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' OPPOSITION TO DEFENDANTS' *DAUBERT* MOTION TO DISMISS THE EXPERT TESTIMONY OF HARRIS L. DEVOR

[REDACTED VERSION]

TABLE OF CONTENTS

Page

I. INTRODUCTION

In a case involving whether defendants' financial statements included misleading statements, defendants have moved to exclude certain expert opinions of plaintiffs' accounting expert, Harris L. Devor ("Devor"). Plaintiffs respectfully urge the Court to deny defendants' motion.

Devor's accounting credentials, skill and expertise are unassailable. Devor is a Certified Public Accountant with over ***35 years*** of accounting and auditing experience. He has been retained by the U.S. Department of Justice as the lead accountant in one of the largest accounting frauds in history. He has been retained by the Texas Attorney General and other Attorneys General for his accounting, auditing and damages expertise. In the past four years alone Devor has been retained as an expert in 20 matters, including *In re WorldCom, Inc. Securities Litigation*, in which he testified at trial for three days. Devor has lectured on SEC, bankruptcy, closely-held business, non-profit, audit and statistical sampling subjects and is a member of the American Institute of Certified Public Accountants as well as the Pennsylvania Institute of Certified Public Accountants.

In preparing his expert report (the "Devor Report"), Devor and highly qualified professionals under his employ and direction reviewed over ***80 days*** of deposition testimony, hundreds of exhibits and thousands of documents produced by defendants and third-parties (including Arthur Andersen, KPMG and regulatory agencies). Over two dozen Generally Accepted Accounting Principles ("GAAP"), Generally Accepted Auditing Standards ("GAAS") and Securities and Exchange Commission ("SEC") rules, regulations and principles were reviewed. These principles, Devor's training, experience and judgment were applied properly to this case.

Defendants' "Daubert" motion misapprehends how Rule 702 applies to Devor's opinions and distorts the record to portray the facts as defendants wish them to be, not as they are. Defendants quibble with Devor's conclusions under the guise of methodological arguments – despite the fact that ***their accounting expert uses the same methods***.

Defendants do ***not*** challenge the majority of Devor's opinions supporting his ultimate conclusion that Household's financial statements were materially misleading during the Class Period. For example, their brief is silent as to Household's myriad credit quality concealment techniques and related accounting and disclosure deficiencies (*see, e.g.*, Devor Report, ¶¶176-406);[1]

---

[1] Attached hereto as Ex. 1. Unless noted otherwise, all exhibits referenced throughout are attached hereto.

does not take issue with his opinions concerning the appropriate disclosure of Household's lending practices and internal controls under GAAP FASCON 1, FASCON 2, and Regulation S-K (Devor Report, ¶¶151-164); and does not take issue with Devor's opinion regarding what an accounting restatement is generally and as applied to Household specifically. Devor Report, ¶¶43-54.

Instead, the three opinions that are the subject of defendants' motion pertain to (A) Household's accounting for certain credit card contracts was not in compliance with GAAP, as admitted by Household in its $600 million restatement; (B) Household's improper revenue recognition policies and accounting effects of its lending practices; (C) Household's improper non-disclosure of an investigation conducted by a group of State Attorneys General ("AG").[2] Household's "(A)" argument is discussed last since it amounts to little more than an *ad hominem* attack on Devor. Devor's opinions on these matters are proper under Rule 702, and defendants' arguments fail for the reasons set forth below.

II. ARGUMENT

A. Devor's Accounting Opinions Are Clearly Admissible Under Rule 702 as Applied in the Seventh Circuit

The admissibility of expert testimony is governed by Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), and its progeny. Under *Daubert*, expert testimony is admissible so long as it is both "relevant" and "reliable." *Id*. at 587-90.

Devor's opinions are clearly relevant. This case involves the accuracy of Household's financial statements and disclosures during the Class Period. Devor's opinions on GAAP, GAAS, SEC rules and his real-world technical knowledge will unquestionably be helpful to the jury. Devor's opinions are not only "helpful" but practically necessary, and courts routinely admit accounting expert testimony to assist the trier of fact. *See, e.g.*, *Tuf Racing Prods., Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000); *Smith v. Biomet, Inc*., No. 3:01-CV-753 PS, 2004 U.S. Dist. LEXIS 30738 (N.D. Ind. Apr. 12, 2004); *SEC v. Johnson*, 525 F. Supp. 2d 70, 77 (D.D.C. 2007); *Weschler v. Hunt Health Sys., Ltd.*, 381 F. Supp. 2d 135 (S.D.N.Y. 2003).

