IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CERABIO, LLC and PHILLIPS PLASTICS CORPORATION,

OPINION AND ORDER

Plaintiffs,

03-C-092-C

v.

WRIGHT MEDICAL TECHNOLOGY, INC.,

Defendant.

- -

This civil action for breach of contract is scheduled for retrial on May 8, 2006, following remand from the Court of Appeals for the Seventh Circuit. Plaintiffs CERAbio, LLC and Phillips Plastics Corporation and defendant Wright Medical Technology, Inc., have filed cross-claims for breach of contract, each alleging that the other failed to comply with the terms of the parties' asset purchase agreement.

Now before the court are the parties' motions in limine. Plaintiffs have moved to exclude from retrial evidence that the appellate court found to be relevant to defendant's counterclaim and defense. Because plaintiffs have failed to show that the probative value

of the evidence is substantially outweighed by the risk of unfair prejudice or waste of time, their motion will be denied.

Defendant has renewed motions in limine upon which the trial court ruled in advance of the November 2003 trial; the rulings were not challenged on appeal. Because the rulings are not clearly erroneous, they remain the law of the case. Therefore, on retrial plaintiffs will not be allowed to solicit expert testimony from their fact witnesses or suggest that the audio tapes made by defendant were illegal. However, plaintiffs will be permitted to present evidence that the contract between the parties was modified by oral agreement.

I draw the following facts from the decision of the court of appeals and from the record.

FACTS

A. Parties

Plaintiff CERAbio, LLC is a limited liability company with its principal place of business in Prescott, Wisconsin. Sometime before the spring of 2001, plaintiff researched and developed Apatight, a patented bone replacement product approved by the Food and Drug Administration for use in humans.

Plaintiff Phillips Plastics Corporation is a Wisconsin corporation with its principal place of business in Phillips, Wisconsin. Plaintiff Phillips Plastics is the sole member of

plaintiff CERAbio.

Defendant Wright Medical Technology, Inc. is a Delaware corporation with its principal place of business in Arlington, Tennessee. Defendant designs, manufactures and sells medical devices and products.

B. Pre-Contractual Negotiations

In the spring of 2001, defendant learned about Apatight at a trade show. At first, defendant wanted plaintiffs to supply Apatight through a vending arrangement. In the course of negotiating the terms of this arrangement, plaintiffs provided defendant with samples of Apatight produced using a tricalcium phosphate (TCP) powder plaintiffs had purchased from their supplier, Plasma Biotal. Eventually, discussions between the parties evolved and they began arranging for defendant to purchase all plaintiffs' assets. During these negotiations, plaintiffs represented that they had an established and repeatable process for producing Apatight.

On May 4, 2001, the parties executed a Mutual Nondisclosure Agreement. The agreement included the following provision:

> **Disclaimer of Warranty** . . . Discloser provides all information on an "as-is" basis and, except as provided in the immediately preceding sentence, makes no warranty, either express or implied, concerning the information, including, without limitation, its accuracy, completeness, or to the non-infringement of intellectual property rights or other rights of third persons or Discloser.

> Recipient assumes all risk in, and Discloser will not be liable for any damages arising out of use of the information, including, without limitation, business decisions made or inferences drawn by Recipient in reliance on the information or the fact of disclosure of the information.

Dkt. #136, at A-705.

In June 2002, defendant's representatives made a one-day "due diligence" visit to plaintiffs' facilities. Later, Kyle Joines, one of defendant's employees, would testify that during the visit he received assurances from plaintiff's representatives that the raw materials necessary to produce Apatight were commercially available from more than one supplier. Other employees of defendant would testify that they were told only one supplier existed and that it had been some time since plaintiffs had last purchased the TCP powder used to produce Apatight.

