IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MARY A. CARROLL and BETTY C. LYNN, on behalf of themselves and all others similarly situated,	)	C.A. No. 03C-08-167 JTV
Plaintiffs,	)	
v.	)	
PHILIP MORRIS USA, INC., a foreign corporation, f/k/a PHILIP MORRIS INCORPORATED,	)	
Defendant.	)	

Submitted: September 27, 2013
Decided: January 2, 2014

Philip M. Finestrauss, Esq., Wilmington, Delaware. Attorney for Plaintiffs.

Donald E. Reid, Esq., Morris, Nicholas, Arsht & Tunnell, Wilmington, Delaware. Attorney for Defendant.

Upon Consideration of Defendant's
Motion to Strike
DENIED

VAUGHN, President Judge

ORDER

Upon consideration of defendant Philip Morris USA, Inc.'s Motion to Strike Plaintiffs' Designation of William A. Farone as an Expert Witness, the plaintiffs' opposition, and the record of the case, it appears that:

1. This is a class action brought against Philip Morris USA, Inc. ("Philip Morris") alleging that Philip Morris violated the Delaware Consumer Fraud Act by using the descriptors "lights" and "lowered tar and nicotine" in advertising and promoting Marlboro Lights cigarettes.

2. On April 3, 2013, the Court approved a scheduling order pertaining to the plaintiffs' anticipated motion for class certification. The scheduling order required the plaintiffs to designate experts, provide expert reports, and make the experts available for depositions by certain dates.[1] On July 7, 2013, the plaintiffs designated William A. Farone ("Farone") as one of their expert witnesss related to class certification. In the plaintiffs' designation they state that Farone "refused to be retained as an expert witness or testify in this case" and they propose to offer into evidence former sworn testimony which Farone gave in the case of *Miles v. Philip Morris Co.*,[2] a Marlboro Lights consumer fraud class action in Illinois. In addition

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[1] In pertinent parts, Section 7 states, "Plaintiffs shall identify any and all experts on issues related to class certification and provide copies of expert reports on or before September 16, 2013," and Section 10 states, "Depositions of any expert identified by Plaintiff on class certification issues shall occur, beginning December 17, 2013 and conclude on or before February 17, 2014."

[2] No. 00-L-0012, Report of Proceeding (3rd Jud. Cir. Ill. Jan. 22-24, 2003).

to their designation, the plaintiffs provided Philip Morris with a complete copy of Farone's trial testimony in *Miles* and stated their intent to have specific portions of his former testimony admitted into evidence at trial in this case.

3. On August 21, 2013, Philip Morris filed this Motion to Strike Plaintiffs' Designation and Use of Farone as an Expert Witness. Philip Morris contends that Farone's former testimony is inadmissible hearsay and will deny Philip Morris its right to expert discovery and cross-examination. Recognizing that Delaware Rule of Evidence 804(b)(1) allows the admission of former testimony by an unavailable witness under specific circumstances, Philip Morris contends that this hearsay exception does not apply because Farone is not "unavailable" and that the criteria of subsection (b)(1) are not satisfied. Regarding unavailability, Philip Morris contends the court should apply a significantly heightened standard of "unavailability" when dealing with the prior testimony of an expert like Farone. Alternatively, Philip Morris contends that Farone should be stricken as an expert witness because his designation violates sections 7 and 10 of the scheduling order. Section 7 requires the plaintiffs to supply expert reports and section 10 requires that experts must be available for depositions.

4. The plaintiffs contend that Farone's expert designation is proper and that his former testimony should be admitted over the defendant's hearsay objection. The contend that Farone is "unavailable" under Rule 804(a)(5) because his attendance cannot be procured by process and he refuses to testify despite their offer to compensate him. The plaintiffs also contend that Farone has unique knowledge and expertise relating to the specific subject matter of this case. They also contend that

Philip Morris, who was a defendant in the above-mentioned proceeding, had an opportunity and similar motive to cross-examine Farone in the former proceeding. They contend that Farone's former testimony in *Miles* satisfies each element of the former testimony exception and should be admitted over any hearsay objection.

