

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

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

**PLAINTIFFS' RESPONSE AND PROPOSED MODIFICATIONS TO THE COURT'S  
JURY INSTRUCTIONS FOR DISCUSSION**

Plaintiffs have reviewed the Court's Jury Instructions For Discussion ("Court's Instructions") and request modifications to five (5) instructions and additions of two (2) instructions. Plaintiffs submit a redlined version of the proposed modified Court's Instructions as Exhibit A and a clean version of these proposed modified Court's Instructions as Exhibit B. Plaintiffs attach as Exhibit C the two additional proposed instructions.

DATED: April 16, 2009

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Exhibit A

**Plaintiffs' Proposed Modification to Court's Instruction No. 2**

**All Litigants Before the Law**

In this case, Defendants William Aldinger, David Schoenholz and Gary Gilmer are individuals, Defendants Household is a corporation and Plaintiffs are entities that purchased Household stock that represent a class of persons and entities others similarly situated. All parties are equal before the law. Defendants and Plaintiffs are entitled to the same fair consideration.

**Plaintiffs' Proposed Modification to Court's Instruction No. 22**

**10b-5 Elements**

Plaintiffs contend that Defendants Household, William Aldinger, David Schoenholz and Gary Gilmer violated Section 10b of the Securities Exchange Act and the Securities Exchange Commission or SEC's Rule 10b-5. From now on, I will use "10b-5" to refer to both the Section and the Rule.

To prevail on their 10b-5 claim against any defendant, plaintiffs must prove each of the following elements:

- (1) the defendant made a false statement of fact or omitted a fact that was necessary, in light of the circumstances, to prevent a statement that was made from being false or misleading;
- (2) the false statement or omission was material;
- (3) the defendant acted with a particular state of mind called "scienter"; and
- (4) the defendants' statement or omission was a substantial factor in causing plaintiffs' economic loss.

If you find that the plaintiffs have proved each of the above elements as to any defendant, your verdict should be for the plaintiffs and against that defendant. If you find that the plaintiffs have not proved each of the above elements as to any defendant, your verdict should be for that defendant and against the plaintiffs.

As I explained earlier, Arthur Andersen is no longer a defendant in this case. However, if you find that the plaintiffs have proved each of the above elements as to any defendant, you must then determine whether ~~plaintiffs~~ defendants have proved each of the above elements as to former defendant Arthur Andersen and what percentage of responsibility, if any, for any loss plaintiffs

suffered is due to former defendant Arthur Andersen's conduct, as is explained on the included verdict form.

Authority: *See Securities and Exchange Act of 1934, §21D(f)(3)(A)(i), §78u-4* (“[W]ith respect to each covered person and each of the other persons claimed by any of the parties to have caused or contributed to the loss incurred by the plaintiff,” the court shall instruct the jury to answer the following questions: “(i) whether such person violated the securities laws; (ii) the percentage of responsibility of such person, measured as a percentage of the total fault of all persons who caused or contributed to the loss incurred by plaintiff ...”); *Newby v. Enron Corp.*, 236 F.R.D. 313, 319 (S.D. Tex. 2006) (“[T]he Court will require any party designating a non-party as potentially wholly or partially at fault to bear the burden of proof demonstrating that the non-party violated the federal securities statutes).

**Plaintiffs' Proposed Modification to Court's Instruction No. 23**

**False or Misleading**

To meet the first element of their 10b-5 claim against any defendant, plaintiffs must prove that the defendant made a false or misleading statement of fact or omitted a fact that was necessary, in light of the circumstances, to prevent a statement that was made from being false or misleading.

A statement of fact is misleading if it creates an impression that the state of affairs differs in a material way from the one that actually exists. In determining whether a statement of fact is false or misleading, you must consider the statement in light of the circumstances that existed at the time it was made.

An omission is misleading if it creates an impression that the state of affairs differs in a material way from the one that actually exists and the defendant has a duty to disclose the omitted fact. The defendants do not have a duty to disclose every fact they possess about Household or any fact that is in the public domain. But each defendant has a duty to disclose a fact if a prior statement that that defendant made would be false or misleading if the fact is not disclosed. If a defendant does not have a duty to disclose a fact but chooses to make a statement about it, the statement must be truthful and complete.

Defendant Household has a duty to file with the SEC an annual report, called a 10-K, and quarterly reports, called 10-Qs, for the first three quarters of each year. These reports include financial statements and other disclosures. Financial statements present a company's financial position at one moment in time, or its operating results and cash flows for a specified period. Household has no duty to update its 10-Q reports on any cycle other than quarterly.



Household has a duty to prepare its financial statements in accordance with generally accepted accounting principles or GAAP. GAAP are the accepted rules and procedures used by accountants in preparing financial statements. If you find that any of Household's financial statements was not prepared in accordance with GAAP, you may presume that the statement is false or misleading.

