

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

LAWRENCE E. JAFFE PENSION PLAN, On) Behalf of Itself and All Others Similarly) Situating,) Plaintiff,) vs.) HOUSEHOLD INTERNATIONAL, INC., et) al.,) Defendants.) _____))	Lead Case No. 02-C-5893 (Consolidated) <u>CLASS ACTION</u> Honorable Jorge L. Alonso
---	---	---

**PLAINTIFFS' CORRECTED OBJECTIONS TO DEFENDANTS' ADDITIONAL
PROPOSED JURY INSTRUCTIONS**

[Exhibit H-7 to [Proposed] Final Pretrial Order]

I. DEFENDANTS' PROPOSED PRETRIAL INSTRUCTIONS

Proposed Instruction No. 1 (Claims, Defenses, and Prior Proceedings):

Plaintiffs object to defendants' proposed instruction. The Court should provide the jury with a summary of the evidence from the first trial. Plaintiffs have prepared a Statement of the Prior Proceedings which should be read and given to the jurors in lieu of defendants' proposed instruction. *See* Proposed Statement of the Prior Proceedings to be Read and Given to the Jury (Exhibit B-3 to [Proposed] Final Pretrial Order); *see also* Plaintiffs' Memorandum in Support of Motion *In-Limine* to Permit Plaintiffs to Present Evidence of the Fraud [Motion *in Limine* No. 1].

II. DEFENDANTS' PROPOSED IN-TRIAL INSTRUCTIONS

Proposed Instruction No. 2 (Evidence Admitted Only Against One Party):

Plaintiffs object to defendants' proposed instruction. It is inapplicable to the issues that must be decided at the retrial. Defendants have not pointed to any evidence that should be admitted as to only one of the four defendants. The evidence regarding loss causation, damages and proportionate liability should be considered as to all four defendants.

III. DEFENDANTS' END OF TRIAL INSTRUCTIONS

Proposed Instruction No. 3 (All Litigants Equal Before the Law):

Plaintiffs object to defendants' proposed instruction. The instruction states that "some of the parties are corporations." Of the relevant actors at the retrial, only defendant Household is a corporation. Plaintiffs ask that the Court use Plaintiffs' Proposed Jury Instruction No. 16 (All Litigants Equal Before the Law), which makes this distinction, in lieu of defendants' instruction.

Proposed Instruction No. 4 (Evidence):

Plaintiffs object to this instruction. Defendants' instruction ignores the fact that the evidence will also consist of testimony from the first trial, which will have to be read to the jury. Plaintiffs request that the Court use Plaintiffs' Proposed Jury Instruction Nos. 6 (Evidence) and 7 (Deposition Testimony and Trial Testimony) in lieu of defendants' proposed instruction, which omits any reference to testimony from the first trial.

Proposed Instruction No. 5 (Evidence Limited to Certain Parties):

Plaintiffs object to defendants' proposed instruction. Again, defendants' instruction implies or assumes that there is evidence that will apply only to certain defendants. The evidence regarding loss causation, damages and proportionate liability should be considered as to all four defendants. Therefore, defendants' instruction is unnecessary and confusing.

Proposed Instruction No. 6 (Prior Inconsistent Statements or Acts):

Plaintiffs object to defendants' proposed instruction. Defendants have modified the Seventh Circuit Model Instruction No. 1.14 by removing brackets around the words "[Party]" and "[witness under oath]" in their proposed instruction. In removing these brackets, defendants have blurred the distinction between prior inconsistent statements by a party and prior inconsistent statements by a third party witness. Any prior inconsistent statement by a party is an admission that is received as substantive evidence. *See* Fed. R. Evid. 801(d)(2)(A)-(E). A party's prior inconsistent statement, unlike statements by third parties, need not be made under oath to qualify as substantive evidence. *See United States v. Disantis*, 565 F.3d 354, 360 (7th Cir. 2009) (explaining that prior inconsistent statements of non-party witnesses "are admissible as non-hearsay, substantive evidence only if 'subject to cross-examination' and 'given under oath'" whereas statements of a party opponent "are admissible as substantive evidence even if not given under oath"). The Court should use Plaintiffs' Proposed Jury Instruction No. 11 in lieu of defendants' instruction and modify it, as necessary, at the conclusion of the trial to address prior statements by particular parties or third parties.

Proposed Instruction No. 7 (Multiple Defendants):

Plaintiffs object to defendants' proposed instruction. First, defendants' use of the word "liable" is confusing in light of the prior jury's finding, as affirmed by the Court of Appeals, that defendants knowingly or recklessly made 17 materially false and misleading statements. Second, plaintiffs again object to defendants' assumption that there will be evidence admitted against only some subset of the defendants. Evidence related to loss causation, damages and proportionate liability will be admissible as to all four defendants.

