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' MOTION TO EXCLUDE TESTIMONY OF DEFENDANTS' PROPOSED EXPERT DR. ROBERT LITAN PURSUANT TO FEDERAL RULE OF EVIDENCE 702

(Exhibits separately filed under seal pursuant to court order)

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Lead plaintiffs respectfully submit this memorandum of law in support of plaintiffs' motion to exclude the testimony of defendants' proposed expert Dr. Robert Litan.

I. INTRODUCTION

To be admissible under Federal Rule of Evidence 702, an expert's opinion must be reliable and helpful to the trier of fact. Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993). None of the proffered testimony of defendants' proposed expert, Robert Dr. Litan ("Dr. Litan") meets the showing of admissibility under Rule 702, *Daubert* and their progeny.[1]

Dr. Litan, a licensed attorney who has no practical experience in the regulation of lending institutions, employs no discernable methodology in concluding Household was not engaged in a nationwide, systemic predatory lending scheme during the Class Period. Instead, his purported "methodology" is based on nothing more than a subjective review of the "four corners" of the report submitted by plaintiffs expert, Catherine Ghiglieri ("Ghiglieri"). In other instances, his "expert opinion" amounts to nothing more than personal anecdotes about his own experience based on his economic education/background as a ***prime*** borrower. Where Dr. Litan does attempt to utilize some sort of methodology, it is so fatally flawed that it cannot be deemed reliable as required by Fed. R. Evid. 702. In addition to Dr. Litan's total failure to utilize any identifiable methodology, he is not qualified to offer expert testimony on any of the subject matters for which he was retained to opine. He improperly assumes the role of advocate for defendants and invades the province of the jury by offering his opinion, without any basis, on defendants' state of mind during the Class Period. Moreover, none of Dr. Litan's testimony will actually help the trier of fact in understanding the evidence or determining any fact in issue. Dr. Litan's expert testimony should be excluded at trial.

II. DR. LITAN'S PROPOSED EXPERT TESTIMONY

Household retained Dr. Litan, a licensed attorney, to "provide [his] views on the predatory lending contentions in the Amended Complaint" and on the securities fraud claims discussed in the

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[1] Moreover, Dr. Litan's testimony should be excluded because it is entirely cumulative of the testimony proffered by defendants' other expert John Bley. A motion to exclude cumulative testimony is being filed concurrently herewith.

report by plaintiffs expert, Catherine Ghiglieri. Report of Robert E. Litan ("LR"), ¶2, attached hereto as Ex. A. Dr. Litan also proffers subjective and conclusory opinions on the following:

- **Household fully disclosed its loan products and predatory lending activities**: Dr. Litan opines that Household fully disclosed to investors its loan products and practices in the Company's securitization prospectuses and other public filings. LR, ¶¶86-90. He further opines that Household disclosed all risk associated with its lending practices. LR, ¶¶168-169, 173, 183, 185.

- **Household did not use the Alternative Mortgage Transaction Parity Act ("AMPTA") to circumvent state law**: Dr. Litan opines that Household fully complied with applicable federal law. LR, ¶145; Feb. 27, 2008 deposition transcript of Robert E. Litan ("Dr. Litan Depo.") at 226:10-13.[2]

- **Household had "legitimate business reasons" for settling with the state Attorneys General**: Dr. Litan opines that Household senior management entered into various settlements to reduce uncertainties that were impeding the Company's ability to raise capital and suppressing the Company's stock price. LR, ¶20. He further concludes that Household "therefore had legitimate business reasons to have settled the various state investigations." LR, ¶¶21, 98-99, 103, 106-107, 109.

- **Defendants did not act with scienter**: Dr. Litan contends that defendants' acquisition or retention of Household stock during the Class Period negates any evidence that **defendants** were knowingly engaged in a scheme to defraud investors. LR, ¶28. He also opines that defendants reasonably believed that the Company was not engaged in a systemic or company-wide predatory lending scheme. LR, ¶¶70-71.

None of these so-called "expert" opinions meet the standard for admissible expert testimony.

III. ARGUMENT

The Supreme Court has observed that "expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert*, 509 U.S. at 595. Because of this risk, trial judges are charged with the responsibility of acting as gatekeepers to exclude unreliable expert witness testimony. *Id*. at 597; *Dhillon v. Crown Controls Corp.*, 269 F.3d 865, 869 (7th Cir. 2001) (emphasizing trial court's "gatekeeper" role). Federal Rule of Evidence 702, amended in 2000 to reflect the Supreme Court's decision in *Daubert*, sets forth the test for determining the admissibility of proposed expert testimony:

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[2] Excerpts from Dr. Litan's Depo. cited throughout are attached hereto as Ex. B.

