

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

LAWRENCE E. JAFFE PENSION PLAN, ON
BEHALF OF ITSELF AND ALL OTHERS SIMILARLY
SITUATED,

Plaintiff,

- against -

HOUSEHOLD INTERNATIONAL, INC., ET AL.,

Defendants.

Lead Case No. 02-C5893
(Consolidated)

CLASS ACTION

Judge Ronald A. Guzman

**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS' MOTION *IN LIMINE* TO EXCLUDE
TESTIMONY OF DEFENDANTS' PROPOSED EXPERT DR. ROBERT
LITAN PURSUANT TO FEDERAL RULE OF EVIDENCE 702**

(PLAINTIFFS' MOTION *IN LIMINE* NO. 6)

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This Memorandum is respectfully submitted on behalf of Defendants Household International, Inc., (“Household”), William F. Aldinger, David A. Schoenholz and Gary Gilmer (the “Defendants”), in support of their opposition to Plaintiffs’ Motion to Exclude Testimony of Defendants’ Proposed Expert Dr. Robert Litan Pursuant to Federal Rule of Evidence 702.¹ For the reasons discussed below, Plaintiffs’ motion should be denied.

PRELIMINARY STATEMENT

Dr. Robert Litan is a nationally-recognized expert on the banking industry and financial policy. At Defendants’ request, he reviewed the Rule 26 report and the rebuttal report of Plaintiffs’ “expert” Catherine Ghiglieri. Dr. Litan has applied his considerable expertise to identify and address serious methodological defects in Ms. Ghiglieri’s all-embracing opinions. As noted in Defendants’ *Daubert* motion, Ms. Ghiglieri’s opinions are admittedly “holistic” (*i.e.*, conclusory) (*See* Declaration of Thomas J. Kavalier in Support of the Household Defendants’ Opposition to Plaintiffs’ Motions In Limine Nos. 1-10 (“Kavalier Decl.”) Ex. 2, Ghiglieri Rebuttal Report at 4) and do not reflect the application of any reproducible methodology or reliable analysis. She offers her conclusory opinions on virtually every aspect of Plaintiffs’ securities fraud claim ranging from the alleged making of false statements, to scienter, to the claimed quantification of a “financial impact” from Defendants’ alleged wrongdoing. All of this analysis purportedly flows from her regulatory expertise and her ever-shifting definition of the term “predatory lending.” As Ms. Ghiglieri herself puts it: “Well, what I do is look at the entire record and from a regulatory standpoint make judgments based on my experience, and, you know, what I’m bringing to the table is what — what I know from my regulatory experience.” (Kavalier Decl. Ex. 3, Ghiglieri Tr. 16:1-5). Ms. Ghiglieri’s proposed testimony is a sham and should be excluded on each of the grounds documented in Defendants’ *Daubert* Motion to Exclude “Expert” Testimony of Catherine A. Ghiglieri.

¹ Defendants Joseph A. Vozar and Household Finance Corporation (“HFC”) join in this opposition and expressly reserve the right to amend, supplement, or re-assert objections to any future motions by Plaintiffs to exclude documents and testimony from any proceeding or submission.

In the event Ms. Ghiglieri's testimony is not excluded, however, Dr. Litan's credentials to address the defects in Ms. Ghiglieri's opinions and methods are beyond question. Dr. Litan is a senior fellow in Economic Studies at the Brookings Institution, and he is the vice president for Research and Policy at the Kauffman Foundation. He holds a PhD in economics from Yale University. Litan has authored or co-authored twenty-one books and approximately two-hundred articles, including a 2001 paper titled "A Prudent Approach to Preventing 'Predatory Lending'." In the early 1990s, he was appointed to and served as a Member of the Presidential-Congressional Commission on the Causes of the Savings and Loan Crisis. In October 1993, President Clinton appointed Dr. Litan to serve as Deputy Assistant Attorney General for Anti-trust at the United States Department of Justice. He provided testimony before various committees of the United States House of Representatives and the United States Senate including the Subcommittee on Financial Institutions and Consumer Issues of the House Banking Committee and the Senate Banking Committee. Dr. Litan has also taught banking law at Yale Law School. (Kavaler Decl. Ex. 14, Litan Rpt. at 1-2, App. 3)

If Ms. Ghiglieri testifies at trial, Dr. Litan will respond to her repeated invocation of the ambiguous term "predatory lending" to attribute false statements to Defendants. He will address the evolving lending policy views during the Class Period about the proper balance between the competing interests of borrowers and shareholders in the market place. Dr. Litan will respond to Ms. Ghiglieri's claims that Household's public statements were false and misleading, and her claim that the Defendants "knew" that what they were doing was wrong. Dr. Litan will also testify that Household's disclosure of the very lending practices Ms. Ghiglieri labels "predatory" undercuts her contention that Household concealed its business model from the public.² As explained herein, Dr. Litan's analysis is demonstrably more rigorous than Ms. Ghiglieri's.

