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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

02cv5893

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

~~[PROPOSED]~~ FINAL PRETRIAL ORDER

VOLUME 2 OF 2

EXHIBIT I-2

UNITED STATES DISTRICT COURT

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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-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman

DEFENDANTS' RESPONSES AND OBJECTIONS TO PLAINTIFFS' PROPOSED JURY INSTRUCTIONS

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Defendants Household International, Inc. ("Household"), William F. Aldinger ("Aldinger"), David A. Schoenholz ("Schoenholz") and Gary Gilmer ("Gilmer") (collectively, "Defendants") respectfully submit these responses and objections to the Plaintiffs' Proposed Jury Instructions ("Plaintiffs' Instructions").[1] These Responses and Objections are based on Defendants' understanding that the parties' Proposed Jury Instructions should be directed to the common, class-wide issues that will be to be tried at this time, with the understanding that the Court has deferred all proceedings on issues of individual reliance and damages to a later phase, if any should be required.

Defendants object generally to Plaintiffs' Proposed Jury Instructions on the ground that Plaintiffs have failed to propose adequate substantive preliminary instructions, including instructions on basic legal issues, such as the elements of the Plaintiffs' claims, and on the jury's role as fact-finder, including the burden of proof, the concept of individual liability, and the jury's obligation to follow the Court's instructions on the law. Under the Federal Rules of Civil Procedure, the Court has the discretion to give Preliminary Instructions regarding the burden of proof, elements of Section 10(b), making a misstatement, materiality, scienter and causation. *See* FED R. CIV. P. 51(b)(3) ("The court may instruct the jury at any time after trial begins and before the jury is discharged"). Courts have noted that it is considered advisable to give instructions "outlining the issues and the law involved" prior to the presentation of evidence.

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1 The Responses and Objections herein are premised on Plaintiffs' specific acknowledgment that no claims have been asserted on behalf of the Class against Defendants Joseph A. Vozar ("Vozar") or Household Finance Corporation ("HFC" and, collectively with Vozar, the "Non-Class Action Defendants") on behalf of the Class, and that no claim or claims that will be at issue in the trial scheduled to begin on March 30, 2009 have been asserted or will be tried against Vozar or HFC. The Non-Class Action Defendants do not waive, but on the contrary, each expressly reserves and intends to preserve, the right to adopt, amend, supplement or re-assert objections to Plaintiffs' Instructions to the extent that Plaintiffs at any future time request that any or all of Plaintiffs' Instructions be given in a trial of claims asserted against Vozar and HFC.

United States v. Bynum, 566 F.2d 914, 924 (5th Cir. 1978); *see also* SEVENTH CIRCUIT AMERICAN JURY PROJECT, FINAL REPORT, at 25–28 (2008) (recommending that trial judges pre-instruct the jury on the substantive law of issues involved in the case); ABA, AMERICAN JURY PROJECT, PRINCIPLES FOR JURIES AND JURY TRIALS, at 20–21 (2005).

Studies have consistently shown that pre-instructing jurors "greatly facilitate[s] various aspects of jury performance, such as improving juror integration of law and facts, enhancing juror recall, improving juror focus on the relevant issues, enhancing juror's chances of applying the correct rule to the evidence, reducing juror questions during deliberations, creating more informed verdicts, and increasing juror satisfaction." Franklin Strier, *The Road to Reform: Judges on Juries and Attorneys,* 30 LOY. L.A. L. REV. 1249, 1256–57 (1997) (footnotes omitted); *see also* Neil P. Cohen, *The Timing of Jury Instructions*, 67 TENN. L. REV. 681, 690–91 (2000) (jury research has shown that substantive pre-instructions "will improve jury recall of evidence and instructions, reduce juror bias and reliance on stereotypes, reduce juror confusion, encourage jurors not to form opinions too early in the case, . . . improve juror understanding of the instructions[,] . . . [and] improve [jurors'] cognitive processing in a complex civil case") (footnotes omitted).

Plaintiffs' Proposed Jury Instructions 1–6 are inadequate to prepare the jury for the scope and complexity of the evidence to be presented at trial. Plaintiffs' proposed instructions include, for example, no explanation of the elements of plaintiffs' Rule 10b-5 and Section 20(a) claims. Plaintiffs' proposed preliminary instructions include no explanation of the parties' respective burdens of proof (indeed, Plaintiffs' proposed instructions do not even use the phrase "burden of proof" until Proposed Instruction No. 40, which is proposed for use after the close of evidence). Given the benefits of pre-instructing the jury regarding important substantive issues, Household requests that the Court adopt Defendants' Proposed Preliminary Instructions 1.01 – 1.30 instead of Plaintiffs' Proposed Jury Instructions 1–6.

Defendants object generally that many of Plaintiffs' Instructions are generalized pattern instructions that have not been adapted to reflect the particular circumstances of this case. Precisely because these pattern instructions were written to fit all situations, without the addition of particularized details they actually fit none. The Seventh Circuit Committee on Pattern Civil Jury Instructions (the "Committee") acknowledged as much in the Introduction to the Seventh Circuit's proposed pattern jury instructions, stating that "These are pattern instructions, no more, no less. . . . The Committee, while hopeful that they will provide an effective template in most trials, strongly recommends that each judge review the instructions to be sure each fits the case on trial." Federal Jury Instructions: Seventh Circuit, Civil Cases, Introduction (2005)). To the extent that Plaintiffs request that their proposed instructions be delivered in the abstract, generalized form contained herein, Defendants object that the instructions are vague, unclear, and confusing, and that they will not assist the jurors in coming to an intelligent understanding of the law or how to relate the law to the evidence that will be presented at this trial.

With respect to many other Plaintiffs' Instructions, Defendants object generally to Plaintiffs' misleading citations of Pattern Civil Jury Instructions of the Seventh Circuit, and other pattern and/or model civil jury instructions, without indicating that the pattern instructions have been modified.

These Responses and Objections are made without prejudice to Defendants' motions in limine and Daubert motions to exclude expert testimony, and without prejudice to any evidentiary objections Defendants have asserted or may assert before or during the course of the trial. Defendants reserve the right to revise, supplement, or withdraw the responses and objections to Plaintiffs' Instructions set forth herein, and/or to request amended, alternative or supplemental instructions, to reflect the Court's subsequent rulings on substantive or evidentiary matters prior to or during the trial, or in the event that the course of the trial provides a basis for further objection, or should the Plaintiffs seek to withdraw, alter or supplement Plaintiffs' In-

structions. In particular, but without limitation, because the present iteration of Plaintiffs' "Operative" Trial Exhibit List still includes more than 1,800 exhibits, the vast majority of which undoubtedly will not be used at trial, Defendants reserve the right to propose alternative, particularized limiting instructions at any time prior to the close of evidence, when it is known which subset of Plaintiffs' designated exhibits will actually be offered and admitted in evidence.

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[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 1

Introduction

Ladies and gentlemen: You are now the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some instructions. At the end of the trial, I will give you more detailed instructions. Those instructions will control your deliberations.

One of my duties is to decide all questions of law and procedure. From time to time during the trial and at the end of the trial, I will instruct you on the rules of law that you must follow in making your decision.

You should not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be.

Authority: Federal Civil Jury Instructions of the Seventh Circuit, Appendix, "Introductory Paragraphs" (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 1

Defendants object to Plaintiffs' Proposed Jury Instruction No. 1 on the grounds that the pattern instruction, standing alone, provides insufficient protection against the substantial risk of unfair prejudice in this case, given Plaintiffs' undisguised intention to offer a wide array of highly inflammatory evidence of only minimally probative value. Plaintiffs' proposed instruction fails to discuss the need for fairness and impartiality, the need to avoid being influenced by sympathy, prejudice, emotion or public opinion, and the fact that the jury must follow the Court's instructions on the law, even if jurors disagree with the law. In this case, both because of the inflammatory, prejudicial nature of much of the evidence Plaintiffs will seek to introduce and because of the widespread media attention to the current adverse conditions in the subprime lending market, it is essential that such instructions be introduced at the earliest possible time, and repeated at appropriate intervals, to minimize the substantial risk that the jury will decide issues on the basis of prejudice or emotion rather than on the basis of reasoned evaluation of the evidence and application of the law.

Preliminary Instructions (Nos. 1–6)

In light of the strong recommendation set forth in the *Seventh Circuit American Jury Project: Final Report* (September 2008) at 25–28, that juries be given substantive preliminary instructions to help them follow the evidence, including instructions on the burden of proof and the elements of the claims and defenses at issue, Defendants object that the instructions that Plaintiffs have identified as "Preliminary Instructions" (Plaintiffs' Proposed Jury Instructions 1-6) are insufficient to prepare jurors to follow the evidence that will be presented during this complex trial. None of those instructions explains the elements of Plaintiffs' claims, the burden of proof on Plaintiffs' claims and Defendants' defenses, or what is and is not evidence that the jury may use in making factual determinations.

Plaintiffs' Proposed Jury Instruction No. 1 should be omitted and replaced with Defendants' Proposed Jury Instruction 1.01.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 2

Order of Trial

The trial will proceed in the following manner:

First, plaintiffs' attorney may make an opening statement. Next, defendants' attorney may make an opening statement. An opening statement is not evidence but is simply a summary of what the attorney expects the evidence to be.

After the opening statements, plaintiffs will call witnesses and present evidence. Then, defendants will have an opportunity to call witnesses and present evidence. After the parties' main cases are completed, plaintiffs may be permitted to present rebuttal evidence [and defendants may be permitted to present sur-rebuttal evidence].

After the evidence has been presented, [I will instruct you on the law that applies to the case and the attorneys will make closing arguments] [the attorneys will make closing arguments and I will instruct you on the law that applies to the case].

After that, you will go to the jury room to deliberate on your verdict.

Authority: Federal Civil Jury Instructions of the Seventh Circuit, Appendix, "Order of Trial" (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 2

Defendants object to Plaintiffs' Proposed Jury Instruction No. 2 only insofar as the pattern instruction, which Plaintiffs have copied verbatim, includes no explanation of the use of interim statements by counsel (*see Seventh Circuit American Jury Project: Final Report* (September 2008), at 25–28, 32–35) and no explanation of the entirely uncontroversial point that Defendants may cross-examine witnesses called by the Plaintiff, and vice versa.

Plaintiffs' Proposed Jury Instruction No. 2 should be omitted and replaced with Defendants' Proposed Jury Instruction 1.02.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 3.

Class Action

This case is a "Class Action," in which the named plaintiffs represent themselves and other unnamed persons or entities. A "Class Action" is a form of a lawsuit designed to permit the claims of a large group of persons, too numerous to be individual participants, to be tried by named plaintiffs, called the "Class representatives." Each of the basic claims is made by the plaintiffs both personally and on behalf of each of the Class members. One court resolves the issues for all Class members.

Well before this case came to trial, I certified this case as a Class Action and appointed the three Class representatives. I ruled that the Class representatives had met the requirements under the federal laws to proceed on behalf of all persons who purchased or acquired Household International, Inc. securities between July 30, 1999 and October 11, 2002. That period of time is called the "Class Period." The "securities" included in the Class are the common stock of Household. Any person who purchased Household securities during that period of time is eligible to be a Class member. Excluded from the Class are: (i) Household International, Inc.; (ii) William F. Aldinger ("Aldinger"), David A. Schoenholz ("Schoenholz") and Gary D. Gilmer ("Gilmer") (collectively, the "Individual Defendants"); (iii) members of the family of each Individual Defendant; (iv) any entity in which any defendant has a controlling interest; (v) officers and directors of Household; and (vi) the legal representatives, heirs, successors or assigns of any such excluded party. Any Class member who did not wish to be part of this lawsuit was allowed to "opt-out." Whatever verdict you reach will be binding on each and every Class member, except for those who opted out.

For the purposes of my instructions to you and your deliberation of this case, I will refer to the Class representatives as "plaintiffs" and will use "plaintiffs" and "the Class" interchangeably. They are one and the same. You may also hear the terms "Class member" or "absent Class member." This refers to the individual members of the Class who purchased Household stock during the Class Period. Those persons do not have to appear or testify at the trial in order for the Class to prevail; and you should not draw any adverse or negative inference from the fact that members of the Class do not testify during the trial. Indeed, neither the plaintiffs nor any other Class member is required to appear in court personally to prove their case. Your verdict, however, will bind each and every member of the Class.

The fact that this is a Class Action in no way indicates whether or not the claims made on behalf of the plaintiff Class have merit. Your consideration of the facts and your verdict should not therefore be influenced in any regard merely because the litigation is presented in the form of a Class Action. Other than as I instruct you, you are not to draw any conclusions or reach any preconceptions, one way or another, by virtue of this being a Class Action.

