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. 9

In both their Motion *in Limine* No. 9 ("MIL No. 9") (Dkt. No. 2141) and their Opposition to Defendants' Motion *in Limine* No. 2 (Dkt. No. 2155), plaintiffs have demonstrated the admissibility of the limited testimony they intend to present from defendants' former loss causation expert, Dr. Mukesh Bajaj. Specifically, plaintiffs have shown that:

- Bajaj's testimony is available for use by both parties: Seventh Circuit law is clear that once a designated testifying expert has provided deposition testimony, that expert's testimony is available for use by both parties. *See SEC v. Koenig*, 557 F.3d 736, 744 (7th Cir. 2009). This is the case even where the party originally proffering the expert's opinions later chooses not to offer the expert's testimony at trial. *See Bone Care Int'l, LLC v. Pentech Pharms., Inc.*, No. 08-cv-1083, 2010 WL 3894444, at *9-*10 (N.D. Ill. Sept. 30, 2010).

- Bajaj's testimony is relevant: As defendants' former ***loss causation*** expert, Bajaj conducted an extensive review of the facts of this case and analyzed those facts in the context of loss causation and damages, the same issues to be retried. *See* Dkt. No. 2159-1. The portions of Bajaj's testimony plaintiffs intend to offer will demonstrate that Bajaj's testimony and that of defendants' new loss causation experts conflict in key ways. *See* Pltfs' MIL No. 9 at 2; Pltfs' Opp. to Defs' MIL No. 2 at 4. Defendants may dispute the importance of inconsistencies between their experts' opinions, but the fact remains that such information is probative and will assist the jury in determining how much weight to give to the opinions and criticisms of defendants' new experts.[1] *See Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 808 (7th Cir. 2013) ("The reliability of data and assumptions used in applying a methodology is tested by the adversarial process and determined by the jury . . . .").

- Bajaj's testimony is admissible under Fed. R. Evid. 801(d)(2)(C): Under Federal Rule of Evidence 801(d)(2)(C), out-of-court statements made by a person authorized by a party to make statements concerning that subject are admissible non-hearsay. Fed. R. Evid. 801(d)(2)(C). Courts have frequently found that trial testimony by a party's expert constitutes a party admission, as by the trial stage the proffering party has full knowledge of the expert's opinions and has elected to have the expert represent their position to the jury.[2]

- Bajaj's testimony is admissible under Fed. R. Evid. 804(b)(1): Even if Dr. Bajaj's prior trial testimony is considered hearsay, it is still admissible under Fed. R. Evid.

[1] Defendants wrongly suggest that plaintiffs "do not need to present" Bajaj's testimony to establish certain points and so such testimony is irrelevant. But relevance is not defined by a party's "need." Rather, evidence is relevant if it has a tendency to make a fact at issue more likely or not – a standard Bajaj's testimony easily satisfies. *See* Fed. R. Evid. 401.

[2] *See In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1016 (9th Cir. 2008); *Bone Care Int'l*, 2010 WL 3894444, at *10; *Glendale Fed. Bank v. United States*, 39 Fed. Cl. 422, 424-25 (Fed. Cl. 1997); *United States v. Ala. Power Co.*, 773 F. Supp. 2d 1250, 1258 n.10 (N.D. Ala. 2011).

804(b)(1), as Bajaj is an unavailable witness[3] and defendants had a full opportunity to develop his testimony through extensive direct and redirect examination during the first trial. *See* Trial Tr. at 4077:1-4242:1 (Dkt. No. 2159-1).

- Admission of Bajaj's Testimony Will Not Unduly Prejudice Defendants, Confuse the Jury, or Waste Time: The portions of Bajaj's trial testimony that plaintiffs intend to offer will only use approximately 15 minutes of the Court's time. It will not confuse the jury to have plaintiffs proffer evidence from defendants' former expert, because jurors are instructed to consider all evidence offered by either party – and not just in the light most favorable to the party offering the evidence. *See United States v. Schaudt*, No. 07 C 0895, 2009 WL 1218605, at *3 (N.D. Ill. Apr. 30, 2009). Lastly, Bajaj's testimony will not unduly prejudice defendants, as there is no basis to assume that it will cause the jurors to decide issues of fact on anything other than the evidence presented. *See* Pltfs' Opp. to Defs' MIL No. 2 at 6 (collecting cases). That defendants would rather the jury not make certain inferences about their litigation strategy, and would prefer not to have to rebut such inferences, is not a valid justification for excluding otherwise admissible evidence. *Id.*

