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, - against - HOUSEHOLD INTERNATIONAL, INC., ET AL., Defendants.	Lead Case No. 02-C5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman

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

(PLAINTIFFS' MOTION *IN LIMINE* NO. 3)

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

FACTUAL BACKGROUND 3

A. MR. JOHN L. BLEY 4

B. DR. ROBERT E. LITAN 5

C. BLEY'S AND LITAN'S TESTIMONY COVER DISTINCT SUBJECTS 6

ARGUMENT 7

CONCLUSION 14

This Memorandum is respectfully submitted on behalf of Defendants Household International, Inc. ("Household"), William F. Aldinger, David A. Schoenholz and Gary Gilmer (the "Individual Defendants" and, collectively with Household, the "Household Defendants" or "Defendants"), in opposition to Plaintiffs' motion to exclude portions of the testimony of Defendants' expert witnesses John L. Bley and Dr. Robert E. Litan.

PRELIMINARY STATEMENT

Plaintiffs have proffered their expert Catherine Ghiglieri, a former regulator of state-chartered banks in Texas, to offer wide-ranging opinions captured in her 221-page "report" and 70-page "rebuttal" – both of which are results-driven advocacy pieces that do not reflect the application of any relevant expertise or reliable methodology. Plaintiffs describe Ms. Ghiglieri as an "industry expert" to support her extensive opinions in four areas that require expert response:

(1) that "Household engaged in numerous, systemic and company-wide predatory lending practices." (*See* Declaration of Thomas J. Kavaler in Support Opposition to Plaintiffs' Motions In Limine Nos. 1, 3-10 ("Kavaler Decl.") Ex. 1, Ghiglieri Rpt. at 4, 87);

(2) that "Household contended that it did not engage in predatory lending, however, its actions did not support its words." (*Id.* at 4, 81);

(3) that "[t]he financial impact to Household of its predatory lending practices was significant." (*Id.* at 5, 124); and

(4) that "Household masked delinquencies and chargeoffs in a variety of ways" (*Id.* at 5, 131).

These four quoted opinions on diverse subjects that Plaintiffs could as well have elected to present through two or more "experts" are just some of the key punch lines that Ms. Ghiglieri (Plaintiffs' sole all-purpose expert) used as section headings in her report. The "methodology" underlying these conclusory punch lines, however, involved no objective or reproducible methods; it principally involved repeating and quoting an inadmissible litany of unadjudicated complaints from a tiny minority of Household borrowers, newspaper reports of the same, and criticisms by regulators and self-appointed consumer activists. Ms. Ghiglieri accepted all of these anecdotes as true for purposes of her reports and categorically rejected any exculpatory material in the record, including with respect to the anecdotes *et. seq*. she cited. From this non-"analysis," Ms. Ghiglieri claims to support virtually every element of Plaintiffs' fraud claim –

from falsity to scienter to financial impact. As Defendants demonstrate in their *Daubert* motion, Ms. Ghiglieri's proposed testimony, like her report, is a sham and should be excluded.

In responding to Plaintiffs' claims and Ms. Ghiglieri's various "expert" conclusions, Defendants obtained reports from two types of experts. First, a pair of former state regulators from Washington (John Bley) and Illinois (Carl LaSusa), responded to the regulatory issues in Ms. Ghiglieri's report.[1] If Ms. Ghiglieri is allowed to testify at trial, Bley, the former Director of the Washington Department of Financial Institutions will testify – based upon his expertise as a regulator – as to reasons for rejecting: (1) Ms. Ghiglieri's use of the term "predatory lending" in the context of regulatory examinations where it has no relevance (Kavaler Decl. Ex. 4, Bley Rpt. at 13-15), (2) her regulatory-based criticisms of Household's system of internal controls and audit functions (*Id.* at 42-62), and (3) her reliance on regulatory review documents as inconsistent with state regulatory practice and procedure (*Id.* at 15-18).

