) On April 6, 2004, Holmes produced Ms. Keenan's affidavit. (*Id.,* Ex. E.) However, Ms. Keenan was not deposed. (Def.'s Second Mot. Lim. at ¶ 19.)

In response to Sood's motion, Holmes asserts that these witnesses are not subject disclosure pursuant to Rule 26(a)(2) because they are not expert witnesses and will not provide opinion testimony. (Pl.'s Resp. Second Mot. Lim. at 4.) [FN3] Holmes states that the nurses are fact witnesses who will testify regarding their observations, notes in the medical record, and knowledge of the practices at the medical unit. (*Id.* at 5-6.)Holmes states that none of the nurses, with the exception of Christine Keenan, have any recollection of Holmes. (*Id.* at 6 n. 3.) From the deposition testimony before the court, it appears that their testimony is more properly characterized as fact testimony or lay opinion evidence pursuant to Rule 701, rather than testimony based on their specialized knowledge and training, which is Rule 702 testimony.[FN4]Thus, the motion in limine is denied as to those nurses; however, the trial testimony of the nurses who were deposed, including Ms. O'Sullivan, Mr. Petrocelli, Ms. Boston and Ms. Sloan, may not go beyond their deposition testimony.

FN3. In his response, Holmes claims that only witnesses who are to give "opinion testimony" must be disclosed pursuant to Rule 26(a)(2). (Pl.'s Resp. Second Mot. Lim. at 6.) That is not correct. Rule 26(a)(2) requires formal disclosure of *any* witness who is to provide testimony under Rule 702. Rule 702 permits a witness qualified as an expert by knowledge, skill or training to testify thereto "in the form of an opinion or otherwise."

> FN4. At oral argument, Holmes' counsel argued that the court's standing order regarding the disclosure of expert witnesses discusses only the disclosure of physicians. Apparently, Holmes' counsel did not consider the possible application of Rule 26(a)(2) to other treating professionals, such as nurses. While the standing order details the disclosure obligations under Rule 26(a)(2) as applied to treating physicians, including the obligation of a treating physician who is going to opine about causation to provide a written report, that order does not serve to limit the parties' obligations under Rule 26(a)(2). On the contrary, it specifically discusses what is required of "[a]ll experts required to be disclosed pursuant to Rule 26(a)(2)(A)." (Standing Order as to Expert Disclosure and Discovery, *http://www.ilnd.uscourts.gov/JUDGE/BROWN/Expert.htm*). If the nurses were to testify based on their specialized knowledge and training, they would be subject to formal disclosures under Rule 26(a)(2)(A).

Ms. Keenan will also be permitted to testify at trial. Unlike the other nurses, however, Ms. Keenan was never deposed. Her testimony must be limited to the subjects and information provided in her affidavit. However, some of the testimony detailed in Ms. Keenan's affidavit crosses the line into Rule 702 testimony, as Holmes' counsel acknowledged at oral argument. Accordingly, Ms. Keenan will not be permitted to testify regarding the matters described in paragraph 9 of her affidavit.

C. Social Worker

***11** Sood argues that Julie McCabe (Sterr), a social worker, should also have been disclosed under Rule 26(a)(2)(A) because her testimony will be based on her experience as a social worker. (Def.'s Second Mot. Lim. at ¶ 17.) Holmes argues that Ms. McCabe is not a medical professional and was not involved in his treatment. (Pl.'s Resp. Second Mot. Lim. at 3.) Holmes asserts that she is a fact witness in this case and was properly disclosed in his 2003 Rule 26(a)(1) disclosures and 2004 interrogatory responses. (*Id.,* Ex. A.) Ms. McCabe was deposed in January 2004. (Pl.'s Resp. Second Mot. Lim. at 3.) Holmes contends that she will not provide any testimony pursuant to Rule 702, but rather will testify regarding what she saw, observed and perceived (essentially lay opinion testimony), and that she communicated her concerns to the prison staff. (*Id.*)

Because Ms. McCabe was disclosed as a fact witness, she may testify regarding facts within her personal knowledge and provide lay opinion testimony pursuant to Rule 701. However, she may not provide any testimony pursuant to Rule 702 based on her training as a social worker.

D. Dr. Franklin

Finally, Sood argues that Dr. Franklin should be barred from relying on Christina Keenan's affidavit in reaching his opinions, because Ms. Keenan was not properly disclosed. (Def.'s Second Mot. Lim. at ¶ 20.) Holmes notes that Sood has provided no legal authority for his argument. (Pl.'s Resp. Second Mot. Lim. at 5.) Pursuant to Fed.R.Evid. 703, an expert may base his opinion on facts or data made known to him, if of a type reasonably relied upon by experts. Sood has not demonstrated a basis for precluding Dr. Franklin from relying on facts set out in Ms. Keenan's affidavit.

CONCLUSION

For the reasons discussed above, the motions in limine are decided as follows:

1. Plaintiff's First Motion In Limine to Bar Evidence of Any Conviction Other Than the Conviction For Which He Was Jailed at the Time of His Injuries and To Bar All Evidence of the Nature of the Crime Underlying Any Conviction [dkt 87] is granted in part and moot in part.

2. Plaintiff's Second Motion In Limine to Bar Reference to Prior Arrests Other Than the Arrest for Which Plaintiff was Jailed in March 2001 [dkt 89] is granted in part and denied in part.

3. Plaintiff's Third Motion In Limine to Bar All References to Plaintiff's Prior Substance Abuse [dkt 91] is denied.

4. Plaintiff's Fourth Motion In Limine to Bar Ref-

erence to Other Irrelevant and Embarrasing Health Conditions [dkt 93] is withdrawn.

5. Plaintiff's Fifth Motion In Limine to Bar FRCP 26(a)(2)(B) Testimony from Defendant Dr. Sood [dkt 95] is granted in part and denied in part.

6. Plaintiff's Sixth Motion In Limine to Bar Reference to the Length or Details of Mr. Holmes' Sentence [dkt 97] is moot.

7. Defendant's First Motion In Limine Barring Cumulative Expert Witness Testimony [dkt 101] is denied.

8. Defendant's Second Motion In Limine Barring Expert Opinion Testimony Which Has Not Been Disclosed Pursuant to Rule 26(A)(2) and This Court's Standing Order [dkt 102] is granted in part and denied in part.

***12** 9. Defendant's Third Motion In Limine Prohibiting the Display or Publication to the Jury of the Five Photographs Identified As Plaintiff's Exhibit # 1 [dkt 103] is denied.

10. Defendant's Fourth Motion In Limine Prohibiting Any Testimony Regarding Prior or Other Claims [dkt 104] will be addressed in a separate ruling.

IT IS SO ORDERED.

N.D.Ill.,2006.
Holmes v. Sood
Not Reported in F.Supp.2d, 2006 WL 1988716 (N.D.Ill.)

END OF DOCUMENT

TAB 18

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated,	)	
Plaintiffs,	)	
v.	)	**No. 02 C 5893**
HOUSEHOLD INTERNATIONAL, INC., et al.,	)	**Judge Nan R. Nolan**
Defendants.	)	

ORDER

Plaintiffs have filed this securities fraud class action alleging that Defendants Household International, Inc., Household Finance Corporation, and certain individuals (collectively, "Household") engaged in predatory lending practices between July 30, 1999 and October 11, 2002 (the "Class Period"). Currently before the court are (1) Class' Motion to Compel Andrew Kahr Documents Improperly Withheld as Privileged or Destroyed by the Household Defendants, and (2) Plaintiffs' Motion to Unseal Exhibit Nos. 1-24 and 28-32, Filed with the Declaration of Azra Z. Mehdi in Support of the Class' Motion to Compel Andrew Kahr Documents. For the reasons set forth here, the motions are both denied.

BACKGROUND

Andrew Kahr was a founder of, and consultant for, Providian Financial Corp., a subprime lender that reportedly paid more than $400 million to settle charges of unfair business practices in 2002. In 1999, Household CEO William Aldinger retained Mr. Kahr "to introduce opportunistic methods to accelerate the growth of U.S. Consumer Finance." Mr. Kahr apparently provided Household with a list of 60 potential consumer finance initiatives, 10 of which Household selected for "further review and potential immediate implementation." According to Household, very few of

Mr. Kahr's ideas were in fact implemented, and none were implemented in the form suggested by Mr. Kahr. (Def. Resp., at 1.)

During the course of discovery, Household produced "hundreds of pages of memoranda and other communications to and from Mr. Kahr." (*Id*. at 2.) Household claims that it withheld as privileged "[o]nly one small subset of Kahr-related documents [that were] created in the course of one particular assignment in which Mr. Kahr interfaced directly with Household's in-house counsel to assist them in providing legal advice to the Company regarding whether the Federal Parity Act (which had recently been enacted) did or did not preempt certain state consumer lending regulations or statutes." (*Id*.) Plaintiffs insist that the documents do not reflect communications between an attorney and client necessary to obtain legal advice. Plaintiffs also question the circumstances surrounding the apparent destruction of numerous Kahr documents in or around June 2002.

Defendants have submitted the 32 withheld Kahr documents for *in camera* inspection. The court has carefully reviewed each document and now enters the following rulings.

DISCUSSION

The attorney-client privilege provides that (1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived. *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991). The purpose of the privilege is to "encourage full disclosure and to facilitate open communication between attorneys and their clients." *United States v. BDO Seidman*, 337 F.3d 802, 810 (7th Cir. 2003).

A. Existing Kahr Documents

Plaintiffs argue that Mr. Kahr's role as an outside consultant to Household management is not sufficient to establish that his communications with Household's attorneys are protected by the attorney-client privilege. In support of this assertion, Plaintiffs cite *Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co.*, 129 F.R.D. 515 (N.D. Ill. 1990), in which the court held that "the attorney-client privilege, as applied by the courts of Illinois, does not extend to communications with former employees of a client corporation now employed as 'litigation consultants.'" *Id*. at 518. *Barrett* is inapplicable, however, in that it was a diversity case involving the application of Illinois' "control group" test for the attorney-client privilege. *Id*. at 516-17. As this court has previously noted, the Supreme Court has soundly rejected the control group test in federal question cases such as the one at issue here. *Upjohn Co. v. United States*, 449 U.S. 383, 392-92 (1981) ("[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.") In addition, courts have construed *Barrett* narrowly, finding that the attorney-client privilege can extend to non-employee agents who communicate with attorneys on behalf of a corporate principal for the purpose of receiving legal advice. *See, e.g., Caremark, Inc. v. Affiliated Computer Servs., Inc.*, 192 F.R.D. 263, 267 (N.D. Ill. 2000); *Trustmark Ins. Co. v. General & Cologne Life Re of America*, No. 00 C 1926, 2000 WL 1898518, at *5 (N.D. Ill. Dec. 20, 2000).

In this case, the court finds that Mr. Kahr was serving as an agent of Household management. He was hired by CEO Aldinger to give advice about consumer financing initiatives, and was working on behalf of the corporation at the time of the relevant communications. *Cf. United States v. Evans*, 113 F.3d 1457, 1462 (7th Cir. 1997) ("[T]he attorney-client privilege will not shield from disclosure statements made by a client to his or her attorney in the presence of a third party who is not an agent of either the client or attorney.") Thus, disclosure to Mr. Kahr did not alone waive the attorney-client privilege.

Plaintiffs claim that the Kahr documents are nevertheless discoverable because Household's attorneys did not provide any legal advice. Rather, Plaintiffs argue, "[i]t is apparent that Household lawyers were merely conduits for the exchange of ideas that related to deceptive sales, marketing and training ideas promulgated by Mr. Kahr, and not because there was any legal advice being communicated." (Pl. Mot., at 9.) It is true that "a corporation cannot shield its business documents by routing them through an attorney." *B.F.G. of Illinois, Inc. v. Ameritech Corp.*, No. 99 C 4604, 2001 WL 1414468, at *6 (N.D. Ill. Nov. 13, 2001). Having reviewed the documents in question, however, the court concludes that they all relate to legal advice regarding the interpretation and application of the Federal Parity Act. In each document, Mr. Kahr is either requesting or receiving legal advice about whether proposed policies comply with federal and/or state laws.

Even assuming the communications relate to legal advice, Plaintiffs argue, Defendants cannot show that Mr. Kahr was necessary to the Company obtaining such advice. "[W]hen the third party is a professional, such as an accountant, capable of rendering advice independent of the lawyer's advice to the client, the claimant must show that the third party served some specialized purpose in facilitating the attorney-client communications and was essentially indispensable in that regard." (Pl. Mot., at 10 (quoting *Cellco P'ship v. Certain Underwriters at Lloyd's London*, No. Civ. A. 05-3158 (SRC), 2006 WL 1320067, at *2 (D.N.J. May 12, 2006).) To the extent that Mr. Kahr had specialized expertise in the area of consumer finance initiatives, the court is satisfied that Defendants have demonstrated the necessity of his services in this case. Indeed, Household limited dissemination to only a handful of individuals whose duties related to the document contents, and it is clear that Household intended all of the communications to remain confidential. "[W]hen a corporation provides a confidential document to certain specified . . . contractors with the admonition not to disseminate further its contents . . ., absent evidence to the contrary we may reasonably infer that the information was deemed necessary for the . . . contractors' work." *F.T.C.*

v. GlaxoSmithKline, 294 F.3d 141, 148 (D.C. Cir. 2002). As the *GlaxoSmithKline* court explained, ""we can imagine no useful purpose in having a court review the business judgment of each corporate official who deemed it necessary or desirable for a particular . . . contractor to have access to a corporate secret. It suffices instead that the corporation limited dissemination to specific individuals whose corporate duties relate generally to the contents of the documents." *Id*. Thus, the documents in question are all protected by the attorney-client privilege.

B. Destroyed Kahr Documents

The court briefly addresses Plaintiffs' additional concern that Defendants improperly destroyed Kahr documents after the start of this litigation. Plaintiffs direct the court to a June 24, 2002 email from Household Chief Information Officer Ken Harvey to William Aldinger, David Schoenholz, and attorney Ken Robin, with the subject line "Kahr Memos":

> We will be deleting 620 emails from over 90 employee mailboxes shortly. Most of these were forwarded internally after being received.
>
> We will also block all incoming memos from that e-mail account. Mr. Kahr could still send e-mail from another account should he figure out that he is blocked.
>
> We have created a database containing all these notes and will work with Ken Robin on the disposition.

(Ex. 27 to Pl. Mot.) Ken Robin responded to this email four days later, stating: "I think you should send out a note on disposing of all memos." (*Id*.) Plaintiffs argue that these email exchanges demonstrate that Household improperly destroyed Kahr documents. (Pl. Mot., at 12-13.)

Defendants respond that they "have no reason to believe that any Kahr-related documents were destroyed after the start of this litigation" on August 19, 2002. (Def. Resp., at 4.) Plaintiffs claim that as of June 24, 2002, Defendants knew about threatened litigation from the state attorneys general. Plaintiffs are correct that "[a] party has a duty to preserve evidence, including any relevant evidence over which the party has control and reasonably knew or could reasonably foresee was material to a potential legal action." *Krumwiede v. Brighton Associates, L.L.C.*, No. 05

C 3003, 2006 WL 1308629, at *8 (N.D. Ill. May 8, 2006). Plaintiffs' evidence in this regard, however, is not sufficient to establish all of the elements required to justify an adverse inference.

"A prerequisite to the imposition of sanctions for spoliation is a determination that the party, which destroyed the documents, had an obligation to preserve them." *Cohn v. Taco Bell Corp.*, No. 92 C 5852, 1995 WL 519968, at *5 (N.D. Ill. Aug. 30, 1995). To find an adverse inference, moreover, the court must find that the documents were destroyed in "bad faith," meaning destroyed "for the purpose of hiding adverse information." *Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155 (7th Cir. 1998). A party's "destruction or inability to produce a document, standing alone, does not warrant an inference that the document, if produced, would have contained information adverse to [the party's] case." *Park v. City of Chicago*, 297 F.3d 606, 615 (7th Cir. 2002).

On the current record, the court is unable to determine whether Plaintiffs are entitled to an adverse inference in this case based on the destruction of Kahr-related documents. Plaintiffs' motion is thus denied.

CONCLUSION

For the reasons stated above, Plaintiffs' Motion to Compel Andrew Kahr Documents Improperly Withheld as Privileged or Destroyed by the Household Defendants [Doc. 895], and Plaintiffs' Motion to Unseal Exhibit Nos. 1-24 and 28-32, Filed with the Declaration of Azra Z. Mehdi in Support of the Class' Motion to Compel Andrew Kahr Documents [Doc. 898] are both denied.

ENTER:

Dated: January 25, 2007

NAN R. NOLAN
United States Magistrate Judge

TAB 19

LEXSEE 2005 U.S. DIST. LEXIS 13607

JOHN KLACZAK and JEFF SHARP, individually and as ex rel. UNITED STATES OF AMERICA, Relators, v. CONSOLIDATED MEDICAL TRANSPORT INC., d/b/a COMED TRANSPORT, INC. TOWER AMBULANCE SERVICE, INC., DALEY'S AMBULANCE SERVICE, LTD., ESTATE OF JOHN W. DALEY, JR., JOHN W. DALEY, III, BRIAN T. WITEK, RICHARD S. WITEK, TOM WAPPEL, ST. BERNARD HOSPITAL, MT. SINAI HOSPITAL MEDICAL CENTER OF CHICAGO, JACKSON PARK HOSPITAL, TRINITY HOSPITAL, SOUTH SHORE HOSPITAL, SOUTH SUBURBAN HOSPITAL, HOLY CROSS HOSPITAL, BETHANY HOSPITAL, ST. JAMES HOSPITAL, LORETTO HOSPITAL, and "JOHN DOE" MEDICAL PROVIDERS, Defendants.

Case No. 96 C 6502

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

2005 U.S. Dist. LEXIS 13607

May 26, 2005, Decided
May 26, 2005, Filed

SUBSEQUENT HISTORY: Summary judgment granted by, Motion granted by *Klaczak ex rel. United States v. Consol. Med. Transp., 2006 U.S. Dist. LEXIS 76100 (N.D. Ill., Sept. 30, 2006)*

PRIOR HISTORY: *Klaczak v. Consol. Med. Transp., Inc., 2002 U.S. Dist. LEXIS 16824 (N.D. Ill., Sept. 6, 2002)*

COUNSEL: [*1] For John Klaczak, Jeff Sharp, individually, Plaintiffs: Sidney R. Berger, Attorney at Law, Chicago, IL; Brian Richard Holman, Holman & Stefanowicz, LLC, Chicago, IL; Jeffrey Mark Friedman, Law Office of Jeffrey Friedman, PC, Chicago, IL.

For United States of America, Plaintiff: AUSA, Daniel Edward May, Kurt N. Lindland, United States Attorney's Office, NDIL, Chicago, IL.

For Consolidated Medical Transport, Inc., Defendant: Daniel M. Purdom, Christy L. LeVan, Joseph Henry McMahon, Hinshaw & Culbertson, Lisle, IL; Frank Joseph Marsico, Hinshaw & Culbertson, Chicago, IL.

For John W Daley, Jr, Defendant: Daniel M. Purdom, Hinshaw & Culbertson, Lisle, IL; J David Dillner, Hiskes, Dillner, O'Donnell, Marovich & Lapp, Ltd, Timothy Charles Lapp, South Holland, IL.

For Richard S Witek, Defendant: Daniel M. Purdom, Joseph Henry McMahon, Hinshaw & Culbertson, Lisle, IL.

For St. Bernard Hospital, Defendant: Clare E. Connor, Frances Wiet Makuch, Tom H. Luetkemeyer, Hinshaw & Culbertson, Chicago, IL.

For Mt Sinai Hospotal Medical Center of Chicago, Defendant: Patrick Sean Coffey, Antonio DeBlasio, Donna J. Rolf, Gardner Carton & Douglas LLP, Chicago, IL; William M. Ejzak, [*2] Schuyler, Roche & Zwirner, Chicago, IL.

For Jackson Park Hospital, Defendant: Timothy F. Haley, Emily M Maki-Rusk, Scott A. Carlson, Seyfarth Shaw, Chicago, IL.

For Trinity Hospital, South Suburban Hospital, Bethany Hospital, Defendants: Clare E. Connor, Tom H. Luetkemeyer, Hinshaw & Culbertson, Chicago, IL.

For South Shore Hospital, Defendant: Clare E. Connor, Hinshaw & Culbertson, Chicago, IL.

For Holy Cross Hospital, Defendant: Patrick Edward Deady, John Michael Tecson, Laura Cha-Yu Liu, Matthew James Cleveland, Hogan Marren, Ltd., Chicago, IL.

For St. James, Defendant: Patrick J. Galvin, Hammond, IN; Bradford D. Roth, Cassiday, Schade & Gloor, Chicago, IL; Robert A Anderson, Krieg Devault Galvin, Hammond, IN.

For Loretto Hospital, Defendant: Patrick Edward Deady, John Michael Tecson, Laura Cha-Yu Liu, Timothy Brennan Caprez, Hogan Marren, Ltd., Chicago, IL.

JUDGES: Hon. Mark Filip.

OPINION BY: Mark Filip

OPINION

MEMORANDUM AND OPINION

In this *qui tam* action, plaintiffs John Klaczak and Jeff Sharp ("Relators"), individually and on behalf of the United States, are suing Consolidated Medical Transport ("CoMed"), as well as the various other defendants named [*3] in the caption of this case. [1] The United States partially intervened in this matter, and declined to intervene in other aspects of the Relators' claims. (D.E. 15). (In this regard, for example, it appears that the United States declined to intervene in the claims against the Defendant hospitals. (*See id.*)) The Relators allege, among other things, that certain defendants violated the *False Claims Act* ("FCA") by entering into agreements for ambulance services, which agreements constituted a kickback scheme in violation of the Medicare Anti-Kickback Statute, *42 U.S.C. § 1320a-7b et seq*. Count V of Relators' Second Amended Complaint is an FCA claim brought against St. Bernard Hospital, Mt. Sinai Hospital, Jackson Park Hospital, Trinity Hospital, South Shore Hospital, South Suburban Hospital, Holy Cross Hospital, Bethany Hospital, St. James Hospital, Loretto Hospital (collectively, "Defendants"), and "John Doe" Medical Providers. Relators allege that, in violation of the Anti-Kickback Statute, Defendants have "knowingly and willfully accepted illegal remunerations offered to them by CoMed in the form of drastically reduced rates for their Part A transports [*4] in exchange for which they referred to CoMed their Part B transports." (Second Am. Compl. (D.E. 85) P 81.) Before the Court is the Defendants' Motion (D.E. 180) in Limine to Exclude the Expert Testimony of Frank W. Nagorka and Eva Jo Sparks under *Federal Rules of Evidence 104* and *702*. [2] For the following reasons, the motion is granted in part and denied in part.

1 The Court assumes that the reader has a certain degree of familiarity with the history of this case, particularly that history which is not relevant to the disposition of this motion. Judge Andersen has issued two opinions detailing the background of this case. *See Klaczak v. Consol. Med. Transp., Inc., 2002 U.S. Dist. LEXIS 16824, No. 96-6502, 2002 WL 31010850, at *1-3 (N.D. Ill. Sept. 9, 2002)*; *United States ex ret. Sharp v. Consol. Med. Transp., Inc., 2001 U.S. Dist. LEXIS 13923, No. 96-6502, 2001 WL 1035720, at *1-3 (N.D. Ill. Sept. 4, 2001)*.

2 The individual defendants in this case orally moved to join this motion. (*See* D.E. 181). As a practical matter, their motion may be moot, as the individual defendants (who were the subject of the intervention of the United States) have settled with the government. As a result, the claims that the government is pursuing, at least on its own behalf, as well as the claims against the individual defendants, are now resolved.

[*5] BACKGROUND

This suit was filed in October 1996, and in the years since then, this case has produced a long and relatively complex procedural history, much of which is not relevant to the resolution of Defendants' Motion. [3] What is relevant, however, is that during 2004, this Court set a disclosure and report schedule for experts in this matter. The Realtors disclosed Frank W. Nagorka ("Nagorka") and Eva Jo Sparks ("Sparks") as their experts and provided Defendants with copies of Sparks's and Nagorka's expert reports. Defendants have moved to exclude Sparks's and Nagorka's testimony and reports, arguing that their testimony generally (and their expert reports specifically) fail to meet the required standards for admissibility and would fail to assist the jury in understanding the facts of this case. (D.E. 180 at 2.) Defendants also contend that Sparks's and Nagorka's testimony is "inadmissible and inappropriate as a matter of law and . . . that neither [Sparks nor Nagorka] is qualified to testify as to the opinions that they ultimately offer." [4] (*Id.*)

3 This Court received this case via reassignment upon taking the bench in 2004.

[*6]

4 The Court makes no finding at this time that Realtors' experts are qualified to offer any of the testimony identified in their reports. The reports did not contain *curriculum vitae* and the issue of qualification was not addressed in any meaningful way in the parties' briefs. Defendants may raise qualification challenges as this matter approaches trial, if appropriate, and the parties are

free to request a *Daubert* hearing at that later juncture if one is appropriate.

Before reaching the merits of Defendants' Motion, a brief review of an opinion and order that Judge Andersen issued in this case on September 4, 2001, is necessary to put Defendants' Motion in context. *See United States ex rel. Sharp v. Consol. Med. Transp., Inc., 2001 U.S. Dist. LEXIS 13923, No. 96-6502, 2001 WL 1035720 (N.D. Ill. Sept. 4, 2001)*. In that opinion, Judge Andersen ruled that "if the Relators can show that the alleged scheme is in fact an illegal kickback scheme [in violation of the Anti-Kickback statute], and that the government would have barred claims had it known of the existence of the underlying scheme, a violation [*7] of the FCA would be proven." *2001 U.S. Dist. LEXIS 13923, [WL] at *10*. Judge Andersen found that "under these circumstances, the alleged facts would constitute a fraudulent scheme materially bearing on the government's decision to pay the claims submitted to it." *Id.* The Relators must prove that "had the government known about the kickback scheme, it would have refused payment of the claims, and, further, that the defendants were aware that this was the case when they engaged in their fraudulent conduct." *Id.* The Relators have apparently endeavored to follow Judge Andersen's directions, with their expert reports taking a marked shortcut (producing, as discussed below, proffered expert testimony in the form of various inappropriate legal conclusions) on the issue of Defendants' liability.

With respect to the Relators' proffered experts, Mr. Nagorka is a paramedic and lawyer whose report ultimately concludes that "the ambulance provider agreements . . . constituted a kickback scheme in violation of the Anti-Kickback Statute." (D.E. 180, Ex. A ("Nagorka Report") at 1, 44.) In reaching this conclusion, Nagorka's report, which reads more like a legal brief than an expert report, sets forth numerous assertions [*8] about the applicable law, reviews various agreements between the Defendants and defendant ambulance companies, and asserts that the Defendants and their agreements violated the Anti-Kickback Statute. (*See id.* at 14 ("The ambulance provider agreements entered into by Bethany Hospital and Consolidated Medical Transport violate the Anti-Kickback Statute (*42 U.S.C. § 1320a-7b(b)*).").) Nagorka also asserts that the Defendants and their agreements are not protected by any laws concerning safe harbor protections (*see, e.g., id.* at 2 (stating that the agreements "fail to meet the 'safe harbor" requirements")), and Nagorka further asserts that discounts received by the Defendants from CoMed were "illegal remunerations." (*See, e.g., id.* at 15 ("The rates provided to Bethany Hospital by CoMed are illegal remunerations under the Anti-Kickback Statute."); *see also, e.g.,* ("The discounts that Bethany Hospital received from CoMed on transports that Bethany Hospital was financially responsible for (e.g., DRGs, Medicare Part A transports, in-patient transports) are illegal remunerations.").)

Ms. Sparks is a Certified Fraud Examiner (D.E. 180, Ex. B ("Sparks [*9] Report") at 1), who, according to her report, the Relators expect to "testify relating to the application of Medicare rules and regulations as applied to" this case. (*Id.;* D.E. 182 at 10.) Sparks's report begins by discussing the Medicare system. (D.E. 180, Ex. B at 1-6). Her ultimate opinion is that, among other things, the Defendants and defendant ambulance companies "knowingly entered into a kickback scheme" and "knowingly filed Cost Reports with Medicare containing false certifications and statements." (*Id.* at 21.) She opines that each claim presented to Medicare and Medicaid by the Defendants and the defendant ambulance companies "which were provided or procured through the underlying kickback scheme . . . is a fraudulent claim on the Government." (*Id.*) Of particular relevance to Defendants' Motion is Sparks's conclusion that Defendants "knowingly concealed from Medicare the improper kickback schemes" and that Defendants "knew that any disclosure . . . would result in denial of all claims made to Medicare." (*Id.* at 10.)

ANALYSIS

A district court must exercise its informed discretion to determine whether to admit expert testimony or not. *See, e.g., Good Shepherd Manor Found., Inc. v. City of Momence, 323 F.3d 557, 564 (7th Cir. 2003)*. [*10] After reviewing the proffered expert reports, and after reviewing applicable precedent, the Court finds that much of the testimony of the Relators' proffered experts, and particularly much of the testimony of attorney Nagorka, should not be admitted at trial. The legal conclusions offered by Relators' experts will not assist the jury in understanding the evidence or in determining the facts at issue. Independently, such testimony presents an impermissible risk of usurping the role of the Court as it relates to the jury. In addition, and independently, the potential for jury confusion attendant to such testimony warrants exclusion pursuant to *Federal Rule of Evidence 403*. The Court also, as explained below, excludes various purported expert testimony from Sparks and Nagorka as to what the Defendants purportedly knew or whether the Defendants intended to commit fraud. Such testimony is not helpful to the jury, as the jury is well positioned to make this type of assessment in the absence of a battle of expert testimony about what parties knew or did not know, or did or did not subjectively intend to do. In addition, such testimony is independently excluded [*11] pursuant to *Rule 403*.

Federal Rule of Evidence 702 provides that an expert witness may testify as to "scientific, technical, or

other specialized knowledge" where such testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." *Fed. R. Evid. 702*. Seventh Circuit precedent, however, prohibits expert witnesses from offering opinions or legal conclusions on issues that will determine the outcome of a case. *See, e.g., Good Shepherd, 323 F.3d at 564* ("The district court correctly ruled that expert testimony as to legal conclusions that will determine the outcome of the case is inadmissible.") (citing *United States v. Sinclair, 74 F.3d 753, 758 n.1 (7th Cir. 1996)*; *accord, e.g., Hygh v. Jacobs, 961 F.2d 359, 363 (2d Cir. 1992)* ("This circuit is in accord with other circuits in requiring exclusion of expert testimony that expresses a legal conclusion."); *Niebur v. Town of Cicero, 136 F. Supp. 2d. 915, 920 (N.D. Ill. 2001)* ("The Court of Appeals is crystal clear that an expert may not 'improperly tell[] the jury [*12] why [a party's] conduct was illegal.' Expert witnesses are not allowed to draw legal conclusions' . . . .") (quoting, first, *Haley v. Gross, 86 F.3d 630, 645 (7th Cir. 1996)*, and second, *West v. Waymire, 114 F.3d 646, 652 (7th Cir. 1997)*; *In re Initial Public Offering Servs. Litig., 174 F. Supp. 2d 61, 64 (S.D.N.Y. 2001)* ("In fact, every circuit has explicitly held that experts may not invade the court's province by testifying on issues of law.") (collecting numerous cases); *id.* ("While an expert may provide an opinion to help a judge or jury understand a particular fact, 'he may not give testimony stating ultimate legal conclusions based on those facts.'") (quoting *United States v. Bilzerian, 926 F.2d 1285, 1294 (2d Cir. 1991))*.

Precedent teaches that one reason for these rules is to prevent the situation where the expert usurps or infringes upon the role of the judge. *See Panter v. Marshall Field & Co., 646 F.2d 271, 294 n.6 (7th Cir. 1981)* ("It is not for witnesses to instruct the jury as to applicable principles of law, but the judge."); *accord, e.g., Burkhart v. Wash. Metro. Area Transit Auth., 324 U.S. App. D.C. 241, 112 F.3d 1207, 1213 (D.C. Cir. 1997)* [*13] ("Each courtroom comes equipped with a legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards."). The Seventh Circuit has noted that, if a court would admit such expert testimony, a court would improperly signal to the jury that it is appropriate to look to the parties' experts for legal guidance. *See Harbor Ins. Co. v. Cont'l Bank Corp., 922 F.2d 357, 366 (7th Cir. 1990)*.

The Court need not decide at this time (nor have the parties asked for) the precise language of the instructions that the Court will give to the jury at the conclusion of any trial in this case. [5] Even a rough sketch of what those instructions may look like (in light of the relevant law and Judge Andersen's prior rulings), however, reveals the many material legal conclusions and assertions contained in the Nagorka and Sparks reports. Judge Andersen "recognized that a violation of the Anti-Kickback Statute may form the basis of an FCA claim." *Sharp, 2001 U.S. Dist. LEXIS 13923, 2001 WL 1035720, at *1*; *2001 U.S. Dist. LEXIS 13923, [WL] at *8* ("Courts recognize that FCA liability may be premised on the violation of a different federal statute that otherwise lacks a private [*14] cause of action."). The Anti-Kickback Statute, *42 U.S.C. § 1320a-7b(b)* makes it a felony to:

> knowingly and willfully solicit[] or receiver any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind--(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or (B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program.

42 U.S.C. § 1320a-7b(b). As explained above, Judge Andersen held that "if the Relators can show that the alleged scheme is in fact an illegal kickback scheme [in violation of the Anti-Kickback statute], and that the government would have barred claims had it known of the existence of the underlying scheme, a violation of the FCA would be proven." *Sharp, 2001 U.S. Dist. LEXIS 13923, 2001 WL 1035720, at *10*. Under [*15] Judge Andersen's ruling, the issue of whether Defendants violated the Anti-Kickback Statute is outcome determinative and will be the subject of a jury instruction at trial.

> 5 A trial date has not been set in this case, and the parties have not submitted proposed jury instructions. Judge Andersen stated that "this is a case of first impression in [the Seventh Circuit] and . . . [that] there is a dearth of case law relevant to the issue from any court." *Sharp, 2001 U.S. Dist. LEXIS 13923, 2001 WL 1035720, at *4*. The time that has passed since Judge Andersen's ruling has not added any definitive level of clarity to what jury instructions might look like, although the Court's research uncovered cases addressing use of the Anti-Kickback Statute to attempt to establish a violation of the FCA, which cases were not available to Judge Andersen. *See, e.g., United States ex rel. Bidani v. Lewis, 264 F. Supp. 2d 612 (N.D. Ill. 2003)* (holding that viola-

tion of Anti-Kickback statute can be basis for False Claims Act violation); *United States ex rel. Barrett v. Columbia/HCA Health Care Corp., 251 F. Supp. 2d 28 (D.D.C. 2003)* (similar).

