**6.9 Section 17 of the Securities Act of 1933 – 15 U.S.C. § 77q–**

**Misrepresentation or Omission in the Offer or Sale**

**of a Security – 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 obtain money or property using any untrue statement of a material fact or by omitting any material fact necessary to make statements, in light of the circumstances under which they were made, not misleading in connection with the offer to sell 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.]

To prove a claim under Securities Act § 17, 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] directly or indirectly made one or more misrepresentations of material fact [or omissions of material fact] in the offer to sell or sale of a security.

And third, you must find that [name of defendant] was negligent in making the representation [or omission].

[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 misrepresentation or omission of material fact actually 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.]

The terms “sale” or “sell” mean the transfer of a security for value. This includes the transfer of a contract of 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 someone made a misrepresentation of material fact [or an omission of material fact]. The SEC claims that [name of defendant] is responsible for the following misrepresentations of fact [or omissions]: [Describe the alleged misrepresentations or omissions claimed to have been fraudulently made.]

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 SEC.

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.”

[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 have a reasonable basis for believing, they’re true. But if the person or entity making the predictions, expressions of opinion, 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 at the time they were made. Subsequent events proving that the predictions, expressions of opinion, or projections were wrong don’t create a violation of § 17.]

If [name of defendant] has made false or inaccurate statements regarding material facts before, such as statements made in reports [he/she/it] filed with the Securities Exchange Commission, 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, the SEC must prove that [name of defendant] was negligent in making materially false or misleading statements or omissions in connection with the offer to sell or sale of a security. “Negligence” is the failure to exercise the due diligence, care, or competence that a reasonable person would when making representations, or failing to disclose facts, in the proxy solicitation. Ask yourself: Would a reasonable person have omitted or made the statements?

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] directly or indirectly made one or more misrepresentations of fact [or omissions of fact necessary to make other statements that were made not misleading] in connection with the offer to sell or sale of a security?

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

That the misrepresentation [or omission] was material?

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

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

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

So Say We All.

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

Foreperson’s Signature

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