18.3 Securities—Misrepresentations or Omissions—Materiality

The plaintiff [*name*] must prove by a preponderance of the evidence that the defendant [*name*]'s misrepresentation or omission was material. A factual representation concerning a security is material if there is a substantial likelihood a reasonable investor would consider the fact important in deciding whether to buy or sell that security. An omission concerning a security is material if a reasonable investor would have regarded what was not disclosed to [him] [her] [*other pronoun*] as having significantly altered the total mix of information [he] [she] [*other pronoun*] took into account in deciding whether to buy or sell the security.

You must decide whether something was material based on the circumstances as they existed at the time of the statement or omission.

Comment

In *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988), the Supreme Court adopted the standard for materiality developed in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), (whether a reasonable shareholder would "consider it important" or whether the fact would have "assumed actual significance") as the standard for actions under 15 U.S.C. § 78j(b). The Ninth Circuit describes this standard as "objective materiality." *In re Alphabet, Inc. Sec. Litig.*, 1 F.4th 687, 705 (9th Cir. 2021).

In discussing materiality, the Ninth Circuit has applied *TSC Industries* and *Basic Inc.* in various formulations. *See, e.g.*, *SEC v. Hui Feng*, 935 F.3d 721, 736 (9th Cir. 2019) (applying *TSC Industries* materiality test); *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946-48 (9th Cir. 2005) (applying *Basic Inc.* materiality test); *No. 84 Emp'r-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 934 (9th Cir. 2003) (declining to adopt a bright line rule for materiality that would require an immediate change in stock price and instead engaging in a "fact-specific inquiry" under *Basic Inc.*); *In re Stac Electrs. Sec. Litig.*, 89 F.3d 1399, 1408 (9th Cir. 1996) (applying test of whether there was a substantial likelihood that the omitted fact would have been viewed by reasonable investor as having significantly altered the "total mix" of information made available); *Kaplan v. Rose*, 49 F.3d 1363, 1371 (9th Cir. 1994) (applying test of whether the omission or misrepresentation would have misled a reasonable investor about the nature of his or her investment); *McGonigle v. Combs*, 968 F.2d 810, 817 (9th Cir. 1992) (applying test of whether there was a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of a reasonable shareholder); *see also In re Atossa Genetics Inc. Sec. Litig.*, 868 F.3d 784, 795-96 (9th Cir. 2017) (discussing the relationship between materiality and reliance and noting that "materiality" may be different when plaintiff alleges direct reliance on misrepresentation, rather than fraud-on-the-market theory). For a discussion of the distinction between mere puffery, which is not material, and a statement that is materially misleading, see *In re Quality Systems, Inc. Sec. Litig.*, 865 F.3d 1130, 1143-44 (9th Cir. 2017). *See also In re Sorrento Therapeutics, Inc. Sec. Litig.*, 97 F.4th 634, 641 (9th Cir.

2024) (concluding that a biopharmaceutical company's statements regarding a promising cure for COVID-19 was simply enthusiasm and corporate optimism rather than materially misleading). In evaluating materiality, courts may consider SEC interpretive guidance. *See In re Alphabet, Inc. Sec. Litig*., 1 F.4th at 700. The Ninth Circuit has held that stock price movements are relevant to reliance and not to materiality. *See Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1277 (9th Cir. 2017).

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. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175 (2015).

In *Sneed*, when confronted with a FDA Warning letter central to healthcare providers, the court explained that it was not relevant for a reasonable investor. 147 F.4th at 1133-34 (citing *Police Ret. Sys. of St. Louis v. Intuitive Surgical*, 759 F.3d 1051, 1061 (9th Cir. 2014)). The court reasoned just because the FDA requires disclosure of specific instructions to healthcare providers, it does not mean the omission of that information is relevant for investors. *Id.*

The Ninth Circuit has also held that when plaintiffs make claims about the effect of highly technical information on investment decisions, they must provide enough context to make clear why investors would find one set of technical information meaningfully different from another set of technical information. *See In re Nektar Therapeutics Sec. Litig.*, 34 F.4th 828, 837 (9th Cir. 2022).

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