Defendants abandoned Bajaj in favor of three new experts. They now have to live with the fact that his testimony is inconsistent with their new group of experts. At the first trial, Bajaj testified to fraud-related information that entered the market in his attempt to support defendants' truth-on-the-market defense. He also selected a different peer group from Ferrell and James. Now, defendants want to tell a different story. If they are allowed to put on their new experts, they have to deal with the old one's now inconvenient (for defendants) testimony. Otherwise, defendants' gamesmanship in telling different stories to different juries may go unnoticed.

[3] Defendants' assertion that plaintiffs "have failed to demonstrate that they made any independent effort to contact Dr. Bajaj to request his attendance" is ill-taken, as defense counsel previously informed plaintiffs' counsel that any independent attempts by plaintiffs to contact Bajaj would be inappropriate, and that defense counsel would not accept service of a trial subpoena on Bajaj's behalf. *See* Declaration of Daniel S. Drosman, attached hereto as Ex. A. Moreover, defense counsel expressly agreed during the parties' pre-motion conference that they would not contest that Bajaj was "unavailable" pursuant to Fed. R. Evid. 804(b)(1). *See id.* Having induced plaintiffs to rely on these representations, defendants cannot now seek to penalize plaintiffs for doing so.

Thus, for the reasons stated above, as well as in plaintiffs' MIL No. 9 and Opposition to Defendants' MIL No. 2, plaintiffs should be permitted to present certain portions of Bajaj's trial testimony to the jury.

DATED: May 13, 2016

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
MICHAEL J. DOWD (135628)
SPENCER A. BURKHOLZ (147029)
DANIEL S. DROSMAN (200643)
LUKE O. BROOKS (90785469)
LAWRENCE A. ABEL (129596)
HILLARY B. STAKEM (286152)

s/ Luke O. Brooks
LUKE O. BROOKS

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
MAUREEN E. MUELLER
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: 561/750-3000
561/750-3364 (fax)

Lead Counsel for Plaintiffs

MILLER LAW LLC
MARVIN A. MILLER
LORI A. FANNING
115 S. LaSalle Street, Suite 2910
Chicago, IL 60603
Telephone: 312/332-3400
312/676-2676 (fax)

Liaison Counsel

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.

s/ Luke O. Brooks

LUKE O. BROOKS

ROBBINS GELLER RUDMAN
& DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101-8498
Telephone: 619/231-1058
619/231-7423 (fax)

E-mail: LukeB@rgrdlaw.com

Jaffe v. Household Int'l, Inc., No. 02-5893 (N.D. Ill.)
Service List

Counsel	E-mail address
Stewart Theodore Kusper Giovanni Antonio Raimondi THE KUSPER LAW GROUP, LTD. 20 North Clark Street, Suite 3000 Chicago, IL 60602 (312) 204-7938 Tim S. Leonard JACKSON WALKER L.L.P. 1401 McKinney Street, Ste. 1900 Houston, TX 77010 (713)752-4439	Stewart.Kusper@Kusperlaw.com Giovanni.Raimondi@Kusperlaw.com tleonard@jw.com
Counsel for Defendant David A. Schoenholz	
Dawn Marie Canty Gil M. Soffer KATTEN MUCHIN ROSENMAN LLP 525 West Monroe Street Chicago, Illinois 60661 (312)902-5253	dawn.canty@kattenlaw.com gil.soffer@kattenlaw.com
Counsel for Defendant William F. Aldinger	
David S. Rosenbloom C. Maeve Kendall McDERMOTT WILL & EMERY, LLP 227 West Monroe Street Chicago, IL 60606 (312) 984-2175	drosenbloom@mwe.com makendall@mwe.com
Counsel for Defendant Gary Gilmer	
R. Ryan Stoll Mark E. Rakoczy Andrew J. Fuchs Donna L. McDevitt Patrick Fitzgerald SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP 155 North Wacker Drive Chicago, IL 60606 (312)407-0700	rstoll@skadden.com mrakoczy@skadden.com Andrew.Fuchs@skadden.com Donna.McDevitt@skadden.com Patrick.Fitzgerald@skadden.com pclement@bancroftpllc.com zhudson@bancroftpllc.com TKavaler@cahill.com Jhall@cahill.com dbutswinkas@wc.com sfarina@wc.com