[*16] Moreover, established Seventh Circuit precedent, as well as case law from this district, specifically teaches that an expert may not offer opinion testimony as to whether a defendant violated a statute or regulation, at least where that statute or regulation is at issue in the case. *See Good Shepherd, 323 F.3d at 564* (holding that expert testimony that included "conclusions that the [defendants] violated the [*Fair Housing Amendments Act*]" was properly excluded) (citing *Sinclair, 74 F.3d at 757 n. 1*); *McCabe v. Crawford & Co., 272 F. Supp. 2d 736, 740 (N.D. Ill. 2003)* (holding that plaintiff's expert, a law professor who specialized in consumer law, "may not expound on what complies and does not comply with the [*Fair Debt Collection Practices Act*]; these are inappropriate legal conclusions"); *Cent. Die Casting and Mfg. Co., Inc. v. Tokheim Corp., 1998 U.S. Dist. LEXIS 18472, No. 93-7692, 1998 WL 812558, at *9 (N.D. Ill. Nov. 19, 1998)* ("The Court agrees that an expert's opinion concerning whether a statute or regulation was violated is likely an inadmissible legal conclusion . . . ."). Accordingly, any opinion as to whether Defendants violated [*17] the Anti-Kickback Statute, or met (or did not meet) with the safe harbor strictures, or whether any discounts received were illegal remunerations, is improper. *See, e.g., Good Shepherd, 323 F.3d at 564*; *Sinclair, 74 F.3d at 758 n.1*; *McCabe, 272 F. Supp. 2d at 740*.

The Relators' briefing, with all respect, is not particularly helpful. The Relators "do not contest the proposition that experts cannot render impermissible legal conclusions." (D.E. 182 at 2.) But rather than explain which, if any, of the specific legal conclusions contained in their experts' reports is a "permissible" legal conclusion (whether any actually would be is suspect, given the precedent cited above), Relators advance, as best the Court can tell, three general arguments. First, Relators argue that "as a practical matter not all opinions can be easily identified as permissible factual conclusions or impermissible legal conclusions." (*Id.*) Second, Relators argue that "courts have admitted testimony that clearly sets forth a legal conclusion[,] and *Rule 704 of the Federal Rules of Evidence* permits opinions on the ultimate issue. [*18] " (*Id.*) Third, Relators argue that, even if the Court excludes certain of Sparks's and Nagorka's testimony, that exclusion does not mandate that they should be excluded from testifying at trial. (*Id.* at 2, 4.) The Court addresses these arguments in turn.

Realtors begin with the proposition that certain words have both legal and non-legal or lay meanings. According to the Relators, an expert opinion may encompass the lay meaning of such a word, and (given the potential dual meaning of certain words) what appears to be a legal conclusion on its face may actually not be one. By way of illustration, the Realtors point to Defendants' objection that "Sparks even goes as far as to affirmatively state that the Defendants committed fraud, an ultimate legal conclusion that directly invades the province of this Court." (*Id.* at 3 (quoting D.E. 180 at 7).) In support of what appears to be Relators' implicit argument that Sparks's opinion that the Defendants committed fraud is not an improper legal conclusion, Relators cite *In re Air Crash Disaster at Lockerbie Scotland on December 2, 1988 ("Lockerbie "), 37 F.3d 804 (2d Cir. 1994)*. In that case, the Second Circuit stated, [*19] in analyzing a fairly peripheral issue within a lengthy appeal, that it was not an abuse of discretion for the district court to admit testimony of one of the plaintiffs' expert witnesses who testified that he thought that the defendant had "engaged in 'fraud' and 'deceit.'" *Id. at 826*. The court went on to explain that "it was clear from the . . . [the expert witness's] direct and cross examination that he used those terms in a nonlegal sense." *Id.*

The *Lockerbie* case does not assist the Relators. *Lockerbie* did not question "the general rule" "that an expert may not testify as to what the law is, because such testimony would impinge on the trial court's function." *Id. at 826-27* (collecting cases). *Lockerbie* also cautioned that "permitting an expert to give a legal conclusion" may often be improper because it "implicitly provide[s] a legal standard to the jury." *Id. at 827* (collecting cases). "Thus, expert testimony expressing a legal conclusion should ordinarily be excluded . . . ." *Id.*

More specifically, given the context and matters at issue in this case, Relators cannot credibly argue that Sparks is using [*20] the term "fraud" in a nonlegal sense. Relators are claiming that Defendants committed fraud within the meaning of one or both of the False Claims Act and the Anti-Kickback Statute. Nor can Relators credibly argue that the passage of time will somehow reveal that Sparks's report uses the term fraud in a nonlegal sense. Realtors are suing Defendants under the FCA, and the issues of whether Defendants committed fraud and subjectively intended to commit fraud are material to establishing Defendants' potential legal liability--liability, incidentally, under federal statutory regimes and related precedent that are, at least at times, arguably byzantine. Abundant caselaw confirms the impropriety of such purported expert testimony. *See, e.g., Steadfast Ins. Co. v. Auto Mktg. Network, Inc., 2004 U.S. Dist. LEXIS 6938, No. 97 C 5696, 2004 WL 783356, *6 (N.D. Ill. Jan. 28, 2004)* (barring experts from testifying as to whether an insurance claim was filed in bad faith, as the "experts are in no better position than the jury to assess Steadfast's subjective intent"; allowing such experts to testify about intent would be improper because it "would

be little more than 'telling the jury what result to reach'") [*21] (quoting *Woods v. Lecureux, 110 F.3d 1215, 1221 (6th Cir. 1997)*; *Dahlin v. Evangelical Child and Family Agency, 2002 U.S. Dist. LEXIS 24558, No. 01 C 1182, 2002 WL 31834881, at *3 (N.D. Ill. Dec. 18, 2002)* (holding that an expert cannot testify that certain actions constituted fraud because it "is a quintessential jury determination on which the Court will instruct a jury concerning the factors it is to consider" and because the expert is no "more qualified than an ordinary juror" to determine intent) (collecting cases); *Isom v. Howmedica, Inc., 2002 U.S. Dist. LEXIS 9116, No. 00 C 5872, 2002 WL 1052030, *1-2 (N.D. Ill. May 22, 2002)* (barring proposed expert testimony concerning opposing party's intent because expert is no more qualified than jury to assess party's intent); *see also Woods, 110 F.3d at 1221* (affirming district court's decision to preclude plaintiff's expert from testifying about whether defendants were "deliberately indifferent" in prison civil rights case, because such testimony gives "the false impression that . . . [the expert] knows the answer to this inquiry"; such testimony improperly "runs the risk of interfering with a district court's jury instructions" [*22] and "hardly can be viewed as being helpful to the jury"). Sparks's testimony, by her own admission, is directed, in part, at Medicare Fraud and Abuse Rules and Regulations, and she opines that "each claim presented to Medicare and Medicaid by the Defendant[s] . . . is a fraudulent claim on the Government." (Sparks Report at 21.) This is precisely the sort of testimony--about fraud in the legal sense, as well as about a party's subjective state of mind, a subject on which the expert is no better qualified than a jury--that precedent forbids.

Relators also implicitly suggest that the legal conclusions in Sparks's and Nagorka's reports are permissible because courts have admitted testimony that sets forth legal conclusions and *Federal Rules of Evidence 704* "permits an expert to express an opinion that embraces an ultimate issue to be decided by the trier of fact." (D.E. 182 at 4.) In support, Plaintiffs cite *Miksis v. Howard, 106 F.3d 754, 762 (7th Cir. 1997)*. *Miksis,* however, does not support Relators' argument that either Sparks or Nagorka are permitted to proffer legal conclusions in this case. *Miksis* distinguished factual versus legal causation, [*23] *see id. at 762*, holding that admission of the expert's opinion at issue in that case (which was directed at factual, not legal, causation) was not "manifestly erroneous" or an abuse of discretion. *Miksis* did not (as Relators appear to suggest), hold that a legal conclusion on the ultimate issue of causation was the proper subject of admissible expert testimony, much less that it was required to be admitted. Indeed, other caselaw teaches that such testimony is properly excluded. *See, e.g., Good Shepherd, 323 F.3d at 564*; *McCabe, 272 F. Supp. 2d at 740*; *Isom, 2002 U.S. Dist. LEXIS 9116, 2002 WL 1052030, at *3*.

Relators also proffer various "examples of cases in which the courts allowed expert testimony/opinions that the opposing party argued were impermissible legal conclusions." (D.E. 182 at 6.) Realtors contend that what is "clear from these cases is that one cannot assume [that] the Court will disallow expert testimony simply because the opposing party classifies it as a legal conclusion." (*Id.* at 7.) This Court takes no issue with this unobjectionable generality. However, to the extent Relators cite these cases in support of some sort [*24] of implied argument that the various legal conclusions offered by Relators' proposed experts are admissible, the Court finds that, after reviewing these cases and the proposed testimony, such an argument is unpersuasive.

Indeed, *West v. Waymire, 114 F.3d 646 (7th Cir. 1997)*, a case cited by the Realtors, actually undermines such a conclusion. *West* noted that the plaintiff's expert's affidavit was "admissible to show . . . [negligent supervision], [but] was not admissible to show . . . a municipal policy . . . [of refusing to protect against certain dangers for purposes of *Monell* liability under *42 U.S.C. § 1983*]," which was a "legal conclusion that an expert witness is not allowed to draw." *West, 114 F.3d at 652* (collecting cases). *West,* therefore, actually supports the position (which is consistent with the Seventh Circuit's holdings in *Sinclair* and *Good Shepherd*) that, as a general rule, an expert may not testify as to a legal conclusion. And, notably, courts within this district have cited *West* in support of this very proposition. *See Dahlin, 2002 U.S. Dist. LEXIS 24558, 2002 WL 31834881, at *3 n.2*; [*25] *Isom, 2002 U.S. Dist. LEXIS 9116, 2002 WL 1052030, at *2 n.1 (N.D. Ill. May 22, 2002)*; *Niebur, 136 F. Supp. 2d at 920*.

Moreover, in many of the cases cited by Relators, the court determined, based on the specific facts of the respective case, that the proffered opinion was, in fact, *not* a legal conclusion. *See United States v. Brown, 7 F.3d 648, 651, 653-54 (7th Cir. 1993)*(finding that district court committed no "clear abuse of discretion" in admitting testimony of prosecution's expert concerning whether amount of drugs was consistent with user or distributor status, because the expert's testimony "merely assisted the jury in interpreting the significance of the evidence by comparing [the defendant's] activities to typical behavior patterns of crack users and distributors" and "did not interfere with the jury's exclusive role") [6]; *United States v. Oles, 994 F.2d 1519, 1523 (10th Cir. 1993)*(reviewing for plain error only, as there was no trial objection, and holding that witnesses' reference to the legal term "kiting," where those "witnesses neither attempted to legally define check kiting nor explained the elements of a check kiting offense," was not plain

error); *Heflin v. Stewart County, Tenn., 958 F.2d 709, 715 (6th Cir. 1992)* [*26] (holding, over a dissent, that trial court did not abuse its discretion concerning expert, who testified as an expert concerning correctional institutions and did not claim to have any expertise on the legal requirements for recovery from jail officials for dereliction of duty, that defendants were deliberately indifferent because expert simply used the term in "the way an ordinary layman would"). [7] The fact that other courts have failed to find an abuse of discretion concerning admitted testimony, after determining that often belated and untimely objections were unfounded on factual grounds, does not change the nature of the Realtors' expert testimony here. In addition, none of the Relators' cases casts meaningful doubt on the well-established principles outlined at length above that demonstrate the impropriety of much of the testimony of the proffered experts of the Relators here.

6 *See also United States v. Brown, 7 F.3d 648, 654 n.3 (7th Cir. 1993)*(noting that such testimony is always potentially excludable, if warranted, pursuant to *Fed. R. Evid. 403*).

[*27]

7 *But see Woods, 110 F.3d at 1221* (affirming district court's decision to preclude plaintiff's expert from testifying about whether defendants were "deliberately indifferent" in civil rights case, because such testimony gives "the false impression that . . . [the expert] knows the answer to this inquiry"); *id.* (teaching that admission of such testimony "hardly can be viewed as . . . being helpful to the jury").

In sum, none of the cases Relators cite support the conclusion that Nagorka and Sparks should be permitted to offer opinion testimony on ultimate issues of law in this case. For instance, this is not a case, as in some of the other cases Relators cite, where the proposed experts are testifying as a means to assist in determining the frequency with which certain contractual language is used in an industry. *See WH Smith Hotel Servs. v. Wendy's Int'l, Inc., 25 F.3d 422, 429 (7th Cir. 1994)*(holding that the district court, in bench trial, properly admitted expert testimony regarding custom and usage in connection with interpretation of an ambiguous [*28] provision of an operating agreement); *Huddleston v. Herman & MacLean, 640 F.2d 534, 552 (5th Cir. 1981)*(holding that the district court properly admitted expert testimony that boilerplate language in prospectus "was standard language for a prospectus used in connection with the issuance of a new security" and thus was unlikely to have been viewed as negating the effect of other misleading statements in prospectus). And in some of the cases cited by Realtors, there is no indication that either party objected to the introduction of expert testimony involving legal conclusions. *See e.g., Autoskill Inc. v. Nat'l Educ. Supp. Sys., 994 F.2d 1476, 1493 (10th Cir. 1993)*(noting that judge, at a bench trial, considered expert testimony regarding what aspects of a computer program were protectable under copyright law) [8]; *Whittaker Corp. v. Edgar, 535 F. Supp. 933, 943 (N.D. Ill. 1982)*(reflecting that experts testified regarding whether a transaction would be taxable; admissibility does not seem to have been litigated).

8 *See also Autoskill Inc., 994 F.2d at 1497 n.25* (noting that trial judge explained that he was not relying on purported expert's legal assertions and conclusions).

[*29] Relators' reliance on the text of *Federal Rule of Evidence 704* is also misplaced. Legal conclusions, of course, depending on the particular posture of a case, may be "ultimate issues." That said, the Court notes that *Federal Rule of Evidence 704*, which abolished the "ultimate issue" rule, does not function in isolation. *See Fed. R. Evid. 704* Advisory Committee Notes ("The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under *Rules 701* and *702*, opinions must be helpful to the trier of fact, and *Rule 403* provides for exclusion of evidence which wastes time.")

Moreover, Seventh Circuit precedent teaches that "that *Federal Rules of Evidence 702 and 704* prohibit experts from offering opinions about legal issues that will determine the outcome of a case." *Sinclair, 74 F.3d at 758 n.1* (emphasis added); *accord Good Shepherd 323 F.3d at 564*. Indeed, the plain text of *Federal Rule of Evidence 704* requires [*30] that an expert opinion, notwithstanding that it may reach an "ultimate issue," must be "otherwise admissible." *Fed. R. Evid. 704*. In this regard, an expert's opinion must, among other things, "assist the trier of fact to understand the evidence or to determine a fact in issue," within the meaning of *Federal Rule of Evidence 702*. *Fed. R. Evid. 702*. The Seventh Circuit instructs that "expert testimony is helpful to the jury if it concerns a matter beyond the understanding of the average person, assists the jury in understanding facts at issue, or puts the facts in context." *United States v. Welch, 368 F.3d 970, 974 (7th Cir. 2004)*(citing *Fed. R. Evid. 702*). Legal conclusions as to ultimate issues generally do not assist the trier of fact because they simply tell the trier of fact what result to reach. *See, e.g., United States v. Duncan, 42 F.3d 97, 101 (2d Cir. 1994)*("Generally, the use of expert testimony is not permitted if it will usurp either the role of the trial judge in instructing the jury as to the applicable [*31] law or the role of the jury in applying that law to the facts before it. When an expert undertakes to tell the jury what result to reach, this does not *aid* the jury in making a decision, but rather attempts to substitute the expert's

judgment for the jury.") (collecting numerous circuit court authorities; internal quotation marks omitted; emphasis in original); *Woods, 110 F.3d at 1220-21*; *Paradigm Sales, Inc. v. Weber Marking Sys., Inc., 880 F. Supp. 1247, 1255 (N.D. Ind. 1995)*("*Fed. R. Evid. 704(a)* provides that 'otherwise admissible' opinion testimony is not rendered inadmissible because it embraces an ultimate issue, but legal conclusions are not 'otherwise admissible' under Rule[] . . . 702 because they are not helpful to the trier of fact."). Relatedly, precedent teaches that proffered expert assertions about another's subjective intent or knowledge are not helpful to the jury, which is equally if not much better suited to make these assessments than the parties' competing paid experts. *See Isom v. Howmedica, Inc., 2002 U.S. Dist. LEXIS 9116, No. 00 C 5872, 2002 WL 1052030, *1 (N.D. Ill. May 22, 2002)*(barring proffered [*32] expert testimony concerning party's intent, and stating that "even though *Federal Rule of Evidence 704(a)* abrogates the common-law rule barring expert opinions on an 'ultimate issue,' we must nonetheless analyze whether an 'expert' opinion on this topic would assist the jury and if so, whether its probative value is outweighed by its danger for unfair prejudice"); *Dahlin v. Evangelical Child and Family Agency, 2002 U.S. Dist. LEXIS 24558, No. 01-1182, 2002 WL 31834881, at *3 (N.D. Ill. Dec. 18, 2002)*(same quote, and barring proffered expert testimony of clinical psychologist as to whether the defendant committed fraud); *accord, e.g., Woods, 110 F.3d at 1220-21*. As a result, *Federal Rules of Evidence 702* and *704*, along with *Federal Rule of Evidence 403* and the precedent interpreting and applying those rules, are consonant with the Court's ruling and do not counsel in favor of admission of the Relators' suspect testimony.

With the aforementioned principles in mind, the Court turns to the substance of the two proffered expert reports.

A. Nagorka's [*33] Report Is Stricken In Substantial Part

Nagorka's report is comprised almost entirely of impermissible legal conclusions. The gist of his opinion is succinctly stated in the "Overview and Opinions" section of the report. In that section, Nagorka states that "in my opinion . . . the ambulance provider agreements entered into by the Defendants Hospitals . . . constituted a kickback scheme in violation of the Anti-Kickback statute (*42 U.S.C. § 1320a-7b(b)*)"). (Nagorka Report at 1.) In support of this conclusion, Nagorka's report recites what he views as the applicable law and reaches the conclusion that the each of the Defendants has violated a federal criminal statute and various federal regulations. While this may be the proper subject of a brief, or perhaps a closing argument, it is not the proper subject of an expert opinion. *See, e.g., Good Shepherd, 323 F.3d at 564* ("The district court correctly ruled that expert testimony as to legal conclusions that will determine the outcome of the case is inadmissible.") (citing *United States v. Sinclair, 74 F.3d 753, 758 n.1 (7th Cir. 1996)*; *accord, e.g., Hygh v. Jacobs, 961 F.2d 359, 363 (2d Cir. 1992)* [*34] ("This circuit is in accord with other circuits in requiring exclusion of expert testimony that expresses a legal conclusion."). Such an assertion (and many similar ones, discussed further below) invades the province of this Court and the province of the jury and will not assist the jury as contemplated by *Federal Rule of Evidence 702*.

In the wake of the broad legal conclusion stated in the overview, Nagorka's report continues into an extended legal discussion of the Anti-Kickback statute. (Nagorka Report at 1-2.) The report continues into an even longer legal discussion of the purported inapplicability of any "safe harbor" provision--at least as Nagorka would define the "safe harbor" protections based on his extended assertions concerning the content, meaning and proper interpretation of, *inter alia,* federal statutory and regulatory provisions, the preamble to a federal regulation, and an Inspector General Advisory Opinion. (*Id.* at 2-14.) The report then proceeds to a review of various purported provider agreement between the Defendant hospitals and the Defendant ambulance companies. (*Id.* at 15-44.)

After carefully reviewing the Nagorka [*35] report, the Court exercises its discretion to exclude most of it. The aforementioned major sections are replete with numerous legal assertions. (*See, e.g.,* Nagorka Report at 2 ("*Section 1320a-7b(b)(1)* is the mirror image of *Section 1320a-7b(b)(2)*, thereby making the party giving the remuneration (the ambulance companies) in the same legal position as the party receiving the remuneration (the Defendant hospitals")); *id.* ("The discounts that the Defendant hospitals received . . . are illegal remunerations"); *id.* ("The ambulance service agreements . . . fail to meet the safe harbor requirements.") [9] *id.* at 14 ("The ambulance provider agreements entered into by Bethany Hospital and Consolidated Medical Transport violate the Anti-Kickback Statute (*42 U.S.C. § 1320a-7b(b)*).") [10] ; *id.* (opining that various discounts do not qualify under purported safe harbor parameters as delimited by Nagorka); *id.* at 16 ("The rates provided to Bethany Hospital . . . are illegal remunerations under the Anti-Kickback statute."). [11]) They also contain block quotations from purported applicable statutory and regulatory regimes (Nagorka Report at 1-2, 3, [*36] 4, 5, 6, 11-13), which invade the province of the Court in defining that relevant law, which are unhelpful to the jury, and which create an unacceptable risk on balance of jury confusion given their limited utility as offered in the form of expert testimony. *Accord Fed. R. Evid. 403*. [12] The report also con-

tains extended discussions and extrapolations of certain potentially relevant legal material, such as an Inspector General Advisory Opinion (Nagorka Report at 6-10). [13] These discussions are not helpful to the jury and invade the province of the Court in defining the relevant law. In this latter regard, the Nagorka report also often elides from its legal conclusions, interpretations, and assertions concerning the applicable legal rules to legal assertions about the ultimate issues in the case. *See, e.g.,* footnotes 9-11, *supra.* This sort of testimony is not helpful to the jury. *See, e.g., Good Shepherd, 323 F.3d at 564* (citing *Sinclair, 74 F.3d at 757 n.1*); *McCabe v. Crawford & Co., 272 F. Supp. 2d at 740*. It also is subject to exclusion under *Rule 403* because Nagorka's assertions about [*37] the ultimate legality of various challenged practices contain various implicit legal determinations that invade the province of the Court. *See, e.g., Torres v. County of Oakland, 758 F.2d 147, 150 (6th Cir. 1985)* ("The problem with testimony containing a legal conclusion is in conveying the witness' [sic] unexpressed, and perhaps erroneous, legal standards to the jury. This invades the province of the court to determine the applicable law and to instruct the jury as to that law.") (internal quotation and citations omitted); *McCabe v. Crawford & Co., 272 F. Supp. 2d 736, 740 (N.D. Ill. 2003)* (discussing court's gatekeeper obligations).

9 *See also, e.g.,* Nagorka Report at 15, 17, 18, 20, 21, 23, 24, 26, 27, 29, 30, 32, 33, 35, 36, 38, 38, 41, 42, 44 (all substantially identical).

10 *See also, e.g.,* Nagorka Report at 15, 16, 18, 20, 21, 23, 24, 26, 27, 28, 30, 31, 33, 34, 36, 37, 39, 40, 42 (all substantially identical).

11 *See also, e.g.,* Nagorka Report at 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43 (all similar).

[*38]

12 Given the lack of clarity in the Nagorka report and the report's repeated practice of intertwining improper assertions about governing law and improper assertions about whether such legal regimes were violated, the Court also excludes as unhelpful and as potentially confusing to the jury testimony about the nature of the provider agreements. *See, e.g.* Nagorka Report at 10 ("Even a cursory review of the ambulance provider agreements . . . demonstrate that the contracts were 'exclusive supplier agreements.'"). *Accord Torres v. County of Oakland, 758 F.2d 147, 150-51 (6th Cir. 1985)*; *McCabe v. Crawford & Co., 272 F. Supp. 2d 736, 740 (N.D. Ill. 2003)* ("Because expert testimony can be powerful and misleading, judges must act as gatekeepers and exclude expert testimony where the possible prejudice of the testimony outweighs its probative force.") (citations omitted). (Incidentally, if the matter is as obvious as Nagorka contends, a properly-instructed jury will not need Nagorka's assistance in this regard.) Nagorka's conclusions and assertions about the contracts present an unacceptable risk of presenting the jury with Nagorka's extensive (and often, at least in this section of the report, implicit) testimony concerning applicable legal rules of decision.

[*39]

13 *See, e.g.,* Nagorka Report at 6 ("The comments provided in the above-listed portions of the preamble to the "safe harbor" regulations (*42 C.F.R. § 1001.952*), demonstrate that the discounts provided to and received by the Defendant hospitals . . . do not comply with the requirements of the discount exception to the Anti-Kickback Statute.").

Nagorka's report is not excluded in its entirety. In limited portions of his report, Nagorka opines concerning market conditions in the ambulance services industry and whether, for example, the rates provided to the Defendant hospitals are commercially reasonable. *See, e.g.,* Nagorka Report at 15 ("The rates provided to Bethany Hospital by CoMed are not commercially reasonable in the absence of CoMed receiving Bethany Hospital's referrals of Medicare Part B transports and Medicaid transports."); *id.* ("A BLS round trip transport for $ 68.25 plus mileage at $ 2.95 is below CoMed's actual cost for such transport."); *id.* at 17 ("P 4.2(b) establishes that the rates being charged to Holy Cross Hospital were below the [*40] 'retail rates.'"); *id.* at 43 (discussing testimony concerning invoices and admissions concerning payments to St. James Hospital). Mr. Nagorka can testify to such matters without invading the province of the Court, invading the province of the jury, creating an imprudent risk of jury confusion and waste of time, and without violating the extensive precedent developed in this area. Mr. Nagorka will be able to testify in such a limited capacity at trial--subject to any further *Daubert* challenges or other evidentiary or substantive rulings that may affect the scope of the trial or his role in it.

B. Sparks's Report Is Stricken In Part

Relators contend that "Sparks'[s] proposed testimony would be helpful to the jury because the Medicare system is clearly beyond the common knowledge of the jury." (D.E. 182 at 10.) Defendants acknowledge that Sparks's report does provide background information "as to the Medicare System and provider reimbursement and hospital cost reports" (D.E. 180 at 6) as well as Medicaid (D.E. 183 at 4). After reviewing Sparks's report, the Court makes the preliminary conclusion that such testi-

mony may be helpful to the trier of fact, and the Court declines [*41] to admit or exclude such testimony in its entirety as this time. If Defendants have specific objections to this type of testimony, they may move to exclude it at trial. [14]

> 14 Any objections based on a lack of foundation for Sparks's opinions are more properly addressed at trial. The Court declines to exclude or admit any opinion that may be subject to a foundation objection at this time. Similarly, the Court did not consider Defendants' arguments regarding Sparks's damage calculations, as these arguments were raised for the first time in Defendants' reply brief. In addition, this opinion is certainly not a blanket ruling that all of Sparks's putative testimony is admissible under *Fed. R. Evid. 403*. Such objections can be addressed at trial or in the period immediately preceding it.

In this regard, for example, the Sparks report begins with an extended overview of the Medicare System and its operation. Although this section of the report relates, at least tangentially, to some [*42] statutory and legal rules, that is not the essence of the testimony, which presents an overview about the general programs that have been created within Medicare and the payment mechanisms that exist within them. (*See, e.g.,* Sparks Report at 1-2). Sparks's report also discusses various forms, certifications, and documentation required by the Medicare oversight systems. (*See id.* at 6-7).

The Court does, however, strike portions of Sparks's report that are improper under the principles outlined above and holds that she may not testify to these matters at trial. Specifically, the Court strikes portions of her report that opine as to the Defendants' states of mind. She may not testify as to any of the Defendants' respective states of mind at a trial in this matter. [15] There is no indication (her certification as a fraud examiner notwithstanding) that she is any more qualified than the average juror to make such a determination. *See, e.g., Woods, 110 F.3d at 1221*; *Steadfast Ins. Co. v. Auto Marketing Network, Inc., 2004 U.S. Dist. LEXIS 6938, No. 97-5696, 2004 WL 783356, at *6 (N.D. Ill. Jan. 26, 2004)*; *Dahlin, 2002 U.S. Dist. LEXIS 24558, 2002 WL 31834881, at *3*. The Court similarly [*43] strikes her report to the extent that it opines that the Defendants committed fraud within the meaning of the operative statutes and holds that she may not testify as to whether any of the Defendants intended to and did commit fraud at a trial in this matter. *See Dahlin, 2002 U.S. Dist. LEXIS 24558, 2002 WL 31834881, at *3*. [16]

> 15 *See, e.g.,* Sparks Report at 8 ("In knowing violation of the Anti-Kickback Statute, Defendants COMED, Tower and Daley's **knowingly and willfully offered illegal remunerations** to the Defendant Hospitals . . . ."") (emphasis in original); *id.* at 9 ("Violation of the *State of Illinois Whistleblower Reward and Protection Act*: Defendants . . . knowingly concealed from Medicaid the improper kickback schemes that they had with the Defendant Hospitals knowing that any disclosure of said schemes would result in denial of all of the claims . . . ."); *id.* at 10 (stating that Defendants "knowingly concealed from Medicaid the improper kickback schemes"); *id.* at 17 ("The Defendant Hospitals knew that their arrangements with the Defendant Ambulance Companies were kickback schemes . . . ."); *id.* at 19 ("Defendant Hospital Officers knowingly and willingly participated in Medicare Fraud . . . because of the existence of the kickback scheme which the Defendant Hospitals knowingly entered into with the Defendant ambulance companies."); *id.* at 21 ("The Defendant Hospitals and Defendant Ambulance Companies knowingly entered into a kickback scheme . . . ."); *id.* ("The Defendant hospitals knowingly filed Cost Reports with Medicare containing false certifications and statements."); *see also id.* at 6 ("Defendant Hospitals received discounts on Part A ambulance transports in return for Part B referrals to COMED Transport, Inc.") (emphases omitted). Sparks also cannot testify as to the state of mind of regulators. *See, e.g.,* Sparks Report at 19-20 (opining, without apparent foundation, about the beliefs of the CMS).

[*44]

> 16 Nagorka's report contains improper assertions of the same general variety. *See, e.g.,* Nagorka Report at 2 ("Clearly, the remunerations . . . were offered and received to induce or in return for the exclusive agreement for the referral of business reimbursed under Medicare and Medicaid.").

C. The Experts Will Be Expected to Testify Within The Confines of The Permissible Testimony in Their Reports.

Defendants ask the Court to exclude not only Nagorka's and Sparks's expert reports, but also their testimony. The Relators argue that, even if the Court excludes portions of Nagorka's and Sparks's expert reports, the Court should not preclude them from testifying at all. The Relators suggest that Nagorka could testify as to the ambulance services industry and that Sparks could testify as to the Medicare system generally. Defendants respond that the experts' reports do not contain such testimony and that the Relators should not be allowed to rewrite the reports at this juncture. Given that the Court has not

completely excluded the testimony of either putative expert, the Court need not address [*45] whether either should be entirely barred from testifying. However, the Court will not permit either individual to testify as to subjects that are not fairly encompassed within or relate to the portions of their reports that are appropriate under the law. As a result, neither expert (nor any expert that the Defendants may ultimately offer) will be able to opine about subjects that are not encompassed within properly disclosed expert reports.

In support of their position, the Relators rely on *McCabe v. Crawford & Co., 272 F. Supp. 2d 736, 740-41 (N.D. Ill. 2003)*, for the proposition that "it would be improper to exclude the testimony of an expert witness because his or her expert report contains legal conclusions." (D.E. 182 at 4.) *McCabe* does not, however, help the Relators here. In *McCabe,* the court found, like the Court in the instant case, that a purported expert had offered improper legal conclusions in his expert report and subsequently granted a motion to exclude that report. *McCabe, 272 F. Supp. 2d at 740-41*. The court then held that the expert was not barred from testifying at trial because the expert "may offer something of value [*46] in regards to industry standards and practice." *Id.* Before the party could offer that expert at trial, however, the court held that the party would have to submit another expert report that complied with *Federal Rule of Civil Procedure 26(a)(2)*. [17] *Id. at 741*. Thus, *McCabe* cannot be read to have allowed an expert to testify outside the confines of his report. Rather, the court in *McCabe* simply extended expert discovery to allow the expert to submit a report disclosing the opinions, if any, to which he would ultimately testify.

17 *Rule 26(a)(2)* requires a party to disclose, via written report, "a complete statement of all opinions to be expressed [by the purported expert] and the basis and reasons therefore." *Fed. R. Civ. P. 26(a)(2)(B)*.

Here, by contrast, the Relators at least suggest that they should be able to circumvent the entire expert discovery regime set up by *Rule 26* by attempting to recast [*47] the content of Nagorka's and Sparks's reports in order to allow them to testify to opinions not timely disclosed. The Court will not allow such maneuvering and will, instead, hold Nagorka and Sparks to any disclosed opinions that have not been excluded by this Order. *See generally Salgado v. Gen. Motors Corp., 150 F.3d 735, 742 n.6 (7th Cir. 1998)* ("If the expert's report contains only incomplete opinions, the court may choose to restrict the expert's testimony to those opinions alone."). The Court notes that the Relators have not asked the Court to extend discovery in order to submit an additional report by either witness, [18] and given that they have been given a full and fair opportunity to submit expert reports in the course of extensive discovery, the Court would refuse any such request. Thus, to the extent that the Relators have tendered a valid report by Nagorka or Sparks, and only to that extent, the Relators' experts will be allowed to testify to the opinions contained in or that reasonably grow out of those limited portions of the report.

18 The Court notes that such additional reports would almost certainly not constitute supplementation of previously disclosed opinions as the Relators have not indicated that anything contained in the initial expert reports was "incomplete or incorrect." *See Fed. R. Civ. P. 26(e)(1)*.

[*48] CONCLUSION

For the foregoing reasons, Defendants' motion is granted in part and denied in part.

So ordered.

Mark Filip

United States District Judge

Northern District of Illinois

Dated: May 26, 2005

TAB 20

United States District Court, N.D. Illinois, Eastern Division.

LaSALLE NATIONAL BANK, et al., Plaintiffs,
v.
MASSACHUSETTS BAY INSURANCE COMPANY, et al., Defendants.

No. 90 C 2005.

Jan. 17, 1997.

MEMORANDUM OPINION AND ORDER

ANN CLAIRE WILLIAMS, District Judge.

***1** Prior to November 16, 1988, Plaintiffs Stanley and Ingrid Berg lived in a house at 117 Shore Acres Drive in Lake Bluff, Illinois. Plaintiff LaSalle National Bank held legal title to the Bergs' house. Defendants Massachusetts Bay Insurance Company, Hanover Insurance Company, State Mutual Life Assurance Company of America, and SMA Financial Corporation insured the Bergs' house. On November 16, 1988 fire destroyed the Bergs' house. Since that time, defendants have refused to pay plaintiffs for damages incurred as a result of the fire, claiming that Plaintiff Stanley Berg caused the fire to be set and misrepresented his losses. The parties have asked the court to rule on a series of motions in limine.

