

*filed in my Jury Instructions*

153

CLERK, U. S. DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS

FILED  
7-13-95

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

MICHAEL N. MILBY, CLERK  
BY DEPUTY *Baker*

*cc: Carrell*  
*McClure*  
*Pech +*  
*Book*

MARLENE MALEK and ABRAHAM  
SLOMOVICS,

Plaintiffs,

v.

LANDMARK GRAPHICS CORPORATION  
and C. EUGENE ENNIS,

Defendants.

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CIVIL ACTION NO. H-92-800

COURT'S INSTRUCTIONS TO THE JURY

TRUE COPY I CERTIFY  
ATTEST:  
MICHAEL N. MILBY, Clerk  
By *[Signature]* 7-19-95  
Deputy Clerk

### General Instructions

#### **Members of the Jury:**

Now that you have heard the evidence, my duty is to give you the instructions of the Court on the law you should apply to this case. Your duty as jurors is to follow the law as stated in these instructions and to apply these rules of law to the facts you find from the evidence in the case. You are not to single out one instruction alone as stating the law; rather, you must consider the instructions as a whole.

Regardless of any opinion you may have as to what the law should be, you would violate your sworn duty if you based a verdict upon any view of the law other than that given in the instructions of the Court. You are therefore not to be concerned with the wisdom of any rule of law stated by the Court. Similarly, you would violate your sworn duty as judges of the facts if you based your verdict upon anything but the evidence in this case. You, the Jury, are the sole and exclusive judges of the facts.

You are to perform this duty without bias or prejudice as to any party. Our system of law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

You should consider and decide this case as an action between persons of equal standing in the community, of equal worth, and

holding the same or similar stations in life. The fact that some of the parties are corporations should play no part in your deliberations. A corporation is entitled to the same fair trial at your hands as is a private individual. All persons, including corporations, stand equal before the law.

You must consider only the evidence properly admitted in the case. Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; any deposition testimony of witnesses that was admitted into evidence; all exhibits received in evidence, regardless of who may have produced them; and all facts that have been admitted or stipulated. You must entirely disregard any evidence that a party objected to if I sustained that objection and any evidence that was ordered stricken by the Court.

Statements and arguments of counsel are not evidence; rather, they are intended only to assist you in understanding the evidence and the contentions of the parties. During the course of the trial it often becomes the duty of counsel to make objections and for the Court to rule on them in accordance with the law. You should not consider or be influenced by the fact that such objections have been made, whether they were sustained or overruled.

Similarly, you should not allow your attitude toward either party or the evidence to be affected by how you regard the general conduct or attitude of the attorneys. Each attorney has a solemn duty to defend the client vigorously and with dedication and thus may not please everyone all the time. Your decision on the facts

of this case should therefore not be affected by your opinion of the attorneys.

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You should carefully scrutinize all the testimony given and, in weighing the testimony of each witness, consider the relationship between the witness and the parties in this case, his or her interest in the outcome of the case, the witness's manner of testifying, candor, fairness, and intelligence, and the extent to which the witness' testimony has been confirmed or contradicted, if at all, by other credible evidence.

You will rely upon your own good judgment, your own common sense, and the experience you have gained as you have gone about your everyday affairs in weighing the evidence and determining the weight to be given to it. You are permitted to accept as true and worthy of belief everything that a particular witness may have said, or you are permitted to reject everything that a particular witness may have said. Of course, you may also accept as true part

of what a witness tells you and reject other portions of that witness's testimony.

#### **Witnesses**

A witness may be discredited or "impeached" by contradictory evidence or by evidence that the witness has at other times made statements that are inconsistent with the witness's present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness and not to conclusively establish the truth of the earlier statements. If you believe any witness has been impeached and thus discredited, you are free to give the testimony of that witness such credibility, if any, as you may think it deserves.

#### **Evidence**

You may, in your determination of the facts of this case, consider both direct and circumstantial evidence. Direct evidence is the testimony of a witness who actually saw an event occur. Circumstantial evidence is proof of a chain of circumstances pointing to the occurrence of a fact or the existence of a fact. Direct evidence includes a witness's testimony as to facts within that person's own personal knowledge, matters that the witness saw and heard, and matters that came to the witness out of that person's own senses or observations. Circumstantial evidence, rather than or in addition to direct evidence, can be used to establish a fact if that fact may be fairly and reasonably inferred from all other facts and circumstances proved in the case. In

order to establish a fact or conclusion by circumstantial evidence, the facts that were directly proven in the case must be such as to make the fact or conclusion sought to be shown by circumstantial evidence more reasonably probable to be true than alternative facts or conclusions.

