**18.5 Securities—Knowingly**

[A defendant acts knowingly when [he] [she] [it] makes an untrue statement with the knowledge that the statement was false or with reckless disregard for whether the statement was true.] [A defendant acts knowingly when [he] [she] [it] omits necessary information with the knowledge that the omission would make the statement false or misleading or with reckless disregard for whether the omission would make the statement false or misleading.]

[“Reckless” means highly unreasonable conduct that is an extreme departure from ordinary care, presenting a danger of misleading investors, which is either known to the defendant or is so obvious that the defendant must have been aware of it.]

**Comment**

This instruction addresses the element of “scienter,” which was developed in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193, *reh’g denied*, 425 U.S. 986 (1976). In *Nelson v. Serwold*, 576 F.2d 1332, 1337 (9th Cir. 1978), the court found that Congress intended Section 10(b) to reach both knowing and reckless conduct, and it interpreted the *Ernst & Ernst* decision as merely eliminating negligence as a basis for liability.

The Ninth Circuit defined “recklessness” in the context of Section 10(b) and Rule 10b–5 in *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1569 (9th Cir. 1990) (en banc), and *In re Software Toolworks Inc.*, 50 F.3d 615, 626 (9th Cir. 1994). Recklessness satisfies the scienter requirement, except as to forward-looking statements under the safe harbor provisions of the Private Securities Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. § 78u-5, for which actual knowledge that the statement was false or misleading is required. *See* Comment to Instruction 18.4 (Securities—Forward-Looking Statements).

In *Webb v. SolarCity Corp*., 884 F.3d 844, 851 (9th Cir. 2018), the Ninth Circuit explained that the scienter standard requires facts demonstrating an intent to deceive, manipulate or defraud, or “deliberate recklessness.” The court defined “deliberate recklessness” as “an extreme departure from the standard of ordinary care.” *Id*.; *see also Glazer Cap. Mgmt., L.P. v. Forescout Techs., Inc.*, 63 F.4th 747,765 (9th Cir. 2023) (stating that deliberate recklessness “is a higher standard than mere recklessness and requires more than a motive to commit fraud,” and “only satisfies scienter under § 10(b) to the extent that it reflects some degree of intentional or conscious misconduct” (quotation omitted)).

For a discussion of when a corporate officer’s scienter can be imputed to a corporation, particularly if that officer also defrauds the corporation, *see In re ChinaCast Education Corp*. *Securities Litigation*, 809 F.3d 471 (9th Cir. 2015).

The PSLRA entitles a defendant in any private action arising under Rule 10b-5 to require the court to submit a written interrogatory to the jury regarding each defendant’s state of mind at the time of the alleged violation of the securities laws. 15 U.S.C. § 78u-4(d).

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