Plaintiffs' Motions in Limine

1. Plaintiffs move to bar defendants' expert, Robert Schwarz, from offering his opinion about several subjects having to do with the cause of the fire that destroyed the Bergs' house. Plaintiffs' only argument in support of this motion is that "Robert Schwarz has testified at his deposition as not having any specialized education with respect to electricity or chemistry."In their response to this motion, defendants point out that Schwarz has extensive experience as a cause and origin investigator, having investigated hundreds of fires. The court agrees with defendants that Schwarz may testify, consistent with his deposition, that the fire in this case was intentionally set at multiple points. Clearly, Schwarz may explain, support, and elaborate on this conclusion, which is central to defendants' principal affirmative defense. Of course, plaintiffs may cross-examine Schwarz about his qualifications and testimony. *Plaintiffs' first motion in limine is denied.*

2. Plaintiffs move to bar Illinois Fire Marshals Harry Schaefer and Terry Pitkus from offering their opinions about several subjects having to do with the cause of the fire. Plaintiffs' only argument in support of this motion is that "Harry Schaefer and Terry Pitkus have testified at their depositions they have no special [sic] training in electricity or chemistry."In their response to this motion, defendants point out that Schaefer is a certified arson investigator and Pitkus is an experienced cause and origin investigator. The court agrees with defendants that Schaefer and Pitkus may testify, consistent with their depositions, that the fire in this case was intentionally set. Clearly, they may explain, support, and elaborate on this conclusion, which is central to defendants' principal affirmative defense. Of course, plaintiffs are entitled to cross-examine them about their qualifications and any other aspect of their testimony. *Plaintiffs' second motion in limine is denied.*

3. Plaintiffs move to bar defendants' expert, Erik Anderson, from offering his opinion about whether electricity or a lightening strike caused the fire, how the fire was caused, and how it spread. Plaintiffs' only argument in support of this motion is that Anderson "did not examine all glow connections, wiring, appliances, lightening grounds or lightening rods at the fire site."As an electrical engineer who inspected the dwelling after the fire, Anderson may testify about the role of electricity or a lightening strike in causing the fire, and he may elaborate on this testimony in any appropriate manner. Of course, plaintiffs may cross-examine Anderson about his qualifications, the adequacy of the inspection he conducted, or any other aspect of his testimony. *Plaintiffs' third motion in limine is denied.*

***2** 4. Plaintiffs move to bar any testimony about injuries suffered by fire-fighters, "as it would tend to be highly prejudicial and without probative value."In response to this motion, defendants argue that such testimony would indicate the intensity of the fire, and it would rebut any argument by plaintiff that the fire was fought improperly or that fire-fighters were not

injured. Defendant's "intensity of the fire" argument is unpersuasive. Fire-fighters or other officials at the scene can testify about the intensity of the fire without distracting the jury with potentially emotional evidence about injuries to fire-fighters. For this reason, pursuant to Rule 403 of the Federal Rules of Evidence, the court excludes any evidence of injuries to fire-fighters. *Plaintiffs' fourth motion in limine is granted.*

There is a caveat however: If plaintiffs "open the door" by suggesting that the fire was fought improperly, or that fire-fighters were not injured, the court will likely permit defendants to rebut any such suggestion with evidence of injuries to fire-fighters.

5. Plaintiffs move to bar any of defendants' witnesses from indicating whether they believe Stanley Berg or Ingrid Berg caused the fire. In response to this motion, defendants state that they do not plan to elicit such testimony. Therefore, *plaintiffs' fifth motion in limine is granted.*

Of course, defendants may present evidence indicating that the fire was intentionally set; defendants may present evidence of the Bergs' financial condition (see below); and defendants may *argue* that circumstantial evidence suggests that Stanley Berg set the fire. Such evidence and argument is highly relevant to the affirmative defense of arson.

6. Plaintiffs move to bar as irrelevant all testimony regarding the financial condition of Stanley Berg or Ingrid Berg or companies associated with them after December 31, 1989 -- with the exception of testimony about their business loans. Defendants do not oppose this motion, but see no reason to make an exception for plaintiffs' business loans. The court agrees. Plaintiffs' sixth motion in limine is granted insofar as it excludes all testimony regarding the financial condition of plaintiffs and companies associated with them after December 31, 1989, but denied insofar as it seeks to carve out an exception regarding plaintiffs' business loans. *Plaintiffs' sixth motion in limine is granted in part and denied in part.*

7. In their seventh motion in limine, plaintiffs move to bar testimony about litigation involving the Bergs or businesses associated with them. In their response to defendants' ninth motion in limine, however, defendants indicate that they intend to refer to the case captioned *Berg Products Design, Inc. v. Leech Bridges, and Hanover Insurance Company,* No. 89L-1019.Until such time as plaintiffs clarify their position on this matter, *plaintiffs' seventh motion in limine is denied.*

This ruling does not in any way limit or affect the court's ruling on plaintiffs' twentieth motion in limine, which bars any reference to any criminal investigation or indictment.

***3** 8. Plaintiffs move to bar testimony by any expert not disclosed prior to the filing of plaintiff's final pretrial order. Defendants state that they will not present such testimony. Therefore, *plaintiffs' eighth motion in limine is granted.*

9. Plaintiffs move to bar introduction into evidence of any exhibit not tendered prior to the filing of plaintiffs' final pretrial order. Defendants state that they will not introduce such evidence. Therefore, *plaintiffs' ninth motion in limine is granted.*

10. Plaintiffs move to bar defendants' witnesses from referring to any literature, photograph, recording, etc. that has not appeared during the course of discovery or been included in the final pretrial order. Defendants state that they will not refer to such items. Therefore, *plaintiffs' tenth motion in limine is granted.*

11. Plaintiffs move to bar any testimony about the state of mind of Stanley Berg or Ingrid Berg. Defendants state that they do not intend to offer such testimony. Therefore, *plaintiffs' eleventh motion in limine is granted.*

However, defendants may offer testimony regarding observations by witnesses concerning Stanley Berg's physical condition, including nervousness and anxiety, unless plaintiffs can offer a compelling argument as to why such testimony should not be permitted.

12. Plaintiffs move to bar any testimony about what personal property remained at the fire site after the fire, stating that:

Defendant removed dozens of truck loads of debris within days after the fire without first advising Plaintiff so Plaintiff could view same. Defendant's acts

were highly prejudicial to Plaintiff, particularly as a result of Defendant later relying in part upon the absence of certain personal property from the fire sight [sic].

In response to this motion, defendants present a copy of a consent, signed by Stanley Berg, stating that defendants and their agents "may enter upon, inspect and search the ... premises, or any property appurtenant thereto, and may remove, test, examine, and retain custody of materials in or on said property as evidence."

In light of the consent signed by Stanley Berg, the court sees no reason to bar defendant's witnesses from testifying about their observations regarding what personal property remained at the fire site after the fire. This testimony is clearly relevant to the affirmative defense of misrepresentation. Of course, plaintiffs may bring such testimony into question through cross-examination, and they may rebut such testimony with testimony by their own witnesses. *Plaintiff's twelfth motion in limine is denied.*

13. Plaintiffs move to bar any testimony by defendants' witnesses indicating that Stanley Berg or Ingrid Berg were financially motivated to burn down their house. Plaintiffs' entire argument in support of this motion is that such testimony would be "conclusionary and speculative, having no probative value."Contrary to plaintiffs' argument, however, such testimony does have probative value in that it supports defendants' principal affirmative defense that Stanley Berg caused his own house to burn. As the Illinois courts have held, "evidence of motive is admissible when the affirmative defense of arson is raised. The evidence of [plaintiff's] financial difficulties tends to show his motive to commit arson." *C. L. Maddox, Inc. v. Royal Insurance Company of America,* 567 N.E.2d 749, 755 (Ill. App. Ct. 5th Dist. 1991). Since evidence of the Bergs' financial condition has probative value, and plaintiffs fail to support their assertion that such evidence would be "conclusionary and speculative," the court declines to exclude such evidence. *Plaintiffs' thirteenth motion in limine is denied.*

***4** 14. Plaintiffs move to call Fire Marshals Harry Schaefer and Terry Pitkus as adverse witnesses, "based on their deposition opinion(s) that the subject fire was arson, which is totally adverse to Plaintiff's position."Under Rule 611(c) of the Federal Rules of Evidence, a party may ask a witness leading questions of "a hostile witness, an adverse party, or a witness identified with an adverse party."In this case, the fire marshals are not parties to the lawsuit, so they cannot possibly be "adverse parties." They have no apparent relationship or connection to the defendant insurance companies (apart from their testimony in this lawsuit), so they are not "identified with an adverse party" in the normal sense of being an employee, agent, friend, or relative of an adverse party. The only indication that the fire marshals are "hostile witnesses" is that they have stated opinions on an important issue that contradict the opinions of plaintiffs. However, expressing a contrary view does not in an of itself make a witness "hostile" under Rule 611(c). If it did, nearly every witness in every lawsuit could be treated as "hostile." *See Suarez Matos v. Ashford Presbyterian Community Hospital, Inc.,* 4 F.3d 47 (1st Cir. 1993) (rejecting notion "that simply because a party expects favorable testimony from a witness, the opponent is entitled to call him, or her, as hostile"). Absent more specific evidence that the fire marshals are identified with the defendants or hostile to the plaintiffs, the court will not let plaintiffs address the fire marshals with leading questions. *Plaintiffs' fourteenth motion in limine is denied.*

15. Plaintiffs move to bar all non-party witnesses from the courtroom during the trial and limit defendants to a single representative in court. Defendants agree that all non-party witnesses for both sides should be barred from the courtroom during the course of trial. Therefore, that portion of plaintiffs motion in limine is granted.

Defendants also agree to limit themselves to a single representative at counsel table at any given time during the course of the trial. However, defendants decline to exclude additional representatives from the portion of the courtroom where observers normally sit, and the court can think of no reason why they should do so. Therefore, defendants' motion is granted insofar as it limits defendants to a single representative at counsel table but denied insofar as it relates to the audience portion of the courtroom.

Plaintiffs' fifteenth motion in limine is granted in part and denied in part.

16. Plaintiffs move to have present at trial the bus bar

and housing and any other exhibit moved from the fire site required by plaintiff and possessed or controlled by defendants. Defendants agree to "make available to Plaintiffs the bus bar and housing and any other exhibit" they control (but refuse to transport such items to court). Therefore, *plaintiffs sixteenth motion in limine is granted.*

***5** 17. Plaintiffs move to bar defendants' witnesses from suggesting that the proof of loss submitted by Stanley Berg and Ingrid Berg contained any misrepresentations, citing *State Farm Ins. v. Gray,* 570 N.E.2d 476 (Ill. App. Ct. 1st Dist. 1991). That case held that an insurer could not raise the defense of timely notice because it had sent the insured a letter stating that it had completed its investigation and would afford coverage. In this case, by contrast, the defendant insurers never indicated that their investigation was complete, never indicated that they would afford coverage to Stanley Berg, and only indicated that they would afford partial coverage to Ingrid Berg. Therefore, *Gray* has no relevance to the facts of this case. In this case, the proof of loss submitted by Stanley Berg is relevant to defendants' affirmative defenses of arson and misrepresentation. *Plaintiffs' seventeenth motion in limine is denied.*

18. Plaintiffs move to bar any defense witness from wearing any official uniform or medal, stating that "undo prejudice may occur without any probative value being obtained."In this regard, the court accepts defendants representation that none of their witnesses intend to wear such items -- with the possible exception of the Illinois fire marshals, over whom defendants have no control. If the fire marshals decide to wear official uniforms or medals, the court finds that such uniforms or medals will not in any prejudice the jury, since the jury will know their official qualifications in any event. Therefore, *plaintiffs' eighteenth motion in limine is denied.*

19. Plaintiffs move to bar all evidence regarding lie detector tests. Defendants have not filed a response to this motion and apparently do not object to it. In any event, the court does not see how such evidence would be probative in this case. *Therefore, plaintiffs' nineteenth motion in limine is granted.*

20. Plaintiffs move to bar any testimony regarding any criminal investigation or indictment related to Stanley Berg or Ingrid Berg, arguing that "such testimony would be highly prejudicial and has no probative value."Defendants agree that such testimony should be barred. However, defendants state that they may wish to elicit testimony from law enforcement officials who investigated the fire "without making any direct statements that STANLEY BERG was the target of [their] investigation."According to defendants, such testimony "would do no more than imply to the trier of fact that law enforcement officials were investigating the fire and would not necessarily suggest that STANLEY BERG was a target of said investigation."The court appreciates defendants candor with respect to this serious issue. After reflecting on defendants' concerns, the court orders defendants to avoid not only references to criminal investigations or indictments of Stanley Berg, but also references to criminal investigations or proceedings of any kind whatsoever. Thus, *Plaintiffs' twentieth motion in limine is granted.*

***6** However, if defendants wish to ask any questions or elicit any answers that may run afoul of this ruling, they may file a motion to reconsider. Such a motion should state the specific questions and specific anticipated responses at issue, and it should explain why the court should admit such evidence despite its potentially prejudicial effect.

Defendants' Motions in Limine

Although several of defendants' motions in limine have been withdrawn or ruled on, the following motions remain:

4. Defendants move the court to bar plaintiffs' witnesses from referring to ant texts, photographs, videotapes, etc. not referred to in their depositions or otherwise produced as part of discovery. Like plaintiffs' tenth motion in limine, *defendants' fourth motion in limine is granted.*

5. Defendants move the court to bar plaintiffs from presenting any undisclosed expert witness or opinion. Like plaintiffs' eighth motion in limine, *defendants' fifth motion in limine is granted.*

6. Defendants move the court to bar plaintiffs from introducing any exhibit not previously tendered to defendants. Like plaintiffs' ninth motion in limine, *defendants' sixth motion in limine is granted.*

7. Defendants move the court to bar plaintiffs from referring to the Illinois Insurance Code, 215 ILCS 5/155. This provision allows an insurance policyholder to collect attorney's fees from an insurance company if it appears to the court that the insurance company caused a "vexatious and unreasonable" delay in settling a claim. Defendants argue, and plaintiffs agree, that this issue is a question of law for the court to decide. Therefore, *defendants' seventh motion in limine is granted.*

Although plaintiffs have agreed not to refer to the Illinois Insurance Code, they nonetheless wish to "characteriz[e] certain of Defendant's acts as vexatious or unreasonable."Defendants reply that "[t]he only issues in this case are whether STANLEY BERG was responsible for the fire and whether STANLEY BERG made material misrepresentations."The court rules that plaintiffs may not refer to defendants' acts as vexatious or unreasonable, because defendants' vexatiousness or unreasonableness have no apparent bearing on any issue that the jury must decide in this case.

9. Defendants move the court to bar plaintiffs from referring to other litigation in which any of the defendant insurance companies is a named defendant. Plaintiffs respond that they are entitled to refer to the case captioned *Berg Products Design, Inc. v. Leech Bridges, and Hanover Insurance Company,* No. 89L-1019.Defendants reply that they do not object to references to the *Berg Products Design* case, but do object to references to any other cases. Therefore, the court denies defendants' motion insofar as it involves the *Berg Products Design* case but grants defendants' motion insofar as it involves any other case in which any of defendant insurance companies is a named defendant. *Defendants ninth motion in limine is granted in part and denied in part.*

***7** 10. Defendants move the court to bar testimony or evidence indicating that plaintiffs paid premiums for the relevant insurance policy. In what is essentially a breach of contract case, however, plaintiffs are entitled to show that they abided by the terms of the contract (*e.g.,* by paying premiums), just as defendants are entitled to show that plaintiffs did not abide by the contract (*e.g.,* by arson and misrepresentation). The fact that plaintiffs paid premiums is not utterly critical to their case, but neither is it particularly prejudicial to defendants or time-consuming to the court. Absent any caselaw to the contrary, the court will allow plaintiffs to show that they paid premiums. *Defendants tenth motion in limine is denied.*

11. Defendants move the court to bar all non-party witnesses who are not testifying from the courtroom during the trial of this case. For the same reason that plaintiffs' fifteenth motion in limine was granted in part, *defendants' eleventh motion in limine is granted.*

Conclusion

The court grants plaintiffs' motions in limine nos. 4, 5, 8, 9, 10, 11, 16, 19, and 20, and defendants' motions in limine nos. 4, 5, 6, 7, and 11.The court denies plaintiffs' motions in limine nos. 1, 2, 3, 7, 12, 13, 14, 17, and 18, and defendants' motion in limine no. 10. The court grants in part and denies in part plaintiffs' motions in limine nos. 6 and 15, and defendants' motion in limine no. 9.

The court recently received plaintiffs' motions in limine nos. 21, 22, 23, and 24.If defendants wish to respond to these motions, they must file their responses on or before January 17, 1997. The court will rule on all outstanding motions by January 27, 1997. Trial is set for February 3, 1997, at 10:00 a.m.

N.D.Ill.,1997.
LaSalle Nat. Bank v. Massachusetts Bay Ins. Co.
Not Reported in F.Supp., 1997 WL 24677 (N.D.Ill.)

END OF DOCUMENT

TAB 21

United States District Court, N.D. Illinois, Eastern Division.

Shari LIEBERMAN, Ph.D, Plaintiff,
v.
The AMERICAN DIETETIC ASSOCIATION, Defendant.

No. 94 C 5353.

Aug. 23, 1996.

MEMORANDUM OPINION AND ORDER

BUCKLO, District Judge.

***1** The plaintiff, Shari Lieberman, Ph.D., wrote columns providing advice on nutrition and disease which were published in 1989. A member of the defendant, The American Dietetic Association ("ADA"), filed a complaint with the ADA asserting that *inter alia* Dr. Lieberman's columns were not scientifically grounded. Following proceedings before the ADA Ethics and Appeals Committees, the ADA published the following statement in February, 1994:

Shari Lieberman, MS, has had the RD credential suspended for a period of three years effective January 7, 1994 for violating Principle 7 of the Code of Ethics for the Profession of Dietetics, which states: The dietetic practitioner practices dietetics based on scientific principles and current information.

("Statement") Dr. Lieberman subsequently filed the present lawsuit claiming that the ADA defamed her by publishing the Statement. This opinion addresses the ADA's motion to exclude or, in the alternative, limit the expert testimony which Dr. Lieberman plans to offer. For the reasons discussed below, the motion is denied.

1.

In its motion, the ADA argues that the testimony of Dr. Lieberman's eight expert witnesses is not relevant to proving either that the Statement is false or that the ADA acted with malice in publishing it. In response, Dr. Lieberman asserts that she intends to offer the testimony of her expert witnesses to show only that the ADA published the Statement with malice and not that it is in fact false. Dr. Lieberman aims to demonstrate malice in part by providing expert testimony that each of her statements which the Ethics and Appeals Committees found were not based on scientific evidence actually were grounded in such evidence.

To show constitutional (or "actual") malice, Dr. Lieberman must demonstrate that the ADA knew that the Statement was false or recklessly disregarded whether it was false or not. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1990). Mere negligence cannot establish actual malice. *Id.* Rather, Dr. Lieberman is required to prove that the ADA "entertained serious doubts as to the truth of [its] publication" or had "a high degree of awareness of ... probable falsity." *Id.* Common law malice is different from constitutional malice. One Illinois court has defined it common law malice as

the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstance that law will imply an evil intent.

Management Association of Illinois v. Board of Regents of Northern Illinois University, 248 Ill.App.3d 599, 618 N.E.2d 694, 705, 188 Ill.Dec. 124 (1st Dist.1993).

The ADA argues that I should bar Dr. Lieberman from presenting the testimony of her eight experts in relation to the issues of actual and common law malice. The ADA asserts that during the Ethics and Appeals Committee proceedings, Dr. Lieberman and her counsel contended that it was improper for the committees to look outside the record submitted to them to determine whether Dr. Lieberman based her advice on scientific principles and current information.[FN1] Because Dr. Lieberman's experts used information that was not in the record before the Ethics and Appeals Committees, the ADA maintains that the experts' testimony is not relevant. I do not agree.

FN1. Dr. Lieberman contests the ADA's contention in this regard. She says she only asked that she be told what information they

were relying on and to have an opportunity to rebut any information not in the record.

***2** The ADA has cited no authority in support of its position, and I am aware of none. The issue in this case is not whether the Ethics and Appeals Committees' decisions were fair. The issue is whether the Statement libeled Dr. Lieberman. Because I am not reviewing the proceedings that took place before the Ethics and Appeals Committees, Dr. Lieberman is not confined to the material before those committees. Moreover, the fact that the ADA may have complied with Dr. Lieberman's wish that it not refer to information outside of the record during the committee hearings neither justifies malicious conduct on its part nor indicates that the ADA did not act maliciously in its publication. Accordingly, I will not bar Dr. Lieberman from presenting expert testimony addressing whether her columns had a scientific basis on the grounds that her experts rely on data not before the Ethics and Appeals Committees.

2.

Dr. Lieberman is required to prove that the ADA acted with actual malice at the time it published the Statement. *See* *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984) (finding that individual who published inaccurate statement and did not realize inaccuracy at the time of publication was not proven malicious); *Sharon v. Time, Inc.*, 599 F.Supp. 538, 564 (S.D.N.Y.1984) (stating that "actual malice rests on the defendant's state of mind at the time of publication"). The ADA argues that the plaintiff's experts' opinions do not show that the ADA was malicious when it published the Statement in February, 1994, because the experts reference articles that were published after that date.[FN2]

FN2. The ADA argues, in addition, that some of the articles that the plaintiff's experts reference post-date the Ethics and Appeals Committees' hearings in 1990 and 1992 respectively. For the reasons stated above, since Dr. Lieberman claims that the ADA defamed her by publishing the Statement and not by publishing the decisions of the Ethics and Appeals Committees, the dates of those decisions are irrelevant.

Dr. Lieberman's experts testified in their depositions that they held their respective opinions prior to 1994 and as early as May, 1990 (the date of the Ethics Committee hearing) and September, 1992 (the date of the Appeals Committee hearing). Enig Dep., p. 133; Kandaswami Dep., pp. 148-49; Preuss Dep., p. 106; Lin Dep., pp. 109-10; Glade Dep., p. 152; Simone Dep., p. 72.[FN3] At any rate, the mere fact that an article was published after 1994 does not in itself establish that the article is based on scientific principles that came to light after 1994. At least two of the plaintiff's experts testified in their depositions that the research underpinning articles on which they relied was completed prior to the articles' publication dates. Enig Dep., p. 130; Kandaswami Dep., pp. 90-91. The ADA does not refer me to any specific scientific principle discovered after February, 1994 on which the plaintiff's experts rely.[FN4] Accordingly, the fact that Dr. Lieberman's experts cite to articles published after February, 1994 does not render the experts' opinions inadmissible.

FN3. Two of Dr. Lieberman's experts did not clearly testify that they held the opinions that they provide in their expert reports prior to February, 1994. Dr. Bland testified in his deposition that his report would have been "substantially the same" in 1992. Bland Dep., p. 97. Only one of the articles that he references in his expert report, however, was published in 1994. This article references 253 sources published between 1920 and 1993 and three sources published in 1994. The rest of the articles to which Dr. Bland cites were published in 1993 or earlier. Dr. Ayoub testified in her deposition that she began recommending Pau D'Arco to treat yeast infections in 1992. Ayoub Dep., p. 50. Only one of Dr. Ayoub's references-a summary of an article-apparently post-dates February, 1994.

FN4. In its reply brief, p. 7, the ADA cites three exhibits attached to Dr. Enig's expert report as support for its assertion that the plaintiff's experts rely on articles "consist[ing] of original research and scientific studies that were not published until after the relevant time frame." One of the exhibits is not an article but Dr. Enig's letter to the editor of Nutrition Today correcting an article that the periodical published in 1993.

The January/February 1994 edition of Nutrition Today published the letter. The European Journal of Clinical Investigation published the second exhibit in 1994, which reports the results of a study. The Journal, however, received the article in April, 1993 and accepted it in October, 1993. The article references forty-seven sources published before 1994 and one source that was in press. The third exhibit, while it also reports the results of a study, cites seventeen articles published in 1992 or earlier. Accordingly, the publication dates of these articles alone does not demonstrate that scientific principles uncovered after 1994 support the articles.

3.

The ADA argues that Dr. Lieberman should not be permitted to offer expert testimony on whether scientific support exists for all of her statements raised in the complaint submitted to the ADA or in the Ethics Committee's decision. The ADA contends that such testimony is not relevant because it was the Appeals Committee's decision that served as grounds for the Statement. Thus, the ADA maintains that only expert testimony addressing the Appeals Committee's conclusions on Dr. Lieberman's advice is relevant. I agree with Dr. Lieberman, however, that since it was the ADA that published the Statement, all of the ADA's actions with respect to her theoretically could be evidence of malice on the part of the ADA. I do not have sufficient information at this point to determine whether allegations made by the ADA or sustained by the Ethics Committee but not the Appeals Committee evidence malice on the part of the ADA.[FN5]

FN5. Before trial I will require plaintiff to submit an offer of proof as to any such evidence. The decision would seem to turn on how well established a particular principle was (thus did the complaint or initial decision appear to be without any basis) and who the persons were who were involved. If there is an overlap between the persons publishing the Statement and those making allegations or decisions that are unsupportable, that can be evidence of malice on the part of the ADA.

4.

***3** Finally, the ADA contends that if I do not exclude Dr. Lieberman's eight experts from testifying, I should limit the amount of expert testimony on the basis that their testimony is cumulative. Each expert provides testimony related to different areas of nutrition science. The ADA apparently agrees with this point. *See* Def.'s Opening Brf., p. 12. The expert testimony, therefore, is not cumulative.

N.D.Ill.,1996.
Lieberman v. American Dietetic Ass'n
Not Reported in F.Supp., 1996 WL 490779 (N.D.Ill.)

END OF DOCUMENT

TAB 22

United States District Court, N.D. Illinois, Eastern Division.

Joshua MARTINKOVIC, a minor, by his mother and natural guardian, Deborah Martinkovic; Deborah Martinkovic, individually; and Valentine Martinkovic, Plaintiffs,

v.

Dr. Ishiaque BANGASH and Wyeth Laboratories, Inc., Defendants.

No. 84 C 9568.

Dec. 18, 1987.

MEMORANDUM ORDER

PRENTICE H. MARSHALL, District Judge.

***1** There are a number of pretrial evidentiary motions in limine pending in this product liability case. The circumstances giving rise to plaintiffs' claims are adequately set forth in our memorandum order of August 13, 1987 denying defendant's motion for summary judgment and need not be repeated here.

1. Defendant's motion to exclude all evidence dated subsequent to the minor plaintiff's last DTP immunization on November 5, 1982 is denied. Defendant denies that its DTP vaccine was the cause of Joshua Martinkovic's disability. When causation is an issue subsequent similar happenings may be offered by plaintiff to prove causation. In addition, post-November 5, 1982 clinical uses of other vaccines which were available prior to November 5, 1982 may be admissible on the issues of whether defendant's vaccine was unreasonably dangerous on the one hand or unavoidably unsafe on the other.

2. Defendant's motion in limine to exclude evidence of package inserts and other warnings dated after November 5, 1982 as a subsequent remedial measure under Rule 407 F.R.Evid. is granted. As we read plaintiffs' memoranda in opposition to defendant's motions in limine, plaintiffs do not oppose this motion.

3. Defendant's motion in limine to exclude all evidence of or references to any lot of DTP which was not in date and available to Dr. Bangash on July 2, September 2 or 3 or November 5, 1982 is denied. As we understand the record to date, defendant has been unable (or has refused) to identify the lots of DTP which were available in Dr. Bangash's office at the time Joshua Martinkovic was vaccinated. In these circumstances, plaintiffs may have to rely upon circumstantial evidence to establish the lots and their alleged defects. An absolute bar to references to any lot post-November 5, 1982 is too stringent and should not be invoked.

4. Defendant's motion in limine to exclude all evidence of or references to a trip report prepared by Dr. Marc W. Dietch concerning conversations with Dr. Larry Baraff on September 6, 1978 is denied. It appears to us that the trip report is admissible as a record of a regularly conducted activity under Rule 803(6) F.R.Evid. But certainly it is admissible as an admission by a party opponent under Rule 801(d)(2)(D) F.R.Evid. Thus the declarations by Deitch that he had been told by Baraff of the incidence of generalized seizures following administration of defendant's DTP is certainly admissible against defendant on the issue of defendant's knowledge and its duty adequately to warn. We recognize the hearsay within hearsay problem presented by the declarations of unidentified declarants to Dr. Baraff. Rule 805 F.R.Evid. And as we read plaintiffs' answer to the motion, they, too, recognize this problem and that they will "need to introduce other evidence" "to provide that Dr. Baraff's reported rate of adverse reaction was correct." P. 3. Thus, at this point, we need not consider whether Deitch's memorandum constitutes an adoptive admission by defendant of the truth of the reports of adverse reactions. We suggest, however, that the parties turn their attention to that question prior to trial and provide the court with their positions with regard thereto so that the jury can be properly instructed when the Deitch trip report is offered and received in evidence.

***2** 5. Defendant's motion in limine to exclude all evidence relating to DTP inserts prepared by other manufacturers is granted. Plaintiffs have not opposed this motion.

6. Defendant's motion in limine to exclude evidence

concerning Eli Lilly and Company's Tri-Solgen DTP vaccine and Japanese acellular vaccine is denied. When, as here, a defendant is charged with the design, manufacture and sale of an unreasonably dangerous product, the state of the art in the industry generally is relevant. This is equally true when the defendant is charged with the negligent design, manufacture and sale of a product. Clearly the knowledge in the industry which, according to plaintiffs' proffer, goes back to at least the 1960's, should not be barred on the theories advanced by defendant.

7. Defendant's motion in limine to exclude all evidence relating to adverse reaction reports, etc. is denied in part and granted in part. Of course the anecdotal reports of alleged adverse reactions are not admissible to prove the truth of the matter declared in the reports. But receipt of the reports is relevant on the issue of defendant's knowledge of adverse reactions. And the records maintained by defendant of the receipt of those reports are admissible against defendant either as its records of regularly conducted activities under Rule 803(6) F.R.Evid. or as defendant's admissions under Rule 801(d)(2)(C) and (D) F.R.Evid. Admissible, non-hearsay evidence must be adduced with regard to the prevalence of the adverse reactions. The jury will be appropriately instructed when the records of the adverse reactions reports are received.

8. Defendant's motion in limine to "exclude all evidence" relating to the "Drake Hotel memorandum" is denied. This motion is overly broad. We agree, however, that the contents of the memorandum should not be disclosed to the jury until it has been properly authenticated and an appropriate foundation for it has been laid as either an exception to the hearsay rule, an adoptive admission by defendant or notice to defendant. All we know about the document is that it was allegedly prepared by a person named Dr. Paul Koehler and it purports to reflect his impressions of a meeting which occurred on March 5, 1964 at the Drake Hotel in Chicago. We are also told that Koehler will not testify. Accordingly, it appears unlikely that plaintiff will be able to qualify the document as a hearsay exception under Rule 803(1)(5) or (6).

But we are also told that Mahlon Z. Bierly, Jr., attended the meeting at the Drake Hotel in behalf of Wyeth, and that he is still employed by Wyeth. If Bierly testifies, the document may be used to refresh his recollection.

Furthermore, we are not told from what repository the document has come. Maybe Bierly read and adopted it after it was prepared by Koehler.

Finally, there is the remote chance that the document might be used by an expert witness under Rule 703 F.R.Evid. which provides that, "[Facts or data] ... of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, ... need not be admissible in evidence." Plaintiffs' counsel are directed to make no reference to the contents of the memorandum without leave of court which will be granted only upon a showing that the contents are admissible under some theory which has not been articulated by plaintiffs thus far.

***3** 9. Defendant's motion in limine to exclude from the courtroom and hallways all allegedly vaccine-damaged individuals and all hearsay references thereto is granted in light of the memorandum submitted by defendant and plaintiffs' non-response thereto. Of course, this ruling does not preclude admissible testimony with regard to other similar events.

10. Defendant's motion in limine to exclude all evidence relating to "mass immunizations" is granted. Plaintiffs have not responded to defendant's memorandum in support of that motion.

Defendant's motion to exclude a video recording allegedly portraying a day in the life of Joshua Martinkovic is granted because plaintiffs have not responded to the motion or defendant's memorandum in support thereof.

11. In its motion filed September 22, 1986, defendant moved to exclude all evidence relating to alleged or suspected deaths including sudden infant death syndrome. That motion has not been supported by a brief from defendant nor responded to by plaintiffs. The burden is upon defendant to persuade us of the correctness of its pretrial position. Accordingly, that motion in limine is denied.

12. Plaintiffs' motion in limine re vaccine shortage is granted and plaintiffs are also directed not to intro-

duce any evidence relating to defendant's decision to discontinue marketing its DTP vaccine.

13. Plaintiffs' motion in limine to call defendant's employees as adverse witnesses, etc. is granted in part and denied in part. Of course, plaintiffs may examine current employees of defendant as adverse witnesses under Rule 611(c) F.R.Evid. But to the extent that plaintiffs seek an order directing defendant to produce employees who do not reside within the subpoena power of the court, the motion is denied.

14. Plaintiffs' motion in limine to prohibit reference to collateral source is granted subject to the caveat that defendant may adduce evidence that certain rehabilitation, nursing, educational and/or medical care which has been or will be provided to Joshua Martinkovic in the future has been and will be provided without charge.

15. Plaintiffs' motion in limine to prohibit reference to income tax matters is denied. Defendant's memorandum in opposition accurately summarizes the state of the law with regard to this subject and that summary will be followed in this case.

16. Plaintiffs' motion in limine to exclude risk/benefit information re whooping cough is denied. Plaintiffs' motion in limine to exclude videotape or film of whooping cough victims is granted. The information provided in defendant's memorandum in opposition to plaintiffs' motion in limine to exclude risk/benefit information is very persuasive. This information is relevant to defendant's defense. Defendant is entitled to have the jury know the milieu in which its vaccine has been designed, manufactured and sold. This is particularly true in light of Comment k to Section 402A of the Restatement of Torts.

However, the relevant information can be transmitted to the jury testimonially. It need not be graphically portrayed by the film which defendant wishes to use.

***4** We believe the foregoing constitutes a ruling on all of the pending motions in limine. If the parties wish to submit additional motions in limine, they must do so with memoranda in support by December 21, 1987, with answering memoranda by December 28, 1987 at 12:00 noon delivered to Judge Marshall's chambers.

The cause is held for trial January 4, 1988 at 9:30 a.m.

N.D.Ill.,1987.
Martinkovic by Martinkovic v. Bangash
Not Reported in F.Supp., 1987 WL 28400 (N.D.Ill.)

