**18.7 Securities—Justifiable Reliance—Fraud-on-the-Market Case**

The plaintiff does not have to prove that [he] [she] [it] justifiably relied on the alleged misrepresentation or omission in deciding to [purchase] [sell] the [security] [securities] in question if [he] [she] [it] proves by a preponderance of the evidence that there was an active, open market in the [security] [securities] at the time of the transaction[s] in question. An “active, open market” means that there were a large number of traders, a high level of activity, and frequent trades, such that the price of the security immediately reflects all publicly available information.

If you find that the plaintiff has proved by a preponderance of the evidence that (1) an active, open market for the [security] [securities] existed at the time of the transaction[s] in question and (2) investors reasonably relied on that market as an accurate reflection of the current market value of the [security] [securities], you may find that the plaintiff has proved that [he] [she] [it] relied on the defendant’s statements.

If, however, the defendant proves by a preponderance of the evidence that (1) the plaintiff did not actually rely on the integrity of the market or (2) the alleged misrepresentation or omission did not affect the market price of the security, then the defendant has rebutted any presumption that the plaintiff relied on the market. In that event, the plaintiff must then prove that [he] [she] [it] justifiably relied directly on the alleged misrepresentation or omission.

**Comment**

Use this instruction when a theory of fraud on the market is involved. That theory is based on the premise that when persons buy or sell publicly-traded shares, they rely on the marketplace to ensure the integrity of the price, to the extent that price is a consideration in their decision. *Basic Inc. v. Levinson*, 485 U.S. 224, 245-49 (1988); *see also Halliburton v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2409 (2014) (affirming *Basic*’s holding that “the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations”). Under the theory, a presumption of reliance is established “by demonstrating that a security is actively traded in an ‘efficient market,’ in which prices immediately reflect all publicly available information.” *Miller v. Thane Int’l, Inc.*, 615 F.3d 1095, 1103 (9th Cir. 2010). *Cammer v. Bloom*, 711 F. Supp. 1264, 1286-87 (D.N.J. 1989), “outlined a test for market efficiency in the context of a section 10(b) securities fraud class action.” *Miller*, 615 F.3d at 1102; *see also id.* at 1103 (noting that the *Cammer* test “was developed in support of [the fraud-on-the-market] presumption” and “is not appropriate for assessing loss causation”). The Ninth Circuit in *Miller* observed that “*Cammer* sets out five well-recognized factors ‘designed to help make the central determination of efficiency in a particular market.’” *Id.* (quoting *Binder v. Gillespie*, 184 F.3d 1059, 1065 (9th Cir. 1999)). These factors are (1) whether the stock trades at a high weekly volume, (2) whether securities analysts follow and report on the stock, (3) whether the stock has market makers and arbitrageurs, (4) whether the company is eligible to file SEC registration form S-3, and (5) whether there are empirical facts showing a cause-and-effect relationship between new information about the corporation and an immediate response in the stock price. *Binder*, 184 F.3d at 1065.

When the plaintiff demonstrates market efficiency, the law presumes that the market itself has factored in relevant information and the plaintiff need not prove that he or she individually or the class of purchasers whom the plaintiff seeks to represent relied on the statements or omissions on which the action is based. *In re Convergent Techs. Sec. Litig.*, 948 F.2d 507, 512 n.2 (9th Cir. 1991) (holding that in fraud-on-the-market case, plaintiff need not show actual reliance on misrepresentation or omission; instead, plaintiff must show reliance on integrity of price established by market, which was in turn influenced by misleading information or omission of information). However, the defendant may rebut evidence giving rise to the presumption of reliance. *In re Apple Computer Sec. Litig.*,886 F.2d 1109, 1115 (9th Cir. 1989). The defendant may do so in a variety of ways too numerous to list here, and always dependent on the facts of the given case. In general, however, to rebut the presumption of reliance the defendant must show that there was no link between the plaintiff’s decision to trade at a fair market price and the alleged misrepresentation or omission. *See Basic Inc.*, 485 U.S. at 248; *see also Kaplan v. Rose*, 49 F.3d 1363, 1376 (9th Cir. 1994) (holding that presumption can be rebutted by showing that information tending to refute misrepresentation had entered market through other channels). But even if some information was “out there,” corporate insiders “are not relieved of their duty to disclose material information when the information has received only brief mention in a few poorly-circulated, lightly-regarded publications.” *In re Apple Computer*, 886 F.2d at 1116.

If the jury finds in a fraud-on-the-market case that the defendant rebutted the presumption of reliance, use Instruction 18.6 (Securities—Justifiable Reliance—Generally) to instruct the jury on what the plaintiff must prove.

The Ninth Circuit has recognized that “[t]he burden of pleading loss causation is typically satisfied by allegations that the defendant revealed the truth through ‘corrective disclosures” which ‘caused the company's stock price to drop and investors to lose money.’” *Lloyd v. CVB Financial Corp.*, 811 F.3d 1200, 1209 (9th Cir. 2016) (quoting *Halliburton Co. v. Erica. P. John Fund, Inc.*, 134 S. Ct. 2398, 2406 (2014)). “[T]he ultimate issue is whether the defendant’s misstatement, as opposed to some other fact, foreseeably caused the plaintiff's loss.” *Id.* at 1210. While a defendant’s announcement of a government investigation does not, without more, qualify as a corrective disclosure, such an announcement can form the basis for a viable loss causation theory if accompanied by a subsequent corrective disclosure by the defendant. *Id.* Thus, in *Lloyd*, the Ninth Circuit concluded that the following allegations adequately pled loss causation: (1) the defendant disclosed that it had received a subpoena from the Securities and Exchange Commission, causing its stock price to drop 22 percent, (2) the market and analysts viewed the subpoena as related to the defendant's alleged earlier misrepresentations that there was no reason for “serious doubts” about a major borrower’s ability to repay loans issued by the defendant, (3) the market’s fears about the subpoena were confirmed when the defendant made a subsequent disclosure that it was writing off the bulk of the loans and classifying the remainder as nonperforming, and (4) the subsequent disclosure had a minimal effect on the defendant’s stock price, indicating that the earlier 22 percent drop reflected the market’s concern about the loans. *Id.*

In a case in which a plaintiff alleges a fraud-on-the-market theory, the definition of “materiality” may be different than when a plaintiff alleges direct reliance on a misrepresentation. *See In re Atossa Genetics Inc. Sec. Litig.*, 868 F.3d 784, 795-96 (9th Cir. 2017).

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