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 TO EXCLUDE CERTAIN TESTIMONY OF DEFENDANTS' EXPERT JOHN BLEY PURSUANT TO FEDERAL RULE OF EVIDENCE 702

(PLAINTIFFS' MOTION *IN LIMINE* NO. 10)

CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005
(212) 701-3000

EIMER STAHL KLEVORN & SOLBERG LLP
224 South Michigan Avenue
Chicago, Illinois 60604
(312) 660-7600

Attorneys for Defendants Household International, Inc., Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer and J. A. Vozar

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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 support of their opposition to Plaintiffs' Motion to Exclude Certain Testimony of Defendants' Expert John Bley Pursuant to Federal Rule of Evidence 702 ("Plaintiffs' Brief").

PRELIMINARY STATEMENT

By moving to exclude certain testimony of Defendants' expert John Bley, Plaintiffs have sealed the fate of their own "expert" Catherine Ghiglieri.

Mr. Bley's testimony directly responds to Ms. Ghiglieri's opinions, setting forth the accepted analysis employed by financial institution regulators and criticizing Ms. Ghiglieri's failure to employ that or any method of analysis other than "I know it when I see it." Mr. Bley explains that in her blind reliance on hearsay customer complaint allegations, extrapolation from that anecdotal "evidence" to form companywide opinions, and failure to consider Household's detailed responses (which are a key part of the regulatory dialogue), Ms. Ghiglieri falls far short of the obligation of an expert to consider obvious alternative explanations for these few customer complaints. In short, the primary purpose of Mr. Bley's testimony is to demonstrate that Ms. Ghiglieri did not employ proper methods and that her opinions were biased, conclusory and unsupported. The very grounds on which Plaintiffs attack Mr. Bley's criticisms of the Ghiglieri Reports are the foundation for the required exclusion of Ms. Ghiglieri's purportedly expert testimony.[1]

Excluding testimony of one expert because he identifies the improper methods and biased analysis underlying the proffered testimony of another would turn the *Daubert* proc-

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[1] The party offering a putative expert's testimony must establish by a preponderance of the evidence that the expert testimony is admissible and that the expert is qualified. *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). A district judge is vested with the duty to act as a "gatekeeper" for expert testimony, "only admitting such testimony after receiving satisfactory evidence of its reliability." *Dhillon* v. *Crown Controls Corp.*, 269 F.3d 865, 869 (7th Cir. 2001) (citing *Daubert*, 509 U.S. at 589). If this Court in its gatekeeping role determines that Ms. Ghiglieri's proffered testimony does not satisfy the standards of Rule 702, and thus excludes her as a witness, Defendants do not intend to call Mr. Bley.

ess on its head. As with their "spoliation" motion and so many of their *in limine* motions, Plaintiffs seek to overcome their lack of reliable evidence by urging the Court to keep the jury in the dark as to key elements of their opponents' defense. This tactic should not be countenanced. If Ms. Ghiglieri's 200 page report were not an improper laundry list of statistically insignificant anecdotal hearsay and conclusory *ipse dixit* opinions regarding "predatory lending," the law applicable in this case, and even the state of mind of Defendants, then Mr. Bley's expert criticisms of those improper opinions would not be required at trial. The obvious and —based on the very standards briefed by Plaintiffs on this motion —correct solution here is to exclude the testimony of Ms. Ghiglieri, thus obviating the need for Mr. Bley to testify and for the Court to consider this motion.

FACTUAL BACKGROUND

Mr. Bley is the former Director of the State of Washington Department of Financial Institutions (DFI), appointed by Governor Michael Lowry in 1993 to serve as the Department's first Director. The Washington Department of Financial Institutions regulates, among other things, the activities of state-chartered banks, credit unions, consumer finance companies, mortgage brokers and securities and franchising activities. Mr. Bley has appeared before numerous legislative hearings in the State of Washington concerning financial institutions regulation. He has also testified before the United States Congress on matters related to banking and in hearings held by the United States Federal Reserve Board on matters including the regulation of lending practices and subprime lending. (*See* Declaration of Thomas J. Kavaler in Opposition to Plaintiffs' Motions *In Limine* Nos. 1, 3-10 ("Kavaler Decl.") Ex. 4, Bley Report at 2-3).

