

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

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

**LEAD PLAINTIFFS' MEMORANDUM IN OPPOSITION TO HOUSEHOLD
DEFENDANTS' DAUBERT MOTION TO EXCLUDE THE EXPERT TESTIMONY OF
CATHERINE A. GHIGLIERI**

REDACTED VERSION

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Pursuant to Fed. R. Evid. 702, this Court should admit the expert testimony proffered by Catherine A. Ghiglieri regarding two issues: (1) Household's predatory lending practices, and (2) Household's reaging practices¹ that concealed the true credit quality of its loan portfolio. Ms. Ghiglieri has relevant expertise in both topics, with over 25 years of experience as a regulator examining for these practices. Indeed, defendants themselves sought to retain her in this case based on her experience and expertise. Now, having been frustrated in that goal, defendants seek exclusion of Ms. Ghiglieri's Report (but not her Rebuttal Report)² based on Ms. Ghiglieri's qualifications, methodology and usefulness to the jury. Defendants' arguments are meritless.

Ms. Ghiglieri has 25 years' worth of regulatory expertise regarding predatory lending and reaging practices, including 18 years at the Office of the Comptroller of the Currency ("OCC") and 7 years as Texas Banking Commissioner. She has personally examined banks for predatory lending and reaging, taught others how to conduct such examinations and supervised teams of examiners conducting examinations for these practices. Despite this substantial expertise regarding predatory lending and reaging, and despite their earlier attempt to retain Ms. Ghiglieri, defendants now assert that she lacks expertise to opine on Household's predatory lending and reage practices because Household is a financial institution and not a bank. Defendants' distinction between banks and financial institutions has no relevance to Ms. Ghiglieri's testimony as evidenced by defendants' prior attempt to retain her (despite knowing her bank regulatory background) and defendants' failure to

¹ Plaintiffs allege that defendants used a number of practices to manipulate the reported delinquency and charge-off statistics, including reaging loans, rewriting loans, skip-a-pay programs, forbearances, and modifications. For ease, these practices will simply be referred to as "reaging."

² "Report" refers to the August 15, 2007 Expert Witness Report of Catherine A. Ghiglieri, attached as Exhibit A to the Declaration of D. Cameron Baker in Support of Plaintiffs' Memorandum in Opposition to Household Defendants' Daubert Motion to Exclude the Expert Testimony of Catherine A. Ghiglieri ("Baker Decl."), filed herewith. "Rebuttal Report" refers to the February 1, 2008 Rebuttal Report of Catherine A. Ghiglieri, Ex. B. All "Ex. __" references are to the Baker Decl. unless otherwise stated.

identify a single meaningful difference between the two in their motion papers. Equally probative on this point is Ms. Ghiglieri's testimony as to the lack of any such distinction and the acknowledgement, either explicit or implicit, by three of defendants' own experts that the applicable expertise involves all lenders, including both banks and financial institutions. For example, one defense expert, Robert Litan, when discussing predatory lending, cites federal and state laws applicable to all *lenders* (his term) and rests his expertise, in part, on predatory lending articles he wrote for the American *Bankers* Association. December 12, 2007 Report of Robert E. Litan ("Litan Report") at 2, 12, Ex. C.

Ms. Ghiglieri's testimony has the reliability required by Fed. R. Evid. 702 – her opinions were developed in accordance with an accepted methodology and rest upon an adequate factual foundation. Significantly, she used the same methodology she used as a regulator at the OCC and later as Texas Banking Commissioner and the same methodology used by regulators across the country to conduct examinations of lenders. Declaration of John L. Bley ("Bley Decl.") at 2, Ex. D. Applying this methodology and her experience, Ms. Ghiglieri considered and relied upon evidence developed in the record regarding, *inter alia*, defendants' training, internal controls, incentive plans, lending products and practices, complaints, regulatory reports of examination, reaging policies and practices, rewrite policies and practices, skip-a-pay programs, and reported delinquency statistics.

Ms. Ghiglieri's testimony will be of great assistance to the jury and provide the contextual framework the jury will need to analyze the elements of falsity and scienter of plaintiffs' securities fraud claims. Predatory lending and reaging are complicated, involving specialized knowledge and jargon indecipherable to the layperson. Like a regulator, the jury will be presented with evidence concerning Household's policies and products, training, internal controls, incentive plans, consumer complaints and other regulator reports of examination. However, unlike a regulator, the jury has no training or experience to assess and evaluate the evidence on these subjects. It is precisely because

of Ms. Ghiglieri's ability to help the jury bridge this gap and evaluate the evidence that defendants concoct this baseless motion attempting to knock her out.

Defendants argue that Ms. Ghiglieri's testimony is unnecessary and unhelpful to the jury because predatory lending and reaging are not elements of a federal securities fraud case. This Court has rejected defendants' argument repeatedly, including as recently as December 2, 2008 at the presentment hearing for plaintiffs' spoliation motion.³ See December 2, 2008 Hr'g Tr. at 11:5-13, Ex. E.⁴ Ms. Ghiglieri's testimony is probative on, and relevant to, issues that the jury will decide.

In sum, Ms. Ghiglieri is eminently qualified to provide testimony on these issues and her testimony is both reliable and relevant. Thus, the Court should admit her testimony pursuant to Fed. R. Evid. 702.

I. FACTUAL BACKGROUND

A. Plaintiffs' Allegations

Plaintiffs bring this case on behalf of a class of investors in Household common stock based on, *inter alia*, material misrepresentations or omissions made by the defendants regarding Household's predatory lending practices and its reaging practices. These two aspects of the alleged fraud are two sides of the same coin: a predatory loan is also a loan likely to become a delinquent loan. Rebuttal Report at 68, Ex. B. Because bank regulators have specialized experience and knowledge on both issues, plaintiffs retained Catherine A. Ghiglieri, a former career bank regulator.

³ For example, defendants argued this point extensively in their Motion to Dismiss pursuant to *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 344-46 (2005). See Dkt No. 247. However, this Court rejected those arguments without a word. See April 24, 2006 Memorandum Opinion and Order, Dkt No. 494.

⁴ The Court observed "[plaintiff are] alleging that part of the fraud upon the investors was that the Company was running a fraudulent lending scheme and denying that it was doing so and by virtue of that scheme pumping up its share values and the price of its shares, thereby defrauding its shareholders." *Id.*

B. Ms. Ghiglieri's Background and Experience

Ms. Ghiglieri is a former bank regulator who worked at the OCC for 18 years and served as the Texas Banking Commissioner for 7 years. In the course of her career as a bank regulator, Ms. Ghiglieri developed substantial experience and expertise regarding predatory lending and reaging practices.⁵ Bank regulators, including the OCC and the Texas Banking Commission, examine banks for compliance and for safety and soundness. Compliance examinations focus on whether the loans were issued in compliance with applicable law, including but not limited to consumer protection laws and regulations, such as the Real Estate Settlement Procedures Act, Regulation B, and Regulation Z, etc. Safety and soundness examinations focus on the quality of the loan portfolio and include evaluation of whether the company is using reaging practices to mask delinquencies and prevent charge-offs. Safety and soundness examinations also address compliance since compliance can pose a threat to the safety and soundness of the lending institution itself. Rebuttal Report at 69, Ex. B. Ms. Ghiglieri has also had involvement in reviewing consumer complaints regarding lending practices. Rebuttal Report at 68, Ex. B.

From 1986 to 1988, Ms. Ghiglieri served as OCC Director of Bank Supervision, Southeastern District, where she was responsible for regulating those national banks within the District that had total assets over \$1 billion or that were problem banks. From 1988 to 1992, as OCC Atlanta Field Office Supervisor she supervised 250 banks with assets less than \$5 billion covering a five state region in the southeastern United States.

⁵ As noted in her Report and her Rebuttal Report, Ms. Ghiglieri has personally examined banks for compliance and loan quality. Report at 7, Ex. A; Rebuttal Report at 67-68, Ex. B. She received extensive training from the OCC on how to conduct examinations and has taught others how to examine banks. Rebuttal Report at 67, Ex. B. At the OCC and as Texas Banking Commissioner, Ms. Ghiglieri supervised teams of examiners. Report at 7-8, Ex. A; Rebuttal Report at 67-69, Ex. B. Ms. Ghiglieri's current Curriculum Vitae is attached hereto as Ex. F.

In June of 1992, Ms. Ghiglieri was appointed to be the Texas Banking Commissioner. In this capacity, Ms. Ghiglieri was responsible for regulating all state-chartered banks in Texas. This included banks lending to subprime customers, such as Wells Fargo. The Texas Banking Department conducted compliance and safety and soundness examinations of banks operating under its jurisdiction.

