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 Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION *IN LIMINE* TO EXCLUDE DEFENDANTS' CUMULATIVE EXPERT TESTIMONY

PLAINTIFFS' MOTION *IN LIMINE* NO. 3

I. INTRODUCTION

Lead plaintiffs respectfully submit this memorandum of law in support of their motion *in limine* to exclude the cumulative testimony of defendants' designated expert witnesses. Defendants have submitted two reports from a total of three purported "predatory lending" expert witnesses – a joint report by John L. Bley ("Bley") and Carl A. LaSusa ("LaSusa") and a separate report by Robert E. Litan ("Litan"). All three of these experts were retained by defendants to opine on the definition of predatory lending, defendants' understanding of the term, and to rebut the conclusions presented in the expert witness report of Catherine A. Ghiglieri ("Ghiglieri") that defendants' practices constituted predatory lending.

While LaSusa has recently been removed from defendants' witness list, it appears defendants still intend to call both Bley and Litan. Pursuant to Federal Rule of Evidence 403's prohibition against "needless presentation of cumulative evidence," one of these two witnesses should be precluded from testifying at trial. Presentation of multiple experts on defendants' predatory lending conduct would be a waste of time, unnecessarily cumulative, unfairly prejudicial to plaintiffs and will not help the jury. Defendants should be required to select a single expert to rebut Ghiglieri's conclusions and testify about the predatory lending aspects of this case.

II. ARGUMENT

A. Cumulative Evidence May Be Excluded Under Federal Rule of Evidence 403

Otherwise relevant evidence may be excluded under Rule 403 of the Federal Rules of Evidence if its probative value is substantially outweighed by, among other things, "the danger of unfair prejudice," "waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. This Court has broad discretion to exclude evidence under Rule 403. *See United States v. DeLuca*, No. 00 CR 387, 2002 WL 370213, at *2 (N.D. Ill. Mar. 8, 2002) ("A district court's

exclusion of evidence under Rule 403 is entitled to special deference.") (citing *United States v. Miles*, 207 F.3d 988, 992-93 (7th Cir. 2000)).

B. The Predatory Lending Opinions of Bley and Litan Are Cumulative and Allowing Both to Testify Would Unduly Prejudice Plaintiffs

Defendants designated expert witnesses Bley and Litan to offer identical and cumulative opinions on predatory lending. Specifically, defendants have proffered both Bley and Litan to testify regarding: (1) the definition of predatory lending; (2) defendants' understanding of the term; and (3) whether or not defendants engaged in predatory practices. Because such cumulative and repetitive testimony is a waste of both the Court and jury's time, only one of these experts should be permitted to testify at trial.[1]

Multiple expert witnesses expressing the same opinions is exactly the type of needlessly cumulative, time-wasting, and unfairly prejudicial evidence Rule 403 is designed to eliminate. Accordingly, "'it is generally the practice in this district to prohibit a party from offering multiple experts to express the same opinions on a subject.'" *Commonwealth Ins. Co. v. Stone Container Corp.*, No. 99 C 471, 2002 WL 385559, at *6 (N.D. Ill. Mar. 12, 2002) (citation omitted). Pursuant to Form Local Rule 16.1.1, ordinarily "[o]nly one . . . [expert] witness on each subject for each party will be permitted to testify absent good cause shown." N.D. Ill. Form LR 16.1.1. at 2 n.7; *see also Dahlin v. Evangelical Child & Family Agency*, No. 01 C 1182, 2002 U.S. Dist. LEXIS 24558, *16 (N.D. Ill. Dec. 18, 2002) (Court excluded duplicative expert testimony.); *Sunstar, Inc. v. Alberto-Culver Co., Inc.*, No. 01 C 0736, 2004 WL 1899927, at *25 (N.D. Ill. Aug. 23, 2004) (permitting only one expert to testify at trial on each subject). As this Court has explained:

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[1] Plaintiffs have filed separate *Daubert* motions addressing the substantive deficiencies in these supposed experts' methodologies and opinions.

> Multiple expert witnesses expressing the same opinions on a subject ***is a waste of time and needlessly cumulative***. It also raises the unfair possibility that jurors will resolve competing expert testimony by ***"counting heads"*** rather than evaluating the quality and credibility of the testimony.

Sunstar, 2004 WL 1899927, at *25 (emphasis added). This rule "govern[s] the trial stage of the case." *Id*. at *24.

Bley and Litan are both designated as financial services industry experts. There is nothing that Bley has said in this case, either in the Joint Report or in his deposition, that Litan did not say during his deposition or could not say on the witness stand. Bley's opinions and testimony are entirely duplicative of those to be presented by Litan. *See Miles*, 207 F.3d at 993 (affirming exclusion of evidence that "'added very little to the probative force of the other evidence in the case'") (citation omitted); *Hill v. Porter Mem. Hosp.*, 90 F.3d 220, 224 (7th Cir. 1996) (affirming exclusion of testimony that "would have been largely, if not totally, cumulative of . . . other experts").