Mr. Bley, together with the former Supervisor of the Illinois Department of Financial Institutions Carl A. LaSusa, issued a Joint Report With Respect to Federal Rule of Civil Procedure 26 on December 10, 2007, as amended February 15, 2008 ("Bley Report") to explain the shortcomings in the Expert Witness Report of Catherine A. Ghiglieri ("Ghiglieri Report") submitted by Plaintiffs' expert on August 15, 2007. Mr. Bley's testimony will also address the opinions expressed in the Rebuttal Report of Catherine A. Ghiglieri, dated February 1, 2008. ("Ghiglieri Rebuttal," together "Ghiglieri Reports").

Mr. Bley's credentials at first blush appear similar to Ms. Ghiglieri's in that both headed state agencies that regulated financial institutions, but unlike Ms. Ghiglieri, Mr. Bley

headed a state agency that supervised non-bank consumer lending companies, including Household, and he held this position through most of the Class Period. Ms. Ghiglieri's credentials include seven years of experience as Texas Banking Commissioner, "supervising state-chartered banks in Texas," preceded by employment, in various positions, with the Office of the Comptroller of the Currency, "the regulator of national banks in the United States." (Kavaler Decl. Ex. 1, Ghiglieri Report at 7–8). This is a vital distinction because regulators of depository institutions are principally charged with protecting the deposits themselves rather than protecting the borrowers who receive the depositors' funds. Neither of her former employers regulates non-depository consumer finance companies such as Household's Consumer Lending unit, which did not rely on customer deposits as its source of funding and which was subject to statutory and regulatory requirements that differed materially from those applicable to banks and other depository institutions.

If Ms. Ghiglieri appears at trial, Mr. Bley will respond from his perspective as a regulatory expert to her opinion that Household was engaged in widespread "predatory lending". He will testify as to regulatory and compliance issues faced by a consumer finance company, distinguishing the regulatory environment for non-depository financial institutions such as Household from the regulation of banks. Mr. Bley will explain that "predatory lending" is not an enforcement term used by regulators and 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.'" (Kavaler Decl. Ex. 4, Bley Report at 1). Mr. Bley will also addresses the common use of certain loan products, features and practices in the industry during the Class Period, including many that Ms. Ghiglieri now defines as "predatory" and assess Household's extensive system of internal controls, including: (1) training; (2) branch audit function; (3) employee discipline and incentive structure; (4) senior management oversight; (5) an independent internal audit department; (6) an audit committee; and (7) an independent external auditor.

ARGUMENT

The testimony that Plaintiffs seek to exclude is almost entirely testimony that directly responds to the opinions and methodology of Ms. Ghiglieri. If she were allowed to offer these opinions, Defendants in fairness would have to be allowed to respond to her through Mr. Bley's testimony as to the proper application of regulatory standards.

A. Mr. Bley's Opinions Regarding the Washington Department of Financial Institutions and Other State Agency Reports of Examination Respond to Ms. Ghiglieri's Analysis and Opinions

Through the end of 2001 Mr. Bley served as Director of the Washington Department of Financial Institutions (DFI). In that position, he managed approximately 150 professional examiners, lawyers and staff members, including Chuck Cross, the examiner who at that time was investigating the 19 customer complaints which formed the basis of the Expanded Report of Examination Mr. Cross issued in May 2002 ("the Expanded Report"). (Kavaler Decl. Ex. 4, Bley Report at 2). Defendants fully agree with Plaintiffs that "off the cuff" opinions are inadmissible (*see*, *e.g*., Household Defendants' *Daubert* Motion to Exclude the "Expert" Testimony of Catherine A. Ghiglieri, Charles Cross and Harris L. Devor and authorities cited therein). However, Mr. Bley's explanation of authority delegated to and within the DFI plainly does not fall into that category. That the Expanded Report was not "backed by the moral authority of the State of Washington" is a fact supported by the Expanded Report itself, the relevant Washington State statutes and the testimony of Mr. Bley's subordinate Mr. Cross, who authored the Expanded Report.