As Texas Banking Commissioner, Ms. Ghiglieri was a member of the Conference of State Bank Supervisors (“CSBS”). At the meetings of CSBS, Ms. Ghiglieri participated in discussions regarding common compliance issues faced by the state bank supervisors, including various predatory lending practices.

Since July 1999, Ms. Ghiglieri has provided a wide range of consulting services to banks and other financial institutions, including assisting her clients with regulatory enforcement actions. Ex. E. She also has provided expert witness services in numerous cases involving regulatory matters, including a predatory lending action, *In re Providian Fin. Servs. Corp. Sec. Litig.*, No. C 01-3952 (N.D. Cal. 2004). Rebuttal Report at 70, Ex. B.

C. Ms. Ghiglieri Applied Her Regulatory Experience and Knowledge to Assess Whether Household Engaged in Predatory Lending Practices and Improper Reaging of Loans

Ms. Ghiglieri employed the same methodology used by regulators across the country to assess whether plaintiffs’ allegations of predatory lending and credit quality manipulation were substantiated by evidence in the record.⁶

The term “predatory lending” refers to deceptive and unfair practices and products, such as misrepresenting the terms and conditions of the loan or loaning a borrower an amount beyond his or

⁶ Because defendants generally don’t attack the reliability of Ms. Ghiglieri’s testimony regarding reaging practices, plaintiffs only provide factual background regarding Ms. Ghiglieri’s testimony on predatory lending practices and the financial impacts of those practices.

her ability to repay. Report at 12-13, Ex. A. By virtue of being deceptive or unfair, these practices and products are also illegal. There are a number of well-known predatory lending practices, such as insurance packing, equity skimming/equity stripping, loan flipping and loan splitting, all of which are at issue here. Report at 12-22, App. D, Ex. A (discussing pre-Class Period authorities regarding predatory lending and specific predatory practices).

As a regulator at the OCC and later as Texas Banking Commissioner, Ms. Ghiglieri acquired practical regulatory experience and knowledge in how to investigate and determine whether a company was engaged in deceptive or unfair practices. Ms. Ghiglieri employed that experience and knowledge to review and consider Household's internal documents produced in discovery as well as deposition testimony taken in this case on a number of subjects, including (1) corporate internal controls; (2) incentive programs; (3) training; and (4) development of new products. She also reviewed and considered reports of examination issued by federal and state regulators, complaints received by defendants, and defendants' responses to reports of examination and complaints. Based on her review of the evidence developed in the record, Ms. Ghiglieri concluded that Household did, in fact, engage in widespread predatory lending as alleged by plaintiffs. Report at 23, Ex. A.

In both of her reports, Ms. Ghiglieri cited as support for her opinions a series of steps taken by Household, including the individual defendants, commencing in late 1998. *See* Report at 24-26, 29-33; *see also* Rebuttal Report at 4-13, Ex. B (summarizing these steps and their impact). These include the following:

1.

[REDACTED]

[REDACTED], Report at 44-49, Ex. A, Rebuttal Report at 44-46, Ex. B;

2.

[REDACTED]

- [REDACTED] Report at 49-55, Ex. A,
Rebuttal Report at 41-43, Ex. B;
3. [REDACTED] Report at 33-44, Ex. A,
Rebuttal Report at 37-40, Ex. B; and
4. [REDACTED]
Report at 25-33, 105-112, Ex. A, Rebuttal Report at 5, Ex. B.

Ms. Ghiglieri identified these steps and related actions as causing nationwide predatory lending at Household. Rebuttal Report at 4-13, Ex. B.

In addition, Ms. Ghiglieri discussed and analyzed specific predatory practices and products in her reports, including but not limited to: (1) loan splitting and related practices concerning second loans; (2) loan flipping and “points on points” (practices associated with refinancing borrowers and charging them excessive fees); (3) equity-based lending (lending based on the equity in the home and not on the ability to repay); (4) insurance packing; (5) Household’s “discount points” and improper disclosure of those “discount” points; and (6) excessive prepayment penalties and improper disclosure of prepayment penalties. *See generally* Report at 87-120, Ex. A, Rebuttal Report at 21-36, Ex. B. These practices and products are separately assessed and discussed by Ms. Ghiglieri in her reports.

Insurance packing provides a good example of Ms. Ghiglieri’s methodology and analysis. Insurance packing is the deceptive sale of insurance to real estate borrowers. It can involve a sales person asserting that the insurance is required when it is optional. Report at 99, Ex. A. It can involve not informing the borrower that he or she is purchasing insurance. *Id.* Regulators use several tools to assess whether a company engages in insurance packing. One of the tools is consideration of the insurance penetration rate, *i.e.*, how many of the eligible borrowers have

insurance on their loans. High penetration rates indicate insurance packing. *Id.*, see also April 9, 2008 Deposition of Charles Cross (“Cross Depo.”) Tr. at 129:19-131:19, Ex. G (insurance penetration analysis is a “pretty routine” step); HHS-OTS 00032 at 00050, Ex. H (January 16, 2003 OTS report of examination [REDACTED]); see also February 13, 2008 Deposition of Catherine A. Ghiglieri (“Ghiglieri Depo.”) Tr. at 368:1-369:4, Ex. I (testimony re: OTS January 16, 2003 report of examination). [REDACTED]

[REDACTED] See, e.g., HHS-OTS 00032 Report at 48, Ex. H

[REDACTED]. As a result, during the Class Period, penetration rates for certain offices were [REDACTED] and during a two month period in 2001, company-wide rates were [REDACTED] *Id.* at 99 (citing two L. Sodeika memoranda to G. Gilmer) and 103 (citing Washington Department of Financial Institutions (“DFI”) report finding penetration rates as high as 92-100%).

In assessing whether Household engaged in insurance packing, Ms. Ghiglieri also considered such factors as (1) [REDACTED], Rebuttal Report at 10, Ex. B; (2) [REDACTED] that enabled sales staff to overcome any objections from a borrower discovering the insurance on their loan, *id.*; (3) reports of examination and other materials from government regulators and attorneys, Report at 102-04, App. E, Ex. A; (4) complaints and internal documents noting that the insurance was placed on the loan without the borrower’s consent, Report at 100-02, App. F, H, Ex. A; and last but not least; (5) [REDACTED]

[REDACTED] Report at 49-53, Ex. A; Rebuttal Report at 12, Ex. B.

Using an internal Household estimate, Ms. Ghiglieri noted that the potential refunds associated with insurance packing were as high as [REDACTED] million in addition to earlier costs associated

with the elimination of single premium credit life insurance on real estate loans.⁷ Report at 126, Ex. A.

With this background in mind, plaintiffs address defendants' arguments to exclude Ms. Ghiglieri's testimony.

II. LEGAL ARGUMENT

A. Under the Standard of Admissibility Set Forth in Fed. R. Evid. 702, Ms. Ghiglieri's Testimony Is Plainly Admissible

The admissibility of expert testimony is governed by Fed. R. Evid. 702, which the Supreme Court analyzed in its landmark decision, *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). In *Daubert*, the Supreme Court held that Fed. R. Evid. 702 actually *lowered* the admissibility standard for expert testimony and rejected the more stringent admissibility standard utilized by some lower courts relying on *Frye v. United States*, 54 App. D.C. 46 (1923). See *Daubert*, 509 U.S. at 588. Under *Daubert*, the Court applies a three-step analysis for determining the admissibility of expert opinion testimony: (1) is the expert qualified?; (2) is the expert's reasoning or methodology reliable?; and (3) does the testimony help the trier of fact understand the evidence or determine a fact in dispute? *Ervin v. Johnson & Johnson, Inc.*, 492 F.3d 901, 904 (7th Cir. 2007). The first two prongs of this framework evaluate the reliability of the proposed testimony and the third prong evaluates the relevance of the proposed testimony. *Ammons v. Aramark Unif. Servs., Inc.*, 368 F.3d 809, 816 (7th Cir. 2004). As the Seventh Circuit put it, Fed. R. Evid. 702 is "notably liberal." *Krist v. Eli Lilly & Co.*, 897 F.2d 293, 298 (7th Cir. 1990). The overall approach is one that excludes patently unreliable expert testimony and relies upon cross-examination and other traditional methods to undercut shaky, but admissible expert testimony. *Daubert*, 509 U.S. at 595.

⁷ This figure does not include other insurance-related refunds applicable to individual states for which Ms. Ghiglieri had no internal documentation. Report at 128, Ex. A.

