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

LAWRENCE E. JAFFE PENSION PLAN, on Behalf of Itself and All Others Similarly Situated, Plaintiff,	)	Case No. 02 C 5893
	)	Judge Jorge L. Alonso
v.	)	
HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION *IN LIMINE* NO. 9

Defendants respectfully submit this Response to Plaintiffs' Motion *In Limine* No. 9 To Permit Plaintiffs To Offer Certain Prior Trial Testimony of Dr. Mukesh Bajaj. The Court should deny Plaintiffs' Motion because Dr. Bajaj's prior testimony is irrelevant, and because admission of Dr. Bajaj's prior testimony would result in unfair prejudice to Defendants, confuse the jury, and waste the jury's, the Court's, and the parties' time.

BACKGROUND

Dr. Mukesh Bajaj was Defendants' loss causation expert at the first trial. Following the Seventh Circuit's remand for a new trial on loss causation and inflation, Defendants retained three new experts for the retrial—Professor Allen Ferrell, Professor Christopher James, and Professor Bradford Cornell. After Defendants served the initial reports of Professors Ferrell, James, and Cornell, Plaintiffs filed a motion asking this Court to preclude Defendants from "substituting" new experts for the retrial. Dkt. 2068. In denying that motion, this Court noted that "the Seventh Circuit's decision contemplates that there will be additional expert testimony concerning Professor Fischel's loss causation models." Dkt. 2102 at 1-2.

ARGUMENT

A. Dr. Bajaj's Testimony from the First Trial Is Irrelevant.[1]

Plaintiffs contend that Dr. Bajaj's testimony from the first trial is admissible as non-hearsay because it is the admission of a party-opponent under Fed. R. Evid. 801(d)(2)(C). Mot. at 2-4. Plaintiffs further argue that, if Dr. Bajaj's testimony from the first trial is deemed to be hearsay, it nevertheless is admissible under Fed. R. 804(b)(1)'s exception to the hearsay rule, because Dr. Bajaj is unavailable to testify at the new trial. *Id.* at 4. Defendants do not concede that Dr. Bajaj's testimony is an admission by a party opponent, and Plaintiffs have failed to demonstrate that they made any independent effort to contact Dr. Bajaj to request his attendance at the retrial. *See, e.g., Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 164-65 (3d. Cir. 1995) (holding that prior testimony of expert did not constitute an admission of a party-opponent pursuant to Fed. R. Evid. 801(d)(2)(C) and, therefore, was hearsay, and that Fed. R. Evid. 804(b)(1)'s exception to the hearsay rule was inapplicable because the plaintiff, who sought to introduce these statements, "made no independent attempt to contact [the expert], offer him his usual expert witness fee, and request his attendance at trial"). Dr. Bajaj is not a retained expert for the retrial and he cannot testify as a fact witness because he has no personal knowledge of any facts at issue.

But even if Plaintiffs were correct that Dr. Bajaj's prior trial testimony is not hearsay, the Court should deny Plaintiffs' Motion *In Limine* No. 9 because Plaintiffs have failed to demonstrate that Dr. Bajaj's testimony from the first trial is *relevant*. *See* Fed. R. Evid. 401

[1] Defendants' Motion *In Limine* No. 2 To Preclude Reference to Prior Proceedings requests, among other things, that Plaintiffs be precluded from presenting Dr. Bajaj's testimony from the first trial or informing the new jury that Defendants used a different expert in the first trial. Dkt. 2146. Defendants' arguments regarding Dr. Bajaj are set forth in Section A of their memorandum of law in support of that motion. Dkt. 2147.

(defining relevant evidence); Fed. R. Evid. 402 (providing that "[i]rrelevant evidence is not admissible"); *see also, e.g., United States v. Foster*, 939 F.2d 445, 451 (7th Cir. 1991) ("*[I]f relevant*, Rule 702 allows for the admission of expert testimony if the witness is qualified and if the testimony would be helpful to the jury.").

Plaintiffs assert that "Bajaj's testimony from the first trial is relevant since it is at odds with defendants' three new loss causation/damages experts." Mot. at 1. Specifically, Plaintiffs contend that: (i) Dr. Bajaj "admitted there was leakage of fraud-related information related to the Washington DFI [Department of Financial Institutions] report in 2002, a fact disputed by defendants' new experts"; and (ii) Dr. Bajaj created a different peer group index than the peer group indices created by Professors Ferrell and James. *Id.* at 1.

