**18.4 Securities—Forward-Looking Statements**

In considering whether 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], you must distinguish between statements of fact and forward-looking statements.

Predictions, projections, and other forward-looking statements, even if ultimately proven incorrect, are generally not statements of fact, but instead forecasts about what may or may not occur in the future.

Predictions, projections and other forward-looking statements may constitute a basis for a violation of Rule 10b-5 only if the plaintiff proves by a preponderance of the evidence that, at the time the forward-looking statements were made, (1) the defendant did not actually believe the statements, (2) there was no reasonable basis for the defendant to believe the statements, or (3) the defendant was aware of undisclosed facts tending to seriously undermine the accuracy of the statements.

**Comment**

This instruction addresses “forward-looking statements” that fall outside the coverage of the safe harbor afforded to forward-looking statements by the Private Securities Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. § 78u-5(c). The PSLRA’s safe harbor has numerous exclusions. For example, the safe harbor does not apply to statements contained in audited financial statements, nor does it apply to various other categories of statements such as statements made in connection with a going-private transaction, a tender offer, or an initial public offering. *See generally* 15 U.S.C. § 78u-5(b). When the PSLRA’s safe harbor does not apply, background judicial doctrines may nonetheless govern whether statements of opinion or statements accompanied by cautionary language are actionable under Rule 10b-5. *See, e.g.*, *Retail Wholesale & Dep’t Store Union Local 338 Retirement Fund v. Hewlett-Packard* Co., 845 F.3d 1268, 1275-76 (9th Cir. 2017) (concluding that aspirational statements were not capable of being false); *In* *re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 388 & n.2 (9th Cir. 2010) (applying materiality test to forward-looking statements when PSLRA safe harbor did not apply); *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1111 (9th Cir. 2010) (holding that “vague statements of optimism” are not actionable); *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 947 (9th Cir. 2005) (applying “bespeaks caution” doctrine).

The term “forward-looking statements” refers generally to management projections of future economic performance, such as sales, revenue or earnings per share forecasts. In the context of the PSLRA safe harbor, the term means “any statement regarding (1) financial projections, (2) plans and objectives of management for future operations, (3) future economic performance, or (4) the assumptions ‘underlying or related to’ any of these issues.” *No. 84 Empl’r-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 936 (9th Cir. 2003) (quoting 15 U.S.C. § 78u-5(I)).

The Ninth Circuit has held that “transparently aspirational statements, as well as

statements of ‘mere corporate puffery, vague statements of optimism . . . or other feel-good monikers’ are generally not actionable as a matter of law” unless the statements “provide [a] concrete description of the past and present that affirmatively create[s] a plausibly misleading impression of a state of affairs that differed in a material way from the one that actually existed.” *In re Alphabet, Inc. Sec. Litig*., 1 F.4th 687, 700 (9th Cir. 2021).

When a defendant makes mixed statements containing non-forward-looking statements as well as forward-looking statements, the non-forward-looking statements are not protected by the safe harbor of the PSLRA. *In re Quality Systems, Inc. Sec. Litig.*, 865 F.3d 1130, 1146-48 (9th Cir. 2017).

As to forward-looking statements not subject to the PSLRA safe harbor, the Ninth Circuit has stated that such statements are potentially actionable under the theory that “[a] projection or statement of belief contains at least three implicit factual assertions: (1) that the statement is genuinely believed, (2) that there is a reasonable basis for that belief, and (3) that the speaker is not aware of any undisclosed facts tending to seriously undermine the accuracy of the statement.”  *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113 (9th Cir. 1989). *See also In re Oracle*, 627 F.3d at 388; *Provenz v. Miller*, 102 F.3d 1478, 1487 (9th Cir. 1996); *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 501 (9th Cir. 1992). Accordingly, “[f]or a forward-looking statement . . . to constitute a material misrepresentation giving rise to Section 10(b) or Rule 10b-5 liability, a plaintiff must prove either ‘(1) the statement is not actually believed [by the speaker], (2) there is no reasonable basis for the belief, or (3) the speaker is aware of undisclosed facts tending seriously to undermine the statement’s accuracy.’” *In re Oracle*, 627 F.3d at 388 (quoting *Provenz*, 102 F.3d at 1487) (alteration in original). “The fact that [a] forecast turn[s] out to be incorrect does not retroactively make it a misrepresentation.” *Id.* at 389. “Risk disclosures that ‘speak [] entirely of as-yet-unrealized risks and contingencies’ and do not ‘alert [] the reader that some of these risks may already have come to fruition’ can mislead reasonable investors.” *In re Alphabet, Inc. Sec. Litig*., 1 F.4th at 703.

A forward-looking statement that is not affirmatively exempted from the safe harbor’s coverage under 15 U.S.C. § 78u-5(c), is afforded safe harbor protection “if it is forward-looking and *either* is accompanied by meaningful cautionary language *or* is made without actual knowledge that it is false or misleading.” *Wochos v. Tesla, Inc.*, 985 F.3d 1180, 1190 (9th Cir. 2021) (quoting *Quality Systems*, 865 F.3d at 1141).

As to the first category, the PSLRA provides a safe harbor for identified forward-looking statements that are “accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement[s].” 15 U.S.C. § 78u-5(1)(A)(I); *see also id.* § 78u-5(2) (providing a conditional safe harbor for oral forward-looking statements). This prong of the PSLRA safe harbor codifies principles underlying the “bespeaks caution” doctrine. *See Empl’rs Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125, 1132 (9th Cir. 2004). This instruction does not address the bespeaks caution doctrine because application of that doctrine is typically not a question for the jury. *See id.* (“The bespeaks caution doctrine provides a mechanism by which a court can rule as a matter of law [typically in a motion to dismiss for failure to state a cause of action or a motion for summary judgment] that defendants’ forward-looking representations contained enough cautionary language or risk disclosure to protect the defendant against claims of securities fraud.”) (alteration in original) (quoting *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1413-15 (9th Cir. 1994)) (internal quotation marks omitted).

As to the second category, the PSLRA provides a safe harbor for forward-looking statements that the speaker actually believed were true. *See* 15 U.S.C. § 78u-5(c)(1)(B). To avoid application of the safe harbor under this category, “plaintiffs must prove that ‘forward-looking’ statements were made with ‘actual knowledge’ that they were false or misleading.” *In re Daou Sys., Inc., Sec. Litig.*, 411 F.3d 1006, 1021 (9th Cir. 2005) (quoting *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 993 (1999) (Browning, J., concurring in part and dissenting in part)). By contrast, if the statement is not covered by the PSLRA safe harbor, “[t]he requisite state of mind, at a minimum, is deliberate or conscious recklessness.” *Empl’rs Teamsters*, 353 F.3d at 1134.

*Revised Sept. 2021*