Devor's opinions are clearly reliable. The *Daubert* factors to be considered in evaluating expert opinions under Rule 702 – including an objective "testing" factor defendants repeatedly insist

---

[2] Household Defendants' Motion for Leave to File *Instanter* Memorandum of Law in Excess of Fifteen Pages in Support of Defendants' *Daubert* Motion to Exclude the "Expert" Testimony of Catherine A. Ghiglieri, Charles Cross and Harris L. Devor ("Defs' Mem.") at 3.

applies to Devor's opinions – do not apply in the accounting context. As the Court explained in *Biomet*, 2004 U.S. Dist. LEXIS 30738, in applying *Tuf Racing Products*, 223 F.3d at 591, because accounting is not a science, "the central focus of our analysis is ***on [the accountant's] qualifications and the empirical assumptions*** that he used, not the traditional *Daubert* factors." 2004 U.S. Dist. LEXIS 30738, at *5-*6.[3] Devor's ***35*** years' experience, training and accounting expertise, as applied to an extensive review of the record in this case demonstrate the reliability of his opinions.

Defendants' contrary arguments seek to silence Devor in order to confuse the jury.

B. Defendants' Attacks on Devor's Revenue Recognition Opinions Fail

1. Devor Properly Makes Assumptions Regarding Household's Lending Practices in Order to Explain Their Accounting Treatment Under GAAP

Defendants take issue with Devor's opinion in paragraph 148 of his report. Devor opines that ***if*** plaintiffs' allegations that Household was engaged in improper lending practices are true [redacted] *Id*. Defendants make two arguments to exclude this opinion under "*Daubert*."

First, they say courts have ruled "properly reported income" and "accurate historical" data cannot form the basis of a securities class action. Defs' Mem., §II.A. This argument is nonsensical since the opinion defendants seek to exclude stands for the opposite proposition: ***if*** plaintiffs' allegations are correct ***then*** the associated [redacted] Devor Report, ¶148; *see also* Defs' Mem. at 13 (describing Devor's opinion as [redacted]). Improper revenue recognition under GAAP is a valid basis for a securities fraud claim and a valid subject matter for expert opinion.

Second, defendants take issue with the "conditional" nature of Devor's revenue recognition opinion, which defendants describe as [redacted] Defs' Mem., §II.B. at 13 (emphasis in original). Defendants argue the other flaw here is Devor's "failure and inability" to define "'improper.'" *Id.* Devor repeatedly explained during his deposition and made clear in his report that under GAAP, if a company engages in an improper activity, that means the company is [redacted]

[3] Emphasis is added and citations are omitted throughout unless otherwise indicated.

[redacted] and cannot record revenue from such activities. *See* Devor Report ¶¶147-148. But the two "conditional" and "definitional" issues are really one under *Daubert*; namely, whether experts can make assumptions concerning certain facts in order to render opinions that are squarely within their areas of expertise.

Courts in this Circuit have held such assumptions are proper under Rule 702 provided they are grounded in fact. *Biomet*, 2004 U.S. Dist. LEXIS 30738 is instructive. In *Biomet*, the court denied a *motion in limine* seeking to exclude a financial expert's opinions. There, as here, the movant sought to exclude an opinion because it was "'based upon assumptions of fact.'" *Id.* at *3 (quoting from movant's brief). Applying the Seventh Circuit's ruling in *Tuf Racing Products*, 223 F.3d at 591, the court reviewed the underlying assumptions, observed that the record "help[ed] establish" those assumptions, and concluded the expert's opinions satisfied Rule 702. *Biomet*, 2004 U.S. Dist. LEXIS 30738, at *9-*10, *13-*14.

