**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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| In re PARMALAT SECURITIES LITIGATION | : | MASTER DOCKET<br>04 MD 1653 (LAK) |
| This document relates to: 04 Civ 0030 (LAK) | : | |
| | : | ELECTRONICALLY FILED |

# JURY INSTRUCTIONS PROPOSED BY DEFENDANTS GRANT THORNTON INTERNATIONAL, GRANT THORNTON LLP, AND GRANT THORNTON INTERNATIONAL, LTD


STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, New York 10038
(212) 806-5400

*Attorneys for Defendants*
*Grant Thornton International and*
*Grant Thornton International, Ltd*

WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

200 Park Avenue
New York, New York 10166
(212) 294-6700

*Attorneys for Defendant*
*Grant Thornton LLP*

## PRELIMINARY STATEMENT

Pursuant to the Court's order of April 23, 2009, Doc. 1696, Defendants Grant Thornton International ("GTI"), Grant Thornton LLP ("GT-US"), and Grant Thornton International, Ltd ("GTI Ltd") submit the following request to charge. Defendants have attempted to provide a comprehensive set of instructions for the close of trial, together with supporting authorities. Defendants reserve the right to amend, supplement, or revise these proposed instructions, or to withdraw or replace proposed instructions. Such modifications or additions may be necessary based on Defendants' review of Plaintiff's proposed instructions, the outcome of various pending and anticipated pre-trial motions, as well as any rulings the Court may render in charging conferences or during the course of the trial, and/or the evidence actually adduced at trial.

Dated: June 15, 2009

Respectfully submitted,


STROOCK & STROOCK & LAVAN LLP

By: /s/ James L. Bernard
James L. Bernard (JB-4273)
180 Maiden Lane
New York, New York 10038
(212) 806-5400
(212) 806-6006 (fax)
jbernard@stroock.com

*Attorneys for Defendant*
*Grant Thornton International and*
*Grant Thornton International, Ltd*

WINSTON & STRAWN LLP

By: /s/ Linda T. Coberly
Bruce R. Braun (BB-2505)
Linda T. Coberly (LC-8078)
Andrew R. DeVooght (AD-0250)
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600
(312) 558-5700 (fax)
lcoberly@winston.com

*Attorneys for Defendant*
*Grant Thornton LLP*

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## 1. INTRODUCTION

Ladies and gentlemen: You are now the jury in this case. It is my duty to instruct you on the law.

You must not infer from these instructions or from anything I may say or do that I have an opinion regarding the evidence or what your verdict should be.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so. In following my instructions, you must follow all of them and not single out some and ignore others; they are all important.

Ninth Circuit Model Jury Instructions 1.1B

## 2. ALL PERSONS EQUAL BEFORE THE LAW—ORGANIZATIONS

You should consider and decide this case as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. Corporations and partnerships are entitled to the same fair trial as a private individual. All persons—including corporations, partnerships, and other organizations—stand equal before the law and are to be treated as equals.

Kevin F. O'Malley, Jay E. Grenig, William C. Lee, 3 Fed. Jury Practice & Instructions §103.12 (5th ed. 2000)

## 3. MULTIPLE DEFENDANTS

Although there is more than one defendant in this action, that does not mean that if one defendant is liable to the plaintiff, all defendants are liable. Each defendant is entitled to a fair consideration of the evidence and is entitled to have the case decided solely on the evidence that applies to that defendant.

Kevin F. O'Malley, Jay E. Grenig, William C. Lee, 3 Fed. Jury Practice & Instructions §103.14 (5th ed. 2000) (modified); *see also* Charge of the Honorable Ronald A. Guzman in *Jaffe v. Household Int'l, Inc.*, No. 02-cv-05893 (N.D. Ill. May 7, 2009)

## 4. USE OF NOTES

You may use the notes taken by you during the trial. However, the notes should not be substituted for your memory. Notes are not evidence. If your memory should differ from your notes, then you should rely on your memory and not on your notes.

Kevin F. O'Malley, Jay E. Grenig, William C. Lee, 3 Fed. Jury Practice & Instructions §103.02 (5th ed. 2000)

## 5. WHAT IS AND IS NOT EVIDENCE

The evidence in this case is the sworn testimony of the witnesses, the exhibits received in evidence, stipulations, admissions, and judicially noticed facts.

By contrast, the question of a lawyer is not to be considered by you as evidence. It is the witnesses' answers that are evidence, not the questions. At times, a lawyer on cross-examination may have incorporated into a question a statement that assumed certain facts to be true and asked the witness if the statement was true. If the witness denied the truth of a statement, and if there is no direct evidence in the record proving that assumed fact to be true, then you may not consider it to be true simply be cause it was contained in the lawyer's question.

An example of this is the question "When did you steal the car?" You would not be permitted to consider as true the assumed fact that the witness ever stole the car, unless the witness himself indicated he had, or unless there was some other evidence in the record that showed he had.

Testimony that has been stricken or excluded is not evidence and may not be considered by you in rendering your verdict. Also, if certain testimony was received for a limited purpose—such as for the purpose of assessing a witness' credibility—you must follow the limiting instructions I have given.

Arguments by lawyers are not evidence, because the lawyers are not witnesses. What they have said to you in their opening statements and in their summations is intended to help you understand the evidence to reach your verdict. However, if your recollection of the facts differs from the lawyers' statements, it is your recollection that controls.

Exhibits that have been marked for identification may not be considered by you as evidence until and unless they have been received in evidence by the court. To constitute evidence, exhibits must be received in evidence. Exhibits marked for identification but not admitted are not evidence, nor are materials brought forth only to refresh a witness' recollection.

Finally, statements that I may have made concerning the quality of the evidence do not constitute evidence.

It is for you alone to decide the weight, if any, to be given to the testimony you have heard and the exhibits you have seen.

Leonard B. Sand, Modern Federal Jury Instruction 74-1 (modified)

## 6. DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what the witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

> Charge of the Honorable James A. Teilborg in *Sekuk Global Interprises v. Apollo Group Inc.*, Civ 04-2147-PHX-JAT (D. Ariz. Jan. 16, 2008)

## 7. JUDICIAL NOTICE

I have taken judicial notice of certain facts that are not subject to reasonable dispute. I have accepted these facts to be true, even though no direct evidence has been introduced proving them to be true. You are required to accept these facts as true in reaching your verdict.

Leonard B. Sand, Modern Federal Jury Instruction 74-3

## 8. STIPULATIONS

A stipulation of facts is an agreement among the parties that a certain fact is true. You must regard such agreed facts as true.

Leonard B. Sand, Modern Federal Jury Instruction 74-4

## 9. DEPOSITIONS

Some of the testimony before you is in the form of depositions that have been received in evidence. A deposition is simply a procedure where the attorneys for one side may question a witness or an adversary party under oath before a court stenographer prior to trial. This is part of the pretrial discovery, and each side is entitled to take depositions. You may consider the testimony of a witness given at a deposition according to the same standards you would use to evaluate the testimony of a witness given at trial.

Leonard B. Sand, Modern Federal Jury Instructions 74-14

## 10. PROPER TO MEET WITH WITNESS

It is entirely proper for a lawyer to meet with any witness before a deposition or trial.

Adapted from charge of the Honorable Ronald A. Guzman in *Jaffe v. Household Int'l, Inc.*, No. 02-cv-05893 (N.D. Ill. May 7, 2009)

## 11. INTERROGATORIES

You have heard and seen evidence in this case in the form of interrogatories. Interrogatories are written questions posed by one side that call for written answers under oath from the other side. Both the questions and answers are made prior to trial after the case has begun in what is called pretrial discovery, and each side is entitled to seek such discovery from the other.

You may consider a party's answers to interrogatories as evidence against a party who made the answer, just as you would any other evidence that has been admitted in this case.

In this regard, you are not required to consider a party's answers to interrogatories as true, nor are you required to give them more weight than any other evidence. It is up to you to determine what weight, if any, should be given to the interrogatory answers that have been admitted as evidence.

Leonard B. Sand, Modern Federal Jury Instructions 74-13

## 12. SUMMARIES AND CHARTS NOT ADMITTED INTO EVIDENCE

Charts and summaries were shown to you in order to make the other evidence more meaningful and to aid you in considering the evidence. They are no better than the testimony or the documents upon which they are based, and are not themselves independent evidence. Therefore, you are to give no greater consideration to these charts or summaries than you would give to the evidence upon which they are based.

It is for you to decide whether the charts or summaries correctly present the information contained in the testimony and in the exhibits on which they were based. You are entitled to consider the charts and summaries if you find that they are of assistance to you in analyzing the evidence and understanding the evidence.

Leonard B. Sand, Modern Federal Jury Instructions 74-12

## 13. UNCALLED WITNESS EQUALLY AVAILABLE

There are several persons whose names you have heard during the course of the trial but who did not appear here to testify, and one or more of the attorneys has referred to their absence from the trial. I instruct you that each party had an equal opportunity or lack of opportunity to call any of these witnesses. Therefore, you should not draw any inferences or reach any conclusions as to what they would have testified had they been called. Their absence should not affect your judgment in any way.

Leonard B. Sand, Modern Federal Jury Instruction 75-4

## 14. WITNESS CREDIBILITY

You have had the opportunity to observe all the witnesses. It is now your job to decide how believable each witness was in his or her testimony. You are the sole judges of the credibility of each witness and of the importance of his testimony.

It must be clear to you by now that you are being called upon to resolve various factual issues raised by the parties. In making these judgments, you should carefully scrutinize all of the testimony of each witness, the circumstances under which each witness testified, and any other matter in evidence that may help you decide the truth and the importance of each witness' testimony.

How do you determine where the truth lies? You watched each witness testify. Everything a witness said or did on the witness stand counts in your determination. How did the witness impress you? Did he appear to be frank, forthright and candid, or evasive and edgy as if hiding something? How did the witness appear; what was his demeanor—that is, his carriage, behavior, bearing, manner and appearance while testifying? Often it is not what a person says but how he says it that moves us.

You should use all the tests for truthfulness that you would use in determining matters of importance to you in your everyday life. You should consider any bias or hostility the witness may have shown for or against any party as well as any interest the witness has in the outcome of the case. You should consider the opportunity the witness had to see, hear, and know the things about which he testified, the accuracy of his memory, his candor or lack of candor, his intelligence, the reasonableness and probability of his testimony and its consistency or lack of consistency and its corroboration or lack of corroboration with other credible testimony.

In other words, what you must try to do in deciding credibility is to size a witness up in light of his or her demeanor, the explanations given and all of the other evidence in the case. Always remember that you should use your common sense, your good judgment, and your own life experience.

Leonard B. Sand, Modern Federal Jury Instruction 76-1 (modified)

## 15. EXPERT WITNESSES

In this case, I have permitted certain witnesses to express their opinions about matters that are in issue. A witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, experience and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing this opinion testimony, you may consider the witness's qualifications, his or her opinions, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness's testimony. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept opinion testimony merely because I allowed the witness to testify concerning his or her opinion. Nor should you substitute it for your own reason, judgment and common sense. The determination of the facts in this case rests solely with you.