The Expanded Report on its face states that "[t]he findings and violations contained herein are considered 'apparent' findings and violations based upon information and documentation provided to date. Additional information, or lack thereof, may be cause for amended findings and violations. ***This report does not contain charges or orders by the Director*** and should not be considered a trigger of rights or procedures under chapter 34.05 RCW, the Administrative Procedure Act." (Kavaler Decl. Ex. 9 at 5) (emphasis added). Unless an examination triggers these procedures, it is unadjudicated and a set of findings or allegations only. If John Bley, the long-time Director of the Washington DFI and occupant of that office during most of the Class Period, is not qualified to state what is and is not a final finding by the Director of the Washington DFI, then no one is. And if Ms. Ghiglieri were allowed to express her uneducated surmises on this subject to the jury, it is foolish to suggest that Mr. Bley should not be allowed to set the record straight.

Mr. Bley's authoritative testimony is particularly important because Ms. Ghiglieri would lead the jury to believe, contrary to fact, that the "apparent findings and violations" within the Expanded Report are in fact final agency rulings. She supports this misleading conclusion by

deceptively citing an excerpt from prior testimony of Mr. Cross (another of Plaintiffs' proffered experts) in which (according to Ms. Ghiglieri) he states "'we [in Washington State] use the term 'apparent violation' prior to actually filing charges…'" (Kavaler Decl. Ex. 2, Ghiglieri Rebuttal at 60). The full text that Ms. Ghiglieri replaced with an ellipsis is illuminating, both substantively and as a vivid demonstration of Ms. Ghiglieri's "expert" "method." Mr. Cross's full statement is exactly the opposite of the impression Ms. Ghiglieri tries to convey. He said: "We use the term 'apparent violation' prior to actually filing charges ***because they are essentially initial findings***. It is just a term of art to allow the process, the understanding, that, you know***, it's not a finding by the director that a violation has occurred. It's a finding by an examiner who is not in a position to commit the Department to charges for those violations***." (Kavaler Decl. Ex. 8 at 31:11-17). (emphasis added).

Mr. Bley will offer testimony to illustrate another of Ms. Ghiglieri's profound methodological flaws — namely her acceptance of unadjudicated consumer complaints and regulatory allegations based thereon for the truth of the matter asserted without any independent investigation. Unlike Ms. Ghiglieri's uninformed assumptions and counterfactual conclusions, Mr. Bley's testimony that "the findings in a regulatory report of examination are just like the allegations in a civil complaint" should not be excluded because it is well grounded in his expertise and supported by the facts he investigated. Mr. Bley's expert testimony is also in accord with the law. Regulation of financial institutions is an iterative and continuous process that is protected from public disclosure for the very reason that the allegations in regulatory communications and examinations are unadjudicated observations conveyed privately to the regulated entity to elicit a response.[2] As the Special Deputy Attorney General on behalf of North Carolina's Of-

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[2] Plaintiffs erroneously cite to FRE 803(8)'s hearsay exception for "Public Records and Reports" to support their position that the Expanded Report is deemed "inherently reliable" by the Federal Rules of Evidence and should be accepted for the "truth of the matter asserted." (Plaintiffs' Brief at 5). This is simply wrong. Rule 803(8) applies only to "matters observed" in appropriate circumstances, such as factual observations regarding loan agreement terms or Household's response to customers (which Ghiglieri ignores), and does not excuse double or triple hearsay or apply where "the sources of information or other circumstances indicate lack of trustworthiness." Chuck Cross's admission that his Expanded Report of Examination was not performed according to accepted standards, the loans were not a random or statistically significant sample (in fact were too "woefully inadequate" to yield statistical significance) and that his conclusions at times were

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fice of the Commissioner of Banks explained to Magistrate Judge Nolan in earlier proceedings in this action, state regulatory exams are "predecisional in that they were prepared prior to an agency decision," form a part of the "free and open discussion that is vital to the OCOB's regulatory function" and "[a]ny disclosure of such information may be harmful to a licensee or members of the public, particularly when taken out of the regulatory context." (Kavaler Decl. Ex. 10 at 4-7). It is surprising that Ms. Ghiglieri overlooks this important distinction because it prevailed even at the federal bank regulatory agency where she spent most of her career:

> "'Bank safety and soundness supervision is an iterative process of comment by the regulators and response by the bank. . . This relationship is both extensive and informal. . . The supervisory relationship is informal in the sense that it calls for adjustment, not adjudication. . . .Because bank supervision is relatively informal and more or less continuous, so too must be the flow of communication between the bank and the regulatory agency. Bank management must be open and forthcoming in response to the inquiries of bank examiners, and the examiners must in turn be frank in expressing their concerns about the bank. These conditions simply could not be met as well if communications between the bank and its regulators were not privileged.'"