Devor's assumptions are grounded in fact. In this case, plaintiffs have adduced a large body of evidence demonstrating that Household was engaged in improper, indeed illegal, lending practices during the Class Period. *See generally* Expert Witness Report of Catherine A. Ghiglieri. Ex. 2 hereto. Devor has satisfied Rule 702 by reviewing plaintiffs' allegations, extensive supporting evidence, *see* Devor Report, ¶¶129-145 (under "alleged" practices), and confirming that plaintiffs' allegations [redacted] Devor Report, ¶148. Devor does not opine that plaintiffs' lending allegations are "right." He reviews sufficient evidence to confirm that his assumption is supported by the evidence in this case, and then provides an opinion on what the proper revenue recognition treatment based on that assumption under GAAP accounting rules. That is all Rule 702 requires. *See Biomet*, 2004 U.S. Dist. LEXIS 30738, at *7 ("assumptions must be grounded in evidence") (citing cases); *accord Amakua Dev. LLC v. Warner*, No. 05-C-3082, 2007 U.S. Dist. LEXIS 49952, at *43-*44 (N.D. Ill. July 10, 2007) ("[An expert] can base his expert opinion on his expertise as applied to the facts (or hypothetical facts) as presented by the party who retained the expert. That is legitimate expert testimony and one of its chief distinctions from 'fact' testimony.").

Defendants admit that Devor can offer opinions based on assumptions or "hypothetical assertion[s] of fact," but complain that plaintiffs' predatory lending allegations are "incapable of being proved or disproved." Defs' Mem. at 14. That position is clearly not one they plan to take at trial. Nor is it the position their industry experts take. Further, they never challenged the sufficiency of plaintiffs' evidence on this subject at the close of discovery under Rule 56, as was their right.

Defendants' challenge to Devor's opinion is difficult to square with the fact that their expert employs the same methodology on the exact same issue. The first question in Weil's report under [redacted] is [redacted] ?" Expert Report of Roman L. Weil ("Weil Report"), at 3.

Weil does not respond by saying an accountant cannot answer the question posed. He does not say "I cannot assume Household did anything 'predatory or improper' because that assumption 'is incapable of being proved or disproved (because it is not defined),'" (Defs' Mem. at 14); rather, Weil ***assumes*** Household is engaged in predatory or improper lending and responds [redacted]" Weil Report, ¶1 at 3. Ex. 3 hereto. Both he and Devor apply accounting rule FASCON 5 – and their own judgment, training and experience – to reach their respective, though differing conclusions.[4] Defendants cannot exclude Devor's opinion simply because they do not like the result he reaches. *See, e.g.*, *Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1192 (9th Cir. 2007) ("The test for reliability, however, 'is not the correctness of the expert's conclusions but the soundness of his methodology.'") (quoting *Daubert*, 43 F.3d at 1318).

Moreover, Devor's opinion on how GAAP applies to this case is helpful under *Daubert* because the average juror is unfamiliar with GAAP. *See Johnson*, 525 F. Supp. 2d at 78 (admitting accounting opinion because GAAP terms and their application may not be familiar to the average juror). As an experienced accountant, Devor is imminently well qualified to deliver such an opinion. *See Malone v. Microdyne Corp.*, 26 F.3d 471, 478 (4th Cir. 1994) (citing Devor's accounting opinions regarding revenue recognition with approval). Defendants' contrary arguments fail.

2. Devor's Opinion Regarding the Estimated Impact on Net Interest Margin and Other Revenue Has Sound Bases and Is Helpful to the Jury

Devor offers at ¶149 of his report an opinion concerning the impact on net interest margin and other revenue related to Household's "alleged" lending practices. Defendants object that Rule 702 does not permit Devor to assume certain of plaintiffs' allegations are correct. That argument fails as noted above. Defendants' next objection to paragraph 149 is based on a ***document*** Devor

---

[4] *Compare* Devor Report, ¶147 (citing FASCON 5 rule), (conclusion, [redacted]); *with* Weil Report, ¶1 at 5 (citing FASCON 5, and other rules) and at 6 (conclusion, [redacted]

analyzed to reach his conclusions. Defendants argue: "by seizing upon numbers set forth ***in a document that is vague*** and ***whose author cannot recall*** the most salient details about its preparation, Devor reveals that his method is fatally flawed and can only result in a speculative opinion." *See* Defs' Mem., §II.C. at 19 (conclusion).