END OF DOCUMENT

TAB 23

H

United States District Court, N.D. Illinois, Eastern Division.
James E. MATTHEWS, Plaintiff,
v.
COMMONWEALTH EDISON COMPANY, Defendant.
No. 93 C 4140.

March 24, 1995.

Leon M. Despres, Thomas Howard Geoghegan, Robert Chuck Drizin, Despres, Schwartz & Geoghegan, Chicago, IL.
Julie Allen, Lisa D. Freeman, Sidley and Austin, Chicago, IL.

REPORT AND RECOMMENDATION

GUZ AN, United States Magistrate Judge.
***1** TO: HONORABLE ANN C. WILLIAMS, JUDGE

TO: UNITED STATES DISTRICT COURT

This case comes to this Magistrate Judge on a referral from Judge Aspen [FN1] to conduct a pretrial conference and hear and enter orders on any objections to exhibits and jury instructions and motion to strike.

Pending is an action for employment discrimination pursuant to the Age Discrimination in Employment Act 29 U.S.C. § 621 and the Americans With Disabilities Act of 1990 42 U.S.C. § 12101*et seq*. The defendant, Commonwealth Edison Company, has filed a motion in limine seeking the exclusion of Sandor Goldstein, the expert witness of the plaintiff. The motion seeks to exclude his testimony and to exclude any exhibits, reports or other memoranda prepared by him. The motion is based on two separate arguments. First, that since Mr. Goldstein's testimony all pertains to the issue of front pay, this is an issue for the court in the 7th Circuit and not an issue that should go to the jury. Second, that testimony should not be allowed because Mr. Goldstein's analysis is too speculative.

As to the latter argument, I recommend that the motion be denied. It is too early at this point in time to know with any certainty that Mr. Goldstein's testimony will be based on speculation. We have been provided with no transcripts of any depositions taken by him or any of his affidavits or reports. Nor is there any certainty that he would testify only as to those things in his deposition or prior reports or affidavits. This should be the determination for the trial court to make as his testimony comes in, or after his testimony has been heard on a voir dire examination. Damages, as we all know, need not be determined with exact precision, but only with reasonable certainty. Reasonable certainty as to front pay or future damages is not something which can be determined in the abstract. I therefore recommend that the motion in limine in this regard be denied, or that the court reserve its ruling.

In *Fortino v. Quasar Company,* 950 F.2d 389 (7th Cir.1991) the court considered the issue of "Whether front pay is a question for the jury or for the judge in an age discrimination case." As the court pointed out, the issue turns on the question of whether front pay should be deemed legal because it resembles common law damages, and therefore triable by a jury, or equitable because it is in lieu of an equitable remedy of reinstatement. A court of equity does have the power to make an award of damages in substitution for an equitable remedy that the plaintiff wants and is entitled to as a matter of strict principle, but that for some reason is not feasible. In ruling, the court in *Fortino* indicated that it is in agreement with the 2nd Circuit that there is no right to a jury trial on this issue. Citing the case of *Dominick v. Consolidated Edison Company,* 822 F.2d 1249, 1257-58 (2nd Cir.1987). This court agrees with the decision in that case. The contrary suggestion that the right to front pay is to be determined by the court, but the amount of front pay by the jury, is unworkable. Front pay is a substitute for the equitable remedy of reinstatement. As such, the right to front pay as well as the amount is to be determined by the court. To the extent that Goldstein's testimony pertains only to front pay, I recommend that the motion to exclude his testimony be granted.

***2** The defendant has objected to plaintiff's exhibits

1, 4, 5, 6, 7 and 10. Exhibit 1 is the Zion Station Management Personnel Full Report dated May 9, 1991. It is objected to on the basis of relevance. The parties have agreed to a stipulation of a list of the names, ages, date of hire and job title of all employees within the electrical maintenance department at Zion Station as of August 19, 1992. With this stipulation, Exhibit 1 is no longer necessary and is withdrawn.

Exhibit 4 is a letter from Karen Redmond, the EEOC investigator to Edison dated March 4, 1993 and Exhibit 5 is the EEOC Notice of Right to Sue issued to Matthews, bearing a date of July 2, 1993. These were objected to on the basis of relevance and Exhibit 4 is also objected to on the basis of hearsay. The objections should be sustained because the facts contained in these two documents have already been agreed to in statement 65 of the Statement of Agreed Facts. Exhibit 6 is also objected to on the basis of relevance. It is recommended that the objection to Document No. ML 00005 be overruled. All other pages are withdrawn by plaintiff. ML 00005 is entitled Involuntary Nuclear Separations-Age Analysis. It states the percentage of people over the age of 40 who were discharged as a result of the work force reduction plan. As such it can be circumstantial evidence, that the defendant targeted those employees 40 years or older for elimination during its work force reduction plan implementation. All other pages of this exhibit are withdrawn.

Exhibit 7 is also objected to on the basis of relevance and it is likewise recommended that the objection be overruled. The exhibit is entitled Nuclear Operations Management Personnel Listing-Zion Station. It contains the names of personnel at the Zion Station and certain data about each such employee. For example, one column is entitled Salary Grade and gives the salary grade of each such employee. Another is entitled Service Date and gives the date upon which each such employee commenced service. Another is entitled Birth Date and gives the date of birth for each employee, while another column apparently indicates the sex of the employee. Of particular importance is a column entitled Code, which appears to list among other things, those employees that have either medical problems or are of limited ability. This would tend to suggest that the physical disability of employees was being taken into account. This, of course, could be circumstantial evidence to help support the plaintiff's case that he was discharged in part at least because of his disability. It is therefore recommended that this objection be denied.

The objection as to Exhibit 10 is withdrawn.

The defendant next objects to Nancy Matthews, the plaintiff's wife, as a witness in this case. The objection is based upon the fact that Mrs. Matthews allegedly has no firsthand knowledge regarding the defendant's termination of plaintiff's employment and that she was not listed or disclosed in the answers to interrogatories which requested the names of all persons with information relevant to the case. As to the first objection, lack of personal knowledge, is in effect a motion to disqualify her as incompetent because she lacks any personal knowledge upon which to base her testimony. I recommend that the court reserve its ruling. Clearly, it is not possible at this point to know even the range of things as to which this witness might testify. For example, she could testify as to her husband's physical condition and ability to do certain tasks which she personally observed. Such testimony, if the plaintiff's physical ability becomes an issue, could clearly be relevant. What else she may have observed is not possible for the court to know at this time. It therefore is premature to grant the motion to bar her as a witness on the basis of lack of competence to testify as to anything relevant.

***3** The motion however should be sustained because of plaintiff's failure to disclose this witness during the discovery of the case. Defendants quite rightly object to the fact that they have not deposed this witness and are not prepared to examine her if she should take the stand. However, she should be barred only as a witness during the plaintiff's case in chief-not as a rebuttal witness. Rebuttal witnesses are oftentimes not known until after the trial is commenced because the need to call such a witness may not arise until the opposing party introduces an argument in issue or a fact during the course of the trial which must now, unexpectedly, be rebutted.

Defendants also object to plaintiff's list of special damages. The grounds asserted are 1) lack of foundation for the totals represented; 2) Matthews is not entitled to receive the monies listed; and 3) the issue of monetary relief is for the court or the jury. The first two objections, of course, are for the trier of fact to determine. The last is also encompassed in the

motion in limine upon which I have previously given my recommendation. All amounts reflecting front pay should in fact not be presented to the jury.

We now come to plaintiff's and defendant's proposed jury instructions and verdict forms. Plaintiff's Proposed Jury Instruction No. 1 is objected to on the grounds that it is argumentative, not supported by the authority, and does not include the defendant's answer. The objection is sustained as to the second paragraph. This paragraph does not accurately state the defendant's position, in that it represents that the defendants are denying that the plaintiff is in fact disabled. I therefore recommend that this paragraph be stricken. The first paragraph should also be rewritten to indicate that the Americans With Disabilities Act makes it unlawful for an employer to intentionally discriminate against an employee with a disability so long as that employee is adequately performing the essential functions of his job with or without reasonable accommodation. The third paragraph should be amended and the words "could have performed" should be stricken and replaced with "was performing." Finally, the 4th paragraph should be stricken, all but the first sentence. This will make a balanced and much more accurate representation of the issues which the case will be presenting to the jury.

Plaintiff's Proposed Jury Instruction No. 2 is objected to as being argumentative and unsupported by the authority. I agree with the objections in that these instructions are not sufficiently precise. For example, the first element that the plaintiff must prove is described as "That James E. Matthews is regarded as having a physical or mental impairment that substantially limits one or more major life activities." Actually, the first element that Mr. Matthews must prove is that he has a disability. Having a disability is further defined as either having or being regarded as having a condition that substantially limits one of the major activities of life. The wording of this first element in the Plaintiff's Proposed Jury Instruction No. 2 can therefore lead to confusion or be considered redundant. In element No. 3, the phrase "with or without reasonable accommodation" is left out and there are various other problems with this instruction. In lieu of this instruction, I recommend giving the Defendant's Proposed Jury Instructions No. 16 and 17. However, the Defendant's Jury Instruction No. 16 should be supplemented with the final two paragraphs of the Plaintiff's Proposed Jury Instruction No. 2 which read "In addition, James E. Matthews is not required to produce direct evidence of unlawful motive. Intentional discrimination, if it exists, is seldom admitted, but is a fact which you may infer from the existence of other facts." Plaintiff is entitled to have this included in the instructions and it is not included anywhere else.

***4** Plaintiff's Proposed Jury Instruction No. 3 is objected to as being incomplete. This instruction is substantially similar to Defendant's Proposed Jury Instruction No. 18 with the exception of the last paragraph in the Defendant's Jury Instruction. I recommend that the Defendant's Proposed Jury Instruction No. 18 be given without the last paragraph which has been withdrawn. Either version then is essentially acceptable.

Plaintiff's Proposed Jury Instruction No. 4 is objected to as being argumentative and prejudicial and unsupported by authority. The counterpart to this is the Defendant's Proposed Jury Instruction No. 20. Together, these two instructions are complete. Separate, neither one is actually appropriate. For example, the Plaintiff's Proposed Jury Instruction No. 4 in its paragraph no. 3 borders on being a persuasive argument to the jury rather than an instruction on the law. However, the first two paragraphs define and described the term "reasonable accommodation." Yet, the instruction as a whole, lacks a definition of what a qualified individual is. I therefore recommend that the Plaintiff's Jury Instruction No. 4 be denied, and that instead the Defendant's Proposed Jury Instruction No. 20 be given. However, since Defendant's Proposed Jury Instruction No. 20 does not contain an affirmative definition of the term "reasonable accommodation," I recommend that paragraphs 1 and 2 of Plaintiff's Proposed Jury Instruction No. 4 be included as Paragraph Nos. 2 and 3 of Defendant's Proposed Jury Instruction No. 20.

Plaintiff's Proposed Jury Instruction No. 5 is objected to as argumentative and prejudicial. It is recommended that the objection be sustained because both parties indicate that there would be no evidence to suggest that there was another position available for which the plaintiff was qualified which was denied him. The instruction therefore has no place in this particular case.

Plaintiff's Proposed Jury Instruction No. 6 is objected

to as being argumentative, prejudicial and not supported by authority. Clearly, the third paragraph of this proposed instruction could easily be interrupted as giving approval to and sanctioning the testimony of Sandor Goldstein. The counterpart to this is the Defendant's Proposed Jury Instruction No. 22. This instruction however also has problems in that the second paragraph conflicts with the proposed instructions as to punitive damages. The third paragraph also fails to include not only wages, but benefits which the plaintiff must be compensated for and this third paragraph also instructs the jury to deduct any unemployment compensation payments which the plaintiff has received. In addition to this, there is a basic difference in the approach to the damages instructions by plaintiff and the defendant. The defendant's damages instructions include the calculation of damages for both the age discrimination and disability discrimination counts, while the plaintiff has separate instructions for each count. There is also a great possibility that the jury will be confused if, for example, Defendant's Proposed Jury Instruction No. 15 which goes to the issue of double damages under the ADEA is given along with the Plaintiff's Proposed Jury Instruction No. 9 which goes to punitive damages. Without some instruction as to how to integrate these separate damages's instructions, the jury will most likely become confused and unable to fulfill its function. I therefore recommended that the parties have a conference and attempt to redraft and to integrate and coordinate their proposed damages instructions, which include Defendant's Proposed Jury Instruction No. 15, Plaintiff's Proposed Jury Instruction No. 33, Plaintiff Proposed Jury Instruction No. 6, Plaintiff's Proposed Jury Instruction No. 9, and Defendant's Proposed Jury Instruction No. 22. As amended Defendant's Revised Instruction No. 22 appears to appropriately state the law with regards to the lost benefits for which the plaintiff is entitled to be compensated. Also by dropping paragraph 3, it is in line with this court's recommendation regarding unemployment compensation benefits as collateral source payments.

***5** Plaintiff's Proposed Jury Instruction No. 7 is objected to on the bases asserted in the motion in limine. I recommend that the objection be sustained. The instruction should not be given as indicated in the recommendation on the motion in limine.

Plaintiff's Proposed Jury Instruction No. 8 is withdrawn. Plaintiff's Proposed Jury Instruction No. 10 is also withdrawn and Defendant's Proposed Jury Instruction No. 17 should be given in its stead.

Plaintiff's Proposed Jury Instruction No. 11 is withdrawn. Plaintiff's Proposed Jury Instruction No. 12 is also withdrawn and Defendant's Proposed Jury Instruction No. 17 should be given in its stead.

Plaintiff's Proposed Jury Instruction No. 13 is objected to as being an incomplete statement of the law. I recommend the objection be overruled and that the instruction be given. This instruction is taken almost verbatim from the Code of Federal Regulations and does include all of that portion of the code which is applicable, I believe, to this case.

Plaintiff's Proposed Jury Instruction No. 14 is objected to because portions of the instruction are allegedly not applicable to the case and prejudicial. I recommend that it be given, but only with the following modifications. Paragraph No. 6 which begins “Pay close attention to the testimony and evidence” should be modified in that all of the material beginning with the second sentence (“if you would like to take notes during the trial, ...”) through the sentence which reads “A juror's notes are not entitled to any greater weight than the recollection of each juror concerning the testimony” should be stricken. The last paragraph on the second page of the instruction should be modified to include a statement that it is not likely that this case will result in any news or media coverage. As so modified, the instruction I recommend should be given.

There are no objections to the Plaintiff's Proposed Jury Instruction No. 15 and I recommend that it be given.

Plaintiff Proposed Jury Instruction No. 16 is withdrawn and Defendant's Proposed Jury Instruction No. 4 should be given instead. Plaintiff's Proposed Jury Instruction No. 17 is withdrawn as it is covered by Plaintiff Proposed Jury Instruction No. 14.

Plaintiff's Proposed Jury Instruction No. 18 is not objected to and I recommend that it be given. Plaintiff's Proposed Jury Instruction No. 19 is the Fifth Circuit Pattern Jury Instruction No. 2.11. It is not objected to and I recommend it be given.

The objection as to Plaintiff's Proposed No. 20 is withdrawn and I recommend that it be given. There was no objection to Plaintiff Proposed Jury Instruction No. 21 and I recommend that it be given. Plaintiff's Proposed Jury Instruction No. 22 is objected to, but I recommend that the objections be overruled. This is the 5th Circuit Pattern Jury Instruction on a single witness, drawing reasonable inferences, and the two different types of evidence. Plaintiff's Proposed Jury Instruction No. 23 is the 5th Circuit Pattern Jury Instruction No. 2.19 with regards to expert testimony and I recommend that it be given if there is actual expert testimony taken during the trial.

***6** There is no objection to Plaintiff's Proposed Jury Instruction No. 24 and I recommend that it be given.

Plaintiff's Proposed Jury Instruction No. 25 is withdrawn.

Plaintiff's Proposed Jury Instruction No. 26 is denied as it is repetitive of many instructions already given. In its stead, Defendant's Proposed Jury Instruction No. 1 should be given.

Plaintiff's Proposed Jury Instruction No. 27 should be denied. It includes inaccurate statements as to the law and also instructions on the issue of good faith seniority systems which is not being asserted by the defendants in this case as a defense.

Plaintiff's Proposed Jury Instruction No. 28 is withdrawn. Plaintiff's Proposed Jury Instruction No. 29 regards the calculation of future damages and if the recommendation as to the motion in limine is followed, this instruction should obviously not be given to the jury. The same with Plaintiff's Proposed Jury Instruction No. 30.

Plaintiff's Proposed Jury Instruction No. 31 is a punitive damages instruction, but this has already been covered by a previous instruction. This instruction should, therefore, be denied as repetitive.

Plaintiff's Proposed Jury Instruction No. 32 is withdrawn.

Plaintiff's Proposed Jury Instruction No. 34 instructs on the plaintiff's duty to minimize his damages. It is not objected to and I recommend it be given.

Defendant's Proposed Jury Instruction No. 1 is given in lieu of Plaintiff's Proposed Jury Instruction No. 26 as previously indicated. I recommend that Defendant's Proposed Jury Instruction No. 2 be given. Its simply an instruction on fairness to a corporation.

Defendant's Proposed Jury Instruction No. 3 should be given with the modification that the last two sentences in the third paragraph be stricken. I think this language would just simply be confusing to the jury.

Defendant's Proposed Jury Instruction No. 4 should be given in lieu of Plaintiff's Proposed Jury Instruction No. 16.

Defendant's Proposed Jury Instruction No. 5 I recommend be denied. It is covered by Plaintiff's Proposed Jury Instruction No. 22.

Defendant's Proposed Jury Instruction No. 16 I recommend be denied. The second paragraph is confusing.

Defendant's Proposed Jury Instruction No. 7 I recommend be given. There is no objection.

Defendant's Proposed Jury Instruction No. 8 is the 5th Circuit Pattern Jury Instruction No. 2.16 modified. I recommend it not be given and in its place, Plaintiff's Proposed Jury Instruction No. 21 be given.

Defendant's Proposed Jury Instruction No. 9 I recommend that it not be given. It is already covered by a given plaintiff's instruction. The same with Defendant's Proposed Jury Instruction No. 10, which is covered by Plaintiff's Proposed Jury Instruction No. 23.

Defendant's Proposed Jury Instruction No. 11 also I recommend be denied. The subject matter is covered by Plaintiff's Proposed Jury Instruction No. 24.

There is no objection as to Defendant's Proposed Jury Instruction No. 12. The last sentence of the last paragraph however should be modified to clearly indicate that it is Commonwealth Edison's contention that Mr. Matthews' age and physical condition played no role in the decision to terminate his employment. As

stated right now, without such a preface, the sentence could be deemed by the jury to be the court's assertion of that fact.

***7** Plaintiff's Proposed Jury Instruction No. 13 is not objected to and I recommend that it be given.

There is no objection to Defendant Proposed Jury Instruction No. 19, which is a definition of the term "essential functions" and I recommend that it be given.

Defendant's Proposed Jury Instruction No. 23 is withdrawn.

Defendant's Proposed Jury Instruction No. 25 I recommend be denied. This same subject matter is covered by Plaintiff's Proposed Jury Instruction No. 19 which is the 5th Circuit Pattern Jury Instruction in unmodified form.

Defendant's Proposed Jury Instruction No. 27 is 5th Circuit Pattern Jury Instruction No. 3.1 modified. I recommend it be given.

Defendant's Proposed Jury Instruction No. 28 I recommend be given.

Defendant's Proposed Jury Instruction No. 21 is a *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) instruction. I do not believe that the fact pattern in this case fits the *Price Waterhouse* fact pattern. Initially, it is difficult to apply the rationale of the *Price Waterhouse* case to an Americans With Disabilities Act case because the *Price Waterhouse* language is premised upon the fact that it is improper to consider a suspect criteria in any way in reaching an employment decision.

"Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. In now familiar language, the statute forbids an employer to 'fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment,' or to 'limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's sex'. 42 U.S.C. §§ 2000(e)2000(a)(1), (2) (emphasis added). We take these words to mean that gender must be irrelevant to employment decisions to construe the words 'because of' as colloquial shorthand for 'but-for causation,' as does *Price Waterhouse,* is to misunderstand them." 490 U.S. at 239.

The Americans With Disabilities Act, on the other hand, actually requires the employer to consider the suspect criteria, i.e., the disability, and in some circumstances, to make an accommodation for it.

In *Price Waterhouse,* the Supreme Court supplemented the evidentiary framework of *McDonald Douglas* and *Burdine* for a particular type of case. As Justices Kennedy and Scalia stated in their dissent, the opinion establishes:

"That in a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been supported by legitimate reasons. The shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making the decision." 490 U.S. at 280, 109 S.Ct. 1775 at 1806.

***8** For a further definition of what this "direct and substantial evidence of discriminatory animus" actually means, we can turn to the language in Justice O'Connor's concurring opinion where she states: [FN2]

"Thus, stray remarks in the work place, while perhaps probative of sexual harassment, (citation omitted) cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecision makers, or statements by decision makers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard.... Race and gender always 'play a role' in an employment decision in the benign sense ... For example, in the context of this case, a mere reference to "a lady candidate" might show that gender "played a role" in the decision, but by no means could support a rational fact finders inference that the decision was made "because of" sex. What is required is what Ann Hopkins showed here: direct evidence that the decision makers placed sub-

stantial negative reliance on an illegitimate criterion in reaching their decision."

Justice O'Connor goes on to describe how this new and enhanced *McDonald Douglas* evidentiary framework would look. She states:

"First, the plaintiff must establish the *McDonald Douglas prima facie* case ... [in the traditional way]. The plaintiff should also present any direct evidence of discriminatory animus in the decisional process. The defendant should then present its case, including its evidence as to legitimate, nondiscriminatory reasons for the employment decision ... once all the evidence has been received, the court should determine whether the *McDonald Douglas* or *Price Waterhouse* framework applies to the evidence before it. If the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided under the principles enunciated in *McDonald Douglas* and *Burdine*..., *Id.* at 278." 490 U.S. 228 at 278, 109 S.Ct. 1775 at 1805.

The choice of instructions therefore is evidence dependent. The court must first decide if the evidence warrants an instruction under either the *McDonald Douglas* or the *Price Waterhouse* approach. If the threshold for the *Price Waterhouse* shifting of the burden to the defendant has been met, then the *Price Waterhouse* instruction is appropriate. It does not appear to me, from the discussions of counsel and the other pretrial materials that I have seen that the *Price Waterhouse* threshold will be met in this case, rather Commonwealth Edison appears to be denying any improper consideration of the plaintiff's disability whatsoever in its determination to discharge him. In its letter of August 22, 1994, the defendant argues that under the law, when motivating factor is used as a standard of proof, the defendant is entitled to prove that the same action would have been taken regardless of the presence of the protected factor. Apparently then, the defendant seeks an instruction regardless of whether or not the court first determines that the threshold standard in *Price Waterhouse* has been met, which will shift the burden of proof to it. The announced rationale for this position is that although the defendant does not concede that any impermissible factor was used in this case, defendant believes it should be allowed to argue "in the alternative" as part of its defense in this matter. For this reason, the defendant's counsel concludes the instruction shifting the burden to it should be given. But what defense counsel fails to realize is that it may argue in the alternative without causing a shifting of the burden of proof to it. Under the *McDonald Douglas-Burdine* evidentiary framework, the plaintiff bears the burden of proving not just that an inappropriate or impermissible factor was considered, but more than that-that it was a determining factor. In other words, that the plaintiff would not have been discharged but for the consideration of the impermissible factor. *Holzman v. Jaymar-Ruby, Inc.,* 916 F.2d at 1298 (7th Cir.1990). So that while maintaining the burden of proof entirely upon the plaintiff, the defendant already enjoys, without a *Price Waterhouse* instruction, the alternative of arguing both that no discriminatory factor was considered and that even if such a factor was considered, it was not a determining factor. Without the *Price Waterhouse* instruction, it is the plaintiff that bears the burden of proving by a preponderance of the evidence both that an impermissible factor was considered and that it was a determining factor in the decision.

***9** I make no specific recommendation to the court at this time in view of the heavily evidence dependent nature of this determination. Rather, I suggest that this is a determination the court should make, as explained by Justice O'Connor, "once all the evidence has been received."

In addition to the renewed *Price Waterhouse* /Defendant's No. 21, instruction defendants resubmit in their August 22, 1994 letter a redraft of Defendant's No. 14. This is the Defendant's Business Judgment Instruction. I recommend that it be given as resubmitted.

Also revised is Defendant's Instruction No. 15. This is an instruction as to liquidated damages and a definition of the willful violation that is required to trigger such damages. The instruction as revised is recommended.

Also resubmitted is Plaintiff's Instruction No. 9 which is now Plaintiff's Revised Instruction No. 9. As revised, I recommend that the instruction be given. It appears to properly advise the jury of the availability of nature, extent and propriety of punitive damages. It instructs the jury on the parameters upon which it is to base any punitive damages award. The instruction, of course, should only be given if after the close

of all of the evidence the court is convinced that sufficient evidence as to willful, malicious or reckless action has been adduced.

The final resubmission is a resubmission of the Defendant's Proposed Special Jury Interrogatories. As usual, the problem with special interrogatories is that they have a tendency to become sort of a legal maze for the jury to work its way through. Regardless of the propriety of the questions being proposed to the jury, the fact of having to answer each and every such question in sequence itself may become an impediment to reaching a final verdict. In addition, it is impossible to know the appropriateness of the questions and the sequence of such questions until if not all, at least a majority of the evidence has been heard. I therefore make no recommendation with regards to the Defendant's Special Jury Interrogatories.

Turning now to the proposed list of voir dire questions. Defendants object to Plaintiff's First Proposed Question and I would sustain the objection unless the words "if the evidence warranted it" are added to the question. The same with the second proposed question. There is an objection to questions 5 and 6 which I recommend be overruled. If any prospective juror feels its appropriate for large companies to use reduction in force plans to eliminate older employees, the plaintiff clearly has the right to know about it. Question No. 7 is withdrawn.

There is an objection to Defendant's Proposed Question No. 20. I can see no basis for objection to that question. I recommend that the objection be overruled. Similarly with Question No. 26, if there is a prospective juror who has had a dispute or whose friend or close family member has had a dispute with Commonwealth Edison, clearly the defendants are entitled to know that. Proposed Questions 40, 41, 43 and 44 all go to the prior work experiences either with or without unions or experiences in being laid off or discharged of the prospective jurors. I see no reason why the defendants should not be able to find out any prospective juror's history in this regard. I recommend that the objections be overruled. Similarly with Question No. 48. It seeks to find out whether or not any of the prospective jurors or family members or friends have ever suffered from an illness on the job that effected their ability to work and what their experience was with the company that they were working for when that occurred. I see nothing wrong with this line of questioning. It tends to disclose to the defendant the possible attitudes which prospective jurors may have developed in regard to issues that will be central in this case.

***10** Questions 51 through 58 go to the attitude of the prospective jurors with respect to the company's obligations to its employees and its right to reduce its work force and clear its work force of employees who are not performing adequately. My only objection to this set of questions is that its entirely too long. Defendants should be made to generalize in one or two questions the issues being probed by Questions 51 through 58 in order to void wasting time and monotonous repetition.

Any objections to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of receipt of this notice. *See*Fed.R.Civ.P. 72(b); 28 U.S.C. § 636(b)(1). Failure to object constitutes a waiver of the right to appeal. *Egert v. Connecticut General Life Ins. Co.,* 900 F.2d 1032, 1039 (7th Cir.1990).

FN1. Reassigned to Judge Ann C. Williams on September 22, 1994.

FN2. There is disagreement between the plurality opinion and Justice O'Connor's concurring opinion on the initial threshold requirement which triggers the shift in the burden of proof to the defendant. Justice O'Connor states that her threshold standard differs substantially from that proposed by the plurality. The plurality opinion on the other hand asserts that "After comparing [the two standards] we do not understand why the concurrence suggests that they are meaningfully different from each other...." The plurality opinion would require that plaintiff show that "gender played a motivating part in an employment decision...." Since the plurality considers both standards to be equivalent, the court, it would seem, may apply either in its decision making process.

N.D.Ill.,1995.
Matthews v. Commonwealth Edison Co.
Not Reported in F.Supp., 1995 WL 478820 (N.D.Ill.), 7 A.D. Cases 1636, 9 A.D.D. 33

END OF DOCUMENT

TAB 24

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern Division.

MEDCOM HOLDING COMPANY, Plaintiff,
v.
BAXTER TRAVENOL LABORATORIES, INC. and Medtrain, Inc., Defendants.

No. 87 C 9853.

March 5, 1993.

MEMORANDUM OPINION AND ORDER

CONLON, District Judge.

***1** The saga of this case continues beyond two trials, beyond countless motions, beyond an appeal, to a third trial. As the controversy enters its sixth year, however, it remains far from resolution. At the heart of the controversy is defendant Baxter Travenol Laboratories, Inc.'s ("Baxter") 1986 sale of a corporate subsidiary, Medcom, Inc. ("the company"), to plaintiff Medcom Holding Company ("Medcom") for $3.77 million.

PROCEDURAL HISTORY

Following a six-week trial, on March 16, 1990, a jury found that Baxter violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5 ("Rule 10b-5"), made fraudulent representations and breached the stock purchase agreement in connection with its sale of the company.[FN1]

The *Medcom I* jury awarded Medcom $5.725 million in compensatory damages and $10 million in punitive damages. On June 29, 1990, the court granted Baxter's motion for a new trial restricted to the issue of compensatory damages on the ground that the jury's award of damages related to the company's domestic programs was not supported by the evidence. The court reserved ruling on the validity of the punitive damages verdict until the issue of compensatory damages could be resolved by *Medcom II.* Discovery regarding compensatory damages was reopened and the parties were ordered to submit a revised joint pretrial order and exhibits.

On April 2, 1991, the *Medcom II* jury returned a $9 million verdict for Medcom on the Rule 10b-5 claim (Count I) and a $4.3 million verdict on the breach of contract claim (Count V). The jury returned a damages verdict of "zero" on the fraudulent misrepresentation claim (Count IV). Medcom had offered virtually the same damages evidence in *Medcom II* to support alternative theories of relief stated in each count, but Medcom refused to elect a count for recovery after the verdict. The court denied Medcom's motion to cumulate the verdicts, and both parties sought judgment notwithstanding the verdict ("JNOV") or a new trial. Both Medcom and Baxter contended that they were prejudiced by the narrow scope of the evidence admitted at the second trial. Both parties urged that the third trial ("*Medcom III* ") should include evidence relating to liability. The court set aside the *Medcom II* compensatory damages verdict and ordered a new trial because there was no rational basis for awarding Medcom $9 million on its Rule 10b-5 claim when recovery under the rule is generally limited to the amount paid for the securities-here, just $3.77 million. The new trial was subsequently delayed by the Seventh Circuit until the appeal of a collateral equitable issue could be resolved. The appeal was recently resolved. *See Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.,* No. 91 2008, slip. op. (7th Cir. Jan. 26, 1993).

The *Medcom II* verdict reflected intractable difficulties that plagued the parties and the court during the *Medcom II* trial. For example, disputes over whether evidence went to liability only (and thus was inadmissible) or liability and damages (and thus was admissible) were recurrent. Describing the impact of *Medcom I* to the *Medcom II* jury was also problematic: the description ultimately failed, given *Medcom II* 's inconsistent verdicts on Counts IV and V. After considering the arguments for wider evidentiary scope by both parties and mindful of the *Medcom II* problems, the court invited the parties to (1) readdress the practicability of a bifurcated damages trial and (2) propose workable guidelines for the admissibility of liability evidence at *Medcom III.*

DISCUSSION

I. Scope Of New Trial

***2** The parties propose radically different guidelines for the admissibility of evidence at *Medcom III.* Medcom urges that only evidence that relates to the *amount* of damages it suffered should be admitted. Under Medcom's approach, both Baxter and Medcom could introduce evidence disputing the value of domestic programs and balance sheet items. Medcom concedes that this approach would admit evidence that is "liability-related" but contends such evidence is "also directly related to the measure of damages." Medcom's Proposed Guidelines at 3. Baxter first argues that the new trial should not be limited to damages. In the alternative, Baxter urges that at a minimum, the parties must be able to dispute whether a particular injury was proximately caused by Baxter.

A bifurcated retrial is only proper when the issue to be retried is so distinct and separable from the others that a trial of the bifurcated issue may be conducted without injustice. *Gasoline Products Co., Inc. v. Champlin Refining Co.,* 283 U.S. 494, 499 (1931). When issues resolved by the first trial are so interwoven with issues sought to be separately retried that the latter cannot be submitted to the jury independently of the former without confusion and uncertainty, a bifurcated retrial amounts to the denial of a fair trial. *Id.* (bifurcated trial improper where material terms of breached contract were not discernable from verdict). *Accord Continental Casualty Co. v. Howard,* 775 F.2d 876, 883 (7th Cir.1985), *cert. denied,* 475 U.S. 1122 (1986).

Given the experience of *Medcom II* and the consequent dissatisfaction of the parties, it now appears that a trial confined to the issue of damages runs afoul of *Gasoline Products.* In the first place, both parties urge the court to allow evidence that is admittedly "liability-related" in *Medcom III,* conceding that a fair trial is not possible without at least some liability evidence. But the parties then propose guidelines that are neither workable nor logically consistent. Medcom, for example, proposes that the scope of evidence should be all evidence related to the "amount" of the injury. Medcom then argues that the parties should be able to dispute the amount of liability for particular items on the balance sheet and particular domestic programs. Baxter would be permitted to show that there was no overstatement on a particular item and therefore no liability on that item; in essence, *liability would be retried on an item-by-item basis.* That is not the practical makings of a damages-only trial. Moreover, this approach is flawed. Baxter would be able to contest liability on items put in issue by Medcom, but not on all items. If Baxter demonstrated that no overstatement occurred as to an item, Baxter could theoretically show it had no liability whatsoever for that item. But, of course, Medcom wants none of that-Medcom specifically proposes to prohibit Baxter from arguing that it has no liability. Medcom's approach skillfully tap dances around the reality of the situation: A fair and workable trial on damages cannot be had in the absence of liability evidence.

***3** More fundamentally, as *Medcom II* made clear, the *Medcom I* verdict did not adequately determine Baxter's liability with respect to any particular claim. Although three counts of the complaint were at issue in *Medcom I,* each count was in turn composed of a multitude of the same claims. For example, in each count Medcom contended that the balance sheet was overstated in a number of ways, and that Baxter promised Medcom approximately 1500 more current domestic programs than Baxter delivered. Each one of those claims-for an individual balance sheet item or a particular domestic program-could have been a separate count. The *Medcom I* verdict form grouped individual claims by generic type, *e.g.,* for balance sheet overstatement, and by legal theory, *e.g.,* breach of contract. By so doing, the verdict form provided necessary simplification. But the verdict form did not disclose whether the *Medcom I* jury found for Medcom on a particular claim on a particular legal theory. As Baxter points out, it cannot even be said with certainty that the jury found for Medcom on a particular type of claim on a particular legal theory. For example, the verdict form did not make clear whether Baxter's liability for securities fraud related to the domestic programs or the balance sheet.

