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' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF HOUSEHOLD DEFENDANTS' *DAUBERT* MOTION TO EXCLUDE THE "EXPERT" TESTIMONY OF HARRIS L. DEVOR

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 Reply 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 further support of their motion to exclude the testimony of Plaintiffs' expert witness Harris L. Devor.

PRELIMINARY STATEMENT

Devor's methodology suffers from the same problem that led to his exclusion in past litigation. He has failed to "show his work." Attempting to rehabilitate him, Plaintiffs' brief in opposition creates out of thin air a process which one ***could*** use to arrive at Devor's opinions, but the effort is pointless. Devor himself never claimed to follow these new "methods." In fact, Devor explicitly testified that he did ***not*** follow the methods Plaintiffs now proffer. Maybe Devor should have. Maybe Plaintiffs wish he had. But he did not, and the admissibility of his proposed testimony must rise or fall on Devor's own qualifications and work, *vel non*.

While the deficiencies of Devor's analyses are many and varied, the following are his major flaws, any one of which requires the exclusion of his opinions:

- Devor bases his revenue recognition opinion on the assumption that Household's practices were "improper" but provides no explanation as to when something is "improper," preventing any other accountant from replicating his "analysis."

- Devor opines that ***if*** Household "was not entitled to the benefit" of the revenue it reported then it "should not have recognized the revenue." However, this is simply a restatement of the accounting standard at issue which holds that a company can only recognize revenue if it is "entitled to the benefits" of that revenue. In other words, Devor spent 15 pages of his Report posing the question he purports to address, not answering it.

- Devor failed to analyze any aspect of the accounting underlying Household's August 2002 restatement. Instead, he literally copied verbatim the analysis performed by KPMG and attempted to pass it off as his own, adding nothing more than "I agree." Beyond illustrating the uncontested fact that accountants can and do disagree about the proper accounting treatment for the credit card contracts at

> issue, Devor's conclusory agreement with one such accountant, without contributing any analysis, would provide no useful guidance to the jury. An "expert" is of no use to the jury by simply saying, "me too."

Plaintiffs' brief offers nothing to counter Defendants' showing regarding the lack of any methodology underlying Devor's conclusory opinions. Instead, Plaintiffs construct and refute "straw man" arguments that Defendants did not make, repeatedly trying to bolster Devor's conclusions with tangential facts, and obscuring what is really at issue in this motion, namely, the reliability of Devor's method (or lack thereof), not the validity of his conclusions. That Plaintiffs' counsel were forced to conjure up a methodology that Devor ***might*** have used (but did not use and did not claim to have used) in an effort to prop up his opinions is nothing more than an acknowledgment that Devor himself applied no expert methodology at all. To state the obvious, Plaintiffs' counsel will not be witnesses at trial, and their ingenuity in trying to salvage a facially inadequate expert report does not satisfy the strict criteria articulated in *Daubert*.

ARGUMENT

I. DEVOR'S "OPINIONS" CONCERNING THE RESTATEMENT ISSUES ARE INADMISSIBLE

Defendants demonstrated at some length in their opening brief that Devor simply lifted his "analysis" wholesale from KPMG's workpapers while claiming at his deposition that KPMG's words were his own. (Memorandum of Law in Support of Household Defendants' *Daubert* Motion to Exclude the "Expert" Testimony of Harris L. Devor, dated January 30, 2009 ("Def. Mem.") at 8-10). Plaintiffs' response is to concede that Devor ***did*** lift his work from KPMG but they now insist that Devor never suggested otherwise. Devor's sworn testimony speaks for itself and no amount of rewriting in Plaintiffs' brief can change that. (*See* Declaration of Susan Buckley in Support of Household Defendants' *Daubert* Motion to Exclude the "Expert" Testimony of Catherine A. Ghiglieri, Charles Cross and Harris L. Devor, dated January 30, 2009 ("Buckley Decl.") Ex. 2 (Devor Tr.) at 121:4-127:4). The overarching point, however, is that

having conceded that Devor simply cut and pasted KPMG's work and presented it in his report -- whether or not Devor confessed to having done so -- Plaintiffs have conceded that Devor's "opinions" are inadmissible under *Daubert*.