5. It is within the discretion of the trial court to allow former testimony as an exception to the rule against hearsay.[3] Generally, an out-of-court statement offered for the truth of the matter asserted is hearsay, inadmissable at trial; however, former testimony is a recognized exception to the rule against hearsay.[4] Before a declarant's former testimony can be admitted into evidence, the proponent of the evidence must demonstrate that the declarant is "unavailable" to testify as a live witness.[5]

6. Farone is currently employed by the Food and Drug Administration ("FDA"), or at least does contractual work for the FDA. He claims that his reason for refusing to testify is fear of being accused that doing so while working for the FDA will place him in a conflict of interest. He is beyond the process of this court. The plaintiffs have offered to pay Farone's fees and expenses, but Farone still refuses. An

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[3] *Younger v. State*, 496 A.2d 546, 551 (Del. Supr. 1985).

[4] D.R.E. §802 ("Hearsay is not admissible except as provided by law or by these Rules."). D.R.E. §804(b)(1) ("Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (1) Former testimony. Testimony given as a witness at another heading of the same or a different proceeding, or in a deposition taken in compliance with the law in the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interested, had an opportunity and similar motive to develop he testimony by direct, cross or redirect examination.").

[5] D.R.E. §804(b)(1).

affidavit filed by Farone indicates that any effort by the plaintiffs to have him appear and testify would be futile unless "Philip Morris stipulates that his serving as an expert witness . . . would not be a conflict of interest with his FDA work," something which Philip Morris apparently refuses to do. I conclude that the plaintiffs have satisfied the requirements of Rule 804(a)(5).

7. I also conclude that Farone is uniquely qualified to present the testimony that the plaintiffs seek to present. The plaintiffs assert that Farone is the only former employee of Philip Morris who has been willing to testify on behalf of plaintiff class action lawsuits. Other cases utilizing Farone or his testimony have concluded that Farone brings a wealth of knowledge to the issue since he worked in a lab designing cigarettes and is extremely familiar with both the technical details of how to make cigarettes safer and the decisions made by Philip Morris in this regard.[6] I conclude that the plaintiffs have met the heightened "unavailability" standard advanced by Philip Morris, if such a standard exists.

8. In addition to the declarant being "unavailable," the party against whom the alleged hearsay is being offered must have had an "opportunity and similar motive" to cross-examine the declarant.[7] Philip Morris does not deny that it was the defendant in the *Miles* trial or that *Miles* involved the same or similar issues. Instead

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[6] *See e.g. U.S. v. Philip Morris USA Inc.*, 449 F.Supp.2d 1, 186 (stating, "Dr. William Farone . . . was impressive and credible as both a fact and expert witness."); *Miles v. Philip Morris Co., Inc.*, No.00-L-0012 (3rd Jud. Cir. Ill.) (finding that due to Farone's unique position of being able to give "insider" testimony on the core issues of the case, Farone was an indispensable witness); *Hunter v. Philip Morris USA*, No. 4BE-06-004074 (Alaska Super. Ct. Sept. 30, 2011).

[7] D.R.E. §804(b)(1).

Philip Morris contends that Farone's testimony is out-dated and unrelated to evolving scientific standards. However, Philip Morris has failed to identify anything specific in support of its contention. Furthermore, Philip Morris' cross-examination of Farone in *Miles* was detailed, lengthy and comprehensive, especially considering that Farone had testified in many cigarette trials. Under these circumstances, I find that Philip Morris had the requisite opportunity and similar motive to cross-examine Farone. I conclude that the plaintiffs have successfully fulfilled the requirements of DRE 804 and that Farone's former testimony in the *Miles* case is admissible under said rule in this case.

9. In the alternative, Philip Morris argues that Farone's designation as an expert witness violates the scheduling order, sections 7 and 10. I find, however, that those sections do not apply to former testimony admissible under Rule 804.

10. For the foregoing reasons, Philip Morris' Motion to Strike Plaintiffs' Designation of William A. Farone as an Expert Witness is ***denied***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

oc: Prothonotary
cc: Order Distribution
File