Second, Dr. Robert Litan, a Ph.D. in economics and a nationally-known expert on the banking industry and financial policy, submitted a report that addressed those portions of Ms. Ghiglieri's report that go far beyond the scope of a state banking regulator. If Ms. Ghiglieri is allowed to appear, Litan will testify, *inter alia*, that: (1) Ms. Ghiglieri misuses the inherently ambiguous term "predatory lending" to attribute false statements to Defendants (Kavaler Decl. Ex. 14, Litan Rpt. at 18-19); (2) Ms. Ghiglieri's conclusion that "Household and its senior executives knew what predatory lending was and engaged in it anyway" (Kavaler Decl. Ex. 1, Ghiglieri Rpt. at 15) is inconsistent with Defendants' use and understanding of the term (Kavaler Decl. Ex. 14, Litan Rpt. at 19); (3) Ms. Ghiglieri's claim that "predatory lending" caused a "financial impact" of "between $726 million and $755 million" (Kavaler Decl. Ex. 1, Ghiglieri Rpt. at 130) is not supported by her analysis or cited evidence, and is based on no recognizable methodology (Kavaler Decl. Ex. 14, Litan Rpt. at 3, 44); and (4) Ms. Ghiglieri's arguments about

[1] Having no intention to burden the proceedings (or waste Defendants' limited trial time) with duplicative testimony, Defendants designated only Bley to deliver testimony with respect to the report he and LaSusa prepared.

"masked delinquencies" are inconsistent with long-standing industry practices designed to facilitate delinquent loan collection (Kavaler Decl. Ex. 14, Litan Rpt. at 45-49).

As is clear from this limited summary (or even a brief perusal of the reports themselves), Bley's and Litan's opinions do not overlap, aside from both being predicated on Ms. Ghiglieri's defective analysis of matters within their respective areas of expertise. In fact, Plaintiffs submitted separate and distinct *Daubert* motions on each expert, aimed at non-overlapping conclusions, belying their current contention that the two are "identical." (Plaintiffs' Brief at 2). Plaintiffs' motion does not assert and offers no authority for the unstated premise that two experts with differing expertise cannot be used to challenge a single expert's omnibus opinions on diverse and wide-ranging topics. Just because Plaintiffs elected to try to cram diverse subjects into the mouth of one putative "expert" does not mean that Defendants are required to do likewise. In fact, as demonstrated herein, the law is exactly the opposite.

Of course, at the heart of this issue is the hopelessly unscientific and unobjective report and testimony of Ms. Ghiglieri, which should itself be excluded. Exclusion of her testimony will substantially reduce, if not eliminate, any need for testimony by either Bley or Litan. Furthermore, if Ms. Ghiglieri is permitted to testify, there is no reason that the claim of "cumulative" testimony by Bley and Litan cannot easily be evaluated from the actual trial proceedings, should Defendants attempt to adduce the same (*i.e.*, cumulative) testimony from a second expert as they have already adduced from a first. There is simply no need to address a claim of "cumulative" expert testimony in the vacuum of Plaintiffs' bare-bones *in limine* motion.

FACTUAL BACKGROUND

Plaintiffs allege that Defendants violated the federal securities laws when they denied criticism that Household purposefully followed "predatory lending" practices. Plaintiffs also contend that Defendants misrepresented in their SEC filings the credit quality of their loan portfolios by improperly "reaging" or "restructuring" customer loans. To support these positions, Plaintiffs proffer the "expert" testimony of Catherine Ghiglieri, a professional witness who, in her Rule 26(a)(1) "expert" report addresses a panoply of issues including: business management, regulatory policy and compliance, internal controls, lending practices, account reaging, delinquency statistics, SEC filings, the supposed financial impact of practices that she "considers

"predatory" (in the know-it-when-I-see-it sense), and even the state of mind of members of senior management. Apparently, there is no subject at issue in this case in which this single witness is not an expert. Following the submission of reports by Bley and Litan dealing with different aspects of her broad opinions, Ms. Ghiglieri then submitted a 70-page "rebuttal report" addressing criticisms of her analysis. At trial Defendants intend to call, *inter alia*, these two experts to respond to the many and varied opinions of Ms. Ghiglieri, which purport independently to support almost every element of Plaintiffs' securities fraud claim.