Devor conceded in his deposition that his "analysis" of restatement issues was limited to "read[ing] all of the documents and look[ing] at KPMG and Anderson's [sic] analysis of the same issues. That was my analysis." (Buckley Decl. Ex. 2 (Devor Tr.) at 118:23-119:6). Faced with Devor's devastating admission that he was a mere reader, Plaintiffs attempt to pass it off as reliable expert methodology. In their words: "Devor has substantial auditing experience and can rely upon and agree with another auditor in explaining the bases for his opinion." (Memorandum of Law in Support of Plaintiffs' Opposition to Defendants' *Daubert* Motion to Dismiss the Expert Testimony of Harris L. Devor, dated February 10, 2009 ("Pls. Opp.") at 14). Plaintiffs provide no support for this proposition, other than an inapplicable and out-of-context quote from Weil's deposition testimony.[1]

Although Plaintiffs are content with Devor's adopting of KPMG's analysis as the basis for his conclusions instead of conducting his own, *Daubert* and its progeny expect more of an expert than the utterance of bottom-line conclusions devoid of explanation of how they were derived. *See, e.g.*, *Huey* v. *United Parcel Service, Inc.*, 165 F.3d 1084, 1086-87 (7th Cir. 1999)

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[1] Plaintiffs cite the portion of Weil's deposition where, when asked whether he had "assessed the accuracy of the disclosures in the securitization prospectuses", Weil stated that he did not because "there is no question asked of me that would lead me to believe that I should second guess the work of an auditor. . . . I take those financial statements to be approximately what the auditor says they are." (Declaration of Thomas J. Kavaler in Opposition to Plaintiffs' Motions *In Limine* Nos. 1, 3-10, dated February 10, 2009 ("Kavaler Decl.") Ex. 16 (Weil Tr.) at 201:7-18). Although plaintiffs attempt to draw from this statement a broad proposition that an accounting expert can simply rely on an auditor's analysis, the effort is unavailing. As Weil testified, he was not asked to opine on the accuracy of the disclosures in Household's securitization prospectuses. In contrast, Devor ***was*** asked to opine on the accounting issues that gave rise to the restatement and he did, albeit without conducting any analysis of his own.

(expert opinion excluded because the expert did "not describe the reasoning used to reach his conclusion"); *see also Brown* v. *Primerica Life Insurance Co.*, No. 02 C 8175, 2006 WL 1155878, at *2-*4 (N.D. Ill. Apr. 29, 2006) (Kocoras, C.J.) (expert affidavit excluded in part because "we have no information that would allow a determination of whether [the expert] employed any methodology at all, let alone whether it could be separated from 'subjective belief or unsupported speculation'" (quoting *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993))).

This methodological deficiency is nothing new with Devor. It is the same flaw that has brought about the exclusion of his testimony in at least one other securities fraud action. *See In re Acceptance Insurance Cos., Securities Litigation*, 352 F. Supp. 2d 940, 948 (D. Neb. 2004) ("Devor sets forth some foundation for his expert opinions, including an explanation of accounting theory and his interpretation of various accounting rules . . . . However, like [the other expert], Devor does not explain how he reached his ultimate opinions nor does he describe the analytical processes he went through to reach his opinions.") *aff'd*, 423 F.3d 899 (8th Cir. 2005). Plaintiffs' attempt to wish this criticism away by explaining that Devor's assignment was "narrow" does not dilute the district court's account of Devor's failures under *Daubert* (which he has repeated here) or the Court of Appeal's agreement that "the opinions [of Devor and another expert] were mere legal conclusions with no analytical reasoning or support." 423 F.3d at 905.

Plaintiffs' repeated efforts to justify Devor's lack of analysis by pointing to supposed lack of empirical studies by defense expert Roman Weil are nonsensical. Plaintiffs have mounted their own attack on Dr. Weil (*See* Memorandum of Law in Support of Plaintiffs' Motion Exclude [sic] Certain Testimony of Defendants' Expert Roman L. Weil Pursuant to Federal Rule of Evidence 702, dated January 30, 2009), an attack that is ultimately unpersuasive. (*See* Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion *In Limine* to Exclude Certain Testimony of Defendants' Expert Roman L. Weil Pursuant to Federal Rule of Evidence 702,

dated February 10, 2009). But it is no answer to Devor's failings under *Daubert* to falsely claim that some other expert's report suffers from the same flaws.

