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' OPPOSITION TO DEFENDANTS' MOTION IN LIMINE NO. 4 TO EXCLUDE EVIDENCE CONCERNING EXPERT WITNESSES THAT IS UNRELATED TO THEIR OPINIONS AND TESTIMONY

I. INTRODUCTION

Defendants ask that the Court exclude certain evidence that directly pertains to Professor Daniel R. Fischel's ("Fischel") qualifications and credibility. First, an expert's qualifications and credibility are always relevant to his testimony. It is clearly relevant in this case where defendants have designated three new experts in a misguided and inappropriate attempt to outnumber Professor Fischel. In fact, Fischel's qualifications and credibility will be critical to the jury's determination of loss causation and damages, which will focus on the testimony of these four experts, assuming all are admitted. Second, much of this evidence was admitted into evidence at the first trial – by defendants themselves. Now, however, defendants claim the evidence that they elicited or admissions that they made are unfairly prejudicial. Defendants are wrong. Nothing about this evidence will arouse the jury's passions or cause it to decide the case on anything other than the evidence at trial. Moreover, by offering evidence of Fischel's qualifications at the first trial, defendants cannot seriously contest its relevance or admissibility at the retrial. Defendants' motion should be denied.

II. BACKGROUND

Professor Fischel is unquestionably the foremost expert on loss causation and damages in securities cases. He wrote the seminal article regarding the application of financial economics to securities fraud litigation and has been cited with approval by the Supreme Court. Daniel R. Fischel, *Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities*, 38 Bus. Law 1 (1982); *Basic Inc. v. Levinson*, 485 U.S. 224, 247 n.24 (1988). In this case, the Court of Appeals stated:

> The defendants acknowledge Fischel's prominence in the field. Apparently, he's ***the*** expert for this type of financial analysis; the defendants tried to hire him as well, but they were too late.

Glickenhaus & Co. v. Household Int'l, Inc., 787 F.3d 408, 415 n.3 (7th Cir. 2015) (emphasis in original).

The Seventh Circuit was referring to statements made and testimony elicited by defense counsel at the first trial. In their cross-examination of Fischel, defendants brought out the following testimony:

> Counsel for Defendants: Now, you have an extensive background in this area in connection with disclosures and their impact on stock price, don't you?
>
> Professor Fischel: I do.
>
> Counsel for Defendants: You are widely regarded as if not the preeminent, one of the preeminent experts in this field; are you not?
>
> Professor Fischel: That's very kind of you to say. I hope that's the case, but I accept your gracious compliment.
>
> Counsel for Defendants: And your work has been cited by the Supreme Court, correct?
>
> Professor Fischel: It has.
>
> Counsel for Defendants: And, in fact, when we were looking for an expert, we contacted you to see if you were available, but you had already been hired by these folks, correct?
>
> Professor Fischel: You were nice enough to contact me to try and hire me in this case, but I was already retained, yes.

Trial Tr. 2856:18-2857:8.[1]

Later in the examination, defense counsel reiterated defendants' views on Professor Fischel in the following exchange:

> Defense Counsel: Okay. Now if I understand what you just said, you're saying the jury should take this chart, 1397, and in the column where you, the expert, the person quoted by the Supreme Court, the person who wrote the book in this area literally – you did write a book in this area, didn't you?
>
> Professor Fischel: I did. And you're just too kind with your compliments.
>
> Defense Counsel: You're the man, Professor.

Trial Tr. 2970:17-23.

Clearly, it was defendants who elicited testimony about their "too late" attempt to retain Professor Fischel. Likewise, it was defendants who made affirmative statements about Fischel's

[1] Relevant excerpts from the 2009 Trial Transcript are attached as Ex. 1 to the Declaration of Luke O. Brooks in Support of Plaintiffs' Oppositions to Defendants' Motions *in Limine*, filed herewith ("Brooks Decl.").

expertise. In light of defendants' comments, it is not surprising that the Court of Appeals found that defendants have acknowledged Fischel's preeminence in the field.

