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 *IN LIMINE* NO. 3

I. INTRODUCTION

Following the Seventh Circuit's mandate, the issues to be retried are loss causation, damages and proportionate liability. Despite the narrowed scope of the ***issues*** to be retried, however, the ***evidence*** relevant to those issues is not as limited as defendants would have the Court believe. Because much of the evidence from the first trial is relevant to the issues that will be retried, the evidentiary rulings from the first trial governing the admissibility of that evidence should apply with equal force at the retrial.

II. ARGUMENT

A. Defendants Cannot Overcome the Presumption that the Court's Prior Evidentiary Rulings Should Apply at the Retrial

Although the scope of the retrial in this case has been narrowed to the issues of loss causation, damages and proportionate responsibility, the evidence relevant to the jury's determination on those issues overlaps with the evidence presented at the first trial. *See* Plaintiffs' MIL No. 1 (Dkt. No. 2133); Opposition to Defendants' MIL No. 1 (Dkt. No. 2154). Indeed, as established in plaintiffs' Motion *in Limine* No. 1, evidence of defendants' fraud is relevant to establishing, *inter alia*, what is non-fraud information, and whether and to what extent it impacted Professor Fischel's models, and the allocation of responsibility for plaintiffs' losses among the four defendants. *See generally* Dkt. No. 2133. Thus, although the scope of the ***issues*** to be retried is narrow in light of the Seventh Circuit's mandate, the ***evidence*** necessary to prove those issues has not been so narrowed. The distinction is an important one, which defendants repeatedly attempt to blur.

While the law of the case doctrine gives rise to a presumption "that earlier rulings will stand," the presumption may be rebutted only for "***compelling reasons***" such as "new controlling law or clear error."[1] *Best v. Shell Oil Co.*, 107 F.3d 544, 546 (7th Cir. 1997) (emphasis added);

[1] In *United States v. Boyd*, 208 F.3d 638, 642-643 (7th Cir. 2000), cited by defendants, the Seventh Circuit found the district court had erred in ruling that defendants' failure to challenge the admissibility of evidence at the first trial waived the issue in the second trial. *Id.* at 642. Here, the Court previously rejected defendants' evidentiary objections, and defendants have not established that the evidence plaintiffs seek to introduce is irrelevant to the retrial. Thus, even if the Court finds the law of the case does not create a presumption, the evidentiary rulings from the first trial should continue to apply at the retrial.

CERAbio, LLC v. Wright Med. Tech., Inc., No. 03-C092, 2006 WL 641466, at *10-*11 (W.D. Wis. Mar. 10, 2006) ("a court may reexamine the ruling of a judge previously assigned to the case only when 'he has a conviction at once strong and reasonable that the earlier ruling was wrong, and if rescinding it would not cause undue harm to the party that had benefitted from it'") (citation omitted). Here, defendants contend that the Court has a "compelling reason" to revisit the prior evidentiary rulings in this case because the Seventh Circuit remanded for a new trial on loss causation, damages and proportionate responsibility. Defs' Opp. at 5 (Dkt. No. 2162). The Seventh Circuit's remand does not provide a compelling reason to revisit the evidentiary rulings made before the last trial, because that evidence has continuing relevance to loss causation, damages and proportionate responsibility. *See* Plaintiffs' MIL No. 1; Opposition to Defendants' MIL No. 1. Thus, defendants' attempt to distinguish cases where the court refused to re-examine *in limine* rulings from the first trial on the grounds that they did not involve a remand of a "small subset of issues to the district court for retrial" is unavailing. Defs' Opp. at 6. Furthermore, because defendants failed to challenge any of the Court's prior evidentiary rulings on appeal, they should be precluded from re-litigating them now.

Defendants also contend the Court should go back in time and "close the door" to settlement-related evidence that was admitted at the last trial only after ***defendants*** affirmatively opened the door to such evidence. The fact that the Court originally precluded such evidence, but then allowed that evidence following defendants' "tactical" decision to elicit testimony regarding it, should have no bearing on the admissibility of settlement-related evidence at the retrial.[2] Having let the cat out, defendants cannot stuff it back into the bag years later simply because defendants' new counsel may have made a different "tactical" decision at the last trial. Evidence regarding Household's civil and regulatory settlements – which bears directly on issues relating to loss causation, damages and proportionate responsibility – should be admissible at the retrial, just as it was at the first trial. *See*

[2] During the Pretrial Conference, Judge Guzmán warned that settlement-related evidence may come in at trial if defendants opened the door to it.