Defendants mischaracterize the document at issue. It is not "vague." It is exactly what it is described to be in Devor's report – estimates of customer refunds based on assumptions that ***Household's employee***, Carin Rodemoyer ("Rodemoyer"), its author, believed to be ***reasonable***. Devor Report, ¶149 n.54. Plaintiffs deposed Rodemoyer, who confirmed several times that it appeared she did prepare the document.[5] She further explained various terms and their meanings, and specifically stated that the assumptions used to obtain the "estimates" of six categories of "AG Costs" were, in fact, ***reasonable***:

Q: [redacted]

A: [redacted]

Rodemoyer Depo. at 117:12-17; 119:21-24 [redacted] Rodemoyer further testified that preparing documents like the "AG Costs" document was within the scope of her duties while at Household. *Id.* at 121:15-18.

Rodemoyer reported to the CFO of Household's Consumer Lending Division, Joseph Vozar ("Vozar") during the Class Period. *Id*. at 17:8-12.[6] As Vozar testified:

A: [redacted]

---

[5] *See* June 27, 2006 deposition transcript of Carin Rodemoyer ("Rodemoyer Depo.") at 114:3-6 [redacted] 116:1-6 (same); 116:20-23 (same); 118:24-119:3 (same). Ex. 4 hereto.

[6] A duplicate of the "AG Costs" document at issue was produced by defendants from Vozar's files along with other AG documents from his files. *See* Ex. 5 hereto (Vozar 128), *compare with* Ex. 6 (Cahill Gordon letter dated October 28, 2005 producing Vozar 128 in response to plaintiffs' second document request).

[redacted]

Feb. 8, 2007 deposition transcript of Joseph A. Vozar ("Vozar Depo.") at 440:7-16. Ex. 7 hereto. Vozar also authenticated a July 2002 Monthly Report in which he states that he [redacted]

Vozar Depo. at 437-438; Vozar Depo. Ex. 127 at HHS 0291831. Ex. 8 hereto.

In addition, Vozar confirmed that the handwriting on a document produced from his files with the "AG Costs" document, was his. Vozar Depo. at 440:24-441:2. He did not [redacted] providing the numbers in the "AG Costs" document to Rodemoyer but stated [redacted] *Id.* at 441:10-15. A side-by-side comparison of Vozar's handwriting, *see* Ex. 9 (Rodemoyer 17 at HHS 03070933), and the first page of the "AG Costs" document, *see* Ex. 5 (Vozar 128 at HHS 3249503), lead conclusively to the result that Vozar did provide the assumptions, which Rodemoyer confirmed were ***reasonable***.

Notwithstanding defendants' wide-eyed bewilderment as to the "purpose" of this document, it is clear that Household was calculating restitution for customers whom the AGs asserted ***had claims under state and federal law on the same bases alleged by plaintiffs in this case***. Supporting documents show the AG group sought restitution of monies Household had not earned legally – not refunds to "curry favor" with customers as defendants insist without support is an "alternative explanation." The Devor Report has 15 pages of background information demonstrating his grasp of the "context" in which the AG Costs document was created. *See* Devor Report, ¶¶131-145.

Notably, the "AG Costs" document has a date of [redacted] two weeks after Vozar received an e-mail at 6/29/2002 at 03:59 PM from Household's Kathleen Curtis (copying defendant Gilmer, among others) forwarding an e-mail from Washington State Attorney General Huey regarding Household's "improper" lending practices. Ex. 11 hereto (Robin 40). The attachment states "[redacted] *Id*. at HHS 02915308.

That document includes six categories of illegal practices and corresponding "[redacted]" categories that match the categories of "improper" lending practices set forth in Lead Plaintiffs' Complaint, and match the categories quantified in the "AG Costs" document. *Compare*, *e.g.*, Ex. 11 (Robin 40) at point (3) on HHS 02915309 "[redacted]

[redacted] and "[redacted]" for same at point (3) on HHS 02915319; *with* Complaint ¶52(a) (Household was "[m]isrepresenting the actual interest rates on loans by falsely telling customers that making bi-weekly payments with Household's EZ Pay Plus Bi-weekly Payment Plan ("EZ Pay Plan") would produce lower interest rates, when it would not"); *and* "AG Costs" document at HHS 03070935 (Ex. 9), calculating "[redacted] and "[redacted]" Further, the "AG Costs" document [redacted]" date and time are ***55 minutes*** before a meeting held in Gilmer's office regarding the AGs. *See* Sodeika Depo. Ex. 58 at HHS 02140386. Ex. 12 hereto.

