

18.1 Securities—Purpose and Selected Definitions

Congress enacted the securities laws to protect the integrity of financial markets. The plaintiff [name] claims to have suffered a loss caused by the defendant [name]'s violation of certain of these laws.

There are terms concerning securities laws that have a specific legal meaning. The following definitions apply throughout these instructions, unless noted otherwise.

[A “security” is an investment of money in a commercial, financial, or other business enterprise, with the expectation of profit or other gain produced by the efforts of others. Some common types of securities are [stocks,] [bonds,] [debentures,] [warrants,] [and] [investment contracts].]

The buying and selling of securities are controlled by the Securities Laws. Many of these laws are administered by the United States Securities and Exchange Commission (SEC).

A “10b-5 claim” is a claim brought under a federal statute, Section 10(b) of the Securities Exchange Act of 1934, which prohibits acts of deception in connection with the purchase or sale of a security and in violation of rules and regulations that the SEC has the duty and power to issue. A corresponding SEC Rule, Rule 10b-5, prohibits the misrepresentation of material facts and the omission of material facts in connection with the purchase or sale of securities. A person or business entity who violates the securities laws, including Rule 10b-5, may be liable for damages caused by the violation.

[A “misrepresentation” is a statement of material fact that is false or misleading when it is made. [A statement may be misleading even if it is literally true if the context in which the statement was made caused the listener or reader to remain unaware of the actual state of affairs.]]

[An “omission” is a failure to disclose a material fact that needed to be disclosed to prevent other statements that were made from being misleading.]

[A “broker” buys and sells securities for clients, usually for a commission. A broker can also be a dealer.]

[A “dealer” buys securities and resells them to clients. A dealer also can be a broker.]

[A “controlling person” is [an individual who] [a company that] possesses the power to direct the management or policies of a business enterprise or of another person involved in the management or policymaking of the enterprise. A broker or a dealer may be a controlling person.]

["In connection with" means that there was some relationship, or nexus, between the allegedly fraudulent conduct and the [sale] [purchase] of the securities. [The defendant's conduct may be in connection with a purchase or sale of a security even if the defendant did not actually participate in any securities transaction.]]

An instrumentality of interstate commerce includes the postal mails, e-mails, telephone, telegraph, telefax, interstate highway system, internet and similar methods of communication, and travel from one state to another within the United States.

Comment

"Materiality" is defined in Instruction 18.3 (Securities—Misrepresentations or Omissions—Materiality).

Whether a specific financial instrument qualifies as a security can be a threshold issue. *SEC v. Hui Feng*, 935 F.3d 721, 728-729 (9th Cir. 2019). The definition of "security" includes "any . . . investment contract." 15 U.S.C. § 78c(a)(10). The Supreme Court's decision in *Howey* and later case law hold that an "investment contract" exists when there is the investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others. *See SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946); *United Housing Fund., Inc. v. Forman*, 421 U.S. 837, 851-52 (1975). "Courts applying *Howey* 'conduct an objective inquiry into the character of the instrument or transaction offered based on what the purchasers were 'led to expect,'" including an analysis of the promotional materials associated with the transaction." *Hui Feng*, 935 F.3d at 729 (quoting *Warfield v. Alaniz*, 569 F.3d 1015, 1021 (9th Cir 2009)). "[I]f an investor is dependent on a seller to provide efforts that could lead to profits," such as where the seller has "practical" or "complete control" over an enterprise and its profitability, then the *Howey* efforts-of-others requirement is satisfied. *SEC v. Barry*, 146 F.4th 1242, 1252 (9th Cir. 2025). Even intrastate sales can be subject to regulation if part of an integrated sales offering to out-of-state buyers. *Id.* at 1261. Whether an offering is integrated depends on a five-part test under *SEC v. Murphy*, 626 F.2d 633 (9th Cir. 1980). *Id.*

Whether a security is subject to federal securities law's registration requirements depends

in part on whether the security is sold interstate. *Id.* at 1260 (quoting 15 U.S.C. § 77c(a)(11)).

Fractional interests in life settlements were not exempt from registration requirements where the

interests shared a financing scheme, were the same type of security, and were offered to at least

one out-of-state resident. *Id.* In such a scenario, the offerings were part of an integrated, interstate offering. *Id.*

A statement of opinion does not constitute an “untrue statement of material fact” simply because the stated opinion ultimately proves incorrect. *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 176 (2015). For example, a statement that is merely aspirational—such as a corporate code of conduct—generally is not actionable because it cannot be said to be false. *See Retail Wholesale & Dep’t Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1275-76 (9th Cir. 2017). But an opinion is actionable as a false statement if the speaker does not sincerely hold the view or belief expressed regarding the material representation or if the opinion contains a material, verifiable statement of fact that is untrue. *Omnicare*, 575 U.S. at 183-85. Further, an opinion may be actionable if the speaker omits material facts necessary to make the opinion not misleading. *Id.* at 185-91. When the omission of a fact, taken in its full context, makes an opinion misleading to a reasonable investor, securities law “creates liability only for the omission of material facts that cannot be squared with such a fair reading.” *Id.* at 190-91. Although *Omnicare* was decided under § 11 of the Securities Act of 1933, the Ninth Circuit has clarified that the pleading requirements set forth in *Omnicare* apply to claims under § 10(b) of the 1934 Act and Rule 10b-5. *City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605, 616 (9th Cir. 2017); *see Glazer Cap. Mgmt. v. Forescout Techs., Inc.*, 63 F.4th 747, 764, 771, 779 (9th Cir. 2023) (applying *Omnicare* in the context of § 10(b) and Rule 10b-5 claims). *See also In re Cloudera Inc.*, 121 F.4th 1180, 1187-89 (9th Cir. 2024) (explaining that “cloud-related” terminology, such as “cloud-native,” “native public cloud services,” and “hybrid cloud,” in the allegedly false statements was not pleaded with particularity because the “terms lack[ed] a plain or ordinary meaning,” and the plaintiff failed to plead facts supporting his definitions of the terms).