A. MR. JOHN L. BLEY

Bley is the former Director of the State of Washington Department of Financial Institutions ("DFI"). He was appointed by Governor Michael Lowry to serve as the first Director of Washington's DFI in 1993. The Washington Department of Financial Institutions regulates, among other things, the activities of state-chartered banks, credit unions, consumer finance companies, mortgage brokers, securities and franchising activities. Bley has appeared before numerous legislative hearings in the state of Washington concerning the regulation of financial institutions. He has also testified before the United States Congress on banking matters and in hearings held by the United States Federal Reserve Board on various matters including the regulation of lending practices and subprime lending. (Kavaler Decl. Ex. 4, Bley Rpt. at 2-3)

As a former regulator of non-depository consumer lending companies (including Household), Bley will respond to Ms. Ghiglieri's opinion that Household engaged in widespread "predatory lending." He will testify that, for regulators, the term "predatory lending" has little relevance and that governing enforcement regulations *never use that ambiguous phrase*, which even Ms. Ghiglieri admits is non-standardized and custom-defined by her for this case. Bley will further explain that "[l]egislatures have uniformly declined to grant financial institutions regulators the authority to first define and then enforce against the amorphous term 'predatory lending.'" (*Id.* at 1). Bley will also testify about the regulatory and compliance issues faced by consumer finance companies, distinguishing the regulation of non-depository financial institutions (such as Household) from depository financial institutions (such as the banks Ms. Ghiglieri once supervised). He will offer his expertise about the types of regulatory compliance (character, content, and manner regulation) and explain the regulatory process, which is comprised of two parts: (1) a field examination process; and (2) an enforcement process. In addition, he will demonstrate

that Ms. Ghiglieri's biased selection of and reliance on unadjudicated customer complaints with no examination of alternative explanations is the antithesis of responsible regulation, and yields a completely unreliable result.

Bley will also address the purpose and scope of the state regulations and laws Ms. Ghiglieri cites and their application to the commonly-used lending practices Ms. Ghiglieri criticizes. He will also explain and assess from the viewpoint of an expert regulator Household's extensive system of internal controls.

B. DR. ROBERT E. LITAN

Dr. Litan is a senior fellow in Economic Studies at the Brookings Institution in Washington, D.C. and the vice president for Research and Policy at the Kauffman Foundation in Kansas City, Missouri. He holds a Ph.D. in economics from Yale University. During his career, Litan has authored or co-authored twenty-one books and approximately two-hundred articles, including a 2001 paper titled "A Prudent Approach to Preventing 'Predatory Lending'." In October 1993, Litan was appointed by President Clinton to serve as Deputy Assistant Attorney General for Antitrust of the United States Department of Justice. In the early 1990s, Litan was appointed to and served as a Member of the Presidential-Congressional Commission on the Causes of the Savings and Loan Crisis. Litan has provided testimony before various committees of the United States House of Representatives and the United States Senate including the Subcommittee on Financial Institutions and Consumer Issues of the House Banking Committee and the Senate Banking Committee. Litan has previously taught banking law at Yale Law School. (Kavaler Decl. Ex. 14, Litan Rpt. at 1-2, App. 3.)

If Ms. Ghiglieri is allowed to testify, Dr. Litan will respond to her repeated use – over 300 times in her two reports – of the inherently ambiguous term "predatory lending" to attribute false statements to the Defendants. He will address the explosion in use of the term during the Class Period, and the evolving policy views during that time about the proper balance between the competing interests of shareholders and borrowers in the market place. Litan will also discuss the headline risk to the value of lenders' securities created by the growing focus on "predatory lending" issues during the Class Period, the economics of this risk, its use as a political tool, and the options available to lending company management to deal with such challenges.

Litan will address the methodological flaws underlying Ms. Ghiglieri's assertions that Household's denials of "predatory lending" accusations were false and misleading. His testimony will show that investors reacted to events during the Class Period in ways inconsistent with Ms. Ghiglieri's opinion that Household made false statements. Litan will also testify that Household's SEC filings disclosed its usage of the lending practices Ms. Ghiglieri labels "predatory." Litan will dispute Ms. Ghiglieri's contention that the activities she deems "predatory" were against the shareholders' interests and caused a "financial impact" which she measures at "between $726 million and $755 million." (Kavaler Decl. Ex. 1, Ghiglieri Rpt. at 130). He will explain the methodological flaws in her biased, non-scientific calculations, and challenge Ms. Ghiglieri's contention that customer and shareholder perspectives about predatory lending issues were aligned.

Litan will also expose the methodological and substantive flaws underlying Ms. Ghiglieri's allegations that "Household's policies regarding restructuring and reaging of accounts . . . masked delinquencies and charged-off loans," and that "Household made false and misleading statements in its securities filings regarding its restructuring and reaging policies."[2] (Kavaler Decl. Ex. 1, Ghiglieri Rpt. at 166, 131). Bley does not address this issue. Litan will explain that the allegations attacking Household's reaging policies do not consider the legitimate reasons for reaging (which Plaintiffs acknowledge are beneficial to customers). Finally, he will explain that Household's reaging practices were disclosed in publicly filed documents that were discussed extensively by securities analysts.