Authority: Fed. R. Civ. P. 23; Minute Order of December 3, 2004 re: Class Action Certification; *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 560 (2d Cir. 1968); *Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 3

Defendants object to Plaintiffs' Proposed Jury Instruction No. 3 on the grounds that it is biased, argumentative, unnecessarily detailed, verbose and redundant. The principal reasons to instruct the jury on the nature and purpose of a class action are to explain terminology that will be used during the trial, such as "Class" and "Class Period," and to caution the jurors that they are not to be influenced by the fact that the case is proceeding as a class action. Plaintiffs' proposed instruction fails to accomplish either purpose.

The introduction of such phrases as "a large group of persons," and "too numerous to be individual participants," in the first paragraph of Plaintiffs' proposed instruction is an inappropriate attempt to elicit sympathy and prejudice the jury. The nature and purpose of a class action can and should be accurately and adequately explained without argumentative references to the size of the class. Plaintiffs' statement that "Any Class member who did not wish to be part of this lawsuit was allowed to 'opt-out'" is unnecessary and misleading.

Buried in the second paragraph of Plaintiffs' proposed instruction are certain facts that would be helpful to the jury — the definition of the Class Period, the identification of the securities at issue, and the explanation of the term "Class Representative" — if they were not lost in a mass of wholly unnecessary detail. Plaintiffs' requested instructions that "I certified this case as a Class Action and appointed the three Class representatives." and "I ruled that the Class representatives had met the requirements under the federal laws to proceed . . ." are both unnecessary and prejudicial, by suggesting that these rulings resulted from a contested, evidentiary process, misconstrue the nature of the uncontested class certification process in this case. Plaintiffs are attempting to employ the imprimatur of the Court to vest the Lead Plaintiffs with unwarranted prestige and authority in the jury's eyes.

Preliminary Instructions (Nos. 1–6)

Plaintiffs' proposed instructions, in the third paragraph, regarding the inferences that may or may not be drawn from the nonappearance of Class Members inappropriately and unfairly singles out Class Members for special treatment. Instructions regarding the inferences that may be drawn from the nonappearance of any witness, including Class Members, would be more appropriately given at a later time, if needed at all, and in the context of neutral instructions that relate equally to all parties. In addition, although this paragraph instructs that the outcome of the case will bind all Plaintiffs, it fails to mention that the outcome will also bind all four Defendants. Plaintiffs' reference to "individual members of the Class," like the reference to "individual participants" in the first paragraph, incorrectly suggests that the class is made up of individual persons, rather than primarily of institutional investors, another inappropriate attempt to elicit sympathy and incite prejudice against the Defendants.

The sequence of Plaintiffs' proposed instructions, *i.e.*, placing instructions on class actions ahead of instructions identifying the parties and the nature of the claims asserted, will be confusing and, by creating the impression that a civil action is a subset of class actions rather than the other way around, it also places undue emphasis on the fact that the case is proceeding as a class action.

Plaintiffs' Proposed Jury Instruction No. 3 should be omitted and replaced with Defendants' Proposed Jury Instruction 1.04.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 4.

Parties and Claims

This is a Class Action brought under the federal securities laws by purchasers of common stock of Household International, Inc., between July 30, 1999 and October 11, 2002 (the "Class Period"). The Lead Plaintiffs that represent all of the Class members are PACE Industry Union Management Pension Fund, The International Union of Operating Engineers Local No. 132 Pension Plan, and Glickenhaus & Company. The defendants include Household International, Inc. and the Individual Defendants. The Individual Defendants were Household's senior management during the Class Period and made public statements on behalf of Household: William F. Aldinger, Chief Executive Officer and Chairman of the Board of Directors; David A. Schoenholz who was Chief Financial Officer and Vice-Chairman of the Board of Directors; and Gary D. Gilmer, who was Vice-Chairman of Consumer Lending and Group Executive of U.S. Consumer Finance.

The plaintiffs allege that the defendants violated §10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 by knowingly or recklessly issuing false or misleading statements or omitting material facts about Household's business during the Class Period that artificially inflated Household's stock price and caused damages to Household investors (the plaintiffs). Plaintiffs also allege that the defendants violated §20(a) of the Exchange Act because as control persons they were responsible for violations of the Exchange Act by other persons. Defendants deny all of plaintiffs' allegations.

Authority: Fed. R. Civ. P. 23; *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 560 (2d Cir. 1968); *Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 4

Defendants object to Plaintiffs' Proposed Jury Instruction No. 4 on the grounds that it presents a biased, argumentative, fact-intensive and unnecessarily detailed description of Plaintiffs' position that is more appropriate as an opening statement, yet also fails to provide necessary instruction on the elements of Plaintiffs' claims and Defendants' defenses and the related burden of proof. In addition, the proposed instruction inappropriately recites numerous purported facts as to which the parties have not stipulated.

Plaintiffs' proposed instruction sets forth a one-sided, argumentative explication of Plaintiffs' allegations against Household and the Individual Defendants, while reducing De-

fendants' position to a one-sentence blanket denial, the brevity and generality of which would raise doubts about Defendants' veracity. Plaintiffs' one-sided description of the claims at issue in this trial resembles an opening statement more than an instruction on the law, and such argumentation is inappropriate as an instruction from the Court.

At the same time, the proposed instruction neglects to explain the elements of a Section 10(b) / Rule 10b-5 claim, the elements of a Section 20(a) claim, the concepts of materiality, scienter, presumed reliance, and loss causation, or the significance of the parties' respective burdens of proof. In order for the jury to follow the evidence at trial, the Court's preliminary instructions need to provide an accurate statement of the essential elements that Plaintiffs are required to prove under the controlling law, else the jurors will have no idea what Plaintiffs must prove. *See Seventh Circuit American Jury Project: Final Report* (September 2008) at 25–28. Neither this proposed instruction nor any of Plaintiffs' preliminary instructions provides that necessary foundation. The minimal, incomplete references to the law in this proposed instruction will cause only confusion.

Plaintiffs' Proposed Jury Instruction No. 4 also fails to identify any alleged false statement or omission that is a basis for Plaintiffs' securities fraud claims. Without instruction on this *sine qua non* of any securities fraud claim, the jury will not be prepared to follow the evidence that is presented at trial.

Finally, the proposed instruction fails to discuss the concept of bifurcation and fails to explain to jurors that they will be concerned only with class-wide issues and that any award of damages will be considered only in the second stage, if any, of this bifurcated trial. Plaintiffs' reference to "damages" (in the second paragraph) is inappropriate in this stage of the bifurcated trial. Although loss causation, which necessarily encompasses the concept of economic loss, is an essential class-wide element that must be proved in this stage, all issues relating to damages are individual and thus reserved for the second stage, if any.

Preliminary Instructions (Nos. 1–6)

Plaintiffs' Proposed Jury Instruction No. 4 should be omitted and replaced with Defendants' Proposed Jury Instruction 1.03, and that instruction should be followed, for completeness, with Defendants' Proposed Preliminary Jury Instructions 1.06–1.13.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 5.

Private Actions

Private lawsuits under the federal securities laws such as this Class Action are an important enforcement mechanism to supplement governmental regulations of the securities markets. Public policy encourages private actions as enforcement devices for the public interest. The major objective of the federal securities laws is to provide more protection to the investing public. To this end, private actions brought by investors such as this Class Action have long been viewed as a necessary supplement to United States Securities and Exchange Commission ("SEC") enforcement actions. Thus, the courts recognize that private actions provide an essential tool for the enforcement of the securities laws and are a necessary supplement to SEC action.

Authority: *Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 5

Defendants object to Plaintiffs' Proposed Jury Instruction No. 5 in its entirety on the grounds that it is argumentative, prejudicial, biased and irrelevant. Plaintiffs' views on the purpose of implied private actions under the securities laws, and their self-serving opinions on the importance of such actions, are irrelevant and will only distract the jury's attention from its obligation to resolve the relevant factual disputes in this case in accordance with the law. The suggestion that this private civil action brought by plaintiffs seeking damages is a close cousin to an SEC enforcement action is biased, opinionated and misleading. In addition, Plaintiffs' proposed instruction is irrelevant and unnecessary because jurors are required to accept the rules of law as given by the Court, whether or not they understand the policy reasons behind those rules and even if they disagree with them. *Federal Jury Instructions: Seventh Circuit, Civil Cases*, § 1.01 (2005). The final sentence of the instruction, by describing private actions as an "essential tool" for enforcement, risks encouraging the jurors to think of themselves as securities law "bounty hunters" instead of counseling them to focus on soberly applying the law to the facts.

If such an instruction were to be given, Plaintiffs' proposed instruction would need to be balanced by, among other things, informing jurors (a) that Congress has enacted significant reforms to the securities laws in recent years, including the PSLRA and SLUSA, specifically designed to address abuses in the use of implied private actions and the negative effects that such abuses have had on the American economy, and (b) that governmental attention paid to abuses in the use of implied private actions has included the prosecution and conviction of several plaintiffs' class action lawyers, including lawyers formerly associated with the firm representing Plaintiffs in this case.

Plaintiffs' Proposed Jury Instruction No. 5 should be omitted in its entirety. Should the Court determine that any instruction on the purpose of private lawsuits under the federal securities laws may be given, Defendants reserve the right to request alternative or supplemental instructions.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 6.

Purpose of the Securities Laws

As you know, this case involves the purchase and sale of the publicly traded securities of Household. The plaintiff Class claims to have suffered a loss caused by the defendants' violations of the securities laws. Following the stock market crash of 1929, Congress passed laws to protect the integrity of the financial markets. The underlying idea of these laws is that full disclosure of material matters about securities that are bought and sold will protect the integrity of the marketplace. The laws involved in the claims in this case are §§10(b) and 20(a) of the Exchange Act and Rule 10b-5 promulgated thereunder by the SEC.

A security is an investment in an enterprise with the expectation of profit from the efforts of other people. One common type of security is stock.

The buying and selling of stocks is controlled by the securities laws. One who violates the securities laws is liable for damages caused by the violation. In particular, the securities laws prohibit misrepresentation of material facts or omission of material facts in connection with the purchase and sale of securities.

Congress enacted these laws to ensure fair dealing and to outlaw deceptive and inequitable practices by those selling or buying securities. The laws recognize that the purchase of a stock is different from the purchase of an item in the grocery store in that the average investor is not in a position to make a personal investigation to determine the worth, quality and value of securities.

Among the primary objectives of the Exchange Act and Rule 10b-5 are the maintenance of fair and honest securities markets and the elimination of manipulative practices that tend to distort the fair and just price of stock. Any deceptive or manipulative practices that influences trading activity undermines the function and purpose of a free market. The statutes and rules are designed to support investors' expectations that the securities markets are free from fraud and to prevent a wide variety of devices and schemes that are contrary to a climate of fair dealing. They are intended to replace the philosophy of caveat emptor (let the buyer beware) with a policy of full and accurate disclosure. Such disclosure is designed to enable the investing public to make realistic appraisals about the merits of the securities so that investors may make informed investment decisions.

Authority: Adapted from 3B Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions* §162.211 (5th ed. 2001.); 4 Hon. Leonard B. Sand et al., *Modern Federal Jury Instructions* ¶82.01, Instruction 82-2 (2008); *Basic Inc. v. Levinson*, 485 U.S. 224, 230-31, 234 (1988); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386-87 (1983); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976); *SEC v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995) ("A central purpose of the securities laws is to protect investors and would-be investors in the securities market against misrepresentations."); *United States v. Parrott*, 425 F.2d 972, 977 (2d Cir. 1970) ("[T]he charge as to the purpose of the statute [is] useful to give the statute some coherence in the eyes of the jury which may not have been fully informed as to the meaning of the securities laws").

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 6

Defendants object to Plaintiffs' Proposed Jury Instruction No. 6 on the grounds that the instruction is argumentative, inflammatory, irrelevant and biased. Defendants propose that the jury be given a neutral, balanced instruction identifying the particular securities laws that are involved in this case and that the jury should be informed that the underlying purpose of the securities laws is to encourage full and accurate disclosure of material information. Plaintiffs' overwrought rhetoric, however, and their repeated references to "deceptive or manipulative practices" are both inflammatory and unhelpful.

Plaintiffs' vague definition of the term "security" in the second paragraph is confusing, unhelpful and unnecessary. It is undisputed that the claims at issue in this trial relate to Household's common stock, and it is undisputed that Household's common stock was a security. Nothing will be gained, and clarity and simplicity will be lost, by burdening the jury with the kind of abstract legal definition that has baffled courts and lawyers for decades.