Proposed Instruction No. 8 (Section 10(b) Elements Generally):

Plaintiffs object to defendants' proposed instruction. The jury should be instructed with respect to Rule 10b-5 and each of its elements. The Court should also instruct the jury as to the elements which have already been proven. Plaintiffs request that the Court use Plaintiffs' Proposed Jury Instruction Nos. 17 (Rule 10b-5 Defined) and 18 (Elements for Primary Liability Under Section 10(b)) in lieu of defendants' proposed instruction.

Proposed Instruction No. 9 (Loss Causation):

Defendants' proposed jury instruction on loss causation is objectionable on numerous grounds. To begin, plaintiffs object to the first sentence in paragraph one, as it improperly refers to loss causation as the "first element" plaintiffs must prove to prevail on their §10(b) claim. This is inaccurate, misleading and inconsistent with the Seventh Circuit's opinion in this case, which specifically enumerates all of the elements plaintiffs must prove to prevail under §10(b) and Rule 10b-5. See *Glickenhau & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 414 (7th Cir. 2015) (listing loss causation as the sixth and final element plaintiffs must prove to prevail under Rule 10b-5); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005) (same). By describing loss causation as the "first element" plaintiffs must prove, the jury may give less weight to the other five elements, including those plaintiffs have already conclusively proven. Additionally, as set forth in plaintiffs' proposed jury instructions, plaintiffs believe that the jury should be instructed on all elements plaintiffs must prove (and have proved) under Rule 10b-5.

Plaintiffs object to the second sentence in the first paragraph of defendants' proposed jury instruction, which states that plaintiff must prove a "direct causal connection between the particular misstatement or omission and plaintiffs' loss." As defendants concede, plaintiffs need only prove that the misstatement or omission was a substantial or significant cause of plaintiffs' loss, not that it was the sole cause. By using the language "direct causal connection," defendants' attempt to raise the bar on what plaintiffs are required to prove by improperly implying that the misstatement or omission must be *the* cause of plaintiffs' loss.

Plaintiffs object to the third sentence in the first paragraph of defendants' proposed jury instruction as it ignores that expert testimony is commonly used to isolate the economic losses caused by the fraud and omits the Seventh Circuit's finding that "Fischel's models controlled for market and industry factors and general trends in the economy – the regression analysis took care of that." *Glickenhauser*, 787 F.3d at 421; *see id.* at 422 (rejecting argument that the leakage model must *itself* account for, and perfectly exclude, any firm-specific, non-fraud related factors).

Plaintiffs object to the fourth sentence in the first paragraph of defendants' proposed jury instruction, as defendants' addition of the word "significant" is redundant. Plaintiffs object to the last sentence in the first paragraph on the grounds that it presents the jury with a misleading and unnecessary hypothetical.

Plaintiffs object to the second point in paragraph two, "that when the truth was revealed about that misstatement or omission, the revelation caused Household's stock price to decrease." This language implies that the truth must be revealed in a single revelation or corrective disclosure and is contrary to Seventh Circuit and Supreme Court precedent which "generally recognize[s] that the truth can leak out over time." *Glickenhauser*, 787 F.3d at 422 (citing cases); *id.* at 416 (observing that "information contained in a major disclosure event often leaks out to some market participants before its release"). As the court instructed the jury at the last trial – an instruction defendants did not challenge on appeal – and as plaintiffs' proposed instruction states, the truth may be revealed to the market through a single disclosure or series of disclosures made by any person or entity.

Plaintiffs object to the last paragraph of defendants' proposed jury instruction in its entirety as it is completely unnecessary and would likely confuse the jury. The first sentence of defendants' final paragraph indicates that plaintiffs must, among other things, prove that they "lost money when they sold the stock at a lower price." This statement is untrue. Plaintiffs need not sell their stock at all, let alone at a lower price, to suffer damages in a securities case. *Ong v. Sears, Roebuck & Co.*, No. 03 C 4142, 2006 U.S. Dist. LEXIS 73801, at *41-*46 (N.D. Ill. Sept. 27, 2006). The Seventh Circuit found that "Fischel's models controlled for market and industry factors and general trends in the economy" because "the regression analysis took care of that." *Glickenhauser*, 787 F.3d at 421. In

light of the Seventh Circuit's ruling, the only other "factors" that may have caused Household's stock price to decrease are firm-specific, non-fraud related factors. But defendants have failed to identify any significant firm-specific, non-fraud factors that could have affected Household's stock price. *See* February 1, 2016 Order at 22. The statement that "[m]any factors other than a misstatement or omission may cause a stock price to decrease" is plainly wrong in light of these holdings. The last sentence improperly inverts what plaintiffs must prove to establish the element of loss causation. The entire paragraph should be stricken.