C. BLEY'S AND LITAN'S TESTIMONY COVER DISTINCT SUBJECTS

As evidenced by the following chart, Bley and Litan address distinct issues raised by Ms. Ghiglieri's single all-encompassing "expert" report.

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[2] Notably, Ms. Ghiglieri's conclusions in this regard overlap substantially with the opinions expressed by Plaintiffs' accounting "expert" Harris Devor. (*See, e.g.*, Kavaler Decl. Ex. 17, Devor Rpt. at 66-149 (referring to Household's use of restructuring as a "credit quality concealment technique)). Defendants assume Plaintiffs will not seek to offer cumulative expert testimony at trial except to the extent that incidental overlap is inevitable, as in the narrow areas of overlap between Litan and Bley discussed herein.

Subjects Addressed by Plaintiffs' Expert	Defendants' Expert Trial Testimony
"Household's corporate culture" (Kavaler Decl. Ex. 1, Ghiglieri Rpt. at 24)	Bley
"Household's product development" (*Id.* at 25)	Bley
"Household's sales training" (*Id.* at 33)	Bley
"Household's compensation program" (*Id.* at 44)	Bley
Household's "internal controls" (*Id.* at 49)	Bley
Household's regulatory compliance (*Id.* at 53)	Bley
"Household's technology" (*Id.* at 65)	Bley
Household's "internal control process in place to handle consumer complaints" (*Id.* at 72)	Bley
"Household's employee turnover" (*Id.* at 80)	Bley
"Household contended that it did not engage in predatory lending" (*Id.* at 81)	Litan
Whether "Household structured its loans in a predatory manner" (*Id.* at 89)	Litan
Whether "Household made required disclosures in compliance with federal and state laws" and whether those disclosures were "inaccurate or misleading" (*Id.* at 105)	Litan
The "financial impact to Household of its predatory lending practices" (*Id.* at 124)	Litan
"Household masked delinquencies and charge-offs in a variety of ways" (*Id.* at 131)	Litan
"Household made false and misleading statements in its securities filing regarding its restructuring and reaging policies" (*Id.* at 169)	Litan

ARGUMENT

Plaintiffs wrongly argue that Defendants must choose one expert to testify to every issue covered by Ms. Ghiglieri's prolix report, which would in effect allow Plaintiffs to select the number of experts Defendants can present by the simple stratagem of cramming supposed "expertise" on diverse subjects into the mouth of only one "expert." This is not the law. This Court's Local Rules state that "[o]nly one expert witness on each ***subject*** for each party will be permitted to testify absent good cause shown. If more than one [Federal Rule of Evidence 702] witness is listed, the subject matter of each expert's testimony shall be specified." N.D. Ill. Local Rule Form 16.1.1, n.7. (emphasis added). The purpose of this rule stems from Federal Rule of

Evidence 403, which allows a court to exclude evidence "if its probative value is substantially outweighed by . . . needless presentation of cumulative evidence." Fed. R. Evid. 403. These rules are ***not*** designed to arbitrarily limit the number of experts that a party may call, or to create a Draconian rule preventing two witnesses from ever uttering the same words. Rather, they are designed to prevent a party from parading before the jury multiple experts with duplicative testimony on the same subject. *See, e.g.*, *Dahlin* v. *Evangelical Child & Family Agency*, 01 C 1182, 2002 WL 31834881, at *5 (N.D. Ill. Dec. 18, 2002) (Kennelly, J.) (requiring plaintiffs to choose between two proposed experts on standards of care in adoption agency practice because testimony of both "is entirely and unnecessarily duplicative.").