Contrary to Plaintiffs' assertion, Dr. Bajaj did *not* admit that there was leakage of fraud-related information relating to the Washington DFI report. Plaintiffs' assertion mischaracterizes Dr. Bajaj's report and testimony. Dr. Bajaj's non-existent "admission" is, therefore, irrelevant.[2]

Plaintiffs' suggestion that Dr. Bajaj's testimony is "at odds" with that of Professors Ferrell and James because Dr. Bajaj used a different industry index than Professors Ferrell and James also is incorrect. Dr. Bajaj, Professor Ferrell, and Professor James *all agree* that the S&P Financials Index that Professor Fischel used as his industry index is too broad to capture the

[2] In his report, Dr. Bajaj noted that Plaintiffs' expert, Professor Fischel, had identified August 27, 2002, the date on which the *Bellingham Herald* published an article about the Washington DFI report, as one of the 14 corrective disclosure days included in his specific disclosures model. Bajaj Report (Ex. A hereto) at 58. Dr. Bajaj further noted that the market had received information about the Washington DFI report on at least four prior dates, and there was no statistically significant change in Household's stock price on any of those dates. *Id.* at 58-59. Dr. Bajaj did not characterize the information revealed on those four dates, and again on August 27, 2002, as "fraud-related," nor did he assert that this information "leaked out" over these five dates. Dr. Bajaj's point, rather, was that the information about the DFI report that was released on August 27, 2002 was stale information that had no effect on Household's stock price and, therefore, there is no basis to characterize the information released on August 27, 2002 as a "curative" or "corrective" disclosure.

effects of nonfraud factors that disproportionately were affecting Household and other companies that operated in the narrower subprime sector of the financial industry. The fact that each of these three experts chose slightly different industry indices does not mean that their testimony is inconsistent.[3]

The fact that Professors Ferrell and James chose to use different industry indices than Dr. Bajaj also does not provide any basis for cross-examination of Professors Ferrell and James. Professors Ferrell and James, as well as Professor Cornell, testified that they did not did not rely on Dr. Bajaj's reports or testimony in conducting their own expert analyses in this case. *See* Defendants' Motion *In Limine* No. 2 (Dkt. 2147) at 3-4.

Because Plaintiffs have failed to demonstrate that the testimony of Dr. Bajaj that they seek to introduce at the new trial is relevant to their case-in-chief or for purposes of cross-examining Defendants' experts, the Court should deny Plaintiffs' Motion *In Limine* No. 9 to admit this evidence. Fed. R. Evid. 401, 402.[4]

B. Admission of Dr. Bajaj's Testimony from the First Trial Would Result in Prejudice to Defendants and Would Confuse the Jury.

Even if Dr. Bajaj's testimony from the first trial were relevant and thus admissible, it should be excluded pursuant to Fed. R. Evid. 403. Rule 403 allows the Court to exclude

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[3] Which industry index to use in conducting a regression analysis is a matter that lies within the judgment of the particular expert conducting the analysis. *See, e.g., In re Seagate Tech. II Sec. Litig.*, 843 F. Supp. 1341, 1348 (N.D. Cal. 1994) ("Usually, industry indices need to be specially constructed because most companies do not fit neatly into a single industry category.").

[4] Contrary to Plaintiffs' assertion, Plaintiffs do not need to present Dr. Bajaj's trial testimony to establish "whether a company's stock price could become inflated because of something the company failed to disclose (*i.e.*, a fraudulent omission)," or "how inflation can enter and leave a stock price." Mot. at 3. There is no dispute about these issues, which are addressed in the Seventh Circuit's opinion in this case. *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 415-25 (7th Cir. 2015). Furthermore, Plaintiffs' own expert, Professor Fischel, can testify about these matters, as can Defendants' experts.

otherwise relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

Admitting Dr. Bajaj's prior testimony, and thus informing the jury that Defendants used a different loss causation expert in the first trial, would present a significant danger of unfair prejudice, jury confusion, and waste of time that outweighs any potential probative value. The potential prejudice to Defendants and the risk of jury confusion is clear. In denying Plaintiffs' motion to preclude Defendants from "substituting" new experts, the Court noted that "the Seventh Circuit's decision contemplates that there will be additional expert testimony concerning Fischel's loss causation models." Dkt. 2102 at 1. Plaintiffs, however, seek to penalize Defendants for hiring new experts and prejudice the jury by insinuating that Defendants chose not to continue use Dr. Bajaj because his opinions are harmful to Defendants and inconsistent with the opinions of Defendants' new experts. These insinuations are untrue, but rebutting them would require significant time and explanation about Dr. Bajaj's prior opinions and the procedural history of this case. Forcing Defendants to spend valuable trial time responding to such a collateral attack on a witness who is not appearing at trial would be highly prejudicial and likely to confuse the jury. And, of course, time spent rehashing the prior proceedings in this case, rather than proving or disproving the elements at issue before this jury, would be a waste of the jury's, the Court's, and the parties' time and resources.