As a result of the manner in which Medcom compressed multiple claims into three alternative theories of relief, the determination of damages on a particular claim simply cannot be separated from the determination of liability and causation. *Cf. Gasoline Products, supra.* Generally, courts must speculate whether a bifurcated trial will cause jury confusion and uncertainty. *Id.* However, here the court has the hindsight benefit of *Medcom II.* While it is possible that the problems encountered during *Medcom II*

could be mitigated by additional jury instructions, a different verdict form or a damages-only evidentiary approach that was workable, it is unlikely. It makes no sense to fine tune an automobile that has no wheels. Moreover, the ultimate justification for a damages-only trial was to conserve judicial resources by avoiding retrial of previously determined issues. It is now clear that limiting the scope of the issues in *Medcom III* would not conserve resources. The liability judgment in favor of Medcom is vacated. The liability of Baxter (for claims relating to the balance sheet and domestic programs only) will be determined anew at *Medcom III* without any reference to the *Medcom I* verdict.

Baxter's response raises an additional issue. Baxter urges the exclusion at *Medcom III* of the testimony of Medcom's damages expert, David Anderson. Baxter contends that Anderson's testimony at *Medcom II* does not qualify as expert testimony under Fed.R.Evid. 703 and alternatively, that Anderson's testimony should be excluded under Fed.R.Evid. 403. Baxter's argument amounts to a motion *in limine* that is wholly unrelated to the scope of liability evidence that should be admitted at *Medcom III*. The scope of liability evidence for *Medcom III* is the only issue currently under consideration. The admissibility of Anderson's testimony therefore is not properly before the court.

II. Medcom's Financial Condition

***4** Medcom also filed a motion styled "Plaintiff's Motion as to Evidence and Damages Regarding Medcom Holding's Financial Condition." The relief Medcom seeks (like the title of its motion) is vague, perhaps for good reason. The court only invited the parties to discuss the *scope of liability evidence* that should be admitted at *Medcom III*. The motion does not treat the issue of liability evidence and is therefore unauthorized. Instead, the motion poses what are in effect several ill-defined motions *in limine* unrelated to liability evidence. Due to the advanced state of the case, Medcom's motion must overcome significant hurdles. Medcom has either made each argument in the motion previously or it has not. If Medcom has made the argument before, the current argument is for reconsideration and must contain something novel that could not have been argued before. *See* *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir.1987). If Medcom has not made the argument before, the argument comes five years into the case and after two trials. Medcom must demonstrate some excuse for not having previously made the argument and show that Baxter would not be prejudiced by any evidentiary change raised this late. None of Medcom's arguments meet this standard.

Medcom seeks to introduce evidence of the money it borrowed to purchase the company and the interest it has paid on the borrowed money. As Baxter points out, the court has held on at least three occasions that this evidence would not be admitted. *See* Memorandum Opinion & Order at 2-4 (N.D.Ill. issued Jan. 2, 1992); Tr. II [FN2] 4423-30; Memorandum Opinion & Order at 9 (N.D.Ill. issued Mar. 24, 1992). *See also* Tr. II at 4961. The court excluded evidence of interest actually paid because that theory of damages was not offered until just two weeks before *Medcom II* and because Medcom could offer no documentation of the interest or notes. *Id.* Medcom's complete lack of documentation for a purportedly sizeable, concrete damages claim was particularly troubling given that the court had reopened discovery for *Medcom II*. The court had also permitted Medcom to amend the pretrial order before *Medcom II*. This claim was not included in the amended pretrial order.

Medcom's current motion advances absolutely no new evidence or law; in fact, Medcom only acknowledges one of the prior occasions that the court has addressed the issue of interest. More fundamentally, if Medcom's proffer before *Medcom II* was tardy, the same proffer after *Medcom II* is unequivocally untimely. The motion is therefore denied with respect to interest evidence for two reasons: Medcom fails to present adequate grounds for reconsideration and the presentation of the interest damages theory comes far too late in the controversy.

Medcom also seeks to introduce evidence of other expenses Medcom incurred on behalf of the company. The documentary evidence Medcom seeks to introduce was produced for the first time concurrently with this motion even though the documents were responsive to Baxter's discovery requests. The production was untimely even if, as Medcom contends, some of the documents postdated the close of discovery. Rule 26 imposes an ongoing duty to update discovery requests. Five or six years into litigation is not the proper time to be offering new dam-

ages theories. The motion is denied with respect to other evidence of expenses.

***5** Likewise, Medcom may not offer any new testimony by John Manley as to contributions he has made without charging either Medcom or the company. To the extent an expense has been the subject of testimony and discovery before *Medcom II,* Medcom is of course free to offer evidence of that expense at *Medcom III.* But Medcom may not now substantively change its proof. Medcom may not deviate from previously offered damages evidence by offering undiscovered evidence on a new theory through nothing more than Manley's testimony.

Medcom complains that its inability to present interest evidence skews the jury's view of the company's profitability in favor of Baxter. Specifically, Medcom points out that Baxter underscored the company's positive cash flow during its *Medcom II* opening statement, contending that positive cash flow reflected positively on the value of the company. *See* Tr. II. 4414-4116. But *evidence* of the company's positive cash flow came from Medcom's witness John Manley *on direct examination. Id.* at 4921-23, 4960. Medcom also points out that the court sustained objections to questions about Medcom's financial condition. *Id.* at 4923-24. As the court noted, however, evidence of a parent corporation's current financial health is irrelevant to the calculation of the value of a subsidiary corporation at the time of purchase. *Id.* at 4961. Moreover, the evidence Medcom sought to introduce was never produced during discovery; summary documents concerning Medcom Holding Company's financial health were not produced until April 1992.

To be sure, the *Medcom II* jury was permitted to hear testimony regarding the company's positive cash flow but not the interest paid by Medcom on the money it borrowed to finance the company's purchase (or any other Medcom financial data). However, the company's cash flow is a proper part of the valuation of the company. As the court has determined, under the circumstances evidence of interest actually paid by Medcom is *not* admissible. Even assuming Medcom's argument had substantive merit, Medcom offered this evidence far too late. Medcom did not even mention this claim until just before *Medcom II.*Medcom did not produce any documentary support for the testimony until April 1992. Otherwise admissible evidence may be excluded if the evidence was not produced during discovery or offered in a timely manner. Fed.R.Civ.P. 37.

In the final analysis, the evidentiary rulings were evenhanded on this issue. Although the court held Medcom's financial condition was not relevant to the damages determination, the court also recognized the potentially prejudicial effect of any evidence or implication that Manley or Medcom had improperly drained cash from the company. Tr. II. at 4961. The court invited Medcom to submit a cautionary instruction. *Id.* Medcom does not complain that any proffered instruction was erroneously refused. Moreover, the only *testimony* Medcom claims unfairly skewed the evidence was presented by Medcom during Manley's direct examination. Medcom simply may not assert prejudice on a subject that Medcom itself opened with its own witness.

***6** Baxter seeks attorneys fees and costs of responding to Medcom's motion under Fed.R.Civ.P. 11 and 37. The request is granted. As Baxter points out, a motion to reconsider is frivolous if it contains no new evidence or arguments of law. *Magnus Electronics v. Masco Corp.,* 871 F.2d 626, 630 (7th Cir.1989). By this motion, Medcom seeks to relitigate an issue the court has already decided three times without acknowledging *all* the court's earlier rulings. Medcom offers no new law-the only case Medcom cites was discussed in the court's memorandum opinion of January 2, 1992-and there are certainly no new facts to support the interest damages theory. Worse, the motion is disingenuous for failing to adequately acknowledge or distinguish the court's earlier decisions. Counsel for Medcom is ordered to pay Baxter its reasonable attorney's fees and costs in responding to "Plaintiff's Motion as to Evidence and Damages Regarding Medcom Holding's Financial Condition."

III. Punitive Damages

Ruling on Baxter's motion with respect to *Medcom I* 's $10 million punitive damages award was deferred pending *Medcom II* 's resolution of compensatory damages. Because *Medcom II* did not resolve the issue of compensatory damages and there will not be a new trial on damages alone, the court will now rule on the punitive damages motion.

Baxter contests the jury's $10,000,000 punitive dam-

ages award on the grounds that the jury had no basis for the award and, in any event, the award was excessive. Punitive damages are available under Illinois law for willful, wanton or grossly fraudulent misrepresentations. *Four "S" Alliance, Inc. v. American Nat'l Bank & Trust Co.,* 432 N.E.2d 1213, 1217 (Ill.App.1982). Punitive damages serve the dual purposes of punishing gross misconduct and deterring the defendant and others from repeating misconduct. *Lenard v. Argento,* 699 F.2d 874, 890 (7th Cir.1983), *cert. denied,* 464 U.S. 815 (1983). Punitive damages do not follow as a matter of course from a finding of fraud liability. As the Seventh Circuit stated in *AMPAT/Midwest, Inc. v. Illinois Tool Works, Inc.,* 896 F.2d 1035, 1043 (7th Cir.1990):

The Illinois courts, however, take rather a dim view of punitive damages, *Beaton & Associates, Ltd. v. Joslyn Mfg. & Supply, supra,* 159 Ill.App.3d at 845-46, 111 Ill.Dec. at 656, 512 N.E.2d at 1293, and insist that the plaintiff seeking them demonstrate not only simple fraud but gross fraud, breach of trust, or " 'other extraordinary or exceptional circumstances clearly showing malice and willfulness.' " *Home Savings & Loan Ass'n v. Schneider,* 108 Ill.2d 277, 284, 91 Ill.Dec. 590, 593, 483 N.E.2d 1225, 1228 (1985). Moreover, it is for the judge rather than the jury to decide whether the standard is satisfied. *Kelsay v. Motorola, Inc.,* 74 Ill.2d 172, 186, 23 Ill.Dec. 559, 565, 384 N.E.2d 353, 359 (1978); *Parsons v. Winter,* 142 Ill.App.3d 354, 360, 96 Ill.Dec. 776, 781, 491 N.E.2d 1236, 1241 (1986).

***7** In *AMPAT,* the court upheld a district court's decision to vacate a punitive damages award on the ground that aggravating circumstances did not accompany the fraud.

Medcom relies on a series of misrepresentations and omissions to justify the award of punitive damages, including the failure to disclose the *Fuisz* litigation, and misrepresentations concerning the convertibility of the Saudi programs and the prospective Daharan medical center contract.[FN3] The *Fuisz* litigation resulted in a settlement obligating Baxter to pay a certain sum. Marschall Smith, Baxter's associate general counsel, testified he did not believe Baxter was required to disclose the *Fuisz* litigation to Medcom under the agreement. Tr. I 188-202. Medcom asserted that the agreement required Baxter to disclose all contractual commitments, liabilities and litigation. Joint Ex. 1, ¶¶ 5(j), (1), (p) and (q). Medcom correctly points out that Fuisz could have reinstituted his suit against the company had Baxter failed to pay the settlement. However, Baxter paid the settlement and, in fact, the *Fuisz* litigation did not result in any loss to the company. Baxter's failure to disclose the *Fuisz* litigation was harmless and is an insufficient basis for awarding punitive damages. Nor could nondisclosure of the *Fuisz* litigation reasonably be viewed as a willful, wanton or grossly fraudulent misrepresentation under these circumstances.

Medcom contends Baxter's representations about Saudi Arabian business prospects constitute gross fraud. Robert Funari, company president before the sale, was evasive during negotiations about his knowledge of the Daharan medical center and prospective Saudi business, when in fact he had been informed that the Daharan medical center might never be built. Tr. I 513-15, 537-443, 3685-91; Pl.Ex. 35. John Manley, Medcom's principal investor and negotiator, testified that he would not have purchased the company had he known of the *Fuisz* litigation or the dim business prospects in Saudi Arabia. Tr. I 2004. Medcom also complained that Baxter misrepresented the status of the UCLA newsletter and the physician education programs. However, Medcom failed to establish actual damages from any of these purported misrepresentations: The *Medcom I* jury awarded zero damages for each of these items. These alleged misrepresentations did not inhibit Medcom from receiving the benefit of its bargain when it purchased the company.

At the heart of Medcom's case are Baxter's misrepresentations about the number of domestic programs and Baxter's overstatement of the balance sheet. No aggravating circumstances surrounded misrepresentations of the quantity of domestic programs. Medcom points out that Nancy Hunter, the nurse education production manager at the time of the sale, testified that she "in essence" told Bill Forster that the contents of the prospectus were inaccurate. Tr. I 3776-77. Forster was the company's general manager at the time of the sale. However, Hunter could not remember Forster's response or any details of the conversation. *Id.* Thus, there was no evidence that Baxter maliciously misstated the company's net worth on the balance sheet. At trial, the extent of the overstatement was left in doubt. As the Seventh Circuit recently observed in *AMPAT,* misrepresentations sufficient to

establish fraud do not necessarily justify punitive damages. 896 F.2d at 1043-44. At best, Baxter's damaging representations constitute ordinary fraud. Viewing the evidence in a light most favorable to Medcom, Baxter misrepresented the quality and quantity of the product that it sold to Medcom. Compensatory damages amounting to the benefit of the bargain insure remuneration for Baxter's misrepresentations. However, Medcom is not entitled to recover punitive damages on the *Medcom I* record.

***8** Medcom asserts that Robert Funari wanted to sell the company and improve his standing within Baxter. Tr. I 259-62. Funari indicated to his superiors that Baxter would recover more than the $1,000,000 book value of the company after the sale of all company assets. Tr. I 438-40. In itself, Funari's desire to sell the company and gain approval from his superiors does not support a finding of willful intent to defraud Medcom.

John Manley was not a naive investor who entered into an agreement based solely upon trust and confidence in Baxter and its representations. *See Home Savings,* 483 N.E.2d at 1227-28 (seller induced unsophisticated buyers to rely upon seller's expertise). Manley is a sophisticated and experienced investor. Tr. I 2124-25. While Manley had a right to rely upon representations in the prospectus, he also had ample opportunity to evaluate Baxter's representations. Manley was provided open access to the company's programs and business records. Manley actually interviewed individual employees with direct knowledge about the programs, including Nancy Hunter. Tr. I 2188. Manley testified that all Baxter personnel whom he interviewed were truthful. Tr. I 2186-90. In addition, Manley received detailed sales statistics about the programs. Tr. I 2226-28. Giving a sophisticated investor free access to the facts is a poor means of perpetrating willful and wanton fraud. Providing Manley with all information he requested under these circumstances rebuts any inference of actual malice, willfulness or gross fraud.

Judgment as a matter of law is entered in favor of Baxter on Medcom's claim for punitive damages.[FN4] A verdict must be supported by an evidentiary basis that would allow a reasonable jury to find for the prevailing party with respect to a particular issue. Fed.R.Civ.P. 50; *Garrett v. Barnes,* 961 F.2d 629, 631-32 (7th Cir.1992).[FN5] Where a verdict is only supported by speculation, conjecture or a mere scintilla of evidence, judgment as a matter of law is proper. *Garrett,* 961 F.2d at 632. Viewing the evidence and inferences in a light most favorable to Medcom, there is an insufficient evidentiary basis in the *Medcom I* record for a reasonable jury to have found willful, wanton or grossly fraudulent misrepresentations. *Cf. Four "S", supra.* The *Medcom I* record therefore does not provide an adequate evidentiary basis for an award of punitive damages.

CONCLUSION

The liability judgment entered in favor of Medcom on March 16, 1990 is vacated. Remaining liability and damages issues shall be retried together. Medcom's motion as to evidence and damages regarding Medcom's financial condition is denied; counsel for Medcom is ordered to pay Baxter reasonable attorney's fees and costs in responding to the motion. Baxter's motion for judgment as a matter of law is granted as to the $10 million punitive damages award.

FN1. The first trial is referred to as "*Medcom I,*" and the second trial is referred to as "*Medcom II.*"

FN2. Transcript references designated "Tr. I" are to the *Medcom I* transcript; references designated "Tr. II" are to the *Medcom II* transcript.

FN3. For a detailed factual background regarding this motion, see Memorandum Opinion and Order (N.D.Ill. issued June 29, 1990).

FN4. Baxter's March 30, 1990 motion seeks judgment notwithstanding the verdict, a new trial or remittitur. Fed.R.Civ.P. 50 was amended effective December 1991 to rename judgment notwithstanding the verdict "judgment as a matter of law." There was no change in the legal standard for obtaining relief under Rule 50, however.

FN5. It should also be noted that Illinois law commits the determination of the availability of punitive damages to the court (rather

> than the jury) in the first instance. *AMPAT,* 896 F.2d at 1043. The court could review the jury's decision *de novo,* substituting its judgment for the jury's. There is no evidentiary basis for a punitive damages award. If the court applied the more rigorous standard of *de novo* determination, it follows that judgment as a matter of law would still be granted in favor of Baxter.

N.D.Ill.,1993.
Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.
Not Reported in F.Supp., 1993 WL 62367 (N.D.Ill.)

END OF DOCUMENT

TAB 25

United States District Court, N.D. Illinois.
Natalie MENSHIKOVA, et al., Plaintiffs,
v.
CITY OF CHICAGO, et al., Defendants.
No. 95 C 5528.

May 29, 1997.

MEMORANDUM OPINION AND ORDER

SHADUR, Senior District Judge.
***1** In accordance with the procedure and schedule that were established at the time of the pretrial conference that resulted in this Court's approval of the Final Pretrial Order ("FPTO") in this action, counsel for each side has or have submitted motions in limine and responses to the other side's similar motions. Unfortunately each set of responses arrived at the beginning of this month, during the time that this Court was sitting by designation with the Court of Appeals for the Second Circuit. Consequently, as a result of an inadvertent oversight the motions were not brought to this Court's attention until it received a docket printout of pending motions.

This memorandum opinion and order will deal with all of the pending motions. That can be done for the most part without any need for discussion and, in the remaining situations, all that is needed is a brief explanation of the reasons for this Court's rulings.

Plaintiffs' Motions in Limine

Although plaintiffs Natalie Menshikova ("Menshikova") and Scott Whitman ("Whitman") filed a dozen brief motions in limine their inclusion in a single document has caused the Clerk's Office computer to group them all under Dkt. No. 35-1. Because defendants have interposed no objections to plaintiffs' listed Motion 1 and Motions 4 through 8, all of them are granted. Next, plaintiffs' Motions 2 (to preclude any undisclosed expert testimony) and 10 (to preclude the use of any undisclosed witnesses) are granted and, as defendants have requested, shall apply reciprocally.

Defendants oppose Motion 3, which seeks to bar:

any reference to any comments made by any plaintiffs and the criminal trial judge in plaintiff's criminal court appearances related to this case.

In response, defendants correctly point out that a statement of apology that Whitman assertedly made to defendant Eula Scott ("Scott") is admissible as non-hearsay under Fed.R.Evid. ("Rule") 801(d)(2)(a)-though such admissibility would not of course extend to Scott's characterization of the claimed statement. Any other claimed statement (for example, anything said by the state trial judge) is hearsay and is hence inadmissible, although plaintiffs may wish to reconsider the matter in the context of trial-in which event this Court will further address the question.

Plaintiffs' Motion 9 asks to bar reference to "[c]onduct of the plaintiffs before the date of the incident." As defendants correctly respond, this Court cannot issue such a blanket ruling. It is denied for the present, subject to renewal by plaintiffs as to specific matters in the context of the trial.

Plaintiffs' Motion 11 seeks to bar "[a]ny references to terrorist acts, bombings or threats of terrorist acts." That motion is granted. To the extent that defendants' response says that they "will introduce evidence that on August 6, 1994, O'Hare Airport was is [sic] in a 'heightened state of alert,' " any such evidence would partake of the same vice that requires plaintiffs' motion to be granted. Thus, based on this Court's review of the Scott deposition that has been attached to defendants' response, Scott will be permitted to testify as to the directive that existed at O'Hare over an extended period of time (including the August 6, 1994 date of the occurrence at issue),[FN1] but she will *not* be permitted to state her understanding of the reason for that directive (both on hearsay grounds and because any such testimony would plainly run afoul of Rule 403). To avoid any such unfair prejudice under Rule 403, defense counsel will be required to determine the time frame during which that directive has been in effect, and the manner in which that information is communicated to the jury may be the appropriate subject of a stipulation or other neutral handling.

FN1. Scott Dep. 28 at lines 22-23 describes that directive:

> And no car could be left unattended. Otherwise, they was ticketed and towed.

***2** Finally, plaintiffs' Motion 12 asks that defendants be barred from any "[r]eferences to any formed or claimed diplomatic status of plaintiffs." Plaintiffs accurately point out that recent events, in the form of excesses committed by persons who have then invoked the mantle of diplomatic immunity, create the potential for serious unfair prejudice. Defendants respond in part by referring to Whitman's lost wage claim, but defendants' argument is bogus unless Whitman attempts to link that claim to a false diplomatic status component. As for defendants' attempt to bootstrap Whitman's earlier statement into evidence under Rule 613, that reflects a patent misunderstanding of that Rule-what it teaches is that if Whitman's trial testimony were to attempt to assert something with which that earlier statement was inconsistent, the earlier statement would be admissible by way of impeachment, but there is no hint of that here. Lastly, to the extent that defendants contend that Whitman's asserted earlier statement should be admitted as a general attack on his credibility, defendants have not brought themselves into the ambit of Rule 608(b) at this time. Accordingly plaintiffs' Motion 12 is granted for now.

Defendants' Motions in Limine

Because defendants' motions in limine have been set out in separate filings, they have been assigned separate docket numbers. Solely for convenience, then, this opinion will treat with the motions in the same order as their respective numbers in the docket.

Before the contested motions are addressed, this Court will put to one side defendants' motions to which plaintiffs have interposed no objection. To that end, defendants' motions in limine to preclude evidence of medical treatment received by Whitman (Dkt. No. 25-1), to bar any reference to a prior claim involving Kathy Burke (Dkt. No. 30-1), to preclude mention of any other claims or causes of action brought against City of Chicago ("City") (Dkt. No. 31-1), to exclude evidence of the theft of plaintiffs' luggage that allegedly occurred in a Moscow train station (Dkt. No. 32-1) and to preclude any evidence that City violated plaintiffs' civil rights under 42 U.S.C. § 1983 (Dkt. No. 33-1) are granted without objection.

As for defendants' motion to bar evidence as to plaintiffs' claimed car rental, hotel and long-distance telephone call expenses (Dkt. No. 26-1), it operates from the mistaken premise that the absence of supporting documentation requires that result. That of course is not so. If Whitman testifies as to such expenses, defense counsel may inquire about the absence of records on cross-examination-and the ultimate resolution of the matter will be for the jury to make. That motion is denied.

Next defendants move to preclude any evidence suggesting that Officer Edward Oriole stole the $2,100 in currency that Whitman says he had in his wallet at the time of arrest (Dkt. No. 27-1). It is true that Whitman has testified in deposition that he did not observe Oriole doing that. But according to Whitman's response, he was detained by City's officers (including Oriole) while they took control of his money-Whitman told them when they arrested him that he had left his wallet containing $2,100 in the rental automobile. Whitman says that defendants refused to allow him to retrieve his wallet and never properly inventoried the wallet or the money. That appears to present a classic matter for jury resolution, and the motion is denied.

***3** Defendants also wish to preclude evidence that Menshikova suffered a "nervous breakdown" or was provided with any form of psychological treatment or therapy after Whitman's arrest (Dkt. No. 28-1). Because that motion is linked with defendants' later-discussed motion to bar the Russian medical records relating to Menshikova's treatment there, it is denied as framed-that is, as a blanket bar to testimony in this area. If and to the extent that Menshikova herself may characterize her situation in terminology different from that employed in the medical records, that would be an appropriate subject for cross-examination-again a matter for the jury to evaluate. That motion too is denied.

As just suggested, defendants also move to bar medical records from Municipal Clinic No. 1 in Tver, Russia (Dkt. No. 29-1). In that respect defendants' initial objection relates to the absence of authentica-

tion, and they then add a Rule 403 objection. As to the first of those objections, it is true that the English translations of the two documents (Exs. A and B to defendants' motion in limine) do not appear to conform to the self-authentication provisions of Rule 902(3). But the deposition testimony of plaintiffs' designated expert Dr. Alexander Mauskap ("Mauskap," of whom more later) is that he finds sufficient evidence of their genuineness to satisfy him for purposes of rendering his opinion under Rule 703-and in that respect the matters on which he relied in forming his opinion need not themselves be admissible in evidence. That motion is also denied.

That in turn leads directly to defendants' challenge to Dr. Mauskap's testimony in its totality (Dkt. No. 34-1). That frontal attack is principally grounded in the fact that Dr. Mauskap is not an active practitioner in gynecology or obstetrics, lacking board certification in both of those specialties. But the level of Dr. Mauskap's knowledge, training and education suffices under Rule 703 to make this matter too a subject for jury evaluation. It should be understood that this Court's jury instructions where opinion testimony is involved do not label the witness as an "expert" (a term that may lend undue weight to opinion testimony despite cautions to the jury that they are not bound to accept such opinions-see Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word 'Expert' Under the Federal Rules of Evidence in Civil and Criminal Jury Trials,* 154 F.R.D. 537 (1994)). That type of instruction helps to assure a balanced evaluation by a jury to which such opinion evidence (whether or not it is the subject of dispute by some other witness) is tendered. In summary, that final motion by defendants is also denied. Again the issues will be for the factfinding jury to resolve.

Conclusion

This opinion disposes of all pending motions other than defendants' April 16, 1997 motion to amend the FPTO (Dkt. No. 36-1), which this Court has previously entered and continued so that the parties could obtain and provide the necessary information to enable this Court to render an informed decision as to the content and significance of defendants' wholly unintelligible document obtained from Northwestern Law School. In the absence of further input in that respect on or before June 9, 1997, this Court will be constrained to deny the motion. In the meantime, the case is now set for trial to begin at 9:30 a.m. August 19, 1997, with the parties' respective proposed jury instructions and voir dire questions to be submitted in this Court's chambers on or before August 6, and with the voir dire conference to discuss trial procedures to be held at 2 p.m. August 8.[FN2]

FN2. At the time of the April 3, 1997 pretrial conference resulting in the approval of the FPTO, this Court had indicated that voir dire questions and jury instructions would be submitted seven days before the trial date. But this Court has since then committed itself to be away from August 12 through 15, thus necessitating the earlier scheduling that is provided for in the text.

N.D.Ill.,1997.
Menshikova v. City of Chicago
Not Reported in F.Supp., 1997 WL 305314 (N.D.Ill.)

END OF DOCUMENT

TAB 26

United States District Court, N.D. Illinois, Eastern Division.

NATIVE AMERICAN ARTS Plaintiff,
v.
EARTHDWELLER, LTD. and the Waldron Corporation Defendants.

No. 01 C 2370.

May 31, 2002.

MEMORANDUM OPINION AND ORDER

CONLON, J.

***1** Native American Arts, Inc. ("NAA") sues Earthdweller, Ltd., and The Waldron Corporation ("Waldron") for violations of the Indian Arts and Crafts Act of 1990 ("the IACA"), 25 U.S.C. § 305e (Counts I, III, V, VII), and for punitive damages under the IACA pursuant to 25 U.S.C. § 305e(b) (Counts II, IV, VI, VIII). The claims arise from Waldron's alleged fraudulent offer, display, and sale of goods as Indian-produced. The court denied Waldron's motion for summary judgment and set the case for trial. Earthdweller is in default. NAA and Waldron move *in limine* to bar evidence at trial and exclude expert testimony.

I. Standard of Review

The background of this case is discussed in the court's order denying Waldron's summary judgment motion. *See* *Native American Arts, Inc. v. Waldron Corp.*, 2002 WL 655683 (N.D.Ill. Apr. 22, 2002). The court excludes evidence on a motion *in limine* only if the evidence is clearly inadmissible for any purpose. *See* *Hawthorne Partners v. AT & T Technologies*, 831 F.Supp. 1398, 1400 (N.D.Ill.1993). Motions *in limine* are disfavored; admissibility questions should be ruled upon as they arise at trial. *Id.* Accordingly, if evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial to allow questions of foundation, relevancy, and prejudice to be resolved in context. *Id.* at 1401.Denial of a motion *in limine* does not indicate evidence contemplated by the motion will be admitted at trial. Instead, denial of the motion demonstrates the court cannot determine whether the evidence in question should be excluded outside the trial context. *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir.1989); *Brom v. Bozell, Jacobs, Kenyon & Eckhardt*, 867 F.Supp. 686, 690-691 (N.D.Ill.1994).

II. NAA's Motions *in Limine*

A. Contested Motions

Motions *in Limine* 1 and 3. NAA seeks to bar reference that it is not an Indian arts and crafts organization, and NAA employs two non-Native Americans. NAA also moves to bar reference that it is not listed in an Indian arts and crafts board source directory. In response, Waldron asserts the evidence is probative of NAA's lack of standing because NAA is not a "legally established Indian arts and crafts organization composed of members of Indian tribes."28 U.S.C. § 305e(d)(4). Waldron failed to plead an affirmative defense that NAA lacked standing because it was not a legally established Indian arts and crafts organization. Failure to plead an affirmative defense of lack of standing is a waiver of that defense. *LINC Finance Corp. v. Onwuteaka*, 129 F.3d 917, 922 (7th Cir.1997); *Bank Leumi LeIsrael v. Lee*, 928 F.2d 232, 235 (7th Cir.1991); Fed.R.Civ.P. 8(c). Consequently, Waldron cannot challenge NAA's status as an Indian arts and crafts organization. Motions *in limine* 1 and 3 are granted.

Motions *in Limine* 2 and 15. NAA moves to bar reference to NAA's prior litigation or investigations. Further, NAA moves to bar reference to the dates and locations when it videotaped retail stores where Waldron's products were sold. Waldron asserts NAA's pre-suit investigations are probative of when NAA knew or should have known Waldron's products were not Indian-made. In denying Waldron's motion for summary judgment, this court determined NAA raised a genuine dispute of fact about when NAA knew or should have known Waldron's products were not Indian-produced. *See* *Waldron Corp.*, 2002 WL 655683, at *3. NAA's pre-suit investigations are relevant to the statute of limitations issue. Motions 2 and 15 are denied.

***2** Motions *in Limine* 4, 11 and 16. NAA moves to bar reference to the identification of NAA's suppliers. NAA seeks to exclude reference to Waldron's donations to Intertribal Bison Cooperative. Further, NAA moves to bar reference to Bear Tracks' use of a disclaimer or statement about the authenticity of its products. These motions are vague and conclusory. NAA does not identify its suppliers, explain the Intertribal Bison Cooperative's function, or identify the relevant statements of authenticity. NAA fails to sufficiently explain the grounds for the exclusion of evidence. Accordingly, the court cannot determine the evidence is clearly inadmissible. Motions *in limine* 4, 11, and 16 are denied.

Motion *in Limine* 6. NAA moves to bar reference to Michael Mullen's testimony before the U.S. Senate Committee on Indian Affairs concerning NAA's prior investigations into purported IACA violations. Waldron asserts Mullen's testimony is relevant to establish when NAA should have reasonably known its products were purportedly violating the IACA. NAA did not provide the court with Mullen's Senate hearing testimony. Accordingly, the court cannot determine all references to Mullen's testimony are clearly inadmissible. Motion *in limine* 6 is denied.

Motion *in limine* 7. NAA moves to bar reference to the testimony of various retailers of Waldron products. NAA contends the retailers will testify they did not believe Waldron's products were authentic Indian goods. NAA contends the evidence is inadmissible hearsay. Waldron responds the retailers' testimony is not hearsay. NAA asserts Waldron named 17 individual retailers in a third supplemental Rule 26(a) disclosure after discovery closed on March 7, 2002. NAA does not identify the individuals retailers, attach the relevant Rule 26(a) disclosure, or identify the evidence it seeks to exclude. In response, Waldron argues the retailers were disclosed before March 7th. Waldron fails to provide support for that assertion. The court cannot rule on the admissibility of disputed evidence based on the parties' unsupported, conclusory assertions. Motion *in limine* 7 must be denied.

Motion *in limine* 9. NAA moves to bar reference to Sherry Baskin's opinion that NAA and Bear Tracks are competitors. NAA contends Baskin's testimony is inadmissible hearsay and opinion testimony. In response, Waldron asserts Baskin, Bears Tracks' general manager, will testify based on her personal knowledge. Accordingly, motion *in limine* 9 is denied.

Motion *in limine* 10. NAA seeks to bar reference to all Waldron product lines, except “Circle of Nations” and “Earthcharms” product lines. NAA asserts its claims involve the Circle of Nations and Earthcharms product lines only. In response, Waldron argues its marketing materials promote all Waldron product lines; those materials demonstrate it did not falsely suggest its products were Indian-made. NAA's motion is overbroad; granting the motion would exclude all Waldron's marketing materials. Waldron's marketing and advertising of its products are potentially probative of whether it offered products for sale that falsely suggested they were Indian-produced. Motion *in limine* 10 is denied.

B. Uncontested Motions

***3** The following motions *in limine* are granted as uncontested: motion *in limine* 5 to bar reference to the alleged inappropriateness of one Indian tribe from making products in the style or motif of another Indian tribe; motion *in limine* 8 to bar reference to Sherry Baskin's hearsay testimony about conversations with Bear Track's sales clerks; motion *in limine* 12 to bar reference to NAA's initial damages disclosure of $100,000,000; motion *in limine* 13 to bar reference to NAA's ability to bring a cause of action with the Ho-Chunk Nation or to bring other non-IACA claims; and motion *in limine* 14 to bar reference to NAA's filing of four separate actions that were consolidated in the present case.

C. Motion *in Limine* to Bar Evidence for Discovery Violations

NAA moves to bar evidence that Waldron's products are not falsely suggestive of being Indian-produced. NAA argues Waldron refused to respond to its discovery requests seeking various Waldron products and tags. Discovery closed on March 7, 2002. NAA did not move to compel the production of Waldron's products or tags pursuant to Fed.R.Civ.P. 37(a) before discovery closed. NAA failed to seek enforcement of its discovery rights. Accordingly, the motion *in limine* is denied. *See* *Nichols v. City of Chicago*, No. 89 C 3526, 1992 WL 92117, at *3 (N.D.Ill. Apr. 30, 1992) (denying motion *in limine* because moving party failed to comply with Fed.R.Civ.P. 37(a)).