Counsel	E-mail address
Paul D. Clement D. Zachary Hudson BANCROFT PLLC 1919 M Street NW, Ste. 470 Washington, DC 20036 (202)234-0090 Thomas J. Kavaler Jason M. Hall CAHILL GORDON & REINDEL LLP 80 Pine Street New York, NY 10005 (212)701-3000 Dane H. Butswinkas Steven M. Farina Leslie C. Mahaffey Amanda M. MacDonald WILLIAMS & CONNOLLY LLP 725 Twelfth Street NW Washington DC 20005 202-434-5000 Luke DeGrand Tracey L. Wolfe DEGRAND & WOLFE, P.C. 20 South Clark Street Suite 2620 Chicago, Illinois 60603 (312) 236-9200 (312) 236-9201 (fax)	lmahaffey@wc.com amacdonald@wc.com twolfe@degrandwolfe.com ldegrand@degrandwolfe.com
Counsel for Defendant Household International Inc.	

Counsel	E-mail address
Michael J. Dowd Spencer A. Burkholz Daniel S. Drosman Luke O. Brooks Hillary B. Stakem ROBBINS GELLER RUDMAN & DOWD LLP 655 West Broadway, Suite 1900 San Diego, CA 92101 (619)231-1058 619/231-7423 (fax) Jason C. Davis ROBBINS GELLER RUDMAN & DOWD LLP Post Montgomery Center One Montgomery Street, Suite 1800 San Francisco, CA 94104 (415)288-4545 (415)288-4534 (fax) Maureen E. Mueller ROBBINS GELLER RUDMAN & DOWD LLP 120 East Palmetto Park Road, Suite 500 Boca Raton, FL 33432 (561)750-3000 (561)750-3364 (fax)	miked@rgrdlaw.com spenceb@rgrdlaw.com dand@rgrdlaw.com lukeb@rgrdlaw.com hstakem@rgrdlaw.com jdavis@rgrdlaw.com mmueller@rgrdlaw.com
Lead Counsel for Plaintiffs	
Marvin A. Miller Lori A. Fanning MILLER LAW LLC 115 S. LaSalle Street, Suite 2910 Chicago, IL 60603 (312)332-3400 (312)676-2676 (fax)	Mmiller@millerlawllc.com Lfanning@millerlawllc.com
Liaison Counsel for Plaintiffs	

EXHIBIT A

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

DECLARATION OF DANIEL S. DROSMAN IN SUPPORT OF PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR MOTION IN LIMINE NO. 9

I, Daniel S. Drosman, declare as follows:

1. I am an attorney duly licensed to practice before all of the courts of the State of California, and I am also admitted *pro hac vice* in this Court for this action. I am a member of the law firm of Robbins Geller Rudman & Dowd LLP, Lead Counsel of record for plaintiffs in the above-entitled action. I have personal knowledge of the matters stated herein and, if called upon, I could and would competently testify thereto.

2. On April 19, 2016, along with my colleagues Michael Dowd, Spencer Burkholz and Luke Brooks, I met and conferred telephonically with counsel for defendants, Steve Farina and Ryan Stoll.

3. At that time, defense counsel acknowledged that Dr. Mukesh Bajaj was outside the subpoena power of this Court and reiterated their refusal to accept service of a trial subpoena on Dr. Bajaj's behalf. Defense counsel further stated that it would be inappropriate for plaintiffs' counsel to independently contact Dr. Bajaj regarding this litigation.

4. Messrs. Stoll and Farina agreed during our April 19 discussion that defendants would not contest that Dr. Bajaj is unavailable pursuant to Federal Rule of Evidence 804(a), while reserving defendants' right to object to the witnesses on all other grounds. I confirmed this agreement via e-mail correspondence at 4:18 p.m. PDT that day. This e-mail is attached to Dkt. No. 2142-11.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 13th day of May, 2016, at Chicago, Illinois.

s/ Daniel S. Drosman
DANIEL S. DROSMAN