UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Honorable Jorge L. Alonso

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR MOTION TO PRECLUDE DEFENDANTS FROM SUBSTITUTING NEW EXPERTS

I. INTRODUCTION

Eight years after the deadline for expert witness disclosures, six years after the jury returned a verdict in favor of plaintiffs, and just months before the retrial of this case, defendants have proffered the reports of three new expert witnesses. Despite calling Mukesh Bajaj ("Bajaj") to testify on loss causation at the first trial, defendants now contend they are entitled to swap out Bajaj for three different experts simply because Daniel R. Fischel ("Fischel") has proffered supplemental opinions in accordance with the Seventh Circuit's directive. In order to designate new expert witnesses, however, defendants are required to demonstrate manifest injustice that will result if they are precluded from relying on their three new experts at the retrial. Unable to make the necessary showing of manifest injustice, defendants attempt to divert the Court's attention by raising a number of arguments belied by both the facts and the law.

First, defendants ignore the holdings of a half-dozen cases to pretend that the "manifest injustice" standard is not the law governing the use of new experts on retrial. But defendants' efforts to muddle the case law serve only to demonstrate that they are incapable of meeting the "manifest injustice" standard. In fact, when put to the challenge of showing manifest injustice, defendants fail entirely to explain why the loss causation expert they have already designated, Bajaj, is incapable of responding to Fischel's testimony and testifying at the retrial of this case.

Second, defendants misrepresent the Court's September 8, 2015 Order ("Order"), asserting that the Court has already "rejected" the arguments that plaintiffs make in support of their motion to preclude defendants from substituting new experts. But the Court has never even addressed defendants' gambit to substitute new expert witnesses. In fact, the Court's Order is completely silent on the issue of whether defendants are entitled to designate new expert witnesses.

Finally, defendants mischaracterize the trial testimony, which is plainly inconsistent with several opinions now offered by defendants' three new experts.

Despite their efforts at misdirection, defendants cannot escape the fundamental fact that they have not and cannot make the requisite showing of "manifest injustice" necessary to justify their designation of three new expert witnesses. Accordingly, plaintiffs' motion to preclude defendants from substituting new experts should be granted.

II. ARGUMENT

A. Defendants Refuse to Acknowledge the Manifest Injustice Standard Because They Cannot Satisfy It

Defendants claim that they "were not required to move the Court and demonstrate manifest injustice before designating new experts." Opp. at 5 (Dkt. No. 2072). Defendants are wrong. Even now, when put to the challenge of demonstrating manifest injustice if substitution is precluded, defendants are unable to provide any cogent reason that their loss causation expert at the first trial, Bajaj, is unable to testify competently about loss causation at a retrial. Simply put, defendants refuse to recognize the manifest injustice standard for the use of new experts on retrial because they cannot satisfy it.

In *Cleveland v. Piper Aircraft Corp*., 985 F.2d 1438 (10th Cir. 1993), a jury returned a verdict in favor of the plaintiff, but that verdict was overturned and a new trial awarded because the special verdict form improperly restricted jurors from allocating fault to all potentially responsible parties. *Id*. at 1440. On remand, the trial court ruled that only the experts presented in the first trial could be introduced in the second trial. *Id*. On interlocutory appeal of the trial court's rulings, the court of appeals held: "[w]e remand for reconsideration of the trial court's denial of the use of all new expert witnesses and exhibits with the understanding that ***parties may move for the admission of new evidence and use of new witnesses upon a showing of manifest injustice in the denial of***

their use." *Id*. at 1450.[1] The court further set out guidelines by which the trial court could exercise its discretion:

> We note that the accident occurred on July 8, 1983. The original pretrial order was filed on February 10, 1986. The parties had ample time for discovery and investigation. Our remand for a new trial was not an invitation to reopen discovery for newly retained expert witnesses and to enlarge trial time unnecessarily through the addition of totally new exhibits and testimony. It is always easy in hindsight for counsel to realize there may be a better way to try a case the second time around.

Id. at 1449.