Plaintiffs propose that their [Proposed] Jury Instruction No. 19 be given. Plaintiffs' proposed instruction is consistent with the loss causation instruction given at the last trial, an instruction defendants did not challenge on appeal. *See also* Memorandum of Law in Support of Plaintiffs' Motion *in Limine* to Object to Defendants' Proposed Verdict Form, Including Their "Question One" and Their Attempt to Add "Defendants' Specific Disclosures Model" as an Option for the Jury to Select in Determining Damages [Motion *in Limine* No. 5].

Proposed Instruction No. 10 (Damages, i.e., Inflation):

Plaintiffs object to defendants' proposed jury instruction. Defendants' proposed instruction is a modified version of the instruction on damages given at the last trial, which defendants did not challenge on appeal. *See* Jury Instructions as Given at First Trial (Dkt. No. 1614), at 34. Plaintiffs object to the first two sentences of defendants' proposed instruction as confusing and misleading. Specifically, defendants' instruction suggests that the jury must make 17 separate determinations of whether defendants' fraud caused plaintiffs' losses under §10(b), when the jury need only make a single determination: whether plaintiffs have proved defendants' fraud caused their losses. *See Glickenhauser*, 787 F.3d at 415 (confirming that loss causation can be proven by showing that "the price of the securities [plaintiffs] purchased was 'inflated' . . . and that it declined since the truth was revealed"). Defendants' proposed instruction also improperly puts the focus on the 17 statements, rather than on the disclosures plaintiffs claim revealed the truth and their impact on Household's stock price, contrary to the Seventh Circuit's findings. *Id.* ("The best way to determine the impact of a false statement is to observe what happens when the truth is finally disclosed and use that to work

backward . . .”). Once the jury determines that the stock price declines during the disclosure period were substantially caused by the removal of fraud-related inflation, plaintiffs will have proven loss causation. The jury will then be asked to estimate plaintiffs’ damages using the model it believes most accurately estimates the fraud-related information in Household’s share price for each day during the Class Period. Requiring the jury to parse loss causation on a statement-by-statement basis is both unnecessary and inconsistent with the Seventh Circuit’s findings. *See Glickenhau*, 787 F.3d at 417-18 (“As soon as the first false statement was made, that overpricing became fully attributable to the false statement . . . every subsequent false statement caused the full amount of inflation to remain in the stock price . . . because had the truth become known, the price would have fallen then.”). Plaintiffs object to defendants’ unnecessary addition of the phrase “and may not be based on speculation or guesswork” in the third sentence of the second paragraph. Plaintiffs object to the last sentence in defendants’ proposed instruction, as defendants attempt to reinstruct the jurors on plaintiffs’ burden of proof, which has already been addressed in a separate instruction. Plaintiffs ask the Court to use Plaintiffs’ Proposed Jury Instruction No. 20 (Damages) in lieu of defendants’ proposed instruction.

Proposed Instruction No. 11 (Allocation of Responsibility):

Plaintiffs object to defendants’ instruction. In the first sentence, defendants again advance their flawed argument that damages are determined on a statement-by-statement basis. *See* Plaintiffs’ Objections to Defendants’ Proposed Instruction No. 10, *supra*. Plaintiffs also object to the first sentence of defendants’ instruction which includes the words “if any.” Defendants’ instruction is confusing. If the jury finds loss causation and determines the daily per share damages, the jury will have to determine the percentage of responsibility for all four defendants, even if the allocation for one of the defendants is “zero.” Plaintiffs ask the Court to use Plaintiffs’ Proposed Jury Instruction No. 21 (Section 10(b) – Apportionment of Responsibility) in lieu of defendants’ instruction.

Proposed Instruction No. 12 (Selection of Foreperson; Verdict Form):

Plaintiffs object to this instruction. Defendants' proposed instruction improperly modifies Seventh Circuit Model Instruction No. 1.32 to add the phrase "every question in." Defendants undoubtedly made this modification because of their flawed proposed verdict form. Plaintiffs have objected to both defendants' Verdict Form and their proposal that the jury make 17 separate determinations with respect to loss causation. *See* Memorandum of Law in Support of Plaintiffs' Motion *in Limine* to Object to Defendants' Proposed Verdict Form, Including Their "Question One" and Their Attempt to Add "Defendants' Specific Disclosures Model" as an Option for the Jury to Select in Determining Damages [Motion *in Limine* No. 5]; Plaintiffs' Objections to Defendants' Proposed Jury Instruction Nos. 10 and 11. Therefore, plaintiffs ask the Court to use Plaintiffs' Proposed Jury Instruction No. 23 (Duty to Deliberate), which faithfully tracks the Seventh Circuit Model Instruction.

