

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

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

**REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION IN
LIMINE TO EXCLUDE DEFENDANTS' CUMULATIVE EXPERT TESTIMONY**

[PLAINTIFFS' MOTION *IN LIMINE* NO. 3]

[REDACTED VERSION]

I. INTRODUCTION

Lead plaintiffs respectfully submit this reply memorandum of law in further support of their motion *in limine* to exclude the cumulative testimony of defendants' retained expert witnesses.

Defendants freely acknowledge that John L. Bley ("Bley") and Robert E. Litan ("Litan") cannot give duplicative testimony at trial but brush off this concern by simply stating, without support, that their testimony will not be duplicative. Defendants' attempt to distinguish Bley and Litan based on their backgrounds should be rejected. The proper question is not whether they have different backgrounds, but instead whether they offer duplicative opinions. They do, as evidenced by their opinions on issues within the predatory lending context, such as the term's definition, defendants' understanding of the term and whether or not defendants engaged in predatory practices. Attached as Appendix A is a chart reflecting numerous examples of Bley and Litan's identical and overlapping opinions. Defendants' tactic is transparent. They hope to outnumber plaintiffs' expert, Catherine A. Ghiglieri, on the predatory lending issues and use one expert to bolster another. This should not be permitted. The jury's proper assessment is not based on quantity, but rather quality and credibility.

Given the overlapping nature of the reports and deposition testimony submitted by Bley and Litan, the Court should eliminate the potential prejudice by limiting defendants to one retained expert or the other.¹ In the alternative, the Court should strictly prohibit Bley and Litan from providing any overlapping testimony about the same or similar issues.

¹ Plaintiffs have already been prejudiced by defendants' failure to comply with Local Rule 16.1.1 by not providing a sufficient description of the subject matter of the testimony from these "experts." The only description that defendants provided is a generic description that "[t]he subject matter of their expert testimony is contained in their respective reports and depositions." Defendants' Statements of Qualifications of Expert Witnesses to be Read to the Jury and Defendants' Statements of Qualifications of Witnesses Who May Offer Testimony Based on Specialized Knowledge at 1 (attached at Ex. F-2 to the [Proposed] Final Pretrial Order). Given the substantial overlap between Bley and Litan's Reports and testimony, this is not

II. ARGUMENT

Defendants' attempt to "outnumber" plaintiffs' predatory lending expert should be rejected. There is no dispute that Bley and Litan cannot testify about the same subject matter at trial. Defendants' attempt to distinguish between the two is unconvincing. In essence, defendants argue that Bley and Litan have disparate backgrounds and thus are entitled to offer opinions on the same subjects. Defs' Opp. at 1-12. This "distinction" cannot overcome the fact that both were retained to rebut claims of "predatory lending" and each will provide overlapping opinions on the same subject matter. Allowing the jury to hear defendants' story on predatory lending from their two retained experts will only create confusion, waste time and prejudice plaintiffs.

Both of defendants' retained predatory lending experts will render the exact same opinions on the definition of predatory lending and whether defendants' practices constitute predatory lending. *See* Litan Rpt. at 15-18, 20-27;² Joint Rpt. at 2, 14, 19-36.³ For example, both will opine that defendants' Pay Rights Rewards Program qualified as an alternative mortgage under AMTPA, and in the same bald, conclusory fashion. *See* Litan Rpt. at 30, 37; Joint Rpt. at 21-24. Both will also opine (without any substantive analysis) that many of the alleged predatory practices by defendants were in fact legal. *See* Litan Rpt. at 37-42; Joint Rpt. at 19-21; Litan Tr. at 76:14-18, 79:2-4, Ex. A hereto; Bley Tr. at 29:7-13, Ex. B hereto. Additionally, both will opine that illegal predatory lending acts by Household employees were not widespread, notwithstanding the evidence

helpful. In correspondence, plaintiffs requested that defendants provide a real description of the proffered expert testimony of these witnesses. Defendants refused to do so until now.

² The Litan Report is attached as Ex. 14 to the Declaration of Thomas J. Kavalier in Support of Opposition to Plaintiffs' Motions *in Limine* Nos. 1, 3-10 ("Kavalier Decl.").

³ The Joint Report is attached as Ex. A to Plaintiffs' Motion to Exclude Certain Testimony of Defendants' Expert John Bley Pursuant to Federal Rule of Evidence 702 (Plaintiffs' Motion *in Limine* No. 10).

to the contrary. *See* Litan Rpt. at 23, 27-37; Joint Rpt. at 19, 36-37.⁴ As this Court’s Local Rules clearly state, “[o]nly one . . . [expert] witness on each subject for each party will be permitted to testify absent good cause shown.” N.D. Ill. Local Rule Form 16.1.1, at 2 n.7. *See also Sunstar, Inc. v. Alberto-Culver Co., Inc.*, No. 01 C 0736, 2004 WL 1899927, at *25 (N.D. Ill. Aug. 23, 2004) (“Multiple expert witnesses expressing the same opinions on a subject is a waste of time and needlessly cumulative.”). Defendants, therefore, must choose to present the opinions of either Bley or Litan, but not both.