The broad statements in the first two sentences of the third paragraph of Plaintiffs' proposed instruction are not accurate and, even if they were, they are unnecessary verbiage. The buying and selling of stocks is *not* "controlled" by the securities laws, and one who violates the securities laws is *not* always "liable for damages." The third sentence of the third paragraph is inaccurate because it fails to make clear that an omission of material fact is actionable only if the fact that was omitted was necessary, in light of the circumstances, to keep the statements that were made from being misleading.

In addition, the inflammatory details and provocative wording of Plaintiffs' proposed instruction are inappropriate and unhelpful. Plaintiffs' invocation of "the stock market crash of 1929," for example, as well as their use of phrases like " undermin[ing] the function and purpose of a free market," "investors' expectation that the securities markets are free from

fraud," and "climate of fair dealing," and their repeated references to "violations" and "deceptive and inequitable practices" are unnecessary rhetorical flourishes that will distract the jury from its obligation to resolve the relevant factual disputes in this case in accordance with the law. This rhetoric goes well beyond any helpful explanation of the "purpose" of the securities laws. To be balanced, if these passages were included, this instruction would also need to inform jurors that, more recently, Congress has enacted significant reforms to the securities laws, including the PSLRA and SLUSA, in an effort to address the abuses in the use of private securities law class actions, and the negative effects that such abuses have had on the American economy.

The "grocery store" analogy that is included in the fourth paragraphs of this instruction should be omitted because it is inapt and misleading. Referring to "the purchase of an item in the grocery store" in close juxtaposition to the term "the average investor" will mislead the jury by suggesting, inaccurately, that the average investors in Household stock are individual consumers, not large, sophisticated financial institutions and other institutional investors. In addition, the example is confusing because it fails to make clear that the statement that "the average investor is not in a position to make a personal investigation" refers to the time prior to the enactment of securities laws requiring disclosure. The analogy does not serve to educate the juror on the purpose of the securities laws, but rather to arouse sympathy for "the average investor" and bias against those accused of as yet unproven securities law violations.

Other statements included in Plaintiffs' proposed instruction are inappropriate expressions of Plaintiffs' opinion. For example, the statement that the disclosures required by securities laws are intended to replace the philosophy of caveat emptor with a policy of full and accurate disclosure could cause the jury to conclude incorrectly that securities laws are intended to eliminate all investment risk and to interpret the disclosure obligations too broadly.

Plaintiffs' Proposed Jury Instruction No. 6 should be omitted and replaced with Defendants' Proposed Jury Instructions 1.05.

B. IN-TRIAL INSTRUCTIONS

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 7.

Cautionary Instruction Before Recess

We are about to take our first break during the trial, and I want to remind you of the instruction I gave you earlier. Until the trial is over, you are not to discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else. If anyone approaches you and tries to talk to you about the case, do not tell your fellow jurors but advise me about it immediately. Do not read or listen to any news reports of the trial. Finally, remember to keep an open mind until all the evidence has been received and you have heard the views of your fellow jurors. I may not repeat these things to you before every break that we take, but keep them in mind throughout the trial.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 2.01 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 7

Defendants do not object to Plaintiffs' Proposed Jury Instruction No. 7, which is styled as a follow-up or reminder, provided that an earlier instruction has been given, as referenced in the first sentence. As no initial instruction on this subject is included in Plaintiffs' Proposed Jury Instructions, this instruction should be replaced with Defendants' Proposed Jury Instructions Nos. 2.01 and 2.02.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 8.

In-Trial Instruction on News Coverage

I understand that reports about this trial are appearing in the newspapers, or on radio and television and the Internet. The reporters may not have heard all the testimony as you have, may be getting information from people whom you will not see here under oath and subject to cross examination, may emphasize an unimportant point, or may simply be wrong.

You must not read anything or listen to anything or watch anything with regard to this trial. It would be a violation of your oath as jurors to decide this case on anything other than the evidence presented at trial and your common sense. You must decide the case solely and exclusively on the evidence that will be received here in court.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 2.02 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 8

Defendants do not object to Plaintiffs' Proposed Jury Instruction No. 8, provided that a direction to ignore publicity is included near the start of the first paragraph, immediately preceding the explanation about reporters' lack of knowledge. *See* Defendants' Proposed Jury Instruction No. 2.10.

Defendants' response, as well as Defendants' Proposed Jury Instruction No. 2.10, are premised on the assumption that such instructions will be given if and to the extent actually needed during trial. At this time, Defendants do not have sufficient information to assess the necessity of the proposed instructions. Defendants therefore reserve the right to revise and/or supplement the responses and objections set forth herein, and/or to request amended, alternative or supplemental instructions if and when warranted by the circumstances at the time of trial.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 9.

Stipulations of Fact

The parties have stipulated, or agreed, that [*stipulated fact*]. You must now treat this fact as having been proved for the purpose of this case.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 2.05 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 9

Defendants do not object to Plaintiffs' Proposed Jury Instruction No. 9.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 10.

Judicial Notice

I have decided to accept as proved the fact that _____. You must now treat this fact as having been proved for the purpose of this case.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 2.06 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 10

Defendants do not disagree that the instruction shown in Plaintiffs' Proposed Jury Instruction No. 10 should be given during trial each time a fact is judicially noticed. In addition, Defendants propose that an explanation of the concept of judicial notice, in lay terms, also be included in the Court's instructions on "What Is Evidence," and that all facts judicially noticed be summarized in the Court's instructions after the close of evidence. *See* Defendants' Proposed Jury Instructions Nos. 1.15 and 3.05.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 11.

Deposition as Substantive Evidence

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded.

The deposition of *[Witness]*, which was taken on *[date]*, is about to be presented to you. Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if the witness had been present to testify.

[Do not place any significance on the behavior or tone of voice of any person reading the questions or answers.]

Authority: Federal Civil Jury Instructions of the Seventh Circuit 2.08 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 11

Defendants do not disagree that an instruction similar to Plaintiffs' Proposed Instruction No. 11 should be when given the first deposition testimony is offered during trial. Because all of the depositions in this case have been videotaped, however, and because the presentation of selected portions of a videotaped deposition might otherwise be confusing to the jury, Defendants propose that the second paragraph of the instruction begin with the words "Portions of the videotaped deposition of . . . ." Defendants object to the use of the third sentence, shown in brackets, as unnecessary and confusing. Defendants further propose that a reminder instruction on the use of deposition testimony be given after the close of evidence.

Accordingly, Plaintiffs' Proposed Jury Instruction No. 11 should be replaced with Defendants' Proposed Jury Instructions Nos. 2.05 and 3.27.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 12.

Use of Interrogatories (To Be Used Only When Interrogatories Are Read Without Admission Into Evidence)

Evidence will now be presented to you in the form of written answers of one of the parties to written interrogatories submitted by the other side. These answers were given in writing and under oath before this trial in response to written questions.

You must give the answers the same consideration as if the answers were made from the witness stand.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 2.09 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 12

Subject to and without waiving Defendants' objections to the relevance, materiality and admissibility as evidence for any purpose of any specific interrogatory and/or interrogatory answer Plaintiffs may offer to read at trial or otherwise offer in evidence, Defendants agree that a specific instruction akin to Plaintiffs' Proposed Jury Instruction No. 12 should be given during trial each time an interrogatory and answer are read, and again after the close of evidence.

Defendants object to Plaintiffs' Proposed Jury Instruction No. 12 on the ground that use of the pattern instruction without tailoring it to the particular circumstances of this case will be insufficiently helpful to the jury. Plaintiffs object further on the ground that the proposed instruction fails to make clear that introducing an opposing party's answers to interrogatories and offering them in evidence does not mean that the introducing party accepts those answers or binds itself to those answers. Accordingly, Plaintiffs' Proposed Jury Instruction No. 12 should be omitted and replaced with Defendants' Proposed Jury Instructions Nos. 2.06 and 3.28.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 13.

Summaries of Records as Evidence

Stipulated

The parties agree that [*describe summary in evidence*] accurately summarize the contents of documents, records, or books. You should consider these summaries just like all of the other evidence in the case.

Not Stipulated

Certain [*describe summary in evidence*] is/are in evidence. [The original materials used to prepare those summaries also are in evidence.] It is up to you to decide if the summaries are accurate.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 2.12 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 13

Defendants do not object to Plaintiffs' Proposed Jury Instruction No. 13.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 14.

Judge's Comments To Lawyer

I have a duty to caution or warn an attorney who does something that I believe is not in keeping with the rules of evidence or procedure. You are not to draw any inference against the side whom I may caution or warn during the trial.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 2.14 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 14

Defendants do not object to Plaintiffs' Proposed Jury Instruction No. 14. *See* Defendants' Proposed Jury Instruction No. 2.16.

Defendants' response, as well as Defendants' Proposed Jury Instruction No. 2.16, are premised on the assumption that the proposed instruction will be given only if and to the extent actually needed during the trial. At this time, Defendants do not have sufficient information to assess the necessity of giving the proposed instruction. Defendants therefore reserve the right to revise or supplement this response, to assert objections, or to request amended, alternative or supplemental instructions if and to the extent warranted by the circumstances at the time of trial.

C. GENERAL INSTRUCTIONS

General Instructions (Nos. 15–23)

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 15.

Functions of the Court and the Jury

Members of the jury, you have seen and heard all the evidence and arguments of the attorneys. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone and in that field neither I nor anyone else may invade your province.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

Perform these duties fairly and impartially.

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 1.01 (2008) (omitting bracketed material in fourth paragraph).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 15

Defendants do not object to Plaintiffs' Proposed Jury Instruction No. 15, provided the first bracketed sentence in the fourth paragraph of the pattern instruction is also included, substituting "emotion" for "fear." *See* Defendants' Proposed Jury Instruction No. 3.01.

General Instructions (Nos. 15–23)

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 16.

All Litigants Equal Before the Law

In this case, one of the defendants is a corporation. All parties are equal before the law. A corporation is entitled to the same fair consideration that you would give any individual person.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 1.03 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 16

Defendants do not object to having the Court give an instruction that all litigants are entitled to the same fair consideration under the law. The instruction must be bilateral, however, if it is to be fair. Identifying "one of the defendants" (even if not by name) as a corporation without also specifically identifying the Lead Plaintiffs as corporations or other legal entities is neither fair nor balanced, and indeed may invite precisely the anti-corporate enmity that the instruction is purportedly intended to forestall.

Defendants also propose that a similar instruction be given as part of the Preliminary Instructions and again at the close of evidence, and that a separate instruction on the concept of agency should be given after the close of evidence. Accordingly, Plaintiffs' Proposed Jury Instruction No. 16 should be omitted and replaced with Defendants' Proposed Jury Instructions Nos. 1.13 and 3.15.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 17.

Evidence in the Case

The evidence consists of the testimony of the witnesses, the exhibits admitted in evidence; and stipulations.

A stipulation is an agreement between both sides that certain facts are true.

I have taken judicial notice of certain facts. You must accept these facts as proved.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 1.04 (2008); Fed R. Evid. 201(g).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 17

Defendants do not object to having the instruction shown in Plaintiffs' Proposed Jury Instruction No. 17 given following the close of evidence, except insofar as the instruction fails to explain the concept of "judicial notice," a legal term that will be unfamiliar and confusing to a lay juror, and except insofar as the instruction assumes that a prior instruction has explained what it means for something to be "admitted" in evidence. In addition, Defendants propose that an instruction on what is evidence that the jury may consider should be given as part of the Preliminary Instructions as well as at the close of evidence. *See Seventh Circuit American Jury Project: Final Report* (September 2008) at 25–28.

Plaintiffs' Proposed Jury Instruction No. 17 should be omitted and replaced with Defendants' Proposed Jury Instructions Nos. 1.15 and 3.05.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 18.

Deposition Testimony

During the trial, certain testimony was presented to you by deposition and video. You should give this testimony the same consideration you would give it had the witnesses appeared and testified here in court.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 1.05 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 18

Defendants do not object to Plaintiffs' Proposed Jury Instruction No. 18.

General Instructions (Nos. 15–23)

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 19.

What Is Not Evidence

Certain things are not to be considered as evidence. I will list them for you:

First, if I told you to disregard any testimony or exhibits or struck any testimony or exhibits from the record, such testimony or exhibits are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, internet or television reports you may have seen or heard. Such reports are not evidence and your verdict must not be influenced in any way by such publicity.

Third, questions and objections or comments by the lawyers are not evidence. Lawyers have a duty to object when they believe a question is improper. You should not be influenced by any objection, and you should not infer from my rulings that I have any view as to how you should decide the case.