In re Bank One Securities Litigation, 209 F.R.D. 418, 426 (N.D. Ill. 2002) (Denlow, J.) (citing *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 633 (D.C. Cir. 1992)). This explanation is of heightened importance because Ms. Ghiglieri admittedly refused to take into consideration Household's lengthy and detailed responses to examinations. (*See, e.g.,* Kavaler Decl. Ex. 3 at 151:10-152:3 (When asked if she discounted Household's written responses to inquiries from regulators, Ghiglieri replied that she disregarded everything Household had to say, sight unseen, because she had categorically decided that Household's input was "unreliable" (*id.*) — once again assuming the very conclusion she was purportedly hired to test)).

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based on speculation produce a blatant "lack of trustworthiness" in the Expanded Report. For reasons Bley will explain to the jury, this and other reports of examination are far from "inherently reliable" as Plaintiffs assert. (*See* Household Defendants' *Daubert* Motion to Exclude the "Expert" Testimony of Catherine A. Ghiglieri, Charles Cross and Harris L. Devor; Defendants' Motion in Limine to Exclude or Limit 14 Categories of Evidence: (B) Federal and State Regulatory Exams).

Mr. Bley's explanation of "creative" examination further illustrates the outer limits of field examination communications, which necessarily differ from findings of violations of law in an enforcement setting. This is illustrated by Mr. Cross's own testimony that as a field examiner he had a reputation as a "pit bull" and that Washington DFI "pushed the envelope" in that it used methods and found violations that no other state had yet considered: "we started to drill deeper, become more insistent. We became — We were very aggressive regulators. . . . we were extremely aggressive." (Kavaler Decl. Ex. 7 at 192-196). Indeed, Mr. Cross admitted that some of his conclusions in the report were mere "speculation." (Kavaler Decl. Ex. 8 at 255:2-5).

B. Mr. Bley's Opinions as to Customer Complaint Tracking and Reporting Respond to Ms. Ghiglieri's Opinions

Plaintiffs contend that Mr. Bley should be barred from testifying to his conclusion that Household "diligently tracked all complaints ***that were not immediately resolved at the branch level***" (Plaintiffs' Brief at 6 quoting Bley Report at 61) (emphasis added) because this statement "contradicts" the deposition testimony of former employee Robin Allcock that "there was no effort to track ***branch level complaints*** prior to the 2001-2002 timeframe." (Plaintiffs' Brief at 6) (emphasis added). It is clear from their face that these two statements are not contradictory, but rather are completely consistent. Moreover, Mr. Bley identifies such monthly unresolved complaint tracking memoranda in his report. Plaintiffs are again wasting the Court's time or trying to mislead the Court by seeking unnecessary and counter-factual relief.

Plaintiffs similarly seek to bar Mr. Bley from testifying as to the "reliability" of a Household comprehensive study reviewing alleged "effective rate" complaints received from 1999 through 2002.[3] Mr. Bley in fact discusses this study, known as the Effective Rate Complaint Review, primarily to put in context Ms. Ghiglieri's own conclusions based on its specific findings. As he points out, Ms. Ghiglieri relies on the Effective Rate Complaint Review to support her contention that complaints on this subject were geographically diverse, while ignoring

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[3] Unlike the compilation at issue in *Sommerfield* v. *City of Chicago*, 254 F.R.D. 317 (N.D. Ill. 2008) (Cole, J.) cited by Plaintiffs, the Effective Rate Complaint Review was not commissioned by attorneys and was not prepared by attorneys, nor was it withheld from Plaintiffs in this action under attorney work product protection. (Kavaler Decl. Ex. 13).

the finding in the Review that there were fewer than 50 such complaints nationwide (or far less than 1% of the customer base) — which flatly rebuts her conclusion that the "problem" was "widespread." (*See* Kavaler Decl. Ex. 4, Bley Report at 40-41 citing Ghiglieri Report p. 115). As Plaintiffs correctly note, "[e]xperts cannot ignore the evidence before them to reach opinions favoring their client." (Plaintiffs' Brief at 4 citing *Chan* v. *Coggins*, No. 07-60792, 2008 U.S. App. LEXIS 20987, at *8 (5th Cir. Oct. 2, 2008)). This tenet plainly bars Ms. Ghiglieri's testimony, but Plaintiffs have shown no such bias by Mr. Bley.