In *Sunstar, Inc.* v. *Alberto-Culver Co., Inc.*, No. 01 C 736, 2004 WL 1899927 (N.D. Ill. Aug. 23, 2004), a defendant proposed to call two experts regarding Japanese law. Applying the local rule, Magistrate Judge Nolan stated that "[o]nly one of [Defendant's] experts will be permitted to testify at trial on each subject of Japanese law" but that "[t]his does not mean that [Defendant] is limited to one testifying expert regarding Japanese law; it is limited to one testifying expert on each subject of Japanese law." *Id.* When a co-defendant also intended to call an expert on Japanese law, Judge Nolan, applying FRE 403 to the defendants collectively, held that the second defendant's expert's testimony "will be permitted to the extent it is not duplicative of the testimony of [the first defendant]'s expert(s) on Japanese law." *Id.* Although Plaintiffs quote liberally from Magistrate Judge Nolan's *Sunstar* decision in their brief, they fail to discuss the facts of *Sunstar* or the key distinction summarized above. Plaintiffs also fail to note that this Court affirmed Magistrate Judge Nolan's decision, finding "no error" in her decision that a party may offer multiple expert witnesses where each is confined to the subject matter of his expertise. *Sunstar, Inc.* v. *Alberto-Culver Co.*, No. 01 C 736, 2005 U.S. Dist. LEXIS 23098, at *24 (N.D. Ill. Sept. 19, 2005) (Guzman, J.).

Ms. Ghiglieri has espoused literally dozens of opinions on virtually every aspect of this case including Household's internal controls, lending policies, reaging policies, and SEC disclosures. While her lack of expertise in many of the areas she assails is evident, and is the subject of Defendants' *Daubert* motion on point, if Ms. Ghiglieri is permitted to serve as Plaintiffs' "mouthpiece" in the overbroad fashion they propose, Defendants will be entitled to rebut her assertions with the aid of witnesses who actually have expertise in the subject matter of their

respective testimony. Put another way, the fact that for whatever reason Plaintiffs elected to cover so many core elements through a single "expert," whether qualified to speak to those elements or not, does not require Defendants to make the same mistake. In responding to the diverse issues Ms. Ghiglieri may cover, Bley and Litan will offer testimony that contains virtually no overlap apart from the genesis of their views in the deficiencies of Ms. Ghiglieri's report and Plaintiffs' claims. Minor overlap of this kind is unavoidable and does not warrant or even support the relief Plaintiffs seek by this motion.

It is well-settled that multiple experts are appropriate where, as here, they are offered to address separate issues within a larger topic. *Lieberman* v. *The American Dietetic Association*, No. 94-5353, 1996 WL 490779, at *3 (N.D. Ill. Aug. 23, 1996) (Bucklo, J.) (holding that testimony by eight expert witnesses was "not cumulative" because "[e]ach expert provides testimony related to different areas of nutrition science."). When two experts' testimonies are substantially different, incidental overlap on particular points is permissible to give their testimony context. *See THK America* v. *NSK Ltd.*,[3] 917 F. Supp. 563, 576 (N.D. Ill. 1996) (Ashman, M.J.) (allowing two patent experts to testify despite overlap when one expert's testimony would relate to general background issues and the other's would focus on case-specific issues); *Wetherill* v. *University of Chicago*, 565 F. Supp. 1553, 1565 (N.D. Ill. 1983) (Shadur, J.) (allowing three experts to testify about issues surrounding a drug study where one expert would testify about defendants' knowledge of the drug, a second about pathology and a third about animal testing of the drug).

As demonstrated above, Bley and Litan's testimony will cover substantially different subjects. Indeed, Plaintiffs identify only three minor issues upon which Bley's and Litan's

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[3] The complexity and significance of this federal securities fraud case, which has lasted over six years and alleges billions of dollars in damages, favors permitting multiple experts. *See, e.g.*, *THK America* v. *NSK Ltd.*, 917 F. Supp. 563, 576 (N.D. Ill. 1996) (Ashman, M.J.) ("In a case such as this, involving claims exceeding 140 million dollars, which has lasted over five years and has involved untold hours of lawyers' work and which may take five or more weeks to try, the Court believes that any doubts as to whether one or two experts should be employed should be resolved by allowing the additional expert. In these circumstances, the attorneys should be allowed to try their own cases.").

testimony may briefly and incidentally overlap. The thrust of Plaintiffs' argument is that they are somehow prejudiced because both Bley and Litan state in their reports that there is no consensus definition on the term "predatory lending." Plaintiffs' objection distorts a narrow and unavoidable overlap caused solely by the fact that each of Defendants' experts examines distinct deficiencies in Ms. Ghiglieri's patently defective "predatory lending" analysis, based on his separate areas of expertise. Litan provides an in-depth discussion of use of the term "predatory lending" as a foundation for explaining the economic and political environment during the Class Period as legislators grappled with the proper application of the term and the tension between consumer activists' demands and management's obligation to protect the interests of shareholders. He also discusses the rise in "headline risk" for subprime lenders such as Household. In contrast, Bley discusses the term only briefly, noting its lack of meaning and utility in the regulatory context and, therefore, its disconnect from Ms. Ghiglieri's claimed ambit of expertise as a bank regulator.