Fourth, the lawyers' opening statements and closing arguments to you are not evidence. Their purpose is to discuss the issues and the evidence. If the evidence as you remember it differs from what the lawyers said, your memory is what counts.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 1.06 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 19

Defendants object to Plaintiffs' Proposed Jury Instruction No. 2 only insofar as the pattern instruction, which Plaintiffs have copied verbatim, includes no explanation of the use of interim statements by counsel (*see Seventh Circuit American Jury Project: Final Report* (September 2008), at 25–28, 32–35).

Accordingly, Plaintiffs' Proposed Jury Instruction No. 19 should be omitted and replaced with Defendants' Proposed Jury Instructions No. 3.06.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 20.

Note-Taking

Any notes you have taken during this trial are only aids to your memory. The notes are not evidence. If you have not taken notes, you should rely on your independent recollection of the evidence and not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollections or impressions of each juror about the testimony.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 1.07 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 20

Defendants do not object to Plaintiffs' Proposed Jury Instruction No. 20, except insofar as the pattern instruction is insufficiently adapted to the circumstances of this case. As this Court recognized in the jury charge given in *Sunstar Inc.* v. *Alberto-Culver Co.* (N.D. Ill. 2006) (Guzman, J.), Trial Transcript, November 28, 2006 at 11, the note-taking instruction requires more complete directions regarding the procedures for handling jurors' notes throughout the trial, and it needs to clarify that note-taking is optional. In addition, Defendants propose that instructions on note-taking should be included in the Court's preliminary instructions as well as at the close of evidence. *See Seventh Circuit American Jury Project: Final Report* (September 2008) at 25–28.

Accordingly, Plaintiffs' Proposed Jury Instruction No. 20 should be omitted and replaced with Defendants' Proposed Jury Instructions Nos. 1.24 and 3.07.

General Instructions (Nos. 15–23)

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 21.

Limited Purpose of Evidence

You will recall that during the course of this trial I instructed you that I admitted certain evidence for a limited purpose. You must consider this evidence only for the limited purpose for which it was admitted.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 1.09 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 21

Defendants do not object to Plaintiffs' Proposed Jury Instruction No. 21. *See* Defendants' Proposed Jury Instruction No. 3.08.

In addition, however, because limiting instructions will play a crucial role in protecting against the risk of unfair prejudice in the particular circumstances of this case, Defendants propose (a) that the jury should be instructed as part of the Preliminary Instructions on what is evidence that certain evidence may be admitted only for a limited purpose and (b) that a particularized and specific instruction identifying evidence that has been admitted for a limited purpose, and identifying the permissible and impermissible uses of such evidence, will be needed whenever any evidence is admitted for a limited purpose during the trial.

Accordingly, Plaintiffs' Proposed Jury Instruction No. 21 should be supplemented with Defendants' Proposed Jury Instructions Nos. 1.17 and 2.11--2.14 (as and to the extent needed). Defendants reserve the right to supplement the responses and objections set forth herein, and/or to request alternative or supplemental instructions, at any time prior to or during the presentation of evidence for which limiting instructions may be needed.

General Instructions (Nos. 15–23)

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 22.

Weighing the Evidence

You should use common sense in weighing the evidence and consider the evidence in light of your own observations in life.

In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this "inference." A jury is allowed to make reasonable inferences. Any inference you make must be reasonable and must be based on the evidence in the case.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 1.11 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 22

Defendants do not object to Plaintiffs' Proposed Jury Instruction No. 22, except insofar as the instruction fails to explain the concept of "inferences" adequately in the particular circumstances of this case. To reduce the risk that the jury may draw unwarranted inferences on the basis of emotion and innuendo, given the inflammatory character of much of the evidence Plaintiffs intend to offer at trial, Defendants propose that the Court's instruction on inferences be supplemented to include Judge Sand's admonition that "An inference is not a suspicion or a guess. It is a reasoned, logical conclusion that a disputed fact exists on the basis of another fact that has been shown to exist."

Accordingly, Plaintiffs' Proposed Jury Instruction No. 22 should be omitted and replaced with Defendants' Proposed Jury Instruction No. 3.10.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 23.

Definition of "Direct" and "Circumstantial" Evidence

You may have heard the phrases "direct evidence" and "circumstantial evidence." Direct evidence is proof that does not require an inference, such as the testimony of someone who claims to have personal knowledge of a fact. Circumstantial evidence is proof of a fact, or a series of facts, that tends to show that some other fact is true.

As an example, *direct evidence* that it is raining is testimony from a witness who says, "I was outside a minute ago and I saw it raining." *Circumstantial evidence* that it is raining is the observation of someone entering a room carrying a wet umbrella.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. You should decide how much weight to give any evidence. In reaching your verdict, you should consider all the evidence in the case, including the circumstantial evidence.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 1.12 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 23

Defendants do not object to Plaintiffs' Proposed Jury Instruction No. 23. See Defendants' Defendants' Proposed Jury Instruction No. 3.11.

WITNESS TESTIMONY

Witness Testimony (Nos. 24–35)

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 24.

Testimony of Witnesses (Deciding What to Believe)

You must decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all. You also must decide what weight, if any, you give to the testimony of each witness.

In evaluating the testimony of any witness, including any party to the case, you may consider, among other things:

- the ability and opportunity the witness had to see, hear or know the things testified about;
- the witness's memory;
- any interest, bias, or prejudice the witness may have;
- the witness's intelligence;
- the manner of the witness while testifying;
- and the reasonableness of the witness's testimony in light of all the evidence.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 1.13 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 24

Defendants do not object to Plaintiffs' Proposed Jury Instruction No. 24, except that in the particular circumstances of this case, where most of the witnesses will be Defendants' current and former employees, and where Plaintiffs can be expected routinely to question their credibility, the pattern instruction should be supplemented to make clear that even if the jury disbelieves testimony given by a witness called by the Defendants on a particular issue, that does not mean the Plaintiffs have satisfied their burden of proof on that issue.

Accordingly, Plaintiffs' Proposed Jury Instruction No. 24 should be omitted and replaced with Defendants' Proposed Jury Instruction No. 3.14.

Witness Testimony (Nos. 24–35)

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 25.

Bias

In deciding whether to believe a witness, you should specifically note any evidence of hostility or partiality which the witness may have towards one of the parties. Likewise, you should consider evidence of any other interest or motive that the witness may have in cooperating with a particular party.

It is your duty to consider whether the witness has permitted any such bias or interest to color his or her testimony. In short, if you find that a witness is biased, you should view his or her testimony with caution, weight it with care and subject it to close and searching scrutiny.

Authority: 4 Hon. Leonard B. Sand, et al., *Modern Federal Jury Instructions* ¶76.01, Instruction 76-2 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 25

Defendants do not object to Plaintiffs' Proposed Jury Instruction No. 25. *See* Defendants' Requested Instruction No. 3.21.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 26.

Discrepancies in Testimony

You are the sole judges of the credibility, that is the believability, of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence contrary to the testimony.

You should carefully examine all the testimony given, the circumstances under which each witness has testified, and every matter in evidence tending to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor or manner while testifying.

Consider the witness's ability to observe the matters as to which the witness has testified, and whether the witness impresses you as having an accurate recollection of these matters. Also, consider any relation each witness may have with either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which the testimony of each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses may or may not cause you to discredit such testimony. Two or more persons seeing an event may see or hear it differently.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, that you may think it deserves. In short, you may accept or reject the testimony of any witness, in whole or in part.

Authority: 3 Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions* §105.01 (5th ed 2001.) (modified to add the phrase "that is the believability" in the first sentence).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 26

Defendants object to Plaintiffs' Proposed Jury Instruction No. 26 on the grounds that it is unnecessary, redundant and confusing. Notwithstanding its title, this instruction is no more than a cumulative and long-winded repackaging of Plaintiffs' Proposed Jury Instruction No. 24, which tracks the language of Federal Civil Jury Instructions of the Seventh Circuit 1.13

(2008). Defendants object further that the needless repetition of redundant instructions on credibility determinations places unwarranted emphasis on the possibility that trial witnesses will give testimony that is not credible. Because the repetition and undue emphasis will inevitably cause jurors to be unnecessarily suspicious of all witness testimony, Defendants will be prejudiced, as nearly all of the fact witnesses at trial will be current or former employees of Defendant Household.

Plaintiffs' Proposed Jury Instruction No. 26 should be omitted in its entirety.

Witness Testimony (Nos. 24–35)

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 27.

Interest in Outcome

In evaluating the credibility of the witnesses, you should take into account any evidence that a witness may benefit in some way from the outcome of the case. Such interest in the outcome creates a motive to testify falsely and may sway a witness to testify in a way that advances his or her own interests. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony, and accept it with great care.

Keep in mind, though, that it does not automatically follow that testimony given by an interested witness is to be disbelieved. There are many people who, no matter what their interest in the outcome of the case may be, would not testify falsely. It is for you to decide, based on your own perceptions and common sense, to what extent, if at all, the witness's interest has affected his or her testimony.

Authority: 4 Hon. Leonard B. Sand, et al., *Modern Federal Jury Instructions* 76.01, Instruction 76-3 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 27

Defendants do not object to Plaintiffs' Proposed Jury Instruction No. 27.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 28.

Prior Inconsistent Statements [Or Acts]

You may consider statements given by [*Party*] [*Witness under oath*] before trial as evidence of the truth of what he or she said in the earlier statements, as well as in deciding what weight to give his or her testimony.

With respect to other witnesses, the law is different. If you decide that, before the trial, one of these witnesses made a statement [not under oath] [or acted in a manner] that is inconsistent with his or her testimony here in court, you may consider the earlier statement [or conduct] only in deciding whether his or her testimony here in court was true and what weight to give to his or her testimony here in court.

[In considering a prior inconsistent statement[s] [or conduct], you should consider whether it was simply an innocent error or an intentional falsehood and whether it concerns an important fact or an unimportant detail.]

Authority: Federal Civil Jury Instructions of the Seventh Circuit 1.14 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 28

Defendants do not object to Plaintiffs' Proposed Jury Instruction No. 28, provided that the testimony offered at trial renders any of its three discrete components necessary and appropriate, provided that the specific instruction actually proposed must be objective and must be specifically and accurately tailored to the circumstances of this case. *See* Defendants' Proposed Jury Instructions Nos. 3.16–3.18.

Defendants submit that the pattern instruction is insufficiently particularized to permit evaluation of any part of the proposed instruction in relation to any specific witness at this time and, accordingly, Defendants reserve the right to supplement the responses and objections set forth herein, and/or to request alternative or supplemental instructions, if and when Plaintiffs propose any specific instruction on the use of any particular witness's prior inconsistent statement(s).

Witness Testimony (Nos. 24–35)

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 29.

Lawyer Interviewing Witness

It is proper for a lawyer to meet with any witness in preparation for trial.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 1.16 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 29

Defendants do not object to Plaintiffs' Proposed Jury Instruction No. 29. *See* Defendants' Proposed Jury Instruction No. 3.19.

Witness Testimony (Nos. 24–35)

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 30.

Number of Witnesses

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 1.17 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 30

Defendants do not object to giving an instruction to the effect that the weight of the evidence is not determined by the number of witnesses. Defendants do object to Plaintiffs' Proposed Jury Instruction No. 30, however, on the grounds that the pattern instruction fails to clarify the relation between the quantity and quality of evidence and the parties' burden of proof, fails to specify that the quality of evidence is the driving factor, and fails to extend the point to the number of exhibits. Accordingly, Plaintiffs' Proposed Jury Instructions Nos. 30 and 31 should be omitted and replaced with Defendants' Proposed Jury Instruction No. 3.12.

Witness Testimony (Nos. 24–35)

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 31.

All Available Witnesses or Evidence Need Not Be Produced

The law does not require any party to call as a witness all persons who might have knowledge of the facts related to this trial. Similarly, the law does not require any party to present as exhibits all papers and things mentioned during this trial.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 1.18 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 31

Defendants do not object to giving an instruction that all potential witnesses need not be called nor all potential exhibits introduced. Defendants submit, however, that such an instruction will be most helpful to the jury, in the circumstances of this case, if it is expressed in relation to the parties' burden of proof rather than as an abstract statement about legal requirements. Accordingly, Plaintiffs' Proposed Jury Instructions Nos. 30 and 31 should be omitted and replaced with Defendants' Proposed Jury Instruction No. 3.12.

Witness Testimony (Nos. 24–35)

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 32.

Adverse Inference from Missing Witness

[*Witness*] was mentioned at trial but did not testify. You may, but are not required to, assume that [*Witness's*] testimony would have been unfavorable to [plaintiffs] [defendant].