Devor's "opinions" concerning the restatement also fail the relevance prong of *Daubert*. Had Devor attempted to explain or clarify the accounting rules that govern the issues at hand, rather than simply recite them, or performed his own analysis and application of those rules to the facts of this case, rather than simply copy KPMG's analysis, or even explained why he preferred KPMG's conclusions to those of other accountants that had examined the accounting issues relating to the restatement, his opinions might be relevant. But Devor did none of the above, and thus cannot aid the trier of fact in any way beyond that already provided by the KPMG witnesses deposed by Plaintiffs in this action who actually did the work and performed the analyses that Devor did not. It is thus clear that Devor's "opinion" concerning the restatement issues is superfluous and unnecessary and should be excluded under Rule 702. *See, e.g.*, *Amakua Development LLC* v. *Warner*, No. 05 C 3082, 2007 WL 2028186, at *14 (N.D. Ill. July 10, 2007) (Filip, J.) (excluding sections of a financial expert's opinion because his proposed testimony seemed "to reiterate the facts as [his clients] view [] them" and, therefore, did not qualify as expertise).

II. DEVOR'S "OPINIONS" ON "IMPROPER LENDING" ISSUES ARE INADMISSIBLE

A. The Application of Devor's "Revenue Recognition" Theory In The Context of a Federal Securities Fraud Case Is Inconsistent With Governing Law

Devor's revenue recognition theory is that revenues "improperly received" should not be recorded as revenue under GAAP. As Defendants established in their opening brief, this theory has been soundly rejected by the courts. Plaintiffs argue in response that Devor's theory is actually the opposite of what was addressed in the relevant cases, but this is simply not so. The distinction that Plaintiffs fail to grasp is that the revenue Devor claims was "improper" was

actually received, a fact that Devor does not deny. Instead, Devor's assumption is that the revenue actually received was "improperly" received, and on that basis should not have been recognized. It is this exact principle that has been rejected by the courts.

Plaintiffs' reference to "accurate historical data" (Pls. Opp. at 3) reflects their misreading of *In re Sofamor Danek Group, Inc.*, 123 F.3d 394 (6th Cir. 1997). In that case, the plaintiffs unsuccessfully claimed that defendants' financial statements were materially misleading because they failed to disclose that revenues were obtained and recorded by defendant from sales of a drug for a use not approved by the FDA. The Sixth Circuit held that "[i]t is clear that a violation of federal securities law cannot be premised upon a company's disclosure of accurate historical data." *Id*. at 401 n.3. Applied to the instant case, it is evident that the recognition of revenue actually received constitutes accurate historical data because Defendant did, in fact, receive the recognized revenue. Devor's assumption that this actual revenue was "improperly received" is irrelevant as well as unsubstantiated in his Report.

Plaintiffs' reference to "properly reported income" (Pls. Opp. at 3) is a reference to *In re Marsh and McLennan Cos.*, 501 F. Supp. 2d 452, 470 (S.D.N.Y. 2006), in which the district court considered a claim identical to the one proffered by Devor and rejected it as a matter of law:

> Absent an allegation that [defendant] reported income that it did not actually receive, the allegation that a corporation properly reported income that is alleged to have been, in part, improperly obtained is insufficient to impose Section 10(b) liability.

Id. at 469-70. Devor's theory that revenue actually received should not have been recognized is flawed as a matter of law.

B. Devor's "Opinions" Concerning Household's Lending Practices Are Not Reliable and Will Not Aid the Trier of Fact

For proper revenue recognition under FASCON 5, revenue must be realized (or realizable) and earned. According to FASCON 5,

> An entity's revenue-earning activities involve delivering or producing goods, rendering services, or other activities that constitute its ongoing major or central operations, and revenues are considered to have been earned when the entity has substantially accomplished what it must do to ***be entitled to the benefits*** represented by the revenues.

(emphasis added). As noted above, Devor does not disagree that the revenue Defendants recognized was in fact realized (*i.e.* received). However, Devor's theory, as stated explicitly in his Report at ¶148, is that *if* Household's revenue was improperly received, *then* the company was not "entitled to receive the benefits." This is the legally untenable theory that Devor uses to conclude that Defendant should not have recognized certain revenue.

