IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, on Behalf of Itself and All Others Similarly Situated, Plaintiff,	)	Case No. 02 C 5893
	)	Judge Jorge L. Alonso
v.	)	
HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	)	

REPLY IN SUPPORT OF DEFENDANTS' MOTION *IN LIMINE* NO. 4 TO EXCLUDE EVIDENCE CONCERNING EXPERT WITNESSES THAT IS UNRELATED TO THEIR OPINIONS OR TESTIMONY

Through their Motion *In Limine* No. 4, Defendants seek an order excluding: (1) evidence that, prior to the first trial, Defendants contacted Plaintiffs' expert, Professor Daniel Fischel, to inquire about possibly retaining him as an expert; (2) statements by Defendants' prior counsel at the first trial about Professor Fischel; and (3) testimony by Professors Ferrell and Cornell about certain consultants at Compass Lexecon with whom they have worked in the past. For the reasons set forth herein and in Defendants' Motion, this evidence should be excluded because it is irrelevant and because Plaintiffs seek to introduce this evidence solely for the purpose of unfairly prejudicing Defendants.

ARGUMENT

The Evidence that Plaintiffs Seek To Introduce Is Irrelevant and Its Admission Would Unfairly Prejudice Defendants

Plaintiffs' opposition reads as if Defendants were attempting to prevent the jury from learning about Professor Fischel's qualifications and experience as an expert. *See* Opp. at 3

(asserting that "Defendants' arguments fail to acknowledge the relevance and important of establishing an expert's qualifications and credibility"); *id.* at 4 ("There is no question that Professor Fischel's experience and qualifications are relevant.").

Plaintiffs' assertions mischaracterize Defendants' motion. Defendants are not contending that Plaintiffs should be precluded from informing the jury about Professor Fischel's qualifications and experience. The evidence Plaintiffs seek to introduce, however, has no bearing on Professor Fischel's qualifications and experience. In fact, the only reason Plaintiffs seek to introduce this evidence is to unfairly prejudice Defendants. It should be excluded.

A. The Fact that Defendants Contacted Professor Fischel In the Course of Considering Candidates for an Expert

The fact that Defendants contacted Professor Fischel prior to the first trial, during their initial stages of identifying candidates to serve as an expert, is *not* one of Professor Fischel's "qualifications." Moreover, Plaintiffs' insinuation that Defendants would have retained Professor Fischel as their expert, had he been available, is pure speculation. The mere fact that a party contacts, or even interviews, a potential expert does not inexorably lead to retention of that expert. It by no means suggests, as Plaintiffs apparently intend to imply to the jury, that Defendants would have preferred to retain Professor Fischel as their expert.[1]

Not only is the fact that Defendants contacted Professor Fischel irrelevant to establishing his credentials and experience, but allowing this evidence to be admitted also would unfairly prejudice Defendants. This evidence would suggest to the jury that Defendants consider Professor Fischel to be more desirable than the experts that Defendants retained for this

[1] Plaintiffs preview this entirely unsupported and inappropriate supposition in their Opposition. Opp. at 7 (asserting that "plaintiffs wholeheartedly agree with defendants' conclusion that Professor Fischel was the right expert for this case").

litigation, and that Defendants would have preferred to have hired Professor Fischel. There is no doubt that this would be unfairly prejudicial to Defendants. As one court has explained:

> [P]ermitting one party to call an expert previously retained *or consulted* by the other side entails a risk of very substantial prejudice stemming from the fact of the prior retention, quite apart from the substance of the testimony. One leading commentator aptly has characterized the fact of the prior retention by the adversary as "explosive."

Rubel v. Eli Lilly & Co., 160 F.R.D. 458, 460 (S.D.N.Y. 1995) (citing and quoting 8 C. Wright, et al., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2032, at 447 (1994)) (emphasis added). Prior consultation is no doubt even less relevant than prior retention of an expert, but equally "explosive."

Plaintiffs' authority, *In re Chicago Flood Litigation*, No. 93-C-1214, 1995 WL 437501 (N.D. Ill. July 21, 1995), is inapposite. In that case, two of plaintiff's experts previously had testified for the defendant City of Chicago in unrelated cases about matters that were directly relevant to their testimony in the case at issue. The court allowed this evidence to be admitted because the experts' "prior work for the city is relevant to their experience as property appraisers." *Id.* at *9. Here, nothing about Defendants' contacting Professor Fischel is relevant to the issues at trial. Plaintiffs' reliance on *Chicago Flood* is, therefore, unavailing.