Of course, the document is admissible for its substance in the absence of any expert testimony because it is self-authenticating, and it is not hearsay or otherwise inadmissible. As noted, defendants produced the "AG Costs" document and a duplicate with some additional documents in response to plaintiffs' document requests.[7] These undisputed facts alone trump defendants' "foundation" argument since "[t]he case law [in] this circuit is clear: documents produced in response to discovery are self-authenticating," and party-opponent admissions are not hearsay. *Architectural Iron Workers Local No. 63 Welfare Fund v. United Contrs.*, 46 F. Supp. 2d 769, 772 (N.D. Ill. 1999).

Even assuming, that the "AG Costs" document is inadmissible on other grounds, Devor can base an opinion on it under Rule 703 because the document is a type "reasonably relied upon" by accountants in forming opinions. Defense expert Weil's report states "accounting requires the exercise of judgment and estimates of future outcomes." Weil Report, ¶28 at 48. He further states that "[m]anagement makes accounting choices" and that "[t]he outside auditor checks to see that management's choices conform to GAAP and that management used reasonable methods to implement these choices." *Id.*, ¶26 at 47. Clearly, an accounting expert can rely upon the exact numbers created by of the office of the CFO of Consumer Lending, with inputs from the CFO himself – that are "reliable" according to defendant's own witness – and explain to the jury the accounting effects of those numbers.

---

[7] *See* Ex. 9 (Rodemoyer 17, HHS 02070933-938), compare with Ex. 10 hereto (Cahill Gordon Letter dated May 20, 2005 producing Rodemoyer 17 in response to plaintiffs' first document request; *see also* Ex. 5 hereto (Vozar 128), *compare with* Ex. 6 hereto (Cahill Gordon letter dated October 28, 2005 producing Vozar 128 in response to plaintiffs' second document request).

The fact that Weil exercises his judgment in reviewing the exact same document and reaches a different result is no reason under Rule 702, *see, e.g.*, *Humetrix, Inc. v. Gemplus S.C.A.*, 268 F.3d 910, 919 (9th Cir. 2001) ("Authority to determine the victor in such a 'battle of expert witnesses' is properly reposed in the jury."), or Weil's own standards, *see* Weil Report, ¶30 at 49 (answering "[redacted] to the question "[redacted]") to exclude Devor's testimony.

Defendants' argument that Devor cannot base any accounting opinions on Household's $484 million dollar AG Settlement similarly lacks merit. They do not argue the documentary evidence is "vague." They attack Devor's assumptions, which are valid as discussed above.

C. Devor's Opinions on the Timing of Household's Disclosures of Its Settlement Discussions With the AGs Are Sound

Defendants' next argument regarding the "method" Devor used to determine whether Household should have disclosed the AG investigation in, at the latest, August 2002 fails as well. The question that plaintiffs' expert Devor considers in the "[redacted]" section of his report, ¶¶165-175; and defendants' expert Weil considers at pages 7-17 of his report is "When should Household have disclosed the AG matter?"

To answer this question, both experts first cite GAAP standard FAS 5, which applies to the disclosure of loss contingencies, among other things. Devor Report, ¶¶165-166; Weil Report, ¶4 at 7-8. Both experts say FAS 5 would require disclosure of the AG investigation if there is a [redacted]" that a loss may have been incurred. Weil states the accounting literature does not define this phrase, but he believes it "[redacted]" Weil Report, ¶4 at 8. Devor states "[redacted]" Devor Report, ¶166 n.56.

Both experts then turn to the record to determine when Household ***should*** have disclosed the AG investigation. Defendants make no argument that the documents considered or relied upon by Devor are "vague." Defendants do not claim Devor needs to cite every single document in the record he reviewed on the topic – they cannot because plaintiffs and defendants agreed that no expert should do so. *See* Stipulation Regarding Expert Discovery. Ex. 13 hereto. Rather, defendants say that ***their interpretation*** of some documents in the record "conflict" with Devor's opinion and therefore he must be wrong.

