**6.2 Securities Exchange Act – 15 U.S.C. § 78j – Rule 10b-5 –**

**17 C.F.R. § 240.10b-5 – Misrepresentation or**

**Omission of Material Facts**

[Name of plaintiff/The Securities and Exchange Commission, also known as the SEC,] asserts a claim under the Securities Exchange Act of 1934.

The Securities Exchange Act is a federal statute that allows [the Securities and Exchange Commission, also known as the SEC,/the SEC] to enact rules and regulations prohibiting certain conduct in the purchase or sale of securities. Rule 10b-5 makes it unlawful for a person to commit a fraud in connection with the purchase or sale of a security.

A “security” is an investment in a commercial, financial, or other business enterprise with the expectation that profits or other gain will be produced by others. Some common types of securities are [stocks,] [bonds,] [debentures,] [warrants,] [and] [investment contracts]. The [describe type of security] in this case is a security.]

A person who claims that someone violated Rule 10b-5 may bring a civil action for damages that [he/she/it] suffered as a result of the violation. [The SEC may bring a civil action for the violation of Rule 10b-5.]

To prove a claim under Rule 10b-5, [name of plaintiff/the SEC] must prove each of the following facts by a preponderance of the evidence:

First, you must find that [name of defendant] used an instrumentality of interstate commerce in connection with the purchase or sale of a security.

Second, you must find that [name of defendant] made a misrepresentation of a material fact, or omitted a material fact, in connection with the purchase or sale of a security.

[And third/Third], you must find that [name of defendant] acted knowingly or with severe recklessness.

[The fourth and fifth elements are not required in cases brought by the SEC.]

[Fourth, you must find that [name of plaintiff] justifiably relied on [name of defendant]’s conduct.

And fifth, you must find that [name of plaintiff] suffered actual damages as a proximate result of [name of defendant]’s wrongful conduct.]

[In the verdict form that I’ll explain in a moment, you’ll be asked to answer questions about these factual issues.]

Now I’ll provide you with some additional instructions to help you as you consider the facts [name of plaintiff/the SEC] must prove.

For the first element – that an instrumentality of interstate commerce was used in connection with the purchase or sale of a security – you must use these definitions:

“Instrumentality of interstate commerce” means the use of the mails, telephone, Internet, or some other form of electronic communication, [or] an interstate delivery system such as Federal Express or UPS [, or a facility of a national securities exchange such as the New York Stock Exchange or NASDAQ] [, or an inter-dealer electronic-quotation-and-trading system in the over-the-counter securities market]. It’s not necessary that the misrepresentation or omission of material fact was transmitted using an instrumentality of interstate-commerce. It is enough if the interstate-commerce instrumentality was used in some phase of the transaction.

[A “facility of a national securities exchange” may include a computer-trading program or an online discount-brokerage service. Again, it’s not necessary that the facility of a national securities exchange was the means by which someone transmitted any misrepresentation or omission. It’s only necessary that the facility was used in some phase of the transaction?]

[If there is a genuine question whether the case involves a “security,” additional instructions will be needed here.]

For the second element, [name of plaintiff/the SEC] must prove that [name of defendant] either made an untrue statement of material fact or omitted a material fact, either of which would tend to mislead the prospective buyer or seller of a security.

A “misrepresentation” is a statement that is not true. An “omission” is the failure to state facts that would be necessary to make the statements made by [name of defendant] not misleading to [name of plaintiff/the SEC].

A misrepresentation or omission of fact is “material” if there is a substantial likelihood that a reasonable investor would attach importance to the misrepresented or omitted fact in determining his course of action. Put another way, there must be a substantial likelihood that a reasonable investor would view the misstated or omitted fact’s disclosure as significantly altering the total mix of available information. A minor or trivial detail is not a “material fact.”