B. Statements Made by Defense Counsel at the First Trial Regarding Professor Fischel

Also irrelevant and unfairly prejudicial are statements that Defendants' prior counsel made about Professor Fischel at the first trial. It is obvious from even the limited portion of the trial transcript that Plaintiffs quote in their response that counsel was attempting to set up a line of inquiry intended to undermine Professor Fischel's testimony, not bolster it. Opp. at 2.[2] Yet

[2] Counsel's questions were intended to show that Professor Fischel was unable to identify what caused the $7.97 of "inflation" that, per his Specific Disclosures Model, existed as of the first day of the class *(cont'd)*

Plaintiffs seek to convert counsel's statements regarding Professor Fischel into judicial admissions by Defendants. *Id.* at 4 (asserting that "defendants have admitted that [Professor Fischel] is 'if not the preeminent, one of the preeminent experts in this field,' 'who wrote the book in this area literally'").

Questions and arguments by counsel are not evidence and have no probative value. *Federal Jury Instructions of the Seventh Circuit* § 1.06. And there is no basis to treat statements by prior defense counsel regarding Professor Fischel as judicial admissions. *See, e.g., Robinson v. McNeil Consumer Healthcare,* 615 F.3d 861, 872 (7th Cir. 2010) (rejecting assertion that defense counsel's statement in closing argument that defense did not blame plaintiff for her injuries was an admission that plaintiff was not contributorily negligent, and explaining: "Were the plaintiff's conception of judicial admissions accepted, statements made by lawyers in opening and closing arguments, in making objections, at side bars, and in questioning witnesses would be treated as pleadings and searched for remarks that might be construed as admissions though neither intended nor understood as such.").

The *only* reason for Plaintiffs to introduce this evidence is to unfairly prejudice Defendants. Plaintiffs do not need to use this evidence to establish Professor Fischel's

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period. Based on this line of questioning and Professor Fischel's answers, Defendants' prior counsel argued at closing:

> I said Professor Fischel, you used the words reality check in your testimony. Give me a reality check, Professor Fischel. Tell me the day the inflation came into the stock, and he gave me the first answer, . . . it boiled down to you pick it. You pick it. You pick it, I don't know. . . .Reality check, Professor Fischel. What's the date? You're the expert. They hired you. . . . Professor Fischel comes in and says . . . I've already told you the price for every possible day, but I can't tell you where it comes from. With all due respect to Professor Fischel, . . . I don't think he did his job.

Trial Tr. at 4609:1922; 4610: 15-4611:5.

"preeminence" or his authorship of relevant books or articles. They can establish those facts through Professor Fischel's own testimony. Plaintiffs should not be permitted to improperly suggest to the jury that Defendants believe that Professor Fischel is more qualified or more highly regarded than Defendants' experts. Defendants have made no such concession, nor is any such inference warranted.

C. Testimony Regarding Professors Ferrell's and Cornell's Views About Certain Consultants Compass Lexecon

In addition to seeking to suggest to the jury that Defendants believe Professor Fischel is more qualified than Defendants' own experts, Plaintiffs also seek to inform the jury that Defendants' experts have acknowledged that certain consultants at Compass Lexecon—a company founded by Professor Fischel and at which Professor Fischel is the Chairman and President—are well-qualified, and to imply that Professors Ferrell and Cornell would have preferred to use the consultants at Compass Lexecon instead of the consultants at Cornerstone that they are using for this case. Opp. at 3. This is irrelevant and, in any event, there is no basis for this suggestion.

As is evident from the testimony of Professors Ferrell and Cornell that Plaintiffs quote, Professors Ferrell and Cornell have consulting agreements with Compass Lexecon that *require* them to use the staff of Compass Lexecon as their consulting experts unless, as here, using Compass Lexecon would result in a conflict. Opp. at 3 n.2.[3] Neither the fact that Professors Ferrell and Cornell are required to use Compass Lexecon (absent a conflict), nor the fact that, in response to questions at their depositions, they agreed with Plaintiffs' assertions that staff members at Compass Lexecon were competent, in any way supports the inference that Professor

[3] Professor James is affiliated with Cornerstone, as he disclosed in his report. Dkt. 2060-4, ¶ 4.

Fischel's consultants are "better" than Defendants' experts' consultants. Plaintiffs' speculative suggestion to the jury on this front is inappropriate and irrelevant. In any event, the capabilities of the non-testifying consultants with whom Professor Fischel worked are irrelevant. Professor Fischel is presenting his own opinions, not those of the non-testifying consultants. The Court should not allow this irrelevant evidence to be admitted.

CONCLUSION

For the reasons set forth herein and in Defendants' Motion *In Limine* No. 4, the Court should grant Defendants' Motion *In Limine* No. 4.

Dated: May 13, 2016

Respectfully submitted,

/s/R. Ryan Stoll

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CERTIFICATE OF SERVICE

R. Ryan Stoll, an attorney, hereby certifies that on May 13, 2016, he caused true and correct copies of the foregoing Defendants' Reply in Support of Their Motion *In Limine* No. 4 to be served via the Court's ECF filing system on the following counsel of record in this action:

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