² Dr. Litan will also respond to Ms. Ghiglieri's allegations that "Household's policies regarding restructuring and reaging of accounts . . . masked delinquencies and charged-off loans," and that "Household made false and misleading statements in its securities filings regarding its restructuring and reaging policies." (Kavaler Decl., Ex. 1, Ghiglieri Report at 131, 166). Although Plaintiffs ask the Court to exclude Dr. Litan's testimony entirely, Pl. Br. at 1, Plaintiffs do not take issue with any of Dr. Litan's conclusions as to Household's restructuring practices.

Apart from the hypocritical invocation of reliability requirements that disqualify Ms. Ghiglieri's own analysis, Plaintiffs' principal criticism is that Dr. Litan's observations about the flaws in Ms. Ghiglieri's analysis are "within the average person's grasp" and are thus not proper subjects of expert testimony. (Pl. Br. at 9). Defendants agree that the flaws in Ms. Ghiglieri's reasoning are fundamental, and that many of the alternative explanations and analyses that Ms. Ghiglieri failed to consider are not that difficult to see. But these are among the many valid reasons *to exclude Ms. Ghiglieri's testimony*, not to preclude Defendants from responding with expert analysis if Ms. Ghiglieri is allowed to appear. The fact that the criticisms of Ms. Ghiglieri's methods are basic, however, is a function not of any lack of sophistication or expertise on Dr. Litan's part but rather of the fact that Ms. Ghiglieri failed to employ reliable methods in reaching her conclusions.

At best, Plaintiffs' limited challenges to four of Dr. Litan's opinions go to the weight a jury should afford to them in criticizing Ms. Ghiglieri's problematic analysis, not to their admissibility. If Ms. Ghiglieri is allowed to testify in spite of numerous reliability problems with her analysis, Defendants must be permitted to offer evidence from an indisputable expert to point out the flaws and shortcomings of her approach and conclusions. The attachment of an "expert" label to her suspect analysis is precisely the reason Dr. Litan's testimony will be necessary to explain her many methodological defects to the jury. If she is not permitted to testify, however, there will be no need for Dr. Litan to offer any of the opinions criticized in Plaintiffs' motion.

ARGUMENT

Plaintiffs never acknowledge that it is Ms. Ghiglieri's report that provides the context and subject matter for Dr. Litan's opinions. Instead, Plaintiffs choose to focus on four of Dr. Litan's numerous criticisms in a vacuum (Pl. Br. at 2), eschewing the reality that each of his challenged opinions relates directly to a specific methodological problem in Ms. Ghiglieri's analysis. The four criticisms that Plaintiffs object to are:

1. Dr. Litan's opinion that Household's disclosure of its loan products and practices undercuts Ms. Ghiglieri's conclusion that Household lied to the public and investors. (*Responding to, e.g., Kavalier Decl. Ex. 1, Ghiglieri Rpt. at 81* ("Household

contended that it did not engage in predatory lending, however, its actions did not support its words.”; *and* 166 “Household made false and misleading statements in its securities filing regarding its restructuring and reaging policies”));

2. Dr. Litan’s rebuttal of Ms. Ghiglieri’s unfounded opinion that Household misused the federal Alternative Mortgage Transaction Parity Act (AMTPA) to “circumvent state laws.” (*Responding to, e.g., Kavalier Decl. Ex. 1, Ghiglieri Rpt. at 88*);
3. Dr. Litan’s opinion that settlements cannot reliably be taken as admissions of liability because legitimate business reasons may lead a litigant to settle a disputed legal position. (*Responding to, e.g., Kavalier Decl. Ex. 1, Ghiglieri Rpt. at 130* (using the amount of Household’s settlement payment to state Attorneys General as a basis for calculating the supposed “financial impact of Household’s foray into predatory lending”));
4. Dr. Litan’s opinion that Ms. Ghiglieri improperly ignores numerous indicia that her conclusions about scienter must be wrong. (*Responding to, e.g., Kavalier Decl. Ex. 1, Ghiglieri Rpt. at 15* (“Household and its senior executives knew what predatory lending was and engaged in it anyway.”)).