In this Circuit, “[a]nyone with relevant expertise enabling him to offer responsible opinion testimony helpful to judge or jury may qualify as an expert witness.” *Tuf Racing Prods. v. Am. Suzuki Motor*, 223 F.3d 585, 591 (7th Cir. 2000). “Rule 702 specifically contemplates the admission of testimony by experts whose knowledge is based on experience.” *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000) (internal quotation marks and citations omitted). As stated in the Fed. R. Evid. 702 advisory committee’s notes to the 2000 amendment, “[i]n certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.” *Id.*; *United States v. Conn*, 297 F.3d 548, 556 (7th Cir. 2002) (citing same).

The second test for “reliability” is also lenient, merely requiring that the “***reasoning or methodology underlying the testimony [be] scientifically valid.***” *Daubert*, 509 U.S. at 592-93 (emphasis added). This is a limited inquiry: “the 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” *Smith*, 215 F.3d at 718.

The final prong, that expert testimony be “relevant,” is met whenever such testimony “will assist the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702. As noted by the Seventh Circuit, this standard is met where the testimony at issue “will assist the trier of fact with its analysis of ***any of the issues involved in the case.***” *Smith*, 215 F.3d at 718 (emphasis added).

The analysis is more liberal where the expert testimony, such as Ms. Ghiglieri’s testimony, is based upon judgments and assessments derived from professional experience and knowledge. As the court in *In re Masella*, No. 05-24302, 2007 Bankr. LEXIS 2719 (D. Conn. Aug. 7, 2007) explained:

Experts in disciplines that require the use of professional judgment are ***less likely candidates for exclusion*** because challenges may be ultimately viewed as matters in

which reasonable experts may differ in exercising their judgment as to the appropriate methodology to employ or the appropriate variable to plug into a calculation.

Id., at *7-*9 (citation omitted and emphasis added); *see also In re Joy Recovery Tech. Corp.*, 286 B.R. 54, 70 (Bankr. N.D. Ill. 2002).

In sum, “[t]he permissible scope of expert testimony is quite broad, and District Courts are vested with broad discretion in making admissibility determinations.” *Hill v. Reederei F. Laeisz G.M.B.H., Rostock*, 435 F.3d 404, 423 (3d Cir. 2006). Consequently, “***the rejection of expert testimony is the exception rather than the rule.***” Fed. R. Evid. 702 advisory committee’s notes on the 2000 amendment (emphasis added); *see also Spearman Indus., Inv. v. St. Paul Fire and Marine Ins. Co.*, 128 F. Supp. 2d 1148, 1150 (N.D. Ill. 2001) (quoting same). “Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” *Daubert*, 509 U.S. at 596.

B. Ms. Ghiglieri Has the Expertise to Testify Regarding Household’s Predatory Lending Practices and Reaging Practices

Ms. Ghiglieri has 25 years worth of practical working experience and knowledge on both predatory lending practices and reaging practices. Rebuttal Report at 53-57, 67, Ex. B. Given this experience and knowledge, Ms. Ghiglieri is qualified to testify as to predatory lending and reaging practices. *Tuf Racing*, 223 F.3d at 591; *United States v. Winkle*, 477 F.3d 407, 416 (6th Cir. 2007) (finding former OCC bank examiner qualified to testify as to check kiting based on experience and training at OCC); *see Martinez v. Sakurai Graphic Sys. Corp.*, No. 04 C 1274, 2007 U.S. Dist. LEXIS 65132, at *7 (N.D. Ill. Aug. 30, 2007) (“The Court ‘consider[s] a proposed expert’s full range of practical experience as well as academic or technical training when determining whether that expert is qualified to render an opinion in a given area.’”) (quoting *Smith*, 215 F.3d at 718, alteration in original). Indeed, her extensive experience and knowledge are why defendants themselves, albeit tardily, sought to retain her to opine on their behalf.

Defendants do not challenge Ms. Ghiglieri's expertise regarding predatory lending and reaging practices. Instead, defendants assert that because her regulatory experience and knowledge concerns predatory lending and reaging at banks, she is not qualified to testify as to predatory lending and reaging at finance companies or other comparable "non-depository" financial institutions. Defs' Mem.⁸ at 12-13. Defendants do not explain what differences there are between banks and financial institutions or how such differences, if any, impact Ms. Ghiglieri's ability to opine on Household's predatory lending and reaging practices. *See id.* at 12-15 (asserting "substantial and meaningful" differences but without identifying one or explaining why such differences, if any, bear on Ms. Ghiglieri's qualifications). Defendants' failure to identify any meaningful difference between a bank and a non-depository financial institution as to predatory lending or reaging is fatal to defendants' qualification argument. *McCloud v. Goodyear Dunlop Tires N. Am., Ltd.*, 479 F. Supp. 2d 882, 888 (C.D. Ill. 2007) ("[T]he problem with Defendant's argument is that the ***Defendant does not identify any relevant differences*** between motorcycle and passenger vehicle tires that might render [the proposed expert] unqualified to give his expert opinions in the instant matter.") (emphasis added).

Significantly, there are no material differences. Ms. Ghiglieri stated as much in her Rebuttal Report:

The absence of finance company regulation on my resume is immaterial, since the regulation of mortgage lending, including compliance and lending procedures, is virtually the same in banks as in finance companies and the supervision has been harmonized by the regulators. The same compliance laws apply and the same analysis is performed to determine compliance with mortgage laws and repayment capacity regardless of whether a mortgage is made by a bank or a finance company.

⁸ "Defs' Mem." refers to defendants' Memorandum of Law in Support of Household Defendants' Daubert Motion to Exclude the "Expert" Testimony of Catherine A. Ghiglieri, Dkt. No. 1375.

Rebuttal Report at 70, Ex. B; *see also*, Report at 9-12, Ex. A (discussing lending institutions, both banks and finance companies); Ghiglieri Depo at 27:8-14, Ex. I (her regulatory experience included mortgage fraud). Indeed, before defendants learned Ms. Ghiglieri had a conflict, they themselves wanted to hire her even though her experience was with banks. *See* Ex. J email from J. Hall to Ms. Ghiglieri seeking to hire her to opine on “*sub-prime lending*”).

Defendants’ own experts are in accord.⁹ Robert Litan, a defense expert, noted in his report, “*All lenders*, whether serving the prime or sub-prime markets, are subject to federal (and state) anti-fraud laws The Federal Trade Commission has authority to punish *lenders* engaging in unfair (deceptive) trade practices.” Litan Report at 12, Ex. C (emphasis added); *see also* Rebuttal Report, App. C, Ex. B (setting forth state laws precluding deceptive or unfair practices). In a declaration submitted in support of defendants’ motion, John Bley, defendants’ other predatory lending expert, stated that regulatory process of “the various state and federal agencies that regulate entities like those operated by Household during the Class Period is generally very similar.” Bley Decl., ¶4, Ex. D. As indicated in the declaration’s prior paragraph, the federal agencies at issue, the OCC, FDIC and OTS, all regulate banks. *Id.*, ¶3, Ex. D. A third defense expert, Roman Weil, cited OCC and the Federal Financial Institutions Examination Council (“FFIEC”) documents describing bank reaging policies as support for his assertion that reaging was a common practice in the industry. *See* Report of Roman L. Weil at 19-20 (citing OCC and FFIEC documents for industry standard).

⁹ The fact that defendants’ own experts agree with Ms. Ghiglieri demonstrates that their proposed distinction is, in fact, “silly.” Ghiglieri Depo Tr. at 19:9-14, Ex. I (“I think trying to zero in on a finance company’s distinction between what they do on the mortgage side and what banks do on the mortgage side is silly). Defendants point out that Texas has split regulation of banks and financial institutions into two entities. Defs’ Mem. at 15 n.19. Defendants do not explain how Texas’ regulatory structure bears on this matter, such as why Texas has this structure. The split may have current significance or it may be a historic anomaly. In any event, most states have not split their regulatory structure in this fashion. *See* Ghiglieri Decl. at 19:25-20:4, Ex. I.

The lack of merit in defendants' distinction between banks and financial institutions is highlighted by two facts. First, in Illinois, the Office of Banks and Real Estate (OBRE), the bank regulatory agency, was just as active, if not more so, as the DFI in combating predatory lending. "To fight predatory lending, regulators need complaints," *Chicago Tribune* (January 13, 2002), Ex. L (quoting OBRE official concerning predatory lending and directing consumers to the OBRE and DFI websites). Second, the OTS conducted a special compliance examination of *both* Household f.s.b., the federal bank under OTS supervision, and HFC, the non-depository finance company that ran the sales branches. Rebuttal Report at 69. That OTS report of examination, which is one of plaintiffs' trial exhibits and which is summarized in Appendix E to Ms. Ghiglieri's initial report, [REDACTED] [REDACTED]. HHS-OTS-000058-148, Ex. H; *see also* Report, App. E at 208-09, Ex. A.