Leonard B. Sand, Modern Federal Jury Instruction 76-9

## 16. OFFICIAL TRANSLATION

The Italian language has been used at some points during this trial, in documents or in testimony. You are to consider only that evidence provided through the official court translator. Although some of you may know Italian, it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in English. You must ignore any different meaning of the non-English words.

Kevin F. O'Malley, Jay E. Grenig, William C. Lee, 3 Fed. Jury Practice & Instructions §103.35 (5th ed. 2000)

## 17. BURDEN OF PROOF—PREPONDERANCE OF THE EVIDENCE

The party with the burden of proof on any given issue has the burden of proving every disputed element of his claim to you by a preponderance of the evidence. If you conclude that the party bearing the burden of proof has failed to establish his claim by a preponderance of the evidence, you must decide against that party on the issue you are considering.

What does a "preponderance of evidence" mean? To establish a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a claim has been proved by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

If you find that the credible evidence on a given issue is evenly divided between the parties—that it is equally probable that one side is right as it is that the other side is right—then you must decide that issue against the party having this burden of proof. That is because the party bearing this burden must prove more than simple equality of evidence—he must prove the element at issue by a preponderance of the evidence. On the other hand, the party with this burden of proof need prove no more than a preponderance. So long as you find that the scales tip, however slightly, in favor of the party with this burden of proof—that what the party claims is more likely true than not true—then that element will have been proved by a preponderance of evidence.

Some of you may have heard of proof beyond a reasonable doubt, which is the proper standard of proof in a criminal trial. That requirement does not apply to a civil case such as this, and you should put it out of your mind.

Leonard B. Sand, Modern Federal Jury Instruction 73-2

## 18. INFERENCES

During the trial you have heard the attorneys use the term "inference," and in their arguments they have asked you to infer, on the basis of your reason, experience, and common sense, from one or more established facts, the existence of some other fact.

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.

There are times when different inferences may be drawn from facts, whether proved by direct or circumstantial evidence. The plaintiff asks you to draw one set of inferences, while the defense asks you to draw another. It is for you, and you alone, to decide what inferences you will draw.

The process of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An inference is a deduction or conclusion that you, the jury, are permitted to draw—but not required to draw—from the facts that have been established by either direct or circumstantial evidence. In drawing inferences, you should exercise your common sense. So, while you are considering the evidence presented to you, you are permitted to draw, from the facts you find to be proven, such reasonable inferences as would be justified in light of your experience.

The mere existence of an inference against a defendant does not relieve Plaintiff of the burden of establishing his case by a preponderance of the evidence. If Plaintiff is to obtain a verdict, you must still believe from the credible evidence that he has sustained the burden cast upon him. If he has failed, then your verdict must be for Defendants. If you should find that all of the evidence is evenly balanced, then Plaintiff has failed to sustain the burden of proof and your verdict should be for Defendants. If and only if you determine, after carefully weighing all the evidence, that the facts favor Plaintiff by the standard I have articulated, then he has met the burden of proof.

Leonard B. Sand, Modern Federal Jury Instructions 75-1 and 75-2

## 19. PLAINTIFF'S CLAIM AGAINST GT-ITALY

This lawsuit is a class action on behalf of all domestic investors who purchased or otherwise acquired Parmalat ordinary shares between January 5, 1999 and December 18, 2003. The class is represented by Plaintiff Arch Sturaitis.

On behalf of himself and the class, Plaintiff claims to have suffered losses caused by GT-Italy's violation of Section 10(b) of the Securities Exchange Act of 1934 and a corresponding SEC Rule, Rule 10b-5. Specifically, Plaintiff claims that GT-Italy violated Rule 10b-5 by making a material misrepresentation or omission in a review report dated October 14, 1999. I will refer to this report as "the Review Report" and I will refer to this claim as "Plaintiff's 10b-5 claim against GT-Italy."

## 20. CLAIM AGAINST GT-ITALY—DEFAULT JUDGMENT

GT-Italy did not appear in this case to defend itself. For this reason, a default judgment was entered against it. This default means only that GT-Italy has lost the opportunity to dispute the allegations against it in this case.

GTI and GT-US did not default and did not have any control over GT-Italy's decision to default. As a result, you should not consider GT-Italy's default to be evidence of anything. It does not mean that GT-Italy did anything wrong, and it does not excuse Plaintiff from proving his claim against GT-Italy and these Defendants by a preponderance of the evidence.

> *See Marfai v. T.C. Ziraat Bankasi*, 100 F.3d 243, 252 (2d Cir. 1996); *United States ex rel. Vigilanti v. Pfeiffer-Neumeyer Const. Corp.*, 25 F. Supp. 403 (D.C.N.Y. 1938)

## 21. THE FEDERAL SECURITIES LAWS

Section 10(b) of the Securities Exchange Act of 1934 and a corresponding SEC Rule, Rule 10b-5, together prohibit the misrepresentation of material facts and the omission of material facts in connection with the purchase or sale of securities. A person or business who violates this law may be liable for damages caused by the violation.

In addition, under Section 20(a) of the Securities Exchange Act of 1934, a defendant may be liable if, when someone else violated the securities laws, the defendant had the power to control that person or company with respect to that violation.

Adapted from Ninth Circuit Model Jury Instructions 18.0, 18.8

## 22. SECTION 10(b) AND RULE 10b-5

Section 10(b) of the Securities Exchange Act provides, in pertinent part, as follows:

> 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 any facility of any national securities exchange . . . .
>
> (b) 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.

Rule 10b-5(B) of the Securities and Exchange Commission has the force of law and provides, in pertinent part, as follows:

> 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,
>
> (B) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . .

15 U.S.C. §78j(b); 17 C.F.R. §240.10b-5(B)

## 23. CLAIM AGAINST GT-ITALY—STATEMENTS

Plaintiff alleges that GT-Italy defrauded them by issuing a false report dated October 14, 1999—the "Review Report."

In the Review Report, GT-Italy represented that it had reviewed the Parmalat Board of Directors' Six Month Report for 1999, including Parmalat financial statements for the six-month period ending June 30, 1999. The Review Report stated that Parmalat's financial statements conformed to the requirements set by Italian regulators (known as "CONSOB"), and further stated that GT-Italy's own review had been undertaken in accordance with applicable review standards, also established by CONSOB. Specifically, GT-Italy made the following statements:

> We have reviewed the six-months Report of Parmalat Finanziaria S.p.A. as of June 30, 1999, consisting of the balance sheets, the related statements of income, the accounting and financial footnotes and the group consolidated accounts.
>
> We have also reviewed the accounting and financial reporting matters for the sole purpose of checking the remaining data given in the rest of the interim report.
>
> We conducted our review in accordance with limited review standards as recommended by CONSOB in decree no. 10867 of July 31, 1997.
>
> * * *
>
> On the above basis, we did not acquire knowledge of any significant variations or alterations that should be added to the statements and financial information as identified in paragraph 1 of the present report, in order to achieve conformity with the criteria as set out in CONSOB regulations, for the preparation of six-months report as approved in decree no. 8195 dated June 30, 1994 and subsequent modifications.

Plaintiff contends that GT-Italy violated Rule 10b-5 by issuing the Review Report and making these statements. This is referred to as "Plaintiff's 10b-5 claim against GT-Italy."

> Securities TAC ¶¶ 551, 556

## 24. RULE 10b-5—ELEMENTS

To establish his 10b-5 claim against GT-Italy, Plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

First, that GT-Italy made an untrue statement of a material fact in the Review Report;

Second, that GT-Italy's statement was made in connection with the purchase or sale of Parmalat stock, which just means that there was some nexus or relationship between the allegedly fraudulent conduct and the sale or purchase of Parmalat stock by Plaintiff;

Third, that GT-Italy acted knowingly or with reckless disregard for the truth;

Fourth, that Plaintiff justifiably relied on GT-Italy's statement in buying or selling securities;

Fifth, that GT-Italy's conduct caused Plaintiff to suffer damages.

If you find that Plaintiff has failed to prove any of these elements, your verdict should be for Defendants on all counts.

Leonard B. Sand, Modern Federal Jury Instruction 82-02 (modified); Ninth Circuit Model Jury Instruction 18.0 (definition of "in connection with"); *see also* Ninth Circuit Model Jury Instruction 18.1 (elements instruction)

## 25. RULE 10b-5—MISREPRESENTATION, DEFINED

A misrepresentation is a statement of material fact that is false or misleading when it is made. A statement may be misleading even if it is literally true if the context in which the statement was made caused the listener or reader to remain unaware of the actual state of affairs.

Excerpt from Ninth Circuit Model Jury Instruction 18.0
(definitions of "misrepresentation" and "misleading")

## 26. RULE 10b-5—MATERIALITY

Plaintiff must prove that any false or misleading statement of fact that GT-Italy made in the Review Report was material.

A statement of fact is material if there is a substantial likelihood that a reasonable investor would have considered it important in deciding whether to buy or sell Parmalat stock. An important statement is one that a reasonable investor would view as significantly altering the total mix of information to be considered in deciding whether to buy or sell Parmalat stock.

A reasonable investor is presumed to have ordinary intelligence and is presumed to have information available in the public domain.

In determining whether a statement is material, you must consider it in light of the circumstances that existed at the time the statement was made.

> Charge of the Honorable Ronald A. Guzman in *Jaffe v. Household Int'l, Inc.*, No. 02-cv-05893 (N.D. Ill. May 7, 2009); *see also* Ninth Circuit Model Jury Instruction 18.2

## 27. RULE 10b-5—SCIENTER

If you determine that GT-Italy made a material misrepresentation in the Review Report, then you must determine whether Plaintiff has proved by a preponderance of the evidence that GT-Italy made such misrepresentation knowingly or with reckless disregard for truth or falsity.

"Knowingly" means that GT-Italy made the untrue statement with actual knowledge that the statement was false.

"Reckless" means highly unreasonable conduct that is an extreme departure from ordinary care, presenting a danger of misleading investors, which was either known to GT-Italy or is so obvious that GT-Italy must have been aware of it. It is not enough for Plaintiff to show that GT-Italy simply acted accidentally, mistakenly, or negligently. Recklessness is a form of intentional conduct.

Ninth Circuit Model Jury Instruction 18.3 (modified); charge of the Honorable James A. Teilborg in *Sekuk Global Interprises v. Apollo Group Inc.*, Civ 04-2147-PHX-JAT (D. Ariz. Jan. 16, 2008) (modified)

## 28. RULE 10b-5—JUSTIFIABLE RELIANCE

If you determine that GT-Italy knowingly made a material misrepresentation, then you must determine whether Plaintiff has established justifiable reliance.

Plaintiff may establish justifiable reliance in one of two ways. First, Plaintiff may show that he personally justifiably relied on the misrepresentations. Or, second, Plaintiff may show that he relied on an active and open market for securities, and such market was affected by the misrepresentation.