As is apparent from these citations to Ms. Ghiglieri’s report, Plaintiffs’ own expert has opined (albeit in an unscientific manner) on each of the four matters that Plaintiffs assert in their motion are inappropriate subjects for testimony by Dr. Litan. In turn, Dr. Litan has reviewed Ms. Ghiglieri’s analysis and found it to be lacking in methodological support and inconsistent with the record.

Dr. Litan’s task was to apply his expertise to evaluate the methods used and conclusions reached by Ms. Ghiglieri. He did so, and he concluded that her methods were deeply and irretrievably flawed. Plaintiffs unsurprisingly would prefer not to have these defects exposed by a highly-regarded expert and would rather have Ms. Ghiglieri’s opinions stand unchallenged. Although this position comports with Plaintiffs’ consistent effort to overcome deficiencies in their evidence by insulating the jury from the truth, it is flatly inconsistent with federal case law and common sense.

Dr. Litan's critique of Ms. Ghiglieri's methods and conclusions easily meets the requirements of the Federal Rules; it is her opinions that do not. Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993), prescribe that trial courts will play a gatekeeper role as to proposed expert evidence. *Daubert* sets forth a two-pronged analysis to assess proposed expert testimony, probing its (a) reliability and (b) relevance. See *Chapman v. Maytag Corp.*, 297 F.3d 682, 686 (7th Cir. 2002). The first prong requires the Court to make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid." *Daubert*, 509 U.S. at 592-93. The second prong requires the Court to assess whether the proposed expertise "fits" an issue in the case and thereby advances the trier of fact's understanding of that issue. *Chapman*, 297 F.3d at 687.

Plaintiffs' motion seeks to misdirect the application of the *Daubert* requirements away from Ms. Ghiglieri's "holistic" analysis. Dr. Litan's role here was not to design a study, or to conduct a survey. Dr. Litan's role was to assess the reliability of the methods used by Plaintiffs' expert Ms. Ghiglieri and to opine whether the conclusions she reached were fairly and adequately supported. In the event Ms. Ghiglieri is permitted to testify, Defendants must be permitted to offer their own expert testimony in rebuttal to point out to the jury the many flaws in Ms. Ghiglieri's methods. See *United States v. Barnette*, 211 F.3d 803, 824 (4th Cir. 2000) ("Despite Barnette's attorney's cross examination of Dr. Duncan on the validity of Dr. Duncan's technique, questions from an attorney are not nearly so effective as the testimony of a qualified expert witness."); see also *Menshikova v. Chicago*, 1997 WL 305314 (N.D. Ill. May 29, 1997) (Shadur, J.) (recognizing that a jury "may lend undue weight to opinion testimony" by a witness labeled an "expert") (internal citations omitted).

I. DR. LITAN FAIRLY REJECTS MS. GHIGLIERI'S CONCLUSIONS THAT DEFENDANTS LIED ABOUT "WIDESPREAD PREDATORY LENDING" AT HOUSEHOLD

A. DR. LITAN OFFERS OBJECTIVE REASONS TO REJECT MS. GHIGLIERI'S CONCLUSION THAT HOUSEHOLD ENGAGED IN "SYSTEMIC PREDATORY LENDING"

Ms. Ghiglieri concludes in her report that "[w]hile Household contended that the problems were isolated to a few branches, the documents and testimony show that the predatory lending practices were systemic, widespread and geographically dispersed." (Kavaler Decl. Ex.

1, Ghiglieri Rpt. at 123). Dr. Litan began his evaluation of that conclusion with a straightforward analysis: he took the number of complaints Ms. Ghiglieri relied on, compared that number to the total number of loans (an exercise Ms. Ghiglieri expressly eschewed, *see* Kavalier Decl. Ex. 3, Ghiglieri Tr. 82:21-83:2), and found the complaint rate to be miniscule. He obtained the information he needed from Household's 10-K filings and the discovery record, materials that were equally available to Ms. Ghiglieri.

