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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DIAL CORPORATION, *et al.*,

: 13cv6802

Plaintiffs,

: MEMORANDUM & ORDER

-against-

:

NEWS CORPORATION, *et al.*,

:

Defendants.

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WILLIAM H. PAULEY III, District Judge:

The parties filed twenty-six motions in limine. A significant number of those motions could have been obviated by good faith discussions among the parties. Several melted away during oral argument. For the following reasons, this Court now rules on Plaintiffs' second, third, fourth, and fifth motions in limine, Plaintiffs' motion in limine to exclude the testimony Defendants' damages expert, Dr. Dennis W. Carlton, and Defendants' first, second, third, ninth, tenth, twelfth, thirteenth, fourteenth, and fifteenth motions in limine. This Court reserves decision on any motions not addressed in this Order.[1]

LEGAL STANDARD

The purpose of an in limine motion is "to aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that

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[1] The in limine motions on which this Court reserves decision are: Defendants' Sixth Motion in Limine seeking to exclude evidence of certain witnesses lacking personal knowledge and containing hearsay, and Defendants' Eighth Motion in Limine seeking to exclude evidence of releases between class members and Defendants.

The in limine motions that the parties have either stipulated to, or expressed an intention to stipulate to during the February 16, 2016 oral argument on the parties' motions, are: Plaintiffs' First Motion in Limine, Plaintiffs' Sixth Motion in Limine, Plaintiffs' Seventh Motion in Limine, Plaintiffs' Eighth Motion in Limine, Plaintiffs' Ninth Motion in Limine, Defendants' Fourth Motion in Limine, Defendants' Fifth Motion in Limine, Defendants' Seventh Motion in Limine, and Defendants' Eleventh Motion in Limine.

are definitely set for trial, without lengthy argument at, or interruption of, the trial." Palmieri v. Defaria, 88 F.3d 136, 141 (2d Cir. 1996) (internal quotations omitted). Evidence should only be excluded on a motion in limine when it is "clearly inadmissible on all potential grounds." United States v. Paredes, 176 F. Supp. 2d 179, 181 (S.D.N.Y. 2001). Courts considering a motion in limine may reserve decision until trial so that the motion is placed in the appropriate factual context. See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh v. L.E. Myers Co. Grp., 937 F. Supp. 276, 286–87 (S.D.N.Y. 1996).

This court's ruling regarding a motion in limine is "subject to change when the case unfolds." Highland Capital Mgmt., L.P. v. Schneider, 551 F. Supp. 2d 173, 176 (S.D.N.Y. 2008 (internal quotations and citations omitted).

DISCUSSION

A. Plaintiffs' Second Motion In Limine

Plaintiffs' motion to exclude evidence of class members' alleged business and contracting practices, including practices relating to the purchase or sale of two products together, use of contractual exclusivity provisions, confidentiality clauses, or the timing of contractual bidding, is denied in part. Evidence of such practices within the third party in-store promotions ("ISP") market is relevant and admissible. In addition, during the examination of class members called as witnesses for other purposes, Defendants may inquire concerning a class member's use of contracting practices in its business with third parties.

B. Plaintiffs' Third Motion In Limine

Plaintiffs' motion to exclude non-privileged communications concerning how named Plaintiffs became involved in this lawsuit is denied. This evidence is admissible as

background. This Court will limit the introduction of such evidence to the extent it becomes cumulative or devolves into a minitrial.

That branch of Plaintiffs' in limine motion seeking to exclude evidence pertaining to absentee class members' decisions declining to serve as class representatives is granted. Such evidence is irrelevant.

C. Plaintiffs' Fourth Motion In Limine

Plaintiffs' motion to exclude reference to claims that Plaintiffs voluntarily dismissed is granted. Courts in this Circuit have repeatedly issued in limine orders precluding this type of evidence. See, e.g., Gorbea v. Verizon N.Y., Inc., 11 Civ. 3758, 2014 WL 2916964, at *2 (E.D.N.Y. June 25, 2015) ("The previously dismissed claims . . . are not of consequence in determining the action and therefore will be excluded.").

D. Plaintiffs' Fifth Motion In Limine

Plaintiffs' motion to exclude evidence of the size, financial condition, or profitability of class members is denied. This evidence may be relevant to the parties' relative bargaining power. This Court will limit the introduction of such evidence to the extent it becomes cumulative or unfairly prejudicial.