It is ironic that Plaintiffs criticize Mr. Bley's own use of company-wide analyses, considering that Ms. Ghiglieri made no attempt to do any analysis on her own, or even take full inventory of the information contemporaneously conveyed to Household's management by Class Period studies and regular reports. Rather, she either ignored these studies altogether or combined cherry-picked passages with anecdotal customer complaints to draw conclusions she then irrationally applied to hundreds of thousands of loans. Mr. Bley, in contrast, identified and assessed Household's method of complaint tracking and the resulting monthly and companywide reports to demonstrate the methodological and substantive flaws in Ms. Ghiglieri's unsupported conclusion that Household was a "predatory lender." Either as authoritative support for the outright exclusion of Ms. Ghiglieri's biased, unmethodical, insupportable conclusions about the supposed breadth of customer problems at Household, or as a necessary counterweight if Ms. Ghiglieri is allowed to repeat them to the jury, Mr. Bley's testimony is plainly admissible. And if it is not admissible because he surveyed company-wide studies and monthly reports, then the testimony of Ms. Ghiglieri, which drew selectively from some of the same material, must be excluded on the same grounds.

C. Mr. Bley's Opinions as to Regulatory Settlements Respond to Ms. Ghiglieri's Methodology

It is well-settled that regulatory settlements cannot be used to demonstrate the truth of the underlying allegations. See *Higginbotham* v. *Baxter International, Inc.*, 495 F.3d 753, 758 (7th Cir. 2007) (warning against taking regulatory allegations as proof of wrongdoing.); *Broeski* v. *Provident Life & Accident Insurance Co.*, No. 06 C 3836, 2007 U.S. Dist. LEXIS 42754, at *10 (N.D. Ill. June 8, 2007) (Schenkier, M.J.) ("A settlement agreement is not an adjudication (or even evidence of) misconduct. Indeed, the regulatory settlement agreement upon which plaintiff relies specifically makes this point: it states that the settlement is without any

admission of fault or liability, and that the settlement may not be offered as evidence of any admission of liability or wrongdoing."); *Zivitz* v. *Greenburg*, No. 98 C 5350, 1999 U.S. Dist. LEXIS 19160, at *8 (N.D. Ill. Nov. 30, 1999) (Conlon, J.) ("Rule 408 precludes admission of settlement agreements to establish liability on the claim at issue in the agreement.").

Nevertheless, Plaintiffs' "expert" Ms. Ghiglieri relies heavily on regulatory settlements as establishing conclusive proof of liability—not just as to the matters alleged in particular investigations or claims, but as arbitrarily extrapolated to support Plaintiffs' allegations of systemic abuse of consumers across the entire spectrum of Household's operations and related securities fraud. Indeed, she devotes an entire section of her report to her opinion that "The financial impact to Household of its predatory lending practices was significant and material to its financial condition." Although that may sound like the stuff of expert analysis, in fact Ms. Ghiglieri does nothing more to support her grandiose conclusion than list consumer and regulatory settlements and refunds that the Company authorized during the Class Period in order to resolve proceedings in which no liability was admitted or proved. She also adds the following conclusory and unfounded statements:

- "Household paid the following fines to the states listed below for engaging in predatory lending practices. . ." (Kavaler Decl. Ex. 1, Ghiglieri Report at 129).
- "The authority of each state to prohibit Household's predatory lending practices is reflected in their consent decrees with Household entered into as part of the AG settlement. These decrees, which cover Household loans originated from 1999 to 2002, identify the state statutes and regulations that were violated as a result of Household's predatory lending practices." (Kavaler Decl. Ex. 2, Ghiglieri Rebuttal at 18).
- "While Household claimed that they settled with the States Attorneys General to avoid 'headline' risk, there was in fact a real and substantial liability risk to Household." (*Id*. at 58).