Dkt. No. 2154 at 10-11. The first jury based its liability findings on this evidence; the second jury is entitled to hear it as well.

Confronted with controlling Seventh Circuit precedent, defendants again try to distinguish it by arguing *Watts v. Laurent*, 774 F.2d 168, 181 (7th Cir. 1985) does not permit plaintiffs to "offer evidence related to elements not at issue in the new trial." Defs' Opp. at 7. The Seventh Circuit's decision in *Watts* makes clear that in cases like this one, where evidence from the liability phase is clearly relevant to damages, "the parties shall have an opportunity to present to the second jury whatever evidence . . . from the liability phase of the trial may be regarded as relevant ***in any way*** to the question of damages." *Watts*, 774 F.2d at 181 (emphasis added). Defendants are simply wrong to suggest that ***none*** of the evidence from the first trial has any bearing on the issues that will be determined at the retrial. *See* Plaintiffs' MIL No. 1; Opposition to Defs' MIL No. 1.

Defendants nevertheless agree that some of the Court's rulings should apply to the new trial. Defs' Opp. at 7. Thus, plaintiffs' motion *in limine* should be granted and (1) plaintiffs should receive the same number of peremptory challenges as defendants combined; (2) plaintiffs may examine witnesses identified with defendants with leading questions; and (3) percipient witnesses to whom Federal Rule of Evidence 615 applies will be excluded from the courtroom. Defs' Opp. at 7; *see also* Dkt. No. 1505.

Defendants also consent to three more of Judge Guzmán's prior rulings, subject to "minor modifications." Defs' Opp. at 7. Plaintiffs do not object to one of defendants' proposed modifications, but do object to the other two. Specifically, plaintiffs seek to prevent counsel from communicating with a witness about the witness' trial testimony after the witness is sworn in and before the witness' testimony is complete, and from discussing other witnesses' trial testimony with witnesses who have yet to start or finish testifying. Dkt. No. 2135 at 2. Defendants propose to modify this ruling by clarifying that the parties' experts must be able to discuss the testimony of the opposing experts with counsel before they testify. Plaintiffs do not object to this modification, subject to the limitation that counsel may not communicate with a witness (percipient or expert) while that witness is on the witness stand. Similarly, plaintiffs' counsel must be permitted to discuss

the intervening testimony of defendants' experts with plaintiffs' experts between an expert's testimony in a plaintiffs' case-in-chief and that expert's rebuttal case testimony, if any. Thus, plaintiffs request that counsel should be prevented from communicating with a witness about the witness' trial testimony after the witness is sworn in and before the witness' testimony is complete, and from discussing other witness' trial testimony with percipient witnesses who have yet to start or finish testifying.

Defendants' other proposed modifications, however, should be rejected and the original *in limine* rulings should stand. First, defendants argue that Household "no longer exists as an entity" and, as a result, none of the witnesses in this case are under its control. Therefore (according to defendants), the ruling precluding defendants from introducing live testimony from persons that are unavailable to them and introducing deposition testimony of persons in their control "would not apply to Household in the new trial." Defs' Opp. at 7-8. Defendants' proposed modification is unnecessary, as Household is in the same post-HSBC merger position as it was at the last trial. To the extent any of the witnesses are still employed by Household (now known as HSBC Finance Corp.), those employees are still under Household's control, and the Court's prior *in limine* ruling should apply. *See* Dkt. No. 1505 at 3; *see also Glickenhaus*, 787 F.3d at 412 n.2 ("Household International, Inc., is now known as HSBC Finance Corp. and is owned indirectly by HSBC Holdings plc.").