Authority: Federal Civil Jury Instructions of the Seventh Circuit 1.19 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 32

Defendants object to Plaintiffs' Proposed Jury Instruction No. 32 on the ground that it is inappropriate and unjustified. A missing witness instruction may not be given absent an advance ruling from the Court. *Hoffman* v. *Caterpillar*, 368 F.3d 709, 716–17 (7th Cir. 2004). Plaintiffs have not requested such a ruling, and they have not identified any witness who is "peculiarly within the power" of the Defendants, *Oxman* v. *WLS-TV*, 12 F.3d 652, 661 (7th Cir. 1993), and not available to testify on Plaintiffs' case. Given that Plaintiffs were permitted to take more than 60 depositions of their own selection, and that they now possess videotaped testimony from all of those depositions, it is inconceivable that they could even identify any witness with knowledge of facts at issue who is unavailable to them, much less that they would be able to meet the standards necessary for granting such an adverse inference. Plaintiffs' Proposed Jury Instruction No. 32 should be omitted in its entirety.

Witness Testimony (Nos. 24–35)

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 33.

Cumulative Evidence

Individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts. A piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence.

Authority: *Bourjaily* v. *United States*, 483 U.S. 171, 179-80 (1987).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 33

Defendants object to Plaintiffs' Proposed Jury Instruction No. 33 on the grounds that it misstates the controlling law, that it will confuse and mislead the jury, and that it improperly characterizes Plaintiffs' burden of proof. The language in the instruction is lifted out of context and read too broadly. The case Plaintiffs have cited as their sole authority for this novel instruction is a criminal appeal, in which the Court decided that a trial court may be permitted to evaluate the evidentiary worth of a co-conspirator's out-of-court statement, notwithstanding its presumed unreliability. In Plaintiffs' proposed instruction, however, the quoted language, divorced from its context and read in the abstract, may easily be misinterpreted in a way that would loosen the standards for permissible inferences and lower Plaintiffs' burden of proof. The jury is not entitled to conclude that a given issue has been proved merely because there is more than one insufficient or unreliable piece of evidence. This proposed instruction represents the same flawed reliance on insufficient and unreliable evidence that typifies the reasoning of Plaintiffs' purported "predatory lending" expert. In addition, Defendants incorporate herein their response and objection, *infra*, to Plaintiffs' Proposed Jury Instruction No. 44, in particular as it relates to Plaintiffs' request for an instruction regarding "the overall *impression* created by several state-

ments or omissions" (emphasis added). Plaintiffs' Proposed Jury Instruction No. 33 should be rejected in its entirety.

Witness Testimony (Nos. 24–35)

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 34.

Electronic Mail (E-mail) Presumptively Received

To the extent the evidence presented to you involves e-mail communications, you must presume that such e-mail communications were actually received by the intended recipients.

Authority: *SEC v. Spiegel, Inc.*, No. Civ. A. 03 C 1685, 2003 WL 22176223 (N.D. Ill. Sept. 15, 2003); *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 U.S. Dist. LEXIS 911, at *12 n.2 (S.D. Cal. Jan. 7, 2008), *vacated, in part*, 2008 U.S. Dist. LEXIS 16897 (S.D. Cal. Mar. 5, 2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 34

Defendants do not object to Plaintiffs' Proposed Jury Instruction No. 34, provided Defendants are permitted to seek to rebut the presumption described, if inappropriate as to particular e-mail communications that may be offered in evidence.

Witness Testimony (Nos. 24–35)

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 35.

Spoliation/Destruction of Evidence

Plaintiffs contend that defendants at one time possessed *[describe evidence allegedly destroyed]*. However, defendants contend that *[evidence never existed, evidence was not in its possession, evidence was not destroyed, loss of evidence was accidental, etc.]*.

You may assume that such evidence would have been unfavorable to defendants only if you find by a preponderance of the evidence that:

1. Defendants intentionally caused the evidence to be destroyed; and
2. Defendants caused the evidence to be destroyed in bad faith.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 1.20 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 35

Defendants object to Plaintiffs' Proposed Jury Instruction No. 35 on the grounds that giving this instruction, in the present procedural posture of this case, would be procedurally improper and on the grounds that the instruction misstates the controlling law and lacks evidentiary support. Defendants object, in particular, on the grounds that the proposed instruction may be rendered moot by Plaintiffs' November 26, 2008 motion for sanctions, by means of which Plaintiffs seek a ruling from the Court on precisely the same issues that this proposed instruction purports to present to the jury for decision.

Defendants object further that Plaintiffs' Proposed Jury Instruction No. 35 is premised on an incorrect assumption that it is appropriate to submit to the jury the questions posited by the proposed instruction. Nonetheless, if the jury were asked to judge whether it is appropriate to award an adverse inference sanction, jurors must first be properly informed that the determination of sanctions is a weighty question and that the party seeking sanctions must meet a very difficult burden. Plaintiffs' proposed instruction is insufficient on both of those points, and

in consequence it creates a serious risk of unfair prejudice to Defendants. Defendants also object that the proposed instruction misstates the law by omitting essential elements of any spoliation claim and that the proposed instruction inappropriately minimizes the evidentiary standard the Plaintiffs must meet in order for an adverse inference instruction to be warranted. In particular, the proposed instruction is inaccurate and unhelpful because it does not include any indication of the need to determine, as a threshold question, whether any information was destroyed that was *relevant* to any disputed issues *in this case*. The proposed instruction is further inaccurate and unhelpful because it does not include any explanation of what the term "bad faith" means in this context, and because it does not identify or explain any of the factors that must be considered in determining whether any Defendant acted in bad faith.

In addition, the proposed instruction fails to instruct the jury that, to justify an adverse inference, it is not enough to find that information was destroyed, and not even enough to find that evidence was destroyed intentionally. The jury must also be carefully instructed on the legal meaning of bad faith and that an accusation of bad faith requires them to consider and weigh carefully all the circumstances surrounding the alleged destruction, and not indulge in speculation or be swayed by emotion. The jury must be given careful instructions on the time periods at issue, so that they may consider evidence relating to whether Defendants were actually put on notice of the potential relevance that any allegedly spoliated documents might have had to the issues in this case.

Plaintiffs' Proposed Jury Instruction No. 35 should be omitted in its entirety. Should Court determine that any instruction on spoliation or destruction of evidence may be given, Defendants reserve the right to supplement the responses and objections set forth herein, and/or to request alternative or supplemental instructions.

PARTICULAR TYPES OF EVIDENCE

Particular Types of Evidence (Nos. 36–41)

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 36.

Expert Witnesses

You have heard [witnesses] give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness's qualifications, and all of the other evidence in the case.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 1.21 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 36

Defendants object to Plaintiffs' Proposed Jury Instruction No. 36 on the ground that it is insufficiently tailored to the circumstances of this case and therefore provides inadequate guidance to the jury. Clear, explicit, detailed instructions on how to deal with expert testimony are required where, as here, a large number of expert witnesses are expected to present conflicting opinions on a wide variety of issues at trial. To avoid the risk that one or another of the experts will exert undue influence over the jury's decision making, the jury must be given explicit instructions that disagreements among experts are factual questions and that it is the province of the jury to resolve those disagreements. Plaintiffs' Proposed Jury Instruction No. 36 should be omitted and replaced with Defendants' Proposed Jury Instructions Nos. 3.22 and 3.23.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 37.

Charts and Summaries in Evidence

Stipulated

The parties agree that [*describe summary in evidence*] accurately summarizes the contents of documents, records, or books. You should consider these summaries just like all of the other evidence in the case.

Not Stipulated

Certain [*describe summary in evidence*] is/are in evidence. [The original materials used to prepare those summaries also are in evidence]. It is up to you to decide if the summaries are accurate.

Authority: Federal Civil Jury Instructions of the Seventh Circuit. 1.23 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 37

Defendants object to Plaintiffs' Proposed Jury Instruction No. 37 on the ground that it is based on a misstatement of the law and on the grounds that it is incomplete and confusing. The instruction is not taken from either of the authorities cited, but rather from Ninth Circuit Manual of Model Jury Instructions § 2.13 (2007), which is accompanied by the comment that "[t]his instruction may be unnecessary if there is no dispute as to the accuracy of the chart or summary."

Plaintiffs' Proposed Jury Instruction No. 37 should be omitted and replaced with Defendants' Proposed Jury Instructions Nos. 3.30 and 3.31, which are based on the appropriate Seventh Circuit pattern instructions and which distinguish between those specific charts and summaries as to which the jury must determine accuracy and those as to which the parties have stipulated to accuracy.

Particular Types of Evidence (Nos. 36–41)

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 38.

Demonstrative Exhibits

Certain [*describe demonstrative exhibit, e.g., models, diagrams, devices, sketches*] have been shown to you. Those [short description] are used for convenience and to help explain the facts of the case. They are not themselves evidence or proof of any facts.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 1.24 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 38

Defendants object to Plaintiffs' Proposed Jury Instruction No. 38 on the ground that the pattern instruction has not been sufficiently tailored to the circumstances of this case, in which jurors will likely be shown both summary exhibits and demonstrative exhibits and will need clear instructions on the appropriate consideration to be given to each type. Plaintiffs' proposed instruction does not make clear that jurors should disregard any demonstrative exhibit if it does not correctly reflect the evidence in the case, nor does it instruct the jurors that the underlying evidence has been admitted and that they may consider the underlying evidence if they are unsure about the accuracy of any demonstrative exhibit. See, Federal Civil Jury Instructions of the Seventh Circuit 1.24 (2008), Committee Comments ("Limiting instructions are strongly suggested . . . .").

Plaintiffs' Proposed Jury Instruction No. 38 should be omitted and replaced with Defendants' Proposed Jury Instruction No. 3.32.

Particular Types of Evidence (Nos. 36–41)

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 39.

Dismissed/Withdrawn Defendant

Arthur Andersen is no longer a defendant in this case. You should not consider any claims against Arthur Andersen. Do not speculate on the reasons. You should decide this case as to the remaining parties.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 1.26 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 39

Defendants do not object to having the Court give an instruction that Arthur Andersen is no longer a defendant, but the instruction will be less confusing if the reason for giving it is explained and if Arthur Andersen is identified as Household's former outside auditor. The preliminary instructions should also inform jurors that at the end of the case, if they find that there was any violation of the securities laws, they will be asked to determine what portion of the blame, if any, should be allocated to Arthur Andersen, so that they will have an adequate framework for understanding the evidence that will be presented.

Plaintiffs' Proposed Jury Instruction No. 39 should be omitted and replaced with Defendants' Proposed Jury Instructions 3.04.

Particular Types of Evidence (Nos. 36–41)

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 40.

Burden of Proof – Preponderance of the Evidence

When I say a particular party must prove something by "a preponderance of the evidence," or when I use the expression "if you find," or "if you decide," this is what I mean: When you have considered all the evidence in the case, you must be persuaded that it is more probably true than not true.

Authority: Federal Civil Jury Instructions of the Seventh Circuit 1.27 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 40

Defendants object to Plaintiffs' Proposed Jury Instruction No. 40 on the ground that use of the pattern instruction without tailoring it to the particular circumstances of this case yields an instruction that is incomplete to the point of being misleading. Plaintiffs bear the burden of proving each and every disputed element of their claims by a preponderance of the credible evidence, but this is not explained in the Plaintiffs' proposed instruction. Furthermore, the instruction fails to make clear that if the evidence on a given issue is equally divided between the parties, the jury must find against the party with the burden of proof. In addition, the instruction fails to inform the jury that if jurors are left confused on any issue, the party with the burden of proof has failed to carry its burden on the muddled issue.

Defendants object further to the placement of this crucial instruction so near the end of Plaintiffs' proposed instructions. In the particular circumstances of this case, adequate instructions on the burden of proof are essential to counteract the risk that the jury will be induced to decide issues on the basis of prejudice or emotion. Instructions on the burden of proof should be given, at a minimum, as part of the Preliminary Instructions and again at the beginning of the instructions that are given after the close of evidence. *See Seventh Circuit American Jury Project: Final Report* (September 2008) at 25–28.

Particular Types of Evidence (Nos. 36–41)

Accordingly, Plaintiffs' Proposed Jury Instruction No. 40 should be omitted and replaced with Defendants' Proposed Jury Instructions Nos. 1.07 and 3.02.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 41.

Burden of Proof Where Some Jurors Have Served on Jury in Criminal Case

Those of you who have sat on criminal cases will have heard of "proof beyond a reasonable doubt." The standard of proof in a criminal case is a stricter standard, requiring more proof than a preponderance of evidence. The reasonable doubt standard does not apply to a civil case and you should put that standard out of your mind.