In *Martinez*, this Court rejected an analogous attempt to exclude expert testimony based on an overly fine parsing of expertise. The defendant there challenged the qualifications of one Morita, asserting "Morita's experience is in the field of engineering generally, and that while Morita may be able to testify as to some aspects of the printing industry, he is not qualified to testify as to 'cylinder silk screen presses specifically.'" 2007 U.S. Dist. LEXIS 65132, at *8 (citation omitted). The Court rejected this argument based on Morita's deposition testimony that the machine at issue "'has design features which are common to other types of machines and, you know, I have encountered a lot of those.'" *Id.* at *9.

The cases cited by defendants differ substantially from the case presently before this Court. For instance, in *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564 (7th Cir. 1989), the Seventh Circuit in a pre-*Daubert* decision precluded a travel expert from opining on consumer behavior. *Id.* at 572. Likewise, the Seventh Circuit in *O'Connor v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir.

1994), held that a doctor who based his opinion regarding radiation-induced cataracts on his personal prior experience was not qualified because he treated only five patients with this issue over his 20 years of practice. *Id.* at 1107 n.19. And in *Sports Arena Mgmt., Inc. v. K&K Ins. Group, Inc.*, No. 06 C 6290, 2008 U.S. Dist. LEXIS 51431, at *7 (N.D. Ill. June 26, 2008), this Court found an insurance claim expert unqualified to testify as to underwriting matters where the expert himself disclaimed knowledge of such matters.

In sum, Ms. Ghiglieri's experience as a career bank regulator and knowledge provide ample expertise to enable her to opine on the matters addressed in her reports.¹⁰ *Drago v. Aetna Plywood, Inc.*, No. 96 C 2398, 1998 U.S. Dist. LEXIS 12249, at *10-*11 (N.D. Ill. July 31, 1998) (holding accountant qualified to calculate lost wages based on his skill "in the techniques used to calculate elements of economic loss and his knowledge of the area distinguishes him from the ordinary person").

C. Ms. Ghiglieri's Opinions Are Reliable

Defendants contend for various (and erroneous) reasons that Ms. Ghiglieri's opinions are not reliable. Defendants' contentions do not demonstrate that Ms. Ghiglieri's methodology is invalid and do not support exclusion of her testimony. Even if true, and they are not, defendants' contentions go to the weight of her testimony, not its admissibility.¹¹

¹⁰ As a fall-back, defendants suggest that Ms. Ghiglieri needs to be an expert in the "unique laws and regulatory practices" of all states other than Texas. Defs' Mem. at 14. Again, defendants do not show that each state did in fact have "unique" laws and regulatory practices relating to predatory lending and if so, why that would impact Ms. Ghiglieri's qualifications. *See id.* Moreover, as noted above, the various state laws and federal laws are in accord and generally prohibit any unfair or deceptive practice. *See*, Rebuttal Report, App. C, Ex. B; Litan Report at 12, Ex. C. Accordingly, this suggestion fails for the same reason that their main attack fails – because Ms. Ghiglieri has relevant expertise as to these common issues. *Martinez*, 2007 U.S. Dist. LEXIS, at *8; *McCloud*, 223 F. Supp. 2d at 889-90.

¹¹ Defendants cite numerous inapposite cases that have no bearing on this case. *See, e.g., Baker v. Indian Prairie Cmty. Unit*, No. 96 C 3927, 1999 WL 988799 (N.D. Ill. Oct. 27, 1999) (no explanation as to the methodology used by human factors expert in evaluating cause of accident); *Brown v. Primerica Life Ins.*

1. Ms. Ghiglieri Has Followed an Acceptable Methodology

In two voluminous reports that together aggregate over 300 pages, Ms. Ghiglieri carefully described how she reached her opinions and identified the supporting documents and testimony in the record. As Ms. Ghiglieri testified, she used the same methodology she used as a bank regulator at the OCC and later as Texas Banking Commissioner. Ghiglieri Depo. Tr. at 84:14-22, Ex. I. Her analysis was systematic and logical. She did not rely solely upon complaints and reports of examination but also assessed and relied on evidence regarding defendants' training, internal controls, incentive plans and defendants' loan products. Ms. Ghiglieri's methodology is entirely consistent with the regulatory methodology described by defendants' own expert, John Bley. When considered carefully, defendants' attacks are, in reality, quibbles about the specific documents upon which she relies and certain specific analyses they claim she should have performed.¹² These issues, even if true, go to the weight of Ms. Ghiglieri's testimony, not its admissibility. *Drago*, 1988 U.S. Dist. LEXIS 12249, at *11 (challenges to aspects of methodology and certain of the findings go to weight, not admissibility); *see also Trs. of E. Cent. Ill. Pipe Trades Health & Welfare Fund v.*

Co., No. 02 C 8175, 2006 WL 115898 (N.D. Ill. Apr. 29, 2006) (expert submitted four paragraph conclusory report); *Durkin v. Equifax Check Servs., Inc.*, 406 F.3d 410 (7th Cir. 2005) (English professor's expert opinion rejected when he merely recited plaintiff's claims of confusion and endorsed them); *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 795 (N.D. Ill. 2005) (expert rejected where he relied entirely upon oral statements from defendants' employees and the proffered damage opinion was contrary to the law); *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 418 (7th Cir. 2005) (expert rejected where he relied upon "intuition"); *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499 (9th Cir. 1994) (finding expert opinion unreliable when it was formed prior to expert reviewing the literature he conceded was essential to his opinion); *Huey v. UPS*, 165 F.3d 1084 (7th Cir. 1999) (holding short conclusory letter failed to meet reliability prong where expert did not review personnel files, did not describe any reasoning used and simply accepted plaintiffs' view that he was retaliated against).

¹² For example, defendants repeatedly suggest that Ms. Ghiglieri relied only upon reports of examination and complaints. *See* Defs' Mem. at 17, 30, 37. Ms. Ghiglieri went far beyond that subset of documents and relied upon documents concerning defendants' training, internal controls, incentive plans, products and policies and numerous other subjects. *See* Ghiglieri Depo at 30:1-74, 84:10-25.

Airport Plumbing and Heating Inc., No. 04-1059, 2006 U.S. Dist. LEXIS 787, at *8-*9 (C.D. Ill. Jan. 5, 2006) (same).

Defendants scoff at Ms. Ghiglieri's methodology, describing it as merely reviewing documents and deposition testimony. Defs' Mem. at 16. However, they cannot truly fault her for using traditional regulatory methods. Ghiglieri Depo. Tr. at 30:1-7, 84:10-25, Ex. I. In a declaration filed in support of defendants' motion, defendants' expert, Mr. Bley, describes the regulatory process in nearly identical terms, *i.e.*, reviewing documents and records and possibly interviewing company personnel. Bley Decl., ¶¶5-6 at 2, Ex. D (examiners review books and records of regulated entity and may also interview the institution's personnel or, on occasion, consumers).

Because Ms. Ghiglieri's approach is unimpeachable, defendants suggest that Ms. Ghiglieri's testimony is unreliable because she did not conduct interviews of company personnel, consumers and other regulators and she did not do any statistical analyses or tests. Defs' Mem. at 18. However, these steps are not a required part of the regulatory methodology. Mr. Bley's declaration, despite being carefully crafted by defense counsel, states expressly that the process "*may* involve interviewing the institution's personnel and, on occasion, consumers." *See* Bley Decl., ¶5, Ex. D (emphasis added). Additionally, neither Mr. Bley nor Mr. Litan interviewed Household employees prior to developing their opinions even though, unlike Ms. Ghiglieri, they had access to such employees through defense counsel.

More to the point, Ms. Ghiglieri had alternative and superior sources of information readily available. Ms. Ghiglieri did not need to interview company personnel when she could review their sworn deposition testimony, even assuming such interviews were possible in a litigation context. As such, there was no failure to conduct personal interviews and this is not a basis to exclude Ms. Ghiglieri's testimony.

The same holds true respecting defendants' assertion that Ms. Ghiglieri should have performed some statistical testing, including with respect to a complaint ratio. Where the expertise at issue derives from personal professional experience, this Court has not required "scientific" testing. *Amakua Dev. LLC v. Warner*, No. 05 C 3082, 2007 WL 2028186, at *8 (N.D. Ill. July 10, 2007). Even Mr. Bley in his declaration supporting this motion does not assert that statistical testing is part of the regulatory process. *Id.* This argument, thus, is not about Ms. Ghiglieri's methodology.