Either way, if you find that Plaintiff would have purchased or sold Parmalat stock anyway, such that any misrepresentation by GT-Italy had no effect on Plaintiff's decision, then there was no reliance, and this element is not satisfied.

In addition, Plaintiff cannot satisfy this element if he acted unjustifiably in that he knew the truth, or he knew that the statement was false and traded anyway. In this regard, you may consider Plaintiff's sophistication as an investor in determining whether any reliance was justified.

Adapted from Leonard B. Sand, Modern Federal Jury Instruction 82-7

## 29. RULE 10b-5—JUSTIFIABLE RELIANCE, PERSONALLY

The first way Plaintiff can establish justifiable reliance is by proving by a preponderance of the evidence that he justifiably relied on the alleged misrepresentation in deciding to engage in the purchase or sale of Parmalat stock. Plaintiff may not intentionally close his eyes and refuse to investigate the circumstances or disregard known or obvious risks.

In deciding whether Plaintiff justifiably relied on GT-Italy's alleged misrepresentations or omissions, you may consider evidence of

(1) whether he was sophisticated and experienced in financial and securities matters;

(2) whether he and GT-Italy had a long-standing business or personal relationship, or a relationship in which GT-Italy owed a duty to Plaintiff not to interfere with or adversely affect Plaintiff's interests;

(3) whether he ignored or refused to investigate the circumstances surrounding the transaction;

(4) whether he disregarded risks so obvious that they should have been known or risks so great as to make it highly probable that harm would follow;

(5) whether what GT-Italy misrepresented or concealed suggests that GT-Italy had knowledge of the fraud;

(6) whether he had access to the relevant material information;

(7) how specific was the misrepresentation;

(8) who initiated or expedited the transaction—Plaintiff or GT-Italy;

(9) whether GT-Italy prepared or provided materials that contained adequate warnings about the risks associated with the investment or adequate disclaimers describing limitations on the scope of GT-Italy's representations or involvement; and

(10) any other evidence you find helpful in deciding whether Plaintiff justifiably relied on GT-Italy's misrepresentations or omissions.

Ninth Circuit Model Jury Instruction 18.4

## 30. RULE 10b-5—JUSTIFIABLE RELIANCE, FRAUD-ON-THE-MARKET

If Plaintiff does not prove that he personally relied on the misrepresentation in deciding to engage in the purchase or sale of the securities in question, then he must prove by a preponderance of the evidence that (1) there was an active open market in Parmalat stock at the time of the transactions in question; and (2) the false statement concerned a material fact that affected the market price of the stock purchased or sold by Plaintiff.

If, however, Defendants prove by a preponderance of the evidence that Plaintiff did not actually rely on the integrity of the market then Plaintiff must prove that he relied directly on GT-Italy's alleged misrepresentation, as I have already instructed you.

An "active open market" means that there were a large number of traders, a high level of activity, and frequent trades, such that buyers and sellers could rapidly obtain current information about the price of the security.

A "material fact" is one that would have been significant to a reasonable person's investment decision.

*See* Leonard B. Sand, Modern Federal Jury Instruction 82-7; Ninth Circuit Model Jury Instruction 18.5.

## 31. RULE 10b-5—CAUSATION

If you determine that GT-Italy knowingly made a material misrepresentation and that Plaintiff has established justifiable reliance, then you must determine whether Plaintiff has proved by a preponderance of the evidence that GT-Italy's misrepresentation caused him harm.

To establish causation, Plaintiff must prove that he lost money as a direct and reasonably foreseeable result of GT-Italy's misrepresentation. In other words, the misrepresentation must have been about something that ended up mattering in terms of the value of the securities.

That means that Plaintiff must show that misrepresentations in GT-Italy's Review Report caused an identifiable amount of artificial inflation in Parmalat's share price, and that this artificial inflation later left the share price when the facts misrepresented by GT-Italy were revealed, causing Plaintiff to lose money.

Plaintiff need not prove that the misrepresentation was the sole cause of this injury. On the other hand, it is not enough for Plaintiff to recover if he merely shows that GT-Italy's actions led him to buy the security or that he would have acted differently had he known the truth.

> *See* Leonard B. Sand, Modern Federal Jury Instruction 82-9; Ninth Circuit Model Jury Instruction 18.6; Kevin F. O'Malley, Jay E. Grenig, William C. Lee, 3B Fed. Jury Practice & Instructions §162.300 (5th ed. 2000); *see also Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 175 (2d Cir. 2005); *Parmalat I*, 375 F. Supp. 2d 278, 305 (S.D.N.Y. 2005)

## 32. RULE 10b-5—CAUSATION, OTHER CAUSES

In addition, you should not consider any losses to Plaintiff that resulted from causes other than a misrepresentation in GT-Italy's Review Report. For example, if you find that the loss claimed by Plaintiff was caused by some market condition or fluctuation independent of GT-Italy, Plaintiff is not entitled to recover. Likewise, if you find that the loss claimed by Plaintiff was caused by fraud, misstatements, or omissions other than any misstatement by GT-Italy in the Review Report, Plaintiff is not entitled to recover.

An auditor is only responsible for its own public statements. An auditor is not responsible for statements by a company or any other person or entity even if the auditor knows or has reason to believe those statements are untrue.

*See* Leonard B. Sand, Modern Federal Jury Instruction 82-9; Ninth Circuit Model Jury Instruction 18.6; *Dura Pharma., Inc. v. Broudo*, 544 U.S. 336, 342-43, 125 S. Ct. 1627, 1631-32 (2005); *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 157 (2d Cir. 2007)

## 33. WHETHER TO CONSIDER THEORIES AGAINST GTI AND GT-US

If you find that Plaintiff has proved all elements of his 10b-5 claim against GT-Italy, you may go on to consider whether GTI—or GTI and GT-US together—should be held liable.

If you find that Plaintiff has failed to prove any element of his claim against GT-Italy, you need not go on to make any findings regarding Plaintiff's theories against GTI or GT-US.

## 34. ONLY VICARIOUS LIABILITY, GTI

GTI did not make any statements about Parmalat. Plaintiff sued GTI based entirely on the contention that GTI should be liable for what GT-Italy did. That contention is based on the following theories:

1. Plaintiff argues that GT-Italy was acting on behalf of GTI and under GTI's control when GT-Italy issued the Review Report. This is Plaintiff's "agency" theory.

2. Alternatively, Plaintiff argues that GTI should held liable under Section 20(a) of the securities laws as what is called the "controlling person" of GT-Italy. This is Plaintiff's "Section 20(a)" theory against GTI.

If you decide that Plaintiff has not carried his burden of proof on either of these theories, you must enter a verdict in favor of GTI. Alternatively, if you decide that Plaintiff has not carried his burden of proof on his 10b-5 claim against GT-Italy, you must enter a verdict in favor of GTI.

## 35. ONLY VICARIOUS LIABILITY, GT-US

GT-US also did not make any statements about Parmalat. Plaintiff sued GT-US based entirely on the contention that GT-US should be liable for what GT-Italy did. That contention is based on the following theories:

1. Plaintiff argues that GTI and GT-Italy were both acting on behalf of GT-US and under GT-US's control when GT-Italy issued the Review Report. In other words, Plaintiff argues not only that GT-Italy was acting as GTI's agent, but also that GTI was acting as GT-US's agent, and thus that GT-Italy was acting as GT-US's "sub-agent." This is Plaintiff's "sub-agency" theory.

2. Alternatively, Plaintiff argues that GT-US should held liable under Section 20(a) of the securities laws as what is called the "controlling person" of GTI. This is Plaintiff's "Section 20(a)" theory against GT-US.

If you decide that Plaintiff has not carried his burden of proof on either of these theories, then you must enter a verdict in favor of GT-US. Alternatively, because Plaintiff's theories against GT-US depend on his theories against GTI, if you enter a verdict in favor of GTI, you must also enter a verdict in favor of GT-US.

## 36. AGENCY—DEFINITIONS

A principal may be liable to a third party harmed by an agent acting on behalf of the principal.

Whether a principal-agent relationship exists depends on the intentions and agreements of those two entities.

An agent is a person who, by agreement, represents another person—the principal—in dealings with third persons or transacts business, manages some affair, or does some service for the principal. The agreement may be oral or written, express or implied. Without an agreement, there is no agency.

A principal-agent relationship exists when there is agreement between the principal and the agent that the agent will act for the principal and the principal has the power to control the agent. Without control, there is no agency.

If the entities have an express contract that provides they do *not* agree to serve as principal and agent, Plaintiff must present evidence that contradicts that written agreement, Plaintiff must prove that the parties did, in fact, have an agreement to serve as principal and agent, even though their written agreement said they did not so agree.

*See* IPI 50.05 (2006); *Parmalat I*, 375 F. Supp. 2d 278, 290 (S.D.N.Y. 2005); Rest.3d of Agency §7.03(2)(a); *Rankow v. First Chicago Corp.*, 870 F.2d 356, 359-60 (7th Cir. 1989); *Bellino Schwartz Padob Adver., Inc. v. Solaris Mktg. Group, Inc.*, 222 A.D.2d 313, 635 N.Y.S.2d 587 (1st Dep't 1995); *Bondi I*, 377 F. Supp. 2d 390, 402 (S.D.N.Y. 2005); *see also Oliveira-Brooks v. Re/Max Int'l, Inc.*, 865 N.E.2d 252, 258 (Ill. App. Ct. 2007)

## 37. PLAINTIFF'S AGENCY THEORY AGAINST GTI

Plaintiff's agency theory is that GTI was the principal and GT-Italy was acting as its agent when GT-Italy issued the Review Report.

- GTI denies that it had a principal-agent relationship with GT-Italy.
- GTI also denies that any such relationship included statements made by GT-Italy in the Review Report.
- And GTI further denies that committing securities fraud was within the scope of any possible agency.

If you find that GT-Italy was not acting as the agent of GTI when it issued the Review Report, or was not acting within the scope of its authority as an agent of GTI, then you must find that GTI is not liable for GT-Italy's alleged 10b-5 violation under an agency theory.

*See* IPI 50.04 (2006); Ninth Circuit Model Jury Instruction 4.10

## 38. AGENCY—NATURE OF THE THEORY

Plaintiff's agency theory is based on actual agency. That means that the question is whether GTI actually had an agreement with GT-Italy providing that GT-Italy would act on behalf of GTI and under GTI's control.

It does not matter what someone else might have thought or assumed based on reading websites or just hearing the common name "Grant Thornton." Plaintiff and the class do not contend that they were confused or misled about these relationships. What GTI and GT-Italy told other people about their relationships and corporate structure matters only if you decide it reveals something about the true relationship between GTI and GT-Italy.