[Predictions, opinions, and other projections (if they aren’t expressed as guarantees) aren’t representations of material facts [, and don’t require revision or amendment] – unless the person or entity communicating them doesn’t believe, or doesn’t have a reasonable basis for believing, they’re true. But if the person or entity making the predictions, opinions, or projections actually believed them at the time or had a reasonable basis for making them, then the statements are not materially misleading statements of fact. The focus is on whether the statements were false or misleading when they were made. Later events proving that the predictions, opinions, or projections were wrong don’t create a violation of Rule 10b-5.]

[If the SEC brings the case, add the following: The SEC does not need to identify any particular purchase or sale of securities by a specific person, including [name of defendant]. Rather, it’s enough if the SEC proves that the misrepresentation or omission involved or touched any purchase or sale of a security in any way.] The SEC claims that [name of defendant] made the following misrepresentations or omissions: [Describe the specific statements or omissions claimed to have been fraudulently made.]

For the second element, [name of plaintiff/the SEC] must first prove that [name of defendant] made one or more of the alleged misrepresentations of fact [or omitted facts that would be necessary to prevent other statements made by [name of defendant] from being misleading to [name of plaintiff/the SEC]]. And second, that the misrepresentation [or omission] involved “material” facts.

If [name of defendant] has previously made false or inaccurate statements regarding material facts, such as statements made in reports [he/she/it] filed with the SEC, information [he/she/it] sent to investors, or statements [he/she/it] made in press releases, [he/she/it] has a duty to correct those statements if it is discovered later that those statements weren’t true when made and they remain material to a shareholder’s investment decision.

For the third element, [name of plaintiff] must prove that [name of defendant] made the alleged misrepresentations or omissions knowingly, or with severe recklessness. The term “knowingly” means that [name of defendant] acted with an intent to deceive, manipulate, or defraud. But [name of defendant] didn’t act knowingly if [he/she/it] acted inadvertently, carelessly, or by mistake.

To act with “severe recklessness” means to engage in conduct that involves an extreme departure from the standard of ordinary care. A person acts with reckless disregard if it’s obvious that an ordinary person under the circumstances would have realized the danger and taken care to avoid the harm likely to follow.

As an example, [Name of defendant] acted “knowingly” or with severe recklessness if [he/she/it] stated material facts that [he/she/it] knew were false [or] [stated untrue facts with reckless disregard for their truth or falsity] [or] [didn’t disclose material facts that [he/she/it] knew or was severely reckless in not knowing, and knew or was severely reckless in not knowing that disclosing those facts was necessary to avoid making [his/her/its] other statements misleading.]

[The following instructions on the fourth and fifth elements are not required to be given in SEC cases. The instruction in SEC cases concludes with the bracketed instruction that is provided at the end of this instruction.]

[For the fourth element, [name of plaintiff] must prove that [he/she/it] “relied” on the alleged misrepresentations [or omissions] and was “justified” in doing so.]

[Use when fraud-on-the-market theory is not involved: If you find that the misrepresentation [or omission] didn’t affect [name of plaintiff]’s investment decision, then [name of plaintiff] didn’t “rely” on it and can’t recover on the claim. Also, [name of plaintiff] must prove that [his/her/its] reliance on [name of defendant] was justified. Reliance isn’t “justified” if [name of plaintiff] intentionally ignored or refused to investigate suspicious circumstances by disregarding a risk that [name of plaintiff] knew about, or was so obvious that [name of plaintiff] should have known about it, and the risk was so great as to make it highly probable that harm would follow.

To decide whether [name of plaintiff] justifiably relied on [name of defendant]’s alleged misrepresentations, you should consider:

• [name of plaintiff]’s sophistication and expertise in matters involving finance and securities;

• the existence of a long-standing business or personal relationship between [name of plaintiff] and [name of defendant];

• [name of plaintiff]’s access to relevant information;

• whether [name of defendant] owed a fiduciary duty to [name of plaintiff];

• whether [name of defendant] concealed fraud;

• whether [name of plaintiff] initiated the stock transaction or sought to expedite it; and

• whether [name of defendant]’s misrepresentations were general or specific.