Proposed Instruction No. 13 (Disagreement Among Jurors):

Plaintiffs object to this instruction. Again, defendants have modified the Seventh Circuit Model Instructions by adding the phrase "on each question," among other changes. Defendants' instruction is again designed to reflect defendants' flawed proposed verdict form. *See* Plaintiffs' Objections to Proposed Instruction Nos. 10, 11 and 12 (Selection of Foreperson; Verdict Form), *supra*. Plaintiffs ask the Court to use Plaintiffs' Proposed Jury Instruction No. 24 (Disagreement Among Jurors) in lieu of defendants' instruction. Plaintiffs' proposed instruction tracks the language of the Seventh Circuit Model Instructions.

Defendant Gilmer's Proposed Instruction No. 35 (Allocation of Responsibility):

Plaintiffs object to this instruction. The instruction is not in accordance with the law. The proper language of the statute (15 U.S.C. §78u-4(f)(3)(C)) is set forth below:

In determining the percentage of responsibility under this paragraph, the trier of fact shall consider:

(1) the nature of the conduct of each covered person found to have caused or contributed to the loss incurred by the plaintiff . . . and

(2) the nature and extent of the causal relationship between the conduct of each such person and the damages incurred by the plaintiff . . .

Gilmer has added “the nature of the statements made by each person found to have caused or contributed to plaintiffs loss” and the “issues misrepresented by the statements of each person” which is nowhere to be found in the statute and is improper. Gilmer’s proposed instruction is also improper because it suggests that damages in this case will be determined on a statement-by-statement basis. *See* Plaintiffs’ Objections to Defendants’ Proposed Instruction No. 10. Plaintiffs also object to Gilmer’s insertion of the words “if any.” Gilmer’s instruction is confusing. If the jury finds loss causation and determines the daily per share damages, the jury will have to determine the percentage of responsibility for all four defendants, even if the allocation for one of the defendants is “zero.” Plaintiffs ask the Court to use Plaintiffs’ Proposed Jury Instruction No. 21 (Section 10(b) – Apportionment of Responsibility) in lieu of defendant Gilmer’s instruction.

DATED: May 19, 2016

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
MICHAEL J. DOWD (135628)
SPENCER A. BURKHOLZ (147029)
DANIEL S. DROSMAN (200643)
LUKE O. BROOKS (90785469)
LAWRENCE A. ABEL (129596)
HILLARY B. STAKEM (286152)

s/ Michael J. Dowd
MICHAEL J. DOWD

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

ROBBINS GELLER RUDMAN
& DOWD LLP
JASON C. DAVIS (253370)
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545
415/288-4534 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
MAUREEN E. MUELLER
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: 561/750-3000
561/750-3364 (fax)

Lead Counsel for Plaintiffs

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

Liaison Counsel

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2016, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses for counsel of record denoted on the attached Service List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 19, 2016.

s/ Michael J. Dowd
MICHAEL J. DOWD

ROBBINS GELLER RUDMAN
& DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101-8498
Telephone: 619/231-1058
619/231-7423 (fax)

E-mail: MikeD@rgrdlaw.com

Jaffe v. Household Int'l, Inc., No. 02-5893 (N.D. Ill.)
Service List

Counsel	E-mail address
Stewart Theodore Kuser Giovanni Antonio Raimondi THE KUSPER LAW GROUP, LTD. 20 North Clark Street, Suite 3000 Chicago, IL 60602 (312) 204-7938 Tim S. Leonard JACKSON WALKER L.L.P. 1401 McKinney Street, Ste. 1900 Houston, TX 77010 (713)752-4439	Stewart.Kuser@Kuserlaw.com Giovanni.Raimondi@Kuserlaw.com tleonard@jw.com
Counsel for Defendant David A. Schoenholz	
Dawn Marie Canty Gil M. Soffer KATTEN MUCHIN ROSENMAN LLP 525 West Monroe Street Chicago, Illinois 60661 (312)902-5253	dawn.canty@kattenlaw.com gil.soffer@kattenlaw.com
Counsel for Defendant William F. Aldinger	
David S. Rosenbloom C. Maeve Kendall McDERMOTT WILL & EMERY, LLP 227 West Monroe Street Chicago, IL 60606 (312) 984-2175	drosenbloom@mwe.com makendall@mwe.com
Counsel for Defendant Gary Gilmer	