Plaintiffs never explain – because there is no valid explanation – how this slight overlap in testimony will prejudice them (other than by legitimately casting sunshine on Ms. Ghiglieri's "methods"). Although Ms. Ghiglieri is quick to attribute a fraudulent mindset to speakers at Household who used the term, Ms. Ghiglieri herself expressly admits that the term "predatory lending" has no real meaning – an accurate and fatal concession. In her deposition she stated that "there is no definition of 'predatory lending' that – any one definition, and I discuss that extensively in my report."[4] (Kavaler Decl. Ex. 3, Ghiglieri Tr. 48:22-24). Ms. Ghiglieri explained that it is a subjective standard, "[i]t's like I think pornography, you know it when you see it." (*Id*. at 48:20–50:10). Indeed, Ms. Ghiglieri admitted that, although she used the term hundreds of times in her Report, she did not articulate her own definition of it until eight months after the submission of her Report:

[4] Plaintiffs' other proffered regulatory expert, Chuck Cross, also admitted that the term "predatory lending" means something different to every person. (Kavaler Decl. Ex. 7, Cross Tr. 96:24 - 97:1 ("there is still no agreed-upon or unified definition that exists for predatory lending,")).

> "Q. Now we were talking earlier about your definition of 'predatory lending,' and I believe you told me that your report does not contain a definition but you gave me a definition today in your testimony. Did I understand that correctly?
>
> A. Yes.
>
> Q. Okay.
>
> A. I thought you might ask me for my definition, so I pondered it.
>
> Q. So you pondered it when?
>
> A. In preparation for my deposition.
>
> Q. Yes, but when [temporally], this morning, yesterday, a week ago?
>
> A. Oh, in the last week –" (Kavaler Decl. Ex. 3, Ghiglieri Tr. 85:1-14)

Plaintiffs cannot complain of prejudice merely because Defendants' regulatory expert will explain what's wrong with that "holistic" approach to regulation, and Defendants' lending market expert will elaborate on Ms. Ghiglieri's concession that there was no set definition of the term to explain how the surrounding policy debate during the Class period impacted the known risks to investors in consumer lending companies in that unsettled time.

Plaintiffs also exaggerate the overlap in the proposed testimony of Bley and Litan regarding Defendants' understanding of "predatory lending." While Litan's expert report discussed this point in depth, evaluating the personal definitions given by each member of senior management in contrast to Ms. Ghiglieri's new, litigation-driven definition (Kavaler Decl. Ex. 14, Litan Rpt. at 18), Bley's discussion was relegated to a single footnote in his sixty-two-page report (Kavaler Decl. Ex. 4, Bley Rpt. at 14, n. 25) in which he merely noted that during the Class Period Defendants publicly stated that there was no consensus definition of the term "predatory lending." The limitation of one expert per subject does not favor form over substance, forbidding two witnesses from even uttering the same words. In any event, Ms. Ghiglieri agrees with the substance of that footnote. In her deposition, she admitted that the definition upon which she evaluated the company was broader than the definition the Individual Defendants used when speaking to investors. (Kavaler Decl. Ex. 3, Ghiglieri Tr. at 55:23–56:11 ("Q. But they don't – those four individuals don't seem to share your definition; is that right? A. Well, their definition was more restrictive from what I could tell.")). Even if there were a technical overlap on this small point, Plaintiffs' claims of prejudice ring hollow when their own expert concedes the underlying point.

The final subject of alleged "overlap" is that if Ms. Ghiglieri is allowed to testify, Bley and Litan will both speak, within their respective areas of expertise, to her sweeping conclusion that Defendants deliberately engaged in and encouraged "predatory lending." Plaintiffs' Brief at 5. Plaintiffs' argument on this point reflects confusion about the governing law. As discussed above, Defendants are not limited to the same number of experts as chosen by Plaintiffs for tactical reasons. The fact that Litan and Bley both respond to Ms. Ghiglieri's opinions is irrelevant. What matters is that they respond to separate aspects of these opinions.[5]