From an attorney's point of view, Devor could have concluded that there was a "reasonable possibility" of a loss as of early June 2002 or even earlier. Devor cites a June 28, 2002 letter from

Washington State Attorney General Huey stating (on behalf of a group of state attorneys general) that their "'investigations have revealed that Household engages in widespread lending patterns and practices that violate both state and federal law.'" Devor Report, ¶167. But, applying his accounting expertise, Devor concludes that Household's disclosures were inaccurate in August 2002.

In reaching that conclusion, Devor relied upon numerous other documents, including a statement on August 14, 2002 by the AG group that whatever the actual restitution award ultimately would be, it would be "[redacted]" *Id*. at ¶173. Weil's description:

[redacted]

Weil Report, ¶5 at 13. As of August 14 Household thus faced only two possible outcomes from its "process" with the AGs: (A) a very large, material litigation by any standards (AG's representing at least 62% of Household's lending business according to defendants' brief) or (B) in the words of the AG group's representative a settlement that would be, [redacted]" Devor Report, ¶173.

Did Weil "cherry-pick" from the record by "all-too-conveniently" glossing over the fact that any settlement would be, "[redacted]? Is it rational for Household to claim that it failed to disclose the AG investigation in August because ***there were not enough AGs in the group – that is, the exposure wasn't quite large enough***? *See* Defs' Mem. at 24. Devor considered and does not need to agree with defendants' irrational "alternative explanations."

Devor has more than adequately satisfied Rule 702. He is well within his expertise to apply FAS 5 to the facts of this case. Defendants' claim that Devor "ignored" Household's public filings is demonstrably false as he cites to them in his analysis. Devor Report, ¶172 (earnings call); ¶175 (SEC filings). And their petty claim that Devor's report – after reviewing facts in the record concerning the AG matter in eight paragraphs – inaccurately uses the phrase "lawsuit filed" by the AGs has already been addressed by Devor himself.[8]

---

[8] A. [redacted]

Q. [redacted]

A. [redacted]

The Court should dismiss defendants' arguments for what they are, an attack not on Devor's methodology but on the facts in the record, which they say "cannot ***fairly*** be read to support his conclusion." Defs' Mem. at 24. What the record "fairly" says is finally a question for the jury.

D. Defense Counsel's Personal Attacks on Devor as a "Copy Cat" and a "Plagiarist" Are Scurrilous Attempts to Bury Expert Testimony Explaining that Their Client Has Already Admitted Their Financials Were Materially False During the Class Period

Among many other problems, one of defendants' greatest in this case is that they have already admitted that their financial statements were false and misleading during the Class Period.

Devor offers very clear opinions on the meaning of Household's $600 million restatement, which Devor generously states in after-tax dollars at $386 million. His opinion is not controversial from an accounting perspective. The reason why is because the restatement is ***by definition*** an admission by Household of a material misstatement in previously issued financial statements. Devor Report, ¶¶47-49. It is not Devor's "*ipse dixit*" that supports his opinion. Rather, it is the facts as they exist in the record (the restatement); Devor's understanding of the right accounting rules applied to determine whether a company is permitted to restate (it is not "voluntary" or permitted when there is a "difference of opinion" as defendants and their expert suggest, but based on black letter GAAP rules); and his experience and judgment in accounting allowing him to appreciate and explain what a serious event it is for a company to restate its previously-issued financial statements. *See, e.g.,* Devor Report ¶47 (quoting GAAP Rule APB 20 [redacted]

Devor is more than qualified to make this GAAP accounting concept plain to the jury. *See Malone*, 26 F.3d at 478 (after summarizing Devor's GAAP opinions, holds "Devor's expert testimony, in conjunction with the former Microdyne employees' testimony and the other evidence that the plaintiffs presented at trial, provided a legally sufficient evidentiary basis on which a reasonable jury could find that the defendants had made six false or misleading statements of material fact under §10(b) and Rule 10b-5").