Plaintiffs ask that Mr. Bley be precluded from offering the jury his ***response*** to these types of contentions. (Plaintiffs' Brief at 7). Mr. Bley is not being offered to explain or endorse the reasons why Household management entered into settlements but instead will point out the methodological flaws in Ms. Ghiglieri's insistence on interpreting settlement agreements to draw conclusions that they simply do not support. In offering this critique, Mr. Bley would draw on his own regulatory experience to help the jury understand the frequency with which disputes result in regulatory settlements and how a regulator approaches the settlement process—

information beyond what a layperson would glean from reviewing the settlement agreements himself (if they were allowed into evidence) or listening to Plaintiffs' "expert" merely parrot the allegations underlying the settlement agreements as truths. Mr. Bley's identification of all the reasons for settlement that Ms. Ghiglieri failed to even consider is ultimately a criticism of Ms. Ghiglieri's lack of reliable method, which is the root of the problem. If providing an accurate account of the regulatory considerations that may warrant settlement of non-adjudicated, non-admitted allegations is not allowed, then *a fortiori* Ms. Ghiglieri's baseless equation of settlement and fault should have no place in this trial.

D. Mr. Bley's Opinions Regarding the Alternative Mortgage Transaction Parity Act Respond to Ms. Ghiglieri's Opinions

Ms. Ghiglieri claims that Household used the Pay Right Rewards (PRR) Program "in an attempt to circumvent State laws that prohibited the imposition of a prepayment penalty on traditional mortgages" and that "the PRR was not an alternative mortgage that would allow preemption under AMTPA." (Kavaler Decl. Ex. 1, Ghiglieri Report at 30). Ms. Ghiglieri bases these conclusions in large part on an internal email which states that a dozen states "questioned" whether the loans made under the Pay Right Rewards program qualified as alternative mortgages under AMTPA. (*Id*. at. 89). She blindly adopts the implied position of these states, assumes without analysis that Household's position lacked legal foundation, and misleadingly disparages the invocation of federal preemption as "circumvent[ion] [of] state laws." Plaintiffs now claim that Mr. Bley was remiss in not giving enough consideration to this specific email (which is in fact cited by his Report) in his evaluation of the features of loans made under the PRR program. (Plaintiffs' Brief at 8, Exhibit D; Kavaler Decl. Ex. 4, Bley Report Appendix A).

Here, too, Mr. Bley's conclusions are directly responsive to those offered by Ms. Ghiglieri. Mr. Bley identifies and quotes from the applicable law, identifies the underlying policy considerations from his vantage as a former state regulator responsible for harmonizing state regulations with preemptive federal law, and concludes that Ms. Ghiglieri had no valid basis categorically to assume that the program in question was not subject to federal preemption. He acknowledges that such preemption issues were the subject of a dispute at the time to show that it was not as black-and-white as Ms. Ghiglieri suggests when she concludes from a mention of "questions" from a small minority of the states in which Household operated not only that "most [sic] states did not consider the Pay Rights Reward program a variable interest rate loan trigger-

ing the preemption provision of AMTPA. (HHS03443325)," but that those states were correct as a matter of law (if this was even the final position of any state). (Kavaler Decl. Ex. 1, Ghiglieri Report at 88; Ex. 11). If Ms. Ghiglieri is allowed to offer her conclusory interpretations of AMTPA (which plainly should not be allowed, under Plaintiffs' own reasoning, *see* Plaintiffs' Brief p. 8), Mr. Bley in fairness must be allowed to respond.

E. Mr. Bley's Opinions Regarding Household's Internal Controls Do Not Rely on Household's Legal Department

Plaintiffs argue on the basis of a misguided sword/shield theory that Mr. Bley should not be allowed to "offer any opinion regarding the adequacy of defendants' internal controls," because Mr. Bley states the following fact: "New policies and procedures were vetted by Household's Legal Department. . ." (Plaintiffs' Brief at 8 citing Bley Report p. 20). ***Plaintiffs neglect to mention that this citation is not in the section of the Bley Report where he discusses internal controls***. (*See* Kavaler Decl. Ex. 4, Bley Report, at 42-62). Moreover, the work and output of Household's legal department is not mentioned a single time in the section of the Bley Report focusing on internal controls. *Id.* Mr. Bley's conclusions about internal controls therefore stand regardless of whether the existence of a legal review process is an admissible fact. This is another attempt by Plaintiffs to confuse issues and mislead the Court into striking a significant portion of Mr. Bley's opinion, against which Plaintiffs have no argument.[4]