Defendants' praise of Fischel's expertise and preeminence in his field continued after defendants scrapped their old expert, Dr. Bajaj, and re-loaded for the upcoming trial by retaining three new experts. On remand, defendants' new experts conceded the expertise of Fischel's company, Compass Lexecon, and its staff, which supported Fischel's efforts in this case. Defendants' current experts, Drs. Cornell and Ferrell, were forced to admit at their recent depositions that their first choice for economic analysis to support their expert assignments is Compass Lexecon and its staff.[2] However, in this case, because of Compass Lexecon's conflict, Cornell and Ferrell were forced to use a secondary option to assist them with their economic analysis for defendants. Moreover, Ferrell admitted Professor Fischel's unquestioned expertise, testifying:

Q: What is your opinion of Professor Fischel as an economist?

A: I think he is very smart and talented, and I like him.

Q: Would you say he's brilliant?

A: I would say he's a brilliant legal academic.

Ferrell Depo. Tr. 31:19-25 (Dkt. No. 2130-2).

Faced with their unsuccessful attempt to retain Fischel, their attorney's statements about him, the Court of Appeals' recognition of his expertise and their experts' praise for Compass Lexecon, defendants seek to exclude all of it.

III. ARGUMENT

Defendants' arguments fail to acknowledge the relevance and importance of establishing an expert's qualifications and credibility. In reaching a verdict on loss causation and damages, the jury

[2] Cornell testified that he was employed as a senior consultant by Compass Lexecon (Cornell Depo. Tr. at 39:25-40:4) (attached as Ex. 4 to the Brooks Decl.) and described two Compass Lexecon staff members who assisted Fischel in this case as "good, competent" and reliable (*id*. at 41:6-11) and "a competent, energetic young man." *Id*. at 42:21-22. Likewise, Ferrell testified that he had a contractual relationship with Compass Lexecon, which gave that company a right of first refusal to provide economic consulting analysis for his expert engagements (Ferrell Depo. Tr. at 29:7-23) (Dkt. No. 2130-2) and, as to the Compass Lexecon staff members who supported Fischel's work here, stating that he thought highly of one as an economist and otherwise describing them variously as "talented," "reliable" and "smart." *Id.* at 29:20-32:3.

will necessarily consider Professor Fischel's experience and credentials. *See, e.g.*, *Model Jury Instructions for the District Courts of the Seventh Circuit*, 1.21 (Expert Witnesses) ("Give the testimony whatever weight you think it deserves, considering . . . the witness's qualifications . . . .). As the Third Circuit Court of Appeals held:

> An expert's experience and credentials are properly taken into account by jurors when determining how much weight to give the expert's testimony. . . . [citing case] The past experience of expert witnesses properly influences the weight the testimony should receive.

United States v. Rutland, 372 F.3d 543, 546 (3rd Cir. 2004).

Therefore, there is no question that Professor Fischel's experience and qualifications are relevant. Defendants' attempt to retain Professor Fischel is certainly relevant in proving this point. Moreover, the fact that defendants have admitted that he is "if not the preeminent, one of the preeminent experts in this field," "who wrote the book in this area literally" goes directly to establishing Professor Fischel's experience and qualifications. Defendants can hardly fault plaintiffs for their own admissions. Certainly, the Court of Appeals recognized the relevance of defendants' concessions regarding Fischel, specifically noting them in its opinion. *Glickenhaus*, 787 F.3d at 415 n.3. If the Court of Appeals recognized the relevance of this evidence, it is hard to imagine that it would not be relevant to the jury as well. Similarly, defendants' experts' admissions with respect to their "first choice" relationship with Compass Lexecon for economic support and Ferrell's concession regarding Fischel's expertise are also probative of Fischel's qualifications. In short, this evidence is relevant and should not be excluded under FRE 401.