In their opposition brief, Plaintiffs strive to explain that Devor's assumption that Defendants' practices were "improper" is supported by the evidence, and is in fact capable of being "proved or disproved." This argument completely misses the point. The issue is not whether any evidence exists with which one theoretically might evaluate the propriety of Defendants' lending practices. The incurable problem is that Devor characterizes certain revenues as "improperly received" while failing to define (or offer any expertise about) what constitutes "improper." The notion of "improperly received revenues" is a novel concept introduced by Devor himself -- it does not correspond to Plaintiffs' allegations or with the testimony of Plaintiffs' regulatory "expert" Catherine Ghiglieri as to her unique definition of "predatory lending" (which she also made up explicitly for Plaintiffs in this litigation and she admits has no consensus definition).

It is the lack of any identified content in Devor's concept of "improperly received revenues" that renders it incapable of being proved or disproved. This point cannot be disputed,

and Plaintiffs do not even attempt to do so. Although they point out that an expert is entitled to offer a conditional opinion based upon a hypothetical fact, Plaintiffs overlook that the fact must be capable of being proved or disproved, which necessarily requires some explanation of what the hypothetical fact is. "Whether the expert's technique or theory can be or has been tested — that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability" is one of the factors that must be considered in evaluating the reliability of a proffered expert opinion. Fed. R. Evid. 702 advisory committee's note (2000). *See, e.g., General Electric Co.* v. *Joiner*, 522 U.S. 136, 146 (1997) (ruling that "nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert"); *United States* v. *Mamah*, 332 F.3d 475, 478 (7th Cir. 2003); *R.J. Reynolds Tobacco Co.* v. *Premium Tobacco Stores, Inc.*, No. 99 C 1174, 2004 WL 1613563, at *9 (N.D. Ill. July 19, 2004) (Kocoras, C.J.) (excluding a tobacco industry expert's calculation of damages because "the applicable data and the proffered opinion are separated by an analytical chasm, [which] cannot be bridged solely by the expert's say-so . . . .").

Nowhere in Devor's report does he attempt to define what an "improper" lending practice is. When pressed on the issue at his deposition, Devor revealed himself to be completely incapable of defining "improper." First he stated that "illegal" practices were improper. (Buckley Decl. Ex. 2 (Devor Tr.) at 181:18-182:14). He later said that legal practices may also be improper. (*Id.* at 190:15-18). Devor opined that a lending practice that was "wrong" was "improper." (*Id.* at 182:23-24) ("Q. How do you define 'improper'? A. Wrong."). In effect, Devor's entire theory of "improper" revenue recognition depends upon a concept that Devor himself, as its author, is incapable of defining. This is the essence of a theory that is unreliable because it is incapable of objective testing.

The only remotely substantive attempt Devor made to define "improper" revenue was to posit it was revenue to which Household "was not entitled to the benefits" of. (*Id.* at 194:23-24). This circular and tautological definition only concedes and underscores the absurdity of Devor's theory of revenue recognition in this case. His theory is a standard conditional syllogism: *if* a practice is "improper," *then* Defendant was not entitled to the benefit. If A, then B. However, Devor's attempt to define "improper" as not entitled to the benefit effectively defines "A" as "B". Such facially deficient "expert" methods are inherently unreliable. *See, e.g.*, *Nelson* v. *Tennessee Gas Pipeline Co.*, 243 F.3d 244, 254 (6th Cir. 2001) ("The magistrate judge properly rejected the [expert's] circular reasoning. . . ."); *Stallings* v. *Black & Decker Corp.*, No. 06-cv-4078-JPG, 2008 WL 4530695 at *12 (S.D. Ill. Oct. 7, 2008) ("Such circular reasoning is not scientific, is not based on facts and is not reliable."); *Young* v. *Burton*, 567 F.Supp.2d 121, 132 (D.D.C. July 22, 2008) ("The flaw in [plaintiff's expert's] logic was succinctly explained by defense expert . . . . Such circular reasoning is not scientifically or medically acceptable.").