CONCLUSION

For the reasons set forth above, the Court should deny Plaintiffs' Motion *In Limine* No. 9 To Permit Plaintiffs To Offer Certain Trial Testimony of Dr. Mukesh Bajaj.

Dated: May 6, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

R. Ryan Stoll, an attorney, hereby certifies that on May 6, 2016, caused true and correct copies of the foregoing Defendants' Response to Plaintiffs' Motion *In Limine* No. 9 To Permit Plaintiffs To Offer Certain Prior Trial Testimony of Dr. Mukesh Bajaj to be served via the Court's ECF filing system on the following counsel of record in this action:

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EXHIBIT A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

In re: Lawrence E. Jaffe Pension Plan	)	
Plaintiff,	)	
	)	
v.	)	Lead Case No. 02-C-5893
	)	
Household International, Inc., et al	)	
	)	
	)	
Defendant,	)	
	)	

EXPERT REPORT OF MUKESH BAJAJ

December 10, 2007

changes through a re-assessment of headline risk, and such changed expectations resulted in a significant stock price change on certain days during the Class Period, there is no economic basis to assert that such price declines represent economic harm.

Moreover, Professor Fischel fails to note that Mr. Daniel's comments were not based upon his assessment of HI's headline risk associated with alleged "predatory lending" practices alone. Instead, in his co-authored report, Mr. Daniel noted various other non-fraud related factors that resulted in their overall opinion, including heavy dependence on capital markets for financing and high credit costs.[225]

In identifying August 27, 2002 as a Specific Disclosure, Professor Fischel also cites a *Bellingham Herald* article published that day, which provided details of the WA Report. The article, however, reported information that was several weeks old, which would be value-irrelevant in an efficient market. The article noted:[226]

> In recent weeks, copies of the report have been leaked to every news organization that has been following the HFC story – including The New York Times, Forbes Magazine, American Banker magazine [sic] and The Bellingham Herald.

Specifically, the market received information about the WA Report on at least four prior occasions (April 18, 2002, May 30, 2002, June 10, 2002, and August 26, 2002). As Professor Fischel recognizes, investors came to learn of the WA Report as early as April 18, 2002.[227] On May 30, 2002, Mr. Crudele of the *New York Post* stated that "yesterday Household got a temporary injunction against the release of [the WA Report]." Mr. Crudele further commented that he didn't "know what's in that report, but [he] bet it isn't complimentary to Household" and

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[225] Daniel, Vincent, and Raj Kommineni, "Initiating Coverage of Household International With a Market Perform Rating, Yet Another Un-Investable Situation," *Keefe, Bruyette & Woods*, August 27, 2002.
[226] Fischel Report, paragraph 16.
[227] Fischel Report, paragraph 16.

that Household had told him that the report was "fraught with inaccuracies."[228] [Bracketed text added.] On June 10, 2002, *National Mortgage News* discussed the WA Report with the acting director of the Washington Department of Financial Institutions ("DFI"), which revealed that "in more recent complaints, consumers have said they aren't understanding the terms of their loans."[229] An *American Banker* article on August 26, 2002, which Professor Fischel has cited as a disclosure, also provided a detailed discussion of the various allegations made in the WA Report.[230]

Professor Fischel fails to note that HI's stock price reaction was insignificant on each of the above-mentioned dates, indicating that the market did not consider discussions of the impending WA Report to be value-relevant. HI's stock price reaction to the final publication of the entire WA Report on August 28, 2002 was also insignificant.[231]

In summary, the events that Professor Fischel has identified on August 27, 2002 cannot be considered curative disclosures. My analysis reveals that HI's market-adjusted price change on August 27, 2002 was not statistically significant (See Exhibit 8).

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[228] Crudele, John, "Household Blocks Report in Suit Over Financing Practices," *New York Post*, May 30, 2002.
[229] Venetis, Kyriaki, "Household Facing Investigations, Lawsuits in Washington State," *National Mortgage News*, June 10, 2002.
[230] "Wash. State Report Slams Household's '99-'01 Tactics," *American Banker*, August 26, 2002.
[231] I understand that the complete WA report was available on the *Bellingham Herald* website on August 28, 2002. [Source: "Complete Report by the Washington Department of Financial Institutions," *Bellingham Herald*, August 27, 2002, (HHS 02944208 – HHS 02944215) and Email from Larry West of The Bellingham Herald, September 9, 2002 (BP 000568 – BP 000569), at BP 000568.] Since the time-stamp for this news was unavailable I examined HI's stock price reaction on August 28, 2002 and August 29, 2002 and found both dates' price reactions to be statistically insignificant.