D. Motion to Bar Reference to IACA's Statutory Damages Provision

NAA moves to bar reference to the IACA's damages provision. The IACA provides that a plaintiff may recover the greater of treble damages, or "not less than $1,000 for each day on which the offer or display for sale or sale continues."25 U.S.C. § 305e. NAA asserts the parties disagree about whether the court or the jury should determine damages. NAA asserts the court should grant its motion *in limine* if it determines bifurcation is warranted. Neither party has moved to bifurcate the trial on the issues of liability and damages. A motion *in limine* is an inappropriate procedural vehicle to address bifurcation of trial. NAA's motion must be denied.

E. Motion to Exclude Expert Testimony of Linda A. Olson

NAA moves to exclude Linda A. Olson's expert testimony. Olson opines on Waldron's designs, motifs, and use of Native American stories on jewelry and product tags. An expert's testimony must rest on reliable foundation and must be relevant to the task at hand. *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). The court must consider whether the testimony has been subjected to the scientific method, and whether it assists the trier of fact.Fed.R.Evid. 702; *Wintz v. Northrop Corp.*, 110 F.3d 508, 512 (7th Cir.1997). An expert may be qualified by "knowledge, skill, experience, training, or education."Fed.R.Evid. 702. Waldron bears the burden of establishing the admissibility of Olson's testimony. *Daubert*, 509 U.S. at 593.

***4** Olson holds a Bachelor of Science in art and Master of Arts and Master of Fine Arts degrees in ceramic sculpture. Olson has been an associate professor at Minot State University in North Dakota since 1990, and she is the art department's coordinator. Olson is a professional artist. She has given numerous presentations and exhibitions, and served on various commissions on North American rock art. Her expertise focuses on rock art, petroglyphs, and pictographs. Olson is a member of various rock art professional organizations. Her expert report opines that various Native American images and stories are widely used, and the images are no longer exclusively associated with Native Americans.

NAA advances only conclusory assertions that Olson is not qualified to testify on Native American motifs and designs. NAA fails to address Olson's qualifications. Indeed, Olson's resume presents qualifications that suggest she is skilled in Indian art, designs, and motifs because of her work in North American rock art. *See* Resp. Br., Ex. A, at p. 9-20; Ex. B, Olson Dep. at p. 54.Further, NAA must demonstrate Waldron's products are falsely suggestive of being Indian-made. Olson's testimony about Native American designs and motifs used in Waldron's tags and brochures would assist the trier of fact. Waldron's use of those Native American designs may rebut suggestiveness. NAA fails to demonstrate Olson's testimony should be excluded before trial, and the motion must be denied.

F. Motion to Exclude Brendan Burke's Expert Testimony

NAA moves to exclude Brendan Burke's expert testimony. Burke proffers rebuttal testimony on James T. Berger's expert opinions. Specifically, Burke opines Berger's estimate of $754.00 in actual damages is based on erroneous assumptions from unreliable sources. Burke further opines Berger's assumption that consumer spending on Native American products is evenly spread among the population of any given area is incorrect. Burke contends Berger's estimate of reputation damages is invalid because Berger fails to address the qualitative differences between NAA and Waldron products.

At the outset, NAA challenges Burke's qualifications. NAA asserts Burke conceded at his deposition he was not an expert witness. When Burke was asked when he became an expert, he answered: "I'm transitioning-I would say I'm still in the transition from becoming someone who helps support an expert to someone who does the testifying himself."Resp. Br., Ex. 2 at 31. NAA asserts Burke is not listed in his firm's website (Chicago Partners L.L.C.) as an expert witness. NAA's assertions lack merit. Burke's deposition testimony does not establish he is unqualified as a Fed.R.Evid. 702 expert witness. Nor does Burke's absence from a list of experts disqualify him as a Rule 702 witness. The relevant inquiry is whether Burke's opinions employ the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Kumho Tire Co. v. Carmichael,*

526 U.S. 137, 152 (1999).

***5** Burke holds a PhD in pure mathematics. He currently serves as a director for Chicago Partners, L.L.C., where he performs statistical analysis. Burke has taught mathematics and statistics as a visiting assistant professor at Loyola University. NAA fails to address Burke's relevant qualifications and experiences. Further, NAA contests Burke's conclusions. Burke employs the same methodology as Berger-a market share analysis to determine lost profits. NAA asserts Burke's criticism of Berger's assumptions is incorrect and without support. Dispute over Burke's conclusions is an appropriate subject for cross-examination. Consequently, NAA fails to demonstrate Berger's testimony should be excluded before trial and the motion must be denied.[FN1]

FN1. Burke offers rebuttal expert testimony on Dr. Thomas Watkins' opinions. As discussed below, Dr. Watkins' testimony is inadmissible. Thus, Burke's opinions on Dr. Watkins' testimony are irrelevant.

III. Waldron's Motions *in Limine*

A. Motions *in Limine*

Waldron moves *in limine* to bar substantial evidence at trial. Waldron's submission consists of 49 separate motions *in limine.*These motions are vague, conclusory, and overbroad. Waldron fails to state the basis for various motions *in limine.*Further, Waldron moves to bar evidence based on NAA's purported discovery violations. Waldron did not attempt to enforce its discovery rights pursuant to Fed.R.Civ.P. 37(a). Many motions *in limine* are incomprehensible because Waldron fails to sufficiently explain the evidence it seeks to exclude. *See e.g.* Motion *in Limine* 14 ("Any wholesale sale of Waldron's without proof of competition by NAA in the same wholesale market"). Motions *in limine* are disfavored. *Knowles Electronics, L.LC. v. Micotronics U.S., Inc.,* No. 99 C 4681, 2000 WL 310305, at *1 (N.D.Ill. Mar. 24, 2000). The court may exclude evidence in advance of trial only when the evidence is clearly inadmissible. *See Luce v. United States,* 469 U.S. 38, 41 n. 4 (1984). Waldron's motions *in limine* are unduly burdensome. The court will consider objections as they arise at trial. *See United States v. Connelly,* 874 F.2d 412, 416 (7th Cir.1989). Waldron's motions *in limine* are denied.

B. Motion To Exclude James T. Berger's Expert Testimony

Waldron moves to exclude James T. Berger's expert testimony. Berger opines on NAA's purported market share loss due to Waldron's sale of its products. NAA is a wholesaler and retailer of authentic Indian-made goods. NAA argues it was injured by a reduction in sales caused by Waldron's marketing of non-authentic Indian products as authentic. The IACA imposes strict liability for each IACA violation, regardless of Waldron's intent. *See Ho-Chunk Nation, Inc. v. Nature's Gifts, Inc.,* No. 98 C 3951, 1999 WL 169319, at *6 (N.D.Ill. Mar. 19, 1999); *Native American Arts v. Village Originals,* 25 F.Supp.2d 876, 881-82 (N.D.Ill.1998).

Loss of market share can be an appropriate method of assessing lost profits. *See BASF Corp. v. Old World Trading Co.,* 41 F.3d 1081, 1092-93 (7th Cir.1994). NAA asserts it suffered actual losses from a diversion of sales from NAA to Waldron. NAA seeks damages for lost profits based on an alleged loss of market share. *See BASF Corp.,* 41 F.3d at 1094 (permitting loss of market share damages in a Lanham Act action for false advertising); *Outboard Marine Corp. v. Babock Indus.,* No. 91 C 7247, 1995 WL 296963, at *1-2 (N.D.Ill. May 12, 1995) (loss of market share may be used to calculate lost profits). To establish lost profits based on market share analysis, NAA must establish causation-Waldron's sale of falsely suggestive products caused NAA to lose potential profits. *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.,* 754 F.2d 738, 746 (7th Cir.1985) (aggrieved party must demonstrate lost sales to recover for unrealized growth potential). Waldron asserts NAA cannot demonstrate causation. In response, NAA argues it will offer evidence that sales were diverted from NAA to Waldron. Thus, Waldron's motion is premature.

***6** Further, Waldron challenges Berger's assumptions and conclusions. Disputes between the parties' experts about assumptions and conclusions are appropriate grounds for exploration on direct and cross-examination. The weight and probative value of expert analyses are for the jury to determine. *Medcom Holding Co. v. Baxter Travenol Laboratories,* 106 F.3d 1388, 1400 (7th Cir.1997). Remarkably, neither

party submits Berger's expert report. Thus, the court cannot independently evaluate the parties' assertions. Accordingly, the motion to exclude Berger's expert testimony must be denied.

C. Motion to Exclude Dr. Thomas Watkins' Expert Testimony

Waldron moves to exclude Dr. Thomas A. Watkins' expert testimony. Dr. Watkins conducted a consumer survey to assess whether a select group of individuals believed Waldron's products were manufactured by Native Americans. Consumer surveys are generally admissible in Lanham Act actions, where the plaintiff must establish a likelihood of confusion between two trademarks. *Spraying Systems Co. v. Delavan, Inc.*, 975 F.2d 387, 394 (7th Cir.1992)."Survey evidence is the customary way of proving significant actual deception [.]" *First Health Group Corp. v. United Payors & United Providers, Inc.*, 95 F.Supp.2d 845, 848 (N.D.Ill.2000).

Under § 305e, NAA must demonstrate Waldron's products falsely suggested they were Indian-produced through its marketing, advertising, and sale of the goods. Dr. Watkins retained a random group of individuals, provided them a Waldron product, and asked: "Does the *product* and what's written on its card suggest to you that it's made by American Indians?."Resp. Br., Ex. A. at p. 4. (emphasis added). The IACA does not regulate artistic expression; it restricts the manner in which Waldron's products may be displayed, offered for sale, or sold to the public. Put another way, the IACA does not restrict Waldron's creation of goods in traditional Indian style and motif; the IACA is a truth-in-advertising law. *See Native American Arts, Inc. v. Bundy-Howard, Inc.*, 168 F.Supp.2d 905, 916 (N.D.Ill.2001). Dr. Watkin's consumer survey is flawed because it targets Waldron's products, not the manner in which the products are displayed and offered for sale.

In addition, Dr. Watkins' survey includes questions about Waldron's catalogues and product tags. Dr. Watkins asked the survey group: "Does what you read on the back of the card suggest that the product it accompanies is made by American Indians?"Resp. Br., Ex. A at p. 4. Dr. Watkins provided the participants with a Waldron catalogue and asked: "Do you think this page suggests that the products available in its catalog are made by American Indians?"*Id.* at p. 5.

Unlike trademark infringement actions, NAA does need not to establish consumer confusion between NAA's goods and Waldron's products to prove an IACA violation. *See e.g. Navistar Int'l Transp. Corp. v. Freightliner Corp.*, No. 96 C 6922, 1998 WL 911776 (N.D.Ill.Dec. 28, 1998). Thus, the survey evidence does not assist the trier of fact. Indeed, the questions posed to the survey participants are identical to the ultimate questions for the trier of fact. The jury must determine whether Waldron's tags and catalogues suggest Waldron's products are Indian-produced. Dr. Watkin's survey improperly encroaches on the jury's role to make factual determinations on the ultimate issue. The survey evidence would create unfair prejudice, confuse the issues, and mislead the jury. *See*Fed.R.Evid. 403; *United States v. Hall*, 93 F.3d 1337, 1342 (7th Cir.1996). Accordingly, the motion to exclude Dr. Watkins' testimony must be granted.

CONCLUSION

***7** NAA's motions *in limine* are granted in part and denied in part. Motions *in limine* 1, 3, 5, 8, 12, 13, 14 are granted; motions *in limine* 2, 4, 6, 7, 9-11, 15, 16 are denied. NAA's motions *in limine* to bar Waldron's assertions that its products are not falsely suggestive of being Indian-made; expert testimony of Linda A. Olson and Brendan Burke; and to bar reference to IACA's statutory damages provision are denied. Waldron's conclusory and unsupported forty-nine motions *in limine* are denied as unduly burdensome. Waldron's motion *in limine* to exclude James T. Berger's expert testimony is denied. Waldron's motion *in limine* to exclude Dr. Thomas Watkins' expert testimony is granted.

N.D.Ill.,2002.
Native American Arts v. Earthdweller, Ltd.
Not Reported in F.Supp.2d, 2002 WL 1173513 (N.D.Ill.)

END OF DOCUMENT

TAB 27

HOnly the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
David J. OATES Plaintiff,
v.
Alison MOORE and Turner Home Satellite, Inc., Defendants.
No. 98 C 772.

Sept. 27, 1999.

MEMORANDUM OPINION AND ORDER

PLUNKETT, Senior J.
***1** Before the Court is a Report and Recommendation ("R & R") from Magistrate Judge Keys recommending that the attorney's lien filed with plaintiff's insurance company by his former counsel Susan E. Loggans & Associates ("the Loggans firm" or "the firm") be declared null and void. The Loggans firm filed a timely objection [FN1] to the R & R arguing that the firm was constructively terminated by plaintiff and was, therefore, entitled to recover its fees. Because we have the benefit of a factual presentation from the Loggans firm that the Magistrate Judge did not, we reject the factual findings in the R & R that vary from those set forth below, but adopt the remainder of the R & R in its entirety.

> FN1. Because the Loggans firm was not served with a notice of the R & R, it filed a motion for reconsideration with Magistrate Judge Keys. Though the Magistrate Judge denied that motion, because of the notice problem we have, as he suggested, treated the motion for reconsideration as a timely objection to the R & R.

The Legal Standard

Under Federal Rule of Civil Procedure ("Rule") 72(a), which governs our review of a Magistrate Judge's rulings on non-dispositive motions, we must "modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law."Fed.R.Civ.P. 72(a)."The clear error standard means that the district court can overturn the magistrate judge's ruling only if the district court is left with the definite and firm conviction that a mistake has been made." *Weeks v. Samsung Heavy Indus. Co., Ltd.*, 126 F.3d 926, 943 (7th Cir.1997).

Facts

On May 16, 1997, plaintiff signed a contract with the Loggans firm's predecessor for legal services to be rendered in connection with this personal injury suit. (Oates Aff., Ex. A.) In relevant part, the contract provides:

It is agreed that LOGGANS and COX will be paid attorneys fees as follows:

Thirty-Three and one-third (33-1/3%) of whatever may be recovered from said claim by settlement or trial....

Any decision as to settlement of the case is mine alone and no settlement shall be made without my consent. Should the attorney recommend acceptance of an offer of settlement and I refuse to accept such offer, then LOGGANS and COX has the right to either require that they be reimbursed for all outstanding case expense and advanced any further funds needed for trial or to withdraw from representation in this matter.... Should I elect to terminate the services of LOGGANS and COX, I agree their compensation shall be one-third of any then existing offers or be merit on an hourly basis whichever is greater.

(*Id.*) Shortly thereafter, the Loggans firm filed a complaint on plaintiff's behalf in state court, which defendants removed to this Court. (*See* Pet. Removal.) In January 1998, the Loggans firm filed a notice of attorney's lien with plaintiff's insurance company. (Oates Aff., Ex. J.)

Apparently, plaintiff was satisfied with the representation he received until Ian Alexander was assigned to his case in January 1998. Though the Loggans firm disputes his claims, plaintiff contends that Alexander was pushy, ignored plaintiff's wishes and threatened him with litigation if he did not settle the suit. On

June 23, 1998, these problems, real or perceived, prompted plaintiff's brother to write the following in a letter to the Loggans firm:

***2** The client, David Oates, has indicated that he does not wish to be represented by Ian Alexander. He has been pleased with Mr. George Vournazos, and has no difficulty with Mr. Vournazos continuing on the case....

In conclusion, the client, David Oates, does not want to be represented by Ian Alexander. Continued representation by Mr. George Vournazos is acceptable with David Oates. If this would cause your firm undue difficulty, then provide the appropriate notices to the client and withdraw. The client will then decide whether to seek new counsel or dismiss the case.

(Oates Aff., Ex. D.)

It is not clear what response, if any, the Loggans firm made to the June 23, 1998 letter. However, on July 1, 1998, plaintiff personally wrote to the firm. In pertinent part, that letter states:

I will reiterate once again that I have not terminated representation. I have merely requested that the matter be returned to the prior attorney who was handling it, and that the case be prepared and postured to maximize settlement....

If Mr. Alexander decides to withdraw on behalf of Loggans & Associates, I would remind you that a large portion of the materials in the file were gathered and provided by myself. If there is a withdrawal, I will expect return of my materials. I have not terminated representation, but do expect that the case will be properly prepared and presented.

(Oates Aff., Ex. E.)

On July 9, 1998, the Loggans firm, through Ian Alexander, replied to plaintiff's letter. After addressing the complaints voiced by plaintiff, Alexander concluded the letter by saying:

I appreciate and understand your decision to decline the $30,000 .00 settlement offer at this time.... Please be advised that in light of your posture in this matter, we no longer wish to represent you and will be withdrawing from the case.... Please contact my office to arrange for the transfer of your file.... In regards to those materials that we have gathered on your behalf, we will require that you remit the amount of the case expense expended by this office before we would turn over the file.

(Oates Aff., Ex. F1.) The Loggans firm filed its motion to withdraw the same day.

Discussion

As the Magistrate Judge correctly noted, the Loggans firm's asserted lien is only valid if plaintiff owes fees to the firm. *See*770 ILL. COMP. STAT. 5/1 ("Attorneys at law shall have a lien ... for the amount of any fee which may have been agreed upon by and between such attorneys and their clients...."). According to their contract, plaintiff is required to pay the firm the greater of "one-third of any then existing [settlement] offers" or its fees determined on an hourly basis if he chooses to terminate the relationship. (Oates Aff., Ex. A.) If, however, the firm withdraws from representing him, plaintiff owes it no fees at all. (*Id.*)

The record fully supports Magistrate Judge Keys' conclusion that the firm was not terminated by plaintiff, but voluntarily chose to withdraw. In the last written communication the firm received from plaintiff, he repeatedly stated that though he was unhappy with the current handling of his case, he was not terminating his relationship with the firm. (*See* Oates Aff., Ex. E.) Eight days later, on July 9, 1998, Alexander wrote to plaintiff, saying: "I appreciate and understand your decision to decline the $30,000 settlement offer at this time.... Please be advised that in light of your posture in this matter, we no longer wish to represent you and will be withdrawing from the case."(Oates Aff., Ex. F1.) The July 9, 1998 letter states quite clearly that the firm was withdrawing because plaintiff rejected its settlement recommendation, not, as it now asserts, because plaintiff accused Alexander of unprofessional behavior or because he requested that Vournazos be reassigned to his case. (Resp. Pet. Determination Lien ¶¶ 14, 16J.) Indeed, the letter made no suggestion that Oates remained liable for attorneys' fees, instead it requested only "expense expended" by the office. Because the firm chose to withdraw from representing plaintiff, there is, as the Magistrate Judge found, "no existing contractual debt." (R & R at 8.) In the absence of a debt,

the Loggans firm's lien is null and void.

Conclusion

***3** The Court adopts the Report and Recommendation of Magistrate Judge Keys, with the factual modifications noted above, and finds that the attorney's lien dated January 23, 1998 filed by Susan E. Loggans & Associates, P.C. with plaintiff's insurance company is null and void.

N.D.Ill.,1999.
Oates v. Moore
Not Reported in F.Supp.2d, 1999 WL 782068 (N.D.Ill.)

END OF DOCUMENT

TAB 28

H

United States District Court, N.D. Illinois, Eastern Division.
Thomas G. ONG for Thomas G. Ong Ira and Thomas G. Ong, individually and on behalf of all others similarly situated, Plaintiffs,
v.
SEARS, ROEBUCK & CO., Sears, Roebuck Acceptance Corp., Alan Lacy, Paul J. Liska, Glenn R. Richter, Kevin T. Keleghan, K.R. Vishwanath, Keith E. Trost, George F. Slook, Larry R. Raymond, Thomas E. Bergmann, Credit Suisse First Boston, Goldman, Sachs & Co., Morgan Stanley, Bear, Stearns & Co., Inc., Lehman Brothers and Merrill Lynch & Co., Inc., Defendants.
No. 03 C 4142.

Sept. 14, 2005.

Carol V. Gilden, Christopher James Stuart, Much, Shelist, Freed, Denenberg, Ament & Rubenstein, P.C., Chicago, IL, for Plaintiffs.
Jeffery S. Davis, John Claiborne Koski, Christopher Qualley King, Harold C. Hirshman, Sonnenschein, Nath & Rosenthal LLP, Chicago, IL, for Defendants.

MEMORANDUM OPINION AND ORDER

PALLMEYER, J.
***1** Plaintiffs Thomas G. Ong, Thomas G. Ong IRA, and State Universities Retirement System of Illinois ("State Universities") bring this federal securities class action lawsuit on behalf of (1) all those who purchased, pursuant to a prospectus, securities issued by defendant Sears, Roebuck Acceptance Corp. ("SRAC"). a wholly-owned subsidiary of Defendant Sears, Roebuck & Co. ("Sears"), between October 24, 2001 and October 17, 2002 (the "Class Period"), in any of three debt securities offerings dated March 18, May 21, and June 21, 2002, and (2) all those who, during the Class Period, purchased publicly traded securities issued by SRAC before the Class Period and actively traded them through the public markets and over national securities exchanges.

Sears is one of North America's largest general retailers. In addition to its retail division, Sears provides financing to its customers through private label credit cards and installment plans. SRAC's principal business is purchasing Sears' short-term notes and account receivable balances, which it finances through public sates of SRAC Notes. Defendants Alan Lacy, Glenn R. Richter, Paul J. Liska, Keith E. Trost, George F. Slook, Larry R. Raymond, Thomas E. Bergmann, Kevin T. Keleghan, and K.R. Vishwanath were all officers or directors of Sears, SRAC, or both. Defendants Credit Suisse First Boston Corporation ("CSFB"), Goldman, Sachs & Co. ("Goldman Sachs"), Morgan Stanley & Co., Inc. ("Morgan Stanley"), Bear, Stearns & Co., Inc. ("Bear Stearns"), Lehman Brothers Inc. ("Lehman Brothers"), and Merrill Lynch & Co., Inc. ("Merrill Lynch") were all underwriters of the three SRAC debt securities offerings at issue in this case.

Plaintiffs allege that Sears manipulated information regarding its credit card operations to make those operations appear "more stable and profitable than they actually were," which artificially inflated the market value of SRAC debt securities. Specifically, Sears misrepresented its reliance on subprime creditors; selectively reported delinquency and charge-off rates; and disguised portfolio losses in order to generate high levels of reported receivables that Sears knew would prove uncollectible. Plaintiffs claim that Defendants all made materially false and misleading statements or omissions in connection with Sears' credit card operations in violation of §§ 11. 12(a)(2), and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77l(a)(2), and 77o; and §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 ("SEA"), 15 U.S.C. § 78j(b) and 78t(a), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5.

On September 27, 2004, this court granted in part and denied in part Defendants' four separate motions to dismiss Plaintiffs' October 16, 2003 Amended Class Action Complaint. *Ong ex rel. Ong IRA*, 388 F.Supp.2d 871, 2004 WL 2534615 (N.D.Ill. Sept.27, 2004). In response. Plaintiffs filed a Second Amended Class Action Complaint ("SAC"), adding a variety of new allegations and a new plaintiff, State Universities. Defendants, with the exception of Merrill Lynch,[FN1] insist that the changes to the SAC are not sufficient to remedy the flaws identified by

the court, and seek dismissal of Counts Two, Four, Five, Seven, Eight, and Nine. For the reasons stated here, the motions are granted in part and denied in part.

FN1. Merrill Lynch filed its answer and affirmative defenses to the SAC on January 28, 2005.

BACKGROUND

***2** The extensive procedural and factual background of this case is set forth in this court's September 27, 2004 Memorandum Opinion and Order. *See Ong*, 2004 WL 2534615, at *2-15. The SAC largely repeats the allegations from the prior Complaint, as reflected below. This opinion assumes the reader's familiarity with the earlier decision and attempts to recite relevant facts only as necessary to resolve Defendants' current motions to dismiss.

Sears is one of the largest general retailers in North America. As part of its operations, Sears provides financing to customers through private label credit cards and installment plans. SRAC, Sears' wholly-owned subsidiary, is primarily in the business of purchasing short-term notes or receivable balances from Sears. SRAC funds these purchases by issuing debt securities such as commercial paper, medium term notes, and "other borrowings" (collectively, "SRAC Debt Securities") to the public. (SAC ¶¶ 12, 13, 46, 47.) [FN2]Three SRAC Debt Securities offerings are at issue in this case: (1) $600 million of 6.70% notes due April 15, 2012, offered pursuant to an Indenture dated May 15, 1995 (the "Indenture"), a Registration Statement and accompanying Prospectus dated September 3, 1998 (the "Registration Statement"), and a Prospectus and Prospectus Supplement dated March 18, 2002 (the "3/18/02 Offering"); (2) $1 billion of 7.0% notes due June 1, 2032, offered pursuant to the Indenture, the Registration Statement, and a Prospectus and Prospectus Supplement dated May 21, 2002 (the "5/21/02 Offering"); and (3) $250 million of 7.0% notes due July 15, 2042, offered pursuant to the Indenture, the Registration Statement, and a Prospectus and Prospectus Supplement dated June 21, 2002 (the "6/21/02 Offering").(*Id.* ¶ 2.) Plaintiffs all allegedly purchased SRAC Debt Securities during the Class Period. (*Id.* ¶¶ 9-11.)

FN2. Plaintiffs' Second Amended Class Action Complaint for Violations of Federal Securities Laws is cited as "SAC ¶ __."

Mr. Lacy was Sears' Chief Executive Officer, President, and Chairman of the Board throughout the Class Period. Mr. Richter has been Sears' Chief Financial Officer since October 4, 2002 and also served as Sears' Senior Vice President, Finance prior to that date. Mr. Liska was Sears' Chief Financial Officer until Mr. Richter took over in October 2002. He also served as a director of SRAC. Mr. Trost was the President of SRAC as well as a director of the company. Mr. Slook, also a director of SRAC, was SRAC's Vice President of Finance. Mr. Raymond served as a director of SRAC, as did Mr. Bergmann, who was also Chief Accounting Officer and Controller of Sears. Mr. Keleghan was President of Sears' Credit and Financial Products segment and "an Executive Vice President from the start of the Class Period until October 4, 2002, when he was forced to resign ."Mr. Vishwanath was Sears' Vice President of Risk Management until the company terminated his employment on October 16, 2002. (*Id.* ¶¶ 14-22.)

CSFB, Goldman Sachs, Morgan Stanley, Bear Stearns, Lehman Brothers, and Merrill Lynch are all integrated financial services institutions that provide securities, investment management, and credit services to corporations, governments, financial institutions, and individuals. CSFB and Goldman Sachs were joint "book runners"-i.e., managing underwriters-for the 3/18/02 Offering of SRAC Debt Securities. Morgan Stanley, Bear Stearns, and Lehman Brothers were all joint lead managers for the 5/21/02 Offering. Morgan Stanley was also the book runner for that offering. Merrill Lynch was the book runner for the 6/21/02 Offering. (*Id.* ¶¶ 33-38.)

A. The Relationship Between Sears and SRAC

***3** SRAC's operating income is generated primarily from the earnings on its investments in Sears' short-term notes and account receivables. In addition, Sears determined the amount of SRAC's earnings by requiring SRAC to maintain a set ratio of earnings to fixed expenses. Plaintiffs allege that, "[a]s a result, the yield on SRAC's investment in Sears notes is directly related to SRAC's borrowing costs, i.e., the yield under which SRAC can issue and sell its Debt Securities."It is in Sears' financial interest to keep SRAC's borrowing costs as low as possible because the less

SRAC pays purchasers of its Debt Securities, the less Sears must pay to borrow from SRAC. (*Id.* ¶ 48.)

Given the inter-relationship between Sears and SRAC, "industry analysts and the rest of the market looked to the finances, financial condition and present and future operations of Sears when assessing the investment prospects for SRAC Debt Securities."(*Id* . ¶ 49.)When industry analysts viewed Sears favorably, SRAC was viewed favorably as well; when Sears experienced a downward change in its financial condition, SRAC's financial condition suffered as well. (*Id.* ¶¶ 49-54.)According to Plaintiffs, "the intertwining of the finances and operations of SRAC and Sears cause the SRAC Debt Securities to take on the status of a direct investment with Sears itself."(*Id.* ¶ 56.)

B. Sears' Credit Problems

For many years, Sears was one of the largest credit card issuers in the country. (*Id.* ¶ 62.)Prior to 1993, Sears stores accepted only Sears' own proprietary credit cards ("Sears Cards") and those cards could only be used to make purchases at Sears. (*Id* . ¶ 63.)When Sears began accepting general credit cards in 1993, the company saw a drastic decrease in the use of its Sears Cards; by mid-2000, 24 million of the 60 million Sears Cards were either inactive or carried a zero balance. (*Id.*) At the same time, Sears' retail sales were also in decline due to increased competition from discount retailers like Wal-Mart and Kohl's. (*Id.* ¶ 64.)

In late 2000, Sears began to issue a Sears MasterCard, a general purpose credit card that could be used wherever MasterCard was accepted. The cards carried higher lines of credit and generated fee income for Sears when used at non-Sears locations. Sears hoped that the Sears MasterCard would "stimulate sales and help regain income Sears had lost in recent years due to the decline of its proprietary cards."(*Id.* ¶ 66.)In November 2000, Mr. Lacy, who had been named President and CEO of Sears just a month earlier, identified the Sears MasterCard as a top area for growth within the company. (*Id.* ¶¶ 65, 67.)

By February 2001, the Sears MasterCard carried $1.4 billion in receivables and Sears, through its subsidiary Sears National Bank, had become one of the top 25 bank card issuers. A February 15, 2001 article in *American Banker* reported that Mr. Keleghan, President of Sears Credit, had described Sears MasterCard users as "a very pristine group, almost too pristine.... We don't expect significant delinquencies since we're starting out with a low-risk group."(*Id.* ¶ 69.)Sears' retail segment continued to decline over the next several months, but Mr. Lacy asserted at an April 19, 2001 analysts presentation that Sears' credit segment had "a strong portfolio quality overall" and was "a great business" and "strategically very important" to Sears. (*Id.* ¶¶ 70, 71.)

***4** Despite these representations, Sears credit operations actually suffered from several weaknesses and problems which were hidden from the market. Those weaknesses, described below, ultimately led to an announcement that Sears planned to sell the credit business. (*Id.* ¶ 73.)

1. Reliance on Subprime Creditors

During the Class Period, Sears aggressively marketed its credit cards, particularly the Sears MasterCard, to "create the appearance of a growing, profitable loan portfolio."(*Id.* ¶ 74.)To that end, Sears intentionally lowered its acceptable credit profile so that more consumers would qualify for credit cards, and adopted aggressive marketing strategies designed to appeal to low-income or unstable borrowers. Sears also offered multiple credit cards and increased credit limits to customers who did not qualify for such benefits.(*Id.*) At the beginning of the Class Period, approximately 54% of Sears' credit portfolio consisted of subprime borrowers, compared with a United States industry average of 36.6%. By the end of the Class Period, the portfolio was still nearly half subprime. (*Id.* ¶¶ 75, 76.)

2. Selective Reporting Techniques

In addition to targeting subprime creditors, Sears misleadingly reported the charge-off and delinquency rates [FN3] of its credit cards on a portfolio-wide basis rather than separating out the performances of the Sears Card and the Sears MasterCard. The Sears MasterCard had higher credit limits than those traditionally offered under the Sears Card, as well as lower delinquency and charge-off rates. According to the Plaintiffs, "[t]hese factors, when combined with the dramatic increases in MasterCard receivables, declining Sears proprietary card receivables, [and]

the fact that the Sears proprietary card portfolio was much larger than the new MasterCard portfolio, created an interesting phenomenon during the Class Period ."Specifically, though both portfolios were separately experiencing a "striking rise in delinquencies and charge-offs every quarter," the combined portfolios reflected delinquencies and charge-offs that were relatively stable "because the Sears Card receivables overweighted the average of the two groups."(*Id.* ¶¶ 78-80.)

> FN3. Charge-offs are write-offs taken on uncollectible credit card receivables. *See In re Sears, Roebuck and Co. Sec. Litig.*, 291 F.Supp.2d 722, 724 n. 2 (N.D.Ill.2003). Delinquency rates describe the number of credit card receivables that are past due relative to all outstanding loans.

3. Disguised Losses

Plaintiffs allege that Sears also engaged in practices designed to disguise losses to its credit portfolio. Sears National Bank, which Sears created in 1995, is not subject to the same rules and regulatory oversight as ordinary bank card issuers.[FN4]Thus, Sears was able to adopt more lenient credit policies than its competitors. (*Id.* ¶ 82.)For example, Sears charged-off delinquent credit card loans after 240 days compared with 180 days by competitors. (*Id.* ¶ 82(a).) Sears also deferred charge-offs by relying on generous "renewal" policies, such as offering to make a delinquent account "current" if a customer made a single, minimum payment, and then closing the account and implementing an installment plan to collect the balance due. In addition, Sears "cured" or "re-aged" delinquent accounts (i.e., converted them to current status) after receiving only two consecutive minimum payments; federal regulations require three consecutive minimum payments prior to re-aging. (*Id.* ¶ 82(b)-(c).)

> FN4. The Complaint does not explain why Sears National Bank is not subject to federal regulation and oversight. Nor does it describe the Bank's specific role with respect to Sears, though presumably it was the institution that issued the Sears credit cards.

***5** Sears also adopted promotional programs, such as zero percent financing, that allowed cardholders to minimize or avoid payments for periods of up to a year. This made it "difficult, or even impossible, for cardholders to fall behind in their payments and allowed Sears to delay reporting such accounts as delinquent."(*Id.* ¶ 82(d).) In addition, Sears repeatedly lowered the required minimum monthly payments, which allowed individuals with poor credit histories to purchase higher priced items on more extended payment schedules. This practice increased Sears' income from finance charges but also increased its exposure to bad debt. (*Id.* ¶ 82(e).) Finally, though it is industry practice to report delinquencies after 30 days, Sears did not report them until after 60 days. (*Id.* ¶ 82(f).) According to Plaintiffs, these policies misled investors as to the true quality of Sears' credit portfolio. (*Id.* ¶ 83.)

4. Fraudulent Billings

A final practice that served to weaken Sears' credit portfolio was fraudulent billings on customer accounts. Sears strongly encouraged its employees to induce customers to purchase additional services, including life insurance, credit protection, and extended warranties, whenever they bought a Sears product. "The incentives to make such sales were so strong that it became a regular practice for salespersons to put such items on customers' accounts without their knowledge or consent."(*Id.* ¶ 84.)This, in turn, "helped drive up the high levels of reported receivables that Sears knew to be uncollectible."(*Id.*)

C. False and Misleading Statements

Plaintiffs allege that Defendants issued numerous false and misleading statements to deceive the investing public into believing that Sears' credit operations were "far better, more successful and profitable, than was actually the case."(*Id.* ¶ 85.)*See Ong*, 2004 WL 2534615, at *5-12. For purposes of the pending motions to dismiss, there is no dispute that Plaintiffs have sufficiently alleged that the relevant Defendants made false and misleading statements and, thus, the court will not repeat them here.