Counsel	E-mail address
<p>R. Ryan Stoll Mark E. Rakoczy Andrew J. Fuchs Donna L. McDevitt Patrick Fitzgerald SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP 155 North Wacker Drive Chicago, IL 60606 (312)407-0700</p> <p>Paul D. Clement D. Zachary Hudson BANCROFT PLLC 1919 M Street NW, Ste. 470 Washington, DC 20036 (202)234-0090</p> <p>Thomas J. Kavalier Jason M. Hall CAHILL GORDON & REINDEL LLP 80 Pine Street New York, NY 10005 (212)701-3000</p> <p>Dane H. Butswinkas Steven M. Farina Leslie C. Mahaffey Amanda M. MacDonald WILLIAMS & CONNOLLY LLP 725 Twelfth Street NW Washington DC 20005 202-434-5000</p> <p>Luke DeGrand Tracey L. Wolfe DEGRAND & WOLFE, P.C. 20 South Clark Street Suite 2620 Chicago, Illinois 60603 (312) 236-9200 (312) 236-9201 (fax)</p>	<p>rstoll@skadden.com mrakoczy@skadden.com Andrew.Fuchs@skadden.com Donna.McDevitt@skadden.com Patrick.Fitzgerald@skadden.com pclement@bancroftpllc.com zhudson@bancroftpllc.com TKavalier@cahill.com Jhall@cahill.com dbutswinkas@wc.com sfarina@wc.com lmahaffey@wc.com amacdonald@wc.com twolfe@degrandwolfe.com ldegrand@degrandwolfe.com</p>
Counsel for Defendant Household International Inc.	

Counsel	E-mail address
<p>Michael J. Dowd Spencer A. Burkholz Daniel S. Drosman Luke O. Brooks Hillary B. Stakem ROBBINS GELLER RUDMAN & DOWD LLP 655 West Broadway, Suite 1900 San Diego, CA 92101 (619)231-1058 619/231-7423 (fax)</p> <p>Jason C. Davis ROBBINS GELLER RUDMAN & DOWD LLP Post Montgomery Center One Montgomery Street, Suite 1800 San Francisco, CA 94104 (415)288-4545 (415)288-4534 (fax)</p> <p>Maureen E. Mueller ROBBINS GELLER RUDMAN & DOWD LLP 120 East Palmetto Park Road, Suite 500 Boca Raton, FL 33432 (561)750-3000 (561)750-3364 (fax)</p>	<p>miked@rgrdlaw.com spenceb@rgrdlaw.com dand@rgrdlaw.com lukeb@rgrdlaw.com hstakem@rgrdlaw.com jdavis@rgrdlaw.com mmueller@rgrdlaw.com</p>
Lead Counsel for Plaintiffs	
<p>Marvin A. Miller Lori A. Fanning MILLER LAW LLC 115 S. LaSalle Street, Suite 2910 Chicago, IL 60603 (312)332-3400 (312)676-2676 (fax)</p>	<p>Mmiller@millerlawllc.com Lfanning@millerlawllc.com</p>
Liaison Counsel for Plaintiffs	

REDLINE VERSION

**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,)	
Plaintiff,)	<u>CLASS ACTION</u>
vs.)	Honorable Jorge L. Alonso
HOUSEHOLD INTERNATIONAL, INC., et)	
al.,)	
Defendants.)	

**PLAINTIFFS' CORRECTED OBJECTIONS TO DEFENDANTS' ADDITIONAL
PROPOSED JURY INSTRUCTIONS**

[Exhibit H-7 to [Proposed] Final Pretrial Order]

I. DEFENDANTS' PROPOSED PRETRIAL INSTRUCTIONS

Proposed Instruction No. 1 (Claims, Defenses, and Prior Proceedings):

Plaintiffs object to defendants' proposed instruction. The Court should provide the jury with a summary of the evidence from the first trial. Plaintiffs have prepared a Statement of the Prior Proceedings which should be read and given to the jurors in lieu of defendants' proposed instruction. *See* Proposed Statement of the Prior Proceedings to be Read and Given to the Jury (Exhibit B-3 to [Proposed] Final Pretrial Order); *see also* Plaintiffs' Memorandum in Support of Motion *In-Limine* to Permit Plaintiffs to Present Evidence of the Fraud [Motion *in Limine* No. 1].

II. DEFENDANTS' PROPOSED IN-TRIAL INSTRUCTIONS

Proposed Instruction No. 2 (Evidence Admitted Only Against One Party):

Plaintiffs object to defendants' proposed instruction. It is inapplicable to the issues that must be decided at the retrial. Defendants have not pointed to any evidence that should be admitted as to only one of the four defendants. The evidence regarding loss causation, damages and proportionate liability should be considered as to all four defendants.

III. DEFENDANTS' END OF TRIAL INSTRUCTIONS

Proposed Instruction No. 3 (All Litigants Equal Before the Law):

Plaintiffs object to defendants' proposed instruction. The instruction states that "some of the parties are corporations." Of the relevant actors at the retrial, only defendant Household is a corporation. Plaintiffs ask that the Court use Plaintiffs' Proposed Jury Instruction No. 16 (All Litigants Equal Before the Law), which makes this distinction, in lieu of defendants' instruction.

Proposed Instruction No. 4 (Evidence):

Plaintiffs object to this instruction. Defendants' instruction ignores the fact that the evidence will also consist of testimony from the first trial, which will have to be read to the jury. Plaintiffs request that the Court use Plaintiffs' Proposed Jury Instruction Nos. ~~17~~6 (Evidence) and ~~18~~7 (Deposition Testimony and Trial Testimony) in lieu of defendants' proposed instruction, which omits any reference to testimony from the first trial.