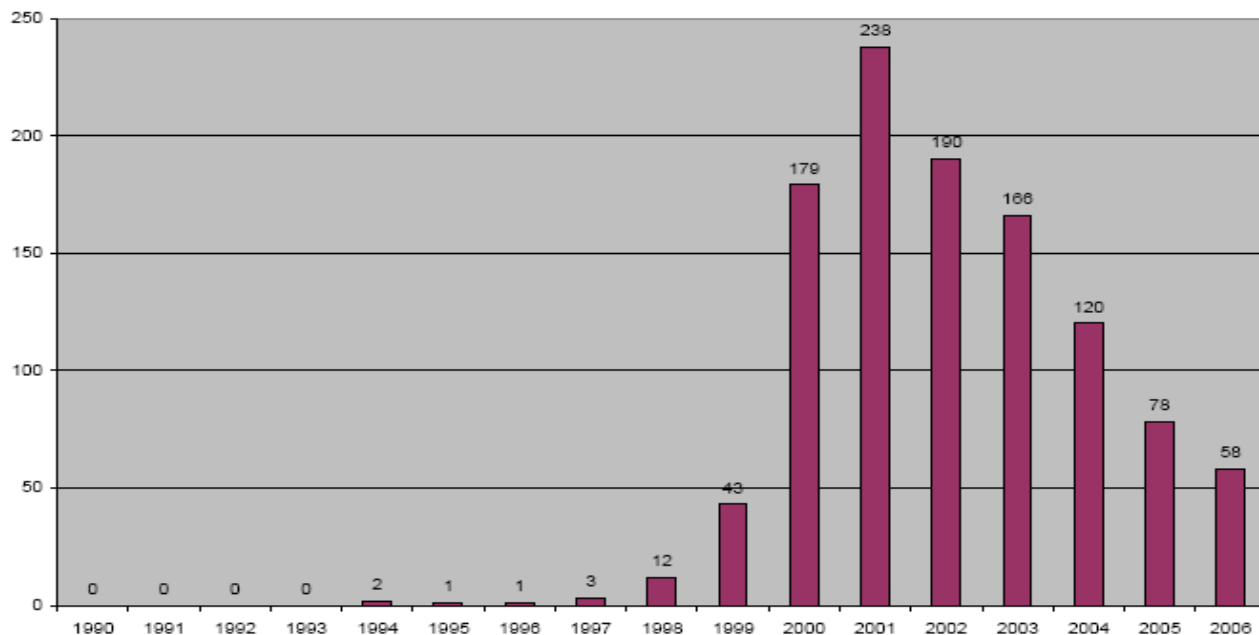
Of course, the calculation of a complaint rate is a simple, easy-to-understand way of testing Ms. Ghiglieri's conclusion that there was a "widespread," "systemic" predatory lending scheme. The fact that she did not calculate the complaint rate herself suggests both a failure of method and a lack of objectivity on her part. Unsurprisingly — and perhaps having performed the calculations but been loath to report the results — Ms. Ghiglieri now *rejects the whole concept of objective quantifications*, calling the complaint rate "an irrelevant number." (Kavalier Decl. Ex. 3, Ghiglieri Tr. 80:21-81:5). Ms. Ghiglieri's admitted failure to consider the total number of loans sold by Household across the country before determining that the handful of customer complaints constituted a "widespread" scheme of predatory lending is a prime example of her abject methodological failure. (Kavalier Decl. Ex. 3, Ghiglieri Tr. 67:4-68:11). Mr. Litan's identification of the problem might be "within the average person's grasp" (Pl. Br. at 9), but it is not out of bounds as expert opinion — it is right on point.

Dr. Litan's analysis is in every respect more rigorous and reproducible than Ms. Ghiglieri's. Where Ms. Ghiglieri made no attempt at even simple quantitative analysis, Dr. Litan performed reproducible calculations that Plaintiffs' counsel can test on cross-examination (and which Ms. Ghiglieri can attempt to dispute if she is permitted to testify). Plaintiffs' arguments provide no basis for excluding Dr. Litan's testimony, particularly where Dr. Litan has employed an objective methodology of exactly the type the law requires (and Ms. Ghiglieri has not). By challenging his calculations and arguing that Dr. Litan omitted pertinent inputs, Plaintiffs' motion (Pl. Br. at 5-6) implicitly concedes that Dr. Litan used a replicable method — just one Plaintiffs don't happen to like. The supposed limitations of Dr. Litan's conclusions are a subject for cross-examination, not a basis for exclusion. *See Saad v. Shimano American Corp.*, 2000 WL 1036253, at *4 (N.D. Ill. 2000) (Schenkier, M.J.) ("[T]he court's gatekeeping function focuses on an examination of the expert's methodology. The soundness of the factual underpinnings of

the expert’s analysis and the correctness of the expert’s conclusions based on that analysis are factual matters to be determined by the trier of fact”) (internal citations omitted).