Plaintiffs' Proposed Modification to Court's Instruction No. 25

Scienter

To meet the third element of their 10b-5 claim against any defendants, plaintiffs must prove that the defendant acted with a specific state of mind. Defendants Household, William Aldinger, David Schoenholz and Gary Gilmer acted with the required state of mind in making a statement of material fact if ~~he~~ the defendant made the statement knowing that it was false or misleading or with reckless disregard for a substantial risk that it was false or misleading.

Household as a corporation acts through its employees, agents, directors, or officers. Household is liable if a Household corporate official or officials (i) make or issue the statement, (ii) order or approve its making or its issuance, or (iii) furnish information or language for inclusion in the statement, where the official or officials act knowing that the statement was false or misleading or with reckless disregard for a substantial risk that it was false or misleading.

Defendants William Aldinger, David Schoenholz and Gary Gilmer acted with the required state of mind in failing to disclose a material fact if he knew the omission would be misleading or recklessly disregarded a substantial risk that it would be misleading.

A defendant's conduct is reckless if it is an extreme departure from the standards of ordinary care and he knows that it presents a risk of misleading investors or the risk is so obvious he must be aware of it.

A finding that any defendant acted with the required state of mind depends on what ~~he~~ that defendant knew or should have known when ~~he~~ the defendant made or failed to make a statement of material fact.

~~If Defendant William Aldinger, David Schoenholz or Gary Gilmer acted with the required state of mind in making or failing to make any statement of material fact, defendant Household also acted with the required state of mind with respect to that statement or omission.~~

The fact that Household restated certain financial statement does not, by itself, prove that any defendant acted knowingly or recklessly with respect to the information in the original financial statements. However, you may consider it along with any other evidence to determine whether any defendant acted knowingly or recklessly.

Authority: Under Seventh Circuit law, “[t]o establish corporate liability for a violation of Rule 10b-5 requires ‘look[ing] to the state of mind of the individual corporate official or officials who make or issue the statement (or order or approve its making or its issuance, or who furnish information or language for inclusion therein, or the like) rather than generally to the collective knowledge of all the corporation’s officers and employees acquired in the course of their employment.’” *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 708 (7th Cir. 2008); *see also Pugh v. Tribune Co.*, 521 F.3d 686, 697 (7th Cir. 2008) (“[a] corporation may be held liable for statements by employees who have apparent authority to make them.”).

**Plaintiffs' Proposed Modification to Court's Instruction No. 27**

**Respondeat Superior**

Under 10b-5, an employer is responsible, under certain circumstances, for the actions and omissions of its employees. The parties agree that Household is liable for any violation of 10b-5 that you find defendants William Aldinger, David Schoenholz, or Gary Gilmer or any corporate official of Household committed.

Authority: Under Seventh Circuit law, “[t]o establish corporate liability for a violation of Rule 10b-5 requires ‘look[ing] to the state of mind of the individual corporate official or officials who make or issue the statement (or order or approve its making or its issuance, or who furnish information or language for inclusion therein, or the like) rather than generally to the collective knowledge of all the corporation’s officers and employees acquired in the course of their employment.’” *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 708 (7th Cir. 2008); *see also Pugh v. Tribune Co.*, 521 F.3d 686, 697 (7th Cir. 2008) (“[a] corporation may be held liable for statements by employees who have apparent authority to make them.”).

**Exhibit B**

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- (3) the defendant acted with a particular state of mind called "scienter"; and
- (4) the defendants' statement or omission was a substantial factor in causing plaintiffs' economic loss.

If you find that the plaintiffs have proved each of the above elements as to any defendant, your verdict should be for the plaintiffs and against that defendant. If you find that the plaintiffs have not proved each of the above elements as to any defendant, your verdict should be for that defendant and against the plaintiffs.

As I explained earlier, Arthur Andersen is no longer a defendant in this case. However, if you find that the plaintiffs have proved each of the above elements as to any defendant, you must then determine whether defendants have proved each of the above elements as to former defendant Arthur Andersen and what percentage of responsibility, if any, for any loss plaintiffs suffered is due to former defendant Arthur Andersen's conduct, as is explained on the included verdict form.

Authority: *See Securities and Exchange Act of 1934*, §21D(f)(3)(A)(i), §78u-4 (“[W]ith respect to each covered person and each of the other persons claimed by any of the parties to have caused or contributed to the loss incurred by the plaintiff,” the court shall instruct the jury to answer the following questions: “(i) whether such person violated the securities laws; (ii) the percentage of responsibility of such person, measured as a percentage of the total fault of all persons who caused or contributed to the loss incurred by plaintiff ....”); *Newby v. Enron Corp.*, 236 F.R.D. 313, 319 (S.D. Tex. 2006) (“[T]he Court will require any party designating a non-party as potentially wholly or partially at fault to bear the burden of proof demonstrating that the non-party violated the federal securities statutes).