E. Defendants' First Motion In Limine

Defendants' motion to preclude Plaintiffs' from attributing conduct amorphously to "News" rather than the named Defendants is granted in part. Plaintiffs have the burden to prove "each of the necessary elements of [their] claims against each [of the four separate] defendant[s] individually." See United States v. Dist. Council of New York City & Vicinity of United Bhd. of Carpenters & Joiners of Am., 90 Civ. 5722, 1993 WL 159959, at *2 (S.D.N.Y.

May 12, 1993). However, portions of Defendants' own records conflate some of the corporate Defendants, and are therefore appropriate areas of inquiry at trial.

F. Defendants' Second Motion In Limine

Defendants' motion to exclude evidence pertaining to Fox News, Rupert Murdoch, the Wall Street Journal, and other uninvolved corporate affiliates is granted in part. This Court will not permit Plaintiffs to inject Rupert Murdoch, Fox News, or other News Corporation-related individuals or entities into evidence unless they are tied directly to relevant evidence, e.g., documents, in the case.

G. Defendants' Third Motion In Limine

Defendants' motion to exclude testimony about "bed-wetting liberals" is granted. Such evidence is irrelevant and unfairly prejudicial.

H. Defendants' Ninth Motion In Limine

Defendants' motion to prohibit Plaintiffs from playing "snippets" of six video recordings during the deposition of Paul Carlucci is denied. Contrary to Defendants' argument, the Rule of Completeness has no application here. The videotaped "snippets" were played during Carlucci's videotaped deposition. As such, they constitute the record of that deposition. To insert additional video snippets to "complete the record" would, in fact, alter the record of the deposition, and create an entirely new and different record.

I. Defendants' Tenth Motion In Limine

Defendants' motion to exclude evidence of three anticompetitive acts allegedly not pled in the Fourth Amended Complaint or set forth in the Joint Pre-Trial Order: (1) including non-disclosure clauses in retailer contracts; (2) offering CPGs favorable rates for using more of Defendants' network (alleged "tiered pricing"); and (3) providing discounted rates to

CPGs in exchange for releases, is denied with respect to (1) and (2), and reserved with respect to (3).

Plaintiffs' arguments concerning non-disclosure clauses in retailer contracts and tiered pricing were addressed by both sides at summary judgment, and are details of Defendants' alleged anticompetitive contracting practices encompassed in the Fourth Amended Complaint. (See, e.g., FAC ¶ 149 ("With its long-term exclusive contracts with retail chains and CPGs, News has unlawfully restrained trade, and acted in concert to monopolize . . . the relevant market for the sale of ISPs[.]").) Accordingly, this evidence is not precluded by Fed. R. Civ. P. 15(b).

This Court reserves decision on the admission of evidence concerning any releases in this litigation, pending this Court's resolution of Defendants' motion to exclude evidence of claims discharged by releases.

J. Defendants' Twelfth Motion in Limine

Defendants' motion to exclude evidence of alleged bundling and tying is denied. Plaintiffs contend that Defendants have offered discounts on ISP to compel class members to purchase free-standing inserts ("FSI"). Although Plaintiffs voluntarily dismissed their claims relating to FSI (see § C, supra), evidence relating to how Defendants price ISP—and by logical extension, how Defendants' price ISP in connection with FSI—is relevant to Plaintiffs' claims.

K. Defendants' Thirteenth Motion in Limine

Defendants' motion to exclude evidence concerning decision by class members' whether to opt out of the Class is granted. Such evidence is irrelevant.

L. Defendants' Fourteenth Motion in Limine

Defendants' motion to exclude evidence concerning the finances of News Corporation is denied. Evidence pertaining to the financial health and profitability of News

Corporation in the aggregate and the other named Defendants is relevant. However, evidence pertaining specifically to other entities affiliated with News Corporation, such as Twenty-First Century Fox and the Wall Street Journal, is irrelevant.

M. Defendants' Fifteenth Motion in Limine

Defendants' motion to compel Plaintiffs to make an offer of proof is denied. Defendants seek an offer of proof on three grounds on which this Court denied Defendants' motion for summary judgment: (1) pre-2008 business torts; (2) evidence of intent to exclude competitors; and (3) retailer overpayments. Specifically, Defendants argue that Plaintiffs must make an offer of proof that the business torts caused "substantial harm," that any intent evidence "caused" anticompetitive effects, and that any retailer-overpayment evidence must satisfy the predatory pricing test of Weyerhaeuser Co. v. Ross-Simmons Harwood Lumber Co., Inc., 549 U.S. 312, 325 (2007).