Notwithstanding their own expert's declaration, defendants specifically contend Ms. Ghiglieri should have calculated a complaint ratio but did not do so because the ratio would have undercut her opinion. Defs' Mem. at 18-19. While plaintiffs could defeat this argument at this juncture simply by reference to Mr. Bley's declaration, plaintiffs will address this argument substantively because it is a recurrent and misleading theme that defendants intend to use at trial.

Despite defendants' assertion to the contrary, it would not have been possible for Ms. Ghiglieri to calculate a reliable complaint ratio because defendants' complaint statistics (the numerator) were not reliable.¹³ Ghiglieri Depo Tr. at 83:9-17, Ex. I. As noted in both her reports, there were significant deficiencies in Household's complaint tracking system [REDACTED]

[REDACTED]. Report at 73-74, Ex. A; *see also* Rebuttal Report at 50-51, Ex. B (same). Given these exclusions, the vast majority of complaints were not tracked during most of the Class Period. The fact that the number of complaints per the tracking system understated the actual number was

¹³ Nor did Ms. Ghiglieri have a reliable denominator. Defendants posit that Ms. Ghiglieri could have used the number of open loan accounts found in Household's Forms 10-K and 10-Q. Defs' Mem. at 19 n.22. However, the complaints relate to certain categories of loans (first and second mortgages) originated by Household's consumer lending business unit during a specified period of time. To make an apples to apples comparison, Ms. Ghiglieri would need to know the number of such loans originated during this time period, not all Household loans "open" at a particular date, which would include loans originated before the time period at issue and other categories of loans, such as auto loans, credit card loans, sales finance loans (from the consumer lending unit) and mortgages (from the wholesale mortgage unit).

recognized internally. For example, in a June 2001 presentation, when discussing the reported trends in effective rate complaints, Ned Hennigan, one of the Regional General Managers for the HFC sales offices, wrote [REDACTED]

[REDACTED] HHS03208139, Ex. N. Defendants cannot use their own intentional failure to properly track complaints as a basis for asserting that Ms. Ghiglieri's testimony is unreliable.

Moreover, as Ms. Ghiglieri testified, the complaint ratio posited by defendants would not have been useful.¹⁴ Ghiglieri Depo Tr. at 83:9-17, Ex. I. From a regulator's perspective, the number of complaints (or the related percentage) is not determinative:

Well, as I think I said before, when you're looking at complaints, you can't just say, "Well there's only one complaint here so we don't have to worry about it."

You have to take into consideration the basis of the complaint, how geographically dispersed they were. This is one of the things I was trying to look at here. And how similar the complaints are.

So it's not just the sheer number. And also, as I said before, regulators realize that it takes a lot for a person to get mad enough to actually file a written complaint. So it doesn't mean that that's all the people that are affected by something, and you have to take that in to account.

Ghiglieri Depo Tr. at 69:16-70:4, Ex. I; *see also id.* at 81:1-5, 106:16-20 (severity of harm to consumer is a factor in considering a complaint). Her opinion is consistent with that of other regulators. *Luna v. Household Fin. Corp.*, No. 02-01635 (W.D. Wash. 2004) February 4, 2003 Deposition of Charles L. Cross Tr. at 4182:15-184:16, Ex. M (complaints are a chief indicator of widespread predatory practices like the "tip of the iceberg").

¹⁴ More useful ratios from the regulatory perspective are "the complaints with this company greater than with a peer company and are they increasing at a greater rate . . ." Cross Depo. Tr. at 75:18-20, Ex. G.

Ms. Ghiglieri has applied a reliable methodology. As the Court stated in *McCloud*, “an expert does not need to perform the best conceivable test.” *McCloud*, 479 F. Supp. 2d at 892 (holding expert did not have to do the impossible or perform the “ideal” test). Defendants’ arguments are in essence assertions regarding the factual evidence underlying Ms. Ghiglieri’s testimony. These assertions, therefore, go to the weight of her testimony and not its admissibility. *Arias v. Allegretti*, No. 05 C 5940, 2008 U.S. Dist. LEXIS 4352, at *10 n.1 (N.D. Ill. Jan. 22, 2008) (defendant’s argument that an expert’s “conclusions are unreliable because he relied on a *de minimis* sample goes to the weight of his testimony, not its admissibility”); *Kunz. v. City of Chicago*, No. 01 C 1753, 2006 U.S. Dist. LEXIS 41897, at *14-*15 (N.D. Ill. June 22, 2006) (admitting expert testimony where opposing party could challenge testimony based on facts relied upon and facts purportedly not considered).

2. Ms. Ghiglieri’s Definition of Predatory Lending Is Reliable

Defendants challenge Ms. Ghiglieri’s definition of predatory lending as unreliable. Ms. Ghiglieri carefully crafted this definition as “a summary definition that took into consideration what everyone thought about it using different words,” in other words a definition consistent with the consensus. Ghiglieri Depo Tr. at 94:6-8, Ex. I; *id.* at 87:4-10. She developed this consensus definition for a specific purpose, to highlight defendants’ own unreasonably narrow interpretation of that term. *Id.* at 93:15-22; *see also id.* at 52:1-7 (other definitions subsumed in her definition). Ms. Ghiglieri’s opinion as to the consensus definition is reliable and admissible.

Defendants belittle Ms. Ghiglieri’s definition as “inconsistent and idiosyncratic,” but, as they did with the “substantial and meaningful differences” between banks and financial institutions, do not demonstrate that her definition differs in any meaningful fashion from that used by other experts in the field. *See* Defs’ Mem. at 15, 23. To the contrary, as Ms. Ghiglieri expressed at her deposition,

although the various definitions didn't use the exact same words, the ideas were similar.¹⁵ Ghiglieri Depo Tr. at 51:1-13, Ex. I.

Defendants, thus, must fall back on the argument that Ms. Ghiglieri developed a definition for this case. This argument is unhelpful for them in this case for two reasons: (1) Ms. Ghiglieri's definition is a consensus definition, not one at odds with other experts or one contrary to the law; and (2) Ms. Ghiglieri's definition was developed for one purpose, to show that the defendants' definitions were outside the consensus, and does not bear on the remainder of Ms. Ghiglieri's predatory lending analysis, which focuses on whether Household's lending practices and products were deceptive or unfair.¹⁶ This case, therefore, does not present the biased and results-oriented definition found lacking in *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 795, 803 (N.D. Ill. 2005).

¹⁵ There was consensus within the relevant community as to the core features of predatory lending (unfair or deceptive practices) as well as consensus as to the inclusion within that term of specific practices, including all of the practices used by defendants. See Report at 12-24, App. D, Ex. A. As both Ms. Ghiglieri and Charles Cross have stated, despite different definitions, there is a consensus amongst regulators as to whether a practice is predatory or not. Ghiglieri Depo Tr. at 51:1-13, Ex. I; Cross Depo Tr. at 109:15-110:7, Ex. G (noting that there is no one universal accepted definition, but that "you could put five or a thousand regulators in the same room, you could throw out some examples, and we'd say that was predatory lending, that wasn't predatory lending, that was, that was. So, you know it when you see it."). Numerous regulators have analogized predatory lending to pornography in that "you know it when you see it." Ghiglieri Depo Tr. at 49:14-16, Ex. I; Cross Depo Tr. at 110:1-5, Ex. G; see Rebuttal Report at 18, Ex. B (citing statement of Ellen Seidman, Director of OTS, "you tend to know predatory lending practices when you see them, but trying to come up with a neat definition is difficult."). Thus, contrary to defendants' assertions, the fifth *Daubert* factor (widespread acceptance) is present here. See Defs' Mem. at 24 n.24 (making conclusory assertion that fifth *Daubert* factor not met).

¹⁶ As discussed earlier, Ms. Ghiglieri's testimony regarding predatory lending is based on assessing whether specific practices and products were deceptive or unfair.

In a footnote, defendants assert that because predatory lending involves illegal practices or products, Ms. Ghiglieri's testimony constitutes a legal opinion¹⁷ and therefore should be barred. Defs' Mem. at 25 n.25. Defendants are wrong as to both.

Ms. Ghiglieri will not be testifying as to the law.¹⁸ Instead, she will be testifying as to how regulators determine whether a lender is engaging in deceptive or unfair practices. This is something that regulators do in the course of their official responsibilities. Mr. Bley stated on September 7, 2000, before he became an expert for defendants, "It is important to note that predatory lending is not a new problem. State regulators have been dealing with this very same issue under a different name for years. What was once called mortgage fraud is now called predatory lending. Under either name, our mission to investigate violations and enforce the law has remained the same." HHS 03244453 at 02344455; *see also* Ghiglieri Depo Tr. at 88:18-21, Ex. I (T. Kavalier asking if it was correct that, *inter alia*, "laws are interpreted daily by regulators such as yourself all around the country").