*See Parmalat I*, 375 F. Supp. 2d 278, 291 (S.D.N.Y. 2005) (recognizing that plaintiff's claim is based on actual agency only); *Bondi I*, 377 F. Supp. 2d 390, 404-405 & cases cited in n.102 (S.D.N.Y. 2005); *see also Slates v. Int'l House of Pancakes, Inc.*, 413 N.E.2d 457, 464 (1980) (distinguishing actual agency from "apparent or ostensible agency," which is "one created by implication or construction and contrary to the intention of the parties"); Kevin F. O'Malley, Jay E. Grenig, William C. Lee, 3 Fed. Jury Practice & Instructions §108.03 & notes (5th ed. 2000) (distinguishing apparent and actual authority); Leonard B. Sand, Modern Federal Jury Instruction 72-2 (same)

## 39. AGENCY—ELEMENTS

To establish the existence of an actual agency relationship, Plaintiff must prove each of the following three elements by a preponderance of the evidence:

> First, Plaintiff must prove that GTI agreed with GT-Italy that GT-Italy would act on GTI's behalf in performing audit services for Parmalat. In determining whether Plaintiff has met this element, you must consider only the words and conduct of GTI. In other words, Plaintiff must prove that the words and conduct of GTI manifested its agreement to have GT-Italy make statements about Parmalat on GTI's behalf in the Review Report.
>
> Second, Plaintiff must prove that GT-Italy agreed with GTI that it would be GTI's agent and act on GTI's behalf in performing audit services for Parmalat. This means that Plaintiffs must prove that GT-Italy believed it was providing services to Parmalat on behalf of GTI, for the benefit of GTI, and because GTI wanted it to, and not solely on its own account or for its own benefit.
>
> Third, Plaintiff must prove that GTI had the power to direct the manner and method of GT-Italy's decisionmaking in respect to statements GT-Italy made about Parmalat. It is not enough that GTI may have exercised some control over GT-Italy. Plaintiff must prove that GTI had the power to control GT-Italy in its performance of the acts that allegedly gave rise to Plaintiff's injury. This means that Plaintiff must prove that GTI had the power to control the statements GT-Italy made, or did not make, in the Review Report.

If Plaintiff fails to prove any one of these elements, you must find for GTI and against Plaintiff on his agency claim.

> *See Bondi I*, 377 F. Supp. 2d 390, 402 (S.D.N.Y. 2005); *Nuevo Mundo Holdings v. PwC LLP*, 2004 WL 112948, *5 (S.D.N.Y. Jan. 22, 2004); *Smith/Pappas*, 501 F. Supp. 2d 560, 589 (S.D.N.Y. 2007); *In re Rezulin Prod. Liab. Litig.*, 390 F. Supp. 2d 319, 330 (S.D.N.Y. 2005) (Kaplan, J.); *Clapp*, 484 N.E.2d at 921; *Hart v. Marriott Int'l Inc.*, 304 A.D.2d 1057, 1058, 758 N.Y.S.2d 435, 438 (3d Dep't 2003)

## 40. AGENCY—AFFILIATION IS NOT AGENCY

An independent company or partnership does not become an agent merely by affiliating itself with an international association and using a brand name. To establish that GT-Italy was an agent of GTI, it is not enough for Plaintiff to show that GT-Italy joined GTI and used the "Grant Thornton" name.

> *See Nuevo Mundo Holdings v. Pricewaterhouse Coopers LLP*, No. 03 Civ. 0613, 2004 WL 112948, *3 (S.D.N.Y. Jan. 22, 2004) ; *In re Lernout & Hauspie Sec. Litig.*, 230 F. Supp. 2d 152, 170 (D. Mass. 2002); *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 488 & n.24 (S.D.N.Y. 2001)

## 41. AGENCY—NO AGENCY RELATIONSHIP UNDER PARTIES' CONTRACTS

I instruct you that, as a matter of law, the contracts between GTI and GT-Italy do not create an agency relationship. Under those contracts, the parties expressly agreed *not* to enter an agency relationship, and further agreed that GT-Italy would *not* act for or bind GTI.

Therefore, to establish the existence of a principal-agent relationship, Plaintiff must show actions by GTI and GT-Italy that are inconsistent with the contracts. These inconsistent actions must prove that GTI *did*, in fact, have an agreement with GT-Italy that GT-Italy would act as GTI's agent, as well as that GT-Italy did, in fact, agree to act on GTI's behalf in making statements about Parmalat in the Review Report.

> *See Rankow v. First Chicago Corp.*, 870 F.2d 356, 359-60 (7th Cir. 1989); *Bellino Schwartz Padob Adver., Inc. v. Solaris Mktg. Group, Inc.*, 222 A.D.2d 313, 635 N.Y.S.2d 587 (1st Dep't 1995); *Bondi I*, 377 F. Supp. 2d 390, 402 (S.D.N.Y. 2005); *see also Oliveira-Brooks v. Re/Max Int'l, Inc.*, 865 N.E.2d 252, 258 (Ill. App. Ct. 2007) (where written agreements do not establish agency, plaintiff must establish that true relationship is one that vested right of control in the putative principal)

## 42. AGENCY—CONTROL

To establish control—the third element of the agency relationship—Plaintiff must prove that GTI had the ability to control what statements GT-Italy made, or did not make, in the Review Report.

> *Bondi I*, 377 F. Supp. 2d 390, 402 (S.D.N.Y. 2005); *Valenti v. Qualex, Inc.*, 970 F.2d 363, 368 (7th Cir. 1992); *Hart v. Marriott Int'l Inc.*, 304 A.D.2d 1057, 1058, 758 N.Y.S.2d 435, 438 (3d Dep't 2003)

## 43. AGENCY—SCOPE OF AUTHORITY

If you find that an agency relationship existed between GTI and GT-Italy, you must determine whether Plaintiff proved that GT-Italy was acting within the scope of its authority when it allegedly committed securities fraud.

An agent is acting within the scope of its authority if it is doing the business assigned to it by its principal. An agent acts outside the scope of its authority if the agent acts purely in its own interest, performs acts that are fundamentally different than those authorized, or performs acts that are clearly inappropriate or unforeseeable.

If you find that GT-Italy committed securities fraud but that its fraud was outside the scope of any agency relationship it had with GTI, you should find for Defendants and against Plaintiff on the Rule 10b-5 claim.

*See* IPI 50.06 (2006) (modified based on *Wright v. City of Danville*, 675 N.E.2d 110, 118 (Ill. 1996))

## 44. PLAINTIFF'S SUB-AGENCY THEORY AGAINST GT-US

If you find that GTI and GT-Italy had an actual agency relationship, you may go on to consider Plaintiff's sub-agency theory against GT-US. If you find that GTI and GT-Italy had no actual agency relationship, however, then you must find for Defendants on the Rule 10b-5 claim, and you need not go on to make any findings about the sub-agency theory against GT-US.

Plaintiff contends that GT-US was the principal, GTI was acting as its agent, and GT-Italy was acting as its sub-agent when GT-Italy issued the Review Report.

- GT-US denies that it had an agency relationship with GTI.
- GT-US also denies that it had a sub-agency relationship with GT-Italy.
- GT-US also denies that any principal-agent or principal-sub-agent relationship with GTI or GT-Italy included statements made by GT-Italy in the Review Report.
- And GT-US further denies that committing securities fraud was within the scope of any possible agency or sub-agency relationship.

*See* IPI 50.04 (2006); Ninth Circuit Model Jury Instruction 4.10

## 45. SUB-AGENCY—NATURE OF THE THEORY

Plaintiff's claim against GT-US is based on actual agency. It does not matter what someone might have thought or assumed, for example, from reading websites, or just hearing the common name, "Grant Thornton." The issue is whether GTI and GT-Italy were, in fact, actually the agent and sub-agent of GT-US.

"Sub-agency" is really another form of agency and requires the same proof of agreement and control. The only difference is that in a sub-agency relationship, the sub-agent does not interact directly with the principal.

> *See Parmalat I*, 375 F. Supp. 2d 278, 291 (S.D.N.Y. 2005) (recognizing that plaintiff's claim is based on actual agency only); *Bondi I*, 377 F. Supp. 2d 390, 404-405 & cases cited in n.102 (S.D.N.Y. 2005); *see also Slates v. Int'l House of Pancakes, Inc.*, 413 N.E.2d 457, 464 (1980) (distinguishing actual agency from "apparent or ostensible agency," which is "one created by implication or construction and contrary to the intention of the parties"); Kevin F. O'Malley, Jay E. Grenig, William C. Lee, 3 Fed. Jury Practice & Instructions §108.03 & notes (5th ed. 2000) (distinguishing apparent and actual authority); Leonard B. Sand, Modern Federal Jury Instruction 72-2 (same)

## 46. SUB-AGENCY—ELEMENTS

To establish the existence of an actual sub-agency relationship between GT-US and GT-Italy, Plaintiff must prove that GT-Italy's statements about Parmalat in the Review Report were actually made on behalf of, and under the control of, GT-US. This requires Plaintiff to prove each of the following four elements by a preponderance of the evidence:

> First, Plaintiff must prove that GT-US agreed with GTI that GTI would act on GT-US's behalf in appointing a sub-agent to perform audit services for Parmalat. In determining whether Plaintiff has met this element, you must consider only the words and conduct of GT-US. In other words, Plaintiffs must prove that the words and conduct of GT-US manifested its agreement that a sub-agent appointed by GTI would perform audits services for Parmalat on GT-US's behalf.
>
> Second, Plaintiff must prove that GTI agreed with GT-US that it would be GT-US's agent and act on GT-US's behalf in appointing a sub-agent to perform audit services for Parmalat. In other words, Plaintiffs must prove that GTI believed it was acting on behalf of GT-US, for the benefit of GT-US, and because that action is what GT-US wanted—not solely on its own account or for its own benefit, or for the benefit of other member firms, or for the benefit of all member firms generally.
>
> Third, Plaintiff must prove that GT-Italy agreed that it would be GT-US's sub-agent and that it would act on GT-US's behalf in performing audit services for Parmalat and making statements about Parmalat in the Review Report. In other words, Plaintiffs must prove that GT-Italy believed it was providing services to Parmalat on behalf of GT-US, for the benefit of GT-US, and because that is what GT-US wanted it to do, and not solely on its own account or for its own benefit.
>
> Fourth, Plaintiff must prove that GT-US had the power to direct, through GTI, the manner and method of GT-Italy's decisionmaking in respect to statements GT-Italy made about Parmalat. It is not enough that GT-US may have exercised some control over GTI governance matters. Plaintiff must prove that GT-US had the power to control the sub-agent in its performance of the acts that gave rise to Plaintiff's injury. This means that Plaintiff must establish that, through control of GTI, GT-US had the power to control the statements GT-Italy made, or did not make, in the Review Report.

If Plaintiff fails to prove any one of these elements, you must find for GT-US and against Plaintiff on his sub-agency claim.