If Devor's "revenue non-recognition" theory is short of definition, analysis and legal support, it is certainly long on prejudicial potential as Devor dedicates a significant portion of his Report to a recital of anecdotes about Household's lending business that he contends demonstrate that Defendants' revenues were "improperly received." He does so notwithstanding his admission that he is not an expert on lending practices, laws or regulations, or the business of a consumer finance company. (*Id.* at 66-68). Plaintiffs' brief in opposition ignores this problem altogether, and instead argues that that there is a large body of evidence supporting the notion that Defendants engaged in improper lending practices. This is nothing more than a flagrant and transparent attempt by Plaintiffs to introduce inflammatory evidence through supposedly "expert" testimony that is completely devoid of expert content. Plaintiffs' mudslinging adds nothing to an evaluation of Devor's conclusory, untestable theory.

Plaintiffs argue that Devor's opinion on GAAP is helpful to the jury "because the average juror is unfamiliar with GAAP." (Pls. Opp. at 5). In fact, however, this is precisely why Devor's opinion is not only unhelpful to the jury, but dangerously misleading. Devor's recitation of accounting rules along with his legally untenable theory of revenue recognition, cloaked in the supposed authority of an "expert," can only lead the jury astray. Instead of advancing a coherent and logically-sound theory, attempting to explain it, and analyzing its application to the facts of this case, Devor simply cites certain accounting rules, posits a circular and nonsensical theory, then proceeds to catalogue more than ten pages of inflammatory anecdotes that he claims evidence improper lending practices, even though he cannot define "improper" and even though he admits that he has no expertise in determining the propriety of lending practices. As established above and in Defendants' opening brief, this is precisely the kind of expert testimony that *Daubert* and its progeny seek to exclude.

C. Devor's Effort to Quantify the Amount of Revenue "Improperly Recorded" Is Not Reliable and Will Not Aid the Trier of Fact

Plaintiffs attempt to defend Devor's use of Rodemoyer Exhibit 17 and Defendants' settlement with certain attorneys general ("AGs") as the basis for his quantification of the amount of revenue "improperly recorded." As to Rodemoyer Exhibit 17, Plaintiffs argue that there is no ambiguity as to what the document represents -- that it is exactly what Devor claims it is: estimates of customer refunds from "improper" practices. However, the author of this informal tabulation did not identify it as such, and the fact that she testified that she relied on reasonable assumptions in creating estimates does not begin to substantiate Devor's made-up interpretation of the document. Devor does not claim any powers as a mind-reader, and that his calculations rely so heavily on an unverified assumption about the meaning of an unidentified list of numbers is a further demonstration of their lack of reliability. But instead of addressing this deficiency under *Daubert* and its progeny, Plaintiffs devote pages of their brief to citing deposition

testimony and documentary evidence that purportedly support Devor's interpretation of this document and his resultant conclusion. However, it is not an expert's conclusions that are subject to a *Daubert* challenge, it is the expert's methods (or lack thereof). Plaintiffs' lengthy (and dubious) insistence of why the meaning of Rodemoyer Exhibit 17 was not vague (notwithstanding its author's contrary testimony) cannot be found anywhere in either Devor's report or his deposition testimony. Devor simply relied on his unexplained "understanding" of what the document represented, and did not bother to describe why this reliance was sound. For Plaintiffs' counsel to fabricate this *post hoc* explanation does not and cannot rehabilitate Devor's failure to do so in the first instance.

Even if one assumes that Rodemoyer Exhibit 17 was indeed an estimate of potential refunds, Devor provides no analysis or explanation as to the relationship between potential refunds and revenue recognition. He simply copies the numbers from Rodemoyer Exhibit 17 and inserts them as the upper end of the range he claims represents the amount of "improperly recorded" revenue. Amazingly, and even putting aside the vagueness of his undefined "impropriety" standard, Devor makes no attempt to provide any explanation or link between ***refunds*** and ***revenue***. It does not take an accounting expert to realize that the two are not the same, and Devor's failure to provide any analysis as to why he equates the two concepts renders his methods and opinion unreliable. This gaping flaw in Devor's methods is underscored by the fact that these refunds were never made and any and all hypothetical claims to such "refunds" have long since been extinguished. Devor makes no attempt to explain just what exactly Defendants are expected to do with this revenue that, according to him, they are not allowed to recognize, and he certainly lends no accounting expertise to the subject of his vague theory.