Authority: 3 Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions* §104.03 (5th ed. 2001).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 41

Defendants do not object to Plaintiffs' Proposed Jury Instruction No. 41, except that Defendants propose that the instruction be included in a burden of proof instruction given as part of the Preliminary Instructions. Defendants submit that instructions on the burden of proof should be given as part of the Court's preliminary instructions. *Seventh Circuit American Jury Project: Final Report* (September 2008) at 25–28. Accordingly, the instruction contained in Plaintiffs' Proposed Jury Instruction No. 41 is included in Defendants' Proposed Jury Instruction No. 1.07.

SECTION 10(b) INSTRUCTIONS

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 42

Rule 10b-5 Defined

I will now instruct you concerning plaintiffs' claim against the defendants under §10(b) and Rule 10b-5. Plaintiffs' claims are based on alleged violations of §10(b) of the Exchange Act. Section 10(b) provides:

> It shall be unlawful for any person, directly or indirectly . . .
>
> * * *
>
> To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

One of the rules promulgated by the SEC in the public interest and for the protection of investors is Rule 10b-5, which reads as follows:

> **Employment of manipulative and deceptive devices.**
>
> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud, or
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

Authority: 15 U.S.C. §78j(b); 17 C.F.R. §240.10b-5; 3B Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions* §162.220; *see also* 4 Hon. Leonard B. Sand, et al., *Modern Federal Jury Instructions* ¶82.01, Instruction 82-1 (2008).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 42

Defendants object to Plaintiffs' Proposed Jury Instruction No. 42 on the grounds that the presentation of unnecessary, overbroad and cumulative legal detail will confuse rather than help the jury. Plaintiffs' proposed instruction, which does no more than recite language from Section 10(b) and Rule 10b-5, without explanation or context, and which includes portions of the statute that are not applicable to this case, would serve only to confuse the jury about which issues it is to decide. Although Section 10(b) and Rule 10b-5 are the statutory basis for the applicable law in this case, the language of these statutory provisions is directed at judges and lawyers; it is not readily accessible to the average juror. Notably, no similar instruction is contained in any circuit's pattern jury instructions on securities law. Nor is the charge necessary, as every element described in this instruction is repeated in greater depth and with greater clarity in other instructions. Plaintiffs' Proposed Jury Instruction No. 42 should be omitted in its entirety.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 43

Elements for Primary Liability Under Section 10(b)

Plaintiffs contend that defendants Household, Aldinger, Schoenholz and Gilmer violated §10(b) of the Exchange Act and Rule 10b-5 by making various false or misleading statements. To establish their claim under §10(b), plaintiffs must establish, by a preponderance of the evidence, each of the six following elements:

1. The defendants made an untrue statement of a material fact or omitted a material fact necessary under the circumstances to keep the statements that were made from being misleading;
2. The defendants acted with particular state of mind, which is called "scienter" and which will be defined below;
3. The plaintiffs relied on the defendants' untrue statement of a material fact or on the defendants' omission to state a necessary material fact in buying or selling securities;
4. The defendants used, or caused the use of, an instrumentality of interstate commerce – such as the mails, a telephone, or any facility of a national securities exchange – in connection with the purchase or sale of securities, regardless of whether the instrumentality was used to make an untrue statement or a material omission;
5. The defendants' misleading statements or omissions were one of the causes of plaintiffs' losses; and
6. The plaintiffs suffered damages as a result of the defendants' conduct.

If you find that the plaintiffs have proved each of the above elements, your verdict should be for the plaintiffs.

Authority: 15 U.S.C. §78j(b); 17 C.F.R. §240.10b-5(b); 3B Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions* §§162.210, 162.230 (5th ed. 2001) (modified); *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645 (7th Cir. 1997); *Otto v. Variable Annuity Life Ins. Co.*, 134 F.3d 841 (7th Cir. 1998); *Tricontinental Indus. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824 (7th Cir. 2007), *cert. denied*, __ U.S. __, 128 S. Ct. 357 (2007).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 43

Defendants object to Plaintiffs' Proposed Jury Instruction No. 43 on the grounds that it misstates the law and on the grounds that it would waste time, confuse the jury and unfairly prejudice Defendants.

This instruction does not accurately reflect the current state of the law as defined by the Supreme Court in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005) ("*Dura*"). In *Dura*, the Supreme Court, in defining the elements of a 10(b) claim, explicitly identified economic loss and loss causation — *i.e.*, a causal connection between the material misrepresentation and an economic loss by the plaintiff — as distinct elements. In *Ray* v. *Citigroup Global Markets, Inc,* 482 F.3d 991, 994 (7th Cir. 2007), the Court of Appeals followed *Dura*'s formulation of the elements of a 10(b) claim.

Defendants object to Plaintiffs' first proposed element, which inappropriately merges the discrete issues of falsity and materiality. In the circumstances of this case and in light of the evidence the parties are expected to introduce at trial, in order to avoid confusion, it will be essential for the jury to focus on those two issues separately.

Defendants object to Plaintiffs' third proposed element, because the instruction suggests inaccurately that reliance is an element that Plaintiffs will have to prove at this trial and that this jury will have to determine. As reflected in Defendants' Proposed Jury Instruction No. 4.22, should Plaintiffs prove that any Defendant made a false statement or omission of material fact in connection with the purchase or sale of Household common stock, Plaintiffs' reliance on that false statement or omission may be presumed for purposes of this stage one trial, which will not be concerned with issues related to individual reliance or rebuttal of the presumption as to particular Class Members.

Section 10(b) Instructions (Nos. 42–66)

Defendants object to Plaintiffs' fourth proposed element because the instruction is an incomplete and inaccurate statement of the law in that it states only that the use of an instrumentality of interstate commerce must be "in connection with the purchase or sale of securities," and omits to instruct the jury that it is also an essential element of Plaintiffs' 10(b) claims, which Plaintiffs bear the burden of proving, that any false statement or omission of material fact, if any was made, was made "in connection with" Plaintiffs' purchase of Household stock. Defendants do not contend that Plaintiffs are required to prove the use of an instrumentality of interstate commerce in connection with the claims at issue in this trial; accordingly, as this is not an issue the jury will need to determine, it will be both wasteful and confusing to include in this proposed instruction the unnecessary verbiage referring to "the use of, an instrumentality of interstate commerce — such as the mails, a telephone, or any facility of a national securities exchange." In addition, as Plaintiffs have now identified the particular misstatements or omissions on which their claims are based, the parties have been able to stipulate that those statements and omissions were made "in connection with the purchase or sale of securities," and the instruction is inaccurate to the extent it suggests that the jury will be required to determine that element.

Defendants object to Plaintiffs' fifth proposed element, which presumably refers to the essential element of "loss causation" without using the term, because the instruction is an incomplete and misleading statement of the law. By avoiding the term "loss causation," in favor of the imprecise lay word "causes," Plaintiffs not only diminish their burden of proof, but also understate the degree to which the jury is required to adhere to a carefully defined analysis of causal relationships between the alleged misstatements or omissions, subsequent corrective disclosure, and the introduction and subsequent removal of stock price inflation. Plaintiffs' vague reference to "the causes of plaintiffs' losses" sidesteps entirely the requirement that, to prove loss causation, "plaintiffs must show both that the defendants' alleged misrepresentations artificially inflated the price of the stock and that the value of the stock declined once the market learned of

the deception." *Ray* v. *Citigroup Global Markets, Inc,* 482 F.3d 991, 995 (7th Cir. 2007). Plaintiffs further diminish their burden of proof, and both soften and minimize the legal standard the jury must apply, by suggesting that a plaintiff can prove loss causation simply by showing that defendants' misleading statements or omissions were "one of the causes" of plaintiffs' losses. The law requires Plaintiffs to prove not just that an alleged misstatement by a defendant was "one of the causes" of plaintiffs' loss, but that the alleged misstatement or omission played a *substantial* part in causing the alleged injury. *In re Daou Systems, Inc.*, 411 F.3d 1006, 1025 (9th Cir. 2005); *Robbins v. Koger Properties, Inc.*, 116 F.3d 1441, 1447 (11th Cir. 1997) ("'the plaintiff need not show that the defendant's act was the sole and exclusive cause of the injury he has suffered; he need only show that it was *'substantial,' i.e.*, a *significant contributing cause*'") (quoting *Wilson v. Comtech Telecommunications Corp.*, 648 F.2d 88 (2d Cir. 1981)) (other internal citations omitted) (emphasis added).

Defendants also object to Plaintiffs' sixth proposed element because this proposed element incorrectly implies that proof of damages will be an object of this trial, notwithstanding this Court's deferral of damages issues to a second stage of the trial, if one should be needed.

Plaintiffs' Proposed Jury Instruction No. 43 should be omitted and replaced with Defendants' Proposed Jury Instruction No. 4.03.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 44

Section 10(b) Misrepresentation or Omission

Plaintiffs bear the burden of proving by a preponderance of the evidence that the defendants made an untrue statement of fact or omitted a material fact when making a statement.

A misrepresentation is a statement that was false and misleading when it was made. Statements are also false and misleading if they tend to create a false or misleading impression. An omission is a failure to disclose a material fact that needed to be disclosed to keep the statements that were actually made from being misleading. You may find a violation of Rule 10b-5 based on a single statement or omission that is materially misleading by itself. Or you may find a violation of Rule 10b-5 if the overall impression created by several statements or omissions is materially misleading.

When a person chooses to make a statement, he or she is under a duty to include such information as would prevent the statements from misleading a reasonable investor. Having chosen to speak, there is an obligation to tell all the facts which are necessary to convey a true and fair understanding of the matters spoken of. Sometimes a statement that is true falls short of fairly informing. Under some circumstances, a half-truth or other statement that is in some sense technically or literally "true" may be misleading.

For a statement to be a violation under the federal securities laws, it is not necessary that defendants' false or misleading statements or omissions actually caused an increase in the trading price of Household common stock.

Authority: 15 U.S.C. §78j(b); 17 C.F.R. §240.10b-5; 3B Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions* §162.231 (5th ed. 2001); *Schlifke v. Seafirst Corp.*, 866 F.2d 935, 944 (7th Cir. 1989) ("incomplete disclosures, or 'half-truths,' implicate a duty to disclose whatever information is necessary to rectify the misleading statements") (citation omitted); *First Virginia Bankshares v. Benson*, 559 F.2d 1307, 1317 (5th Cir. 1977) ("a duty to speak the full truth arises when a defendant undertakes to say anything"); Restatement (Second) of Torts §529, cmt. a (1977) ("A statement containing a half-truth may be as misleading as a statement wholly false. Thus, a statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false misrepresentation as if all the facts stated were untrue."); American Bar Association, *Model Jury Instructions Securities Litigation* 4.02[2] (1996) (modified); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342, 345 (2005); *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 648-49 (7th Cir. 1997); October 17, 2007 Order (Docket No. 1144) at 3 (citing *Dura*, 544 U.S. at 345); *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 419 (5th Cir. 2001); *In re Cendant Corp. Litig.*, 264 F.3d 201 (3d Cir. 2001).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 44

Defendants object to Plaintiffs' Proposed Jury Instruction No. 44 on the grounds that it misstates the law and incorrectly characterizes Plaintiffs' burden of proof, on the grounds that it is argumentative, that it would mislead and confuse the jury, and that it would unfairly prejudice Defendants.

The fundamental flaw in Plaintiffs' proposed instruction is that it fails to identify any particular statement or omission of material fact that Plaintiffs are asking the jury to find was false and misleading. At least since the passage of the PSLRA in 1995, there is no room for doubt that plaintiffs in a securities fraud action are required to "specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading." 15 U.S.C. § 78u-4(b). Two of the three circuits that have promulgated pattern jury instructions for securities fraud cases have specified that the instructions shall include a listing of the "specific statements or omissions claimed to have been fraudulently made." *Pattern Civil Jury Instructions: Fifth Circuit, Civil Cases,* § 7.1 (2006); *Pattern Civil Jury Instructions: Eleventh Circuit, Civil Cases,* § 4.2 (2005). The pattern jury instructions promulgated by the Ninth Circuit , although they are silent on that point, state clearly that the instructions shall "describe the plaintiff's '10b-5' claim." *Model Civil Jury Instructions: Ninth Circuit,* § 18.1 (2007).