> *See* Rest.3d of Agency §3.15(1) (principal/sub-agent relationship has the same elements and is governed by same rules as principal/agent relationship); Rest.2d of Agency §142 (same); Rest.2d of Agency §5, reporter's notes (sub-agent is an agent of the principal and an agent of the principal's agent); *AYH Holdings, Inc. v. Avreco, Inc.*, 826 N.E.2d 1111, 1126 (Ill. App. Ct. 2005)

("An agency relationship exists between the principal and an authorized sub-agent"); *Bondi I*, 377 F. Supp. 2d 390, 402 (S.D.N.Y. 2005); *Clapp v. JMK/Skwerer, Inc.*, 484 N.E.2d 918, 921 (Ill. App. Ct. 1985); *Nuevo Mundo Holdings v. PwC LLP*, 2004 WL 112948, *5 (S.D.N.Y. Jan. 22, 2004); *Hart v. Marriott Int'l Inc.*, 304 A.D.2d 1057, 1058, 758 N.Y.S.2d 435, 438 (3d Dep't 2003)

## 47. SUB-AGENCY—NO AGENCY OR SUB-AGENCY UNDER PARTIES' CONTRACTS

I instruct you that, as a matter of law, the contracts among GT-US, GTI, and GT-Italy do not create an agency or sub-agency relationship. Under those contracts, the parties expressly agreed *not* to enter an agency relationship, and further agreed that GT-Italy would *not* act for or bind GTI or GT-US.

Therefore, to establish the existence of a principal-agent-sub-agent relationship, Plaintiff must show actions by GT-US, GTI, and GT-Italy that are inconsistent with the contracts. Such inconsistent actions must prove that GT-US did, in fact, agree with GTI that GTI would act as its agent and that GT-Italy would act as its sub-agent. The inconsistent actions must also show that GTI did, in fact, agree with GT-US to act on GT-US's behalf in appointing sub-agents, and that GT-Italy did, in fact, agree to act as sub-agent on behalf of GT-US in making statements about Parmalat in the Review Report.

> *Rankow v. First Chicago Corp.*, 870 F.2d 356, 359-60 (7th Cir. 1989); *Bellino Schwartz Padob Adver., Inc. v. Solaris Mktg. Group, Inc.*, 222 A.D.2d 313, 635 N.Y.S.2d 587 (1st Dep't 1995); *Bondi I*, 377 F. Supp. 2d 390, 402 (S.D.N.Y. 2005); *see also Oliveira-Brooks v. Re/Max Int'l, Inc.*, 865 N.E.2d 252, 258 (Ill. App. Ct. 2007) (where written agreements do not establish agency, plaintiff must establish that true relationship is one that vested right of control in the putative principal)

## 48. SUB-AGENCY—VOTING PREROGATIVES INSUFFICIENT TO CREATE AGENCY

Having voting rights in a corporation does not create a principal-agent relationship. To establish that GTI was an agent of GT-US, it is not enough for Plaintiff to show that GT-US had certain voting rights. Rather, Plaintiff must prove that whatever rights and powers GT-US had within GTI gave it a unique power to control GTI in its interactions with GT-Italy. If other member firms had equivalent powers in terms of influencing GTI, or if other member firms could have prevented GT-US from taking actions it wanted to take, then, as a matter of law, GT-US could not have been in control of GTI.

> *See In re Global Crossing, Ltd., Sec. Litig.*, No. 02-910, 2005 WL 1907005, *9 (S.D.N.Y. Aug. 8, 2005); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 308 F. Supp. 2d 249, 273-74 (S.D.N.Y. 2004); *Total Comm. Servs., Inc. v. Seiscor Techs., Inc.*, No. 88-8312, 1990 WL 156609, *4 (N.D. Ill. Oct. 9, 1990); *Theoharous v. Fong*, 256 F.3d 1219, 1227-28 (11th Cir. 2001)

## 49. SUB-AGENCY—NAME RIGHTS INSUFFICIENT TO CREATE AGENCY

Licensing a trade name does not create an agency or sub-agency relationship. To establish that GTI was an agent of GT-US, it is not enough for Plaintiff to show that GT-US was the part-owner of the "Grant Thornton" name. Similarly, to establish that GT-Italy was GT-US's sub-agent, it is not enough for Plaintiff to show that GT-Italy used the "Grant Thornton" name.

> *See Leon v. Caterpillar Indus., Inc.*, 69 F.3d 1326, 1336 (7th Cir. 1995); *Slates v. Int'l House of Pancakes, Inc.*, 413 N.E.2d 457, 464 (Ill. App. Ct. 1980); *Bondi I*, 377 F. Supp. 2d 390, 402 & n.83 (S.D.N.Y. 2005); *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654, 662 (S.D.N.Y. 1997); *Reingold*, 599 F. Supp. at 1254 n.10; *Cromer*, 137 F. Supp. 2d at 487

## 50. SUB-AGENCY—FUNDING INSUFFICIENT TO CREATE AGENCY

The fact that one corporation finances part of the operations of another is not enough to prove an agency relationship.

*Smith/Pappas*, 501 F. Supp. 2d 560, 589 (S.D.N.Y. 2007)

## 51. SUB-AGENCY—OVERLAPPING PERSONNEL INSUFFICIENT TO CREATE AGENCY

Members in an organization can provide personnel to do the organization's business without creating an agency relationship.

The law presumes that GT-US personnel who worked for GTI or participated in GTI activities were acting on behalf of GTI, not GT-US.

> *Smith/Pappas*, 501 F. Supp. 2d 560, 588 (S.D.N.Y. 2007); *Forsyth v. Clark USA, Inc.*, 864 N.E.2d 227, 238-39 (Ill. 2007)

## 52. SUB-AGENCY—SCOPE OF AUTHORITY OF AGENT

If you find that a sub-agency relationship existed between GT-US and GT-Italy, you must determine whether GT-Italy was acting within the scope of its authority when it allegedly committed securities fraud.

A sub-agent is acting within the scope of its authority if it is doing the business assigned to it by its principals. A sub-agent acts outside the scope of its authority if the sub-agent acts purely in its own interest, performs acts that are fundamentally different than those authorized, or performs acts that are clearly inappropriate or unforeseeable.

If you find that any securities fraud committed by GT-Italy was outside the scope of its sub-agency, you should find for GT-US and against Plaintiff on the Rule 10b-5 claim.

IPI 50.06 (2006) (modified based on *Wright v. City of Danville*, 675 N.E.2d 110, 118 (Ill. 1996))

**53. SECTION 20(a)**

Plaintiff's control person theories are an alternative to his agency and sub-agency theories.

Section 20(a) of the Securities Exchange Act provides that "[e]very person who directly or indirectly controls any person liable under any provision of this chapter or any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controller person to any person to whom such controller person is liable."

This section defines control as any "indirect means of discipline or influence short of actual direction" or "ability to exert influence, directly or indirectly over the decision making process of another person."

"Culpable participation" in the violation is also required for control-person liability. Plaintiff must prove that the controlling person's inaction was deliberate and done intentionally to further the fraud.

Kevin F. O'Malley, Jay E. Grenig, William C. Lee, 3B Fed. Jury Practice & Instructions §162.221 (5th ed. 2000) (modified)

## 54. PLAINTIFF'S SECTION 20(a) CLAIM AGAINST GTI

Plaintiff claims that GTI was a controlling person of GT-Italy and is therefore liable if GT-Italy committed any violation of the securities laws.

## 55. SECTION 20(a)—ELEMENTS, GTI

To establish his Section 20(a) claim against GTI, Plaintiff has the burden of proving the following elements by a preponderance of the evidence:

1. GT-Italy violated Rule 10b-5;

2. GTI had control over GT-Italy;

3. GTI was a culpable participant in GT-Italy's violation.

If you find that Plaintiff has established all three of these elements with respect to GTI, then GTI is a controlling person and liable, *unless* GTI proves that it acted in good faith and did not directly or indirectly induce the acts resulting in GT-Italy's liability.

> *See* Ninth Circuit Model Jury Instruction 18.8; Kevin F. O'Malley, Jay E. Grenig, William C. Lee, 3B Fed. Jury Practice & Instructions §162.270 (5th ed. 2000); *Boguslavsky v. Kaplan*, 159 F.3d 715, 720 (2d Cir.1998) ("In order to establish a prima facie case of liability under § 20(a) [in the Second Circuit], a plaintiff must show: (1) a primary violation by a controlled person; (2) control of the primary violator by the defendant; and (3) 'that the controlling person was in some meaningful sense a culpable participant' in the primary violation.") (quoting *SEC v. First Jersey, Inc.*, 101 F.3d 1450, 1472 (2d Cir.1996))

## 56. SECTION 20(a)—CONTROL, GTI

To establish GTI's control over GT-Italy, Plaintiff must prove by a preponderance of the evidence that GTI possessed, directly or indirectly, the actual power to direct or cause the direction of the management and policies of GT-Italy. Plaintiff must prove that GTI had actual control over GT-Italy with respect to any statement that you may find violated Rule 10b-5.

Control is not merely the ability to persuade or the exercise of influence. It means the practical ability to direct the actions of GT-Italy.

> *See* Ninth Circuit Model Jury Instruction 18.8; *In re Asia Pulp & Paper Sec. Litig.*, 293 F. Supp. 2d 391, 396 (S.D.N.Y. 2003) (Sprizzo, J.) (no § 20(a) liability when complaint did not allege that Andersen Worldwide "was able to control or in any way influence the particular audits conducted or opinions offered by its individual member firms"); *Katz v. Katz*, No. 82 Civ. 6383, 1984 WL 2385, *7 (S.D.N.Y. Feb. 14, 1984) (Sand, J.) (§ 20(a) claim requires allegations of "actual control over the transactions in question"); *In re Global Crossing, Ltd. Sec. Litig*., No. 02 Civ. 910, 2005 WL 1875445, *3 (S.D.N.Y. Aug. 5, 2005) (Lynch, J.) (same); *In re Sotheby's Holding, Inc. Sec. Litig.*, No. 00-Civ. 104, 2000 WL 1234601, *8 (S.D.N.Y. Aug. 31, 2000) (Cote, J.) (claim for § 20(a) liability requires allegations of "[a]ctual control over the wrongdoer and the transactions in question"); *In re Alstom SA Sec. Litig.*, 406 F.Supp.2d 433, 487 (S.D.N.Y. 2005) ("The exercise of influence, without power to direct or cause the direction of management and policies through ownership of voting securities, by contract, or in any other direct way, is not sufficient to establish control for purposes of Section 20(a)."); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 352 F.Supp.2d 429, 458 (S.D.N.Y. 2005) ("Control in this context 'is not the mere ability to persuade, but almost always means the practical ability to direct the actions of people who issue or sell securities.'")

## 57. SECTION 20(a)—CULPABLE PARTICIPATION

"Culpable participation" in the violation is required for control-person liability. In the case of inaction, Plaintiff must prove that the GTI's inaction was deliberate and done intentionally to further the fraud.

Whether by action or inaction, Plaintiff must show some measure of involvement by GTI in GT-Italy's statements regarding Parmalat. Plaintiff must show that GTI's conduct rose to the level of highly unreasonable or extreme misconduct and was not simply a deviation from standards of ordinary care.

