**6.8 Section 17 of the Securities Act of 1933 –**

**15 U.S.C. § 77q – Fraud In the Offer and Sale of a Security**

**Through A Device, Scheme, or Artifice to Defraud – SEC Version**

The Securities and Exchange Commission, also known as the SEC, asserts a claim under the Securities Act of 1933.

The Securities Act is a federal statute prohibiting certain conduct in the offer or sale of securities. Section 17 [, like Section 10 and Rule 10b-5,] makes it unlawful for a person to employ any device, scheme, or artifice to defraud in connection with the offer 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.]

To prove a claim under Section 17 of the Securities Act, 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 offer to sell or sale of a security.

Second, you must find that [name of defendant] used a device, scheme, or artifice to defraud someone in connection with the offer to sell or sale of a security.

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

[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 the SEC must prove.

For the first element – that an instrumentality of interstate commerce was used in connection with the offer to sell 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 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.]

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

The terms “sale” or “sell” mean the transfer of a security for value. This includes the contract for sale for value or any other disposition for value of a security or interest in a security. An “offer,” “offer to sell,” or “offer for sale” means attempting to dispose of a security or an interest in a security for value by inviting buyers.

For the second element, the SEC must prove that [name of defendant] used a device, scheme, or artifice to defraud in the offer to sell or sale of a security. The SEC does not need to identify any particular offer to sell or sale of securities by a specific person, including [name of defendant]. Rather, it’s enough if the SEC proves that the device, scheme, or artifice to defraud [name of defendant] used or employed involved, or touched in any way, the offer to sell or sale of securities.

The SEC has alleged that the scheme or device [name of defendant] employed [describe the alleged scheme or device].

A “scheme” is a design or plan formed to accomplish some purpose. A “device,” when used in an unfavorable sense, is a “trick” or “fraud.” Put another way, the term “device, scheme, or artifice to defraud” would refer to any plan or course of action that involves false or fraudulent pretenses, untrue statements of material facts, omissions of material facts, or representations, promises, and patterns of conduct calculated to deceive.

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 the Defendants not misleading to the Plaintiff.

A misstatement 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.”

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/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.

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 offer to sell or sale of any securities?

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

 That [name of defendant] used a device, scheme, or artifice to defraud in connection with the offer to sell or sale of any securities?

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

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

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

So Say We All.

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

Foreperson’s Signature

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