Proposed Instruction No. 5 (Evidence Limited to Certain Parties):

Plaintiffs object to defendants' proposed instruction. Again, defendants' instruction implies or assumes that there is evidence that will apply only to certain defendants. The evidence regarding loss causation, damages and proportionate liability should be considered as to all four defendants. Therefore, defendants' instruction is unnecessary and confusing.

Proposed Instruction No. 6 (Prior Inconsistent Statements or Acts):

Plaintiffs object to defendants' proposed instruction. Defendants have modified the Seventh Circuit Model Instruction No. 1.14 by removing brackets around the words "[Party]" and "[witness under oath]" in their proposed instruction. In removing these brackets, defendants have blurred the distinction between prior inconsistent statements by a party and prior inconsistent statements by a third party witness. Any prior inconsistent statement by a party is an admission that is received as substantive evidence. *See* Fed. R. Evid. 801(d)(2)(A)-(E). A party's prior inconsistent statement, unlike statements by third parties, need not be made under oath to qualify as substantive evidence. *See United States v. Disantis*, 565 F.3d 354, 360 (7th Cir. 2009) (explaining that prior inconsistent statements of non-party witnesses "are admissible as non-hearsay, substantive evidence only if 'subject to cross-examination' and 'given under oath'" whereas statements of a party opponent "are admissible as substantive evidence even if not given under oath"). The Court should use Plaintiffs' Proposed Jury Instruction No. ~~29~~11 in lieu of defendants' instruction and modify it, as necessary, at the conclusion of the trial to address prior statements by particular parties or third parties.

Proposed Instruction No. 7 (Multiple Defendants):

Plaintiffs object to defendants' proposed instruction. First, defendants' use of the word "liable" is confusing in light of the prior jury's finding, as affirmed by the Court of Appeals, that defendants knowingly or recklessly made 17 materially false and misleading statements. Second, plaintiffs again object to defendants' assumption that there will be evidence admitted against only some subset of the defendants. Evidence related to loss causation, damages and proportionate liability will be admissible as to all four defendants.

Proposed Instruction No. 8 (Section 10(b) Elements Generally):

Plaintiffs object to defendants' proposed instruction. The jury should be instructed with respect to Rule 10b-5 and each of its elements. The Court should also instruct the jury as to the elements which have already been proven. Plaintiffs request that the Court use Plaintiffs' Proposed Jury Instruction Nos. ~~41~~17 (Rule 10b-5 Defined) and ~~42~~18 (Elements for Primary Liability Under Section 10(b)) in lieu of defendants' proposed instruction.

Proposed Instruction No. 9 (Loss Causation):

Defendants' proposed jury instruction on loss causation is objectionable on numerous grounds. To begin, plaintiffs object to the first sentence in paragraph one, as it improperly refers to loss causation as the "first element" plaintiffs must prove to prevail on their §10(b) claim. This is inaccurate, misleading and inconsistent with the Seventh Circuit's opinion in this case, which specifically enumerates all of the elements plaintiffs must prove to prevail under §10(b) and Rule 10b-5. See *Glickenhau & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 414 (7th Cir. 2015) (listing loss causation as the sixth and final element plaintiffs must prove to prevail under Rule 10b-5); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005) (same). By describing loss causation as the "first element" plaintiffs must prove, the jury may give less weight to the other five elements, including those plaintiffs have already conclusively proven. Additionally, as set forth in plaintiffs' proposed jury instructions, plaintiffs believe that the jury should be instructed on all elements plaintiffs must prove (and have proved) under Rule 10b-5.

Plaintiffs object to the second sentence in the first paragraph of defendants' proposed jury instruction, which states that plaintiff must prove a "direct causal connection between the particular misstatement or omission and plaintiffs' loss." As defendants concede, plaintiffs need only prove that the misstatement or omission was a substantial or significant cause of plaintiffs' loss, not that it was the sole cause. By using the language "direct causal connection," defendants' attempt to raise the bar on what plaintiffs are required to prove by improperly implying that the misstatement or omission must be *the* cause of plaintiffs' loss.

Plaintiffs object to the third sentence in the first paragraph of defendants' proposed jury instruction as it ignores that expert testimony is commonly used to isolate the economic losses caused by the fraud and omits the Seventh Circuit's finding that "Fischel's models controlled for market and industry factors and general trends in the economy – the regression analysis took care of that." *Glickenhauser*, 787 F.3d at 421; *see id.* at 422 (rejecting argument that the leakage model must *itself* account for, and perfectly exclude, any firm-specific, non-fraud related factors).

Plaintiffs object to the fourth sentence in the first paragraph of defendants' proposed jury instruction, as defendants' addition of the word "significant" is redundant. Plaintiffs object to the last sentence in the first paragraph on the grounds that it presents the jury with a misleading and unnecessary hypothetical.