> If scientific, technical, or other specialized knowledge ***will assist the trier of fact to understand the evidence or determine a fact in issue***, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principle and methods reliably to the facts of the case.

Fed. R. Evid. 702.[3] Thus, to be admissible, the expert must possess "sufficient specialized expertise to render his opinion on the topic . . . reliable, as required by *Daubert*." *Tyus, Inc. v. Publications Int'l, Ltd.*, No. 99 C 5565, 2004 WL 2359250, at *5 (N.D. Ill. Oct. 19, 2004); *Tyus v. Urban Search Mgm't*, 102 F.3d 256, 263 (7th Cir. 1996) (expert testimony must be "tested to be sure that the person possesses genuine expertise in a field"). The Court must then determine whether the expert's testimony is reliable, "that is, whether it is based on a reliable methodology." *Clark v. Takata Corp.*, 192 F.3d 750, 756 (7th Cir. 1999). Finally, the proffered testimony must assist the trier of fact in understanding the evidence or determining a fact in issue. *Id*. at 757; *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1106 (7th Cir. 1994) (second prong of the *Daubert* test is determining whether the expert opinion will assist the trier of fact). The burden is on the party offering the expert testimony to establish admissibility. *See* Fed. R. Evid. 104(a); *Bourjaily v. United States*, 483 U.S. 171, 175 (1987). Here, defendants cannot meet the burden of establishing that any of Dr. Litan's proposed testimony is admissible under Rule 702.

A. Dr. Litan's Failure to Utilize Any Identifiable Methodology Renders His Opinions Inadmissible Under Fed. R. Evid. 702

A fundamental principle of Federal Rule of Evidence 702 and the *Daubert* progeny is that, to be admissible, expert testimony must be the "product of reliable principles and methods." Fed. R. Evid. 702. In other words, the "expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded." Fed. R. Evid. 702, Advisory Committee Notes, 2000 Amendments; *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000) ("Even 'a supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method.'"). While there is no single test for determining when expert testimony is the product of reliable principles and methods, courts are directed to consider, *inter alia*, whether the expert's

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[3] Here, as elsewhere, citations are omitted and emphasis is added, unless noted otherwise.

technique has been tested, whether it has been subject to peer review and publication and whether the conclusions reached can be evaluated for accuracy. *Daubert*, 509 U.S. at 590-94; *Zenith Elecs. Corp. v. WH-TV Broadcasting Corp.*, 395 F.3d 416, 418 (7th Cir. 2005). In addition, "'an expert must 'substantiate his opinion; providing only an ultimate conclusion with no analysis is meaningless.'" *Clark*, 192 F.3d at 757 (citing *Huey v. United Parcel Serv., Inc.*, 165 F.3d 1084, 1087 (7th Cir. 1999)). Indeed, nothing in Rule 702 "'requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert.'" *Id*. at 758. Here, the absence of any demonstrable methodology warrants the exclusion of Dr. Litan's expert opinions at trial.

1. Dr. Litan's Opinion that Household Did Not Engage in Widespread, Systemic Predatory Lending Scheme Is Unreliable and Should Be Excluded

Dr. Litan, acting as a mouth-piece for defendants, opines that the Ghiglieri report does not establish that Household engaged in a massive scheme of predatory lending during the Class Period. LR, ¶8; Dr. Litan Depo. at 37:1-6 (concluding that Ghiglieri does not provide a basis in her report for her statement that Household was engaged in predatory lending). Dr. Litan's conclusion is not based on any verifiable methodology and is nothing more than a subjective, conclusory opinion. *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996) ("'an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process'").

In his report, Dr. Litan states that he based his opinions on the "documents that had been generated or produced during discovery," specifically focusing his attention on the documents cited in the Ghiglieri report. LR, ¶3. Dr. Litan admits, however, that he failed to even review all of the documents relied on by Ghiglieri. *See* Dr. Litan Depo. at 14:20-22 ("**Q:** Did you review all of the documents cited in Ms. Ghiglieri's report? **A:** I can't say that I did."); *id*. at 19:18-24; ("**Q:** You've listed several deposition transcripts on the first page of Appendix 4. Did you read all of – did you read all of the deposition transcripts in their entirety? **A:** I can't tell you I read them in their entirety."). Dr. Litan made no attempt to independently investigate Household's lending practices and he has absolutely no understanding of the loan process at Household during the Class Period. *Klaczak v. Consol. Med. Transp.*, 458 F. Supp. 2d 622, 667 (N.D. Ill. 2006) ("Even in instances where a formal scientific method is not necessary, a purported expert must consider obviously relevant information in forming his opinion."). His opinion is based on nothing more than his personal experience as a ***prime*** borrower.

