

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

LAWRENCE E. JAFFE PENSION PLAN, On
Behalf of Itself and All Others Similarly
Situating,

Plaintiff,

v.

HOUSEHOLD INTERNATIONAL, INC.,
et al.,

Defendants.

Case No.: 1:02-cv-05893

Hon. Jorge L. Alonso

**DEFENDANT GARY GILMER'S SUBMISSION OF AMENDED
PROPOSED JURY INSTRUCTION AND VERDICT FORM**

PRELIMINARY STATEMENT

On April 22, 2016, the parties submitted a [Proposed] Final Pretrial Order. *See* Docket 2151. Exhibit H-10 to the [Proposed] Final Pretrial Order is Defendant Gary Gilmer's Proposed Jury Instruction and Verdict Form. Attachment A to this Submission is Defendant Gary Gilmer's Amended Proposed Jury Instruction and Verdict Form, which should be substituted as Amended Exhibit H-10 to the [Proposed] Final Pretrial Order. Attachment B to this submission is a redline, comparing the Amended Exhibit H-10 to the original. As the Court will observe, the only change in the Amended Exhibit H-10 is the addition of a sub-question in Question 3 of the Verdict Form, which requires the jury to allocate proportionate liability separately as to Statement Number 1, which is the only statement made by Defendant Gilmer. As set forth further below, Defendant Gilmer asserts that it would be error to allow the jury to assign to Gilmer proportionate responsibility for any losses caused by the 16 other statements at issue in this case, because Defendant Gilmer did not make those statements, was not a control

person as to those statements, and was not otherwise legally liable for those statements in any way, and thus Gilmer was not “found to have caused or contributed to” the losses arising from those 16 other statements, as is required for assignment of proportionate liability under 15 U.S.C. § 78u-4(f)(3).

FACTUAL BACKGROUND

Plaintiffs asserted in the first trial that Defendant Gilmer made 40 separate false statements or omissions. The allegedly false statements covered three separate factual areas: (1) predatory lending; (2) 2+ Delinquency/Re-aging; and (3) Restatements. The jury in the prior trial eliminated 23 of those statements. The reversal by the Court of Appeals, and the subsequent stipulation by the Plaintiffs in response to Gilmer’s Motion for Partial Summary Judgment, have eliminated all but one of the remaining statements. Accordingly, at this stage of the proceedings it is undisputed that: Defendant Gilmer made only one false statement (a quote attributed to him in a March 2001 news article); he made that one statement recklessly (not knowingly); that statement related to predatory lending only (not the other two issues presented to the jury); and he has no control person liability as to the persons who made the other 16 statements. The following chart depicts the statements at issue here, the defendants found to be legally responsible as “makers” of those statements, and the relevant state of mind: (Unless otherwise specified, the jury found the following statements¹ were made “recklessly.”)

¹ Statements are numbered according to their identification at the first trial.

| Stmnt. # | Date | Reason(s) Why False | Household | Aldinger | Schoenholz | Gilmer |
|----------|------------------------------|--|----------------|----------------|------------|--------|
| 14 | 03/23/01 Article | Predatory lending | X Knowingly | X Knowingly | | X |
| 15 | 03/28/01 10-K | Predatory lending 2+ Delinquency /Re-aging Restatement | X | X | X | |
| 16 | 04/18/01 Press Release | Predatory lending 2+ Delinquency /Re-aging Restatement | X | X | X | |
| 17 | 05/09/01 10-Q | 2+ Delinquency /Re-aging Restatement | X | X | X | |
| 18 | 07/18/01 Press Release | Predatory lending 2+ Delinquency /Re-aging Restatement | X | X | X | |
| 20 | 08/10/01 10-Q | 2+ Delinquency /Re-aging Restatement | X | X | X | |
| 21 | 10/17/01 Press Release | Predatory lending 2+ Delinquency /Re-aging Restatement | X | X | X | |
| 22 | 11/14/01 10-Q | 2+ Delinquency /Re-aging Restatement | X | X | X | |
| 23 | 12/04/01 Goldman Pres. | 2+ Delinquency /Re-aging | X | X | | |
| 24 | 01/16/02 Press Release | Predatory lending 2+ Delinquency /Re-aging Restatement | X | X | X | |
| 27 | 03/12/02 10-K | Predatory lending 2+ Delinquency /Re-aging Restatement | X | X | X | |
| 28 | 04/09/02 FRC Pres. | 2+Delinquency/Re-aging | X | | X | |
| 29 | 04/17/02 Press Release | Predatory lending 2+ Delinquency /Re-aging Restatement | X | X | X | |
| 32 | 05/10/02 10-Q | 2+ Delinquency /Re-aging Restatement | X | X | X | |
| 36 | 07/17/02 Press Release | Predatory lending 2+ Delinquency /Re-aging Restatement | X | X | X | |
| 37 | 08/14/02 Press Release | Predatory lending | X | X | X | |
| 38 | 08/14/02 10-Q | 2+ Delinquency /Re-aging Restatement | X | X | X | |