The term “fiduciary duty” means the duty one person owes to another in special relationships of trust and confidence, in which one person justifiably expects the person who owes the duty (the fiduciary) to act in the best interests of the person to whom the duty is owed. The duties a financial advisor, an accountant, and an attorney owe to their clients are types of fiduciary duties.

You must consider all these factors to decide whether [name of plaintiff]’s reliance was justified. No single factor is enough.]

If you find that [name of defendant] omitted or failed to disclose material facts, then you may presume that [name of plaintiff] relied on [name of defendant]. The law assumes that [name of plaintiff] would have relied on material facts that were intentionally withheld. But [name of defendant] may overcome this presumption if [he/she/it] can prove, by a preponderance of the evidence, that even if [he/she/it] had disclosed the material facts, [name of plaintiff] would have made the same decision regarding the purchase or sale of a security.]

[Use when fraud-on-the-market theory is involved: If you find that [name of plaintiff] didn’t rely directly on [name of defendant]’s alleged misrepresentation [or omission], you may find that [name of plaintiff] instead relied on the integrity and regularity of the market in which the securities were traded. In that case, if you also find that [name of defendant]’s alleged deception, manipulation, or fraud affected the security’s price in the market – consequently affecting the price at which [name of plaintiff] bought or sold the security – those findings would satisfy [name of plaintiff]’s obligation of proving justifiable reliance on [name of defendant]’s conduct.]

[For the fifth element, [name of plaintiff] must prove that [he/she/it] suffered damage as a proximate result of [name of defendant]’s alleged misrepresentation [or omission]. For damage to be the “proximate result” of a misrepresentation [or omission], [name of plaintiff] must prove that the misrepresentation [or omission] was a substantial or significant contributing cause of the [his/her/its] alleged damages. Ask yourself: If [name of defendant] had not engaged in misrepresentation [or omission], would these damages have occurred? [Name of plaintiff] doesn’t have to prove that the misrepresentation [or omission] was the sole cause of the damage, only that it was a substantial or significant contributing cause.]

[If you find that [name of plaintiff] has proved [his/her/its] claim under 10b-5 by a preponderance of the evidence, you must then consider [name of plaintiff]’s damages.

You should assess the monetary amount that a preponderance of the evidence justifies as full and reasonable compensation for all of [name of plaintiff]’s damages – no more, no less. You must not impose or increase these compensatory damages to punish or penalize [name of defendant]. And you must not base these compensatory damages on speculation or guesswork because [name of plaintiff] can recover only [his/her/its] actual damages.

Actual damages are calculated as the decrease in [name of plaintiff]’s stock value that [name of defendant]’s misrepresentation [or omission] caused. The amount of damages may be expressed in the evidence on a “per-share” basis. Put another way, [name of plaintiff] may demonstrate damages by offering evidence of a dollar amount per share.

Here, [name of plaintiff]’s theory of recoverable compensatory or economic damages is: [describe theory].]

[To be given in SEC cases: If you find that the SEC has proved one or more of its claims against [name of defendant], I alone will determine the remedy or remedies to be imposed later.]

**Special Interrogatories to the Jury**

**Do you find from a preponderance of the evidence:**

 That [name of defendant] used an “instrumentality of interstate commerce” in connection with the securities transaction involved in this case?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

 That [name of defendant] made a false representation of a material fact (or omitted a material fact) in connection with the purchase or sale of a security?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

 That [name of defendant] acted “knowingly” or with “severe recklessness?”

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

[Exclude interrogatories 4, 5, and 6 in cases brought by the SEC.]

 That [name of plaintiff] “justifiably relied” on [name of defendant]’s conduct?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

 That [name of plaintiff] suffered damages as a proximate result of [name of defendant]’s wrongful conduct?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

[Note: If you answered “No” to any of the preceding questions, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If you answered “Yes” to each question, go to the next question.]

 That [name of plaintiff] suffered damages?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “Yes,”

in what amount? $\_\_\_\_\_\_\_\_\_\_\_\_\_

So Say We All.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Foreperson’s Signature

Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_