It is incorrect to instruct the jury, as proposed in Plaintiffs' first paragraph, that Plaintiffs will carry their burden if they prove that "the defendant made an untrue statement of fact or omitted a material fact when making a statement." Plaintiffs' proposed instruction fails to acknowledge that the omission of a material fact when making a statement is actionable only if that omission causes the statement that *is* made to be materially misleading. 17 C.F.R. §240.10b-5; 15 U.S.C. §78j(b). An "incomplete disclosure [claim] is actionable only if what they said is misleading. '[I]n other words it must affirmatively create an impression of a state of affairs that

differs in a *material* way from the one that actually exists.'" *Indiana Electrical Workers' Pension Trust Fund IBEW* v. *Shaw Group, Inc.*, 537 F.3d 527, 541 (5th Cir. 2008) (quoting *Brody* v. *Transitional Hospitals Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002)) (emphasis added). The proposed instruction also fails to make clear that the jury is to consider the claims asserted against each Defendant separately.

Plaintiffs' proposed instruction, in the second paragraph, that "Statements are also false and misleading if they tend to create a false or misleading impression" improperly lowers the Plaintiffs' burden of proof by suggesting that a mere "tendency" to mislead is sufficient to satisfy the requirement that Plaintiffs must prove that a Defendant made a false statement of fact or omitted a material fact necessary to prevent a statement made from being misleading. Plaintiffs have cited no supporting authority for this proposition, and there is no support in this Circuit's precedent for such an instruction.

It is also incorrect to instruct the jury, as proposed in Plaintiffs' second paragraph, that the jury "may find a violation of Rule 10b-5 if the overall impression created by several statements or omissions is materially misleading." The Court of Appeals has never adopted this now discredited, pre-PSLRA theory of "mosaic misrepresentations." *In re Harmonic Inc. Securities Litigation*, 163 F. Supp. 2d 1079, 1093 n.12 (N.D. Cal. 2001). Indeed, even before the passage of the PSLRA, this novel legal theory was already on shaky ground even in the district courts of the Ninth Circuit, where it was conceived. *Moskowitz* v. *Vitalink Communications Corp.*, 751 F. Supp. 155, 157 (N.D. Cal. 1990) ("the legitimacy of the mosaic doctrine in this Circuit is as yet uncertain." (citing *In re Apple Computer Securities Litigation,* 886 F.2d 1109, 1118 (9th Cir. 1989)) (considering each challenged statement individually); *Alfus* v. *Pyramid Technology Corp.*, 745 F. Supp. 1511, Fed. Sec. L. Rep. (CCH) P 95,207, at 95,846 (N.D. Cal. 1990) (same)). In *In re Convergent Technologies Securities Litigation*, 948 F.2d 507 (9th Cir. 1991), another pre-PSLRA case, the Ninth Circuit stated that a plaintiff can prevail on its 10b-5

claim only if it can prove "that a *particular statement*, when read in light of all the information then available to the market, or a failure to disclose particular information, conveyed a false and misleading impression." *Id.* at 512.

Following the enactment of the PSLRA, which requires the court to conduct a statement-by-statement analysis, this "mosaic misrepresentations" theory has been completely rejected even by the few courts that once permitted it. *See In re Harmonic, Inc. Sec. Litig.*, 163 F. Supp. 2d 1079, 1093 n.12 (N.D. Cal. 2001) ("The court has been unable to locate any cases where the pleading was governed by the PSLRA, in which a court substituted the 'gloss and spin' approach for the more rigorous requirements of the PSLRA.").

Based on Plaintiffs' proposed instruction, the jury could incorrectly conclude that they are permitted to find a 10b-5 violation without finding any particular statement false or misleading, contrary to the express requirements of Rule 10b-5 and the PSLRA. The instruction would permit the jury to find a violation based on nothing more than conjecture and speculation, if they merely had an "impression," *i.e.*, a "gut feeling," that a falsity was somewhere "in the air." This was never the law of the Court of Appeals and it is no longer tolerated even in the district courts of the Ninth Circuit. *See In re Harmonic, Inc. Securities Litigation*, 163 F. Supp. 2d 1079, 1093 n.12 (N.D. Cal. 2001). In *In re Harmonic*, the court stated:

> The pleading of falsity under a 'false impression' gloss-and-spin theory of liability is plainly at odds with the mandates of the PSLRA. Under the PSLRA, if plaintiffs allege that defendants made false or misleading statements, they are also required to plead exactly what was false and exactly why it was false. Logically, if the complaint includes a section headed 'False and Misleading Statements,' plaintiffs must identify each statement within that section that is alleged to be false or misleading. To say, as plaintiffs' counsel argued at the hearing, that the complaint 'should be viewed in its entirety' and that a statement that 'may not be false on its face' can be viewed as having 'created the gloss,' is to turn 180 degrees from the PSLRA's requirement that the complaint '*specify each statement* alleged to have been misleading' and 'the reason or reasons why the statement is misleading.' 15 U.S.C. § 78u-4(b)(1). In an 'omissions' case, as part of the reason why the statement is misleading, plaintiffs are required to state exactly what

> information should have been included in order to make the statement not misleading."

Id. at 1093-94 (emphasis in original) Therefore, Plaintiffs' proposed instruction that "you may find a violation of Rule 10b-5 if the overall impression created by several statements or omissions is materially misleading" should be rejected.

Plaintiffs' proposed instruction regarding the duty to disclose when a person speaks, as set forth in Plaintiffs' third paragraph, is both incomplete and overbroad. (It is telling that Plaintiffs' principal authority on the issue of misleading by omission is the Restatement (Second) of Torts, which predates the PSLRA by more than twenty years, and not any of the myriad securities law cases that discuss in detail the circumstances that may give rise to a duty to disclose.) Plaintiffs have excluded the fundamental principle upon which the concept of a duty to disclose is based: "[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." *Chiarella v. United States*, 445 U.S. 222, 234-35 (1980). "Even non-disclosure of *material* information will not give rise to liability under Rule 10b-5 unless the defendant had an affirmative duty to disclose that information. *Oran v. Stafford*, 226 F.3d 275, 285-86 (3d Cir. 2000) (emphasis added). "Silence, absent a duty to disclose, is not misleading under Rule 10b-5." *Basic, Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988).

Rather than instructing the jury correctly on the circumstances that may or may not give rise to such a duty and the proper scope of the necessary disclosures, Plaintiffs' proposed instruction, speaking in broad generalities, erroneously directs the jury to *assume* the existence of a duty whenever a "person chooses to make a statement." Instead of preparing the jury to determine, in the specific circumstances of this case, whether any Defendant failed to disclose any material fact that he or it was obligated to disclose, Plaintiffs' proposed instruction will mislead jurors into assuming the very facts the jurors are supposed to determine on the basis of evidence presented at trial.

Furthermore, the vague formulation used in Plaintiffs' third paragraph, "an obligation to tell all the facts that are necessary to convey a true and fair understanding," glosses over the fundamental principle that disclosure may be required when additional information is necessary to prevent misleading, not just when additional information would satisfy curiosity. The phrase also suggests incorrectly that there are no limits on the information a corporation is required to disclose, but the law is clear that there is no duty to disclose all nonpublic material that a corporation has in its possession. *Indiana Electrical Workers' Pension Trust Fund IBEW v. Shaw Group, Inc.*, 537 F.3d 527, 541 (5th Cir. 2008) (citing *Gross v. Summa Four, Inc.*, 93 F.3d 987, 992 (1st Cir. 1996)); *In re Time Warner Inc. Securities Litigation*, 9 F.3d 259, 267 (2d Cir. 1993) ("[A] corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact.").

In addition, Defendants object that the statement at the end of Plaintiffs' third paragraph that "[u]nder some circumstances, a half-truth or other statement that is in some sense technically or literally 'true' may be misleading" needlessly instructs the jury on a subject that is well within their ability to judge, *i.e.*, when a statement is misleading. Moreover, including the phrase in the instructions would improperly sway the jury to think not only that it is *permissible* to find a violation even if a statement is technically true, but also that statements that are "technically" true or "literally" true are somehow less "true" than other kinds of statements. The instruction serves only to cast an insinuation over all of Defendants' statements in the case. Indeed, in the case upon which Plaintiffs rely, *First Virginia Bankshares v. Benson*, 559 F.2d 1307, 1317 (5th Cir. 1977), the Court's decision characterized the lower court's instructions as "overly broad," despite not finding reversible error on the facts of that case.

Defendants object further that the fourth paragraph of Plaintiffs' Proposed Instruction is misleading and ambiguous. First, the statement, because it relates more closely to loss causation to falsity, will create confusion rather than clarity if is appended to Plaintiffs' Pro-

posed Jury Instruction 44. Second, even if the statement were shown to be technically correct under some circumstances, it can only be misleading and confusing as stated, lacking any specifications or qualification, and it would persuade the jury, incorrectly, that it is permissible to find a securities fraud violation without proving that a misstatement or omission had any effect on the defendant's stock price.

Plaintiffs' Proposed Jury Instruction No. 44 should be omitted and replaced with Defendants' Proposed Jury Instructions Nos. 4.04 – 4.06.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 45

Section 10(b) – Materiality

The plaintiffs must prove by a preponderance of the evidence that the misrepresentation or omission of the defendant was material.

A factual representation concerning a security is material if there is a substantial likelihood a reasonable investor would consider the fact important in deciding whether or not to buy or sell that security. A fact is "important" if a reasonable investor would view the fact as significantly altering the total mix of information made available.

An omission concerning a security is material if a reasonable investor would have regarded what was not disclosed to her as having significantly altered the total mix of information she took into account in deciding whether to buy or sell the security.

You must decide whether something was material based on the circumstances as they existed at the time of the statement or omission. Stock price movement in response to the disclosure of information that reveals the fraud to the market does not establish the materiality or immateriality of the misrepresentation or omission, though it is a factor you may consider in making that determination.

It is not necessary for the plaintiffs to prove that the defendants subjectively recognized that the fact stated or omitted would have been important to a reasonable investor.

Authority: 3B Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions* §162.281 (5th ed. 2001); *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *Rowe v. Maremont Corp.*, 850 F.2d 1226, 1232-33 (7th Cir. 1988) (adopting the definition of materiality set forth in *Basic*); *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 935 (9th Cir. 2003) (movement of stock price was one factor taken into consideration in determining the materiality of defendants' misstatements).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 45

Defendants object to Plaintiffs' Proposed Jury Instruction No. 45 on the grounds that that it misstates the law, that it would confuse and mislead the jury, and that it would prejudice Defendants.

Defendants object, in particular, to the instruction that "[s]tock price movement in response to the disclosure of information that reveals the fraud to the market does not establish

the materiality or immateriality of the misrepresentation or omission, though it is a factor you may consider in making that determination." This is a misstatement of the generally accepted law, including the law in this District.

The Third Circuit has adopted the position that, "in an efficient market, 'the concept of materiality translates into information that alters the price of the firm's stock." *Oran* v. *Stafford*, 226 F.3d 275, 282 (3d Cir. 2000) (quoting *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1425 (3d Cir. 1997) (Alito, J.)). Thus, according to *Oran* and *Burlington*, "if a company's disclosure of information has no effect on stock prices, 'it follows that the information disclosed . . . was immaterial as a matter of law.'" *Oran*, 226 F.3d at 282 (quoting *Burlington*, 114 F.3d at 1425). In *Oran*'s conception, "when stock is traded in an efficient market, the materiality of disclosed information may be measured post hoc by looking to the movement, in the period immediately following disclosure, of the price of the firm's stock." *Oran*, 226 F.3d at 282.

The Fifth Circuit recently has agreed with the reasoning of *Oran/Burlington*, but has discussed that the movement of stock is more important to the presumption of reliance than the element of materiality. *See Oscar Private Equity Investments* v. *Allegiance Telecom, Inc.*, 487 F.3d 261, 265 & n.14 (5th Cir. 2007) ("for plaintiffs seeking a presumption of reliance . . . [w]e now required more than proof of a material misstatement; we require proof that the misstatement *actually moved* the market") (citing generally to *Burlington*, 114 F.3d 1410); *Nathenson* v. *Zonagen, Inc.*, 267 F.3d 400, 415 (5th Cir. 2001) ("While we agree with *Burlington* . . . as to the requirement, in cases depending on the fraud-on-the-market theory, that the complained of misrepresentation or omission have actually affected the market price of the stock, we conclude that it is more appropriate in such cases to relate this requirement to reliance rather than to materiality.").