The Seventh Circuit has expressly held that regulators, such as Ms. Ghiglieri, are entitled to opine as to the application of laws.¹⁹ "Experts are permitted to testify regarding how their government agency applies rules as long as the testimony does not incorrectly state the law or opine

¹⁷ As noted in *Amakua*, 2007 WL 2028186, "there is a fine line between legal conclusions and factual conclusions." *Id.* at *10. "Often, the same information can be elicited as fact where it would be inadmissible in the guise of a legal conclusion." *Id.*; *see also* Fed. R. Evid. 704 advisory committee's note (The question "Did T have capacity to make a will?" is excluded but "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" is admissible.).

¹⁸ Defendants reference the fact that Ms. Ghiglieri has trained as a lawyer. *See* Defs' Mem. at 8. However, Ms. Ghiglieri is not a practicing attorney. Ghiglieri Depo Tr. at 10:6-8, Ex. I.

¹⁹ In *In re Ocean Bank*, 481 F. Supp. 2d 892 (N.D. Ill. 2007), this Court noted that "experts 'cannot testify about legal issues on which the judge will instruct the jury.' As a result, courts will not admit testimony on purely legal matters and comprised solely of legal conclusions." *Id.* at 898 (quoting *United States v. Sinclair*, 74 F.3d 753, 757 n.1 (7th Cir. 1996)).

as to certain ultimate legal issues in the case.” *United States v. Davis*, 471 F.3d 783, 789 (7th Cir. 2006); *see also United States v. Chube*, 538 F.3d 693, 700 (7th Cir. 2008) (treating the question of admissibility of expert testimony on the “ultimate legal question whether they knowingly violated the law” under Fed. R. Evid. 704 and affirming admission of such testimony under that rule) (citing *Davis*, 471 F.3d 783). Defendants do not and cannot contend that Ms. Ghiglieri misstates the law nor does she opine as to ultimate legal issues barred by Fed. R. Evid. 704. *See* Defs’ Mem. at 25 n.25. Indeed, Ms. Ghiglieri will uses the same “legal” test (deceptive or unfair) as defendants’ experts, Bley and Litan. Joint Report Pursuant to Federal Rule of Civil Procedure 26 of John L. Bley and Carl A. LaSusa at 8, Ex. O (discussing Washington statute prohibiting any unfair or deceptive practice); Litan Report at 12 (discussing federal and state laws regarding deceptive and unfair practices) and at 16-17 (Predatory lending applies to unlawful practices, citing Mr. Bley’s statement in 2000 that “predatory lending is the use of deceptive or fraudulent sales practices in the origination of a loan secured by real estate.”). Significantly, the terms “deceptive” and “unfair” have no distinct legal meaning. *See Richman v. Sheahan*, 415 F. Supp. 2d 929, 947 (N.D. Ill. 2006) (where legal term has everyday meaning, testimony is not excluded as legal opinion) (citing 29 Charles Alan Wright and Victor James Gold, *Federal Practice and Procedure* §6284 at 383-84 (1997)).

3. Ms. Ghiglieri’s Opinions Are Reliably Tied to the Documents and Testimony

Defendants next attack Ms. Ghiglieri for engaging in “unsupported extrapolation.” Defs’ Mem. at 27. This attack is simply another argument that Ms. Ghiglieri’s testimony lacks adequate factual support. Thus, even if true, and it isn’t, this goes to the weight of Ms. Ghiglieri’s opinions and not their admissibility. *Arias*, 2008 U.S. Dist. LEXIS 4352, at *10 n.1; *Richman*, 415 F. Supp. 2d at 942 (If there is some factual support for opinion, “it is for the jury, properly instructed, to determine the credibility of the witness and thus the weight to be given to the expert opinion.”).

In their effort to concoct a basis to disqualify Ms. Ghiglieri as an expert witness, defendants mischaracterize the substance of Ms. Ghiglieri's reports and the factual record.²⁰ Because it would require a brief of extraordinary length to discuss each mischaracterization, plaintiffs address the issue globally and will highlight only a few of the most glaring examples.

First and foremost, defendants' arguments are the mere *ipse dixit* of counsel.²¹ *See, e.g.,* Defs' Mem. at 27. Defendants do not cite supporting evidence because there is none. Plaintiffs highlight some glaring examples of defendants' mischaracterization of the record below:

- Defendants accuse Ms. Ghiglieri of improperly relying on "unauthorized" training materials but cite no evidence that the training materials were in fact unauthorized. Defs' Mem. at 27. Contemporaneous company documents and testimony cited by Ms. Ghiglieri show the contrary. Report at 38, Ex. A (citing documents and

²⁰ Defendants cite a number of cases for the proposition that expert testimony connected to the underlying data only via the *ipse dixit* of the expert is inadmissible. *See* Defs' Memo at 29. These cases are inapposite, as here Ms. Ghiglieri carefully assessed defendants' practices and products, training, internal controls, sales incentives, reports of examination and complaints, and defendants' responses prior to developing her opinions. Her reports together run over 300 pages. This is not a case where the expert did not conduct any studies or cite any relevant literature to support her testimony (*see Fuesting v. Zimmer, Inc.*, 421 F.3d 528, 536 (7th Cir. 2005); *McMahon v. Bunn-O-Matic, Corp.*, 150 F.3d 651, 657-58 (7th Cir. 1998) (finding testimony that offered only bare conclusion unreliable); *Reed v. City of Chicago*, No. 01 C 7856, 2006 WL 1543928, at *3 (N.D. Ill. June 1, 2006) (no citation to authority or description of analysis)), where the expert offered as his testimony a conclusion that merely summarized and endorsed the plaintiff's claim (*see Durkin*, 406 F.3d at 421; or where the expert's testimony has no concrete factual basis (*R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.*, No. 99 C 1174, 2004 WL 1613563, at *8 (N.D. Ill. July 19, 2004) (damage expert based sales levels that had no connection to "any concrete factual basis")). Nor is this case similar to *United States v. Mamah*, 332 F.3d 475 (7th Cir. 2003), which involved defendant's attempt to have experts testify that his confession was false. The expert testimony consisted of an anthropologist and sociologist opining as to the behaviors adopted by Ghanaians in response to living under a military regime. *Id.* at 476. The district court found this testimony unreliable for two reasons: (1) neither was a clinical psychologist qualified to assess defendant's susceptibility to U.S. interrogation techniques; and (2) the defendant had lived in the United States for enough time to distinguish between U.S. law enforcement practices and Ghanaian law enforcement practices. *Id.* at 476-77. The Seventh Circuit upheld this decision, finding the expert had no basis for extrapolating how Ghanaian expatriates would react. *Id.* at 477.

²¹ Defendants cite to record evidence only once on this page and that for the proposition that Ms. Ghiglieri was shown at her deposition examples of individuals fired for violation of policy. However, in a later portion of that deposition, Ms. Ghiglieri explained that the documents shown to her had no bearing on her opinion because those employees were not fired for engagement in predatory lending practices but rather other issues. Ghiglieri Depo Tr. at 364:18-366:21, Ex. I. These documents do not undercut Ms. Ghiglieri's testimony regarding Household's lenient treatment of individuals caught engaging in predatory lending.

testimony for the proposition that [REDACTED]

- Defendants assert that one of these trainings was isolated and not distributed nationwide, but cite no evidence as to where the training actually took place. Defs' Mem. at 27. Defendants' assertion is contrary to the contemporaneous internal documents cited by Ms. Ghiglieri showing that the training took place across the nation. Report at 35, Ex. A ([REDACTED]); Rebuttal Report at 37-39, Ex. B.
- Defendants assert that the other training was recalled prior to use, but provide no evidence of this recall. Defs' Mem. at 27. Ms. Ghiglieri cited testimony and other record evidence that show this training was in fact used and not recalled. Report at 42-43, Ex. A; Rebuttal Report at 40, Ex. B.

Second, defendants improperly limit the evidentiary foundation of her testimony to "untested accusations of customers, preliminary findings of examiners and settlement agreements." Defs' Mem. at 30. As noted above, Ms. Ghiglieri's testimony relies on defendants' training, internal controls, incentives and product development. *See, supra*, at §I.C. Complaints and reports of examination corroborate the conclusions Ms. Ghiglieri reached based on these other factors. Likewise, defendants improperly limit Ms. Ghiglieri's analysis of the cost to Household of engaging in predatory lending to Household's settlement with the Attorneys General ("AG"). Defs' Mem. at 28. Even in her summary, Ms. Ghiglieri cited other costs to Household, such as costs for initiating "best practices" and non-AG refunds and penalties. *See* Report at 7, Ex. A; *see also id.* at 124-130 (discussing financial costs to Household).