Plaintiffs are also unhappy with a graphic illustration contained in Dr. Litan’s report. (Pl. Br. at 6-7). The challenged illustration depicts the increasingly frequent use of the term “predatory lending” during the Class Period in a well-known trade publication, *The American Banker*. Of course, that ambiguous term is at the core of Plaintiffs’ claims in this case, and it appears more than 350 times in Ms. Ghiglieri’s report. In responding to Ms. Ghiglieri’s ever-shifting use of this term, Dr. Litan hypothesized that the increased focus on “predatory lending” issues in the media might have corresponded with the increased reputation and headline risks Household faced in connection with its dealings with regulators and consumer activists during the Class Period. That Litan’s hypothesis is borne out by this data speaks for itself.

American Banker References to "Predatory Lending" by Year (1990 - 2006)*



* Source: Search of Westlaw’s American Banker (AMBKR) database for term “predatory lend!”

The illustration depicts a peak in references to the term “predatory lending” in 2001 and 2002, which coincided, as Dr. Litan hypothesized, with the period of highest regulatory and headline risk at Household. It represents an alternative explanation (ignored by Ms. Ghiglieri) for the regulatory focus on Household and the challenges its industry faced during the

Class Period. Again, Plaintiffs' argument that "any lay person could conduct a similar 'analysis'" (Pl. Br. at 7), even if true, is not a basis to exclude Dr. Litan's expert opinion about the implications of this development. Dr. Litan is particularly qualified to testify as to the growing focus on the topic of "predatory lending" during the period at issue in this illustration because he was a key participant in the public policy debate at the time; he offered testimony before Congress and prepared a report on sensible approaches to the evolving policy issues. Notably, Plaintiffs' motion does not fault the data itself (which they could easily check to confirm). In fact, this type of objectively confirmable contextual investigation of a given hypothesis is exactly the kind of testimony that experts are supposed to provide to assist the jury.

Ms. Ghiglieri reached her sweeping conclusion of "systemic" and "widespread" "predatory lending" on the basis of no discernable method at all other than "eyeballing" a portion of the discovery record cherry-picked by Plaintiffs' counsel. In response, Dr. Litan employed straightforward and reproducible analyses to expose the shortcomings of Ms. Ghiglieri's approach and to identify alternative explanations for the observed facts that Ms. Ghiglieri failed to consider. Ms. Ghiglieri's failure to consider these alternative explanations is yet another reason to exclude her testimony, not that of Dr. Litan. *See* Fed. R. Evid. 702 Advisory Committee's note (2000) (citing *Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider alternative causes for the plaintiff's condition)).

B. DR. LITAN FAIRLY REJECTS MS. GHIGLIERI'S CONCLUSION THAT HOUSEHOLD MISLED THE PUBLIC ABOUT ITS LOAN PRODUCTS

Plaintiffs' motion seeks to exclude Dr. Litan's rejection of Ghiglieri's opinion that Household lied about the loans it was selling to the public. (Pl. Br. At 7-9). Again, Plaintiffs' criticism is asserted without the context of Ghiglieri's opinion to which Dr. Litan responds (*i.e.*, her "opinion" that Defendants' "actions did not support their words") (Kavaler Decl. Ex. 1, Ghiglieri Rpt. at 81; *see also id.* at 166 ("Household made false and misleading statements in its securities filing . . .")).

With no stated foundation or authority, Ms. Ghiglieri opines that many of Household's loan products were *per se* "predatory." For example, she identifies "predatory lending products" to include "making loans in excess of 100% of the value of the home" (Kavaler Decl.