The court notes generally, however, Plaintiffs' allegations that between the third quarter of 2001 and the second quarter of 2002, Defendants issued SEC Form 8-Ks and Form 10-Qs reflecting "strong" and "stable" credit portfolio quality. (*Id.* ¶¶ 72, 104.)In truth, the Sears Card and Sears MasterCard portfolios were

excessively weighted towards the subprime market and, when viewed separately, each reflected rising delinquency and charge-off rates.(*Id.* ¶¶ 77, 80, 104, 110, 145, 174-75.)Nevertheless, Defendants made statements at analysts meetings, in press releases, and during investor conference calls confirming the stable and pristine quality of the portfolios and projecting significant increases in earnings each year. Indeed, by July 18, 2002, a Sears press release quoted Mr. Lacy as saying that Sears expected a 22% increase in full year comparable earnings. (*See generally* *id.* ¶¶ 86-158); *Ong*, 2004 WL 2534615, at *5-12.

D. Sears Reveals Its Credit Problems

***6** Plaintiffs allege that the true state of Sears' credit portfolios finally began to emerge in October 2002. On October 4, 2002, Sears issued a press release abruptly announcing that Mr. Liska had replaced Mr. Keleghan as Sears' Executive Vice President and President of Credit and Financial Products. On October 7, 2002, Sears issued a press release reaffirming its July 18, 2002 projection of a 22% increase in comparable earnings per share, but stating that: "The company now expects comparable earnings increases ... in the mid-single digit percent range in its credit and financial products segment."(*Id.* ¶¶ 159-62.)This represented a significant decrease from earlier projections; as of July 18, 2002, Sears had projected credit segment growth "in the low double digits." Sears' stock started to trade down in response to the revised projections. (*Id.* ¶ 162.)

Later that day, Mr. Lacy spoke to investors during a conference call and "reaffirm[ed]" Sears' projection of a 22% increase in earnings per share. With respect to Mr. Keleghan, Mr. Lacy explained that "Kevin left the company at my request, because I lost confidence in his personal credibility.... His departure is not related to business performance and does not indicate a change in our credit strategy."(*Id.* ¶¶ 163-65.)Financial services firm W.R. Hambrecht issued a report commenting on Mr. Keleghan's departure as follows: "[W]e got incrementally bad news.... CEO Lacy stated that he asked Keleghan to leave because he had lost confidence in Keleghan's personal credibility. We don't know what that means, exactly, but we believe it bodes poorly for Sears Credit operations which represent approximately 65% of operating profit and creates even greater uncertainty about the quality of earnings at the credit division."(*Id.* ¶ 168.)By the close of business on October 7, 2002, the price of Sears stock had fallen from $37.64 to $32.25. (*Id.* ¶ 166.)The price of SRAC Debt Securities issued pursuant to the 6/21/02 Offering also fell from $24.81 per share on October 8, 2002 to $21.91 per share on October 10, 2002. (*Id.* ¶ 167.)

On October 17, 2002, Sears issued a press release announcing that it would be increasing its allowance for bad debt by $222 million. The charge against earnings required to cover this increase reduced Sears' earnings for the quarter by 26% as compared to the prior year. Despite having ten days earlier projected a 22% increase in earnings per share that year, Sears now estimated earnings per share would increase only 15%. (*Id.* ¶ 171.)In an analysts meeting conducted by conference call that day, Mr. Lacy attributed Sears' problems in its credit business to the duplicity of Mr. Keleghan and Mr. Vishwanath:

> [I]t became clear to me that Kevin [Keleghan] was not being forthcoming about these issues that this business was facing ... and had become a barrier to getting an objective situation assessment as to what was happening in our business and I terminated him for basically my personal loss of confidence in him relative to his personal credibility ... You should also know that during the course of our analysis we determined that the VP of Risk Management and Credit [Mr. Vishwanath] had also withheld information and had led us to terminate his employment effective yesterday.

***7** (*Id.* ¶ 172.)

When Mr. Liska took over the conference call, he admitted that "[o]ne of the disclosures that [we] make today centers around a portion of our portfolio that is Middle American. A large portion of the proprietary card, our proprietary card portfolio is Middle America."(*Id.* ¶ 173.)In an analysts meeting a year earlier, Mr. Keleghan had explained, "we try to target the middle market," distinguishing that group from the "subprime" market; in this October 2002 meeting, in contrast, Mr. Liska refers to "Middle America" as another way of saying "subprime": "It is generally recognized that [M]iddle America accounts deteriorate more quickly in a tough economy than prime accounts do."Though he suggested that the proportion of Sears borrowers that were subprime was declining, Mr. Liska acknowledged that Sears' credit

portfolio had been heavily subprime for years: "In 1998 Middle America balances represent[ed] 60% of our portfolio. They represent 48% today. Last year the segment represented 54% of our portfolio."(*Id.* ¶ 174)

In response to Sears' disclosures, W.R. Hambrecht reported that Sears' "shocking 26% decrease in earnings ... stunned the Street and all in attendance" at the analysts meeting. "Frankly, it was the realization of our worst-case scenario regarding the state of the company's credit operations, which represent more than 60% of Sears' operating profit."(*Id.* ¶ 176.)Indeed, the price of Sears stock fell $10.80 per share (approximately 32%) to close at $23.15 on October 17, 2002, and there was "extraordinary trading volume" that day of 36 million shares, 12 times greater than Sears' daily trading average of 2.9 million shares during the Class Period. SRAC Debt Securities also fell 8.6% from $24.05 per share on October 16, 2002 to $21.99 per share on October 17, 2002, "on trading of 153,600 Notes, six times the daily trading average of 25,000 shares."(*Id.* ¶¶ 177, 178.)Shortly before the end of the Class Period, SRAC had announced its intention to offer approximately $800 million of three-year SRAC Debt Securities at an interest rate of 13 to 14 basis points above the one-month London Interbank Offered Rate ("Libor").[FN5](*Id.* ¶¶ 53, 179.)After the October 2002 announcements, however, the debt securities were priced at 38 points above Libor. (*Id.* ¶ 180.)

> FN5. Libor represents the rate banks charge each other for short-term Eurodollar loans. Libor is "frequently used as the base for resetting rates on floating-rate securities." http://www.pncadvisors.com/investments/view/1,1419,Glossary,00.html.

On November 12, 2002, Sears filed its Form 10-Q for the third quarter of 2002. In that report, Sears for the first time revealed to investors how the Sears MasterCard and Sears Card portfolios had both been deteriorating during the Class Period. Sears explained that "[b]ecause the MasterCard portfolio has a lower delinquency rate than the Sears Card, the growth in the MasterCard portfolio coupled with the decline in the Sears Card portfolio led to an improvement in the total portfolio delinquency rate as compared to the third quarter of 2001."Sears also stated that it "charges off accounts at 240 days where[as] most bankcard issuers charge off at 180 days. Therefore Sears' delinquency rate is not directly comparable to participants of the bankcard industry."(*Id.* ¶¶ 182, 183.)With respect to its re-aging policies, Sears disclosed that

> ***8** [t]he Company's current credit processing system charges off an account automatically when a customer's number of missed monthly payments reaches eight, except that accounts can be re-aged once per year when a customer makes two consecutive monthly payments. Also, accounts may be charged off sooner in the event of customer bankruptcy. Finance charge and credit card fee revenue is recorded until an account is charged off at which point the charged off balances are presented as a reduction of revenue.

(*Id.* ¶ 184.)

An article on *The Street.com* reported that this new data "shows deep deterioration in the MasterCard portfolio. A back-of-the-envelope calculation suggests that, if this rot continues, the company may have to make loan provisions in 2003 that could wipe out a large part of the earnings analysts currently forecast."(*Id.* ¶ 186.)On November 20, 2002, Bear Steams described Sears' "aggressive write-off policy" as a "key concern," and expressed "uneas [e]" as to whether Sears had "adequately accounted for the potential level of charge-offs."[FN6](*Id.* ¶ 187.)

> FN6. The Complaint does not identify the format of this report.

On January 16, 2003, Sears issued a press release announcing that it was adding another $150 million to its reserves for uncollectible accounts, in part due to "increases in the net charge-off rate and delinquencies."(*Id.* ¶ 188.)On February 28, 2003, S & P downgraded its rating on Sears, no longer deeming the company to be A-list. On March 12, 2003, Sears filed its 2002 Form 10-K repeating the delinquency and charge-off information contained in the third quarter 2002 SEC filings. (*Id.* ¶¶ 189, 190.)For the first time in a Form 10-K, Sears acknowledged, as it had in the Form 10-Q for the third quarter of 2002, that "the Company contractually charges off accounts at 240 days, whereas most bank card issuers charge off at 180 days. As a result, Sears' delinquency rates

are not directly comparable to participants in the bank card industry."(*Id.* ¶ 191.)

At its height, Sears' credit represented almost 70% of Sears' earnings and by 2003, Sears had become the third largest issuer of MasterCard. On March 26, 2003, however, Sears announced that it would be selling all of its credit operations "in an attempt to create value for all investors and focus on its profitable core retail and related services business."(*Id.* ¶ 192.)A number of lawsuits followed. *See, e.g.,* *In re Sears, Roebuck & Co. Sec. Litig.*, 291 F.Supp.2d 722 (N.D.Ill.2003) (securities action filed on behalf of all persons "who purchased securities of defendant Sears, Roebuck & Co. ('Sears') between October 24, 2001 and October 17, 2002 ('class period')."); *In re Sears, Roebuck & Co. ERISA Litig.*, No. 02 C 8324, 2004 WL 407007 (N.D.Ill. Mar.3, 2004) (ERISA action filed on behalf of participants in a Sears 401(k) Savings Plan).

E. This Lawsuit

On June 17, 2003, Plaintiffs Thomas G. Ong and Thomas G. Ong IRA filed suit against Sears, SRAC, Mr. Lacy, Mr. Liska, Mr. Richter, and Mr. Bergmann, alleging violations of federal securities laws in connection with the 6/21/02 Offering of SRAC's Debt Securities. Shortly thereafter on August 27, 2003, the court appointed Plaintiffs Lead Plaintiffs pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 780-4, *et seq.* Plaintiffs amended the Complaint on October 16, 2003, adding Mr. Keleghan, Mr. Vishwanath, Mr. Trost, Mr. Slook, Mr. Raymond, and all the underwriter Defendants as Defendants.

1. The September 27, 2004 Opinion

***9** In January 2004, Defendants filed four separate motions to dismiss the amended Complaint, variously arguing that Plaintiffs lacked standing to pursue claims relating to the 3/18/02 and 5/21/02 Offerings; the Complaint failed to identify any false and misleading statements attributable to them; Plaintiffs failed to allege *scienter,* and there was no basis for control person liability under § 15 of the Securities Act or § 20(a) of the SEA.

The court first held that Plaintiffs did not have standing to pursue their §§ 11 and 12(a)(2) Securities Act claims against the underwriter Defendants involved in the 3/18/02 and 5/21/02 SRAC Debt Securities Offerings because Plaintiffs Ong and the Ong IRA purchased securities only in the 6/21/02 Offering. *Ong,* 2004 WL 2534615, at *18. The court declined, however, to dismiss Merrill Lynch, the sole underwriter Defendant involved in the 6/21/02 Offering, finding sufficient allegations that the company had made false and misleading statements in the Registration Statement and Prospectuses. *Id.* at *18-21.

The court next addressed Plaintiffs' claim that Sears, SRAC, and all of the individual Defendants had violated § 10(b) of the Securities Exchange Act and SEC Rule 10b-5 by misrepresenting the financial performance of Sears' credit operations. With respect to the "Sears Defendants" (including Sears, SRAC, Mr. Lacy, Mr. Liska, Mr. Richter, Mr. Trost, Mr. Slook, Mr. Raymond, and Mr. Bergman), the court agreed that Plaintiffs did not have standing to redress allegedly misleading statements made after Plaintiffs purchased their securities on June 21, 2002. *Id.* at *22-23. Plaintiffs adequately alleged that the Sears Defendants made false and misleading statements prior to that date relating to loan loss reserves, subprime lending, underwriting standards, and delinquencies and charge-offs. *Id.* at "23-25. Plaintiffs did not, however, allege false statements based on comparisons to other subprime lenders, such as Capital One and Discover. *Id.* at *26-27.

Nor did Plaintiffs allege facts giving rise to a strong inference that all of the Sears Defendants acted with fraudulent intent. Defendants did not dispute that Mr. Lacy or Mr. Liska had knowledge of the false and misleading statements alleged in the Complaint, which was sufficient to uphold their § 20(a) control person liability claim. *Id.* at *29, 33 (citing *Johnson v. Tellabs, Inc.*, 303 F.Supp.2d 941, 969 (N.D.Ill.2004) (a § 20(a) claim requires, in part, a primary violation of § 10(b).) As for Mr. Richter, Mr. Trost, Mr. Slook, Mr. Raymond, and Mr. Bergmann, however, the court found "no allegations ... regarding any specific meetings that [they] attended, or the information they received at those meetings that would have put them on notice that Sears was making material misstatements."*Id.* at *29.The mere fact that Mr. Richter, Mr. Trost, Mr. Slook, Mr. Raymond, and Mr. Bergmann were all corporate officers was insufficient to suggest that they were aware that Sears' SEC filings and other statements were false. *Id.* at

*30.In addition, Plaintiffs did not allege any facts indicating that the men acted to achieve some concrete personal gain. *Id.* at *31.

***10** The court found similar deficiencies in the § 10(b) allegations relating to Mr. Keleghan and Mr. Vishwanath. Plaintiffs sufficiently alleged false and misleading statements attributable to Mr. Keleghan, but they did not offer facts supporting a strong inference of *scienter.*Plaintiffs did not identify any document or record that was authored or reviewed by Mr. Keleghan and that showed Sears deliberately sought out subprime customers. *Id.* at *35. Mr. Keleghan allegedly "routinely reviewed financial data indicating that the Sears Card and Sears MasterCard portfolios were separately declining throughout the Class Period," but then on March 14, 2002 "brag[ged] that Sears' portfolio nearly equals the market leader MBNA in its charge-off rate."*Id.* In the court's view, this comment was not enough to raise a strong inference that Mr. Keleghan acted with fraudulent intent. "All of Mr. Keleghan's admissible statements regarding the quality of Sears' credit portfolio occurred on the first day of the Class Period [October 24, 2001]; the fact that the quality of the credit portfolio declined after that date does not demonstrate that Mr. Keleghan knew his statements on October 24, 2001 were false or misleading."*Id.*

Also unavailing was Plaintiffs' argument that Mr. Keleghan was "personally responsible for the implementation of Sears' risk management policies" and, thus, must have known "such rudimentary facts as the extent to which the Company's outstanding loan balances were actually owed by subprime borrowers."*Id.* at *36. The only evidence of such knowledge was a March 7, 2002 UBS Warburg report indicating that Sears' management *"seems* focused on employing a prudent and risk averse growth strategy."*Id.* (emphasis added). The court finally declined to find an inference of *scienter* based on the fact that Mr. Keleghan was fired shortly before Sears' credit problems became public. "Given Mr. Lacy's own equivocation as to the reason for Mr. Keleghan's departure, the court is unable to infer from his termination that Mr. Keleghan knowingly made fraudulent statements."*Id.* The court did preface the foregoing conclusions, however, by noting that Mr. Keleghan's was a "close case." *Id.* at *35.

Mr. Keleghan also sought dismissal of Plaintiffs' § 20(a) claim, insisting that as President of Sears Credit, he did not exercise any control over SRAC.*Id.* at *36. Plaintiffs failed to respond to this argument, but the court found it unpersuasive. There was no dispute that Mr. Keleghan could be a controlling person with respect to Sears, and Plaintiffs alleged that there was a significant interrelation between Sears and SRAC. In the court's view, "[d]etermination of whether an individual defendant is a 'controlling person' under § 20(a) is a question of fact that cannot be determined at the pleading stage."*Id.* at *37 (quoting *In re Sears, Roebuck & Co. Sec. Litig.*, 291 F.Supp.2d 722, 727 (N.D.Ill.2003).

***11** With respect to Mr. Vishwanath, the Complaint did not allege that he made any false or misleading statements during the Class Period. *Id.* Nor could Plaintiffs establish that Mr. Vishwanath acted with fraudulent intent solely based on his position as Vice President of Sears Credit, or by reliance on the group pleading doctrine. *Id.* (citing *Chu v. Sabratek Corp.*, 100 F.Supp.2d 815, 837 (N.D.Ill.2000) ("To the extent the plaintiff's plead *scienter* based exclusively on an individual defendant's position in Sabratek's hierarchy, their claims must be dismissed."); *Johnson v. Tellabs, Inc.*, 262 F.Supp.2d 937, 946 n. 7 (N.D.Ill.2003) ("It is entirely clear ... that the PSLRA abolishes the use of the group pleading doctrine to allege defendant's *scienter."*) As with the other Defendants, however, Plaintiffs' § 20(a) control liability claim against Mr. Vishwanath survived dismissal. *Id.*

2. The Current Motions to Dismiss

On November 15, 2004, Lead Plaintiffs filed a second Amended Complaint (the "SAC"), attempting to remedy these deficiencies by adding State Universities as a Plaintiff and by asserting several new allegations. As noted earlier, Plaintiffs here seek to represent (1) all those who purchased or acquired SRAC Debt Securities pursuant to a prospectus during the Class Period (the "Issuer Class") in the 3/18/02 Offering, the 5/21/02 Offering, and the 6/21/02 Offering; and (2) all those who purchased, during the Class Period, publicly traded SRAC Debt Securities that were issued by SRAC before the start of the Class Period and actively traded through the public markets and over national security exchanges (the "Trader Class").

In Counts One through Three, Plaintiffs allege that

the underwriter Defendants, as well as Mr. Trost, Mr. Slook, Mr. Liska, Mr. Raymond, Mr. Richter, and Mr. Bergman violated § 11 of the Securities Act by "failing to make a reasonable investigation or possess reasonable grounds for believing that the representations contained in the Registration Statement, including the documents incorporated therein, were true and without omissions of any material facts and were not misleading."(SAC ¶¶ 249, 253, 254, 266, 270, 292, 296, 297.) Counts Four through Six charge the underwriter Defendants with violating § 12(a)(2) of the Securities Act by making material misrepresentations in the three SRAC Debt Securities offerings "knowingly or recklessly and for the purpose and effect of concealing the truth with respect to the SRAC's and Sears' operations, business management, performance and prospects from the investing public and supporting the artificially inflated price of the SRAC Debt Securities."(*Id.* ¶¶ 319, 331, 343.)Count Seven alleges that Mr. Lacy, Mr. Liska, Mr. Richter, Mr. Trost, Mr. Slook, Mr. Raymond, and Mr. Bergmann violated § 15 of the Securities Act because they acted as controlling persons of SRAC and had the power to influence and control the decision-making of both Sears and SRAC, "including the content and dissemination of the various statements which Plaintiffs contend are false and misleading herein."(*Id.* ¶ 349.)

***12** In Count Eight, Plaintiffs claim that Sears, SRAC, and all of the Individual Defendants except Mr. Vishwanath violated § 10(b) of the SEA and Rule 10b-5 promulgated thereunder by engaging in a "plan, scheme and course of conduct" to deceive the investing public regarding Sears' high-risk credit practices and induce Plaintiffs to purchase SRAC Debt Securities at artificially inflated prices during the Class Period. (*Id.* ¶ 353.)Plaintiffs also charge in Count Nine that all of the Individual Defendants violated § 20(a) of the SEA because they acted as controlling persons of SRAC and had the power to influence and control the decisions of SRAC and/or Sears, "including the content and dissemination of the SEC filings and other statements that Lead Plaintiffs contend are false and misleading."(*Id.* ¶ 365.)

Defendants have filed three separate motions to dismiss the SAC for failure to comply with the pleading requirements of FED. R. CIV. P. 9(b) and the PSLRA, and for failure to state a claim. The underwriter Defendants involved in the 3/18/02 and 5/21/02 SRAC Debt Securities Offerings-CSFB, Goldman Sachs, Morgan Stanley, Bears Stearns, and Lehman Brothers (collectively, the "Underwriter Defendants")-insist that Plaintiffs still lack standing to sue under § 12(a)(2) for statements made with respect to the 3/18/02 Offering. The Underwriter Defendants further argue that Plaintiffs have not sufficiently alleged damages relating to the 5/21/02 Offering. The Sears and SRAC Defendants, Mr. Keleghan, and Mr. Vishwanath variously claim that the SAC fails to allege that they acted with the requisite *scienter* for purposes of § 10(b) and SEC Rule 10b-5, and that they cannot be liable as control persons under § 20(a) of the Securities Exchange Act or § 15 of the Securities Act. The court addresses each argument in turn.

DISCUSSION

The purpose of a motion to dismiss is to test the sufficiency of the plaintiffs' complaint, not to decide its merits. *Gibson v. City of Chicago,* 910 F.2d 1510, 1520 (7th Cir.1990). A motion to dismiss will be granted only "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which entitles him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Plaintiffs alleging fraud must do so "with particularity," FED. R. CIV. P. 9(b), meaning that they must identify "the who, what, when, where and how: the first paragraph of any newspaper story." *DiLeo v. Ernst & Young,* 901 F.2d 624, 628 (7th Cir.1990). The particularity requirement ensures that plaintiffs "conduct a precomplaint investigation in sufficient depth to assure that the charge of fraud is responsible and supported, rather than defamatory and extortionate." *Ackerman v. Northwestern Mut. Life Ins. Co.,* 172 F.3d 467, 469 (7th Cir.1999).

In addition to complying with Rule 9(b), Plaintiffs must also follow the strict pleading requirements of the PSLRA, which was enacted to discourage claims of "so-called 'fraud by hindsight.' " *In re Midway Games, Inc. Sec. Litig.,* 332 F.Supp.2d 1152, 1155 (N.D.Ill.2004) (quoting *In re Brightpoint, Inc. Sec. Litig.,* No. IP99-0870-C-H/G, 2001 WL 395752, at *3 (S.D.Ind. Mar.29, 2001)). The PSLRA requires plaintiffs to "specify each statement alleged to have been misleading, [and] the reason why the statement is misleading." 15 U.S.C. § 78u-4(b)(1). Plaintiffs must also "state with particularity facts giving rise to a strong inference that the defendant acted with the

required state of mind." 15 U.S.C. § 78u-4(b)(2).*See also* *Chu*, 100 F.Supp.2d at 823.

I. The Underwriter Defendants

***13** The Underwriter Defendants argue that the addition of State Universities as a Plaintiff in this case is not sufficient to allege a § 12(a)(2) claim with respect to the 3/18/02 Offering because State Universities was an after-market purchaser. (UD Mem., at 5.) [FN7] The Underwriter Defendants also claim that Plaintiffs have not sufficiently alleged damages to support their §§ 11 and 12(a)(2) claims relating to the 5/21/02 Offering. The Sears Defendants have joined in both arguments and the court considers each in turn.

FN7. The Memorandum of Law in Support of Credit Suisse First Boston LLC, Goldman Sachs & Co., Inc., Morgan Stanley, Bear, Stearns & Co. Inc. and Lehman Brothers' Motion to Dismiss Counts II, IV and V of Plaintiffs' Second Amended Complaint is cited as "UD Mem., at __."

A. The 3/18/02 Offering

The Underwriter Defendants first seek dismissal of Count Four of the SAC, in which Plaintiffs allege a § 12(a)(2) claim against CSFB and Goldman Sachs relating to the 3/18/02 Offering, for lack of standing. Standing under § 12(a)(2) requires the purchase of securities offered in the prospectus. *See* *Gutter v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 1194, 1196 (6th Cir.1981) (options trader was a seller, and not a purchaser of securities so he lacked standing to sue under § 12(a)(2)); *Cathedral Trading, LLC v. Chicago Bd. Options Exchange*, 199 F.Supp.2d 851, 858 (N.D.Ill.2002) (quoting *Akerman v. Oryx Communications, Inc.*, 810 F.2d 336, 344 (2d Cir.1987)) ("Section 12 imposes liability on persons who offer or sell securities and only grants standing to the person purchasing such security from them"). The purchase, moreover, must be from an initial public offering. *See* *Gustafson v. Alloyd Co.*, 513 U.S. 561, 580, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995) ("Congress contemplated that § 12(2) would apply only to public offerings by an issuer."); *Danis v. USN Communications, Inc.*, 73 F.Supp.2d 923, 932 (N.D.Ill.1999) ("the text of § 12 grants a cause of action only to those who purchase 'from' 'a seller of a security by prospectus'-in an initial public offering.")

State Universities is the only named Plaintiff to have purchased stock from the 3/18/02 Offering. The Underwriter Defendants argue that State Universities purchased the stock on the open market, and not from the initial public offering. As a result, the Underwriter Defendants insist, State Universities was an after-market purchaser and does not have standing to redress claims under § 12(a)(2). (UD Mem., at 4-5 (citing *In re Transkaryotic Therapies, Inc. Sec. Litig.*, 319 F.Supp.2d 152, 158 (D.Mass.2004) (dismissing § 12(a)(2) claim asserted by plaintiffs who admitted to purchasing their securities on the open market and not through an initial public offering); UD Reply, at 2.) [FN8]

FN8. The Reply Memorandum of Law in Support of Credit Suisse First Boston LLC, Goldman Sachs & Co., Inc., Morgan Stanley, Bear, Stearns & Co. Inc. and Lehman Brothers' Motion to Dismiss Counts II, IV and V of Plaintiffs' Second Amended Complaint is cited as "UD Reply, at __."

Plaintiffs neither confirm nor deny that State Universities purchased stock on the open market, arguing instead that this presents a question of fact that cannot be resolved on a motion to dismiss. (Pl. UD Resp., at 3-4.) [FN9]In support of this assertion, Plaintiffs cite *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272 (3d Cir.1992), in which the plaintiffs brought §§ 11 and 12 claims against UJB, a bank holding company, alleging that it issued a false and misleading prospectus and registration statement in connection with a dividend reinvestment and stock purchase plan ("DRISP"). *Id.* at 275, 285-86."Under the DRISP, shareholders reinvested their dividends by purchasing additional UJB Shares.... Some of these new shares were authorized but previously unissued treasury stock, but others were purchased by UJB in the secondary market." *Id.* at 285-86.Given that the after-market shares were purchased by the defendant, and not by the plaintiffs, the court determined that the plaintiffs needed discovery in order "to know whether their shares were newly issued or were purchased in the secondary market." *Id.* at 286.The court therefore assumed, for purposes of a motion to dismiss, that the "plaintiffs' shares did not come from the secondary market." *Id.* at 287 n. 16.

FN9. The Memorandum in Support of Plaintiffs' Opposition to Defendants Credit Suisse First Boston LLC, Goldman Sachs & Co., Inc., Morgan Stanley, Bears Stearns & Co. Inc., and Lehman Brothers Motion to Dismiss Counts II, IV and V of the Second Amended Complaint is cited as "Pl. UD Resp., at __."

***14** Unlike the plaintiffs in *Shapiro,* Plaintiff State Universities purchased the stock at issue in this case. Plaintiffs surely do not need discovery to determine whether that purchase was from an initial public offering or the secondary market. Indeed, the SAC confirms that State Universities purchased stock from the 3/18/02 Offering on September 17, 2002, some six months after the initial offering. (SAC Ex. D ¶ 5.) As noted, Plaintiffs nowhere deny that State Universities was an after-market purchaser and, thus, it is not a qualified purchaser for purposes of § 12(a)(2).

Plaintiffs attempt to avoid this result by citing to cases addressing the pleading and traceability requirements of § 11. *See, e.g., Harden v. Raffensperger, Hughes & Co.,* 65 F.3d 1392, 1399-1400 (7th Cir.1995) ("Section 11 of the Securities Act creates an express cause of action against a series of individuals for material misstatements in or omissions of material fact from a registration statement."); *In re Global Crossing. Ltd. Sec. Litig .,* 313 F.Supp.2d 189, 208 (S.D.N.Y.2003) (for purposes of § 11 claim, "[p]laintiffs have not been required to explain how their shares can be traced; general allegations that plaintiff purchased 'pursuant to' or traceable to false registration statement have been held sufficient to state a claim."); *In re Royal Ahold N.V. Sec. & ERISA Litig.,* 351 F.Supp.2d 334, 403 (D.Md.2004) ("Considering the issue of traceability, ... plaintiffs have not adequately stated a claim under § 11.") None of these cases, however, addresses § 12(a)(2)'s requirement that a plaintiff purchase stock pursuant to an initial public offering. Plaintiffs do not have standing to assert a § 12(a)(2) claim against CSFB and Goldman Sachs relating to the 3/18/02 Offering, and Count Four of the SAC is therefore dismissed.

B. The 5/21/02 Offering

The Underwriter Defendants also argue that Plaintiffs' §§ 11 and 12(a)(2) claims relating to the 5/21/02 Offering (Counts Two and Five, respectively) must be dismissed for failure to allege any cognizable damages. To recover under §§ 11 and 12(a)(2), a purchaser must have suffered damages. *See, e.g., In re Old Banc One Shareholders,* No. 00 C 2100, 2004 WL 1144043, at *5 (N.D.Ill. Apr.30, 2004) ("[T]here can be no recovery [under § 12] unless the purchaser has suffered a loss."); *In re Broderbund/Learning Co. Sec. Litig.,* 294 F.3d 1201, 1203 (9th Cir.2002) (dismissing §§ 11 and 12 claims where the plaintiff sold his shares at a profit). Section 11 provides that damages are capped at "the difference between the amount paid for the security ... and (1) the value thereof as of the time such suit was brought."15 U.S.C. § 77k(e). Under § 12(a)(2), a plaintiff still holding the challenged security at the time he files a lawsuit is entitled to rescission; i.e., "the consideration paid for such security with interest thereon...."15 U.S.C. § 771(a).

The SAC alleges that State Universities made the following purchases from the 5/21/02 Offering: (1) 430,000 shares on May 21, 2002 at $97.101 per share; (2) 200,000 shares on May 29, 2002 at $97 .494 per share; and (3) 350,000 shares on June 18, 2002 at $97.478 per share. (SAC Ex. D ¶ 6.) The SAC also alleges generally that State Universities "purchased SRAC Debt Securities during the Class Period at artificially inflated prices and has been damaged thereby."(*Id.* ¶ 11.)The Underwriter Defendants insist that these allegations are inadequate because they nowhere suggest that State Universities sold its notes at a loss. (UD Mem., at 6-7 (citing *In re AOL Time Warner, Inc. Sec. and "ERISA" Litig.,* 381 F.Supp.2d 192, 2004 WL 992991, at "38-39 (S.D.N.Y. May 5, 2004) (dismissing claims against bond underwriters for lack of standing where the bonds purchased by the plaintiffs "actually increased in value" and were trading above their offering prices when the underwriter defendants were added to the lawsuit).)

***15** Plaintiffs concede that State Universities "continues to hold the May 2002 notes."(Pl. UD Resp., at 9.) The Underwriter Defendants argue that the value of these notes at the time of suit exceeded their value at the date of purchase, and that Plaintiffs therefore have no cognizable claim under § 11. (UD Mem., at 7.) Specifically, the Underwriter Defendants present securities prices for the 5/21/02 Offering notes [FN10] reflecting that at the time this lawsuit was filed on June 17, 2003, the notes were trading at $113.65 per

share. When Plaintiffs amended the complaint on October 16, 2003 to add the Underwriter Defendants, the notes were trading at $105.89. (*Id.* at 4-5, Ex. A.) Indeed, between October 16, 2003 and November 17, 2004, the notes traded below $100 per share only once-on May 13, 2004, when they traded at $99.84 (still higher than any price paid by State Universities).(*Id.* Ex. A.)

> FN10. On a motion to dismiss, the court may take judicial notice of published stock prices if they are in the record. *Grimes v. Navigant Consulting, Inc.*, 185 F.Supp.2d 906, 913 (N.D.Ill.2002) (internal citations omitted).

Plaintiffs respond that this lawsuit "effectively commenced" for purposes of calculating damages under § 11 on October 18, 2002, when they filed a different federal class action on behalf of "persons who purchased securities of defendant Sears, Roebuck & Co. ("Sears") between October 24, 2001 and October 17, 2002."*See* *In re Sears, Roebuck and Co. Sec. Litig.*, 291 F.Supp.2d 722, 724 (N.D.Ill.2003); (Pl. UD Resp., at 6.) At that time, the notes were trading at $81.25, "far lower than the approximately $97 [State Universities] originally paid."[FN11](*Id.* at 7.) Plaintiffs contend that under FED. R. CIV. P. 15(c)(2), the lawsuit pending before this court should "relate back" to the earlier October 18, 2002 lawsuit, which remains pending before Judge Bucklo. (*Id.*) Plaintiffs note that both cases allege "very similar, if not identical, violations of the federal securities laws relating to [Sears'] earnings guidance and credit portfolio." (*Id.* at 7-8 (citing *Bularz v. Prudential Ins. Co. of Am.*, 93 F.3d 372, 379 (7th Cir.1996) (new substantive claim that was otherwise time-barred related back to the date of the original pleading where the claim stemmed from the same " 'conduct, transaction or occurrence' as was alleged in the original complaint.").)

> FN11. The securities prices submitted by the Underwriter Defendants indicate that as of October 18, 2002, the notes were trading at $77.57. (UD Mem., Ex. A.)

Plaintiffs' argument misconstrues Rule 15(c)(2), which provides for relation back "where an amended complaint asserts a new claim on the basis of the same core of facts, but involving a different substantive legal theory than that advanced in the original pleading ." *Bularz*, 93 F.3d at 379. Nothing in Rule 15(c)(2) supports the theory that one lawsuit may relate back to an entirely separate lawsuit. The fact that both lawsuits allege similar conduct by Sears is not sufficient, particularly where, as here, the October 18, 2002 lawsuit seeks redress for those who purchased Sears stock, not the SRAC Debt Securities at issue in this case. *See, e.g.,* *Merzin v. Provident Fin. Group, Inc.*, 311 F.Supp.2d 674, 686 (S.D.Ohio 2004) ("Silverback Plaintiffs" who did not file original complaint but who joined the lawsuit sometime thereafter could not price their securities as of the filing date of the original complaint; "[i]t would not comport with the interests of justice to allow the Silverback Plaintiffs to relate back to a Complaint which they did not file ...") Plaintiffs do not dispute that the 5/21/02 notes purchased by State Universities were worth more on June 17 and October 16, 2003 than State Universities paid for them. The State Universities suffered no damage and, thus, Count Two of the SAC will be dismissed.