Moreover, Dr. Litan's purported "methodology" was limited to examining the Ghiglieri report and determining, based "on the four corners of [the] report," whether there was enough support for the conclusions contained therein. Dr. Litan Depo. at 15:19-25 ("And so what I wanted to do was see well, take the information that's in her report and just look at it."); *id* at 154:16-17 ("I wasn't hired to prove that [Household wasn't] a predatory lender.") *id*. at 287:13-19; 287:4-12 ("My – my opinion in this case is confined to Ms. Ghiglieri's statements, and I was asked to assess whether there was sufficiency for her statements. ***I was not asked to go back and review all of Household's activities*** . . . . I was not asked to do that."). So, while Dr. Litan himself admits that he has done no analysis, he asks that his own superficial and conclusory opinions regarding Ms. Ghiglieri's analysis be given greater value.

Dr. Litan's other "methodologies" are equally unreliable. For instance, Dr. Litan "calculated" the complaint rate at Household by looking at the total number of loans made as compared to the number of complaints received. Based on this "calculation," Dr. Litan determined that from 1999 through 2001, the complaint rate was less than 1%. Dr. Litan then opines, based ***solely*** on his "calculation" that the "pattern and volume of customer complaints during the class period are inconsistent with Household's having pursued a company-wide scheme to prey on customers." LR, ¶¶14, 138-139. Dr. Litan disregards the fact that Household customers around the country were complaining about the exact same "effective rate" presentation which was a red flag to every regulator. Dr. Litan, conceding he has no practical experience in the regulation of lending institutions, also ignores Charles Cross' testimony explaining that regulators also consider the severity of the allegations contained in the complaints, not just the number of complaints reported. *See* Apr. 9, 2008 deposition transcript of Charles Cross ("Cross Depo.") at 75:18-25 ("We measure things like are the complaints with this company greater than with a peer company and are they increasing at a greater rate, are they more egregious than other types of complaints, these types of things."), attached hereto as Ex. C.

Dr. Litan's methodology for arriving at this conclusion is flawed because he ignores any alternative explanations for the lack of complaints. In fact, as Ms. Ghiglieri discusses in detail, during the Class Period Household's internal "Complaint Tracking System" had numerous deficiencies that often resulted in the exclusion of entire categories of complaints, including all of those complaints handled by the branch offices. *See* Expert Report of Catherine Ghiglieri at 73-74, attached hereto as Ex. D. Additionally, only complaints that escalated above the branch level were actually tracked by the "Complaint Tracking System." Dr. Litan made no attempt to analyze

complaints received at the branch level and ignores internal Company documents demonstrating the deficiencies in Household's "Complaint Tracking System," documents inconsistent with the opinions defendants want Dr. Litan to present at trial. Dr. Litan Depo. at 25:6-11; 33:19-35:1. Dr. Litan's failure to take into consideration all alternative explanations for the small "complaint rate" makes his opinion and testimony unreliable and inadmissible. *See, e.g.*, *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000) (excluding testimony where proposed expert had not considered all relevant evidence).

Dr. Litan also discusses the increase in the number of "hits" or references to the term "predatory lending," noting that use of the term increased by 595% in 2001. According to Dr. Litan, this spike illustrates that subprime lenders such as Household faced an increasing risk of allegations of predatory lending by activists and regulators. Because of this increasing risk, Dr. Litan opines, without any support, "Household made increasingly specific disclosures of this risk during the class period." LR, ¶18. Dr. Litan then reasons that Household's "specific disclosures" made investors aware of Household's exposure to various risks stemming from the Company's predatory lending practices. *Id.* Yet he ignores defendants' repeated Class Period denials about the Company's involvement in deceptive lending practices.