REASON FOR AMENDMENT OF PROPOSED VERDICT FORM

There is no dispute that, because Defendant Gilmer was found to have recklessly, and not knowingly, made the one false statement for which he is liable, he cannot be subject to joint and several liability. *See*, 15 U.S.C. § 78u-4(f)(2)(A). There also appears to be agreement that Gilmer shall “be liable solely for” a percentage of responsibility “measured as a percentage of the total fault of all persons who caused or contributed to the loss incurred by the plaintiff.” 15 U.S.C. § 78u-4(f)(2)(B) and (3)(A)(ii). The disagreement between the parties that recently has become evident, however, is as to whether the jury should assign a percentage of responsibility for Gilmer as to the loss caused by all statements made by all defendants, or whether the allocation as to defendant Gilmer should be a percentage of responsibility only as to the loss caused by the one statement that the jury found Gilmer made.

Because the proposed jury instructions and verdict forms currently before the Court would permit the jury improperly to allocate to Gilmer responsibility for losses that go beyond any loss that he caused or contributed to, Gilmer is submitting his Amended Proposed Jury Instruction and Verdict Form. The Amended Verdict Form, by seeking a separate allocation as to Statement Number 1 only, allows the jury in this trial to allocate to Gilmer responsibility only for the losses caused by the single statement Gilmer “made” in this case. The importance of identifying the proportionate liability of Gilmer for the one statement he made is particularly clear, both because two other defendants were found “knowingly” to have made the same statement Gilmer made “recklessly,” and also because Plaintiffs' own expert has now conceded, as directed by the Seventh Circuit's decision, that the losses caused by Statement Number 1 are substantially less than the losses caused by the other statements at issue. *See*, Exhibit G to [Proposed] Final Pretrial Order (Plaintiffs' Itemized Statement of Damages).

The allocation format proposed by Plaintiffs – a single allocation as to all damages, resulting from all statements made by all defendants – runs counter to both the general and the specific dictates of the statutory scheme. Perhaps most importantly, 15 U.S.C. §78u-4(f)(1) makes clear that the proportionate liability provisions of the statute shall not be construed to create or expand liability. It could not be more clear that to allow the jury to apportion liability to Gilmer for 16 statements for which he has no legal liability would be to expand Gilmer’s liability beyond the loss caused by the one statement he made. Moreover, the statute specifically directs that a jury determining the percentage of responsibility for a defendant should consider “the nature of the conduct of each covered person found to have caused or contributed to the loss incurred” and “the nature and extent of the causal relationship between the conduct of each such person and the damages incurred....” 15 U.S.C. § 78u-4(f)(3)(C). The “conduct” for which Gilmer may be held responsible is limited to Statement Number 1, and the loss he caused or contributed to is the loss from that single statement. Accordingly, any jury instruction, and any verdict form, that allows the jury, in purpose or effect, to make Gilmer liable for the losses caused by the other sixteen statements at issue would be in error.