Defendants' superficial reading of *In re Acceptance Ins. Cos., Sec. Litig.*, 352 F. Supp. 2d 940, 945 (D. Neb. 2004) does not suggest a contrary result. In that case, Devor was given a narrow assignment by counsel, which the Eighth Circuit found inadequate because the opinions "did not

---

February 20, 2008 deposition transcript of Harris Devor ("Devor Depo.") at 249:7-19. Ex. 14 hereto.

review the record to see if the statements were supported." *In re Acceptance Ins. Cos. Sec. Litig.*, 423 F.3d 899, 905 (8th Cir. 2005). Devor's assignment is broader here and supported by a review of an enormous factual record. This situation can be contrasted with the issue defendants' expert Weil encountered in *Bluebonnet Sav. Bank, F.S.B. v. United States*, 266 F.3d 1348, 1358 (Fed. Cir. 2001), where he provided an opinion without evidentiary support: "The government argues that Professor Weil, CFSB's expert, assumed a speculative financing term of 13.5% and that CFSB would pay down its debt as quickly as possible . . . [the trial] court correctly noted that there was no evidence presented that anyone would have loaned CFSB the funds required for the capital infusions at 13.5%." The facts in *Acceptance* are further distinguished by the fact that Devor was never deposed in that case, but ***in this case, defendants were able to and did test Devor's restatement analysis during an entire day of deposition examination*** with the benefit of their own expert's "rebuttal" report in hand. Defendants' assertion that Devor's opinions are "un-testable" is false.

Defendants must prevent Devor from offering his opinion on the restatement. Even their ***own expert*** must admit that by restating [redacted] Weil Report, ¶33, at 51. Defense expert Weil demurrers on stating clearly that the "incorrect" method was material. But he admitted what the ***accounting rules*** state at his deposition:

Q: [redacted]

A: [redacted]

Q: [redacted]?

* * *

A: [redacted]

* * *

Q: [redacted]

A: [redacted]

Q: [redacted]

* * *

A: [redacted]

March 12, 2008 deposition transcript of Roman L. Weil ("Weil Depo.") at 218:16-220:1. Ex. 15 hereto.

The simple facts are that Household's financial statements were materially false during the Class Period. Defendant's strategy is to have their expert tie himself up in "gray area" so as to confuse the jury; or, better still, try and exclude plaintiffs' expert, a certified public accountant of 35 years from explaining the accounting rules as applied to this case in a straightforward way.

In a last-ditch effort to hide a clear explanation from the jury, defendants criticize plaintiffs' expert for agreeing "too much" with Household and its own auditors, KPMG.[9] The opinion they attack is Devor's conclusion that [redacted]" Devor Report, ¶128. In reaching this conclusion, contrary to defendants' characterizations, Devor clearly states that he agrees with KPMG as set forth in their summary of all of the issues:

[redacted]

Devor Report, ¶55.

The question for the Court is whether the process Devor followed to arrive at his conclusions in ¶¶128 and 55 of his report are reliable under Rule 702. Devor and highly qualified professionals

---

[9] Notwithstanding the fact that Devor states in his introductory paragraph that he is setting forth a summary [redacted]," Devor Report, ¶55; and lest defendants forget this statement, Devor provided additional reminders in footnotes in succeeding summary sections that [redacted]" Devor Report, ¶56 n.36; "[redacted]" ¶92 n.41; ¶95 n.42; ¶99 n.43; ¶105 n.44 and "[redacted]" ¶109 n.46; and [redacted] (¶117 n.47) defense counsel falsely states in a publicly filed document "he plagiarized KPMG's very words, claiming them as his own." Defs' Mem. at 8. Devor plagiarized nothing and defendants know it.

in his employ and at his direction reviewed deposition testimony and related exhibits; workpapers of Household's former auditors Arthur Andersen; KPMG workpapers; documents produced by Household; and relevant accounting literature – much of which is listed in his report (at Ex. 3), and much of which is not ***per a written stipulation with defendants***. Ex. 13.

As defendants' concede, Devor testified that [redacted]" Defs' Mem. at 8. Devor has substantial auditing experience and can rely upon and agree with another auditor in explaining the bases for his opinions. That is a standard accounting process.