Defendants next argue that, even if relevant, evidence regarding their attempt to retain Fischel is more prejudicial than probative. In support of their position, defendants rely on a single district court opinion from South Carolina, *Firehouse Restaurant Group, Inc. v. Scurmont, LLC*, No. 4:09-CV-618, 2011 WL 3555704, at *7 (D.S.C. Aug. 11, 2011). First, *Firehouse* stands alone. Evidence that opposing counsel attempted to hire the other side's expert is often admitted at trial, as best evidenced by the fact that it was allowed twice in this case alone. *See* Trial Tr. 964:23-965:13 (plaintiffs' expert witness Ghiglieri testifies to defendants' attempt to retain her for this case;

defendants do not even assert an objection); Trial Tr. 2856:18-2857:8 (defendants elicit testimony from Fischel regarding their attempt to retain him in this case).

Second, defendants' quest for South Carolina case law ignored precedent far closer to home. In *In re Chicago Flood Litig.*, No. 93-C-1214, 1995 WL 437501, at *9 (N.D. Ill. July 21, 1995), the defendant City of Chicago attempted to prevent plaintiffs from introducing evidence that plaintiffs' experts had testified for the City in other cases. In rejecting defendant's relevance and prejudice arguments, the trial court wrote:

> ***The city moves to bar reference to the city's prior employment of two of plaintiffs' damage experts***. The plaintiffs intend to call Richard Roddewig and Arthur Murphy to testify to their damages. Roddewig testified on the city's behalf as to zoning classifications and property valuations in three previous lawsuits unrelated to the flood. Murphy was previously employed by the city and testified on its behalf as to the value of real estate in a condemnation case. ***The city contends that Roddewig and Murphy's previous employment by the city is irrelevant and prejudicial insofar as the jury might believe that plaintiffs' experts have the city's seal of approval and might regard the city's cross-examination of these witnesses as "a mere litigation tactic***."
>
> ***The city's argument is meritless. Roddewig and Murphy's prior work for the city is relevant to their experience as property appraisers. The jury is generally entitled to weigh the whole of an expert's credentials***. *Shultz v. Rice*, 809 F.2d 643, 654 (10th Cir. 1986). ***The city's contention that the jury will perceive plaintiffs' witnesses as endorsed by the city is not persuasive***. Insofar as the city intends to present evidence to rebut Roddewig or Murphy's testimony, the city may make clear its disagreement with their conclusions. ***Accordingly, the city's motion in limine to exclude evidence of its prior relationship with Roddewig and Murphy is denied***.

Id. (emphasis added).

Similarly, there is no unfair prejudice in plaintiffs' use of evidence of defendants' attempt to retain Fischel, defense counsel's affirmation of Fischel's qualifications at the first trial or their current experts' admissions regarding the quality of Compass Lexecon's staff. In performing the balancing test under FRE 403, the danger of unfair prejudice must substantially outweigh the probative value of the evidence. In *United States v. Thompson*, 359 F.3d 470, 479 (7th Cir. 2004), the Court of Appeals described unfair prejudice as:

> Evidence is "unfairly prejudicial if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case."

Id.

Defendants simply cannot meet this standard because plaintiffs' evidence here does not appeal to the jury's sympathies, arouse its sense of horror, provoke its intent to punish or otherwise cause the jury to base its decisions on something other than the evidence. Defendants' authorities do not help their position. In fact, they demonstrate the flaw in defendants' arguments. For example, defendants rely on *SEC v. Ferrone*, No. 11-cv-5223, 2016 WL 824721, at *3 (N.D. Ill. Feb. 22, 2016) in arguing that the Fischel-related evidence is unfairly prejudicial. However, in *Ferrone*, the SEC's proposed evidence would have established that Ferrone's co-defendant "took advantage of terminally-ill patients by lying to them and then taking their money without giving them anything in return." *Id*. The proposed evidence in *Ferrone* was clearly inflammatory in sharp contrast to the Fischel-related evidence which is not even remotely prejudicial, never mind inflammatory.