Respectfully submitted,

DATED: 5/16/2016

McDERMOTT WILL & EMERY LLP
DAVID S. ROSENBLOOM
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EXHIBIT A

**UNITED STATES DISTRICT COURT
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**DEFENDANT GARY GILMER'S AMENDED PROPOSED JURY INSTRUCTION
AND VERDICT FORM**

[Amended Exhibit H-10 to [Proposed] Final Pretrial Order]

PRELIMINARY STATEMENT

Pursuant to Local Rule 16.1.1, Defendant Gary Gilmer submits the following proposed jury instructions, in addition to the proposed Jury Instructions previously submitted jointly by all Defendants. Defendant Gilmer reserves the right to submit amended or supplemental proposed instructions, as necessary, based on the contents of any opinions or rulings issued by the Court, our review of Plaintiffs' proposed instructions, the outcome of various pending and anticipated motions, any rulings the Court may render in charging conferences or during the course of the trial, or the evidence adduced at trial.

DEFENDANT GILMER'S MODIFIED PROPOSED INSTRUCTION NO. 35
(Allocation of Responsibility)

If you find plaintiffs are entitled to an award of damages for any of the 17 Statements, then you must separately determine for each defendant the percentage of responsibility, if any, of that defendant for the loss incurred by plaintiffs. In determining the percentage of responsibility of each defendant, you should consider the nature of the statement or statements made by that defendant, the issues misrepresented by the statements made by that defendant, and the nature and extent of the causal relationship between the statement or statements made by that defendant and the damages incurred by plaintiffs.

Authority: Verdict Form, *Jaffe v. Household International, Inc.*, No. 02-cv-5893-RAG at 42 (2009) (modified); 15 U.S.C. § 78u-4(f)(3)(C); 3B O'Malley, Grenig & Lee, *Federal Jury Practice and Instructions—Civil* § 162:335 (6th ed. 2011) (modified); 4 Sand, et al., *Modern Federal Jury Instructions – Civil*, Instr. 82-12 (2008).

DEFENDANT GILMER'S MODIFIED PROPOSED VERDICT FORM

1. Question No. 1:

Have plaintiffs proven that one or more of defendants' misstatements or omissions caused plaintiffs economic loss? Indicate "yes" or "no" for each misstatement or omission below:

Statement 1 (March 23, 2001)

Yes _____ No _____

Statement 2 (March 28, 2001)

Yes _____ No _____

Statement 3 (April 18, 2001)

Yes _____ No _____

Statement 4 (May 9, 2001)

Yes _____ No _____

Statement 5 (July 18, 2001)

Yes _____ No _____

Statement 6 (August 10, 2001)

Yes _____ No _____

Statement 7 (October 17, 2001)

Yes _____ No _____

Statement 8 (November 14, 2001)

Yes _____ No _____

Statement 9 (December 4, 2001)

Yes _____ No _____

Statement 10 (January 16, 2002)

Yes _____ No _____

Statement 11 (March 13, 2002)

Yes _____ No _____

Statement 12 (April 9, 2002)

Yes _____ No _____

Statement 13 (April 17, 2002)

Yes _____ No _____

Statement 14 (May 10, 2002)

Yes _____ No _____

Statement 15 (July 17, 2002)

Yes _____ No _____

Statement 16 (August 14, 2002)

Yes _____ No _____

Statement 17 (August 14, 2002)

Yes _____ No _____

If you answered "No" as to every Statement, then you have finished with the Verdict Form. Please turn to the last page, sign and date the Verdict Form, and inform the Court that you have finished.

If you answered "Yes" as to any Statement, then proceed to Question No. 2.

2. Question No. 2:

For each statement as to which you answered “Yes” in Question 1, determine which, if any, proposed model reasonably estimates plaintiffs’ damages resulting from that Statement, in light of the issue or issues misrepresented in that statement

Statement No. 1

_____ Plaintiffs’ Specific Disclosures Model (Plaintiffs’ Ex. __)

_____ Plaintiffs’ Leakage Model (Plaintiffs’ Ex. __)

_____ Defendants’ Specific Disclosures Model (Defendants’ Ex. __)

_____ None of the proposed damages models reasonably estimates the damages related to the issue misrepresented in that statement

Statements No. 2 through 17

_____ Plaintiffs’ Specific Disclosures Model (Plaintiffs’ Ex. __)

_____ Plaintiffs’ Leakage Model (Plaintiffs’ Ex. __)

_____ Defendants’ Specific Disclosures Model (Defendants’ Ex. __)

_____ None of the proposed damages models reasonably estimates the damages related to the issue or issues misrepresented by each statement.