Courts in this District and elsewhere also require a showing of "manifest injustice" before allowing new expert witnesses to testify at a retrial. Recognizing that the "manifest injustice" holding in *Cleveland* "***appears to be the governing standard applied by most courts with respect to retrials***," the court in *Steadfast Ins. Co. v. Auto Mktg. Networks, Inc.*, No. 97 C 5696, 2003 WL 22902604, at *2 (N.D. Ill. Dec. 8, 2003), denied Steadfast's motion to designate a new expert witness on retrial:

> The only thing that has changed in the meantime is Steadfast has retained new counsel, who would like to present this case to the jury in a different manner than previous counsel. As the Tenth Circuit in *Cleveland* noted, "it is always easy in hindsight for counsel to realize there may be a better way to try a case the second time around." 985 F.2d at 1449. Such a scenario rings true here, and the court sees nothing to suggest a manifest injustice.

Id.

Unable to articulate some tangible, manifest injustice that will result if defendants are precluded from designating new expert witnesses, defendants instead misconstrue the requirements of *Cleveland*. *See* Opp. at 5-7. But try as they might, *Cleveland* (and the cases that have applied it)

[1] Here, as elsewhere, emphasis is added unless noted otherwise.

held that a party seeking to use new experts on retrial must make "***a showing of manifest injustice in the denial of their use***." 985 F.2d at 1450.[2]

Of course, defendants' conclusory claims of manifest injustice – based on *ipse dixit* alone – do not satisfy the standard. But that is all they have. Opp. at 8. After all, defendants never even attempt to explain why the loss causation expert they have already designated, Bajaj, is incapable of responding to Fischel's testimony or testifying at the retrial of this case. Bajaj spent 10,000 hours analyzing the economic evidence in this case, submitted a 92-page report on loss causation, submitted a 24-page sur-rebuttal report in response to the arguments set forth in Fischel's original report, sat for a deposition and testified at trial. *See* Plaintiffs' Mtn. at 3. Bajaj's two expert reports, deposition testimony and trial testimony addressed Fischel's "earlier testimony and reports" – the very same "earlier testimony and reports" defendants now contend they need three new experts to address. Nor do defendants explain why, exactly, Bajaj is incapable of addressing the purportedly "distinct issues" raised by Fischel's supplemental reports.[3]

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[2] *See Steadfast Ins. Co.*, 2003 WL 22902604, at *2 (denying motion to designate a new expert witness on retrial where party cannot show "***manifest injustice***"); *Clark v. R.E.L. Prods.*, Case No. 90-4121-R, 1993 WL 100304, at *2 (D. Kan. Mar. 4, 1993) (affirming magistrate judge's decision to deny adding expert witness before retrial where "[t]he magistrate found that plaintiff had not demonstrated that he would suffer ***manifest injustice*** if he were denied the opportunity to designate additional expert witnesses"); *Grupo Televisa v. Telemundo Communs. Group, Inc.*, No. 04-20073-CIV, 2007 WL 4699017, at *2 (S.D. Fla. Oct. 12, 2007) (denying motion for reconsideration of the court's order striking plaintiffs' newly identified expert and "fail[ing] to see any ***manifest injustice***" in precluding plaintiffs from relying on the new expert at trial); *Little v. City of Richmond*, No. 13-CV-2067-JSC, 2015 WL 798544, at *1-*2 (N.D. Cal. Feb. 23, 2015) (declining to exercise discretion to allow new experts to testify on retrial because exclusion of new experts would not result in "***manifest injustice***").

[3] Defendants also contend that they "timely served the reports of their experts in accordance with" the Court's Order. Opp. at 5. Defendants are incorrect. The deadline for expert disclosures in this case expired ***eight years ago*** (*see* Dkt. No. 1152) and was not re-opened by the Court's Order, which simply set deadlines for supplemental expert reports (and was not an invitation to designate three new expert witnesses) consistent with the Seventh Circuit's directive. On December 10, 2007, defendants served the expert report of Bajaj and did not designate any other expert to testify on the element of loss causation. After remand, defendants never sought to alter or amend the Court's original Rule 16 scheduling order to allow for the designation of new experts.

Given the absence of any valid reason – much less a showing of manifest injustice – why defendants need three new, previously undisclosed experts to respond to Fischel's prior and supplemental reports, it becomes clear that defendants are merely seeking a do-over. Defendants can develop their loss causation theories and defenses through their earlier expert witness; they should not be permitted to proffer three new expert witnesses simply because they have retained new counsel who wish to correct the tactical errors and shortcomings of defendants' prior counsel. *Cleveland*, 985 F.2d at 1449-50 ("It is always easy in hindsight for counsel to realize there may be a better way to try a case the second time around." But "a lawyer's theory of how to 'plug the holes' of a case" does not allow a party to introduce totally new expert witnesses).