Kevin F. O'Malley, Jay E. Grenig, William C. Lee, 3B Fed. Jury Practice & Instructions §162.270 (5th ed. 2000); *In re Alstom SA Sec. Litig.*, 406 F.Supp.2d 433, 487 (S.D.N.Y. 2005)

## 58. SECTION 20(a)—GOOD FAITH DEFENSE, GTI

GTI contends that it is not liable to Plaintiff even if it was a controlling person because it did not induce the violation that led to Plaintiff's economic injury and it acted in good faith. If Plaintiff establishes that GTI is a controlling person, then GTI may defend itself and defeat liability by proving the following elements by a preponderance of the evidence.

> First, GTI must show that it did not directly or indirectly induce the violation. Inducement means that GTI undertook some action that caused the fraud; GTI must show that it took no such action.
>
> Second, GTI must show that it acted in good faith. To meet the burden of establishing good faith, GTI must prove that it neither knew nor had reason to know of any securities violation by GT-Italy. If the perpetration of fraud went unnoticed because of willful or reckless disregard, the good faith defense is unavailable. But if GTI proves that it was blameless or merely negligent, then it cannot be liable as a controlling person

If you find that GTI proved both of these elements, your verdict should be for GTI. If you find that GTI is a controlling person but failed to prove either or both of these elements, your verdict should be for Plaintiff and against GTI.

> *See* Ninth Circuit Model Jury Instruction 18.9 (modified); *see also In re WorldCom, Inc. Sec. Litig.*, No. 02-3288, 2005 WL 638268, *15 (S.D.N.Y. March 21, 2005) ("inducement should be understood to involve proof that the defendant undertook some action that caused the fraud"); *Ingenito v. Bermec Corp.*, 441 F. Supp. 525, 533-534 (S.D.N.Y. 1977) ("Knowledge is the key to the assertion of good faith," and "[t]hose who neither know nor have reason to know of an agent's misdeeds are not liable as control persons."); *Parmalat VII*, 594 F. Supp. 2d 444, 458 (S.D.N.Y. 2009) (to similar effect); *Donohoe v. Consolidated Operating & Production Corp.*, 30 F.3d 907, 912 (7th Cir. 1994) ("the good faith defense exculpates defendants whose behavior is merely negligent. The controlling person must also act recklessly; negligence alone is insufficient").

## 59. KNOWING VIOLATOR, GTI

The verdict form will ask you whether GTI acted with actual knowledge. If your verdict is for Plaintiff and against GTI on Plaintiff's Section 20(a) claim, then you must answer this question. You should answer "no" unless you find that GTI engaged in conduct with actual knowledge that GT-Italy was engaged in securities fraud.

> *See* 15 U.S.C. § 78u-4(f)(1) (defining "knowingly commits a violation of the securities laws")

## 60. PLAINTIFF'S SECTION 20(a) CLAIM AGAINST GT-US

Plaintiff claims that GT-US was a controlling person of GTI and is therefore liable if GTI committed any violation of the securities laws. If you find that GTI was the controlling person of GT-Italy, you may go on to consider this claim. If, however, you find that GTI was not the controlling person of GT-Italy, then you need not make any findings about Plaintiff's Section 20(a) claim against GT-US.

Control person liability under Section 20(a) cannot be established when the allegedly controlled person did not itself make a misrepresentation or omission in violation of Rule 10b-5. Therefore, I instruct you that, as a matter of law, GT-US cannot be held liable as a controlling person based on any control over GTI.

> *See Central Bank v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184, 114 S. Ct. 1439, 1451 (1994) (referring to control-person liability as "secondary liability"); *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 101 (2d Cir. 2001) ("[c]ontrolling-person liability is a form of secondary liability," requiring a "separate inquiry from that of primary liability"); *see also Jackson v. Bache & Co.*, 381 F. Supp. 71, 95 (N.D. Cal. 1974) (to "superimpose agency law over Section 20 would be to create a strict liability standard—a standard specifically rejected by Congress when Section 20 was adopted")

## 61. [ALTERNATIVE] SECTION 20(a)—ELEMENTS, GT-US

To establish his Section 20(a) claim against GT-US, Plaintiff has the burden of proving the following elements by a preponderance of the evidence:

1. GT-Italy violated Rule 10b-5;

2. GTI is a controlling person of GT-Italy;

3. GT-US had control over GTI;

4. GT-US was a culpable participant in GTI's violation of Section 20(a).

If you find that Plaintiff has established all four elements with respect to GT-US, then GT-US is a controlling person and liable, *unless* GT-US proves that it acted in good faith and did not directly or indirectly induce the acts resulting in GTI's liability.

> *See* Ninth Circuit Model Jury Instruction 18.8; Kevin F. O'Malley, Jay E. Grenig, William C. Lee, 3B Fed. Jury Practice & Instructions §162.270 (5th ed. 2000); *Boguslavsky v. Kaplan*, 159 F.3d 715, 720 (2d Cir.1998) ("In order to establish a prima facie case of liability under § 20(a) [in the Second Circuit], a plaintiff must show: (1) a primary violation by a controlled person; (2) control of the primary violator by the defendant; and (3) 'that the controlling person was in some meaningful sense a culpable participant' in the primary violation.") (quoting *SEC v. First Jersey, Inc.*, 101 F.3d 1450, 1472 (2d Cir.1996))

## 62. [ALTERNATIVE] SECTION 20(a)—CONTROL, GT-US

I will now instruct you about the standards for determining whether GT-US had control over GTI.

To establish GT-US's control over GTI, Plaintiff must prove by a preponderance of the evidence that GT-US possessed, directly or indirectly, the actual power to direct or cause the direction of the management and policies of GTI, and that GT-US had the power to direct GTI in its decisionmaking in respect to any work or function of GTI that led to any liability that GTI might bear for securities violations by GT-Italy.

Control is not merely the ability to persuade or the exercise of influence. It means the practical ability to direct the actions of GTI.

> *See* Ninth Circuit Model Jury Instruction 18.8; *In re Asia Pulp & Paper Sec. Litig.*, 293 F. Supp. 2d 391, 396 (S.D.N.Y. 2003) (Sprizzo, J.) (no § 20(a) liability when complaint did not allege that Andersen Worldwide "was able to control or in any way influence the particular audits conducted or opinions offered by its individual member firms"); *Katz v. Katz*, No. 82 Civ. 6383, 1984 WL 2385, *7 (S.D.N.Y. Feb. 14, 1984) (Sand, J.) (§ 20(a) claim requires allegations of "actual control over the transactions in question"); *In re Global Crossing, Ltd. Sec. Litig.*, No. 02 Civ. 910, 2005 WL 1875445, *3 (S.D.N.Y. Aug. 5, 2005) (Lynch, J.) (same); *In re Sotheby's Holding, Inc. Sec. Litig.*, No. 00-Civ. 104, 2000 WL 1234601, *8 (S.D.N.Y. Aug. 31, 2000) (Cote, J.) (claim for § 20(a) liability requires allegations of "[a]ctual control over the wrongdoer and the transactions in question"); *In re Alstom SA Sec. Litig.*, 406 F.Supp.2d 433, 487 (S.D.N.Y. 2005) ("The exercise of influence, without power to direct or cause the direction of management and policies through ownership of voting securities, by contract, or in any other direct way, is not sufficient to establish control for purposes of Section 20(a)."); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 352 F.Supp.2d 429, 458 (S.D.N.Y. 2005) ("Control in this context 'is not the mere ability to persuade, but almost always means the practical ability to direct the actions of people who issue or sell securities.'")

## 63. [ALTERNATIVE] SECTION 20(a)—CULPABLE PARTICIPATION, GT-US

"Culpable participation" in the violation is required for control-person liability. In the case of inaction, Plaintiff must prove that the GT-US's inaction was deliberate and done intentionally to further the fraud.

Whether by action or inaction, Plaintiff must show some measure of involvement by GT-US in GTI's control over GT-Italy's statements regarding Parmalat. Plaintiff must show that GT-US's conduct rose to the level of highly unreasonable or extreme misconduct and was not simply a deviation from standards of ordinary care.

Kevin F. O'Malley, Jay E. Grenig, William C. Lee, 3B Fed. Jury Practice & Instructions §162.270 (5th ed. 2000); *In re Alstom SA Sec. Litig.*, 406 F.Supp.2d 433, 487 (S.D.N.Y. 2005)

## 64. [ALTERNATIVE] SECTION 20(a)—GOOD FAITH DEFENSE, GT-US

GT-US contends that it is not liable to Plaintiff even if it was a controlling person because it did not induce the violation that led to Plaintiff's economic injury and it acted in good faith. If Plaintiff establishes that GT-US is a controlling person, then GT-US may defend itself and defeat liability by proving the following elements by a preponderance of the evidence.

> First, GT-US must show that it did not directly or indirectly induce the violation. Inducement means that GT-US undertook some action that caused the fraud; GT-US must show that it took no such action.
>
> Second, GT-US must show that it acted in good faith. To meet the burden of establishing good faith, GT-US must prove that it neither knew nor had reason to know of any securities violation. If the perpetration of fraud went unnoticed because of willful or reckless disregard, the good faith defense is unavailable. But if GT-US proves that it was blameless or merely negligent, then it cannot be liable as a controlling person.

If you find that GT-US proved both of these elements, your verdict should be for GT-US. If you find that GTI is a controlling person but failed to prove either or both of these elements, your verdict should be for Plaintiff and against GT-US.

> *See* Ninth Circuit Model Jury Instruction 18.9 (modified); *see also In re WorldCom, Inc. Sec. Litig.*, No. 02-3288, 2005 WL 638268, *15 (S.D.N.Y. March 21, 2005) ("inducement should be understood to involve proof that the defendant undertook some action that caused the fraud"); *Ingenito v. Bermec Corp.*, 441 F. Supp. 525, 533-534 (S.D.N.Y. 1977) ("Knowledge is the key to the assertion of good faith," and "[t]hose who neither know nor have reason to know of an agent's misdeeds are not liable as control persons."); *Parmalat VII*, 594 F. Supp. 2d 444, 458 (S.D.N.Y. 2009) (to similar effect); *Donohoe v. Consolidated Operating & Production Corp.*, 30 F.3d 907, 912 (7th Cir. 1994) ("the good faith defense exculpates defendants whose behavior is merely negligent. The controlling person must also act recklessly; negligence alone is insufficient")

## 65. [ALTERNATIVE] KNOWING VIOLATOR, GT-US

The verdict form will ask you whether GT-US acted with actual knowledge. If your verdict is for Plaintiff and against GT-US on Plaintiff's Section 20(a) claim, then you must answer this question. You should answer "no" unless you find that GT-US engaged in conduct with actual knowledge that GT-Italy and GTI were engaged in securities fraud.

> *See* 15 U.S.C. § 78u-4(f)(1) (defining "knowingly commits a violation of the securities laws")

## 66. DAMAGES

If you find that GT-Italy violated Rule 10b-5, and also find that GTI—or both GTI and GT-US—is responsible for GT-Italy's fraud, then you must consider and decide the amount of money damages to award the Plaintiff.