Third, defendants have no basis to argue that Ms. Ghiglieri cannot rely upon complaints, reports of examination and settlements. Defs' Mem. at 31. Regulators do and can rely upon these sources of information in evaluating whether a company is engaged in predatory lending. As defendants' expert, Mr. Bley, acknowledges in the declaration crafted for this motion, regulators do consider consumer complaints and even issue reports of examination based on such complaints. Bley Decl., ¶6, Ex. D.

As to reports of examination, defendants are undercut by their earlier assertion that Ms. Ghiglieri should have interviewed these other regulators. Defs' Mem. at 18. If Ms. Ghiglieri should have relied upon oral representations from other regulators, she clearly can rely upon their reports of examination, which are official documents memorializing their findings and conclusions.²² See Ghiglieri Depo Tr. at 114:24-115:6, 115:23-116:8, Ex. I. Indeed, under Fed. R. Evid. 803(8), reports of examination are admissible for the truth of the matter asserted.²³

As to settlements, defendants cite no reason why an expert cannot reasonably rely upon a settlement, particularly where, as with the AG settlement, Ms. Ghiglieri does not rely upon it to form an opinion as to the underlying transgression. See Report at 130, Ex. A (using AG settlement to determine dollar impact of predatory lending). Additionally, while defendants characterize the Cease and Desist Order issued by the U.S. Securities and Exchange Commission ("SEC") as a settlement, see Defs' Mem. at 17, the Order Instituting Cease-and-Desist Proceedings, Making Findings and Imposing Cease-and-Desist Order Pursuant to Section 21c of the Securities Exchange

²² Defendants erroneously describe reports of examination as "preliminary" findings. Defs' Mem. at 30. To the extent that defendants are suggesting that a report of examination is not a final and official document issued by the state department at issue, that is incorrect. These reports are final and issued by a state official with authority to issue them. See, e.g., Ghiglieri Depo Tr. at 115:24-116:2, Ex. I; Cross Depo Tr. at 99:14-101:14, Ex. G; Bley Decl., ¶8, Ex. D. In some states, including Washington, the department uses the term "apparent violations" to avoid triggering the state administrative procedures act and the associated deadlines. Ghiglieri Depo Tr. at 122:22-123:5, Ex. I; see also *id.* at 126:6-25 (discussing issue and noting Washington exam report stating "The Director of DFI has informed"). Plaintiffs have addressed this issue in greater depth in their *Daubert* motion to exclude Mr. Bley's contrary and erroneous opinion. See Memorandum of Law in Support of Plaintiffs' Motion to Exclude Certain Testimony of Defendants' Expert John Bley Pursuant to Federal Rule of Evidence at 4-6, Dkt. No. 1346.

²³ This point is discussed in greater depth in plaintiffs' opposition to defendants' omnibus motion *in limine* filed concurrently herewith, which is incorporated herein by reference. Plaintiffs' Opposition to Defendants' Omnibus Motion *In Limine* to Exclude or Limit 14 Categories of Evidence ("Omnibus Opp.") at 16-17.

Act of 1934, contains, as its full name expressly states, findings made by the SEC.²⁴ In any event, defendants' auditors, KPMG, relied upon the SEC Order in conducting their audit,²⁵ therefore there is no reason that Ms. Ghiglieri could not also rely upon it.

Fourth, defendants claim that Ms. Ghiglieri is a mere "parrot" because she quotes text from underlying sources in her reports. Defs' Mem. at 32. It does not follow that this is a flaw. Ms. Ghiglieri's actual quotation of the referenced evidence makes it much easier for the reader to assess the underlying evidence. By way of contrast, plaintiffs point to defendants' own memorandum as illustrative of the difficulties that result if one identifies only a page number and not the text at issue.²⁶ See Defs' Mem. at 28 n.31 (citing 20 passages without any parentheticals).

More to the point, defendants try to have it both ways: they seek to exclude Ms. Ghiglieri based on a purported lack of supporting evidence and, at the same time, seek to exclude her for "overquoting" that supporting evidence. Defendants' two arguments are themselves mutually exclusive. In any event, defendants can have no real issue with Ms. Ghiglieri quoting from a document, like the Iowa AG email, to neatly sum up an issue, particularly as defendants themselves suggest Ms. Ghiglieri should consider the views of the other regulators. See Defs' Mem. at 18; Report at 83, Ex. A (using email from Iowa AG in summary of section).

²⁴ The SEC Consent Decree is the subject of a separate motion *in limine* filed by defendants and plaintiffs incorporate by reference their opposition to that motion filed concurrently with this opposition. See Omnibus Opp.

²⁵ See Plaintiffs' Trial Exhibit 1214 (March 2003 KPMG memorandum prepared by W. Long regarding SEC Order).

²⁶ Plaintiffs object to this tactic, which precludes Plaintiffs from adequately responding since they do not know what defendants consider improper on these pages and precludes the Court from assessing the propriety of the cited opinions for the same reasons.

4. **Ms. Ghiglieri Accounts for Alternative Explanations in Her Reports**

Defendants also attempt to knock out Ms. Ghiglieri for “bias.” Defs’ Mem. at 33. As their basis, defendants point to Ms. Ghiglieri’s consideration of deposition transcripts and documents produced in this case, her editing sentences to omit unnecessary language and a purported failure to consider certain Household documents. These do not show bias and even if they did, bias goes to the weight of Ms. Ghiglieri’s testimony, not its admissibility. *Richman*, 415 F. Supp. 2d at 943 (“Credibility determinations, which encompass questions of bias, are for the jury based upon their assessment of those parties, not for the court under its gatekeeping function.”); *Kunz*, 2006 U.S. Dist. LEXIS 41897, at *14 (failure to consider alternatives goes to weight of expert testimony, not its admissibility).

Plaintiffs will not comment on defendants’ first two bases for asserting bias save as follows. No case has found that, as defendants assert, the fact that the depositions were conducted mostly by one side demonstrates bias in the expert who reviews and relies upon the depositions. Additionally, Ms. Ghiglieri reviewed as many documents in the record as she could and did not rely upon “cherry-picked” documents. Ghiglieri Depo Tr. at 34:25-35:23, Ex. I. Not only did Ms. Ghiglieri review perhaps 40 boxes in hard copy and other documents via electronic review, *id.* at 62:9-13, these included documents favorable to Household, such as responses to examination and responses to complaints. *See, infra.* As to the alleged “selective” quotation of materials, Ms. Ghiglieri at her deposition stood by these passages as accurate reflections of the underlying document. *See, e.g.*, Ghiglieri Depo Tr. at 122:19-123:5, 296:16-20, Ex. I. In any event, defendants can attempt to use these passages to discredit Ms. Ghiglieri with the jury.

Notwithstanding defendants’ accusation, Ms. Ghiglieri considered Household’s responses to reports of examination. *See* Defs’ Mem. at 35. However, Ms. Ghiglieri found the responses were substantively wrong and inaccurate, leading her to conclude that they were unreliable. Ghiglieri

Depo Tr. at 151:6-152:3, Ex. I: Rebuttal Report at 62-65, Ex. B (discussing defects in company responses to examiners). Other regulators, such as Mr. Cross, reached a similar conclusion regarding the reliability of the responses and the other documents provided by Household. Rebuttal Report at 65, Ex. B.

Likewise, Ms. Ghiglieri considered but did not rely upon defendants' responses to consumer complaints. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Rebuttal Report at 66, Ex. B.

Further on this point, it is highly disingenuous for defendants to claim that Ms. Ghiglieri did not consider Household's responses to reports of examination because those documents are not identified on the list of documents relied upon. Defs' Mem. at 35 (citing incorrectly Appendix E to Ms. Ghiglieri's Report); *see* Report, App. C, Ex. A. Prior to the issuance of Ms. Ghiglieri's report, the parties expressly stipulated that the experts had to identify only the documents relied upon – not every document they considered. Stipulation Regarding Expert Discovery, Ex. P, ¶2 (parties to provide a list of materials relied upon by each expert). Accordingly, the fact that Ms. Ghiglieri did not list any company response to a report of examination in her list of documents relied upon does not mean, as defendants suggest, that she did not consider them.

In sum, Ms. Ghiglieri cannot be accused of bias or ignoring defendants' responses to reports of examination or complaints. Defendants may of course raise these issues with the jury if they so desire, but they are not a basis to exclude Ms. Ghiglieri's testimony.

