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

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

REPLY IN SUPPORT OF DEFENDANTS' MOTION *IN LIMINE* NO. 3 TO EXCLUDE PLAINTIFFS' EXPERT FROM EXPRESSING OPINIONS NOT PREVIOUSLY DISCLOSED

Plaintiffs oppose Defendants' Motion *In Limine* to preclude Plaintiffs' expert, Professor Daniel R. Fischel, from expressing at trial opinions not previously disclosed to Defendants. But Plaintiffs do not contest that Professor Fischel cannot express undisclosed opinions at trial. Instead, they claim that Professor Fischel's statements during his February 24, 2016 deposition were "entirely consistent" with his previously disclosed opinions and trial testimony. Opp. at 1 (Dkt. 2156). Plaintiffs miss the point. The question is not whether Professor Fischel's statements were "consistent" with what he has said in the past. The question is whether Professor Fischel has adequately disclosed "all opinions" he will express and "the basis and reasons for them." *See* Fed. R. Civ. P. 26(a)(2). To the extent he has not done so here, Professor Fischel should be precluded from expressing those opinions at the retrial.

For expert disclosures to comply with Federal Rule of Civil Procedure 26, they "must include the substance of the testimony which an expert is expected to give on direct examination together with the reasons therefor." *Salgado by Salgado v. Gen. Motors Corp.*, 150 F.3d 735,

741 n.6 (7th Cir. 1998) (quoting Fed. R. Civ. P. 26). An expert must disclose "the basis and reasons for *each* opinion." *Fidelity Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co.*, No. 00 C 5658, 2001 WL 789218, at *3 (N.D. Ill. July 12, 2001). Disclosures that are "conclusory" are unacceptable. *Salgado*, 150 F.3d at 741 n.6.

Professor Fischel should be precluded from offering at trial any opinion for which he has not adequately disclosed the basis and any opinion that is impermissibly "conclusory." At least two pieces of anticipated testimony qualify. *First*, Professor Fischel should not be permitted to testify that there were, or might have been, more than 14 specific disclosures during the class period. Professor Fischel has *never*—not in six written reports, during either of two depositions, or during testimony in the first trial—opined that a corrective disclosure resulting in a statistically significant residual price change occurred on any day other than the 14 days he identified during the class period. *See* Mot. at ¶ 6 (Dkt. 2148). Plaintiffs do not dispute this fact. Instead, they seek to justify Professor Fischel's testimony that he "*could* have included more dates under the specific disclosure model," Fischel Dep. Tr. 49:19-23 (emphasis added), by pointing out that Professor Fischel has made the same claim in the past, Opp. at 1-2. That Professor Fischel has repeated the same conclusory statement, however, is irrelevant. The salient point is that, notwithstanding whether or not he *could* have included additional dates, Professor Fischel never *did* opine that an additional date or event constitutes a specific disclosure. Professor Fischel should thus be precluded both from testifying about new specific disclosure dates before the retrial jury and from informing the retrial jury that he *could* have included additional dates in his specific disclosure model.

Second, Professor Fischel should not be permitted to testify about instances of purported "leakage" that he has not identified as the bases for his opinion that a leakage model is an

appropriate method of measuring loss causation and inflation. Plaintiffs' position appears to be that Professor Fischel's vague references to leakage as "substantial" and "continuous" give him free rein to testify that any given disclosure or event is an example of leakage, regardless of what Professor Fischel stated in his reports or his prior testimony. Opp. at 3.[1] Rule 26 is not so easily circumvented. *See Salgado*, 150 F.3d at 741 n.6. Professor Fischel has disclosed in his reports the specific events underlying his opinion that the truth regarding the 17 misstatements leaked out over time. *See* Mot. ¶ 7.[2] He should be required to adhere to these opinions, which Defendants have relied upon in preparing for trial, rather than being permitted to offer entirely new opinions based on his vague and sketchy descriptions of the scope of the leakage.

Finally, Plaintiffs cannot justify testimony by Professor Fischel about specific disclosures or leakage events not disclosed as the bases for his opinions by referencing an opinion provided by Defendants' expert from the first trial, Dr. Mukesh Bajaj. Defendants have, in multiple filings, explained why any reference to Dr. Bajaj's past testimony should be excluded from the

[1] Defendants have separately moved to preclude Plaintiffs and their expert from inappropriately characterizing the fraud in this case. Dkt. 2147 at 8-10.

[2] Plaintiffs argue that Defendants "fail[ed] to include additional leakage disclosures and events" in their Motion *In Limine*. Opp. at 2. Defendants never purported to provide an exhaustive list of the "leakage disclosures and events" cited in Professor Fischel's reports, but Plaintiffs' citations nevertheless provide insight into the expansive definition of a "leakage disclosure [or] event" they intend to use at trial. The majority of the paragraphs they cite identify events that Professor Fischel cited, not as evidence of leakage, but in support of other points. *See, e.g.*, Fischel Report ¶ 28 (market participants' explanation of Household's stock price decline); Fischel Rebuttal ¶ 16 (analysts' concerns about a settlement with state attorneys general); Fischel Second Rebuttal ¶¶ 13-14 (disagreeing with Professors James and Ferrell's categorization of certain factors as "nonfraud" or "firm-specific"), 15-16 (demonstrating Household's business performance during the class period), 24-26, 34-35, 43, 47, 53-55, 62-63, 65, 83-85, 88-89, 90, 92-93, 96-99, 107 (disagreeing with Professor Ferrell's categorization of certain information as either new, "nonfraud," or "firm-specific"). Professor Fischel should not be permitted to adopt a new definition of "leakage disclosures and events" at trial that is inconsistent with the actual opinions expressed in his reports.

retrial. *See* Dkt. 2145; Dkt. 2168. Professor Fischel has never agreed with or adopted Dr. Bajaj's opinions. At most, Professor Fischel relied upon Dr. Bajaj's opinions and testimony in order to criticize Dr. Bajaj's opinions. *See Fidelity*, 2001 WL 789218, at *3 (requiring an expert to disclose "the basis and reasons for *each* opinion"). There is no need for Professor Fischel to offer this criticism at the retrial. Accordingly, Professor Fischel should not be permitted to testify at the retrial about any specific disclosure or leakage events that he did *not* identify as the basis for his own opinions, but referenced only as part of his criticism of opinions Dr. Bajaj offered during the first trial.

Dated: May 13, 2016

Respectfully submitted,

/s/ R. Ryan Stoll

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CERTIFICATE OF SERVICE

R. Ryan Stoll, an attorney, hereby certifies that on May 13, 2016, he caused true and correct copies of the foregoing Reply Memorandum In Support of Defendants' Motion *In Limine* No. 3 to be served via the Court's ECF filing system on the following counsel of record in this action:

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