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Household has a duty to prepare its financial statements in accordance with generally accepted accounting principles or GAAP. GAAP are the accepted rules and procedures used by

accountants in preparing financial statements. If you find that any of Household's financial statements was not prepared in accordance with GAAP, you may presume that the statement is false or misleading.

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To meet the third element of their 10b-5 claim against any defendants, plaintiffs must prove that the defendant acted with a specific state of mind. Defendants Household, William Aldinger, David Schoenholz and Gary Gilmer acted with the required state of mind in making a statement of material fact if the defendant made the statement knowing that it was false or misleading or with reckless disregard for a substantial risk that it was false or misleading.

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A defendant's conduct is reckless if it is an extreme departure from the standards of ordinary care and he knows that it presents a risk of misleading investors or the risk is so obvious he must be aware of it.

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Authority: Under Seventh Circuit law, “[t]o establish corporate liability for a violation of Rule 10b-5 requires ‘look[ing] to the state of mind of the individual corporate official or officials who make or issue the statement (or order or approve its making or its issuance, or who furnish information or language for inclusion therein, or the like) rather than generally to the collective knowledge of all the corporation’s officers and employees acquired in the course of their employment.’” *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 708 (7th Cir. 2008); *see also Pugh v. Tribune Co.*, 521 F.3d 686, 697 (7th Cir. 2008) (“[a] corporation may be held liable for statements by employees who have apparent authority to make them.”).

Exhibit C

**Plaintiffs' Proposed Instruction Regarding Truth on the Market**

In this case, defendants claim that the market was aware of the true state of affairs notwithstanding the false statements or omissions. Defendants bear the burden of proof on this issue and must show that true state of affairs was conveyed to the public with a degree of intensity and credibility sufficient to counter-balance effectively any misleading information created by the false statement or omission.

Authority: *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 167 (2nd. Cir. 2000) (“Corrective information must be conveyed to the public ‘with a degree of intensity and credibility sufficient to counter-balance effectively any misleading information created by’ the alleged misstatements.”) (quoting *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 116 (9th Cir. 1989)); *Provenz v. Miller*, 102 F.3d 1478, 1492-93 (9th Cir. 1996) (“However, before the ‘truth-on-the-market’ doctrine can be applied, the defendants must prove that the information that was withheld or misrepresented was ‘transmitted to the public with a degree of intensity and credibility sufficient to effectively counterbalance any misleading impression created by insider’s one-sided representations.’”); *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1159-1160 (C.D. Cal. 2008) (rejecting the truth-on-the market defense where defendants claimed that Countrywide’s improper practices were revealed in statistics contained in securitization prospectuses that were on file with the SEC and available to the public because prospectuses are very large documents and coupled with Countrywide’s alleged public misrepresentations, blunted any disclosures in the prospectuses).

**Proof of Knowledge or Intent**

The intent of a person or the knowledge that a person possesses at any given time may not ordinarily be proved directly because there is no way of directly scrutinizing the workings of the human mind. In determining the issue of what a person knew or what a person intended at a particular time, you may consider any statements made or acts done by that person and all other facts and circumstances received in evidence which may aid in your determination of that person's knowledge or intent.

You may infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts to find from the evidence received during this trial.

Authority: 1A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* §17.07 (6th ed. 2008); *United States v. Dearing*, 504 F.3d 897 (9th Cir. 2007).



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

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 100 Pine Street, Suite 2600, San Francisco, CA 94111.

2. That on April 16, 2009, declarant served by electronic mail and by U.S. Mail to the parties the **PLAINTIFFS' RESPONSE AND PROPOSED MODIFICATIONS TO THE COURT'S JURY INSTRUCTIONS FOR DISCUSSION:**

The parties' email addresses are as follows:

<a href="mailto:TKavaler@cahill.com">TKavaler@cahill.com</a> <a href="mailto:PSloane@cahill.com">PSloane@cahill.com</a> <a href="mailto:PFarren@cahill.com">PFarren@cahill.com</a> <a href="mailto:LBest@cahill.com">LBest@cahill.com</a> <a href="mailto:DOwen@cahill.com">DOwen@cahill.com</a>	<a href="mailto:NEimer@EimerStahl.com">NEimer@EimerStahl.com</a> <a href="mailto:ADeutsch@EimerStahl.com">ADeutsch@EimerStahl.com</a> <a href="mailto:MMiller@MillerLawLLC.com">MMiller@MillerLawLLC.com</a> <a href="mailto:LFanning@MillerLawLLC.com">LFanning@MillerLawLLC.com</a>
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New York, NY 10022

David R. Scott, Esq.  
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Colchester, CT 06415

I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of April, 2009, at Chicago, Illinois.

/s/ Marcy Medeiros  
MARCY MEDEIROS