There is nothing Bley has said in this case, either in his report or in his deposition, that Litan has not also said or could not say on the witness stand. As defendants themselves acknowledge, Litan’s testimony goes “far beyond the scope of a state banking regulator.” Defs’ Opp. at 2. The fact that Bley does not address reaging is irrelevant. Defs’ Opp. at 6. Both Bley and Litan intend to give the ultimate opinion that Household did not engage in predatory lending. Thus, limiting defendants to a single predatory lending expert will not prejudice defendants because Litan (assuming *arguendo* that the Court admits his opinions under the *Daubert* criteria) will remain available to testify as to all the opinions to which Bley would testify. *See United States v. Miles*, 207 F.3d 988, 993 (7th Cir. 2000) (affirming exclusion of evidence that ““added very little to the probative force of the other evidence in the case””) (citation omitted). Bley provides no added value and would only cause confusion and a waste of time. Alternatively, if defendants seek to have Bley opine on predatory lending issues, Litan’s testimony should be strictly limited to reaging issues and defendants should be prohibited from eliciting any opinions regarding predatory lending.

⁴ Even defendants’ attempt to distinguish Bley and Litan by their backgrounds fails. For example, Litan’s opinion that “Household made required disclosures” and did not “mask[] delinquencies and charge-offs” invokes many aspects of regulatory compliance and internal controls, topics defendants claim Bley will address. *See* Defs’ Opp. at 7.

Defendants do not meaningfully address the “counting heads” problem articulated by this court in *Sunstar, Inc.*, 2004 WL 1899927, at *25, and the severe prejudice this would cause plaintiffs. Given the fact that defendants retained multiple experts to opine as to Ghiglieri’s conclusions, it is plain that the strategy underlying defendants’ approach is to impress the jury by providing a “team” of experts to outnumber plaintiffs’ single expert. The number of experts does not equate with the merits of a position. Allowing defendants duplicative predatory lending experts would prejudice plaintiffs by evoking emotion in the jury. *See* Fed. R. Evid. 403. Juries should evaluate competing expert testimony according to its quality and credibility, not the number of experts defendants hired. Plaintiffs, as is more common, have designated one witness to give expert testimony on predatory lending issues. Where one of defendants’ two remaining predatory lending experts can cover all the bases, and the risk of prejudice is real, there is no reason not to level the playing field.

III. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court limit defendants to calling either Bley or Litan. Alternatively, if both of these experts are permitted to testify, plaintiffs request that the Court strictly prohibit these witnesses from providing duplicative testimony as to any particular issue at trial.

DATED: February 13, 2009

Respectfully submitted,

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
PATRICK J. COUGHLIN (111070)
MICHAEL J. DOWD (135628)
SPENCER A. BURKHOLZ (147029)
DANIEL S. DROSMAN (200643)
MAUREEN E. MUELLER (253431)

/s/ Michael J. Dowd
MICHAEL J. DOWD

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
AZRA Z. MEHDI (90785467)
D. CAMERON BAKER (154432)
LUKE O. BROOKS (90785469)
JASON C. DAVIS (253370)
100 Pine Street, Suite 2600
San Francisco, CA 94111
Telephone: 415/288-4545
415/288-4534 (fax)

Lead Counsel for Plaintiffs

MILLER LAW LLC
MARVIN A. MILLER
LORI A. FANNING
115 S. LaSalle Street, Suite 2910
Chicago, IL 60603
Telephone: 312/332-3400
312/676-2676 (fax)

Liaison Counsel

LAW OFFICES OF LAWRENCE G.
SOICHER
LAWRENCE G. SOICHER
110 East 59th Street, 25th Floor
New York, NY 10022
Telephone: 212/883-8000
212/355-6900 (fax)

Attorneys for Plaintiff

DECLARATION OF SERVICE BY ELECTRONIC MAIL AND BY U.S. MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Diego, State of California, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway Suite 1900, San Diego, California 92101.

2. That on February 13, 2009, declarant served by electronic mail and by U.S. Mail to the parties the **REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION *IN LIMINE* TO EXCLUDE DEFENDANTS' CUMULATIVE EXPERT TESTIMONY.**

The parties' e-mail addresses are as follows:

TKavaler@cahill.com PSloane@cahill.com PFarren@cahill.com LBest@cahill.com DOwen@cahill.com	NEimer@EimerStahl.com ADeutsch@EimerStahl.com MMiller@MillerLawLLC.com LFanning@MillerLawLLC.com
--	--

and by U.S. Mail to:

Lawrence G. Soicher, Esq.
Law Offices of Lawrence G. Soicher
110 East 59th Street, 25th Floor
New York, NY 10022

David R. Scott, Esq.
Scott & Scott LLC
108 Norwich Avenue
Colchester, CT 06415

I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th day of February, 2009, at San Diego, California.

/s/ Teresa Holindrake

TERESA HOLINDRAKE

APPENDIX A

Restricted Document Pursuant To L.R. 26.2
Filed Under Seal Pursuant To The Protective Order
Dated November 5, 2004 And The Minute Order
Dated October 10, 2006