

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

LAWRENCE E. JAFFE PENSION PLAN, On)	Lead Case No. 02-C-5893
Behalf of Itself and All Others Similarly)	(Consolidated)
Situated,)	
) <u>CLASS ACTION</u>
Plaintiff,)	
) Judge Ronald A. Guzman
vs.)	Magistrate Judge Nan R. Nolan
)
HOUSEHOLD INTERNATIONAL, INC., et)	
al.,)	
)
Defendants.)	
_____)	

**REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION IN
LIMINE TO EXCLUDE CERTAIN TESTIMONY OF DEFENDANTS' EXPERT JOHN
BLEY PURSUANT TO FEDERAL RULE OF EVIDENCE 702**

[PLAINTIFFS' MOTION *IN LIMINE* NO. 10]

Plaintiffs move to exclude ten portions of the testimony of defendants' expert, John Bley, because they amount to no more than "[t]alking off the cuff – deploying neither data nor analysis." *Lang v. Kohl's Food Stores, Inc.*, 217 F.3d 919, 924 (7th Cir. 2000).¹ Defendants' opposition does not refute plaintiffs' showing. Instead, like an overmatched boxer, defendants bob and weave to no avail. Defendants' counter-arguments, such as they are, cannot withstand cursory examination. Plaintiffs, therefore, respectfully request that this Court exclude the ten referenced portions of Mr. Bley's testimony.

Before proceeding to discuss the portion of testimony at issue, plaintiffs address the one global argument made by defendants, namely that "fairness" requires that their expert, Mr. Bley, be entitled to respond to Catherine Ghiglieri's report. Reliability, not fairness, is the standard under Fed. R. Evid. ("FRE") 702. Accordingly, where, as here, Mr. Bley's opinions are not reliable, they must be excluded even though they are offered in response to Ms. Ghiglieri's testimony.

Plaintiffs now address the ten portions of Mr. Bley's testimony at issue and why they should be excluded notwithstanding defendants' counter-arguments.

A. Mr. Bley Cannot Opine that the Washington Department Expanded Report of Examination Is Not an Official Report and Related Assertions

Plaintiffs challenge three specific opinions:

1. the opinion that the Washington Department of Financial Institutions ("Washington DFI") Expanded Report was not "backed by the moral authority of the State of Washington." Pls' Mem.² at 4 (citing Bley Report³ at 16);

¹ Emphasis added and internal quotations and citations omitted unless otherwise noted.

² "Pls' Mem." refers to Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion to Exclude Certain Testimony of Defendants' Expert John Bley Pursuant to Federal Rule of Evidence 702.

³ "Bley Report" refers to the Joint Report Pursuant to Federal Rule of Civil Procedure 26 of John L. Bley and Carl A. LaSusa, as amended February 15, 2008 (attached to Pls' Mem. as Exhibit A).

2. the opinion that the findings in a report of examination are “just like the allegations in a civil complaint.” Pls’ Mem. at 5 (citing Bley Report at 9); and
3. the opinion that sometimes a “creative” examiner will put a “novel” theory in a regulatory report just to see how the company will respond. Pls’ Mem. at 5 (citing Bley Report at 10).

Each of these opinions should be excluded.

As to the first, while defendants dance around the issue, they do not and cannot dispute that the Expanded Report is an official authorized report of the Washington DFI. 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 (“Defs’ Mem.”) at 4. Accordingly, it is backed by the “moral authority” of the State of Washington and Mr. Bley should not be allowed to testify otherwise. As a fall-back, defendants contend that Mr. Bley should be allowed to testify that the Expanded Report was not signed by the director of the Washington DFI. Defs’ Mem. at 4. Plaintiffs agree that Mr. Bley is qualified to testify on that issue; however, expert testimony on whether the director of the Washington DFI signed the report is unnecessary as that fact can be ascertained from the report itself. More to the point, the director of the Washington DFI does not sign reports of examination. Bley Depo Tr. (excerpts attached hereto as Ex. 1) at 40:19-42:12 (he did not sign or review reports of examination before they went out).