Again, defendants' accounting expert's process in another context is instructive as to whether accounting experts can rely upon auditors' work and deliver reliable opinions under Rule 702. Weil opines in his report that Household's processes for charging-off bad loans need not be specifically disclosed to the Company's owners. Weil Report, ¶9 at 24. Addressing his report, Weil testifies:

A: . . . [redacted]

Q: [redacted]

A: [redacted]

Q: [redacted]

A: [redacted]

Weil Depo. at 200; 201:3-18.

The fact that Devor agrees (mostly, not completely) with KPMG and explicitly says so in his report does not make his opinion unreliable.[10] Defendants' problem is not that Devor used a method

---

[10] Contrary to defendants' assertions, Devor does not agree with everything KPMG found as to the restatement:

Q. [redacted]

A. [redacted]

Q. [redacted]

that is "impossible" to test – they did test it during his deposition. *See, e.g.*, Devor Depo. at 136-170; *see also Biomet*, 2004 U.S. Dist. LEXIS 30738, at *14 (movant "had ample opportunity to fully and vigorously cross examine [expert] on these assumptions, and in fact did so") (citing *Fidelity Nat'l Title Ins. Co. of New York v. Intercounty Nat'l Title Ins. Co.*, No. 00 C 5658, 00 C 7086, 2003 U.S. Dist. LEXIS 7207, at *26-*27 (N.D Ill. Apr. 30, 2003)) ("Disputes between the parties' experts about assumptions and conclusions are appropriate grounds for exploration on direct and cross-examination."). Defendants' problem is they do not agree with Devor's conclusions. Devor's conclusions are reliable, having been reached upon consideration of not just the differing opinions of Household's two auditors but upon the accounting guidance itself and the entirety of discovery made available to him, including communications both internal to Household and with external regulators on the accounting issues in question.

III. CONCLUSION

For the reasons set forth above, defendants' motion should be denied in full.

DATED: February 10, 2009

Respectfully submitted,

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
PATRICK J. COUGHLIN (111070)
MICHAEL J. DOWD (135628)
SPENCER A. BURKHOLZ (147029)
DANIEL S. DROSMAN (200643)
MAUREEN E. MUELLER (253431)

/s/ Michael J. Dowd
MICHAEL J. DOWD

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

A. [redacted]

Devor Depo. at 112:23-113:15.

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
AZRA Z. MEHDI (90785467)
D. CAMERON BAKER (154432)
LUKE O. BROOKS (90785469)
JASON C. DAVIS (253370)
100 Pine Street, Suite 2600
San Francisco, CA 94111
Telephone: 415/288-4545
415/288-4534 (fax)

Lead Counsel for Plaintiffs

MILLER LAW LLC
MARVIN A. MILLER
LORI A. FANNING
115 S. LaSalle Street, Suite 2910
Chicago, IL 60603
Telephone: 312/332-3400
312/676-2676 (fax)

Liaison Counsel

LAW OFFICES OF LAWRENCE G. SOICHER
LAWRENCE G. SOICHER
110 East 59th Street, 25th Floor
New York, NY 10022
Telephone: 212/883-8000
212/355-6900 (fax)

Attorneys for Plaintiff

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 February 10, 2009, declarant served by electronic mail and by U.S. Mail to the parties the **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' *DAUBERT* MOTION TO DISMISS THE EXPERT TESTIMONY OF HARRIS L. DEVOR**.

The parties' email addresses are as follows:

TKavaler@cahill.com PSloane@cahill.com PFarren@cahill.com LBest@cahill.com DOwen@cahill.com	NEimer@EimerStahl.com ADeutsch@EimerStahl.com MMiller@MillerLawLLC.com LFanning@MillerLawLLC.com

and by U.S. Mail to:

Lawrence G. Soicher, Esq.
Law Offices of Lawrence G. Soicher
110 East 59th Street, 25th Floor
New York, NY 10022

David R. Scott, Esq.
Scott & Scott LLC
108 Norwich Avenue
Colchester, CT 06415

I declare under penalty of perjury that the foregoing is true and correct. Executed this 10th day of February, 2009, at San Diego, California.

/s/ Teresa Holindrake
TERESA HOLINDRAKE