F. Mr. Bley's Opinions as to "Borrower Behavior" Respond to Ms. Ghiglieri's Opinions

In directing the Washington DFI, Mr. Bley enforced the Department's mission to facilitate credit to the citizens of Washington. (Kavaler Decl. Ex. 5 at 54:14-23). To fulfill this mission, Mr. Bley was required to understand the needs and product preferences of borrowers in both the prime and subprime sectors. Moreover, Mr. Bley's opinions as to aggregate subprime

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[4] In any event, the indisputable fact that the Company had a legal review process goes only to the standard practices of the Company, it does not invoke any particular legal opinions, and thus does not require any "sword and shield" analysis. For a general overview of this subject, *see* Defendants' Memorandum of Law in Response to Plaintiffs' Motion *in limine* to Exclude Documents or Testimony Which Refer to Advice From Counsel that Defendants Complied with Federal and State Laws (Plaintiffs' Motion *In Limine* # 4).

borrower behavior in terms of product preference are drawn from his specific experience with recipients of sub-prime loans from consumer finance companies such as Household. Ms. Ghiglieri, on the other hand, has spent her career regulating depository financial institutions that operate under a different set of regulations and serve a different clientele. Despite these limitations, Ms. Ghiglieri repeatedly expresses her "knowledge" of consumer behavior:

- "As a former regulator, I know that only a small fraction of borrowers who are impacted by a particular practice will complain to the regulatory agency." (Kavaler Decl. Ex. 2, Ghiglieri Rebuttal p. 52)
- "Borrowers learning about such an aggressive PPP would naturally be hesitant to close the loan and loan sales would be lost." (*Id.* at 11)
- "Why else would a reasonable borrower choose to close a loan at a higher interest rate, paying 5 points, with almost 50% of the new money paid in points absent deception?" (*Id.* at 22)

Once again, Mr. Bley's opinions on borrower preference are directly responsive to these and similar generalizations offered by Ms. Ghiglieri. If his informed opinions on such matters are not admissible, then her virtual mind-reading must be excluded as well. Plaintiffs correctly note that "subjective beliefs lacking any analytical support. . . should be excluded." (Plaintiffs' Brief at 5).

Plaintiffs are incorrect in any event that Mr. Bley's experience as the long-time Director of the Washington DFI did not give him experience and expertise in the investigation and resolution of customer complaints. One function of the Consumer Services Division of the DFI was to investigate consumer complaints. (Kavaler Decl. Ex. 6 at 22). His observations that not all customer complaints are valid, drawn from this regulatory experience, directly refute Ms. Ghiglieri's method of automatically taking anecdotal customer complaints as (a) truth and (b) representative of the experience of most or all of Household's customers.[5]

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[5] Examples of Ms. Ghiglieri's unprincipled extrapolations include the following:

- "[P]redatory lending practices were widely dispersed geographically as indicated by the complaints and regulatory documents I reviewed. . . the fact that there were similar complaints in a number of states across the country demonstrates the similarities of practices in different geographic regions . . ." (Kavaler Decl. Ex. 2, Ghiglieri Rebuttal at 37).

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Ms. Ghiglieri's unfounded assumptions violate both accepted regulatory methodology and the law in this circuit. *Higginbotham* v. *Baxter International Inc.*, 495 F.3d 753, 758 (7th Cir. 2007) ("Accusations differ from proof..."); *U.S.* v. *Mikos*, No. 02 cr 137, 2003 U.S. Dist. LEXIS 22069, at *13-14 (N.D. Ill. Dec. 5, 2003) (Guzman, J.) (holding that data that lacks scientific methodology is "anecdotal evidence" and therefore "ought not to be utilized as a basis upon which to construct an expert opinion."); *BASF Corp.* v. *Old World Trading Co. Inc.*, No. 86 C 5602, 1992 WL 232078, at *4 (N.D. Ill. Sept. 8, 1992) (Leinenweber, J.) (Absent proof of statistical significance, complaint evidence would consume too much time and be irrelevant.). Her testimony should therefore be excluded on the very grounds Plaintiffs advance in support of their attack on Mr. Bley. See Plaintiffs' Brief at 10 (opinion is improper if "based on personal anecdotes" and that is not supported with analysis, studies or articles). If it is not, basic tenets of fairness require that Mr. Bley be allowed to respond.

