**6.5 Securities Exchange Act § 14 – 15 U.S.C. § 77n – Rule 14a-9**

**17 C.F.R. § 14a-9 – Solicitation of Proxies**

[Name of plaintiff/The Securities and Exchange Commission, also known as the SEC] asserts a claim under Section 14 of 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. Section 14 of the Act makes it “unlawful for any person… in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security.”

Rule 14a-9 forbids a person from soliciting proxies, consents, or authorizations from security holders by any written or oral communication that, at the time and in light of the circumstances under which the person makes it, is false or misleading about any material fact, or which omits any material fact that is necessary to make the communication not false or misleading.

For the purposes of Rule 14a-9, a “security” is generally a share of stock that has the right to cast a vote in connection with the election of directors or approval of corporate actions or transactions. A “proxy” is simply an authorization the holder of stock grants to vote that stock. Because shareholders usually can’t attend shareholder meetings in person, most votes cast at those meetings are cast through proxies that have been acquired from shareholders through a proxy solicitation. A “proxy solicitation” is a communication to shareholders under circumstances reasonably calculated to procure [, withhold, or revoke] a proxy. A “proxy statement” is a document that must be sent to security holders whenever their votes are solicited.

To prove a claim under Exchange Act § 14 and Rule 14a-9,

[Name of plaintiff/the SEC] must prove each of the following elements by a preponderance of the evidence:

First, you must find that in soliciting proxies, either through a proxy statement or other written or oral communication, [name of defendant] misstated or omitted material information necessary to prevent the proxy solicitation from being misleading.

Second, you must find that [name of defendant] was negligent in making the material misstatement or omission.

[And third/Third], you must find that the proxy materials were an essential link in the accomplishment of a corporate action or transaction.

[The fourth element is not required in cases brought by the SEC.]

[And fourth, 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] must prove.

The first element that [name of plaintiff/the SEC] must prove is that the proxy solicitations at issue misrepresented or omitted material information necessary to prevent the proxy solicitation from being misleading.

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 not misleading. In particular, the information [name of plaintiff/the SEC] claims was wrongfully misrepresented or omitted from the proxy statement was [describe the specific information claimed to have been misrepresented or omitted].

A misstatement or omission of fact is “material” if there is a substantial likelihood that a reasonable shareholder would have considered the misrepresented or omitted fact important in deciding how to vote.

[Name of plaintiff/The SEC] doesn’t have to show that knowing the correct or omitted fact would cause a reasonable shareholder to change [his/her] vote. It’s enough if [name of plaintiff] shows that those facts would have been significant in a reasonable shareholder’s decision. 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.

You must base a finding of materiality on the facts that existed when the statement was made. You can’t consider events occurring after the statement or omission to determine whether the statement or omission was material when it was made, except to the extent that those facts help you understand the facts that existed at the time of the proxy statement.

[Predictions, opinions, and other projections (if they aren’t expressed as guarantees) aren’t representations of material facts – unless the person or entity communicating them doesn’t believe, or 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, expressions of opinion, or projections were wrong don’t create a violation of Rule 14a-9.]

If [name of defendant] has made false or inaccurate statements before in the proxy solicitation regarding material facts, [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 second element, [name of plaintiff] must prove that [name of defendant] was negligent in making the misrepresentation or omission. “Negligence” is the failure to exercise the due diligence, care, or competence that a reasonable person would when making representations, or deciding what facts to disclose, in the proxy solicitation. Ask yourself: Would a reasonable person have made or omitted the statements in the proxy solicitation?

For the third element, [name of plaintiff/the SEC] must prove that the proxy solicitation was an essential link in the accomplishment of a corporate action or transaction. [Name of plaintiff/the SEC] must prove that the votes of shareholders who were solicited were required at the time to accomplish the corporate action or transaction, and that without the proxy solicitation, the proposed corporate action or transaction couldn’t have been accomplished.

[The fourth element and the following damages instruction is not given in cases brought by the SEC. The instruction bracketed at the end of this instruction is given in SEC cases.]

[For the fourth element, [name of plaintiff] must prove that [he/she/it] suffered damage as a proximate result of [name of defendant]’s alleged misstatement or omission. That is, [name of plaintiff] must prove that the misrepresentation or omission was a substantial or significant contributing cause for the loss so that – except for the misrepresentation or omission – the loss wouldn’t have occurred. Ask yourself: If [name of defendant] had not misrepresented [or omitted] the facts, would these damages have occurred?]

[If you find that [name of plaintiff] has proved [his/her/its] claim 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 the damages suffered because 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] actual damages.

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], in soliciting proxies, misstated or omitted material information necessary to prevent the proxy from being misleading?

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

That [name of defendant] was negligent in making the misstatement or omission?

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

That the proxy solicitation was an “essential link” in the accomplishment of a corporate action or transaction?”

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

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

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: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_