

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Ronald A. Guzman	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	02 C 5893	DATE	3/23/2009
CASE TITLE	Lawrence E. Jaffe Pension Plan vs. Household International , Inc.		

DOCKET ENTRY TEXT

For the reasons set forth in this Order, the Court grants in part defendants' *Daubert* motion to exclude the expert testimony of Harris Devor [doc. no. 1356].

Docketing to mail notices.

	Courtroom Deputy Initials:	LC/LM
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Defendants ask the Court to bar plaintiffs' expert Harris Devor from testifying that Household's accounting of the credit card marketing agreements did not comply with GAAP because he is just parroting KPMG's opinion. The Court disagrees. Though Devor reviewed KPMG's work, he said his opinions were based on his own analysis of the transactions in light of his accounting expertise. (Mem. Law Supp. Pls.' Opp'n Defs.' *Daubert* Mot. Exclude Expert Testimony Devor, Ex. 14, Devor Dep. at 118-19.) That is permissible expert testimony. *See, e.g., Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 613-14 (7th Cir. 2002).

He can also give his opinion about how much of the revenue Household reported for 1999 through the second quarter of 2002 was attributable to predatory lending practices. Defendants can explore on cross-examination the extent to which the documents on which Devor relies – Household's estimate of the refunds it might have to make in connection with the multi-state investigation and the multi-state investigation settlement agreement – are sufficient to support his opinion.

However, Devor cannot opine that, assuming plaintiffs' allegations are true, Household's financial statements for the class period falsely report its revenues because they include as revenue money obtained from predatory lending. Plaintiffs do not argue that Household made no money from its use of the allegedly predatory practices or that it incorrectly reported the amount of money those practices generated. A determination that Household's lending practices were improper, if there is one, would not make that money disappear or render Household's financial statements actionably false because money made from predatory lending is included in them. *See Galati v. Commerce Bancorp, Inc.*, 220 Fed. Appx. 97, 100-02 (3rd Cir. 2007) (affirming district court's dismissal of securities fraud claim that bank made false statements about its deposit totals by including amounts obtained pursuant to an illegal kick-back scheme because "[f]actual recitations of past earnings, so long as they are accurate, do not create liability under Section 10(b)" (quotation omitted)); *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 401 & n.3 (6th Cir. 1997) ("[A] violation of federal securities law cannot be premised upon a company's disclosure of accurate historical data."); *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 501 F. Supp. 2d 452, 470 (S.D.N.Y. 2006) ("[A] company's misleading statements about the sources of its revenue do not make the company's statements of the revenue figures misleading; rather, liability is limited to the misleading statements themselves.")¹

Defendants' last challenge is to Devor's opinion that Household should have disclosed the existence of the multi-state investigation in its August 2002 SEC filings. Devor reached this opinion by applying Financial Accounting Standard No. 5 to the facts he derived from the record, a typical accounting exercise. If, as defendants assert, Devor ascribed too much weight to certain facts and too little to others, they can make that point on cross-examination. Their assertion is not, however, a basis for barring the testimony.

¹Plaintiffs may still argue that Household's financial statements are false for reasons other than the inclusion of money made from allegedly predatory lending practices.