Plaintiffs object to the second point in paragraph two, "that when the truth was revealed about that misstatement or omission, the revelation caused Household's stock price to decrease." This language implies that the truth must be revealed in a single revelation or corrective disclosure and is contrary to Seventh Circuit and Supreme Court precedent which "generally recognize[s] that the truth can leak out over time." *Glickenhauser*, 787 F.3d at 422 (citing cases); *id.* at 416 (observing that "information contained in a major disclosure event often leaks out to some market participants before its release"). As the court instructed the jury at the last trial – an instruction defendants did not challenge on appeal – and as plaintiffs' proposed instruction states, the truth may be revealed to the market through a single disclosure or series of disclosures made by any person or entity.

Plaintiffs object to the last paragraph of defendants' proposed jury instruction in its entirety as it is completely unnecessary and would likely confuse the jury. The first sentence of defendants' final paragraph indicates that plaintiffs must, among other things, prove that they "lost money when they sold the stock at a lower price." This statement is untrue. Plaintiffs need not sell their stock at all, let alone at a lower price, to suffer damages in a securities case. *Ong v. Sears, Roebuck & Co.*, No. 03 C 4142, 2006 U.S. Dist. LEXIS 73801, at *41-*46 (N.D. Ill. Sept. 27, 2006). The Seventh Circuit found that "Fischel's models controlled for market and industry factors and general trends in the economy" because "the regression analysis took care of that." *Glickenhauser*, 787 F.3d at 421. In

light of the Seventh Circuit's ruling, the only other "factors" that may have caused Household's stock price to decrease are firm-specific, non-fraud related factors. But defendants have failed to identify any significant firm-specific, non-fraud factors that could have affected Household's stock price. *See* February 1, 2016 Order at 22. The statement that "[m]any factors other than a misstatement or omission may cause a stock price to decrease" is plainly wrong in light of these holdings. The last sentence improperly inverts what plaintiffs must prove to establish the element of loss causation. The entire paragraph should be stricken.

Plaintiffs propose that their [Proposed] Jury Instruction No. ~~43~~19 be given. Plaintiffs' proposed instruction is consistent with the loss causation instruction given at the last trial, an instruction defendants did not challenge on appeal. *See also* Memorandum of Law in Support of Plaintiffs' Motion *in Limine* to Object to Defendants' Proposed Verdict Form, Including Their "Question One" and Their Attempt to Add "Defendants' Specific Disclosures Model" as an Option for the Jury to Select in Determining Damages [Motion *in Limine* No. 5].

Proposed Instruction No. 10 (Damages, i.e., Inflation):

Plaintiffs object to defendants' proposed jury instruction. Defendants' proposed instruction is a modified version of the instruction on damages given at the last trial, which defendants did not challenge on appeal. *See* Jury Instructions as Given at First Trial (Dkt. No. 1614), at 34. Plaintiffs object to the first two sentences of defendants' proposed instruction as confusing and misleading. Specifically, defendants' instruction suggests that the jury must make 17 separate determinations of whether defendants' fraud caused plaintiffs' losses under §10(b), when the jury need only make a single determination: whether plaintiffs have proved defendants' fraud caused their losses. *See Glickenhauser*, 787 F.3d at 415 (confirming that loss causation can be proven by showing that "the price of the securities [plaintiffs] purchased was 'inflated' . . . and that it declined since the truth was revealed"). Defendants' proposed instruction also improperly puts the focus on the 17 statements, rather than on the disclosures plaintiffs claim revealed the truth and their impact on Household's stock price, contrary to the Seventh Circuit's findings. *Id.* ("The best way to determine the impact of a false statement is to observe what happens when the truth is finally disclosed and use that to work

backward . . .”). Once the jury determines that the stock price declines during the disclosure period were substantially caused by the removal of fraud-related inflation, plaintiffs will have proven loss causation. The jury will then be asked to estimate plaintiffs’ damages using the model it believes most accurately estimates the fraud-related information in Household’s share price for each day during the Class Period. Requiring the jury to parse loss causation on a statement-by-statement basis is both unnecessary and inconsistent with the Seventh Circuit’s findings. *See Glickenhau*, 787 F.3d at 417-18 (“As soon as the first false statement was made, that overpricing became fully attributable to the false statement . . . every subsequent false statement caused the full amount of inflation to remain in the stock price . . . because had the truth become known, the price would have fallen then.”). Plaintiffs object to defendants’ unnecessary addition of the phrase “and may not be based on speculation or guesswork” in the third sentence of the second paragraph. Plaintiffs object to the last sentence in defendants’ proposed instruction, as defendants attempt to reinstruct the jurors on plaintiffs’ burden of proof, which has already been addressed in a separate instruction. Plaintiffs ask the Court to use Plaintiffs’ Proposed Jury Instruction No. ~~44~~20 (Damages) in lieu of defendants’ proposed instruction.