#### **Preponderance of the Evidence**

A "preponderance of the evidence" means the greater weight and degree of the credible evidence admitted in this trial. It does not necessarily mean the greater volume of evidence or the greater number of witnesses. To establish or prove something by a preponderance of the evidence means to prove that something is more likely true than not. In other words, a preponderance of the evidence in this case means such evidence that, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not.

If you find that the subject matter of a question has been established by a preponderance of the evidence, then you will answer the interrogatory "we do." Otherwise, or if you believe that the evidence is equally balanced between the two sides, then the party seeking an affirmative answer to the question failed to carry its burden of proof and your answer to the question must be "we do not."

**Proximate cause:**

"Proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

## CLASS ACTION

As I told you earlier, this lawsuit has been brought as a Class Action. In a Class Action, one or more individuals are certified by the Court to represent all those who have claims similar to their own. Here, the parties bringing the suit are Marlene Malek and Abraham Slomovics. The Plaintiffs have been certified by the Court to represent a class comprised of all persons who bought the common stock of Landmark Graphics Corporation, during the period including from January 20, 1992, through March 10, 1992, inclusive. This Class, which is represented in this suit by Marlene Malek and Abraham Slomovics, includes thousands of persons. Accordingly, if the Plaintiffs prove their claims against the Defendant, then the Class has proved their case as well. Likewise, damages, if any, on such claims must be awarded for the entire Class and not just the Plaintiffs individually.

VIOLATION OF RULE 10b-5

The Plaintiffs' claim is brought under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities Exchange Commission, which has the force of law. Rule 10b-5 provides 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,

- (A) to employ any device, scheme or artifice to defraud,
- (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, or
- (C) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security.

In order to prove a violation under Rule 10b-5, the Plaintiffs must establish each of the following elements by a preponderance of the evidence:

- (1) that Landmark Graphics or Mr. Ennis used an instrumentality of interstate commerce in connection with the transactions involved in this case;
- (2) that Landmark Graphics or Mr. Ennis made a misrepresentation of material fact, failed to state a material fact, or engaged in an act, practice or course of business which operated as a fraud or deceit upon the

members of the Class in connection with the securities transactions involved in this case;

- (3) that Landmark Graphics or Mr. Ennis acted knowingly, or with scienter;
- (4) that the Plaintiffs justifiably relied upon Landmark Graphics's or Mr. Ennis's conduct; and
- (5) that the Plaintiffs suffered damages as a result of Landmark Graphics's or Mr. Ennis's wrongful conduct.

As to the first element, the use of an "instrumentality of interstate commerce" means, for example, the use of the mails or the telephone. I instruct you as a matter of law that both Landmark Graphics and Mr. Ennis used instrumentalities of interstate commerce in connection with the transactions in this case.

As to the second element, the alleged misrepresentation asserted by the Plaintiffs is contained in the Q & A document that was released with Landmark Graphics's January 20, 1992, press release:

**Q-17 WHAT ARE THE STREET ESTIMATES FOR THE 1992 FISCAL YEAR, AS WELL AS THE THIRD QUARTER?**

**A-17 Most of the estimates for the year are for revenues in the range of \$105 - \$115 million and earnings per share of \$1.30 - \$1.40 per share. Estimates for the third quarter are for revenues of 27 million and earnings per share of \$.33 - \$.35.**

**Q-18 ARE YOU COMFORTABLE WITH THESE ESTIMATES?**

**A-18 Yes, but because of the continued shift from the domestic to the international business, we are comfortable with the lower end of the revenues and**

earnings estimates for both the third quarter and the year.

To establish this second element of their claim the Plaintiffs must prove at least one misrepresentation or omission of a material fact or other fraudulent or deceptive act, practice of course of conduct.

A "misrepresentation" is a statement that is not true. An "omission" is a failure to make a statement when that statement is necessary in order to make other statements not misleading.

Projections and financial forecasts are not misrepresentations merely because they may ultimately be proven incorrect.

A projection or a forecast is a misrepresentation if, but only if, Plaintiffs prove by a preponderance of the evidence that the forecast or projection was false when made, and either (i) Defendant had no reasonable basis for the projection or forecast, or (ii) Defendant made the projection or forecast in bad faith.

In determining whether or not Defendant's projections and forecasts were made in bad faith or with no reasonable basis, you must evaluate the projection and forecast on the basis of the circumstances that existed at the time the projections and forecasts were made. In other words, the projections and forecasts may not be held to be misrepresentations merely because subsequent events prove them to have been erroneous.