Devor commits the exact same flaw with respect to the AG settlement. He plugs settlement numbers at the lower end of his "improperly recorded" revenue range with no linkage and no explanation as to why this is sound. Further, Devor failed to acknowledge any of the

common alternative explanations for why an entity might enter into a settlement. In fact, given that the settlement figure was a negotiated amount between Defendants and the AGs, it was by very definition divorced from a specific calculation of restitution. And the fact that the amount of the AG settlement was significantly different from what Devor claims was an estimate of restitution casts doubt on whether either number can properly be linked to "improper" revenue recognition.

It is ironic that in defending Devor's reliance on these documents, Plaintiffs state that "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***. (Pls. Opp. at 7) (emphasis in original). Plaintiffs' Freudian slip finally acknowledges what has been transparent all along: as Plaintiffs have litigated it, this case is not about securities fraud, it is about consumer fraud, or at least about dredging up prejudicial-sounding fact patterns that may incite sufficient prejudice to confuse the jury about the difference. Plaintiffs should not be allowed to present their inadmissible anecdotes through otherwise content-free "expert" testimony.

III. DEVOR'S "OPINION" CONCERNING THE DISCLOSURE OF THE AG SETTLEMENT IS INADMISSIBLE

Defendants demonstrated in its opening Memorandum that Devor failed to consider all the evidence in opining that Defendants should have disclosed the AG settlement as early as August 14, 2002, and, rather, cherry-picked those documents that were favorable to his conclusion while completely ignoring those that undermined his preferred result. Plaintiffs once again respond by mischaracterizing Defendants' argument and attempting to refute the mischaracterization. Defendants' position is not, as Plaintiffs allege, that Devor needed to cite every single document that he reviewed. Nor do Defendants contend that since its interpretation conflicts with Devor's, Devor must be wrong. It is not his conclusions, but rather Devor's lack of expert methodology that renders his opinions inadmissible under *Daubert*. While ignoring the

same contrary evidence that Devor ignores, Plaintiffs attempt to defend Devor's selective review by stating that his conclusion is sound from "an attorney's point of view." Without belaboring the obvious, since Devor is not an attorney, this is completely irrelevant, as is Plaintiffs' attempt to provide Devor with a *post hoc* semblance of a methodology. Plaintiffs may agree all they wish with Devor's unexplained conclusions, and they can spend an infinite number of pages describing why his conclusions might be correct. What they cannot do, however, is disguise the fact that Devor himself failed even to consider the contemporaneous evidence that undermines his conclusions.

Plaintiffs argue that as of August 14 only two outcomes were possible as a result of discussions with the attorneys general: "(A) a very large, material litigation by any standards . . . or (B) in the words of the AG group's representative a settlement that would be, 'to put it mildly, large." (Pls. Opp. at 10). It is indisputable that these were not the only possible outcomes (indeed, Plaintiffs' option "A" was not possible at all because the state negotiators hailed from different jurisdictions, and many that Household invited to the table for the sake of completeness were not inclined to sue at all). But on this subject too, the issue is not the soundness of the conclusion Plaintiffs wish to convey through Devor, it is the consequences under *Daubert* of the complete lack of methodology employed by Devor in evaluating or even reviewing the actual circumstances before issuing a conclusory opinion about Household's supposed obligations. Although some AG negotiator made the comment that a settlement would be large, that statement was made during the ongoing negotiations between Defendants and the AGs and is certainly not a reliable basis for expert opinion. Further, there was no guarantee that a failure to settle would have resulted in litigation, let alone a "very large, material litigation." And this completely fails to consider the numerous other alternatives that may have come to pass, such as, for example: (a) a breakdown in settlement negotiations, followed by a decision by some or all AGs not to pursue litigation in their respective jurisdictions; (b) the commencement of litigation

in one or more jurisdictions followed by a resolution in favor of Defendants, including the potential for immediate victories upon a motion to dismiss; (c) the tenuous alliance of the AG group falling apart, as it appeared likely to do at times. Of course, Plaintiffs make their arguments with the benefit of hindsight, a benefit Defendants did not possess while deciding when to make appropriate disclosures. The fact that more analysis has taken place in this paragraph than in Devor's whole discussion on this topic highlights the deficiencies in his methodology.

CONCLUSION

For the foregoing reasons, the Court should exclude the testimony of Harris L. Devor regarding the subjects of (1) Household's restatement on August 14, 2002, (2) Household's lending practices and revenue recognition, and (3) Household's disclosure of the AG settlement.

Dated: February 13, 2009
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