

18.4 Securities—Forward-Looking Statements

In considering whether the defendant [name] [made an untrue statement of a material fact] [omitted a material fact necessary under the circumstances to keep the statements that were made from being misleading], you must distinguish between statements of fact and what the law calls “forward-looking statements.”

A prediction, projection, or other forward-looking statement, even if ultimately proven incorrect, generally is not statement of fact. Instead, it is merely a forecast about what may or may not occur in the future.

A prediction, projection, or other forward-looking statement may constitute a basis for a violation of Rule 10b-5 only if the plaintiff proves by a preponderance of the evidence that, at the time the forward-looking statement was made, (1) the defendant did not actually believe the statement, (2) there was no reasonable basis for the defendant to believe the statement, or (3) the defendant was aware of undisclosed facts tending to seriously undermine the accuracy of the statement.

Comment

This instruction addresses “forward-looking statements” that fall outside the coverage of the safe harbor afforded to forward-looking statements by the Private Securities Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. § 78u-5(c). The PSLRA’s safe harbor has several exclusions. For example, the safe harbor does not apply to statements contained in audited financial statements, nor does it apply to various other categories of statements, such as statements made in connection with a going private transaction, a tender offer, or an initial public offering. *See generally* 15 U.S.C. § 78u-5(b). When the PSLRA’s safe harbor does not apply, background judicial doctrines may nonetheless govern whether a statement of opinion or a statement accompanied by cautionary language is actionable under Rule 10b-5. *See, e.g., Retail Wholesale & Dep’t Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1275-76 (9th Cir. 2017) (concluding that aspirational statements were not capable of being false); *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 388 & n.2 (9th Cir. 2010) (applying materiality test to forward-looking statements when the PSLRA safe harbor did not apply); *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1111 (9th Cir. 2010) (holding that “vague statements of optimism” are not actionable); *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 947 (9th Cir. 2005) (applying the “bespeaks caution” doctrine).

The term “forward-looking statements” refers generally to management projections of future economic performance, such as sales, revenues, or earnings per share forecasts. In the context of the PSLRA safe harbor, the term means “any statement regarding (1) financial projections, (2) plans and objectives of management for future operations, (3) future economic performance, or (4) the assumptions ‘underlying or related to’ any of these issues.” *No. 84 Empl’r-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920,

936 (9th Cir. 2003) (quoting 15 U.S.C. § 78u-5(I)).

The Ninth Circuit has held that “transparently aspirational statements, as well as statements of ‘mere corporate puffery, vague statements of optimism . . . or other feel-good monikers’ are generally not actionable as a matter of law” unless the statements “provide [a] concrete description of the past and present that affirmatively create[s] a plausibly misleading impression of a state of affairs that differed in a material way from the one that actually existed.” *In re Alphabet, Inc. Sec. Litig.*, 1 F.4th 687, 700 (9th Cir. 2021).

When a defendant makes mixed statements containing both non-forward-looking statements as well as forward-looking statements, the non-forward-looking statements are not protected by the safe harbor of the PSLRA. *In re Quality Systems, Inc. Sec. Litig.*, 865 F.3d 1130, 1146-48 (9th Cir. 2017).

Regarding forward-looking statements that are not expressly protected under the PSLRA safe harbor, the Ninth Circuit has stated that such statements are potentially actionable under the theory that “[a] projection or statement of belief contains at least three implicit factual assertions: (1) that the statement is genuinely believed, (2) that there is a reasonable basis for that belief, and (3) that the speaker is not aware of any undisclosed facts tending to seriously undermine the accuracy of the statement.” *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113 (9th Cir. 1989); see *In re Oracle*, 627 F.3d at 388; *Provenz v. Miller*, 102 F.3d 1478, 1487 (9th Cir. 1996); *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 501 (9th Cir. 1992). Accordingly, “[f]or a forward-looking statement . . . to constitute a material misrepresentation giving rise to Section 10(b) or Rule 10b-5 liability, a plaintiff must prove either ‘(1) the statement is not actually believed [by the speaker], (2) there is no reasonable basis for the belief, or (3) the speaker is aware of undisclosed facts tending seriously to undermine the statement’s accuracy.’” *In re Oracle*, 627 F.3d at 388 (third alteration in original) (quoting *Provenz*, 102 F.3d at 1487). “The fact that [a] forecast turn[s] out to be incorrect does not retroactively make it a misrepresentation.” *Id.* at 389. “Risk disclosures that ‘speak[] entirely of as-yet-unrealized risks and contingencies’ and do not ‘alert[] the reader that some of these risks may already have come to fruition’ can mislead reasonable investors.” *In re Alphabet, Inc. Sec. Litig.*, 1 F.4th at 703 (alterations in original) (quoting *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 986 (9th Cir. 2008)).

A forward-looking statement that is not affirmatively exempted from the safe harbor’s coverage under 15 U.S.C. § 78u-5(c) is afforded safe harbor protection “if it is forward-looking and *either* is accompanied by meaningful cautionary language *or* is made without actual knowledge that it is false or misleading.” *Wochos v. Tesla, Inc.*, 985 F.3d 1180, 1190 (9th Cir. 2021) (quoting *Quality Systems*, 865 F.3d at 1141).

Regarding the first category, the PSLRA provides a safe harbor for identified forward-looking statements that are “accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in

the forward-looking statement[s].” 15 U.S.C. § 78u-5(c)(A)(i); *see also id.* § 78u-5(c)(2) (providing a conditional safe harbor for oral forward-looking statements). This prong of the PSLRA safe harbor codifies principles underlying the “bespeaks caution” doctrine. *See Empl’rs Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125, 1132 (9th Cir. 2004). This instruction does not address the bespeaks caution doctrine because application of that doctrine is typically not a question for the jury. *See id.* (“The bespeaks caution doctrine provides a mechanism by which a court can rule as a matter of law [typically in a motion to dismiss for failure to state a cause of action or a motion for summary judgment] that defendants’ forward-looking representations contained enough cautionary language or risk disclosure to protect the defendant against claims of securities fraud.”) (alteration in original) (quoting *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1413-15 (9th Cir. 1994)) (internal quotation marks omitted).

Regarding the second category, the PSLRA provides a safe harbor for forward-looking statements that the speaker believed were true. *See* 15 U.S.C. § 78u-5(c)(1)(B). To avoid application of the safe harbor under this category, “plaintiffs must prove that ‘forward-looking’ statements were made with ‘actual knowledge’ that they were false or misleading.” *In re Daou Sys., Inc., Sec. Litig.*, 411 F.3d 1006, 1021 (9th Cir. 2005) (quoting *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 993 (1999) (Browning, J., concurring in part and dissenting in part)). By contrast, if the statement is not covered by the PSLRA safe harbor, “[t]he requisite state of mind, at a minimum, is deliberate or conscious recklessness.” *Empl’rs Teamsters*, 353 F.3d at 1134.

There also is a third statutory safe harbor, which is not mentioned in this instruction. This third safe harbor exculpates any forward-looking statement that is “immaterial.” *See* 15 U.S.C. § 78u-5(c)(1)(A)(ii). It is not referred to in this instruction because “materiality” already is an express element of the claim (*see* Instruction 18.2 (Securities—Rule 10b-5 Claim), first element) and is defined separately (*see* Instruction 18.3 (Securities—Misrepresentations or Omissions—Materiality)).

Revised September 2024