5. Ms. Ghiglieri Relied Upon an Adequate Foundation to Form Her Opinions

As discussed above, Ms. Ghiglieri relied on numerous documents to form her opinions. These documents are listed in Appendix C to the Report and Appendix A to the Rebuttal Report. Defendants, thus, have no basis to assert that Ms. Ghiglieri formed her opinions based solely on excerpts from reports of examination. In any event, the question of whether Ms. Ghiglieri relied upon sufficient sources or only a *de minimis* selection goes to weight and not admissibility.²⁷ *Arias*, 2008 U.S. Dist. LEXIS 4352, at *10 n.1.

In sum, defendants' various attacks on the reliability of Ms. Ghiglieri's testimony are misplaced. These attacks do not address the reliability of Ms. Ghiglieri's methodology but rather specific conclusions and the evidentiary support for some of the testimony. As such, these attacks go to the weight of Ms. Ghiglieri's testimony, not its admissibility.

D. Ms. Ghiglieri's Opinions Will Prove Helpful to the Jury

Ms. Ghiglieri's testimony will prove of assistance to the jury. In addition to explaining the meaning and significance of industry jargon (GFEs, discount points, insurance packing, loan flipping, predatory lending, reaging, credit quality metrics, 2+ numbers, charge-offs, etc.), Ms. Ghiglieri will analyze and explain why defendants' consumer lending practices were deceptive and unfair. She will describe how defendants' training, internal controls, incentive programs, and product development caused predatory lending, specifically the practices at issue. She will put into

²⁷ While this point suffices to dispose all defendants' arguments in this heading, plaintiffs must also address defendants' erroneous assertion that Ms. Ghiglieri relied upon two documents, HHS-ED001036-53 (August 2002 Complaint review) and HHS-ED016421-33 (July 2, 2002 complaint study). Defs Memo at 37-38. Ms. Ghiglieri did not rely on these documents. The documents defendants cite are not listed as materials Ms. Ghiglieri relied upon. *See* Report, App. C, Ex. A, Rebuttal Report, App. A, Ex. B. Additionally, the text of her reports makes it clear that she did not rely upon one of the documents. In her initial Report, Ms. Ghiglieri noted that the July 2002 analysis was based on an "incomplete subset of complaints." Report at 115, Ex. A. The Rebuttal Report, likewise, notes this problem and concludes that the "48 number asserted by Household is not reliable." Rebuttal Report at 38, Ex. B.

context the nature and import of defendants' reaging practices, refinance practices and other practices and how they masked credit quality. Because these are complicated issues, Ms. Ghiglieri's testimony will be important to the jury. On a practical level, if Ms. Ghiglieri's testimony were not central to the case, defendants would not have three different experts responding to Ms. Ghiglieri's testimony on these points.

Defendants' assertion that Ms. Ghiglieri's opinions do not go to the elements of this case is wrong factually and legally.²⁸ As the Seventh Circuit stated in *Smith*, expert testimony need not go to the ultimate issue, but "need only be relevant to *an* issue in the case." 215 F.3d at 721 (emphasis in original). Ms. Ghiglieri's opinions are relevant to, and will be of assistance to the jury in determining, whether defendants' statements regarding predatory lending and reaging were in fact false and misleading. Further, although Ms. Ghiglieri will not testify as to defendants' scienter in making those false and misleading statements, she will provide assistance to the jury in evaluating and assessing the inevitable self-serving statements from defendants – for example, defendants' claims that they were "shocked" and "surprised" to find predatory practices abounding in the branch offices or that they did not use their reaging practices to conceal the true credit quality of Household's loan portfolio from potential investors.

Defendants continue to argue, as they have from day one, that because predatory lending and reaging are not elements of securities fraud, no case can lie against them for engaging in these

²⁸ In this section, defendants include substantive arguments going to the merits of this case. For instance, defendants argue that Ms. Ghiglieri's testimony shows at best negligent mismanagement, which was not actionable as securities fraud. See Defs' Mem. at 42 (citing *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977)). This attempt to spin the import of Ms. Ghiglieri's testimony fails. Using Ms. Ghiglieri's testimony regarding defendants' training, product development, incentive plans, and internal controls, the jury will be able to distinguish between an honest but negligent set of managers on the one hand and defendants in this case on the other.

practices. This Court has repeatedly rejected this argument, including on December 2, 2008 in response to a statement from defense counsel, when the Court aptly noted:

THE COURT: How this fits in with alleged fraud, I assume it fits in the same way since almost day one when we had a conference in this case I don't know how many years ago now. They're alleging that part of the fraud upon the investors was that the company was running a fraudulent lending scheme and denying that it was doing so and by virtue of that scheme pumping up its share values and the price of its shares, thereby defrauding its shareholders. Is that essentially about right? Do I have that?

MR. BROOKS: That's about it, Judge.

THE COURT: Okay. That's how it fits in. So now we have that done.

December 2, 2008 Hr'g Tr. at 11, Ex. E; *see also* March 19, 2004 Memorandum Opinion and Order at 15, Dkt. No. 135.

Defendants' suggestion that the jury could understand the underlying documents and testimony without Ms. Ghiglieri's assistance is both implausible and contrary to a 2007 decision by this Court. Just last year, this Court admitted an expert's testimony as helpful to the jury where the proposed testimony concerned "(1) the nature of home equity loans and their terms, and (2) the sub-prime lending industry." *Ocean Bank*, 481 F. Supp. 2d at 904; *see also* E. Gramlich, *Subprime Mortgages: America's Latest Boom and Bust* at 94 (2007) ("Mortgage contracts are complicated even for those with advanced degrees in finance."); February 27, 2008 Deposition of Robert E. Litan Tr. at 53:19-54:1, Ex. R (agreeing with Mr. Gramlich's opinion regarding the complexity of mortgage loan contracts).

Indeed, the very subject matter of her testimony itself demonstrates its usefulness to the jury. Ms. Ghiglieri's testimony concerns defendants' various deceptive lending practices. As proof that those practices are not easily comprehended by the average person, *i.e.*, the jury, plaintiffs point to the fact that borrowers around the nation were duped by these very practices, which says it all. For example, many borrowers believed Household's sales representatives when told that by paying biweekly, they would have a lower "effective" interest rate.

Similarly, the jury will need expert assistance to comprehend defendants' reaging and related practices and how those practices were used to conceal the credit quality of defendants' loan portfolio from potential investors.²⁹ Defendants cannot argue with a straight face that the average juror has any knowledge or understanding about these practices or even credit quality issues in general.

Defendants also contest Ms. Ghiglieri's opinions to the extent that she is opining as to defendants' state of mind. Defs' Mem. at 43. Ms. Ghiglieri does not testify as to defendants' state of mind with respect to their public statements, *i.e.*, scienter. She will testify, for example, based on her experience and knowledge and relying on the evidence before her, that defendants' acts and conduct caused predatory lending to result from those acts. Likewise, she will testify that [REDACTED], "it would have been appropriate to investigate the source of these [allegedly unauthorized] materials and to take appropriate action." Rebuttal Report at 46, Ex. B. This is not testifying as to defendants' state of mind. *United States v. Owens*, 301 F.3d 521, 527 (expert testimony admissible when it does not "comment[] directly on [defendant's] state of mind") (alteration added and in original).

Nor will Ms. Ghiglieri testify about defendants' credibility as witnesses. Defendants point to one statement taken out of context. Defs' Mem. at 43 n.36. Defendants ignore Ms. Ghiglieri's own testimony that she assumed defendants told the truth when they testified as to an unreasonably narrow definition of predatory lending. *See, e.g.*, Ghiglieri Depo Tr. at 102:1-4, Ex. I (assuming

²⁹ In their memorandum, defendants make factual arguments pertaining to whether Household followed the FFIEC guidelines for reaging, which they don't cite and don't explain, and whether it was required to. Defs' Mem. at 42. Plaintiffs leave the merits of these arguments for another day as they have no bearing on this motion.

Aldinger told the truth as to his definition of predatory lending); *id.* at 103:21-24 (assuming Gilmer told the truth as to his definition of predatory lending).

III. CONCLUSION

For the foregoing reasons, defendants' motion to exclude the expert testimony of Ms. Ghiglieri should be denied.

DATED: February 10, 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 Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 100 Pine Street, Suite 2600, San Francisco, California 94111.

2. That on February 10, 2009, declarant served by electronic mail and by U.S. Mail to the parties the **LEAD PLAINTIFFS' MEMORANDUM IN OPPOSITION TO HOUSEHOLD DEFENDANTS' DAUBERT MOTION TO EXCLUDE THE EXPERT TESTIMONY OF CATHERINE A. GHIGLIERI:**

The parties' email addresses are as follows:

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

/s/ Marcy Medeiros

MARCY MEDEIROS