Beginning in late June 2002, plaintiffs' senior product development engineer, Dr. Ying Ko, contacted Plasma Biotal to inquire about the availability of the TCP powder used to manufacture Apatight. Ko was informed that Plasma Biotal had one lot of the "old powder" remaining, but the lot had been contaminated. Plasma Biotal had begun manufacturing a new TCP powder; however, the new powder had a finer grain size and could not be used to produce Apatight using plaintiffs' process.

On July 2, 2002, Ko received an email message from Plasma Biotal representative Paul Steverson, who wrote:

> As is often the case, the customer wants what we don't have!!
>
> . . . We had a demand for TCP but due to time constraints instead of manufacturing it completely ourselves we purchased some precursor material from another company . . . The material was OK with respect to quality on these early occasions . . . but on some subsequent occasions the material failed to meet our internal quality requirements . . .
>
> As a result we developed our own TCP product fully manufactured in house . . . which meets our purity requirements, however for the reasons you have described below you don't think it will work for you . . .
>
> The development of an alternative TCP product more like the outside manufacturer's product but pure may be possible but will require the evaluation of different reactor conditions from those already known to work. The problem with this is that the timescale is somewhat vague given that the plant is used regularly for our current production needs and as the firm's only chemical engineer, I am away until early August on vacation . . .
>
> The only other alternative is [sic] that we can consider is the route of ball milling the powders as discussed with you in earlier e-mails . . .

Dkt. #136, at A-595; dkt. #138, exh. M, at 1. Ko forwarded Steverson's message to a number of plaintiffs' employees, including CERAbio president, Jim Cassidy. Ko added the following note to Steverson's message:

> It does not sound good. The worse [sic] nightmare I ever feared is going to happen. Any suggestions?

Dkt. #136, at A-597; dkt. #138, exh. N.

In July 2002, Ko obtained samples of Plasma Biotal's new powder and began testing it. On August 7, 2002, in response to Ko's request for additional powder samples, Steverson

wrote:

> . . . [W] can still produce the original style Beta TCP powders that you have had from us, we understood that the problem with this material was that one of the batches had more HA present than the others . . .
>
> To make 15 Kg as before . . . will take about two weeks and the price will be as before £150 . . .

Dkt. #136, at A-599.

The parties dispute whether defendant was made aware of the supply problems before closing on the asset purchase agreement.

C. Asset Purchase Agreement

On August 5, 2002, the parties closed on their asset purchase agreement. Under the terms of the agreement, defendant was required to pay $3 million for plaintiff's assets, including patents and technological "know-how." One half of this amount was due at closing; the remaining $1.5 million was due no later than three days after defendant verified that it was able to produce Apatight. In addition, defendant agreed to pay 7.5% royalties on products primarily derived from plaintiffs' technology and 3% on products partially incorporating the transferred technology.

The asset purchase agreement required both parties to use commercially reasonable efforts to achieve verification. Section 8.7 of the agreement outlined the verification process

as follows:

> Following Closing, Buyer shall use its commercially reasonable efforts to promptly install the Manufacturing Equipment with the assistance of Seller and produce three (3) Test Lots meeting the Specifications as soon as is reasonably practicable following delivery of the Manufacturing Equipment to the Facility. In the event Buyer is unable to produce three (3) Test Lots meeting the Specifications within sixty (60) days following the Closing date, Buyer shall so notify Seller, and shall allow Seller's representatives access to the Manufacturing Equipment and otherwise reasonably cooperate with Seller to determine the causes of the failure to produce such test Lots. If Buyer and Seller are unable to determine the causes of the failure to produce such Test Lots, then Buyer shall allow Seller's representatives to utilize the Manufacturing Equipment and materials necessary to produce Test Lots during normal business hours, and Seller shall use its commercially reasonable efforts to produce three (3) Test Lots meeting the Specifications . . . If Seller is able to produce three (3) Test Lots meeting the Specifications pursuant to this Section 8.7, then Verification shall be deemed to have been achieved for purposes of this Agreement.

Dkt. #136, at A-641; dkt. #138, exh. K, at A-733.