G. Mr. Bley's Alleged Opinions as to Defendants' State of Mind Respond to Ms. Ghiglieri's Actual Opinions on that Subject

It is ironic that Plaintiffs criticize certain of Mr. Bley's conclusions as improperly opining on Defendants' state of mind as the very thesis of Ms. Ghiglieri's Reports is her opinion that Defendants not only violated the law (on which she purports to instruct the jury) but also that they did so intentionally. Her 200 page *magnum opus* repeatedly contends that Defendants deliberately engaged in and encouraged "predatory lending" (a term that she admits has no consensus definition).[6] Using her own evolving definition of that concept as requiring "deceptive or

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Footnote continued from previous page.

- "Forbes Article, 'Home Wrecker,' highlights Household's system-wide predatory lending practices.": Section from the Ghiglieri Report, drawing conclusions based on ***two*** customer complaint allegations discussed in a magazine article. (Kavaler Decl. Ex. 1, Ghiglieri Report at 122-123).

6 In addition to acknowledging that there is no set definition of "predatory lending," Ms. Ghiglieri admitted at her deposition that the definition she uses to tar Defendants is one that she made up after Plaintiffs hired her for this case, and adjusted as the case proceeded. (See Kavaler Decl. Ex. 3 at 47:16-25.)

illegal" conduct (Kavaler Decl. Ex. 3, at 47:16-25), Ms. Ghiglieri uses the term "predatory lending" over 350 times in her Report and Rebuttal, expressing the following supposedly expert opinions regarding Defendants' state of mind:

- "Household senior management ***knew***, based on the actions they took in 1999, that predatory lending was going to occur throughout the company." (Kavaler Decl. Ex. 2, Ghiglieri Rebuttal at 4). (emphasis added).
- "Household senior management ***purposefully encouraged*** predatory lending. . ." (*Id*.). (emphasis added).
- " [S]enior management ***knowingly*** created a company structure, culture and products that inevitably resulted in predatory lending." (*Id*. at. 6). (emphasis added).
- "Household's senior management could not have incentivized their branch employees on the five 1999 incentive components . . . without ***knowing and intending*** that it would result in the predatory lending sales practices." (*Id*.). (emphasis added).
- "Household ***knew and intended*** that predatory lending practices would occur throughout the system because of their actions taken or inaction in 1999." (*Id*. at 13). (emphasis added).

To the extent that Mr. Bley discusses Defendants' state of mind, he is merely responding to and highlighting Ms. Ghiglieri's lack of factual support for the extensive allegations of bad faith that pervade and underscore her Reports. Plaintiffs are correct that speculation about another person's state of mind is not the proper province of an expert witness (*see* Plaintiffs' Brief at 11) — but this is one of the many reasons why Ms. Ghiglieri's testimony should be excluded, in which case Mr. Bley will have no need to criticize Ms. Ghiglieri's speculation about Defendants' state of mind. *See Klaczak* v. *Consol. Med. Transp. Inc.*, No. 96 C 6502, 2005 U.S. Dist. LEXIS 13607, at *31 (N.D. Ill. May 26, 2005) (Filip, J.) ("[P]recedent teaches that proffered expert assertions about another's subjective intent or knowledge are not helpful to the jury, which is equally if not much better suited to make these assessments than the parties' competing paid experts".). However, if contrary to the parties' common understanding that "state of mind" opinions should be excluded, the Court were to allow Ms. Ghiglieri to opine as to whether Defendants (or any of them) acted knowingly or deliberately to deceive customers, then Defendants must be permitted to respond.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion *In Limine* #10.

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New York, New York

CAHILL GORDON & REINDEL LLP

By: /s/ Thomas J. Kavaler
Thomas J. Kavaler
Peter Sloane
Patricia Farren
Susan Buckley
Landis C. Best
David R. Owen

80 Pine Street
New York, New York 10005
(212) 701-3000

-and-

EIMER STAHL KLEVORN & SOLBERG LLP
224 South Michigan Ave.
Suite 1100
Chicago, Illinois 60604
(312) 660-7600

Attorneys for Defendants Household International, Inc., Household Finance Corporation, William F. Aldinger, David A. Schoenholz, Gary Gilmer and J. A. Vozar