

18.5 Securities—Knowingly and Recklessly

[A defendant acts knowingly when [he] [she] [other pronoun] makes an untrue statement with the knowledge that the statement was false or with reckless disregard for whether the statement was true.] [A defendant acts knowingly when [he] [she] [other pronoun] omits necessary information with the knowledge that the omission would make the statement false or misleading or with reckless disregard for whether the omission would make the statement false or misleading.]

[A defendant acts recklessly when [he] [she] [other pronoun] engages in highly unreasonable conduct that is an extreme departure from ordinary care, presenting a danger of misleading investors, which is either known to the defendant or is so obvious that the defendant must have been aware of it.]

Comment

This instruction addresses the element of “scienter,” which was developed in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). In *Nelson v. Serwold*, 576 F.2d 1332, 1337 (9th Cir. 1978), the court held that Congress intended Section 10(b) to reach both knowing and reckless conduct, and it interpreted the *Ernst & Ernst* decision as merely eliminating negligence as a basis for liability.

In the Private Securities Litigation Reform Act of 1995 (“PSLRA”), 109 Stat. 737, Congress added “[e]xacting pleading requirements,” among other things, as a “check against abusive litigation.” *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313 (2007). For pleading purposes, a plaintiff must “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” *Id.* at 314 (quoting 15 U.S.C. § 78u–4(b)(2)). In *Webb v. SolarCity Corp.*, 884 F.3d 844, 851 (9th Cir. 2018), the Ninth Circuit explained that the scienter standard requires facts demonstrating an intent to deceive, manipulate or defraud, or “deliberate recklessness.” The court defined “deliberate recklessness” as “an extreme departure from the standards of ordinary care, which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.” *Id.* (brackets, emphasis, and citation omitted); see also *Glazer Cap. Mgmt. v. Forescout Techs., Inc.*, 63 F.4th 747, 765 (9th Cir. 2023) (stating that deliberate recklessness “is a higher standard than mere recklessness and requires more than a motive to commit fraud,” and “only satisfies scienter under § 10(b) to the extent that it reflects some degree of intentional or conscious misconduct” (citation omitted)); *Espy v. J2 Global, Inc.*, 99 F. 4th 527, 536–37 (9th Cir. 2024) (declining to hold that the complaint alleged facts giving rise to a strong inference of scienter where the “majority of [two witnesses’] statements fail to establish reliability or personal knowledge, or simply amount to criticisms of [the defendant’s] management practices and compensation structures,” and which, “even if . . . reliable,” were “simply negative opinions of [the defendant,] . . . not statements which are themselves indicative of scienter”) (citations omitted)).

The PSLRA entitles a defendant in any private action arising under Rule 10b-5 to require the court to submit a written interrogatory to the jury regarding each defendant's state of mind at the time of the alleged violation of the securities laws. 15 U.S.C. § 78u-4(d). For a discussion of when a corporate officer's scienter can be imputed to a corporation, particularly if that officer also defrauds the corporation, see *In re ChinaCast Education Corp. Securities Litigation*, 809 F.3d 471 (9th Cir. 2015).

Scienter can also be shown "in the rare circumstances" when allegations are "not particularized," but "the nature of the relevant fact is of such prominence that it would be absurd to suggest that management was without knowledge of the matter." *Construction Laborers Pension Tr. of Greater St. Louis v. Funko, Inc.*, 166 F.4th 805, 831 (9th Cir. 2025) (internal quotation marks and citations omitted). In *Funko*, the court held that plaintiffs alleged scienter based on the theory that CEO and CFO of company had to know about problems with inventory and implementation of new ERP software, since those were main areas of focus and concern for the company. *Id.* at 833-34.

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