Although the broad focus of these experts will be on Ms. Ghiglieri's opinion that certain products were "predatory" in nature, Bley will respond in relation to Ms. Ghiglieri's disregard of compliance regulation, consumer protection, and regulatory practices in the industry (Kavaler Decl. Ex. 3, Bley Rpt. at 18-42 (corporate compliance structure, product design and sales strategies); *id.* at 42-58 (Household's seven layers of internal controls)), while Litan will focus on Ms. Ghiglieri's attempt to quantify the "financial impact" of the practices she chooses to label as "predatory" and her claim that Household made deliberately false statements on these subjects.[6] Similarly, although both experts will discuss the isolated violations of Company policy by employees, they will do so with a separate focus and body of expertise. These distinctions

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5 To the extent that Bley and Dr. Litan testify about the legality of Defendants' practices or their intent, they will be responding to the allegations in Ms. Ghiglieri's Report that Household's practices were illegal and that Defendants knowingly violated the law. (*See, e.g.*, Kavaler Decl. Ex. 1, Ghiglieri Rpt. at 105). If the Court permits Ms. Ghiglieri to usurp the function of both the Court and the jury by instructing the jury on the law and whether Defendants knowingly violated it, then Defendants must be permitted to respond. However, if the Court excludes Ms. Ghiglieri's impermissible testimony, then neither Bley nor Dr. Litan will need to espouse any opinion on law or intent. Indeed, if the Court excludes all testimony by Ms. Ghiglieri (*see* Memorandum of Law in Support of Household Defendants' *Daubert* Motion to Exclude the "Expert" Testimony of Catherine A. Ghiglieri), there is a great likelihood that neither Bley nor Litan would need to testify at all.

6 Attempting to bolster their argument that Dr. Litan's opinions substantially overlap with Bley's, Plaintiffs assert that "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." (Plaintiffs' Brief at 5). This is simply not true. As discussed above, the majority of these pages concern Defendants' disclosure of Household's practices. Pages 42-49 concern the lack of impact from any alleged "predatory lending" and Ms. Ghiglieri's "reaging" claims. (Kavaler Decl. Ex. 14, Litan Rpt. at 42-49). Bley's report does not address these issues.

are evident even from Plaintiffs' brief which, unable to avoid the differences between the two reports, acknowledges that Dr. Litan's report focuses on disclosure to investors and isolated incidents, while Bley's focuses on the legality of products and corporate culture and Household's internal controls system. (Plaintiffs' Brief at 5).

While Ms. Ghiglieri claims to be an "expert" in regulation, internal controls, business management, lending practices, reaging of accounts, delinquency statistics and disclosure of these items to customers as well as investors, Defendants are entitled to avoid this superficial "jack of all trades, master of none" approach. Any incidental overlap on the above topics that may occur would be insignificant and would not prejudice Plaintiffs enough to "substantially outweigh" the clear probative value of educating the jury about "predatory lending" issues from both consumer/regulatory and management/investor perspectives.[7] *See, e.g.*, *Holmes* v. *Sood*, 02 C 7266, 2006 WL 1988716, at *5-6 (N.D. Ill. July 11, 2006) (Brown, M.J.) (allowing testimony of two doctors despite topic overlap because "[t]he fact that their testimony and opinions may overlap to some extent does not demonstrate a sufficient basis of . . . needless presentation of cumulative evidence."); *THK America*, 917 F. Supp. at 577 (allowing two experts on damages because one expert approached damages from an accounting perspective and the other from an economic perspective, "[a]lthough there will be considerable overlap and although one expert may comment and build upon the report of the other"); *Doe* v. *Tag, Inc.*, 92 C 7661, 1993 WL 484212, at *2 (N.D. Ill. Nov. 18, 1993) (Conlon, J.) (permitting the testimony of two expert doctors who co-authored a report despite defendant's Rule 403 objection, stating that "[a]lthough the two experts may present some identical testimony, it would be to the jury's benefit to hear both doctors testify, particularly because their 1989 report is of central concern in this case.").

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[7] Plaintiffs' complaint that the limited overlap between Bley's and Dr. Litan's testimony will waste time rings hollow. The Court has already limited each party's trial presentation to a set amount of time. If Defendants are wasting anyone's time, it is ***their own***. Plaintiffs' disingenuous arguments reveal their true concern regarding their own "expert" Ms. Ghiglieri; that an "expert in everything" is an expert in nothing.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion *In Limine* # 3 to exclude what they refer to as cumulative expert testimony.

Dated: February 10, 2009
New York, New York

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