Second, defendants claim that evidence of a settlement between Professor Fischel's firm, Lexecon, and the Milberg Weiss firm is relevant to Professor Fischel's "motivations and bias" for testifying as plaintiffs' retained expert in this case.[3] Even if the Court denies defendants' Motion *in Limine* to Exclude Evidence Concerning Expert Witnesses that is Unrelated to Their Opinions or Testimony (Dkt. No. 2149), evidence regarding a settlement between Professor Fischel's firm and a law firm that no longer represents plaintiffs has no bearing on Professor Fischel's "motivations and

[3] Defendants' characterization of the Lexecon/Milberg Weiss settlement as a settlement between Professor Fischel and "Plaintiffs' counsel" is inappropriate and incorrect. Lexecon did ***not*** reach a settlement with the firm that represents plaintiffs at trial. Defendants' suggestion of impropriety should not be countenanced.

bias."[4] Moreover, defendants' argument defies common sense. The fact that Professor Fischel's firm was adverse to Milberg Weiss in a lawsuit would actually demonstrate his potential bias against that law firm – not bias in its favor. Defendants are simply trying to prejudice the plaintiff class, which has nothing whatsoever to do with the *Lexecon* case, with evidence of that 20-year old lawsuit. This evidence is both irrelevant and unfairly prejudicial and should be excluded. Counsel for defendants should be instructed not to raise that issue in front of the jury, just as they were precluded from doing at the last trial. *See* Dkt. No. 1505 at 3.

Finally, defendants contend that the rulings on defendants' "omnibus" motion *in limine* made prior to the last trial should not apply to the retrial, as they are "incompatible with the more limited issues in the new trial." Defs' Opp. at 9. To the contrary, as established in plaintiffs' opposition to defendants' Motion *in Limine* No. 1, the same categories of evidence defendants sought to exclude before the last trial via their "omnibus" motion *in limine* are relevant to issues of loss causation, damages and proportionate responsibility. *See* Dkt. No. 2154 at 6-15. Plaintiffs' motion to apply the Court's prior evidentiary rulings to the retrial should be granted.

B. The SEC Consent Decree Should Be Admitted at the Retrial

On March 18, 2013, Household entered into a Consent Decree with the SEC relating to disclosures contained in the Company's SEC filings concerning Household's false statements and omissions regarding its restructuring and other account management policies.[5] Plaintiffs do not contend, as defendants suggest, that the SEC Consent Decree has "suddenly transformed into something other than a settlement document." Defs' Opp. at 10. Although the SEC Consent Decree remains a settlement document, the reasons for its exclusion pursuant to Fed. R. Evid. 408 no longer apply. Since defendants have already been found liable for making false statements and omissions of material facts, the jury is not charged with assessing falsity or materiality and there is no longer a

[4] Plaintiffs' counsel withdrew from Milberg Weiss and joined a new firm in 2004. *See* Dkt. No. 139; *see also* Dkt. Nos. 169, 1675.

[5] Defendants' contention that the SEC Consent Decree is irrelevant because it was entered into after the Class Period in this case lacks merit, as post-Class Period evidence is relevant when it "relate[s] back to the earlier fraudulent conduct" and is probative of an element in the case. *See SEC v. Holschuh*, 694 F.2d 130, 144 (7th Cir. 1982).

danger of plaintiffs using the consent decree to establish those elements.[6] Nor do plaintiffs "admit that the SEC Consent Decree is irrelevant to the issues in dispute in the new trial." *Id*. To the contrary, the SEC Consent Decree is relevant to the jury's understanding of defendants' re-aging fraud which, in turn, is necessary for the jury's verdict on loss causation, including its evaluation of whether certain disclosures were related to that fraud or not. As an example, the SEC Consent Decree explains the importance of Household's reported 2+ delinquency numbers, which is "[o]ne of the critical measures of Household's financial performance." *See* PX1303 at 2. The SEC Consent Decree also explains why Household's SEC filings relating to re-aging were false and misleading and omitted material facts. *See* PX1303 at 3-5. Furthermore, the SEC Consent Decree will help the jury understand why defendants' other SEC filings, including those made in connection with the April 9, 2002 FRC, were materially false and misleading. This relates directly to loss causation. The SEC Consent Decree is also relevant to proportionate liability. For example, Aldinger, Schoenholz and Household are liable for the re-aging misstatements while Gilmer is not. The SEC Consent Decree should be admissible at the retrial.

III. CONCLUSION

For all of the reasons set forth in plaintiffs' Motion *in Limine* No. 3 and herein, plaintiffs' motion should be granted in its entirety.

DATED: May 13, 2016

Respectfully submitted,

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[6] The Consent Decree does not contain a settlement figure, and plaintiffs do not intend to use the settlement to establish "'the amount of a disputed claim'" as defendants suggest. Defs' Opp. at 10 (citation omitted). Because there is no settlement figure, it is hard to see how the jury could use the Consent Decree to establish damages.

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 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 May 13, 2016.

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