To assess falsity as a basis for a claim under Rule 10b-5, courts look to “the perspective of the reasonable investor.” *Sneed v. Talphera, Inc.*, 147 F.4th 1123, 1133 (9th Cir. 2025). A court needs “to look at ‘the context surrounding the statement.’” *Id.* (quoting *Weston Fam. P’ship. LLLP v. Twitter, Inc.*, 29 F.4th 611, 622 (9th Cir. 2022)). Context matters because courts presume that a reasonable investor—who has money on the line—acts with care and seeks out relevant information. *Id.* (citing *SEC v. Monarch Fund*, 608 F.2d 938, 942 (2d Cir. 1979) (“All reasonable investors seek to obtain as much information as they can before purchasing or selling a security.”)). A reasonable investor cares about a statement’s “surrounding text, including hedges, disclaimers, and apparently conflicting information.” *Omnicare, Inc.*, 575 U.S. at 190.

As to “omissions,” the Supreme Court has held that Rule 10b-5 is violated by nondisclosure only when there is a duty to disclose. *See Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988) (“Silence, absent a duty to disclose, is not misleading under Rule 10b-5.”).

There is a duty to disclose “when necessary ‘to make . . . statements made, in the light of the circumstances under which they were made, not misleading.’” *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011) (citing 17 C.F.R. § 240.10b-5(b)); *see also Hanon v. Dataproducts Corp.*, 976 F.2d 497, 504 (9th Cir. 1992) (“Rule 10b-5 imposes a duty to disclose material facts that are necessary to make disclosed statements, whether mandatory or volunteered, not misleading”). In addition, the Supreme Court has stated that “[p]ure omissions are not actionable under Rule 10b-5(b).” *Macquarie Infrastructure Corp. v. Moab Partners*, 601 U.S. 257, 260, 264 (2024) (holding that the failure to disclose information that Item 303 of SEC Regulation S-K requires be provided in periodic public filings does not, by itself, support a private action under Rule 10b-5(b); that rule prohibits only misrepresenting material facts and omitting material facts that are necessary to make the statements that are made not misleading).

A duty of disclosure also may arise when the parties have “a fiduciary or agency relationship, prior dealings, or circumstances such that one party has placed trust and confidence in the other.” *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1157 (9th Cir. 1996) (citations and internal quotation marks omitted) (holding that a financier of a leveraged buyout of a corporation did not have a duty to disclose material information regarding the corporation to investors in the corporation’s debentures). A notable example of Rule 10b-5 liability for material omissions arising out of a fiduciary relationship is insider trading. *See Chiarella v. United States*, 445 U.S. 222, 228 (1980) (recognizing that insider trading is actionable under Section 10(b) because “a relationship of trust and confidence [exists] between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation”). It bears emphasis, however, that a trust relationship is not essential to establishing liability for failure to disclose under Rule 10b-5; a defendant can assume a duty to disclose by “affirmatively tell[ing] a misleading half-truth about a material fact to a potential investor[,] . . . independent of any responsibilities arising from a trust relationship.” *United States v. Laurienti*, 611 F.3d 530, 541 (9th Cir. 2010).

Regarding “brokers,” the Ninth Circuit has used the totality-of-the-circumstances approach. *See Hui Feng*, 935 F.3d at 731-34. In determining if an individual acted as a broker, courts may consider whether that individual:

- (1) is an employee of the issuer of the security;
- (2) received transaction-based income such as commissions rather than a salary;
- (3) sells or sold securities from other issuers;
- (4) was involved in negotiations between issuers and investors;
- (5) advertis[ed] for clients;

- (6) gave advice or made valuations regarding the investment;
- (7) was an active finder of investors; and
- (8) regularly participates in securities transactions.

Id.

Regarding “controlling persons,” see Section 20(a) of the 1934 Act, 15 U.S.C. § 78f(a). *See also No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Corp.*, 320 F.3d 920, 945 (9th Cir. 2003) (discussing controlling person liability).

Regarding the phrase “in connection with,” the Ninth Circuit has noted:

To show a Rule 10b-5 violation, a private plaintiff must prove a “causal connection between a defendant’s misrepresentation and [the] plaintiff’s injury[,]” . . . a proximate relationship between the plaintiff’s injury and the purchase or sale of a security[,] . . . [and] a connection between the defendant’s alleged misrepresentation and the security at issue.

Levine v. Diamantheset, Inc., 950 F.2d 1478, 1485-86 (9th Cir. 1991) (citations omitted) (first alteration in original). A defendant need not, however, have participated in any securities transaction so long as that defendant was engaged in fraudulent conduct that was “in connection with” a purchase or sale. *See Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971) (holding that fraudulent conduct is “in connection with” a purchase or sale if the alleged fraudulent conduct is “touching” the securities transaction).

Regarding the phrase “instrumentality of interstate commerce,” it is not necessary that interstate mailings, interstate telephone calls, or other interstate use of instrumentalities of interstate commerce be proved; intrastate use of such instrumentalities of interstate commerce is sufficient to satisfy the jurisdictional requirements. *Spilker v. Shayne Labs., Inc.*, 520 F.2d 523, 526 (9th Cir. 1975).

Revised December 2025