Dr. Litan employs no scientific, technical, or other specialized knowledge in reaching this conclusion, but instead conducts what amounts to no more than a basic word search for the term "predatory lending" in only ***one*** periodical, *The American Banker.* LR, ¶16; Dr. Litan Depo. at 112:20-21 ("I just did a word search to find out how many times it was searched."); *id.* at 115:13-116:4 ("**Q:** So your analysis was based purely on the number of hits without including other factors affecting the industry or the state of the legal or regulatory outlook; is that correct? **A:** Well, I used the hits and the mention of the term just to illustrate the fact that, as I said, the term was new . . . ."). Dr. Litan's "methodology" fails to take into consideration commonly used synonyms for predatory lending such as "mortgage fraud" or "deceptive lending." *See id.* at 117:15-22 (testifying that he did not search for the term "mortgage fraud," even though his colleague (and another one of defendants' proposed experts, John Bley) testified that predatory lending is merely a new term for mortgage fraud).[4] At no time did Dr. Litan demonstrate how conducting a basic word search rises to the level

[4] Similarly, Dr. Litan opines that there was a very small number of "effective rate" complaints during the Class Period, which, in his opinion, demonstrates that Household's predatory lending scheme was limited to one geographic region or one specific lending branch. He bases this opinion on the fact that he found

of reliable methodology contemplated by *Daubert* and its progeny – any lay person could conduct a similar "analysis."[5] Nor does Dr. Litan make any attempt to establish a rationale link between the number of references to the term predatory lending in one periodical to an increased risk in predatory lending allegations to Household.

As demonstrated by the foregoing, Dr. Litan utilized no verifiable "methodology" to determine that Household did not engage in a nationwide predatory lending scheme. His opinions, conclusions and testimony concerning Household's predatory lending practices are based on speculation, supposition and lack adequate support from the relevant facts and data. His opinions do not meet the showing of reliability required to be admissible under Rule 702 and should be excluded at trial. *See, e.g.*, *Klaczak*, 458 Supp. 2d at 666 (excluding expert testimony of expert lawyer/paramedic because not qualified to offer expert opinions on market conditions in ambulance services industry and because his limited knowledge made his testimony unreliable).

2. Dr. Litan's Opinion that Household Fully Disclosed Its Loan Products and Practices Is Unreliable and Should Be Excluded

According to Dr. Litan, even if Household was engaged in deceptive lending practices during the Class Period, Household fully disclosed Household's loan products and lending practices to investors via debt securitization prospectuses aimed at debt investors, rather than common stock equity investors who are the Class members in this action. *See* LR, ¶86; Dr. Litan Depo. at 120:15-121:3. Dr. Litan bases this opinion on nothing more than a cursory review of Household's prospectuses and public filings from which he draws subjective, conclusory findings.[6]

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limited reference to the term "effective rate" in the complaints and regulatory examinations he reviewed. Dr. Litan Depo. at 130:18-24. Yet he failed to search for the terms "equivalent rate" or "comparative rate," two commonly used synonyms for Household's "effective rate" scam. *Id*. at 131:13-132:9. Dr. Litan ignores the fact that Household did not categorize complaints as "effective rate" complaints until much later in the Class Period, only generally identifying them as complaints regarding terms of the contract.

[5] Dr. Litan's "analysis" is akin to using Microsoft Word's "word search" function to locate all the references to the term "predatory lending" in this memorandum of law.

[6] Defendants should also be barred from introducing evidence, through their expert, that Household fully disclosed to its investors Household's predatory lending and reaging practices because Household failed to produce evidence concerning its "disclosures" during discovery. *See, e.g.*, Plaintiffs' Motion *In Limine* to Preclude Evidence Re: Defendants' Truth-on-the-Market Defense and Defendants' Stock Trading Pursuant to Fed. R. Civ. P. 37.

Dr. Litan's opinion is based on his review of securitization prospectuses publicly filed by a completely separate legal entity, Household Finance Corporation ("HFC"). His opinion ignores the fact that HFC's debt securitization prospectuses were comprised of only a subset of Household's loan products. He did not even personally compile the prospectuses he reviewed. Instead, he relied on counsel for defendants to obtain the prospectuses and locate, within each prospectus, each alleged "disclosure." Dr. Litan Depo. at 122:11-13. He then "asked the attorneys [to] go to the prospectuses and find out what if anything did Household say in these prospectuses about [Household's lending practices] . . . were [the] subject of charges in Ms. Ghiglieri's report." *Id*. at 122:18-123:9; *see, e.g.*, *Lyman v. St. Jude Medical S.C., Inc.*, 580 F. Supp. 2d 719 (E.D. Wis. 2008) (expert testimony unreliable where expert witness failed to independently verify data provided to him by counsel). In other words, Dr. Litan's opinion is based solely on information spoon-fed to him by defendants; information that naturally advances only the arguments defendants will present at trial. He concedes he never even read the prospectuses in their entirety. *See, e.g.*, *Sommerfield v. City of Chicago*, No. 06 C 3132, 2008 WL 4786509, at * 8 (N.D. Ill. Nov. 3, 2008) (excluding expert testimony where expert relied solely on information provided to him by attorneys because such information was inherently unreliable).