Ex. 1, Ghiglieri Rpt. at 95) and charging prepayment penalties for periods of “up to five years.” (Kavaler Decl. Ex. 3, Ghiglieri Tr. 360:6-11). Ms. Ghiglieri further concludes that Household took steps to “conceal” its alleged wrongdoing. (Kavaler Decl. Ex. 1, Ghiglieri Rpt. at 24). In response to Ms. Ghiglieri’s conclusion that Household sought to “conceal” the nature of its loan portfolio, Dr. Litan points to evidence that Household laid bare in public filings the very products and practices Ms. Ghiglieri criticizes under her definition of “predatory.”³

The fact that Ms. Ghiglieri failed to consider these disclosures before concluding that Household sought to “conceal” the practices she deems “predatory” reveals yet another of her severe methodological failings and yet another reason that her testimony should be excluded. Yet, ignoring their own expert’s shortcomings, Plaintiffs’ motion absurdly suggests that Dr. Litan should have doubted the veracity of the SEC securitization disclosures, which Ms. Ghiglieri never even considered at all. (Pl. Br. At 8). Needless to say, Plaintiffs have never once alleged that the prospectuses were false, or included them on any list of the Company’s alleged false statements. Their point is and always has been that certain information was concealed. These prospectuses show that it was instead revealed. If Ms. Ghiglieri is permitted to convey her “holistic” opinion that Defendants are liars, Defendants should be allowed to present the testimony of their own expert, Dr. Litan, to explain to the jury what is wrong with her approach.

³

Moreover, Dr. Litan can provide helpful testimony to the jury in this connection. Dr. Litan can explain to the jury, as he does in his report, what securitization of loans is and why finance companies rely on securitization of loans to access the capital they need to fund ongoing operations. Dr. Litan can explain to the jury that investors in securitizations require the issuing company to disclose extensive, detailed information about the underlying loans, including the loan terms (interest rates, prepayment penalties, whether the loans are first liens or second liens, the loan-to-value (LTV) ratios, etc.). These are critical points, and they are points that are not within the ambit of most lay jurors. Thus, Dr. Litan’s expert testimony on the subject of Household’s securitization prospectus disclosures is entirely appropriate. *See Sommerfield v. City of Chicago*, No. 06 C 3132, 2008 WL 4786509, at *13 (N.D. Ill. Nov. 3, 2008) (Cole, M.J.) (“Expert testimony is helpful to the jury if it concerns a matter beyond the understanding of the average person.”) (internal citations omitted).

II. DR. LITAN FAIRLY REJECTS MS. GHIGLIERI'S UNFOUNDED OPINION THAT HOUSEHOLD MISUSED THE FEDERAL ALTERNATIVE MORTGAGE TRANSACTION PARITY ACT (AMTPA) TO CIRCUMVENT STATE LAW

Ms. Ghiglieri claims that Household improperly relied upon the federal preemption provisions in the Alternative Mortgage Transaction Parity Act (“AMTPA”) “in an attempt to circumvent State laws that prohibited the imposition of a prepayment penalty on traditional mortgages.” (Kavaler Decl. Ex. 1, Ghiglieri Rpt. at 30). Dr. Litan’s opinions reject Ms. Ghiglieri’s baseless assertion that designing loan products that are subject to a federal regulatory regime, and thus taking advantage of federal preemption (as Congress intended) to avoid the strictures of varying state laws (in the 46 separate states in which Household operated), constitutes a “predatory” practice. Although Plaintiffs characterize Dr. Litan’s response on the AMTPA issue as “subjective and conclusory” (Pl. Br. at 2), they fail to articulate in their brief any argument as to why Dr. Litan’s critique of Ms. Ghiglieri’s conclusions on AMTPA does not amply satisfy the *Daubert* standards for admissibility.⁴ They also fail to explain how Ms. Ghiglieri’s unfounded and contrary views on the identical subject are somehow entitled to be heard by the jury but Dr. Litan’s carefully documented rebuttal is not.