As to the second, since reports of examination are admissible for the truth of the matter asserted under FRE 803(8), Mr. Bley should be precluded from comparing the findings in a report of examination to the allegations in a complaint.⁴ As an independent ground for exclusion, this opinion

⁴ Plaintiffs’ position on the application of FRE 803(8) to reports of examination is set out in Plaintiffs’ Opposition to Defendants’ Omnibus Motion *in Limine* to Exclude or Limit 14 Categories of Evidence (Dkt. No. 1413) at 16-18; *see also id.* at 2-3 (applying FRE 803(8) to U.S. Securities and Exchange Commission Order). Defendants cannot rely on snippets of a legal brief submitted by the North Carolina Attorney General’s Office for the proposition that reports of examination are “predecisional.” Defs’ Mem. at 5-6. The

is unsupported speculation. Although defendants argue in conclusory fashion that this opinion is “well grounded in [Mr. Bley’s] expertise and supported by the facts he investigated” (Defs’ Mem. at 5), it is not. Mr. Bley is proffered as an expert in regulation, not in litigation. Further, the assertion that Mr. Bley “investigated” facts is unfounded.

As to the third, Mr. Bley’s opinion is not relevant to this case because he did not opine that any of the reports of examination at issue were authored by a “creative” examiner using a “novel” theory just to see how the company would respond. Pls’ Mem. at 6. Defendants do not deny this, but advance as support their own contention that Charles Cross in the Washington DFI Expanded Report was “aggressive.”⁵ However, if Mr. Bley himself had this view of the Washington DFI Expanded Report, he would have stated so in his report. Instead, Mr. Bley offers only a bald, unsupported and irrelevant opinion about “creative examiners” and “novel theories,” which should be excluded under FRE 702 as unreliable.

B. Mr. Bley’s Complaint Opinions Should Be Excluded

Mr. Bley cannot testify as to his factual assertion that defendants “diligently tracked all complaints that were not immediately resolved at the branch level” (Pls’ Mem., Ex. A (Bley Report) at 61), or any opinions based on defendants’ July 2002 Effective Rate Study.

cited snippets simply recite the applicable legal test for the deliberative process privilege, which Magistrate Judge Nolan never addressed.

⁵ Defendants mischaracterize Mr. Cross’s testimony in *Luna v. Household Finance Corp., III*, No. C02-1635 (W.D. Wash.) to suggest that he admitted the conclusions of the Expanded Report were “speculation.” In reality, Mr. Cross testified “It’s possible at times that [opinions about Household’s intentions were] speculation, yes.” Declaration of Thomas J. Kavalier in Opposition to Plaintiffs’ Motions in *Limine* Nos. 1, 3-10 (“Kavalier Decl.”) (Dkt. No. 1409), Ex. 8 at 255:3-5. Mr. Cross did not admit or in any way concede that the conclusions regarding Household International, Inc.’s (“Household”) predatory lending practices were speculation. To the contrary, plaintiffs have already shown the rigorous analysis performed by Mr. Cross to reach those conclusions. See Lead Plaintiffs’ Opposition to Defendants’ *Daubert* Motion to Exclude the Expert Testimony of Charles Cross (Dkt. No. 1424). Plaintiffs incorporate that document herein by reference.

An expert cannot testify to the existence of disputed facts. *Richman v. Sheahan*, 415 F. Supp. 2d 929, 942 (N.D. Ill. 2006). Mr. Bley's factual assertion is not only disputed, it is fundamentally inconsistent with Robin Allcock's testimony. Consider the example of a borrower who complains repeatedly to the branch staff over a period of months. As Ms. Allcock testified, that person is not identified in defendants' complaint tracking system. Yet, Mr. Bley's testimony suggests erroneously that this borrower is counted in the defendants' complaint tracking system. Because this testimony consists of an erroneous factual assertion, it should be excluded.