The agreement provided that the parties could sue each other only for material breaches of the agreement and contained the following clause:

> This Agreement, including schedules and exhibits referred to herein and the N[on] D[isclosure] A[greement], embody the entire agreement and understanding of the parties hereto in respect of the transactions contemplated by this Agreement and supersedes any and all prior agreements, understandings and discussions with respect thereto. There are no restrictions, promises, representations, warranties, covenants or undertakings of Seller contained in any material made available to Buyer pursuant to the terms of the N[on] D[isclosure] A[greement], or the correspondence between Seller and Buyer. No variation or modification of this Agreement and no waiver of any provision or condition hereof, or granting of any consent contemplated hereby, shall be valid unless in writing and signed by the party

> against whom enforcement of any such variation, modification, wavier [sic], or consent is sought.

Dkt. #138, exh. K, at A-739.

D. Verification Efforts

After closing on the agreement, defendant attempted to buy the TCP powder plaintiff had used to manufacture Apatight, but found that it was no longer available. Despite Steverson's assurances to plaintiff in the August 7, 2002 email, Plasma Biotal was not able to produce an "original style powder" immediately.

On September 10, 2002, Jim Cassidy wrote a letter to Jeffrey Roberts, defendant's vice president of research and development. The letter included the following passage:

> Section 1.16 of the Asset Purchase Agreement defines a Test Lot, by, among other things, referencing CERAbio's Work Instructions that are attached to the Asset Purchase Agreement as Exhibit D. Nothing in the Asset Purchase Agreement states that the Work Instructions are set in stone and that they may not be changed, if an event occurs that renders them meaningless. Such an event has occurred, and as you have agreed, as recently as our telephone conversation on September 5, 2002, CERAbio will be allowed to change, i.e., to redline the Working Instructions to account for the occurrence of such an event.
>
> This event, as you are well aware, is the complete unavailability of Old Powder, that was used in developing the Work Instructions and that is used in the process. The supplier whom CERAbio has been using for Old Powder is no longer using its former suppliers for the components that make up Old Powder and instead is relying on internal manufacturing to make "New Powder." *CERAbio was not aware of this change prior to Closing.* CERAbio learned about this development after approaching the supplier with an order

> for Old Powder to be used in producing Test Lots. After learning about this development, CERAbio requested that the supplier try to find Old Powder from other sources but this search was not successful . . .

Dkt. #136, at A-699 (emphasis added). (Defendant contends that the italicized sentence is a lie upon which it relied in agreeing to permit modification of the work instructions. Plaintiff contends that the statement contained in the letter is truthful when taken in the context of its ongoing exchange with Plasma Biotal .)

From late August 2002 to early November 2002, defendant allowed plaintiffs' employees to work at its facilities to alter the work instructions and develop a process for manufacturing Apatight using the new powder. These attempts were labeled "pre-verification" efforts since the formal verification process described in the agreement could not begin until an appropriate substitute for the old powder had been identified. No successful test lots were produced during this time.

On November 8, 2002, defendant notified plaintiffs that it considered the asset purchase agreement to have been breached. Shortly thereafter, defendant obtained a powder much like the powder called for in the original work instructions, which it used to produce Cellplex, a ceramic bone replacement virtually identical to Apatight. Defendant contends that Cellplex was created using a completely different process from the one described in plaintiffs' work instructions.

F. Trial Court Proceedings

In February 2003, plaintiffs filed suit under Delaware law, contending that defendant had breached the asset purchase agreement by refusing to pay royalties and the second $1.5 million installment due under the agreement. Defendant counterclaimed for breach of contract, fraudulent inducement of the contract, fraud in the performance of the contract, pre-contract negligent misrepresentation and negligent misrepresentation in the performance of the contract.