***16** As for Plaintiffs' § 12(a)(2) claim, the Underwriter Defendants argue that State Universities' only potential remedy-rescission-is unavailable here because the notes are currently trading at a price that exceeds the purchase price. (UD Mem., at 7-8 (citing *Merzin,* 311 F.Supp.2d at 684 (dismissing § 12(a)(2) claim where rescission "would clearly result in a loss for Plaintiffs.") .) In *Merzin,* for example, the plaintiffs purchased securities for $25 per share. At the time they filed their lawsuit, the price per share had dipped below $25, but by the time of the court's ruling on the defendants' motion to dismiss, the stock was trading in excess of $30 per share. 311 F.Supp.2d at 684. The court dismissed the plaintiffs' § 12(a)(2) claim, noting that they would suffer a loss by tendering back their stock in exchange for the value of the consideration paid (*i.e.,* $25 per share) as opposed to selling the shares on the open market for in excess of $30 per share. *Id.*

Plaintiffs oppose such a "moving target approach," noting that "[i]nvestors in this scenario would be forced into a form of Russian roulette in trying to time the sale of their securities."(Pl. UD Resp., at 9-10.) In Plaintiffs' view, "the damages suffered by investors who purchase securities pursuant to false and misleading information [are] not abrogated simply because the price of those securities ultimately

(or temporarily) rises."(*Id.* at 10.)Plaintiffs do not cite any support for this argument, and courts have found that "[t]he proper time for the plaintiff to choose between damages and rescission 'is at the time the complaint is filed." ' *In re AOL Time Warner, Inc. Sec. and "ERISA" Litig.*, 2004 WL 992991, at *39 (quoting *Wigand v. Flo-Tek, Inc.*, 609 F.2d 1028, 1035 (2d Cir.1979)).*But see* *Merzin*, 311 F.Supp.2d at 684. In this court's view, the proper time for the damages/rescission choice in this case was November 15, 2004, the date State Universities was added as a Plaintiff. On that date, the SRAC notes were trading at $105.04 per share, well above the $97 per share purchase price. (UD Reply, Ex. A.)

Even using the dates of the previous complaints, moreover, State Universities would still suffer a loss by tendering back its SRAC notes in exchange for the purchase price. On June 17, 2003, the notes were trading at $113.65 per share, and on October 16, 2003, the notes were trading at $105.89 per share. (*Id.*) Plaintiffs have failed to state a claim for damages under § 12(a)(2) with respect to the 5/21/02 notes and Count Five of the SAC is therefore dismissed.

II. The Sears and SRAC Defendants

Plaintiffs allege that Sears, SRAC, and all of the individual Defendants except Mr. Vishwanath violated § 10(b) of the Securities Exchange Act and SEC Rule 10b-5 by misrepresenting the financial performance of Sears' credit operations, which caused Plaintiffs to purchase securities at artificially inflated prices. Plaintiffs also allege that all of the individual Defendants are responsible for the misrepresentations as controlling persons under § 20(a) of the SEA and under § 15 of the Securities Act. To state a claim under § 10(b) and Rule 10b-5, Plaintiffs must allege that each defendant "(1) made a misstatement or omission, (2) of material fact, (3) with *scienter,* (4) in connection with the purchase or sale of securities, (5) upon which the plaintiff[s] relied, and (6) that reliance proximately caused plaintiff[s'] injuries." *In re HealthCare Compare Corp. Sec. Litig.*, 75 F.3d 276, 280 (7th Cir.1996).

***17** To state a claim under § 20(a) of the Act, Plaintiffs must allege "(1) a primary securities violation; (2) [that] each of the Individual Defendants exercised general control over the operations of [Sears and/or SRAC]; and (3) [that] each of the Individual Defendants 'possessed the power or ability to control the specific transaction or activity upon which the primary violation was predicated, whether or not that power was exercised." *Tellabs,* 303 F.Supp.2d at 969 (quoting *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, 881 (7th Cir.1992)). The requirements for claims under § 15 of the Securities Act "are largely co-extensive with the requirements for Section 11 claims. The only additional element that Section 15 would require is that the Defendant was in a position of control over the alleged violators of Section 11." *Miller v. Apropos Technology, Inc.*, No. 01 C 8406, 2003 WL 1733558, at *7 (N.D.Ill. Mar.31, 2003).*See also*15 U.S.C. § 77o(a).

In addition to Count Two discussed above, the Sears Defendants have moved to dismiss Counts Seven, Eight, and Nine of the SAC. They insist that Plaintiffs have once again failed to allege that Mr. Richter, Mr. Trost, Mr. Slook, Mr. Raymond, or Mr. Bergmann acted with fraudulent intent for purposes of a § 10(b) claim. The Sears Defendants also urge that the *scienter* allegations against Mr. Lacy and Mr. Liska are insufficient as a matter of law. As a result, the Sears Defendants argue, the § 10(b) claim against Sears and SRAC fails as well, requiring dismissal of Plaintiffs' §§ 10(b) and 20(a) claims (Counts Eight and Nine). Finally, the Sears Defendants seek dismissal of Count Seven on the ground that none of the Individual Sears Defendants was a controlling person of SRAC. Mr. Keleghan and Mr. Vishwanath have separately moved to dismiss Counts Eight and Nine on similar grounds. The court addresses each argument in turn.

A. *Scienter*

The Sears and SRAC Defendants argue that Plaintiffs have not alleged *scienter* with respect to any of the individual Defendants in this case, and that the § 10(b) claims against all Defendants should therefore be dismissed. To establish *scienter,* Plaintiffs must plead facts establishing that the Sears and SRAC Defendants acted with intent to deceive. *S.E.C. v. Jakubowski,* 150 F.3d 675, 681 (7th Cir.1998). The Seventh Circuit has not addressed the proper test for *scienter* in light of the PSLRA, and courts in this district are split. Most courts, however, have adopted the standard enunciated by the Second Circuit, requiring plaintiffs in a PSLRA action to allege (1) facts show-

ing that defendants had both motive and opportunity to commit fraud; or (2) facts constituting strong circumstantial evidence of conscious misbehavior or recklessness. *Press v. Chemical Investment Servs. Corp.*, 166 F.3d 529, 538 (2d Cir.1999).*See In re Spiegel, Inc. Sec. Litig.*, 382 F.Supp.2d 989, 2004 WL 1535844, at *24 (N.D.Ill. July 8, 2004) (collecting cases).

***18** Plaintiffs claim that the Sears and SRAC Defendants knew that Sears' credit card accounts were riskier and more unstable than they led the public to believe, which demonstrates conscious misbehavior or recklessness. (Pl. Sears Resp., at 3.) [FN12] Recklessness requires "conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care ... to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." *Rehm v. Eagle Finance Corp.*, 954 F.Supp. 1246, 1255 (N.D.Ill.1997)."[S]ecurities fraud claims typically have sufficed to state a claim based on recklessness when they have specifically alleged defendants' knowledge of facts or access to information contradicting their public statements. Under such circumstances, defendants knew or, more importantly, should have known that they were misrepresenting material facts related to the corporation." *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir.2000). One of the "classic fact patterns" that gives rise to a strong inference of *scienter* is where "defendants published statements when they knew facts or had access to information suggesting that their public statements were materially inaccurate." *Florida State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 665-66 (8th Cir.2001) (citing *City of Philadelphia v. Fleming Cos.*, 264 F.3d 1245, 1260-61 (10th Cir.2001)); *In re Scholastic Corp. Sec. Litig. .*, 252 F.3d 63, 76 (2d Cir.2001); *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1064 (9th Cir.2000); *Novak*, 216 F.3d at 311.

FN12. Plaintiffs' Response to the Sears Defendants' Motion to Dismiss Claims Two, Seven, Eight and Nine of the Second Amended Class Action Complaint is cited as "Pl. Sears Resp., at ___."

1. The Deficiencies in the Amended Complaint

As noted, this court found the *scienter* allegations of the Amended Complaint lacking in several respects. First, the court found "no allegations ... regarding any specific meetings that Mr. Richter, Mr. Trost, Mr. Slook, Mr. Raymond, or Mr. Bergmann attended, or the information they received at those meetings that would have put them on notice that Sears was making material misstatements." *Ong*, 2004 WL 2534615, at *29. The mere fact that Mr. Richter, Mr. Trost, Mr. Slook, Mr. Raymond, and Mr. Bergmann were all corporate officers was insufficient to suggest that they were aware that Sears' SEC filings and other statements were false. *Id.* at *30. In addition, Plaintiffs did not allege any facts indicating that the men acted to achieve some concrete personal gain. *Id.* at *31.

The court also determined that "[a]ll of Mr. Keleghan's admissible statements regarding the quality of Sears' credit portfolio occurred on the first day of the Class Period [October 24, 2001]," and that the decline in the credit portfolio quality after that date "d[id] not demonstrate that Mr. Keleghan knew his statements on October 24, 2001 were false or misleading."*Id.* at *35.In that regard, the court noted that Plaintiffs did not identify any document or record that was authored or reviewed by Mr. Keleghan and that showed Sears deliberately sought out subprime customers. *Id.* at *35.Plaintiffs' assertion that Mr. Keleghan "routinely reviewed financial data indicating that the Sears Card and Sears MasterCard portfolios were separately declining throughout the Class Period" and was "personally responsible for the implementation of Sears' risk management policies," without more, was not sufficient to raise a strong inference that Mr. Keleghan acted with fraudulent intent. *Id.* at *35, 36.

***19** In addition, Mr. Keleghan's discharge shortly before Sears' credit problems became public did not support an inference of *scienter* given "Mr. Lacy's own equivocation as to the reason for Mr. Keleghan's departure."*Id.* at *36. The court allowed Plaintiffs' § 10(b) claims to proceed as against Sears, SRAC, Mr. Lacy, and Mr. Liska, however, finding no clear objection to the sufficiency of the *scienter* allegations with respect to the latter two individuals. The court nonetheless invited Mr. Lacy and Mr. Liska to challenge the *scienter* allegations in light of the findings regarding the other individual Defendants. *Id.* at *29 n .20.

2. The *Scienter* Allegations in the SAC

In the SAC, Plaintiffs allege that the Individual Defendants "were fully aware of the problems inherent in [Sears' credit] portfolio because of a detailed reporting system that enabled them to monitor the credit ratings of each consumer on a regular basis."(SAC ¶ 209.) Plaintiffs note that in Sears' 2001 Form 10-K, "[m]anagement represented ... that it [Sears] maintained a system of internal controls to ensure proper accounting and financial disclosures, and that it reviewed loan loss reserves to ensure that such reserves were adequate to account for likely losses inherent in the portfolio."(*Id.* ¶ 210.)The President of Sears National Bank in Arizona, which developed Sears' policies for granting credit, reported directly to Mr. Keleghan. So did both the Vice President of Asset Management and Risk Management and the Vice President of Account Services, who oversaw Sears' collections and accounts services provided by regional credit centers. (*Id.* ¶¶ 214, 215.)Each credit center had a collection division that handled matters relating to payment, and an account services division that handled initial grants of credit, alteration of credit limits, and general consumer inquiries.(*Id.* ¶ 215.)

According to the SAC, information "was gathered" every month from the regional centers and compiled into reports detailing delinquency and charge-off rates. In addition, the entire Sears portfolio "would be rescored for credit history" every quarter, and reports "were compiled" detailing the credit scores of Sears' cardholders. (*Id.* ¶ 216.)Plaintiffs do not indicate who did the gathering, compiling, or rescoring, but they do allege that the reports "were provided to" Mr. Keleghan, Mr. Vishwanath and Mr. Lacy. (*Id.*) Plaintiffs further allege that all senior executives and management, including the Individual Defendants, received a Monthly Operating Review ("MOR") from each of the collection and account services divisions. The MORs "were circulated in the second week of each month" and "compiled all pertinent financial information for each division," including "the amount of profits derived from late fees, up-to-date delinquency figures, and other important information" on charge-offs, customer composition, and loan loss reserves. (*Id.* ¶¶ 217, 218.)

***20** In addition to receiving the MORs, Mr. Keleghan purportedly attended monthly meetings at Sears headquarters to discuss problems in Sears' credit business. According to an unidentified former Sears employee who "served as an analyst in the credit finance division until November 2001," Mr. Keleghan also met "routinely" with Mr. Liska to discuss matters addressed in the division meetings, and he met with Mr. Lacy in that regard "on occasion." (*Id.* ¶¶ 217, 219, 220.)At Sears' quarterly meetings for all managers and directors responsible for collection, which were "usually" led by Mr. Keleghan and attended by Mr. Lacy, participants discussed promotional policies, delinquency statistics, credit scores, and the effectiveness of the collections operations. "Each meeting also included discussions of similar reports that were generated and available at headquarters, and in the field, detailing payment, delinquency, and charge-off data on a monthly basis."(*Id.* ¶ 221.)Plaintiffs claim that these meetings demonstrate that "organizational structures were in place which facilitated the flow of information, through meetings and reports, to senior management at Sears and SRAC," and that "Sears' top management (including the Sears Defendants) were made personally aware of the credit scores of the entire Sears credit portfolio."(*Id.* ¶¶ 220, 222.)

According to another unidentified former Sears employee described as "a twenty-year veteran of the Company who served as director of finance for Sears' retail division from 1993 through 2001," Mr. Lacy and Mr. Liska attended planning meetings where "each division presented key financial information, analyses of each division's performance, and comparative analyses with previous years' performance and projections."(*Id.* ¶ 223.)All of the Sears Defendants, moreover, "were kept apprised of" the credit card business by virtue of a DOS-based computer program known as Total System ("TSYS"). According to a third, unidentified former Sears national management employee who worked at the company from June 2002 until January 2003, "TSYS processed and tracked all credit card transactions, as well as delinquencies and charge-offs."Plaintiffs claim that TSYS "could be viewed at any point in time so that managers could be kept informed of current delinquency and charge-off data."(*Id.* ¶ 226.)In fact, TSYS integrated a computer program developed by Mr. Keleghan and Mr. Vishwanath and launched in 1999 "that conducted risk analyses for the credit card portfolio."(*Id.* ¶ 233.)

3. Analysis

Plaintiffs' new allegations essentially fall into three categories: (1) all senior executives and management received MORs containing profit and loss information, including up-to-date delinquency figures and information on charge-offs, customer composition, and loan loss reserves (*id.* ¶¶ 217, 218); (2) senior executives met regularly to discuss the performance of Sears' credit division (*id.* ¶¶ 218-220, 223); and (3) Sears management had access to the TSYS computer database, which integrated a risk analysis computer program developed by Mr. Keleghan and Mr. Vishwanath. (*Id.* ¶ 233.)The Sears and SRAC Defendants argue that these new allegations are insufficient to demonstrate that they knew or recklessly disregarded the truth about the quality of the Sears portfolio. For the reasons explained below, the court sustains Defendants' objections in part and overrules them in part.

a. The Individual Defendants

***21** The Individual Defendants begin by arguing that general allegations that a defendant received internal financial reports cannot support an inference of *scienter.*(Sears Mem., at 5 (citing *Johnson v. Tellabs, Inc.*); K/V Mem., at 10).) [FN13] In *Tellabs,* the plaintiffs alleged that the defendants knew or recklessly disregarded that their statements about Tellabs' financial condition were false because the defendants received regular reports about daily product bookings, revenues, and product development. 303 F.Supp.2d at 963. The court found these allegations insufficient, noting that the complaint omitted a variety of pertinent details about those reports:

> FN13. The Memorandum of Law in Support of Motion to Dismiss of Defendants Kevin Keleghan and K.R. Vishwanath is cited as "K/V Mem., at ___."

> Plaintiffs do not describe the contents of these reports or detail what such reports reflected. They do not allege who, other than the "finance department," prepared such reports. They do not allege any particularized facts showing how the information contained in the reports demonstrated the falsity of Tellabs' fourth quarter financial results or sufficient facts regarding how the information supports any inference of knowledge of falsity. *Id.* Also insufficient were slightly more specific allegations that the reports showed "declining demand in the third and fourth quarters of 2000 for a variety of Tellabs' products, including the TITAN 5500."Specifically, the plaintiffs failed to allege "what reports showed a decline in the demand," "who received such reports," "what information was reflected in th[e] report[s], how significant the decline in demand was, or how much of the decline was attributed to the TITAN 5500 as opposed to other products."*Id.* In the court's view, "allowing a plaintiff to go forward with a case based on general allegations of 'negative internal reports' would expose all ... companies [with internal reporting systems] to securities litigation whenever their stock prices dropped."*Id.* at 963-64 (quoting *In re Vantive Corp. Sec. Litig.,* 283 F.3d 1079, 1087-88 (9th Cir.2002)).

The Individual Defendants also rely on *Tellabs* for the proposition that attendance at meetings is not alone sufficient to demonstrate fraudulent intent. (Sears Mem., at 7-8 (citing *Tellabs,* 303 F.Supp.2d at 966 (fact that Tellabs' officer made quarterly presentations with respect to Tellabs' financial position at "town hall" meetings did not create strong inference of *scienter* absent allegations that the officer knew of the alleged problems with the product at issue); K/V Mem., at 9-10.) As for access to the TSYS computer database, the Sears Defendants argue, Plaintiffs point to no specific information contained in that system that would have put the Individual Defendants on notice that Sears was making material misstatements. (*Id.* at 8; K/V Mem., at 9.) In addition, Plaintiffs do not allege that any individual Defendant actually received, reviewed, or recklessly ignored reports generated by TSYS. (*Id.* at 9.)

***22** Plaintiffs first object that the Individual Defendants have employed the wrong standard for pleading *scienter* because this court adopted the Second Circuit's test, which the *Tellabs* court rejected. (Pl. Sears Resp., at 4.) This argument is a non-starter. In a case where a plaintiff seeks to establish *scienter* based on conscious disregard or recklessness, the requirements set forth in *Tellabs* are the same as those adopted by this court: "Reckless conduct is, at least, conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care ... to the extent that the danger was either known to the defendant or so obvious that the defendant must

have been aware of it." *Tellabs,* 303 F.Supp.2d at 961 n. 15 (quoting *Rehm,* 954 F.Supp. at 1255); *Ong,* 2004 WL 2534615, at *27 (quoting *Rehm,* 954 F.Supp. at 1255). The *Tellabs* court held that plaintiffs "may use 'motive and opportunity' or 'circumstantial evidence' to establish *scienter* under the PSLRA, only if Plaintiffs' allegations support a strong inference that each Defendant acted recklessly or knowingly." 303 F.Supp.2d at 961. This court has already determined that Plaintiffs failed to plead *scienter* based on motive and opportunity even under a test arguably less stringent than the one imposed by *Tellabs,* and the SAC does not add any new allegations in that regard. *Ong,* 2004 WL 2534615, at *30-31.

Plaintiffs next insist that the SAC does provide allegations of "specific documents received by the Sears Defendants and specific meetings attended by them."(Pl. Sears Resp., at 9; Pl. K/V Resp., at 7-8.) [FN14]For example, all senior executives and management received MORs and had access to the TSYS computer program, which was integrated with a risk analysis program developed by Mr. Keleghan. (SAC ¶¶ 217, 218, 226, 233.) In addition, Mr. Lacy "w[as] provided [with]" reports detailing delinquency and charge-off rates and the credit scores of Sears' cardholders. (*Id.* ¶ 221.)Mr. Liska "routinely" met with Mr. Keleghan to discuss matters addressed at monthly meetings of executives within Mr. Keleghan's division, and Mr. Lacy and Mr. Liska both attended planning meetings two or three times per year at which each division presented certain "key financial information." (*Id.* ¶¶ 220, 223.)(*See also* Pl. Sears Resp., at 9-11.) In Plaintiffs' view, these allegations, "read in conjunction with the entire Complaint, show an organizational structure that gave each Sears Defendant access to the very credit information concealed from the investing public."(*Id.* at 11.)

> FN14. Plaintiffs' Memorandum of Law in Opposition to Motion of Defendants Kevin Keleghan and K.R. Vishwanath to Dismiss the Second Amended Class Action Complaint is cited as "Pl. K/V Resp., at ___."

In support of this argument, Plaintiffs cite *Sutton v. Bernard,* No. 00 C 6676, 2001 WL 897593 (N.D.Ill. Aug.9, 2001), where the plaintiffs alleged that the defendants were high-level executives who were involved in the day-to-day operations of the company and who closely monitored the company through internal reports. The court found those allegations sufficient to create a strong inference of *scienter. Id.* at *6. Notably, however, *Sutton* also embraced the "group pleading" doctrine, which "allows plaintiffs to rely on the presumption that certain statements of a company, such as financial reports, prospectuses, registration statements, and press releases, are the collective work of those high-level individuals with direct involvement in the everyday business of the company."*Id.* at *5 n. 5. In *Ong,* this court reaffirmed its conclusion that "group pleading may be appropriate in certain circumstances notwithstanding the PSLRA, [only] as long as the complaint sets forth facts demonstrating that each defendant may be responsible for the fraudulent statements." 2004 WL 2534615, at *30 (quoting *Spiegel,* 2004 WL 1535844, at *20-23). Under that standard, Plaintiffs' allegations are sufficient only with respect to some of the Individual Defendants.

i. Mr. Richter, Mr. Trost, Mr. Slook, Mr. Raymond, and Mr. Bergmann

***23** The SAC does not present any facts demonstrating that Mr. Richter, Mr. Trost, Mr. Slook, Mr. Raymond, or Mr. Bergmann acted with fraudulent intent. Plaintiffs once again fail to identify a single meeting that these Defendants attended, much less the specific information they purportedly reviewed at those meetings. Indeed, the names of these five individuals do not appear anywhere in Plaintiffs' new *scienter* allegations. (SAC ¶¶ 209-34.) General allegations that these Defendants attended meetings where they discussed promotional policies, delinquency statistics, credit scores, and the effectiveness of the collections operation do not satisfy the PSLRA's requirement that Plaintiffs plead facts showing that each Defendant knew or recklessly disregarded that Sears was making material misstatements. (SAC ¶ 221.) Significantly, these are the same allegations this court found lacking to establish *scienter* on the part of Mr. Keleghan in the prior Complaint. *Ong,* 2004 WL 1534615, at *35.*See also*15 U.S.C. § 78u-4(b)(2) (plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."); *Chu,* 100 F.Supp.2d at 823.

With respect to the MORs and the monthly reports

from the regional centers, Plaintiffs identify neither who prepared the documents nor which ones Mr. Richter, Mr. Trost, Mr. Slook, Mr. Raymond or Mr. Bergmann actually saw or reviewed. Plaintiffs also fail to cite any specific data within those reports that should have alerted these Defendants that Sears was making material misstatements. Plaintiffs' general assertions that the reports and MORs contained "pertinent financial information" regarding delinquency and charge-off rates is insufficient. *See, e.g., Arazie v. Mullane,* 2 F.3d 1456, 1466-67 (7th Cir.1993) (affirming dismissal where stockholders failed to refer to any document, meeting, or transaction that could or should have put the defendant on notice that the New Jersey Casino Control Commission objected to a $50 million loan from defendant's Atlantic City casino to service its own debt on casinos located in Nevada).

The fact that "TSYS could be viewed at any point in time" and was "made available to each Individual Defendant" similarly fails to establish that Mr. Richter, Mr. Trost, Mr. Slook, Mr. Raymond or Mr. Bergmann knew their statements regarding Sears' credit portfolio were false. Plaintiffs do not allege that these Defendants ever accessed TSYS or received and reviewed specific TSYS reports that conflicted with Sears' public statements. *See In re Spiegel,* 2004 WL 1535844, at *35 (finding no inference of *scienter* where the plaintiffs did not allege that the company's CEO "actually received or reviewed" two documents prepared by an internal auditor regarding serious problems with the company's credit business).*Compare Asher v. Baxter Int'l, Inc.,* No. 02 C 5608, 2005 WL 331572, at *8 (N.D.Ill. Feb.3, 2005) (allegations that the individual defendants "routinely accessed ... Baxter's weekly (and even daily) revenue and financial reports via a computer system," combined with allegations that nine of eleven defendants financially benefitted from false information by selling their company stock, and that the company was able to acquire a competitor at a much lower cost, supported inference of *scienter*).

***24** Plaintiffs' additional arguments regarding Mr. Richter, Mr. Trost, Mr. Slook, Mr. Raymond, and Mr. Bergmann merit little discussion. The court has already rejected Plaintiffs' theory that *scienter* may be inferred because "organizational structures were in place which facilitated the flow of information, through meetings and reports, to senior management at Sears and SRAC."(SAC ¶ 223.) *Ong,* 2004 WL 2534615, at *35. In addition, a violation of Generally Accepted Accounting Principles ("GAAP"), standing alone, is insufficient to raise an inference of fraudulent intent. *Stavros v. Exelon Corp.,* 266 F.Supp.2d 833, 850 (N.D.Ill.2003).

ii. Mr. Lacy, Mr. Liska, and Mr. Keleghan

With respect to Mr. Lacy, Mr. Liska, and Mr. Keleghan, the court concludes that Plaintiffs have sufficiently alleged *scienter* for purposes of the PSLRA. Unlike the other Individual Defendants, Mr. Liska and Mr. Keleghan both attended management meetings to discuss Sears' financial status. For example, Plaintiffs allege that two or three times a year, Mr. Lacy's "staff-including CFO Paul Liska" attended senior management planning meetings at which "each [account services and collection] division presented key financial information, analyses of each division's performance, and comparative analyses with previous years' performance and projections."(SAC ¶ 223.) Plaintiffs also allege that Mr. Keleghan attended monthly meetings at which "all Sears credit delinquencies were tracked and discussed," and that he led quarterly meetings for all managers and directors responsible for collections around the country. (*Id.* ¶¶ 219, 221.)Mr. Keleghan also developed the credit portfolio risk analysis computer program that was integrated with the TSYS system. (*Id.* ¶ 233.)

Of primary significance, however, is the fact that the court may now consider statements that Mr. Lacy, Mr. Liska, and Mr. Keleghan made after June 21, 2002. The court previously determined that such statements were inadmissible because the only Plaintiffs named in the Amended Complaint, Thomas G. Ong and the Thomas G. Ong IRA, had purchased their debt securities on June 21, 2002. Thus, the court determined that the purchase price "could not have been affected by statements made after that date." *Ong,* 2004 WL 2534615, at *23. The Sears Defendants now concede that the addition of State Universities as a named Plaintiff "cures the Section 10(b) standing defect; according to its certification, [State Universities] bought SRAC notes as late as October 17, 2002."(Sears Mem., at 2 n. 3.)

Mr. Lacy, Mr. Liska, and Mr. Keleghan made several admissible statements within the Class Period sug-

gesting that they had knowledge regarding the performance of the separate Sears Card and Sears MasterCard portfolios. During an April 18, 2002 conference call with analysts, for example, Mr. Liska declined to provide information on the separate portfolios, stating:

> ***25** [W]e're approaching this on a portfolio basis, because as you probably know, we originally ... substituted people out of the Sears card into the Sears MasterCard that were of better credit quality or had stopped using their Sears card. So we look at it more as managing a portfolio and we're probably never going to be in that position that we're going to talk about them as discrete portfolios because we don't manage it like that. And it would probably be misleading if we did that. So, we're just going to comment on it on a total portfolio basis.

(*Id.* ¶ 121.)Sears' decision to move customers from one card to the other based on their credit quality suggests that Sears did have data regarding the separate portfolios. Indeed, during a July 18, 2002 conference call with analysts, Mr. Lacy stated, "what we've been about with our *MasterCard* product, is having a product that has a better rate structure and more convenience, that's more appealing to better credit quality customers."(*Id.* ¶ 139 (emphasis added).) Mr. Lacy further stated that "Sears['] billed *MasterCard* balances at the end of the quarter were $8.5 billion...." (*Id.* ¶ 141 (emphasis added).) Mr. Keleghan similarly appeared to have separate information regarding the Sears Card and Sears MasterCard portfolios when he stated in a July 25, 2002 interview with *Bloomberg News* that "[w]e don't do subprime lending at all *in the MasterCard portfolio.*All my growth is coming from prime and superprime."(*Id.* ¶ 149 (emphasis added).)

Approximately two months after Mr. Keleghan assured investors that the Sears portfolio consisted entirely of prime and superprime customers, he was abruptly discharged on October 4, 2002. (*Id.* ¶¶ 149, 160.)Three days later, Mr. Lacy spoke to investors during a conference call and explained that "Kevin [Keleghan] left the company at my request, because I lost confidence in his personal credibility.... His departure is not related to business performance and does not indicate a change in our credit strategy."(*Id.* ¶¶ 163, 165.)At an analysts meeting on October 17, 2002, however, Mr. Liska stated that "Kevin was not being forthcoming about these issues that this business was facing ... and had become a barrier to getting an objective situation assessment as to what was happening in our business and I terminated him for basically my personal loss of confidence in him relative to his personal credibility."(*Id.* ¶ 172.)

Also on October 17, 2002, Sears issued a press release announcing that it would be increasing its allowance for bad debt by $222 million. (*Id.* ¶ 171.)At that time, Mr. Liska acknowledged that Sears' credit portfolio actually had been heavily subprime for years: "In 1998 Middle America balances represent[ed] 60% of our portfolio. They represent 48% today. Last year the segment represented 54% of our portfolio."(*Id.* ¶¶ 171, 174.)Despite the magnitude of the increased allowance for bad debt, Mr. Lacy had assured investors just three months earlier on July 18, 2002 that "[t]he credit quality of our receivables portfolio has ... improved."Mr. Liska had similarly confirmed that Sears had invested significantly in risk management and "fe[lt] very good about the systems environment."(*Id.* ¶¶ 135, 142.)

***26** In light of these allegations, the court is satisfied that Plaintiffs have raised a strong inference that Mr. Lacy, Mr. Liska, and Mr. Keleghan either knew or were reckless in disregarding information that the separate Sears MasterCard and Sears Card portfolios were in decline.

b. Sears and SRAC

In light of the court's determination that Plaintiffs' § 10(b) claims against Mr. Lacy, Mr. Liska, and Mr. Keleghan survive this motion, Defendants' motion to dismiss the § 10(b) claims against Sears and SRAC is denied. *See Ong,* 2004 WL 2534615, at *28 n. 19 ("A corporation can only 'know' those things known by persons acting on its behalf. The court concludes that if Plaintiffs' allegations on this matter [*scienter*] are adequate with respect to the Individual Defendants, they are adequate with respect to Sears and SRAC, as well.")

B. Control Person Liability Under § 20(a)

To state a claim under § 20(a) of the Act, Plaintiffs must allege (1) a primary violation of § 10(b); (2) each defendant's control over the operations of Sears

and/or SRAC; and (3) each defendant's power or ability to control the specific transaction or activity forming the basis of the primary violation. *Tellabs*, 303 F.Supp.2d at 969; *Sears, Roebuck and Co.*, 291 F.Supp.2d at 727. Section 20(a) does not require *scienter* or heightened pleading. *Sears, Roebuck and Co.*, 291 F.Supp.2d at 727. The Sears and SRAC Defendants claim that Plaintiffs' § 20(a) claim must fail because they have not alleged a primary violation under § 10(b). (Sears Mem., at 11-12; K/M Mem., at 10.) Having rejected the latter argument, the court concludes that the former fails as well.

Mr. Vishwanath separately argues that the § 20(a) claim against him must be dismissed because there are no allegations indicating that he had the "power or ability to control the specific transaction or activity forming the basis of the primary violation."(K/M Mem., at 11.) The court has already considered and rejected this argument in addressing Mr. Vishwanath's previous motion to dismiss. *Ong*, 2004 WL 2534615, at *37 (recognizing that the position of Vice President varies widely in the amount of control and responsibility conferred but noting that whether a defendant is a "controlling person" is a question of fact).*See also* *In re System Software Assocs., Inc.*, No. 97 C 177, 2000 WL 283099, at *16 (N.D.Ill. Mar.8, 2000).

Mr. Vishwanath insists that Plaintiffs have improperly relied on the group pleading doctrine to establish his control over Sears. In fact, the SAC alleges that "all credit finance models within the Company were under Vishwanath's control," and that Mr. Vishwanath "directly supervised the consultants who build the credit models" and "controlled the data that was released and disseminated."(SAC ¶ 224.) In addition, Mr. Vishwanath received weekly reports from the regional credit centers detailing delinquency and charge-off rates, and he helped Mr. Keleghan develop the risk analysis computer program. (*Id.* ¶¶ 225, 233.)These allegations do not rely on Mr. Vishwanath's membership in a group and are sufficient to allege that he was a controlling person for purposes of § 20(a).

C. Control Person Liability Under § 15

***27** The Sears and SRAC Defendants finally argue that Count Seven should be dismissed because Plaintiffs have not named SRAC as a primary violator of the Securities Act. Controlling person liability under § 15 of the Securities Act requires a primary violation of § 11. *See* *Tabankin v. Kemper Short-Term Global Income Fund*, No. 93 C 5231, 1994 WL 30541, at *6 (N.D.Ill. Feb.1, 1994) ("Without primary liability, there is no secondary liability.") The SAC alleges that Mr. Lacy, Mr. Liska, Mr. Richter, Mr. Trost, Mr. Slook, Mr. Raymond, and Mr. Bergmann violated § 15 because they were "controlling persons of SRAC." (SAC ¶ 349.) SRAC, however, is not named as a defendant with respect to the § 11 claims.

Plaintiffs insist that the SAC, "when taken in its totality, clearly puts the defendants on notice that SRAC is [a] primary violator under the Securities Act for the issuance of false and misleading registration statements and prospectuses."(Pl. Sears Resp., at 14-15.) The court disagrees that such an inference suffices for purposes of imposing control liability under § 15. Neither party has addressed whether SRAC qualifies as a primary violator under § 11 and, thus, Plaintiffs will be granted leave to amend the SAC with respect to this issue. The court cautions, however, that any amendment should be consistent with applicable law and immune to further objection from Defendants.

CONCLUSION

For the reasons stated above, the Underwriter Defendants' Motion to Dismiss Counts Two, Four, and Five (Docket No. 56) is granted. The Motions to Dismiss filed by Mr. Lacy and Mr. Liska, by the Sears and SRAC Defendants, and by Mr. Keleghan and Mr. Vishwanath (Docket Nos. 51, 57, and 59) are granted in part and denied in part. Count Two is dismissed for the reasons stated in discussing the Underwriter Defendants' motion to dismiss. Count Eight is dismissed as against all Defendants except Sears, SRAC, Mr. Lacy, Mr. Liska, and Mr. Keleghan. Finally, the motion to dismiss Count Seven is granted with leave to amend as set forth in this opinion, but the motion to dismiss Count Nine is denied.

N.D.Ill.,2005.
Ong ex rel. Ong v. Sears, Roebuck & Co.
Not Reported in F.Supp.2d, 2005 WL 2284285 (N.D.Ill.), Fed. Sec. L. Rep. P 93,524

END OF DOCUMENT