The Court should also exclude any opinions derived from defendants' July 2002 Effective Rate Study because it is inherently unreliable and was prepared under threat of litigation from the Attorneys General. *See* Pls' Mem. at 6-7. Defendants respond that the document is, nonetheless, reliable because it was not commissioned or prepared by attorneys. Defs' Mem. at 7 n.3. In *Sommerfield v. City of Chicago*, No. 06 C 3132, 2008 U.S. Dist. LEXIS 88760 (N.D. Ill. Nov. 3, 2008), this Court noted the opposite, "where the records are prepared by a party rather than a clerical or professional employee there may be a strong motive to falsify the records and the district judge may deem them insufficiently trustworthy to be admitted." *Id.* at *19 (citing *United States v. Spano*, 421 F.3d 599 (7th Cir. 2005)); *see also* *Loeffel Steel Prods., Inc. v. Deltat Brands, Inc.*, 387 F. Supp. 2d 794, 808 (N.D. Ill. 2005) (Witness cannot, under the guise of giving expert testimony, "become the mouthpiece of the witnesses on whose statements or opinions the expert purports to base his opinion.").

Finally, and also as noted in *Sommerfield*, Mr. Bley may not opine based on defendants' subjective summary of the complaints where the underlying complaints themselves are available for review. To paraphrase *Sommerfield*, "if a summary is based on the [complaint files], there is no justification for not supplying [the expert with the complaint files themselves]." 2008 U.S. Dist. LEXIS 88760, at *16.

For each of the foregoing reasons, the identified complaint-related opinions should be excluded.

C. Mr. Bley Cannot Testify as to Why Companies, Including Household, Settle Disputes with Their Regulators

Mr. Bley's opinions as to why companies, including Household, settle disputes with their regulators should be excluded based on his lack of expertise. Defendants do not dispute that Mr. Bley lacks expertise to testify as to why companies, as opposed to regulators, settle. Defs' Mem. at 8-9. To avoid this lack of expertise, defendants propose to convert Mr. Bley's present opinion into an opinion regarding "the frequency with which disputes result in regulatory settlements and how a regulator approaches the settlement process." Defs' Mem. at 9. This "new" opinion has no relationship to the old opinion. Therefore, it was not previously disclosed and thus, should be barred. More to the point, his real opinion was not admissible because it was not relevant to the issues before the jury, *i.e.*, it was not particularized as to why Household settled. The new opinion suffers from the same defect and should be excluded as lacking a "fit" with the circumstances of this case. *Chapman v. Maytag Corp.*, 297 F.3d 682, 687 (7th Cir. 2002) (testimony must "fit" the issues before the jury).

D. Mr. Bley Cannot Testify as to the Alternative Mortgage Transaction Parity Act and Defendants' Pay Right Rewards Product

Mr. Bley's opinion that defendants' Pay Right Rewards ("PRR") product qualified as an alternative mortgage under the Alternative Mortgage Transaction Parity Act should be excluded as a bald conclusion. Defendants' description of Mr. Bley's analysis confirms this.

According to defendants, "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.” Defs’ Mem. at 10. None of these steps constitutes an analysis of whether the PRR qualifies as an alternative mortgage. To the contrary, defendants’ description confirms that Mr. Bley’s opinion is nothing but a bald conclusion.⁶

E. Mr. Bley Cannot Opine About the Adequacy of Defendants’ Internal Controls

As discussed in greater depth in plaintiffs’ Reply Memorandum of Law in Support of Plaintiffs’ Motion *In Limine* to Exclude Defense Documents or Testimony Which Refer to Advice from Counsel that Defendants Complied with Federal and State Laws, which is incorporated herein by reference, defendants may not offer any evidence, including testimony from Mr. Bley, regarding the role, if any, played by the Household Legal Department in reviewing and approving products and practices for compliance with the law. Because this putative role of the Household Legal Department forms a crucial underpinning of Mr. Bley’s opinions regarding the adequacy of defendants’ internal controls, Mr. Bley’s opinions regarding the adequacy of defendants’ internal controls, likewise, must be excluded.

Although defendants contest this, Mr. Bley’s opinions regarding the adequacy of defendants’ internal controls clearly emanate from the putative role played by the Household Legal Department in reviewing and approving products and practices. Mr. Bley opines that Household senior management “undertook to develop legal products and sales strategies” based on the alleged “vetting” by the Household Legal Department of new policies and procedures. Pls’ Mem., Ex. A (Bley Report) at 19-20. Mr. Bley refers back to this opinion and relies upon it to opine on

⁶ Defendants suggest that Ms. Ghiglieri’s opinion regarding the PRR is similarly conclusory. Significantly, although defendants devoted 42 pages to attacking Ms. Ghiglieri’s testimony, they did not specifically assert this issue. *See* Memorandum of Law In Support of Household Defendants’ *Daubert* Motion to Exclude the “Expert” Testimony of Catherine A. Ghiglieri (Dkt. No. 1375). Nor could they as Ms. Ghiglieri in her Rebuttal Report explains why in her opinion the PRR was not in fact an alternative mortgage. *See* Rebuttal Report of Catherine A. Ghiglieri (Kavaler Decl., Ex. 2) at 24.

defendants' internal controls system. *Id.* at 43. Thus, because the foundational opinion is inadmissible, Mr. Bley's overarching opinion of adequate internal controls should be excluded as well.