Moreover, Dr. Litan made no attempt to determine whether HFC's securitization prospectus "disclosures" were consistent with the policies in place at Household during the Class Period, or if the prospectuses even contained accurate representations. Dr. Litan Depo. at 123:10-124:3. Dr. Litan uses the prospectuses to promote defendants' contention that Household's reaging and other lending practices were disclosed. *Id*. at 277:25-278:10 (not opining on the accuracy of the prospectus disclosures, but "just taking them at face value saying that they – whatever it is that I've stated here that they disclosed, they disclosed"); *id*. at 282:21-283:1 (failing to compare what Household disclosed with the Company's own internal policies; "all I did was look at what it is they told investors"). Where, as here, an expert simply sets forth a subjective opinion, "[t]he trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'" Fed. R. Evid. 702, Advisory Committee Notes, 2000 Amendments; *see also O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1106-07 (7th Cir. 1994) (expert testimony based on completely subjective methodology held properly excluded).

Finally, to the extent Dr. Litan's opinion is simply that Household disclosed its predatory lending and reaging practices, no "technical or other specialized knowledge" is required to reach this conclusion. Fed. R. Evid. 702. Nor will Dr. Litan's "expert" opinion actually assist the trier of fact

in understanding whether Household did indeed disclose its lending and reaging practices. Because Dr. Litan would merely be testifying to something "within the average person's grasp," his opinion should be excluded at trial. *Sommerfield*, 2008 WL 4786509, at *13.

B. Dr. Litan Lacks the Requisite Expertise to Opine on the Reasons Household Settled with the State Attorneys General

To offer an expert opinion, a witness must be "qualified as an expert by knowledge, skill, experience, training or education." Fed. R. Evid. 702; *Traharne v. Wayne Scott Fetzer Co.*, 156 F. Supp. 2d 717, 720 (N.D. Ill. 2001) (Guzman, J.) ("A witness may offer an expert opinion ***only*** when he or she draws on specialized 'knowledge, skill, experience, training or education.'"). Courts must focus on whether a witness is shown to have specific expertise in an area at issue that qualifies him as an expert with respect to each opinion offered. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156 (1999); *Jones v. Lincoln Electric Co.*, 188 F.3d 709, 723 (7th Cir. 1999) ("Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony."). While expertise may be based on experience or training, "the district court must ensure that it is dealing with an expert, not just a hired gun." *Tyus*, 102 F.3d at 263. Dr. Litan lacks the expertise required to offer testimony on the reasons Household settled with the state Attorneys General.

In his report, Dr. Litan opines that the reason "Household's senior management entered into various settlements [was] to reduce uncertainties that were impeding the Company's ability to raise capital and suppressing the Company's stock price." LR, ¶¶20, 98-99. Because of this, Dr. Litan concludes, "Household . . . had legitimate business reasons to have settled the various state investigations." LR, ¶¶21, 98, 103, 107, 109. Dr. Litan holds himself out as an "expert" on the reasons why large corporations such as Household choose to enter into settlements with state or federal governmental agencies. He draws his purportedly relevant "expertise" from the ***two*** years he spent as Deputy Assistant Attorney General in the Antitrust Division at the Department of Justice, during which time he "negotiated numerous settlements of alleged violations of the federal antitrust laws on behalf of the U.S. government." LR, ¶4; Dr. Litan Depo. at 91:8-16 (testifying as to personal experience of negotiating settlements with parties that have been subject to government investigations); *id*. at 94:25-95:1 ("having negotiated settlements with other parties"); *id.* at 85:24-86:1 ("I should point out . . . I was a prosecutor."). Dr. Litan fails, however, to explain how his

experience at "Justice" is a sufficient basis for his opinion and how his experience is "reliably [applied] to the facts." Fed. R. Evid. 702.