If you determined that none of the proposed damages models reasonably estimate plaintiffs’ damages resulting from each of the Statements for which you answered “Yes” in Question 1, then you have finished with the Verdict Form. Please turn to the last page, sign and date the Verdict Form, and inform the Court that you have finished.

Otherwise, write the amount of inflation per share, if any, that you find the Statements for which you answered “Yes” in Question 1 caused on each of the dates set forth in Table A. If no loss was caused by those Statements on any date, write “none” or “0.” Then proceed to Question No. 3.

3. Question No. 3:

What percentage of responsibility, if any do you allocate to each of the defendants listed below for the loss plaintiffs incurred as a result of the Statement or Statements made by that defendant and as to which you answered “Yes” in Question 1? In making this determination, you should consider the nature of the statements made by each

person found to have caused or contributed to plaintiffs' loss, the issues misrepresented by the statements of each person found to have caused or contributed to plaintiffs' loss, and the nature and extent of the causal relationship between each such person's statement or statements and plaintiffs' loss.

Statement No. 1

_____ Household

_____ William Aldinger

_____ Gary Gilmer

Statements No. 2 through 17

_____ Household

_____ William Aldinger

_____ David Schoenholz

Respectfully submitted,

DATED: 5/16/2016

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EXHIBIT B

**UNITED STATES DISTRICT COURT
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(Allocation of Responsibility)

If you find plaintiffs are entitled to an award of damages for any of the 17 Statements, then you must separately determine for each defendant the percentage of responsibility, if any, of that defendant for the loss incurred by plaintiffs. In determining the percentage of responsibility of each defendant, you should consider the nature of the statement or statements made by that defendant, the issues misrepresented by the statements made by that defendant, and the nature and extent of the causal relationship between the statement or statements made by that defendant and the damages incurred by plaintiffs.

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Yes _____ No _____

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Yes _____ No _____

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Yes _____ No _____

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____ Plaintiffs’ Specific Disclosures Model (Plaintiffs’ Ex. ____)

____ Plaintiffs’ Leakage Model (Plaintiffs’ Ex. ____)

____ Defendants’ Specific Disclosures Model (Defendants’ Ex. ____)

____ None of the proposed damages models reasonably estimates the damages related to the issue misrepresented in that statement

Statements No. 2 through 17

____ Plaintiffs’ Specific Disclosures Model (Plaintiffs’ Ex. ____)

____ Plaintiffs’ Leakage Model (Plaintiffs’ Ex. ____)

____ Defendants’ Specific Disclosures Model (Defendants’ Ex. ____)

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If you determined that none of the proposed damages models reasonably estimate plaintiffs’ damages resulting from each of the Statements for which you answered “Yes” in Question 1, then you have finished with the Verdict Form. Please turn to the last page, sign and date the Verdict Form, and inform the Court that you have finished.

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What percentage of responsibility, if any do you allocate to each of the defendants listed below for the loss plaintiffs incurred as a result of the Statement or Statements made by that defendant and as to which you answered "Yes" in Question 1? In making this determination, you should consider the nature of the statements made by each person found to have caused or contributed to plaintiffs' loss, the issues misrepresented by the statements of each person found to have caused or contributed to plaintiffs' loss, and the nature and extent of the causal relationship between each such person's statement or statements and plaintiffs' loss.

Statement No. 1

Household

William Aldinger

Gary Gilmer

Statements No. 2 through 17

_____ Household

_____ William Aldinger

_____ David Schoenholz

~~_____ Gary Gilmer~~

Respectfully submitted,

DATED: ~~45/22~~16/2016

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