F. Mr. Bley Cannot Opine as to Customer Behavior

Plaintiffs challenge Mr. Bley's qualifications to testify as to consumer behavior, specifically his opinion as to why borrower complaints are not reliable and his opinion that borrowers are particularly sensitive to the amount of their monthly payment (but not apparently their interest rate or the amount of any origination fees or discount points). Pls' Mem. at 9. In response to this valid criticism, defendants assert Mr. Bley's "specific experience with recipients of sub-prime loans." Defs' Mem. at 12. This unsupported assertion of counsel is insufficient: nowhere in his report does Mr. Bley disclose any such "specific experience."⁷

Recognizing the weakness of their position, defendants seek to limit Mr. Bley's opinion regarding why borrowers complain to the opinion that "not all customer complaints are valid." *Id.* Plaintiffs do not object to the admission of this limited opinion and request that the Court preclude Mr. Bley from going beyond this limited opinion, *i.e.*, expressing any opinion as to why customer complaints are not valid.⁸

⁷ Defendants seek to compare Mr. Bley's testimony to three distinguishable opinions from Ms. Ghiglieri's report. Defs' Mem. at 12. In contrast to Mr. Bley, Ms. Ghiglieri does have personal experience with consumer complaints and thus, her regulatory experience and knowledge enable her to opine: (1) that only a small fraction of borrowers impacted by a practice will complain to the regulatory agency; (2) that Household's prepayment penalty was aggressive compared to industry standards; and (3) that a comparison between the terms and conditions of a loan used to refinance and the terms and conditions of the initial loan can yield evidence of deceptive practices.

⁸ Mr. Bley lacks experience with customer complaints. The fact that one branch of the Washington DFI handles customer complaints is not, without more, sufficient, particularly where Mr. Bley himself states no such experience.

G. Mr. Bley Cannot Testify as to Defendants' State of Mind

Defendants do not attempt to defend Mr. Bley's opinions as to defendants' state of mind save to argue that he is no different in this respect than Ms. Ghiglieri. This assertion has two fatal flaws. First, defendants mischaracterize Ms. Ghiglieri's testimony. Ms. Ghiglieri will not testify as to what defendants actually thought or intended, but rather as to reasonableness and the expected consequences that would flow from defendants' conduct. Second, Mr. Bley's testimony will simply adopt and reiterate defendants' own version of events. It is inappropriate to use an expert to bolster a witness' credibility with the jury in this fashion. *United States v. Vest*, 116 F.3d 1179, 1185 (7th Cir. 1997).

II. CONCLUSION

For the foregoing reasons, the Court should exclude portions of the testimony of defendants' proposed expert, John Bley, at trial.

DATED: February 13, 2009

Respectfully submitted,

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
AZRA Z. MEHDI (90785467)
D. CAMERON BAKER (154432)
LUKE O. BROOKS (90785469)
JASON C. DAVIS (253370)

/s/ D. Cameron Baker
D. CAMERON BAKER

100 Pine Street, Suite 2600
San Francisco, CA 94111
Telephone: 415/288-4545
415/288-4534 (fax)

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 Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 100 Pine Street, Suite 2600, San Francisco, California 94111.

2. That on February 13, 2009, declarant served by electronic mail and by U.S. Mail to the parties the **REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION *IN LIMINE* TO EXCLUDE CERTAIN TESTIMONY OF DEFENDANTS' EXPERT JOHN BLEY PURSUANT TO FEDERAL RULE OF EVIDENCE 702**. 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 13th day of February, 2009, at San Francisco, California.

/s/ Marcy Medeiros

MARCY MEDEIROS