Defendants' new expert Bradford Cornell ("Cornell") should be excluded for the additional reason that defendants failed to designate Cornell as an expert for the first trial even though they had retained Cornell in advance of that trial. Indeed, defendants submitted a declaration from Cornell in advance of the first trial that contained the same opinions as those in his October 23, 2015 expert report. *See* Dkt. No. 1361-7. But defendants never explain why, despite retaining Cornell and submitting a declaration with the same opinions before the first trial, they failed to designate him as an expert at that trial. This defect is fatal. Defendants made a tactical choice not to designate Cornell as an expert for the first trial and must live with that decision. Where, as here, "the moving party knew or should have known that certain witnesses or evidence was necessary at the time of the first trial," the "exclusion of those witnesses during the retrial will likely not be manifestly unjust." *Little*, 2015 WL 798544, at *2; *see Whitehead v. K Mart Corp.*, 173 F. Supp. 2d 553, 565 (S.D. Miss. 2000) (declining to permit defendants to designate a new expert "because these were matters which easily could have been pursued prior to the first trial of this case").

B. The Court's September 8, 2015 Order Is Silent on the Issue of Whether Defendants Are Permitted to Designate New Experts

Defendants incorrectly claim that plaintiffs' motion "rehashes arguments that this Court has already rejected." Opp. at 3. To be sure, the parties disagreed on the scope of the retrial as to loss causation in the Joint Status Report. Plaintiffs argued that the scope of the retrial on this element should be limited to the impact, if any, of non-fraud company-specific information. Joint Status Report at 4-8 (Dkt. No. 2035). Defendants argued that plaintiffs should be required to prove loss causation anew at a second trial. *Id.* at 8-12. The Court settled this dispute in its September 8, 2015 Order: "The Court agrees with defendants . . . [I]n the new trial, plaintiffs must prove that defendants' misrepresentations were 'a substantial cause of the economic loss plaintiffs suffered.'" Order at 1-2. This ruling, however, is entirely unrelated to whether defendants have demonstrated that they would suffer manifest injustice if they were precluded from designating additional expert witnesses.

By twisting the grounds on which plaintiffs seek relief, defendants suggest that it is the scope of the loss causation retrial that somehow correlates with whether they can designate substitute expert witnesses. But plaintiffs' motion to preclude defendants from substituting new expert witnesses does not hinge, as defendants assert, on "their position about the 'limited' scope of the remand." Opp. at 4. Rather, defendants are required to make a showing of "manifest injustice" to designate new experts regardless of the scope of the loss causation retrial. Nothing in *Cleveland* (or any of the other cases mandating a showing of manifest injustice to add expert witnesses on retrial) suggests that its application is limited by the scope of the retrial. Accordingly, the Court has not considered – much less rejected – the arguments in plaintiffs' motion to preclude substituting new experts.

To the contrary, the Order is ***completely silent*** on the issue of whether defendants are entitled to substitute three new experts for their prior expert Bajaj and whether defendants have met the "manifest injustice" standard required under *Cleveland*, 985 F.2d at 1449. While the Order does not preclude defendants from proffering new expert witnesses, it also does ***not*** authorize defendants to retain three new expert witnesses or excuse defendants from meeting the legal standard for substitution – the Order simply does not address the issue.

Having set up this straw man, defendants knock it down by pointing to the Court's language that it "agrees with defendants," from which they draw the unwarranted conclusion that the Court considered and rejected plaintiffs' argument on the use of new experts. Opp. at 4. In fact, the Court's statement that it agreed with defendants directly followed a recitation of the parties' respective positions on the scope of the loss causation retrial. It had nothing to do with the whether defendants should be permitted to substitute new expert witnesses for Bajaj. Order at 1-2.

In short, defendants' contention that this Court "has already rejected" plaintiffs' arguments should be given short shrift. The Court did not address these arguments in the Order or anywhere else.

C. Defendants' Three New Experts Offer Opinions that Contradict Bajaj's Testimony

Defendants assert that the their new experts' reports are consistent with Bajaj's trial testimony. Opp. at 9. On the contrary, their new experts' opinions squarely contradict Bajaj's trial testimony and defendants' theory of the case.

