**6.4 Securities Exchange Act – 15 USC § 78j – Rule 10b-5 –**

**17 C.F.R. § 240.10b-5 – Fraudulent Practice or Course of Dealing**

[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 engage in any practice or course of dealing that would operate as a fraud in connection with the purchase or sale of any 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 [he/she/it] suffered as a result of the violation. [The SEC may bring a civil action because of the Rule 10b-5 violation claimed.]

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] engaged in an act, practice, or course of business – in connection with the purchase or sale of a security – that operated or would operate as a fraud or deceit on any person.

[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.

“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 facility of a national securities exchange was the means by which the defendant[s] used a device, scheme, or artifice to defraud someone. It’s only necessary that the facility 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 how someone engaged in a fraudulent practice or course of dealing. 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] engaged in any act, practice, or course of business, in connection with the purchase or sale of a security, that operated or would operate as a fraud or deceit on any person. [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 act, practice, or course of business that [name of defendant] engaged in involved, or touched in any way, the purchase or sale of securities.]

[Name of plaintiff/The SEC] claims that the act, practice, or course of business [name of defendant] engaged in [describe the alleged act, practice, or course of business].

A “fraud or deceit” means a lie or a trick. A fraud or deceit doesn’t have to relate to an investment’s quality or actually result in the purchase or sale of any security. It’s not necessary that [name of defendant], who was allegedly involved in the fraud or deceit, sold or purchased securities personally if the fraudulent or deceitful conduct defrauded some person.

The term “would” in the phrase “would operate as a fraud or deceit” means that the act, practice, or course of business had the capacity to defraud a purchaser or seller. It’s not necessary that the act, practice, or course of business actually defrauded someone.

For the third element, [name of plaintiff] must prove that [name of defendant] acted 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] 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.

[The following instructions on the fourth and fifth facts 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 act, practice, or course of business 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 been aware of 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.]

[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 deception, manipulation, or fraud, 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 deception, manipulation, or fraud. For damage to be the “proximate result” of a deception, manipulation, or fraud, [name of plaintiff] must prove that the deception, manipulation, or fraud was a substantial or significant contributing cause of [his/her/its] damages. Ask yourself: If [name of defendant] had not engaged in deception, manipulation, or fraud, would these damages have occurred? [Name of plaintiff] doesn’t have to prove that the deception, manipulation, or fraud 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.

[Name of plaintiff] is entitled to recover damages to compensate [him/her/it] for damages suffered as a proximate result of [name of defendant]’s conduct. 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 [for private parties: the purchase or sale of the securities involved in this case] [for SEC cases: the purchase or sale of any securities]?

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

That [name of defendant] engaged in an act, practice, or course of dealing in connection with [for private parties: the purchase or sale of the securities involved in this case] [for SEC cases: the purchase or sale of any securities] that operated, or would operate, as a fraud or deceit on any person?

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” upon [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: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_