You should not infer that Plaintiff is entitled to recover damages merely because I am instructing you on the elements of damages. It is exclusively your function to decide upon liability, and I am instructing you on damages only so that you will have guidance should you decide that Plaintiff is entitled to recovery. Before awarding any damages, you must satisfy yourselves that the injury alleged was a direct and reasonably foreseeable result of the alleged fraudulent conduct. Any damages you do award must be limited to the actual—or compensatory—damages incurred by Plaintiff.

Actual damages are calculated as the difference between the price Plaintiff paid for each share of Parmalat stock and the price each share would have cost if GT-Italy had not made any false or misleading statement of material fact in the Review Report. This means that you should deduct any amount by which Parmalat's stock was already inflated by the time GT-Italy issued the Review Report. In calculating damages, you should not consider any decline in value caused by corrective disclosures addressed to misleading statements or omissions by anyone other than GT-Italy.

The amount of damages you impose, if any, will be expressed on a "per-share" basis. In other words, Plaintiff must demonstrate damages by offering evidence of a dollar amount per share. Your award must be based on evidence and not upon speculation, guesswork, or conjecture. The Plaintiff has the burden of proving damages by a preponderance of the evidence.

Adapted from Leonard B. Sand, Modern Federal Jury Instructions 82-11 and 77-1, the charge of the Honorable James A. Teilborg in *Sekuk Global Interprises v. Apollo Group Inc.*, Civ 04-2147-PHX-JAT (D. Ariz. Jan. 16, 2008), and the charge of the Honorable Ronald A. Guzman, in *Jaffe v. Household Int'l, Inc.*, No. 02-cv-05893 (N.D. Ill. May 7, 2009)

## 67. VERDICT FORM, INCLUDING OTHER ENTITIES

I have prepared a special verdict form for you to use in recording your verdict. This special verdict form is made up of questions concerning the important issues in this case. Some of these questions are to be answered either "yes" or "no" as indicated, and others are to be answered with numbers or percentages as indicated.

The verdict form requires you to answer certain questions about Plaintiff, GT-Italy, GTI, and GT-US.

Also, if you find that Plaintiff is entitled to an award of damages, the verdict form requires you to answer certain questions with respect to several entities about whom there has been evidence introduced at this trial:

- Parmalat (with its officers, directors, and agents)
- DT-Italy
- DTT
- DT-US
- Credit Suisse
- BNL

## 68. LIABILITY OF OTHER ENTITIES ADMITTED

Plaintiff has admitted that all of these other entities committed a violation of the securities laws. Specifically, for purposes of this case, Plaintiff has admitted certain facts as follows:

- **[Specific admissions from pleadings in this case to be inserted later.]**

You will take these admitted facts to be true for purposes of this case. You are not permitted to disregard or disbelieve these facts, even in light of any other evidence presented. These facts are binding and conclusive for the purposes of this trial.

Adapted from Leonard B. Sand, Modern Federal Jury Instruction 74-15 (requests for admission) Kevin F. O'Malley, Jay E. Grenig, William C. Lee, 3 Fed. Jury Practice & Instructions §101.46 (5th ed. 2000) (admissions in pleadings)

## 69. APPORTIONMENT OF RESPONSIBILITY

If you find that GTI or GT-US is liable in this case, you must determine its percentage of responsibility for the loss incurred by Plaintiff.

You must also determine the percentage of responsibility of each of the other entities listed in the jury form.

In determining the percentage of responsibility of each entity, the statute requires you to consider the nature of the conduct of each entity you find contributed to Plaintiff's loss, and the nature and extent of the causal relationship between the conduct of that entity and the damages incurred by Plaintiff.

Separately, for GTI and GT-US in particular, you must also answer whether that entity committed the violation knowingly. Here, "knowingly" means actually being aware that a particular statement of material fact was made, that the statement was false or misleading (or that it omitted a material fact such that the omission made the statement materially misleading), and that persons are likely to reasonably rely on that misrepresentation or omission.

Adapted from Leonard B. Sand, Modern Federal Jury Instruction 82-12; *see also* 15 U.S.C. § 87u-4(f)(3)

## 70. WHETHER TO CONSIDER THEORIES AGAINST GTI LTD

If you find that Plaintiff has proved all elements of his agency or control person theory against GTI, you may go on to consider whether GTI Ltd should be held liable under Plaintiff's successor liability theory. If you find that Plaintiff has failed to prove both his agency theory and control person theories, you need not go on to make any findings regarding Plaintiff's theory against GTI Ltd.

## 71. CLAIM AGAINST GTI LTD

GTI Ltd did not make any statements about Parmalat. Plaintiff sued GTI Ltd based entirely on the contention that GTI Ltd should be liable to the same extent GTI is liable for what GT-Italy did. That contention is based on the theory that GTI Ltd is the successor-in-interest to GTI. This is Plaintiff's "successor liability theory."

If you decide that Plaintiff has not carried his burden of proof on this argument, you must enter a verdict in favor of GTI Ltd. Alternatively, if you decide that Plaintiff has not carried his burden of proof that GTI is liable for what GT-Italy allegedly did, you need not reach the question of whether GTI Ltd is the successor in interest to GTI and you must also enter a verdict in favor of GTI Ltd.

## 72. PLAINTIFF'S SUCCESSOR LIABILITY CLAIM AGAINST GTI LTD

Under Plaintiff's successor liability theory, Plaintiff argues that GTI Ltd is the successor in interest to GTI by virtue of an Asset Purchase and Sale Agreement entered into between the two entities in 2007. GTI Ltd denies that it is liable as the successor to GTI. GTI Ltd argues that it merely purchased certain assets of GTI and that it did not agree to assume any of GTI's liabilities.

## 73. SUCCESSOR LIABILITY—RULE AGAINST, EXCEPTIONS

A corporation that merely purchases the assets of another corporation is not ordinarily liable for the seller corporation's debts and obligations. This means that GTI Ltd is not liable for the debts and obligations of GTI merely because it purchased certain GTI assets. GTI Ltd is only liable if there was an agreement providing that it would assume GTI's liabilities or if certain well-defined exceptions to this rule against successor liability apply. Plaintiff concedes that there was no agreement providing that GTI Ltd would assume the potential liability of GTI at issue in this case. In fact, GTI and GTI Ltd expressly agreed that GTI Ltd would not assume any such liability. Instead, Plaintiff relies on two exceptions to the rule against successor liability. One is known as the "mere continuation" exception. The other is known as the "fraud" exception. This means that you must enter a verdict in favor of GTI Ltd and against Plaintiff on his successor liability claim unless you find that Plaintiff has carried his burden of proof on either one of these two exceptions.

*See Ruiz v. Blentech Corp.*, 89 F.3d 320, 324 (7th Cir. 1996); *Myers v. Putzmeister, Inc.*, 596 N.E.2d 754, 756 (Ill. App. Ct. 1992); *Manh Hung Ngyuen v. Johnson Mach. & Press Corp.*, 433 N.E.3d 1104, 1106 (Ill. App. Ct. 1982); *Barron v. Kane and Roach, Inc.*, 398 N.E.2d 244, 246 (Ill. App. Ct. 1979)

## 74. SUCCESSOR LIABILITY—MERE CONTINUATION EXCEPTION

Plaintiff relies on an exception known as the "mere continuation" exception. For that exception to apply, Plaintiff must prove each of the following four elements by a preponderance of the evidence:

> First, Plaintiff must prove that there is a continuity of the business enterprise between GTI and GTI Ltd, including continuity of management, employees, location, general business operations and assets.
>
> Second, Plaintiff must prove that there is a continuity of shareholders between GTI and GTI Ltd, in that shareholders of GTI became shareholders of GTI Ltd so that they became a constituent part of GTI Ltd.
>
> Third, Plaintiff must prove that GTI ceased operations and dissolved as soon as possible after the transaction with GTI Ltd.
>
> Fourth, Plaintiff must prove that GTI Ltd assumed those liabilities and obligations necessary for the uninterrupted continuation of GTI's business.

If Plaintiff fails to prove any one of these elements, you must find for GTI Ltd and against Plaintiff on his successor liability claim. It is not enough that Plaintiffs prove any one factor alone.

> *See Gray v. Mundelein College*, 695 N.E.2d 1379, 1389 (Ill. App. Ct. 1998); *Kramer v. Weedhopper of Utah, Inc.*, 562 N.E.2d 271, 274-75 (Ill. App. Ct. 1990); G*onzalez v. Rock Wool Eng'g & Equip. Co.*, 453 N.E.2d 792, 796 (Ill. App. Ct. 1983); *Myers v. Putzmeister, Inc.*, 596 N.E.2d 754, 756 (Ill. App. Ct. 1992); *Manh Hung Ngyuen v. Johnson Mach. & Press Corp.*, 433 N.E.3d 1104, 1106 (Ill. App. Ct. 1982); *Barron v. Kane and Roach, Inc.*, 398 N.E.2d 244, 246 (Ill. App. Ct. 1979)

## 75. SUCCESSOR LIABILITY—CONTINUITY OF BUSINESS OPERATIONS NOT SUFFICIENT

Even if Plaintiff proves that there is a continuity of business operations or products and services between GTI and GTI Ltd, that is not sufficient to find GTI Ltd liable for the obligations of GTI. There is no special exception to the rule against successor liability simply because GTI Ltd has a similar business or provides similar products and services to those provided by GTI. This means that you must also find that Plaintiff has proven all of the remaining elements of the mere continuation exception described above.

*See Vernon v. Schuster*, 688 N.E.2d 1172, 1176 (Ill. 1997); *Myers v. Putzmeister, Inc.*, 596 N.E.2d 754, 757-58 (Ill. App. Ct. 1992); *Gonzalez*, 453 N.E.2d at 796; *Manh Hung Ngyuen v. Johnson Mach. & Press Corp.*, 433 N.E.3d 1104, 1106-07 (Ill. App. Ct. 1982); *Domine v. Fulton Iron Works*, 395 N.E.2d 19, 22-23 (Ill. App. Ct. 1979); *Hernandez v. Johnson Press Corp.*, 388 N.E.2d 778, 778-82 (Ill. App. Ct. 1979)

## 76. SUCCESSOR LIABILITY—FRAUD EXCEPTION

Plaintiff relies on an exception known as the "fraud" exception. For that exception to apply, Plaintiff must prove that the transaction between GTI and GTI Ltd was for the fraudulent purpose of escaping liability for GTI's obligations. This means that if Plaintiff fails to prove that GTI Ltd specifically intended for GTI to escape liability to GTI's potential creditors, you must find for GTI Ltd and against Plaintiff on his successor liability claim.