First, defendants argue that "Bajaj did not testify that ***any*** disclosures were fraud related." *Id.* (emphasis in original). But this is precisely what Bajaj did when he used a demonstrative exhibit at trial entitled "Alleged Fraud-Related News Ignored by Prof. Fischel," which graphically depicts over

a hundred dates during the Class Period on which "fraud-related news" was disclosed. *See* Ex. 1;[4] *see also* Ex. 2 at 4237:13-4238:7. This, of course, stands in stark contrast to defendants' new experts' contention that there is no basis to attribute the decline during the 228-day disclosure period to the disclosure of fraud. *See, e.g.*, Expert Report of Professor Allen Ferrell (Dkt. No. 2060-3), ¶17 and Expert Report of Professor Christopher M. James (Dkt. No. 2060-4), ¶58.

Second, defendants pretend that their new expert's use of one index (the Credit Suisse First Boston Specialty Finance Universe) is somehow consistent with Bajaj's use of an entirely different index ("Consumer Finance Index," an index that Bajaj invented for use in this case). Opp. at 10. It is difficult to understand, however, how defendants' new experts "agree" with Bajaj when they eschew his index for a completely different one.

Finally, defendants' new experts criticize Fischel for failing to account for more stringent lending and capital restrictions stemming from guidelines imposed by the Federal Financial Institutions Examinations Council ("FFIEC"). Ferrell Report, ¶¶51, 55; James Report, ¶¶45-47, 55. Defendants concede that their new experts level this criticism, but contend that it is consistent with the trial testimony and defendants' theory of the case at the first trial. Not so. Throughout the trial, defendants sought to convince the jury that the FFIEC rules did ***not*** apply to Household (a finance company), but did apply to Wells Fargo (a bank that considered acquiring Household during the Class Period but walked away from the deal when it uncovered Household's reaging fraud). *See, e.g.*, Trial Tr. at 3242:17-24 (testifying that the FFIEC rules applied to Wells Fargo); Trial Tr. at 1276:12-21 (testimony by Gilmer that the FFIEC did not apply to Household, which purportedly gave Household "greater flexibility in some area[s] than the banks"); Trial Tr. at 2560:20-2561:14 (eliciting testimony on cross examination from plaintiffs' accounting expert that Household was not

[4] All exhibits referenced throughout are attached to the Declaration of Daniel S. Drosman in Further Support of Plaintiffs' Motion to Preclude Defendants From Substituting New Experts.

governed by the FFIEC rules). Defendants argued that Wells Fargo ultimately walked away from the Household deal because of the cost of bringing Household into compliance with FFIEC rules, not because Wells Fargo's due diligence revealed pervasive predatory lending practices and "aggressive" reaging policies. Ex. 3, Trial Ex. 1351; Trial Tr. 4591:3-4592:8 (Household's counsel arguing in closing arguments that the FFIEC rules applied to Wells Fargo and not Household, and "if Wells Fargo had acquired Household" then Wells Fargo would have incurred substantial costs in converting Household to bank accounting); Trial Tr. at 2562:15-18.

Moreover, defendants mischaracterize the trial testimony of Schoenholz and Aldinger regarding the applicability of the FFIEC guidelines to Household by omitting key portions of their testimony. For example, defendants ignore the portion of Schoenholz's trial testimony in which he testified that the FFIEC rules applied to a "***relatively small***" percentage of Household's total receivables. *See* Trial Tr. at 2172:8-20. Schoenholz also testified that the "FFIEC were rules set by banking regulators ***to apply to banks***" and that Household "***was not a bank***." *Id*. at 2172:21-2173:4. Aldinger similarly testified that the FFIEC rules – which he described as "much more strict on what you can do in terms of re-aging" – did ***not*** apply to Household's consumer lending unit, but applied to Wells Fargo. *Id.* at 3242:17-24.

Defendants' new lawyers evidently recognize tactical errors in the first trial and seek to correct them on retrial by using new loss causation experts whose opinions diverge from Bajaj's. While "[i]t is always easy in hindsight for counsel to realize there may be a better way to try a case the second time around," new trials are not meant to give litigants a second chance to promote theories that conflict with positions taken at a prior trial. *See Cleveland*, 985 F.2d at 1449.

III. CONCLUSION

Because defendants have failed to establish that manifest injustice would result if their new experts are not allowed, defendants' new experts should be excluded at the retrial.

DATED: January 8, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2016, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses for counsel of record denoted on the attached Service List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 8, 2016.

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