III. DR. LITAN FAIRLY REJECTS MS. GHIGLIERI'S PREMISE THAT SETTLEMENTS SHOULD BE TAKEN AS ADMISSIONS OF LIABILITY

Plaintiffs’ motion improperly seeks to insulate from expert criticism Ms. Ghiglieri’s wholesale treatment of settlements as admissions of wrongdoing. (Pl. Br. at 9-12). Their motion fails to mention that Ms. Ghiglieri fully accepts and endorses Plaintiffs’ improper reliance on Household’s settlement of disputed claims as an admission of actual misconduct. (See, e.g., Kavaler Decl. Ex. 1, Ghiglieri Rpt. at 130 (using the amount of Household’s settlement payment to state Attorneys General as a basis for calculating the supposed “financial im-

⁴ Plaintiffs’ only argument to exclude Dr. Litan’s testimony in this area is a position they take in another brief — that Defendants should be precluded from testifying that they believed they complied with AMTPA because Defendants (with Court approval) withheld certain documents in discovery on the basis of attorney-client privilege. (Pl. Br. at 11 n.8). Defendants respond to those arguments in their opposition to Plaintiffs’ Motion *In Limine* No. 4, but it is unclear how Plaintiffs’ arguments on that issue could possibly apply to Dr. Litan, who has formed his independent expert opinions without reliance on the materials that were withheld from Plaintiffs in discovery.

pact of Household's foray into predatory lending"). In fact, the four pages of Plaintiffs' argument on this subject never once mention Ms. Ghiglieri (or her opinion to which Dr. Litan responds). What Plaintiffs improperly seek to exclude is an alternative explanation offered by Dr. Litan that Ms. Ghiglieri failed to consider or rule out: that a settling party may have done nothing wrong but nevertheless have a prudential reason for resolving an investigation or lawsuit. (See Kavalier Decl. Ex. 14, Litan Rpt. ¶ 98 ("even though they may have done nothing wrong, it is commonplace for companies to make business decisions to settle lawsuits")).⁵

Incredibly, Plaintiffs take issue with Dr. Litan's expertise to offer criticism of Ms. Ghiglieri's reasoning that is fully supported by both the Federal Rules of Evidence and the requirement that experts draw only reliable inferences from the factual record. (Pl. Br. at 9). Perhaps Plaintiffs assume that all members of the jury will have sufficient business acumen to understand on their own the cost/benefit analysis companies engage in when deciding whether to settle frivolous claims asserted against them. *But see Winchester Packaging, Inc. v. Mobil Chemical Co.*, 14 F.3d 316, 320 (7th Cir. 1994) ("although parties typically are willing to settle for less than they would demand at trial, in order to avoid the expenses and uncertainty of a full-blown litigation, this strategy might be difficult to make credible to a jury, which might treat the settlement offer as the party's highest true estimate of its damage."). More likely, Plaintiffs hope improperly to parade without challenge the fact of Household's settlement as proof of wrongdoing (as they should not be allowed to do under Fed. R. Evid. 408, *see* Defendants' Omnibus Motion In Limine to Exclude Or Limit 14 Categories of Evidence, Category D). Dr. Litan is particularly qualified to shed light on the varying reasons for parties' choices to enter settlements. In addition to Dr. Litan's advanced education in the field of economics, Dr. Litan has first-hand

⁵ Plaintiffs make the outlandish argument that Defendants' assertion of privilege as to conversations with counsel leading up to the settlement with state Attorneys General somehow indicates that the decision to settle was not made for business reasons. One need not think long to imagine a situation in which advice of counsel (perhaps to the effect that although the company's litigation position was strong, litigation of even a frivolous claim could cost millions of dollars and years of aggravation — the present lawsuit being an obvious example of this phenomenon) would lead to a business decision to settle the disputed claim. The fact that Household obtained legal advice regarding the settlement in no way undermines the possibility that Household entered into the settlement for business reasons.

experience with numerous settlements in his position as Deputy Assistant Attorney General in the United States Department of Justice.

On this subject, again, Dr. Litan's testimony will be unnecessary if Plaintiffs are precluded, as they should be, from offering Ms. Ghiglieri's testimony or other evidence to suggest that Household's settlement of disputed claims indicates liability for those disputed claims. If Plaintiffs are allowed to inflame the jury with inadmissible evidence of Household's settlement and expert testimony based on that settlement, however, Defendants should be allowed to present expert testimony supporting the alternative explanation that parties settle disputed claims for a variety of reasons including business and economic reasons.