Proposed Instruction No. 11 (Allocation of Responsibility):

Plaintiffs object to defendants’ instruction. In the first sentence, defendants again advance their flawed argument that damages are determined on a statement-by-statement basis. *See* Plaintiffs’ Objections to Defendants’ Proposed Instruction No. ~~34~~10, *supra*. Plaintiffs also object to the first sentence of defendants’ instruction which includes the words “if any.” Defendants’ instruction is confusing. If the jury finds loss causation and determines the daily per share damages, the jury will have to determine the percentage of responsibility for all four defendants, even if the allocation for one of the defendants is “zero.” Plaintiffs ask the Court to use Plaintiffs’ Proposed Jury Instruction No. ~~45~~21 (Section 10(b) – Apportionment of Responsibility) in lieu of defendants’ instruction.

Proposed Instruction No. 12 (Selection of Foreperson; Verdict Form):

Plaintiffs object to this instruction. Defendants' proposed instruction improperly modifies Seventh Circuit Model Instruction No. 1.32 to add the phrase "every question in." Defendants undoubtedly made this modification because of their flawed proposed verdict form. Plaintiffs have objected to both defendants' Verdict Form and their proposal that the jury make 17 separate determinations with respect to loss causation. *See* Memorandum of Law in Support of Plaintiffs' Motion *in Limine* to Object to Defendants' Proposed Verdict Form, Including Their "Question One" and Their Attempt to Add "Defendants' Specific Disclosures Model" as an Option for the Jury to Select in Determining Damages [Motion *in Limine* No. 5]; Plaintiffs' Objections to Defendants' Proposed Jury Instruction Nos. ~~34~~10 and ~~35~~11. Therefore, plaintiffs ask the Court to use Plaintiffs' Proposed Jury Instruction No. ~~47~~23 (Duty to Deliberate), which faithfully tracks the Seventh Circuit Model Instruction.

Proposed Instruction No. 13 (Disagreement Among Jurors):

Plaintiffs object to this instruction. Again, defendants have modified the Seventh Circuit Model Instructions by adding the phrase "on each question," among other changes. Defendants' instruction is again designed to reflect defendants' flawed proposed verdict form. *See* Plaintiffs' Objections to Proposed Instruction Nos. ~~34~~10, ~~35~~11 and ~~36~~12 (Selection of Foreperson; Verdict Form), *supra*. Plaintiffs ask the Court to use Plaintiffs' Proposed Jury Instruction No. ~~49~~24 (Disagreement Among Jurors) in lieu of defendants' instruction. Plaintiffs' proposed instruction tracks the language of the Seventh Circuit Model Instructions.

Defendant Gilmer's Proposed Instruction No. 35 (Allocation of Responsibility):

Plaintiffs object to this instruction. The instruction is not in accordance with the law. The proper language of the statute (15 U.S.C. §78u-4(f)(3)(C)) is set forth below:

In determining the percentage of responsibility under this paragraph, the trier of fact shall consider:

(1) the nature of the conduct of each covered person found to have caused or contributed to the loss incurred by the plaintiff . . . and

(2) the nature and extent of the causal relationship between the conduct of each such person and the damages incurred by the plaintiff . . .

Gilmer has added “the nature of the statements made by each person found to have caused or contributed to plaintiffs loss” and the “issues misrepresented by the statements of each person” which is nowhere to be found in the statute and is improper. Gilmer’s proposed instruction is also improper because it suggests that damages in this case will be determined on a statement-by-statement basis. *See* Plaintiffs’ Objections to Defendants’ Proposed Instruction No. ~~34~~10. Plaintiffs also object to Gilmer’s insertion of the words “if any.” Gilmer’s instruction is confusing. If the jury finds loss causation and determines the daily per share damages, the jury will have to determine the percentage of responsibility for all four defendants, even if the allocation for one of the defendants is “zero.” Plaintiffs ask the Court to use Plaintiffs’ Proposed Jury Instruction No. ~~45~~21 (Section 10(b) – Apportionment of Responsibility) in lieu of defendant Gilmer’s instruction.

DATED: ~~April 22~~May 19, 2016

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
MICHAEL J. DOWD (135628)
SPENCER A. BURKHOLZ (147029)
DANIEL S. DROSMAN (200643)
LUKE O. BROOKS (90785469)
LAWRENCE A. ABEL (129596)
HILLARY B. STAKEM (286152)

s/ Michael J. Dowd
MICHAEL J. DOWD

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

ROBBINS GELLER RUDMAN
& DOWD LLP
JASON C. DAVIS (253370)
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545
415/288-4534 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
MAUREEN E. MUELLER
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: 561/750-3000
561/750-3364 (fax)

Lead Counsel for Plaintiffs

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

Liaison Counsel