

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

U.S. INFORMATION SYSTEMS, INC.,  
ODYSSEY GROUP, INC. and BLUE  
DIAMOND FIBER OPTIC NETWORKS, INC.,

Plaintiffs,

- against -

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS LOCAL UNION  
NUMBER 3, AFL-CIO, A R  
COMMUNICATION CONTRACTORS, INC.,  
ADCO ELECTRICAL CORPORATION, FIVE  
STAR ELECTRIC CORPORATION, FOREST  
ELECTRIC CORPORATION, HUGH O'KANE  
ELECTRIC COMPANY LLC, IPC  
COMMUNICATIONS, INC. and NEAD  
INFORMATION SYSTEMS,

Defendants.

**ORDER**

00 Civ. 4763 (RMB) (JCF)

**I. Background**

U.S. Information Systems, Inc., Odyssey Group, Inc., and Blue Diamond Fiber Optic Networks, Inc. (collectively, "Plaintiffs") seek to introduce the expert testimony of Dr. Frederick C. Dunbar ("Dr. Dunbar") about certain antitrust economic issues and damages. (See Order, dated April 5, 2004 ("April 5 Order"), at 1.) On or about June 10 and 14, 2004, A.R. Communication Contractors, Inc., ADCO Electrical Corporation, Five Star Electric Corporation, Forest Electric Corporation, Hugh O'Kane Electric Company LLC, IPC Communications, Inc., Nead Information Systems (collectively, "Contractor Defendants"), and International Brotherhood of Electrical Workers Local Union Number 3, AFL-CIO ("Local 3") (Local 3 and Contractor Defendants together, "Defendants") moved before United States Magistrate Judge

James C. Francis IV (for the second time) to exclude Dr. Dunbar's testimony pursuant to Rules 702 and 703 of the Federal Rules of Evidence and Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993). (See Memorandum and Order of Magistrate Judge Francis, dated September 9, 2004 ("September 9 Order").)<sup>1</sup>

Magistrate Judge Francis issued a comprehensive and thoughtful Memorandum and Order, dated September 9, 2004, which denied Defendants' motion. (See September 9 Order at 3-4 (holding that "[t]he defendants are wrong" to argue that "the Corrected Report fails to remedy [defects in the data sample noted in the February 24 Order]".) Defendants submitted objections to the September 9 Order on September 23 and 24, 2004. (See Local 3 Objections, dated September 23, 2004; Contractor Defendants' Objections, dated September 24, 2004 (collectively, "Defendants' Objections").)<sup>2</sup> Plaintiffs submitted a response on September 30, 2004. (See Plaintiffs' Response to Objections, dated September 30, 2004 ("Plaintiffs' Opposition").)

**For the reason set forth below, the September 9 Order is affirmed.**

## **II. Standard of Review**

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<sup>1</sup> On February 24, 2004, Magistrate Judge Francis granted in part Defendants' first motion to exclude Dr. Dunbar's testimony, finding that there were "flaws in the selection of Dr. Dunbar's data sample," and permitting Plaintiffs to submit a revised expert report. (See Memorandum and Order of Magistrate Judge Francis, dated February 24, 2004 ("February 24 Order"), at 32-41, 55-56.) Plaintiffs submitted a revised report on or about March 5, 2004. (See Corrected Expert Report of Frederick C. Dunbar, dated March 5, 2004 ("Corrected Report"), attached as Exhibit H to Declaration of Barry J. Brett, dated June 10, 2004 ("Brett Decl.")). Over Defendants' objections, this Court affirmed the February 24 Order on April 5, 2004 and permitted an additional deposition by Defendants of Dr. Dunbar concerning the Corrected Report, which was conducted on May 17, 2004. (See April 5 Order; Deposition of Frederick Dunbar, dated May 17, 2004, Brett Decl. Ex. Y.)

<sup>2</sup> Local 3 and Contractor Defendants join in each others' objections.

“A decision to admit or exclude expert testimony is considered ‘nondispositive’ of the litigation.” RMED Int’l v. Sloan’s Supermarkets, Inc., No 94 Civ. 5587, 2000 WL 420548, at \*2 n.1 (collecting cases). When considering nondispositive rulings by a magistrate judge, the reviewing court “shall modify or set aside any portion of the magistrate judge’s order found to be clearly erroneous or contrary to law.” Fed. R. Civ. P. 72(a); see 28 U.S.C. § 636(b)(1)(A); Nikkal Indus., Ltd. v. Salton, Inc., 689 F. Supp. 187, 189 (S.D.N.Y. 1988); see also Thomas E. Hoar, Inc. v. Sara Lee Corp., 900 F.2d 522, 525 (2d Cir. 1990). An order is “clearly erroneous” only when the “reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” Thompson v. Keane, No. 95 Civ. 2442, 1996 WL 229887, at \*1 (S.D.N.Y. May 6, 1996) (citation omitted). An order is “contrary to law” when it “fails to apply or misapplies relevant statutes, case law or rules of procedure.” Id. (citation omitted). “[A] magistrate judge’s resolution of a nondispositive matter should be afforded substantial deference and may be overturned only if found to have been an abuse of discretion.” RMED, 2000 WL 420548, at \*2 (citing Nikkal, 689 F. Supp. at 189).

### **III. Analysis**

Defendants raise substantially the same arguments that were raised before Magistrate Judge Francis. Having reviewed the record in this case, including, among other things, the February 24 Order, the September 9 Order, Dr. Dunbar’s initial expert report and his Corrected Report, Defendants’ Objections, Plaintiffs’ Opposition, unsolicited letters to the Court from the parties, and relevant legal authorities, the Court concludes that Magistrate Judge Francis’ September 9 Order is not clearly erroneous or contrary to law. See Fed. R. Civ. P. 72(a); see also RMED, 2000 WL 420548, at \*2-3.

#### IV. Conclusion and Order

For the reasons stated above, Magistrate Judge Francis' September 9 Order is affirmed. The parties and counsel are directed to appear at a status/settlement conference with the Court on April 13, 2005 at 2:00 p.m., in Courtroom 706 of the Thurgood Marshall Courthouse, 40 Centre Street, New York, New York 10007. The Court directs the parties to engage in good faith settlement negotiations prior to the conference with the Court.

Dated: New York, New York  
April 6, 2005



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**Richard M. Berman, U.S.D.J.**