*See Myers v. Putzmeister, Inc.*, 596 N.E.2d 754, 756 (Ill. App. Ct. 1992); *Kramer v. Weedhopper of Utah, Inc.*, 562 N.E.2d 271, 274-75 (Ill. App. Ct. 1990)

## 77. JURY PROCEDURES

When you begin your deliberations, you should elect one member of the jury as your presiding juror. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not hesitate to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

If it becomes necessary during your deliberations to communicate with me, you may send a note through the bailiff, signed by your presiding juror or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing. I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court.

If you send out a question, I will consult with the parties before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including me—how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not disclose any vote count in any note to the court.

Charge of the Honorable James A. Teilborg in *Sekuk Global Interprises v. Apollo Group Inc.*, Civ 04-2147-PHX-JAT (D. Ariz. Jan. 16, 2008)

## 78. COMPLETING THE VERDICT FORM

Follow the instructions on the verdict form carefully. You will note that the verdict form contains numerous questions. Each question you answer must be by unanimous agreement. After reaching unanimous agreement, your presiding juror will fill in the form that has been given to you, sign (by writing the presiding juror's number) and date it, and notify the bailiff that you have reached your verdict.

Charge of the Honorable James A. Teilborg in *Sekuk Global Interprises v. Apollo Group Inc.*, Civ 04-2147-PHX-JAT (D. Ariz. Jan. 16, 2008) (modified)

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

| | | |
|---|---|---|
| In re PARMALAT SECURITIES LITIGATION | : | MASTER DOCKET<br>04 MD 1653 (LAK) |
| This document relates to: 04 Civ 0030 (LAK) | : | **VERDICT FORM** |

**RULE 10(b)-5 CLAIM AGAINST GT-ITALY**

1. Did Plaintiff prove that GT-Italy made an untrue statement of a material fact in the Review Report?

   Yes___ No___

2. Did Plaintiff prove that GT-Italy's statement was made in connection with the purchase or sale of Parmalat stock?

   Yes___ No___

3. Did Plaintiff prove that GT-Italy acted knowingly or with reckless disregard for the truth?

   Yes___ No___

4. a. Did Plaintiff prove that the market for Parmalat securities was efficient?

      Yes___ No___

   b. If not, did Plaintiff prove that he actually and justifiably relied on GT-Italy's review report?

      Yes___ No___

5. Did Plaintiff prove that GT-Italy's conduct caused Plaintiff to suffer damages?

   Yes___ No___

If you answered "no" to any of questions 1-3 and 5, or if you answered "no" to both 4(a) and 4(b), you have finished the verdict form. Please turn to the last page, sign and date the verdict form and inform the bailiff that you have finished. Otherwise, please continue to Question 6.

6. Please indicate whether GT-Italy acted knowingly or recklessly (choose one) in making any untrue statement of a material fact in the Review Report by placing an "X" on the appropriate line.

Knowingly___ Recklessly___

Please continue to Question 7.

**AGENCY THEORY AGAINST GTI**

7. Did Plaintiff prove that GTI agreed with GT-Italy to have GT-Italy make statements about Parmalat on GTI's behalf in the Review Report, despite the parties' written agreement that they would not have that relationship?

   Yes___ No___

8. Did Plaintiff prove that GT-Italy agreed with GTI that it would be GTI's agent and act on GTI's behalf in performing audit services for Parmalat and making statements about Parmalat in the Review Report, despite the parties' written agreement that they would not have that relationship?

   Yes___ No___

9. Did Plaintiff prove that GTI had the power to direct the manner and method of GT-Italy's decisionmaking in respect to statements GT-Italy made about Parmalat in the Review Report?

   Yes___ No___

If you answered "yes" to Questions 7, 8, and 9, please answer Question 10. Otherwise, please leave Questions 10, 11, 12, 13, 14, and 15 blank and proceed to Question 16.

10. Did Plaintiff prove that GT-Italy was acting within the scope of its authority for GTI when it committed securities fraud?

Yes___ No___

If you answered "yes" to Question 10, please continue to Question 11. Otherwise, please leave Questions 11, 12, 13, 14, and 15 blank and proceed to Question 16.

**SUB-AGENCY THEORY AGAINST GT-US**

11. Did Plaintiff prove that GT-US agreed with GTI that a sub-agent appointed by GTI would perform audits services for Parmalat on GT-US's behalf, despite the parties' written agreement that they would not have that relationship?

    Yes___ No___

12. Did Plaintiff prove that GTI agreed with GT-US that it would be GT-US's agent and act on GT-US's behalf in appointing a sub-agent to perform audit services for Parmalat, despite the parties' written agreement that they would not have that relationship?

    Yes___ No___

13. Did Plaintiff prove that GT-Italy agreed to be GT-US's sub-agent and to act on GT-US's behalf in performing audit services for Parmalat and making statements about Parmalat in the Review Report, despite the parties' written agreement that they would not have that relationship?

    Yes___ No___

14. Did Plaintiff prove that GT-US had the power to direct, through GTI, the manner and method of GT-Italy's decisionmaking in respect to statements GT-Italy made about Parmalat?

    Yes___ No___

If you answered "yes" to Questions 11, 12, 13, and 14, please answer Question 15. Otherwise, please leave Question 15 blank and proceed to Question 16.

15. Did Plaintiff prove by a preponderance of the evidence that GT-Italy was acting within the scope of its authority for GT-US when it committed securities fraud?

Yes___ No___

Please continue to Question 16.

**SECTION 20(a) THEORY AGAINST GTI**

16. Did Plaintiff prove by a preponderance of the evidence that GTI had actual control over GT-Italy with respect to any untrue statement of a material fact in the Review Report?

Yes___ No___

17. Did Plaintiff prove that GTI acted or failed to act deliberately and intentionally to further GT-Italy's violation of Rule 10b-5?

Yes___ No___

If you answered "yes" to both Questions 16 and 17, please answer Question 18. Otherwise, please leave Questions 18, 19, 20, 21, 22, and 23 blank and proceed to Question 24.

18. Did GTI prove that it did not directly or indirectly induce GT-Italy's 10b-5 violation and that it acted in good faith as that term is defined in the jury instructions?

Yes___ No___

If you answered "no" to Question 18, please answer Question 19. Otherwise, please leave Questions 19, 20, 21, 22, and 23 blank and proceed to Question 24.

19. Did Plaintiff prove that GTI acted with actual knowledge that GT-Italy was engaged in securities fraud?

Yes___ No___

Please continue to Question 20.

**SECTION 20(a) THEORY AGAINST GT-US**

20. Did Plaintiff prove by a preponderance of the evidence that GT-US had the power to direct GTI in its decisionmaking in respect to any work or function of GTI that led to any liability that GTI might bear for securities violations by GT-Italy?

Yes___ No___

21. Did Plaintiff prove that GT-US acted or failed to act deliberately and intentionally to further GTI's violation of Section 20(a)?

Yes___ No___

If you answered "yes" to both Questions 20 and 21, please answer Question 22. Otherwise, please leave Questions 22 and 23 blank and proceed to Question 24.

22. Did GT-US prove that it did not directly or indirectly induce GTI's Section 20(a) violation and that it acted in good faith as that term is defined in the jury instructions?

Yes___ No___

If you answered "no" to Question 22, please answer Question 23. Otherwise, please leave Question 23 blank and proceed to Question 24.

23. Did Plaintiff prove that GT-US acted knowingly?

Yes___ No___

Please continue to Question 24.

24. Did you mark “yes” to Questions 7, 8, 9, and 10 regarding Plaintiff’s Agency Theory Against GTI?

Yes___ No___

25. Did you mark “yes” to Questions 16 and 17 regarding Plaintiff’s Control Person Theory Against GTI, ***and also*** mark “no” to Question 18 regarding GTI’s good faith?

Yes___ No___

If you answered “no” to both Question 24 and Question 25, you have finished the verdict form. Please turn to the last page, sign and date the verdict form and inform the bailiff that you have finished.

If you answered “yes” to either Question 24 or Question 25, please continue to Question 26.

**SUCCESSOR LIABILITY THEORY AGAINST GTI LTD**

26. Did Plaintiff prove that there is a continuity of the business enterprise between GTI and GTI Ltd, including continuity of management, employees, location, general business operations and assets?

Yes___ No___

27. Did Plaintiff prove that there is a continuity of shareholders between GTI and GTI Ltd, in that shareholders of GTI became shareholders of GTI Ltd so that they became a constituent part of GTI Ltd?

Yes___ No___

28. Did Plaintiff prove that GTI ceased operations and dissolved as soon as possible after the transaction with GTI Ltd?

Yes___ No___

29. Did Plaintiff prove that GTI Ltd assumed those liabilities and obligations necessary for the uninterrupted continuation of GTI's business?

Yes___ No___

30. Did Plaintiffs prove that the 2007 Asset Purchase and Sale Agreement between GTI Ltd and GTI was for the fraudulent purpose of escaping liability for GTI's obligations?

Yes___ No___

Please continue to Question 31.

**DAMAGES**

31. Please specify the total amount of damages per share that Plaintiff suffered as a result of his Rule 10b-5 claim against GT-Italy with regard to the Review Report:

$_____ per share.

| | 32. For each of the following entities, did that entity's violation of the securities laws cause or contribute to the loss incurred by the Plaintiff? | 33. If you answered "yes" for any of the entities in Question 32, indicate the percentage of responsibility for each such entity found to have caused or contributed to Plaintiff's loss. In making this determination you should consider the nature of the conduct of each person found to have caused or contributed to Plaintiff's loss and the nature and extent of the causal relationship between each such person's conduct and Plaintiff's loss. |
|---|---|---|
| Parmalat (with its officers, directors, and agents) | Yes___ No___ | _____% |
| DT-Italy | Yes___ No___ | _____% |
| DTT | Yes___ No___ | _____% |
| DT-US | Yes___ No___ | _____% |
| GT-Italy | Yes___ No___ | _____% |
| GTI | Yes___ No___ | _____% |
| GT-US | Yes___ No___ | _____% |
| Credit Suisse | Yes___ No___ | _____% |
| BNL | Yes___ No___ | _____% |
| | | = 100% Total |

Please sign and return this form.

| | |
|---|---|
| (Presiding juror number) | (Date) |

Adapted from the verdict forms given by the Honorable Ronald A. Guzman, in *Jaffe v. Household Int'l, Inc.*, No. 02-cv-05893 (N.D. Ill. May 7, 2009), and the Honorable James A. Teilborg in *Sekuk Global Interprises v. Apollo Group Inc.*, Civ 04-2147-PHX-JAT (D. Ariz. Jan. 16, 2008).

**CERTIFICATE OF SERVICE**

I, Linda T. Coberly, hereby certify under penalty of perjury that on June 15, 2009, I caused the foregoing JURY INSTRUCTIONS PROPOSED BY DEFENDANTS GRANT THORNTON INTERNATIONAL, GRANT THORNTON LLP, AND GRANT THORNTON INTERNATIONAL, LTD to be served upon all parties to this action through the Court's CM/ECF system and by electronic mail.

Dated: June 15, 2009

/s/ Linda T. Coberly
Linda T. Coberly