IV. DR. LITAN FAIRLY REJECTS MS. GHIGLIERI'S CONCLUSION THAT HOUSEHOLD KNOWINGLY ENGAGED IN SO-CALLED "PREDATORY LENDING" AND THUS INTENTIONALLY MISLED INVESTORS

Plaintiffs argue that "state of mind is not a proper subject for expert testimony," (Pl. Br. at 13), and that offering expert "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." *Id.* at 12. Plaintiffs are correct, of course, but their position on this motion is again surprising in light of Ms. Ghiglieri's extensive opinions on the same subject. For example, she "opines" that:

- Household and its senior executives **knew what predatory lending was and engaged in it anyway.**" (Kavaler Decl. Ex. 1, Ghiglieri Rpt. at 15) (emphasis added).
- "Household senior management *purposefully encouraged* predatory lending. . . ." (Kavaler Decl. Ex. 2, Ghiglieri Rebuttal Rpt. at 4) (emphasis added).
- "Household senior management *knew*, based on the actions they took in 1999, that predatory lending was going to occur throughout the company." (Kavaler Decl. Ex. 2, Ghiglieri Rebuttal Rpt. at 4). (emphasis added).
- "[S]enior management *knowingly* created a company structure, culture and products that inevitably resulted in predatory lending." (Kavaler Decl. Ex. 2, Ghiglieri Rebuttal Rpt. at 6). (emphasis added).
- "Household's senior management could not have incentivized their branch employees on the five 1999 incentive components . . . without *knowing and in-*

tending that it would result in the predatory lending sales practices.” (Kavaler Decl. Ex. 2, Ghiglieri Rebuttal Rpt. at 6). (emphasis added).

- “Household *knew and intended* that predatory lending practices would occur throughout the system because of their actions taken or inaction in 1999.” (Kavaler Decl. Ex. 2, Ghiglieri Rebuttal Rpt. at 13). (emphasis added).

It was in the context of examining Ms. Ghiglieri’s conclusions as to Defendants’ “state of mind” that Dr. Litan examined the subject himself. In response to Ms. Ghiglieri, Dr. Litan offers his opinion that Defendants did not hold the same definition of the term “predatory lending” that Ms. Ghiglieri ascribes to the term in her report. (Kavaler Decl. Ex. 14, Litan Rpt. ¶ 11 (noting that “the Household definition – activity which is *intentionally* unlawful or deceptive — is narrower than Ms. Ghiglieri’s definition.” (emphasis added))). It is noteworthy that at her deposition Ms. Ghiglieri conceded the existence of material differences between her definition of the term and Defendants’ definitions (Kavaler Decl. Ex. 3, Ghiglieri Tr. 55:16-56:8). This concession poses a serious threat to Plaintiffs’ improper effort to use Ms. Ghiglieri to establish the falsity and scienter elements of their 10b-5 claim.

Litan further notes with respect to Defendants’ state of mind that the pattern of the Individual Defendants’ increasing their holdings of Household stock throughout the Class Period is economically inconsistent with the “theory that these executives were knowingly engaged in a scheme to defraud investors,” as Ghiglieri and Plaintiffs suggest. (Kavaler Decl. Ex. 14, Litan Rpt. ¶ 28). The fact that Dr. Litan’s method is reliable and replicable is verified by the fact that Plaintiffs, having compiled the same underlying data, do not quarrel with Dr. Litan’s conclusions, only with his ability to offer them to the jury to undermine Ms. Ghiglieri’s conclusory opinions.

Here again, Plaintiffs fail to acknowledge that Dr. Litan is responding to their “expert” on her own turf. If Ms. Ghiglieri is allowed to testify as to the invective conclusions contained in her reports about Defendants’ state of mind, Defendants should at the very least be allowed to present expert testimony that calls into question the basis of Ms. Ghiglieri’s conclusions. Plaintiffs’ position that Defendants’ “state of mind” is not a proper subject of expert testimony, (*see* Pl. Br. at 12-14), would be more credible if they applied it to their own expert. Nevertheless, so long as Ms. Ghiglieri is precluded from testifying on the subject, based on the very grounds Plaintiffs assert here, the issue will be moot.

In this area as with the others criticized by Plaintiffs' motion, Dr. Litan's purpose was to evaluate whether the negative analysis and opinions reached by Ms. Ghiglieri about Defendants' mental state are consistent with the record. He determined that they are not. Applying his financial expertise, Dr. Litan has synthesized complicated SEC filings in a way the jury will be able to understand in order to expose a logical flaw in Ms. Ghiglieri's reasoning. In this regard, Dr. Litan's testimony is plainly reliable and helpful to the jury to place her opinions in context.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion *In Limine* #6.

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Respectfully submitted,

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