A "material" fact or omission is a fact relating to a matter that would be of some importance to the reasonable investor when deciding how to invest. A minor or trivial detail is not material.

The third element that the Plaintiffs must prove is "scienter," that is, that the Defendant acted knowingly in making the alleged misrepresentation. As used in this case the word "scienter," or to act "knowingly," refers to a mental state embracing intent to deceive, manipulate or defraud.

To establish that Defendant acted knowingly, Plaintiffs do not satisfy their burden of proof merely by showing that Defendant acted accidentally or that Defendant made a mistake. Plaintiffs must show that Defendant acted with an intent to deceive, manipulate or defraud. In other words, Plaintiffs must show that Defendant stated material facts Defendant knew to be false, or stated untrue facts with severely reckless disregard for their truth or falsity, or knew of the existence of material facts that were not disclosed although Defendant knew that knowledge of those facts would be necessary to prevent Defendant's other statements from being misleading.

"Severely reckless" conduct is not proved merely by showing negligence or general recklessness on the part of Defendant. Rather, *severe recklessness* is limited to those highly unreasonable omissions or misrepresentations that involve an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers which is either known to Defendant or is so obvious that Defendant must have been aware of it.

The fourth element that must be proven, *justifiable reliance on the misrepresentation or omission*, is, in this case, controlled by the "fraud-on-the market doctrine." The fraud-on-the market

doctrine dictates that, because the market on which most securities trade is efficient, most publicly available information is absorbed by the market and reflected in the market price, thus raising a presumption of reliance. This is so even if the purchasers do not rely directly on such misstatements. This presumption of reliance is conclusive and this element should be considered established by you unless Landmark Graphics or Mr. Ennis proves that: 1) the misrepresentations or omissions which the Plaintiffs claim that Landmark Graphics or Mr. Ennis made did not affect the market price, or 2) the Plaintiffs would have purchased the stock at the same price had they known the information was not disclosed or was misrepresented; or 3) that the Plaintiffs actually knew the information that was not disclosed or was misrepresented to the market but acquired the stock anyway.

As to the fifth element -- damages -- Plaintiffs must show that their damages, if any, were a proximate result of the misrepresentation. They must show that, except for the misrepresentation, such damage would not have occurred.

If you find that all five elements have been shown each by a preponderance of the evidence, then you must find that the Defendant violated Rule 10b-5. You must separately consider the claims against Landmark Graphics and against Mr. Ennis. In other words, you should bear in mind that all five elements must be proven with respect to Landmark Graphics in order for you to find that Landmark Graphics violated Rule 10b-5, and considered separately all five elements must be proven with respect to

Mr. Ennis order for you to find that Mr. Ennis violated Rule  
10b-5.

QUESTION NO. 1

Did Landmark Graphics violate Rule 10b-5?

Answer "Yes" or "No"

ANSWER:

No

QUESTION NO. 2

Did Mr. Ennis violate Rule 10b-5?

Answer "Yes" or "No"

ANSWER:

No

If you have answered "yes" to Question No. 1 and have answered "no" to Question No. 2, and only in that event, then proceed to read the next instruction pertaining to Mr. Ennis and answer Question No. 3.

If you have answered "yes," to both Question Nos. 1 and 2, or if you have answered "no" to Question No. 1 and "yes" to Question No. 2, then skip the next instruction pertaining to Mr. Ennis and do not answer Question No. 3, but proceed directly to the instructions on damages beginning at page 19 and answer Questions No. 4 and No. 5.

If you have answered "no," to both Question Nos. 1 and 2, then proceed to have your foreperson sign the verdict.

SPECIAL INSTRUCTION REGARDING  
EUGENE ENNIS  
AND  
QUESTION NO. 3

A special word must be said about Defendant Ennis in connection with the Plaintiffs' claims pursuant to Rule 10b-5 if you find that Landmark Graphics violated 10b-5, and that Mr. Ennis did not violate Rule 10b-5. There is a second basis on which Defendant Mr. Ennis may be found liable pursuant to Rule 10b-5. This second basis of liability arises from the fact that through the class period, Defendant Ennis as Chief Executive Officer of the corporation was what the law calls a "controlling person" of Landmark Graphics. Because of this, if you conclude that Plaintiffs have proved a 10b-5 violation against the corporation, then you must decide whether or not Defendant Ennis acted in good faith and did not directly or indirectly induce the acts which result in the corporation's liability. As the person who controlled the corporation, Defendant Ennis is liable to the same extent as the corporation is liable, unless Defendant Ennis proves that he did not act intentionally or recklessly to induce the acts of others which result in the corporation's liability.