Defendants' reliance on cases in which one party tried to poach the other side's expert similarly misses the mark. In this line of cases, one party consulted or retained an expert only to receive an unfavorable opinion, leading them either not to offer the witness as an expert or to withdraw their designation of the expert prior to trial. Thereafter, opposing counsel tried to offer the same expert's opinion. In deciding these cases, a few courts have noted that testimony regarding the expert's prior dealings with the other side may be prejudicial – not because it would force an admission of the expert's qualifications – but because it would lead the jury to believe that one side had improperly suppressed evidence of the expert's opinion. *See*, *e.g. Peterson v. Willie*, 81 F.3d 1033, 1037-38 (11th Cir. 1996) (in affirming trial court's decision to allow defendants to call plaintiff's retained, but subsequently discharged expert, the court noted that allowing defendants to introduce the opinion of plaintiff's withdrawn expert may cause the jury to infer that something was being hidden from them by plaintiff); *Steele v. Seglie*, No. 84-2200, 1986 WL 30765, at *5 (D. Kan. Mar. 27, 1986) (excluding evidence that one side had consulted, but not tendered three experts because "the risk remains that a jury could misinterpret that evidence as an attempt by plaintiff to suppress adverse testimony"); *House v. Combined Ins. Co.*, 168 F.R.D. 236, 247-48 (N.D. Iowa 1996) (permitting plaintiff to call defendant's withdrawn expert, but not allowing disclosure of that

fact because, among other things, it will appear that defendant is improperly hiding information from the jury).[3]

Defendants' remaining argument, that allowing evidence about defendants' attempt to retain Professor Fischel or defense counsel's concessions regarding Fischel's qualifications would result in an extraneous and inflammatory attack aimed at defense counsel, is nonsensical. Far from attacking defense counsel, plaintiffs wholeheartedly agree with defendants' conclusion that Professor Fischel was the right expert for this case, is preeminent in this field and wrote the book on securities fraud causation and damages. Therefore, defendants' reliance on *Stollings v. Ryobi Technologies*, 725 F.3d 753 (7th Cir. 2013) is not only misplaced, but also hard to fathom. In *Stollings*, the Court of Appeals reversed a judgment for defendants in a product liability case because defense counsel improperly and baselessly accused plaintiff's counsel and his expert of essentially engaging in a conspiracy, thereby attacking plaintiff's counsel's motives in bringing the case. *Id*. at 760-63. In short, *Stollings* is utterly inapplicable to this case because plaintiffs have no intention of attacking defense counsel because of his laudatory comments about Fischel and, in any event, there is nothing inflammatory about the issue. Defendants' other cases fare no better. *U.S. v. Xiong*, 262 F.3d 672, 675 (7th Cir. 2001) (simply rejecting defendants' prosecutorial misconduct argument based on the prosecutor's purportedly disparaging remarks about defense counsel in rebuttal argument); *Gruca v. Alpha Therapeutic Corp.*, 51 F.3d 638 (7th Cir. 1995) (reversing judgment in favor of defendants because defendants' counsel made incorrect and improper remarks concerning the F.D.A.'s potential liability for plaintiffs' injuries during closing argument).

Finally, defendants cannot seriously contest the relevance or prejudicial effect of evidence of their attempt to hire Fischel or their trial counsel's remarks about his qualifications. Not only did defendants fail to object to this evidence at the first trial – defendants actually proffered the evidence. Now, defendants' arguments as to its inadmissibility should not be countenanced.

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[3] Even in these cases, the courts noted that if the qualifications or credibility of the expert was later attacked, the ruling would have to be revisited. *See, e.g.*, *Peterson*, 81 F.3d at 1038 n.5 (noting that if the expert's qualifications were attacked, "a court may well decide that the opposing party should be permitted to attempt to rehabilitate the witness by eliciting testimony from the witness that the party had thought highly enough of the witness to consult him or her originally").

In short, Professor Fischel's credibility and qualifications are certainly relevant. And evidence that defendants attempted to hire him, made admissions regarding both his preeminence in the field and the quality of Compass Lexecon's staff will not appeal to the jury's sympathies, arouse its sense of horror, provoke its instinct to punish or cause it to base its decision on anything other than the evidence. As such, it should not be excluded under FRE 401 or 403. Defendants' motion should be denied.

DATED: May 6, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 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 6, 2016.

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