For example, when pressed further about the "legitimate business reasons" underlying Household's settlement, Dr. Litan does no more than extrapolate from his "experience" at "Justice" and conclude that Household must have been concerned about the "legal fees involved" or the "general uncertainty" to Household's capital.[7] *See* Dr. Litan Depo. at 95:9-96:11 (vaguely inferring from his own experience, "having been involved in these kind of situations, that I'm sure they must have known the legal fees involved"); *id*. at 91:8-25 (bringing to bear his "***personal experience***, having negotiated settlements with parties that have been subject to government investigations . . . companies typically in my opinion settle because they want to save money on lawyers"). However, "[a] witness who invokes '[his] expertise' . . . is not an expert as Rule 702 defines that term." *Zenith Electronics Corp.*, 395 F.3d at 419. Because Dr. Litan has done nothing more than rely on his extremely limited two years as a Deputy Assistant Attorney General, he should not be permitted to testify concerning the reasons Household settled with the state Attorneys General. *See, e.g.*, *Sports Arena Mgm't, Inc. v. K&K Ins. Group, Inc.*, No. 06 C 6290, 2008 U.S. Dist. LEXIS 51431, at *8 (N.D. Ill. June 26, 2008) (Guzman, J.) (excluding expert testimony where "opinions are based solely on [the expert's] own, admittedly tangential, experience"); *In re Chapman*, 297 F.3d 682, 688 (7th Cir. 2002) ("Personal observation is not a substitute for scientific methodology and is insufficient to satisfy *Daubert's* most significant guidepost.").

Even if Dr. Litan did possess the requisite expertise, which he clearly does not, he should still be barred from testifying at trial because his opinions concerning the Attorneys General settlement are unreliable. The crux of his opinion is that Household settled with the state Attorneys General to reduce uncertainty and risk stemming from increased allegations of predatory lending during the Class Period – uncertainty and risk that were depressing Household's stock price and impairing its ability to raise capital. LR, ¶107. During his deposition, however, Dr. Litan conceded that he failed

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[7] Dr. Litan's deposition is replete with testimony demonstrating he relied on nothing more than his limited "experience" at "Justice" to opine on such matters as the reasons behind Household's settlement with the state Attorneys General or the significance of the state Attorneys General investigations. All of these opinions must be excluded at trial. *See, e.g.*, Dr. Litan Depo. at 87:1-13 ("When I was at Justice, some other people at our department, ***not me***, ***but some other people*** took the responsibility for suing General Motors – excuse me, General Electric in a criminal investigation. . . . The government lost. . . . It's an example where just because the government even formally charges somebody does not mean that in fact the person did it . . . ."). Dr. Litan has no basis for his conclusion even with respect to this anecdote because there could be a host of reasons why the government "lost."

to consider whether there were any other reasons why Household was unable to raise capital. Dr. Litan Depo. at 90:12-14 ("All I looked at was the documentary evidence indicating that this was ***one*** reason why they wanted to settle this case."). His failure to consider alternative explanations for Household's inability to access the capital markets warrants the exclusion of his testimony at trial. *See, e.g.*, *Allen v. LTV Steel Co.*, 68 Fed. Appx. 718, 721 (7th Cir. 2003) (affirming exclusion of expert whether expert made absolutely no attempt to account for other alternative explanations of tire explosion); Fed. R. Evid. 702, Advisory Committee Notes, 2000 Amendments (enumerating other factors courts should consider in determining the reliability of expert testimony, including "whether the expert has adequately accounted for obvious alternative explanations").

Dr. Litan's opinion also fails to account for defendants prior representations to plaintiffs and this Court that Household settled for ***legal reasons***. *See* Docket No. 658 (Aug. 30, 2006 Minute Entry). During discovery, plaintiffs sought from defendants information concerning the reasons Household entered into a settlement agreement with the state Attorneys General. While defendants provided some information concerning the motivation behind the settlement, defendants withheld other information from plaintiffs based on claims of attorney-client privilege. *See* Docket No. 552 (Plaintiffs' Memorandum of Law in Support of its Motion to Compel Household Defendants' Responses to the Third Set of Interrogatories). Plaintiffs subsequently moved the Court to compel defendants to provide a full response; however, the Court sided with defendants, concluding defendants settled based on the advice of counsel. *See* Docket No. 658 . As a result of the Court's order, plaintiffs were prevented from obtaining any additional discovery concerning Household's reasons for settling with the state Attorneys General. Defendants should not be permitted to argue, through their expert, that Household settled due to "legitimate business reasons" after successfully convincing the Court that Household settled primarily for legal reasons. *See* Docket No. 658. Dr. Litan's testimony on this issue should therefore be excluded at trial.[8] *See, e.g.*, *In re Cassidy*, 892