A motion in limine is not the appropriate tool to ask this Court to weigh the sufficiency of the evidence. See Pavone v. Puglisi, 08 Civ. 2389, 2013 WL 245745, at *1-3 (S.D.N.Y. Jan. 23, 2013). Defendants re-iterate the same three arguments this Court rejected in ruling on Defendants' motion for summary judgment. See Dial Corp. v. News Corp., 13 Civ. 6802, 2016 WL 462515, at *9 (rejecting argument that pre-2008 tortious conduct is irrelevant); Dial, at *8 (noting that Plaintiffs presented evidence that News Corp. intended to use exclusive retailer contracts to engage in anticompetitive conduct); Dial, at *4 (observing that Plaintiffs' evidence of retailer guarantees was not governed by Weyerhaeuser). Because that ship has sailed, Defendants' motion in limine requiring Plaintiffs to make an offer of proof is denied.

Defendants also argue that Plaintiffs should not be permitted to characterize Defendants' alleged practice of gaining unauthorized access to Floorgraphics' computers as

"hacking" because it would be "inflammatory" and unfairly prejudice the jury. See Fed. R. Evid. 403. But "hacking" is an everyday term for unauthorized access to a computer system. Defendants' motion to preclude the use of that term is denied. See, e.g., BLACK'S LAW DICTIONARY 827 (10th ed. 2014) (defining "hack" as "[t]o surreptitiously break into the computer, network, servers, or database of another person or organization.").

N. Plaintiffs' Motion In Limine to Exclude the Testimony of Dennis W. Carlton

Plaintiffs' motion to exclude the testimony of Defendants' damages expert, Dr. Dennis W. Carlton, is denied. Rule 702 of the Federal Rules of Evidence governs the admissibility of expert and other scientific or technical testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In determining whether expert testimony is admissible, a court must assume a gatekeeper function to determine whether "the expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993); accord Campbell v. Metro. Prop. & Cas. Ins. Co., 239 F.3d 179, 184 (2d Cir. 2001). Although the Daubert analysis was initially developed to examine scientific testimony, Daubert applies with equal force to other types of expert testimony including economists. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999). The proponent of the testimony must establish admissibility by a preponderance of the evidence. Bourjaily v. United States, 483 U.S.

171, 175-76 (1988). And this Court has broad discretion in determining whether to admit expert testimony. Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, 265 (2d Cir. 2002).

Defendants plan to offer Carlton's testimony to show that: (1) Plaintiffs cannot prove any damages on their antitrust claims; and (2) Plaintiffs' damages expert's analysis is flawed. Plaintiffs argue that Carlton's testimony is inadmissible because he fails to assume Defendants' liability (i.e., that Defendants engaged in the anticompetitive behavior alleged in the Fourth Amended Complaint) in conducting his damages analysis. But, as Defendants point out, Carlton assumed Plaintiffs would prove liability during his analysis. (See, e.g., Sinaiko Ex. 1 at 4 n.4 ("For purposes of my damages analysis, I assume that Plaintiffs will prevail in some or all of their liability claims.").) And at most, Plaintiffs arguments concerning the assumptions in Carlton's analysis go to its weight, not admissibility of that testimony. See, e.g., Playtex Prods. v. Proctor & Gamble, Co., 02 Civ. 8046, 2003 WL 21242769, at *5-6 ("[A] jury can assess the reliability of [the expert's] theories behind his calculations, and [defendant] may inquire into those theories on cross-examination.").

Plaintiffs' attack on Carlton's regression model is similarly misplaced. Plaintiffs dispute Carlton's decision not to include an independent variable to account for the price effect of retailer commissions in his regression. But this does not render his regression inadmissible. See, e.g., Kroger v. Reno, 98 F.3d 631, 637 (D.C. Cir. 1996) ("[C]ourts have taken the view that a [party] cannot undermine a regression analysis simply by pointing to variables not taken into account that might conceivably have pulled the analysis's sting."). The omission of an independent variable is fair ground for cross examination.

CONCLUSION

For the foregoing reasons, the parties' motions in limine are granted in part, denied in part, or reserved for trial. The Clerk of Court is directed to terminate the motions pending at ECF Nos. 461, 465, and 471.

Dated: February 17, 2016
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J.

All Counsel of Record (via ECF).