Plaintiff moved for summary judgment with respect to defendant's fraudulent inducement, fraud in the performance and negligent misrepresentation claims. The trial court granted the motion after determining that each of the tort claims was barred by the economic loss doctrine and by the non-reliance clause contained in the asset purchase agreement. The case then proceeded to trial on plaintiff's breach of contract claim and defendant's breach of contract counterclaim.

On November 11, 2003, at the final pretrial hearing, the court made a series of evidentiary rulings. The court granted defendant's unopposed motion to preclude undisclosed expert testimony by plaintiff's factual witnesses. In addition, after finding that audio recordings made by defendant's employees had been recorded legally, the court granted defendant's unopposed motion to bar plaintiff from suggesting that the recordings were illegal. However, the court denied defendant's motion to prohibit plaintiff from

suggesting that the asset purchase agreement had been modified by oral agreement.

At the same hearing, the court addressed its global concern that defendant might try to introduce evidence relevant to the tort claims dismissed on summary judgment. To prevent what it viewed as a "back door" attempt to circumvent the summary judgment order, the court issued a blanket evidentiary ruling regarding the parties' pre-contractual knowledge and representations:

> Is it before the contract was entered into? It's out. Is it afterwards? If indeed there is no evidentiary objection to it other than that, it goes in. That's the blue line. That's the only way that I can handle this case in a way that I believe is appropriate under the law of the case which the Court has determined.

Pretrial Hearing Transcript, dkt. #112, at 25:11-15.

Trial was held in November 2003. The jury returned a verdict in favor of plaintiffs.

G. Appeal

On appeal, defendant challenged the dismissal of its counterclaims and the court's decision to exclude from trial all evidence pre-dating the August 5, 2002 closing date. The court of appeals upheld the trial court's summary judgment decision in its entirety, but found that the court had abused its discretion by excluding otherwise-relevant evidence under an "inflexible temporal line," instead of under an individualized consideration of the risk of unfair prejudice posed by each piece of evidence. CERAbio v. Wright Medical

Techology, Inc., 410 F.3d 981, 997 (7th Cir. 2005). The court of appeals found that the exclusion of all evidence relating to the parties' knowledge and actions prior to August 5, 2005, crippled defendant's ability to defend itself against plaintiffs' breach of contract claim and to pursue its own counterclaim. Consequently, the court remanded the case for retrial, directing the district court to consider "on a case-by-case basis" what pre-contractual evidence to exclude and what evidence to admit. Id.

OPINION

A. Plaintiffs' Motions to Exclude Evidence

Plaintiffs concede that evidence of the parties' pre-contractual dealings is relevant to the claims remaining in this case. Nevertheless, they contend that the court should once again exclude all evidence relating to (1) plaintiffs' pre-contractual knowledge regarding the availability of Plasma Biotal's original TCP powder and (2) the parties' pre-contractual discussions regarding what constituted a "reasonable time" for performance of the agreement. Because much of the disagreement regarding the admissibility of this evidence stems from a misunderstanding of *how* the evidence remains relevant, I begin with a summary of each party's theory of liability in this case.

1. Theories of liability

Plaintiffs contend that the parties entered into one contract only: the August 5, 2002 asset purchase agreement. Although plaintiffs acknowledge that the work instructions appended to the agreement were rendered "meaningless" when the TCP powder required by those instructions could no longer be obtained, they view changes to the work instructions as immaterial to the parties' core agreement. In plaintiffs' view, changes made to the work instructions did not constitute a breach of the agreement in and of themselves. Therefore, plaintiffs contend, defendant breached the agreement when it refused to permit them to complete modifications to the work instructions before proceeding with the verification process outlined in the agreement.

On the other hand, defendant contends that the asset purchase agreement was breached as soon as it became apparent that the work instructions plaintiffs provided were useless. Defendant contends that following the "breach," the agreement could have remained viable only if the parties had mutually agreed to (1) waive the provision of the agreement that required all modifications to be in writing and (2) orally agreed to allow plaintiffs to revise the work instructions. (The parties agree that no written modifications to the agreement were ever signed.)

