**18.2 Securities—Rule 10b-5 Claim**

 The plaintiff alleges that the defendant defrauded [him] [her] [it] by [*describe the plaintiff’s “10b-5” claim*]. This is referred to as “the plaintiff’s 10b-5 claim.”

 On this claim, the plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

1. The defendant [made an untrue statement of a material fact] [omitted a material fact necessary under the circumstances to keep the statements that were made from being misleading] in connection with the [purchase] [sale] of securities;

2. The defendant acted knowingly;

3. The defendant [used] [caused the use of] [an instrumentality of interstate commerce, such as mail or telephone] [a facility of a national securities exchange] in connection with the [purchase] [sale] of securities, regardless of whether the [instrumentality] [facility] itself was used to make an untrue statement or a material omission;

4. The plaintiff justifiably relied on [the defendant’s untrue statement of a material fact] [the defendant’s omission to state a necessary material fact] in [buying] [selling] securities; and

5. The defendant’s [misrepresentation] [omission] caused the plaintiff to suffer damages.

 If you find that the plaintiff has proved each of the above elements, your verdict should be for the plaintiff. If, on the other hand, you find that the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

**Comment**

 *See Retail Wholesale & Dep’t Store Union Local 338 Retirement Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1274 (9th Cir. 2017) (listing elements of claim).

 *See* Instruction 18.1 (Securities—Definitions of Recurring Terms) for definitions of “security,” “10b-5 claim,” “misrepresentation,” “omission,” “in connection with,” and “instrumentality of interstate commerce.” National security exchanges include the New York Stock Exchange and the NASDAQ Stock Market.

 *See* 15 U.S.C. § 78j(b) (unlawful to use deceptive device in connection with purchase or sale of security) and 17 C.F.R. § 240.10b-5 (unlawful to use device to defraud, to make untrue statement or omission of material fact, or to engage in fraudulent act in connection with purchase or sale of security). *Gray v. First Winthrop Corp.*, 82 F.3d 877, 884 (9th Cir. 1996), confirms that the elements described in this instruction are required to prove a 10b-5 claim.

 A defendant “makes” a statement if the defendant has ultimate authority over the statement, including its content and whether and how to communicate it. *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011). The plaintiff must show that the defendant had control over the statement; a defendant’s significant involvement in the preparation of a prospectus containing untrue or misleading statements is not enough to show that the defendant “made” the statements.  *Id*.

 A defendant may also be liable if the defendant disseminates false statements with

intent to defraud. *Lorenzo v. S.E.C.*, 139 S. Ct. 1094 (2019). Where a defendant does not “make” a statement but disseminates information that is “understood to contain material untruths,” such conduct can fall within the scope of a 10b-5 claim. *Id*. at 1101; *see also id.* at

1103 (“[U]sing false representations to induce the purchase of securities would seem a

paradigmatic example of securities fraud.”).

 Previously, these instructions phrased the fourth element as requiring that “the plaintiff *reasonably* relied” on the misrepresentation. Several Ninth Circuit cases, however, use the phrase “justifiable reliance.” *See Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 950 (9th Cir. 2005) (“If [Plaintiff] justifiably relied on Defendants’ misrepresentation about the stock sale and, in turn, bought [company] stock based on this reliance, it incurred damages from Defendants’ fraud”); *Binder v. Gillespie*, 184 F.3d 1059, 1063 (9th Cir. 1999); *Gray*, 82 F.3d at 884.

*Revised June 2019*