**18.3 Securities—Misrepresentations or Omissions—Materiality**

The plaintiff must prove by a preponderance of the evidence that the defendant’s misrepresentation or omission was material.

A factual representation concerning a security is material if there is a substantial likelihood a reasonable investor would consider the fact important in deciding whether to buy or sell that security.

An omission concerning a security is material if a reasonable investor would have regarded what was not disclosed to [him] [her] [it] as having significantly altered the total mix of information [he] [she] [it] took into account in deciding whether to buy or sell the security.

You must decide whether something was material based on the circumstances as they existed at the time of the statement or omission.

**Comment**

In *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988), the Supreme Court adopted the standard for materiality developed in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), (whether a reasonable shareholder would “consider it important” or whether the fact would have “assumed actual significance”) as the standard for actions under 15 U.S.C. § 78j(b). The Ninth Circuit describes this standard as “objective materiality.” *In re Alphabet, Inc. Sec. Litig*., 1 F.4th 687, 705 (9th Cir. 2021).

In discussing materiality, the Ninth Circuit has applied *TSC Industries* and *Basic Inc.* in various formulations.  *See, e.g.*, *SEC v. Hui Feng*, 935 F.3d 721, 736 (9th Cir. 2019) (applying

*TSC* materiality test); *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946-48 (9th Cir. 2005) (applying *Basic Inc.* materiality test); *No. 84 Emp’r-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp*., 320 F.3d 920, 934 (9th Cir. 2003) (declining to adopt bright line rule for materiality that would require immediate change in stock price and instead engaging in “fact-specific inquiry” under *Basic Inc.*); *In re Stac Electrs. Sec. Litig.*, 89 F.3d 1399, 1408 (9th Cir. 1996) (applying test of whether there was substantial likelihood that omitted fact would have been viewed by reasonable investor as having significantly altered “total mix” of information made available); *Kaplan v. Rose*, 49 F.3d 1363, 1371 (9th Cir. 1994) (applying test of whether omission or misrepresentation would have misled reasonable investor about nature of his or her investment); *McGonigle v. Combs*, 968 F.2d 810, 817 (9th Cir. 1992) (applying test of whether there was substantial likelihood that, under all the circumstances, omitted fact would have assumed actual significance in deliberations of reasonable shareholder); *see also In re Atossa Genetics Inc. Sec. Litig.*,868 F.3d 784, 795-96 (9th Cir. 2017) (discussing relationship between materiality and reliance and noting that “materiality” may be different when plaintiff alleges direct reliance on misrepresentation, rather than fraud-on-the-market theory).

For a discussion of the distinction between mere puffery, which is not material, and a statement that is materially misleading, *see In re Quality Systems, Inc. Sec. Litig.*, 865 F.3d 1130, 1143-44 (9th Cir. 2017). In evaluating materiality, courts may consider SEC interpretive

guidance. *See In re Alphabet, Inc. Sec. Litig*., 1 F.4th at 700.

The Ninth Circuit has held that stock price movements are relevant to reliance, and not to materiality. *See Retail Wholesale & Dep’t Store Union Local 338 Retirement Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1277 (9th Cir. 2017).

The Ninth Circuit has also held that when plaintiffs make claims about the impact of

highly technical information on investment decisions, they must provide enough context to make

clear why investors would find one set of technical information meaningfully different from

another set of technical information. *See In re Nektar Therapeutics Securities Litigation*, 34 F.4th 828, 837 (9th Cir. 2022).

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