Defendant admits that it allowed plaintiffs to begin modifying the work instructions, but contends that it agreed to the changes only because it believed Cassidy's assertion that plaintiffs were not aware of the TCP powder supply problems prior to closing. Under

Delaware law, evidence of fraud negates the mutual assent required for contract modification. Id. at 995; Continental Ins. Co. v. Rutledge & Co., Inc., 750 A.2d 1219, 1232 (Del. Ch. 2000). Therefore, under defendant's theory, if plaintiffs misrepresented their knowledge of the unavailability of the powder and if defendant relied upon this misrepresentation when it assented to modification of the work instructions, any modification of the contract would be void. Without valid modification of the original agreement standing in the way, defendant falls back to its original position: by providing defendant with "meaningless" work instructions, plaintiffs breached their end of the bargain.

Because the special verdict form used at trial did not ask the jury to specify whether the original contract or a later oral contract was breached, it is impossible to know under what theory the jury found defendant liable at the first trial. What matters is that either theory would provide a ground for liability. The jury was permitted to find either that the agreement had been breached outright or that a modified version of the agreement had been breached. With those possibilities in mind, I turn to the question raised by plaintiffs' motion in limine: Should the evidence excluded from the first trial be excluded again on retrial?

2. Rule 403

When a federal court decides whether to admit or exclude evidence proffered by a

party, the first question is whether the evidence is relevant, that is, whether it has any tendency to make more or less probable any fact of consequence to the determination of the case. Fed. R. Evid. 401. Although relevant evidence is generally admissible under Fed. R. Evid. 402, there are situations in which it may be excluded.

> Federal Rule of Evidence 403 permits evidence to be excluded when
>
> its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In support of their motion in limine, plaintiffs contend that evidence relating to the parties' pre-contractual knowledge and dealings lacks probative value, is unfairly prejudicial and would be a waste of the jury's time. Plaintiffs offer three grounds for excluding this evidence. First, it has limited probative value because it can be rebutted by other evidence. Second, the evidence is unfairly prejudicial because it would undermine the court's dismissal of defendant's fraud-based counterclaims. Third, the evidence would waste time by requiring an extended inquiry into matters they characterize as "collateral." I will address each in turn.

a. Probative value of the evidence

Plaintiffs contend that the evidence defendant wishes to offer lacks probative value because (1) it can be refuted with other evidence and (2) even if the evidence is believed, defendant cannot show that it relied upon plaintiffs' alleged misrepresentations. To address

these points, it is necessary to return briefly to the theories of liability discussed above.

The court of appeals upheld the trial court's summary judgment ruling that defendant could not rely upon plaintiffs' alleged pre-contractual misrepresentations to argue that the original asset purchase agreement was the result of fraud. Because the asset purchase agreement contained a provision in which each party specifically disclaimed any reliance on any representations made by the other that were not recorded in the agreement itself, defendant cannot argue now that it relied on plaintiff's statements when it signed the asset purchase agreement on August 5, 2002.

However, evidence that is irrelevant to some claims may be relevant to others. In this case, evidence of plaintiffs' precontractual knowledge and representations remains relevant and highly probative to (1) defendant's claim that it assented to oral modification of the original agreement as a result of fraudulent statements made by plaintiffs' representatives *after* August 5, 2002 and (2) defendant's claim that plaintiffs breached the original asset purchase agreement by failing to complete the verification process in a commercially reasonable amount of time.

Evidence regarding what plaintiffs knew prior to August 5, 2002, was central to defendant's claim that its assent to oral modification of the agreement had been obtained by fraud:

The trial court's bright line exclusion of all pre-Agreement evidence created an

> arbitrary barrier to evidence that Wright *should have been permitted to present at trial*. The availability vel non of the TCP powder [went] to the heart of the defense that Wright posed to CERAbio's contract claim as well as Wright's own claim for breach of contract.