Section 10(b) Instructions (Nos. 42–66)

In the 2002 case of *Grimes* v. *Navigant Consulting, Inc.*, 185 F. Supp. 2d 906 (N.D. Ill. 2002) (Bucklo, J.), the Northern District of Illinois sided with the Third Circuit's view in *Oran*. In *Grimes*, defendant argued that "the purported misrepresentations charged here are immaterial as a matter of law because they did not affect the price of [defendant's] shares when they were fully disclosed." *Id.* at 912. In formulating her decision, Judge Bucklo followed the reasoning in *Oran*. *Id.* ("[Defendant] refers me to Third Circuit law, under which a disclosure that does not move the market is not material as a matter of law. I conclude that this argument is correct"). Judge Bucklo further stated that "I cannot find any case law indicating that the Seventh Circuit has adopted the 'move the market' rule, although I expect that it would if the issues were presented" *Id.* at 912 n.6; *see also Eckstein* v. *Balcor Film Investors*, 8 F.3d 1121, 1130 (7th Cir. 1993) (stating that the failure of a stock to decline following the revelation of the truth demonstrates that the information is either not material "or that investors had fully taken this fact into account").

Plaintiffs' proposed instruction misstates the generally accepted law. Thus, it would mislead the jury into thinking that stock price movement is not a significant indicator of materiality. Moreover, it has been well-settled by the Supreme Court and the Court of Appeals that if alleged fraud did not affect the stock price of the company then there is no loss causation or economic loss, foreclosing recovery for the Plaintiffs. *Dura Pharmaceuticals* v. *Broudo*, 544 U.S. 336, 342, 347 (2005) (plaintiffs must prove that the "share price fell significantly after the truth became known"); *Ray* v. *Citigroup Global Markets, Inc*, 482 F.3d 991, 995 (7th Cir. 2007) ("plaintiff must show both that the defendants' alleged misrepresentations artificially inflated the price of the stock and that the value of the stock declined once the market learned of the deception"); *Tricontinental Industries Ltd.* v. *PricewaterhouseCoopers, LLP*, 475 F.3d 824 (7th Cir. 2007) ("liability only attaches when a person who misrepresents the financial condition of a corporation in order to sell its stock becomes liable to a relying purchaser for the loss the purchaser

sustains when the facts . . . become generally known and as a result share value depreciate[s]" (citations and internal quotation marks omitted)). If Plaintiffs' proposed instruction were permitted, the jury could become confused, conflating the significance of the stock price movement to the elements of materiality and loss causation, and wrongly concluding that they may find loss causation even if they do not find that the "share price fell significantly after the truth became known." *Dura,* 544 U.S. at 342, 347.

Defendants also object to the proposed charge that "It is not necessary for the plaintiffs to prove that the defendants subjectively recognized that the fact stated or omitted would have been important to a reasonable investor" because it is a misstatement of the law, which will confuse and mislead the jury and prejudice Defendants. First, this instruction conflates the elements of materiality and scienter, which will confuse the jury. Second, the jury will already be provided with a more thorough instruction on scienter elsewhere, making this phrase unnecessary. Third, this phrase contradicts Plaintiffs' own proposed instruction on scienter, which states that "[a] defendant acts with recklessness when his actions . . . present a danger of misleading investors that is either known to the author or speaker or is so obvious that he must be aware of it." *See* Plaintiffs' Proposed Jury Instruction No. 46. Finally, this statement is contrary to the law and contrary to logic. If a defendant does not believe that an undisclosed fact is material, *i.e.* important to a shareholder, then the defendant's failure to disclose it would not indicate scienter — an intent to deceive. *See Schlifke* v. *Seafirst Corp.*, 866 F.2d 935, 947 (7th Cir. 1989) ("The question is not merely whether [defendant] had knowledge of the undisclosed facts; rather, it is the '*danger of misleading buyers* [that] must be actually known or so obvious that any reasonable man would be legally bound as knowing." (emphasis in original) (citation and internal quotation marks omitted)). The proposed charge does not appear in any pattern jury instructions, nor do Plaintiffs cite any authority for this proposition. This is because it is not an accurate statement of the law. *See* 3B O'Malley et al. § 162.232 (plaintiff must show "[t]hat defendant

knew of the existence of material facts that were not disclosed and *defendant should have realized their significance in the making of an investment decision*"). Plaintiffs' proposed charge must therefore be rewritten to correct this misstatement of the law and conform to the published model jury charge on this issue. *See* Fifth Circuit § 7.1 ("[T]he plaintiff must show that the defendant . . . *knew of the existence of material facts* that were not disclosed although he knew that knowledge of those facts would be necessary to prevent his other statements from being misleading.") (emphasis added); Eleventh Circuit § 4.2 ("[I]t must be shown that the Defendant . . . *knew of the existence of material facts* that were not disclosed although the Defendant knew that knowledge of those facts would be necessary to make the Defendant's other statements not misleading.") (emphasis added).

Unless it is substantially revised to take account of Defendants' response and objections, Plaintiffs' Proposed Jury Instruction No. 45 should be omitted in its entirety and replaced with Defendants' Proposed Instructions Nos. 4.07, 4.08 and 4.10.

[PLAINTIFFS' PROPOSED] JURY INSTRUCTION NO. 46

Scienter

Plaintiffs bear the burden of proving by a preponderance of the evidence that defendants acted with a particular state of mind, which is called scienter.

Plaintiffs can prove scienter by showing that the defendants had actual knowledge that their statements were false or misleading when made. A defendant acts knowingly when: (1) he or she makes an untrue statement with knowledge that the statement was false; or (2) he or she omits necessary information with the knowledge that the omission would make the statement false or misleading.

Plaintiffs can also prove scienter by a lesser standard called recklessness that does not require any showing of intentional misconduct. Recklessness may be established by a showing of carelessness approaching indifference, or by showing that a statement was made without regard for whether it was true or false. "Reckless" means highly unreasonable conduct that is an extreme departure from ordinary care, presenting a danger of misleading investors, which is either known to a defendant or is so obvious that a defendant must have been aware of it.

Plaintiffs can prove defendants' scienter either through direct evidence or circumstantial evidence. Thus, you may infer defendants' state of mind from defendants' acts and words given all of the surrounding circumstances at that time.

Authority: 3B Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions* §§162.232, 162.284 (5th ed. 2001); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S. Ct. 2499, 2510 (2007); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 191, 193 & n.12, 197-99, 215 (1976); *Rowe v. Maremont Corp.*, 850 F.2d 1226, 1238 (7th Cir. 1988) ("A plaintiff may not recover in a Rule 10b-5 action unless he proves the defendant acted with scienter – that is, intent to defraud, or reckless disregard for the truth of his representations.") (citations omitted); *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977) (defining recklessness as a "danger of misleading buyers [that is] actually known or so obvious that any reasonable man would be legally bound as knowing"); *Robin v. Arthur Young & Co.*, 915 F.2d 1120, 1126 (7th Cir. 1990).

DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 46

Defendants object to Plaintiffs' Proposed Jury Instruction No. 46 on the grounds that it misstates the law, that it will confuse and mislead the jury, and that it will prejudice Defendants. In particular, as set forth more fully below, Defendants object (a) that the proposed

instruction fails to make clear that the jury is to consider the issue of scienter separately as to each separate Individual Defendant and, indeed, by consistently using the plural "defendants," that the proposed instruction suggests that the mental state of one Individual Defendant may be imputed to others; and (b) that the proposed instruction, throughout, minimizes the evidentiary showing required for any finding of scienter and, in particular, dilutes the rigorous showing needed to justify a finding of recklessness.

Plaintiffs' proposed charge improperly seeks to minimize Plaintiffs' burden of proof by suggesting incorrectly that mere "carelessness" is sufficient and attempting to explain the concept of "scienter" without reference to the Supreme Court's seminal decision in this area. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n. 12 (1976) ("[T]he term 'scienter' refers to a mental state embracing intent to deceive, manipulate, or defraud."); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504 (2007). This phrase "embracing intent to deceive, manipulate, or defraud" is critical because it defines what state of mind must be inferred from a defendant's conduct to ground 10b-5 liability. *See, e.g., Higginbotham v. Baxter International, Inc.*, 495 F.3d 753, 756 (7th Cir. 2007) ("[The] 'required state of mind' is an *intent to deceive*, [which is] demonstrated by *knowledge* of the statement's falsity or *reckless disregard* of a substantial risk that the statement is false." (emphases supplied)). The Court of Appeals consistently has acknowledged the centrality of this language, *see SEC v. Jakubowski*, 150 F.3d 675, 681 (7th Cir. 1998) ("[O]nly persons who act with an intent to deceive or manipulate violate Rule 10b-5."); *Robin v. Arthur Young & Co.*, 915 F.2d 1120, 1126 (7th Cir. 1990) ("Scienter . . . is the intent to deceive, manipulate, or defraud.") (citation and internal quotation marks omitted); *Rowe* v. *Maremont Corp.*, 850 F.2d 1226, 1238 (7th Cir. 1988) ("A plaintiff may not recover in a Rule 10b-5 action unless he proves the defendant acted with scienter — that is, intent to defraud."), and courts and commentators alike embrace the *Hochfelder* language in their suggested jury charges on scienter. *See* American Bar Association § 4.02[4] ("To prove scienter, the plain-

tiff must show an intent to deceive, manipulate, or defraud."); U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit"), *Pattern Jury Instructions - Civil* § 7.1 (2006) ("The plaintiff must show that the defendant acted with an intent to deceive, manipulate or defraud."); U.S. Court of Appeals for the Eleventh Circuit ("Eleventh Circuit"), *Pattern Jury Instructions (Civil Cases)* § 4.2 (2005) ('[I]t must be shown that the Defendant acted intentionally with a mental purpose to deceive, manipulate or defraud."). Likewise in this case, the jury should be charged that "plaintiffs must prove by a preponderance of the credible evidence that each defendant acted with a particular state of mind called 'scienter,' which means that they acted with an intent to deceive, manipulate or defraud."

Although proof of knowledge may be sufficient to support an inference of scienter, *see, e.g.*, *Tellabs*, 127 S.Ct. at 2507 n.3 ("Every Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing the defendant acted intentionally or recklessly . . ."); *SEC v. Lyttle*, 538 F.3d 601, 603 (7th Cir. 2008) (scienter established upon proof, *inter alia*, that defendants "knew the representations they made to investors were false"), Plaintiffs' proposed charge makes two critical errors.

First, in the second paragraph of Plaintiffs' proposed charge, the "knowingly" mens rea is applied only to false statements; there is no reference to mental state with respect to false or misleading omissions. *See* 17 C.F.R. § 240.10b-5 (prohibiting false statements and false or misleading omissions). Following Plaintiffs' proposed instruction, then, the jury could impose liability on a defendant who made a misleading statement (1) regardless of whether the defendant knew or was reckless in not knowing of the existence of corrective information, and (2) regardless of whether the defendant knew or was reckless in not knowing that corrective information would make her statement not misleading. That is not a correct statement of the law, and no authority cited by Plaintiffs says otherwise. *See Robin*, 915 F.2d 1126; *Rowe*, 850 F.2d 1238; *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1043 (7th Cir. 1977) (noting that "a

merely negligent breach of a duty defendant owes plaintiff is not sufficient" to ground liability under § 10(b) or Rule 10b-5); 3B O'Malley et al. § 162.232 (plaintiff must show "[t]hat defendant *knew of the existence* of material facts that were not disclosed and defendant should have realized their significance in the making of an investment decision"); *see also Schlifke* v. *Seafirst Corp.*, 866 F.2d 935, 946 (7th Cir. 1989) ("The question is not merely whether [defendant] had knowledge of the undisclosed facts; rather, it is the '*danger of misleading buyers* [that] must be actually known or so obvious that any reasonable man would be legally bound as knowing.") (emphasis in original)) (citation and internal quotation marks omitted).

On this point, Plaintiffs' proposed charge is at odds with every published circuit court pattern jury instruction on this issue. *See* Fifth Circuit § 7.1 ("[T]he plaintiff must show that the defendant . . . knew of the existence of material facts that were not disclosed although he knew that knowledge of those facts would be necessary to prevent his other statements from being misleading."); Ninth Circuit § 18.3 ("A defendant acts knowingly if she omits necessary information with the knowledge that the omission would make the statement false or misleading."); Eleventh Circuit § 4.2 ("[I]t must be shown that the Defendant . . . knew of the existence of material facts that were not disclosed although the Defendant knew that knowledge of those facts would be necessary to make the Defendant's other statements not misleading."). *See also* American Bar Association § 4.02[4] ("The plaintiff must prove . . . that a defendant made an untrue statement or omitted to disclose a material fact with the knowledge that either the statement was false or that the omission would make other statements false or misleading.").

Second, Plaintiffs' proposed instruction, in the second paragraph, that "Plaintiffs can also prove scienter by a *lesser* standard called recklessness that does not require any showing of intentional misconduct" (emphasis added) is misleading and poses a substantial risk of causing the jury impermissibly to dilute the rigorous standard for scienter; because it is incorrect, unnecessary, and unprecedented, this language should be omitted from the proposed charge alto-