Defendant Ennis can establish this defense by proof that he established, maintained or diligently enforced a proper system of supervision and control over the preparation of Landmark's January 20, 1992 Q & A issued with the press release.

QUESTION NO. 3

Do you find that Defendant Ennis acted in good faith and did not directly or indirectly induce the making of the misrepresentation?

Answer "Yes" or "No"

ANSWER: \_\_\_\_\_

Regardless of your answer to Question No. 3, because of your "yes" answer to Question No. 1 you must now proceed to the instructions on damages beginning on page 19 and answer Questions No. 4 and No. 5.

**CONSIDER DAMAGES ONLY IF NECESSARY**

If the plaintiff has proven his claim against the defendant by a preponderance of the evidence, you must determine the damages to which the plaintiff is entitled. You should not interpret the fact that I have given instructions about the plaintiff's damages as an indication in any way that I believe that the plaintiff should, or should not, win this case. It is your task first to decide whether the defendant is liable. I am instructing you on damages only so that you will have guidance in the event you decide that the defendant is liable and that the plaintiff is entitled to recover money from the defendant.

### THE CLASS'S DAMAGES FOR RULE 10b-5 VIOLATIONS

If you have found that Landmark Graphics or Ennis has violated Rule 10b-5, then you must determine the amount of the monetary loss, if any, that the Class has sustained. You should award the Class an amount of money shown by a preponderance of the evidence to be fair and adequate compensation for the loss that proximately resulted from Defendant's wrongful conduct. The proper measure of damages to reflect the loss proximately caused by the defendant's wrongful conduct is called the out-of-pocket rule. This rule allows for recovery of an amount of damages equal to the difference between the price paid for the stock and the "fair market value" of the stock, that is, the market value at which the stock would have traded in the open market, absent the misrepresentation, at the time of the initial purchase by the defrauded buyers. The use of the out-of-pocket rule requires that the fair market value, that is, the market value the stock would have had absent the misrepresentation, be established for each date on which members of the Class purchased stock during the class period. Thus, the amount of recovery becomes a matter of subtraction of the fair market value of the stock on the date of the Plaintiff's purchases from the purchase price paid by the Plaintiffs on that date.

In determining damages, you are instructed to disregard any increase or decrease in the market price of Landmark Graphics stock after the end of the class period, which was March 10, 1992, and any purchases or sales by the class members after that date.

QUESTION NO. 4

What amount of money would compensate the Class for its damages due to the Rule 10b-5 violation(s)?

Answer in dollars and cents.

ANSWER: \$ \_\_\_\_\_

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In determining damages, you are instructed to disregard any increase or decrease in the market price of Landmark Graphics stock after the end of the class period, which was March 10, 1992, and any purchases or sales by the class members after that date.

QUESTION NO. 4

What amount of money would compensate the Class for its damages due to the Rule 10b-5 violation(s)?

Answer in dollars and cents.

ANSWER: \$ \_\_\_\_\_

QUESTION NO. 5

In answering the foregoing Question No. 4, by what amount do you find that the market price of each one share of Landmark Graphics stock was inflated during the class period as a result of Landmark Graphics's or Mr. Ennis's misrepresentation?

Answer in dollars and cents.

ANSWER: \$ \_\_\_\_\_ per share.

## Final General Instructions

### **The Verdict:**

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous. The verdict form consists of a series of ~~four~~<sup>Five</sup> possible questions. The answer to each question that you are required to answer must be the unanimous determination of all jurors.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous, but do not surrender your honest convictions as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.


Upon retiring to the jury room, you should first select one of your number to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesperson here in court.

If, during your deliberations, you should desire to communicate with the Court, please express your message or question in writing signed by the foreperson, and pass a note to the

courtroom deputy who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you return to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at that time.

Remember at all times you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in this case.

SIGNED at Houston, Texas, on this the 13<sup>th</sup> day of July, 1995.

  
EWING WERLEIN, JR.  
UNITED STATES DISTRICT JUDGE

152  
CLERK, U. S. DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
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BY DEPUTY *[Signature]*

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V.

LANDMARK GRAPHICS CORPORATION  
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Defendants.

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CIVIL ACTION NO. H-92-800

VERDICT

We, the jury find in this case, unanimously, as indicated in  
the answers to the foregoing Special Questions.

Signed at Houston, Texas, this 13 day of July, 1995.

*Jeff R. Davis*  
FOREPERSON OF THE JURY

TRUE COPY I CERTIFY  
ATTEST: *7/13/95*  
MICHAEL N. MILBY, Clerk  
By *[Signature]*  
Deputy Clerk