Allowing both of these witnesses to testify will waste the Court and jury's time by requiring the jury to hear the same testimony twice. Equally important, their testimony will prejudice plaintiffs because the jury could unfairly conclude that the opinions expressed multiple times by Bley and Litan should be credited more than the opinions expressed once by plaintiffs' industry expert, Ghiglieri. *See Sunstar*, 2004 WL 1899927, at *25 (jury should resolve competing expert testimony on its quality and credibility, not by "counting heads"); *Pease v. Production Workers of Chicago & Vicinity Local 707*, No. 02 C 6756, 2003 WL 22012678, at *3 (N.D. Ill. Aug. 25, 2003) (evidence unfairly prejudicial under Rule 403 "where it is likely to induce a jury decision on an emotional, as opposed to a legal, basis"). This danger is especially acute here because Bley and Litan's reports and opinions are confined to attacking Ghiglieri's methods and conclusions, rather than conducting any independent analysis of the predatory lending issues at issue in this case.

Barring one of these two expert witnesses from testifying will not prejudice defendants because the remaining expert will be available to testify as to defendants' predatory lending practices. Litan submitted a 51-page expert report focusing on predatory lending in which he reached three primary conclusions: (1) "Predatory lending" has no precise definition; (2) the definition of "predatory lending" provided by Ghiglieri is "flawed"; and (3) the conclusions in Ghiglieri's Report do not support plaintiffs' assertion that Household engaged in "'predatory lending' on a 'systemic and company-wide' basis." *See* Litan Rpt. at 15, 18, 20. Bley opines on identical areas already covered by Litan's lengthy report. As with Litan's Report, the stated purpose of Bley's 62-page Joint Report is to assess "the validity of the Plaintiffs' Report's analysis, methods, and conclusions." Joint Rpt. at 4. The Joint Report argues not only that there is no consensus as to the definition of "predatory lending" but also that any such illegal practices that may have occurred were isolated due to the "appropriate corporate compliance culture" and "prudent system of internal controls" employed by Household management. *Id*. at 2, 18. All of these opinions are covered in Litan's Report.

Illustrations of the overlap between these two reports abound. For example, Litan devotes a significant portion of his report to detailing the ambiguity of the term "predatory lending" in a section of his report entitled "There Was and Is No Consensus on How 'Predatory Lending' Is Defined." Litan Rpt. at 15-18. Litan in fact quotes Bley on two separate occasions as authority in support of his opinions in this section. *Id*. at 15, 17. Bley's Joint Report repeats Litan's analysis, similarly stating over several pages that "[t]here was and is no public consensus as to the definition of 'predatory lending.'" Joint Rpt. at 14.

Bley and Litan also offer identical (albeit improper) conclusions as to the individual defendants' subjective beliefs regarding what "predatory lending" meant during the class period. Litan states that while Gary Gilmer believed "predatory lending" to be "any activity which would be

intentionally illegal or intentionally deceptive," the "[c]ontemporaneous statements and the deposition testimony of other Household officials reflect that they did not believe that there was an accepted definition of the term 'predatory lending.'" Litan Rpt. at 17-18. Bley likewise states that "contemporaneous public statements by the Officer Defendants plainly indicate their belief that the term 'predatory lending' had no standard definition." Joint Rpt. at 14 n.25.

Both expert reports ultimately conclude (with significant discussion) that defendants' practices did not constitute predatory lending. Litan concludes his report with 29 pages dedicated to responding to Ghiglieri's findings and conclusions that defendants engaged in "illegal predatory lending." Litan Rpt. at 20-49. Litan claims that Ghiglieri's allegations fall into two categories: "(A) those that were legal and disclosed to regulators and borrowers (and thus to investors), and (B) mistakes that were not intended by the Company to harm consumers and which the Company corrected when the mistakes were brought to its attention (primarily the allegations relating to the Company's computer malfunctions in California) and isolated instances of misconduct cited in a few state investigations (notably Washington and Minnesota) and confined to a few of the Company's branches and a tiny fraction of its total customers." *Id.* at 20. Once again, Bley responds in a similar manner by dividing Ghiglieri's conclusions into two parts:

> (i) management's overall stewardship of an appropriate corporate compliance culture associated with product design and sales strategy (*i.e.*, whether management put in place legal product designs and legal sales strategies); and (ii) management's construction of a prudent system of internal controls to assure that the manner in which product designs and sales strategies were executed conformed to company policy (*i.e.*, management's efforts to ensure that the company did not violate lending laws in spite of management's putting in place legal product designs and sales strategies).

Joint Rpt. at 18.

Defendants' expert reports make clear that if allowed to testify, Bley and Litan will both express nearly identical opinions on the definition of predatory lending, the individual defendants' subjective beliefs as to the term's meaning, and ultimately whether or not defendants engaged in

such practices. Defendants undoubtedly want to parade two experts in front of the jury to offer the same opinion – no justification exists for presenting both of these experts' cumulative and repetitive testimony. Duplicative expert testimony "raises the unfair possibility that jurors will resolve competing expert testimony by 'counting heads' rather than evaluating the quality and credibility of the testimony." *Sunstar*, 2004 WL 1899927, at *25. Because the probative value of this repetitive expert testimony is substantially outweighed by the danger of unfair prejudice, the testimony should be excluded.

III. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court preclude one of these two expert witnesses from testifying at trial.

DATED: January 30, 2009

Respectfully submitted,

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DECLARATION OF SERVICE BY ELECTRONIC MAIL AND BY U.S. MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Diego, State of California, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway Suite 1900, San Diego, California 92101.

2. That on January 30, 2009, declarant served by electronic mail and by U.S. Mail to the parties the **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION *IN LIMINE* TO EXCLUDE DEFENDANTS' CUMULATIVE EXPERT TESTIMONY**.

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of January, 2009, at San Diego, California.

/s/ Teresa Holindrake
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