CERAbio, 410 F.3d at 994 (emphasis added).

Moreover, with respect to defendant's claim that plaintiffs failed to complete verification within a commercially reasonable amount of time, the appellate court stated:

> It is easiest to see the erroneous overbreadth of the "bright blue line" ruling when considering Wright's claim that it was precluded from entering evidence that CERAbio failed to perform its end of the contract in a commercially reasonable amount of time. This argument does not significantly tread on the territory covered by the summary judgment order, but was excluded nonetheless.

Id. at 995-96. Under the agreement, one of plaintiff's central obligations was to insure that verification was achieved using commercially reasonable efforts. Because the agreement did not define the amount of time the parties considered "commercially reasonable," the court was required to resort to evidence regarding the parties' understandings at the time the agreement was signed. Id. at 996; Martin v. Star Publishing Co., 126 A.2d 238 (Del. 1956). It was improper for the trial court to exclude evidence relevant to this critical question.

Surveying the effects of the trial court's bright line rule, the court of appeals concluded that the "blanket exclusion of a fundamental piece of [defendant]'s case" substantially influenced the jury's verdict. CERAbio, 410 F.3d at 996. Such a holding is not consistent with plaintiffs' characterization of the evidence as lacking in probative value. The

question, then, is whether the value of this evidence is substantially outweighed by the risk it poses of unfair prejudice or waste of time.

b. Risk of prejudice

All relevant evidence is prejudicial to at least one party. Young v. Rabideau, 821 F.2d 373, 377 (7th Cir. 1987). It is only when the risk of *unfair* prejudice substantially outweighs the probative value of evidence that a court will exclude the evidence under Rule 403. Id. Plaintiffs contend that the evidence defendant wishes to introduce would be unfairly prejudicial because it would undermine the dismissal of defendant's tort-based counterclaims.

As discussed above, any attempt to introduce evidence of misrepresentations made prior to August 5, 2002 would be inappropriate if offered in connection with defendant's theory that it was fraudulently induced to sign the original asset purchase agreement. Under the plain terms of the agreement, defendant was on notice that it could not reasonably rely on plaintiffs' pre-contractual representations. The court of appeals "emphasize[d] that the district court need not allow all pre-contractual evidence in, and m[ight] continue to exclude evidence that might circumvent the court's ruling at summary judgment." CERAbio, 410 F.3d at 997. Therefore, should defendant attempt to introduce evidence of plaintiffs' alleged misrepresentations for the purpose of suggesting that the original contract was invalid, the

evidence will not be admitted.

However, as the court of appeals explained,

> Although the district court granted summary judgment to CERAbio on Wright's fraudulent inducement and fraudulent performance claims, claims regarding modification of the contract had not been excluded by the summary judgment ruling, and evidence that CERAbio fraudulently induced Wright to agree to modify the Agreement was relevant and should have been considered for admission like any other relevant evidence.

Id. at 995. Plaintiffs contend that this evidence should be excluded under Fed. R. Evid. 403 because admitting the evidence would undermine the court's summary judgment ruling dismissing defendant's fraud-based tort counterclaims. Plaintiffs' emphasis on the dismissed tort claims betrays a misunderstanding of how the evidence remains relevant.

Defendant's fraud-based counterclaims were dismissed because they were barred by the economic loss doctrine. Id. at 988. It was not evidence of fraud that the court found improper; it was the recovery of more than contractual damages for the alleged fraud. The doctrine of economic loss prevents sophisticated commercial from using tort principles to circumvent the terms of an agreement. Id.; Wausau Tile, Inc. v. County Concrete Corp., 226 Wis. 2d 235, 593 N.W.2d 445, 451-52 (1999). Because it has already been determined as a matter of law that the parties are limited to the damages available under the contract, introduction of the evidence for a permissible purpose could not circumvent the dismissal of defendant's tort claims. Therefore, plaintiffs have failed to demonstrate any prejudice

that might result from the introduction of defendant's proposed evidence.

c. Waste of time

Finally, plaintiffs contend that evidence of their precontractual knowledge and representations should be excluded because

> Wright's introduction of evidence concerning the truthfulness of the Cassidy letter would spawn a lengthy response from CERAbio and counter-response from Wright. The mini-trial on these collateral issues necessarily would be time-consuming and obscure the real issues in this case.