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[8] Dr. Litan also opines that Household did not use AMPTA to circumvent state law with regard to its Pay Rights Reward (PRR) program. As addressed in a separate motion *in limine*, Dr. Litan must also be precluded from offering testimony on this opinion at trial. During discovery, defendants claimed attorney-client privilege with respect to documents relating to Households' PRR and AMPTA. Due to defendants' assertion of the attorney-client privilege, plaintiffs were unable to obtain information concerning the PRR and AMPTA. Defendants should not now be permitted to introduce evidence, whether through their expert or otherwise, that they believed the PRR program qualified under AMPTA. *See* Plaintiffs' Motion *In Limine* to Exclude Defense Documents or Testimony Which Refer to Advice from Counsel that Defendants Complied with Federal and State Laws.

F.2d 637, 641 (7th Cir. 1990) ("'Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter . . . assume a contrary position.'").

C. Dr. Litan's Opinion that Defendants' Acquisition of Stock During the Class Period Negates Any Inference of Scienter Impermissibly Impedes on the Role of the Jury and Should Be Excluded

Dr. Litan improperly opines there is no evidence that the defendants in this case acted with scienter because they "actually ***acquired*** more Company shares and options than they sold during the class period." LR, ¶28 (emphasis in original). He then concludes that "[b]ecause the senior managers of the Company were themselves significant acquirers and holders of shares and options in the Company, their interests were aligned with the class of shareholders that has sued them in this action." *Id*. Dr. Litan should be precluded from offering his opinions on defendants' Class Period state of mind at trial. First, he bases his opinion on a flawed and impermissibly unreliable "stock holding analysis." Second, his opinion concerning defendants' state of mind during the Class Period is an improper attempt to assume the role of advocate for defendants and usurp the role of the jury as trier-of-fact.

In concluding that defendants acquired or held stock during the Class Period, Dr. Litan conducted an "executive stock holding analysis summary" based on a review of Household's Forms 4 and 5 public filings. Dr. Litan's "stock trade analysis" is inherently unreliable. Dr. Litan assumed the accuracy and completeness of the three individual defendants' SEC filings without independently verifying whether the figures were correct. He considered ***only*** the buying and selling that occurred during the Class Period and blatantly ignores the myriad reasons why defendants did not sell stock during the Class Period, such as whether there was a period of time during which Household senior executives could not trade due to Household's pending merger with Wells Fargo or HSBC, whether defendants' stock options would accelerate as a result of the merger, or if certain options were unvested or under water and therefore not exercisable during the Class Period.[9] Dr. Litan Depo. at 257:22-258:10 ("I was just looking at the – the buying and the selling that was going on."); 261:7-262:9 (testifying that he "wouldn't . . . have knowledge about that"). He even admitted that he was

[9] There is evidence that indicates Household was contemplating a merger with Wells Fargo as early as October 2000. Defendants would have been prohibited from selling Household stock while in possession of material, non-public information concerning any merger.

not retained to opine on why management might have held their stock during the Class Period. *Id*. at 261:21-262:25; 263:16-17.

In fact, one could reach the exact opposite result – that the individual defendants "sold" more stock than they "bought" during the Class Period. For example, Dr. Litan opines that the total common stock possessed by Aldinger increased by net 278,391. However, an analysis of Aldinger's transactions during the Class Period (excluding (i) the removal of restrictions on restricted shares; (ii) transfer of shares to a family LP; (iii) transfer to a charity; and (iv) sale of stock received in connection with option exercises to cover taxes/cost of exercise) reveals that Aldinger actually purchased $2.0 million in common stock, but ***sold*** common stock for a total of nearly ***$11.5 million***.[10] Dr. Litan admittedly failed to analyze the cost of purchase of stock compared to any proceeds defendants might have received from the sale. Dr. Litan Depo. at 257:22-258:10 ("I was just looking at the – the buying and the selling that was going on."). Dr. Litan does not demonstrate (nor can he) how his stock holding "analysis" is reliable in light of his admitted failure to consider any alternative explanations for defendants lack of stock sales during the Class Period.

Dr. Litan then extrapolates from defendants' lack of selling a confidence in the Company – behavior he opines is inconsistent with "some kind of massive intent to deceive and dupe investors." *Id*. at 260:13-20. Dr. Litan's wholesale failure to demonstrate how he is qualified to offer an opinion on defendants' intent warrants the exclusion of his testimony at trial. Moreover, Dr. Litan's opinion overlooks the fact that a lack of insider selling does not automatically negate any inference of scienter. *See, e.g.*, *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. West Holding Corp.*, 320 F.3d 920, 944 (9th Cir. 2003) ("Scienter can be established even if the officers who made the misleading statements did not sell stock during the class period. In other words, the lack of stock sales by a defendant is not dispositive as to scienter."); *Pirraglia v. Novell, Inc.*, 339 F.3d 1182, 1191 n.12 (10th Cir. 2003) (declining to negate scienter or infer lack of motive to defraud from fact defendants did not sell their stock).

Dr. Litan's opinion and proffered testimony as to defendants' state of mind is not a proper subject for expert testimony, but rather an attempt to "improperly . . . assume the role of advocate[]" for the defendants' case. *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 546 (S.D.N.Y.

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[10] The same analysis of Gilmer's and Schoenholz's Class Period transactions reveals that Gilmer bought $85,312.50 in stock but sold nearly $2.0 million, while Schoenholz bought less than $1.0 million in stock but sold $1.2 million.

2004). Through his opinions, Dr. Litan is attempting to instruct the jury on whether defendants acted knowingly or recklessly during the Class Period. The jury should hear these facts from the parties, then hear the law and obligations arising from that law from the Court – not from defendants' expert witness. The determination of whether defendants acted with scienter is solely for the jury. *See, e.g.*, *Klaczak v. Consol. Med. Transp. Inc.*, No. 96 C 6502, 2005 U.S. Dist. LEXIS 13607, at *31 (N.D. Ill. May 26, 2005) ("precedent 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"). For all of the above reasons, Dr. Litan should be precluded from testifying about defendants' state of mind at trial.

D. None of Dr. Litan's So-Called "Expert Opinions" Will Assist the Trier of Fact in Understanding the Evidence or Determining Any Fact in Issue

Finally, in order to be admissible, Dr. Litan's expert "opinion" must actual ***help*** the trier of fact. "Expert testimony is helpful to the jury if it concerns a matter beyond the understanding of the average person." *Sommerfield*, 2008 WL 4786509, at *13; *Dhillion*, 269 F.3d at 871 ("An expert . . . must testify to something more than what is 'obvious to the layperson' in order to be of any particular assistance to the jury." (quoting *Ancho v. Pentek Corp.*, 157 F.3d 512, 519 (7th Cir. 1998)). "However, no expert testimony is needed when the subject matter of the testimony is clearly within the average person's grasp." *Sommerfield*, 2008 WL 4786509, at *13.

None of Dr. Litan's subjective conclusions will actually ***help*** the jury; his report and proposed testimony merely tell the jury what to decide. Opining that the Ghilglieri report does not establish Household engaged in a nationwide scheme of predatory lending, or that there is no clear definition of the term "predatory lending" is vague and serves no purpose other than communicating defendants' views – through their expert – on how this case should be decided. *See, e.g.*, *Sommerfield*, 2008 WL 4786509, at *16. Whether the Ghiglieri report is based on sufficient documentation is a factual question "that is left for the jury to determine after opposing counsel has been provided the opportunity to cross-examine the expert." *Smith*, 215 F.3d at 719; *Kempner Mobile Elecs., Inc. v. Southwestern Bell Mobil Sys.*, 428 F.3d 706, 713 (7th Cir. 2005) (affirming district court conclusion that expert testimony would not assist the trier of fact of determine the issue of fraud damages). Because none of Dr. Litan's so-called "expert opinions" will actually assist the trier of fact, his testimony should be excluded at trial.

IV. CONCLUSION

For the foregoing reasons, the Court should exclude the testimony of defendants' proposed expert, Dr. Robert Litan, at trial.

DATED: January 30, 2009

Respectfully submitted,

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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 January 30, 2009, declarant served by electronic mail and by U.S. Mail to the parties the **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO EXCLUDE TESTIMONY OF DEFENDANTS' PROPOSED EXPERT DR. ROBERT LITAN PURSUANT TO FEDERAL RULE OF EVIDENCE 702**.

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of January, 2009, at San Diego, California.

/s/ Teresa Holindrake
TERESA HOLINDRAKE

EXHIBITS A-D
FILED SEPARATELY
UNDER SEAL