Plts.' Br., dkt. #134, at 23. As discussed above, there is nothing "collateral" about the evidence defendant wishes to introduce: the evidence lies at the heart of defendant's case. Moreover, there is no reason to believe that the presentation of the evidence would consume an inordinate amount of time or distract from the questions the jury must resolve.

Rule 403 does not exist to prevent parties from proving their case; it exists to allow the court to exclude evidence that is misleading, distracting and unfair. Plaintiffs assert that defendant has failed to demonstrate the probative value of the proposed evidence. However, as the party seeking to exclude all evidence referencing pre-contract knowledge and actions, *plaintiffs* are responsible for showing that the probative value of the evidence is significantly outweighed by the dangers the evidence poses. Campbell v. Greer, 831 F.2d 700, 705 (7th Cir. 1987). Because they have failed to meet that burden, plaintiffs' motion will be denied.

B. Defendant's Renewed Motions in Limine

Defendant has renewed three motions in limine upon which the trial court ruled in advance of the first trial held in this case. Because defendant did not challenge any of the court's original rulings on appeal, plaintiffs contend that the rulings remain the law of the case and should not be altered for purposes of re-trial. I agree.

The doctrine of law of the case establishes a presumption that a ruling made at one stage of a lawsuit will be adhered to throughout the suit. Avitia v. Metropolitan Club of Chicago, Inc., 49 F.3d 1219, 1227 (7th Cir. 1995) (citing Messinger v. Anderson, 225 U.S. 436, 444 (1912)). Under the doctrine, 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." Id.; Arizona v. California, 460 U.S. 605, 618 n.8 (1983) (under law of case doctrine, court may depart from prior holding if it is "clearly erroneous" and would work "a manifest injustice").

Defendant contends that although the doctrine creates a presumption in favor of an earlier ruling, it "is no more than a presumption, one whose strength varies with the circumstances; it is not a straitjacket." Avitia, 49 F.3d at 1227. Moreover, defendant contends that the doctrine is particularly weak when applied to evidentiary decisions. In

support of this contention, defendant cites United States v. Boyd, 208 F.3d 638, 642-43 (7th Cir. 2000), in which the court of appeals stated:

> Rulings made at a previous trial of the same case only presumptively control the second trial under the doctrine of law of the case, and when the ruling concerns the admissibility of evidence the presumption is either nonexistent or weak, since issues of admissibility are often highly contextual and evidence at a second trial will often deviate significantly from that at the first.

It is true that evidentiary decisions may "come out" differently from one trial to the next when the decisions are premised upon witness testimony and other "highly contextual" information likely to arise during trial. Here, however, defendants have raised in limine motions identical to those raised before the court in November 2003. They do not suggest that the context of the case has changed in any way that would rebut the presumption in favor of retaining the unchallenged rulings of the district court, or suggest that the court's previous rulings were "clearly erroneous." Because I do not believe the rulings to have been made in error, I decline to disturb them; the prior rulings will stand.

ORDER

IT IS ORDERED that

1. Plaintiffs' motion in limine to exclude to exclude "certain evidence" is DENIED;

2. Defendant's motions in limine to preclude introduction of undisclosed expert testimony, reference to modifications of the parties' asset purchase agreement and reference

to alleged impropriety or illegality of audio recordings made on August 9, 2002 and September 5, 2002 remain resolved in accordance with the rulings issued by Judge Shabaz on November 11, 2003.

Entered this 10th day of March, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge