This is a redline/strikeout copy showing the May 2020 changes to the Ninth Circuit civil instructions. For a discussion of these changes, see the trialdex,com blog.

9.11 PARTICULAR RIGHTS—FIRST AMENDMENT—"CITIZEN" PLAINTIFF

As previously explained, the plaintiff has the burden of proving that the act[s] of the defendant [*name*] deprived the plaintiff of particular rights under the United States Constitution. In this case, the plaintiff alleges the defendant deprived [him] [her] of [his] [her] rights under the First Amendment to the Constitution when [*insert factual basis of the plaintiff's claim*].

Under the First Amendment, a citizen has the right [to free expression] [to petition the government] [to access the courts] [*other applicable right*]. ~~In order to prove~~To establish the defendant deprived the plaintiff of this First Amendment right, the plaintiff must prove the following additional elements by a preponderance of the evidence:

1. the plaintiff was engaged in a constitutionally protected activity;

2. the defendant's actions against the plaintiff would chill a person of ordinary firmness from continuing to engage in the protected activity; and

3. the plaintiff's protected activity was a substantial or motivating factor in the defendant's conduct.

[I instruct you that the plaintiff's [speech in this case about [*specify*]] [*specify conduct*] was protected under the First Amendment and, therefore, the first element requires no proof.]

A substantial or motivating factor is a significant factor, though not necessarily the only factor.

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3–9.8, and when the plaintiff is a private citizen. Use Instruction 9.9 (Particular Rights—First Amendment—Public Employees—Speech) when the plaintiff is a public employee. Because this instruction is phrased in terms focusing the jury on the defendant's liability for certain acts, the instruction should be modified to the extent liability is premised on a failure to act ~~in order~~ to avoid any risk of misstating the law. *See Clem v. Lomeli*, 566 F.3d 1177, 1181-82 (9th Cir. 2009).

Under the First Amendment to the United States Constitution, a citizen has the right to be free from governmental action taken to retaliate against the citizen's exercise of First Amendment rights or to deter the citizen from exercising those rights in the future. *Sloman v. Tadlock,* 21 F.3d 1462, 1469-70 (9th Cir. 1994). "Although officials may constitutionally impose time, place, and manner restrictions on political expression carried out on sidewalks and

median strips, they may not 'discriminate in the regulation of expression on the basis of content of that expression.' State action designed to retaliate against and chill political expression strikes at the very heart of the First Amendment." *Id*. (citations omitted).

However, "members of the public do not have a constitutional right to force the government to listen to their views...[a]nd the First Amendment does not compel the government to respond to speech directed toward it (citations omitted)." *L.F. v. Lake Washington School District #414*, 947 F.3d 621, 626 (9th Cir. 2020).

Thus, ~~in order~~ to demonstrate a First Amendment violation, a citizen plaintiff must provide evidence showing that "by his actions [the defendant] deterred or chilled [the plaintiff's] political speech and such deterrence was a substantial or motivating factor in [the defendant's] conduct." *Id.* (quoting *Mendocino Env'l Ctr. v. Mendocino County*, 14 F.3d 457, 459-60 (9th Cir. 1994). Defining "substantial or motivating factor" as a "significant factor" does not misstate the law. *Ostad v. Or. Health Scis. Univ.*, 327 F.3d 876, 884-85 (9th Cir. 2003); *see also Capp v. City of San Diego*, 940 F.3d 1046, 1056 (9th Cir. 2019) (explaining that retaliatory intent may still be one substantial or motivating factor for retaliatory conduct even if other, non-retaliatory reasons exist). A plaintiff need not prove, however, that "his speech was actually inhibited or suppressed." *Mendocino Env'l Ctr.*, 192 F.3d at 1288; *see also Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016) ("A plaintiff may bring a Section 1983 claim alleging that public officials, acting in their official capacity, took action with the intent to retaliate against, obstruct, or chill the plaintiff's First Amendment rights. To bring a First Amendment retaliation claim, the plaintiff must allege that (1) it engaged in constitutionally protected activity; (2) the defendant's actions would 'chill a person of ordinary firmness' from continuing to engage in the protected activity; and (3) the protected activity was a substantial or motivating factor in the defendant's conduct—i.e., that there was a nexus between the defendant's actions and an intent to chill speech. Further, to prevail on such a claim, a plaintiff need only show that the defendant 'intended to interfere' with the plaintiff's First Amendment rights and that it suffered some injury as a result; the plaintiff is not required to demonstrate that its speech was actually suppressed or inhibited." (citations omitted)).

But see Sharp v. County of Orange, 871 F.3d 901, 919 (9th Cir. 2017) (applying but-for causation standard in summary judgment context); *see also Skoog v. County of Clackamas*, 469 F.3d 1221, 1231-32 (9th Cir. 2006).

In determining whether the First Amendment protects student speech in a public school, it is error to use the "public concern" standard applicable to actions brought by governmental employees. *Pinard v. Clatskanie Sch. Dist. 6J,* 467 F.3d 755, 759 (9th Cir. 2006). Instead, the proper standard to apply to student speech is set forth in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 514 (1969). *Pinard*, 467 F.3d at 759; *see also Ariz. Students' Ass'n*, 824 F.3d at 867; *O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016); *Corales v. Bennett*, 567 F.3d 554, 562-68 (9th Cir. 2009).

"A speech restriction cannot satisfy the time, place, manner test if the restriction does not contain clear standards." *OSU Student All. v. Ray*, 699 F.3d 1053, 1066 (9th Cir. 2012); *see also City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758 (1988) ("The absence of express standards makes it difficult to distinguish, 'as applied,' between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech."). Off-campus student speech may not be

protected under the First Amendment when, based on the totality of the circumstances, the speech bears a sufficient nexus to the school. *McNeil v. Sherwood Sch. Dist. 88J*, 918 F.3d 700, 707 (9th Cir. 2019). Relevant considerations into whether speech bears a sufficient nexus to the school include: (1) the degree and likelihood of harm to the school caused or augured by the speech, (2) whether it was reasonably foreseeable that the speech would reach and impact the school, and (3) the relation between the content and context of the speech and the school." *Id*.; *see also C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1150-52 (9th Cir. 2016); *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F. 3d. 1062, 1069 (9th Cir. 2013).

> Retaliation claims involving government speech warrant a cautious approach by courts. Restricting the ability of government decisionmakers to engage in speech risks interfering with their ability to effectively perform their duties. It also ignores the competing First Amendment rights of the officials themselves. The First Amendment is intended to 'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.' . . . In accordance with these principles, we have set a high bar when analyzing whether speech by government officials is sufficiently adverse to give rise to a First Amendment retaliation claim.

Mulligan v. Nichols, 835 F.3d 983, 989 (9th Cir. 2016) (citations omitted).

For a discussion of the boundaries between First Amendment protected expression and unprotected business activity by a street performer, *see Santopietro v. Howell*, 857 F.3d 980 (9th Cir. 2017).

"Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005). The filing of a grievance/complaint whether it be verbal or written, formal or informal is protected conduct. Threats to sue and/or pursue criminal charges fall within the purview of the constitutionally protected right to file grievances. *Entler v. Gregoire*, 872 F.3d 1031 (9th Cir. 2017).

9.12 PARTICULAR RIGHTS—FOURTH AMENDMENT—UNREASONABLE SEARCH—GENERALLY

As previously explained, the plaintiff has the burden of proving that the act[s] of the defendant[s] [*name[s]*] deprived the plaintiff of particular rights under the United States Constitution. In this case, the plaintiff alleges the defendant[s] deprived [him] [her] of [his] [her] rights under the Fourth Amendment to the Constitution when [*insert factual basis of the plaintiff's claim*].

Under the Fourth Amendment, a person has the right to be free from an unreasonable search of [his] [her] [person] [residence] [vehicle] [*other object of search*]. ~~In order to~~To prove the defendant[s] deprived the plaintiff of this Fourth Amendment right, the plaintiff must prove the following additional elements by a preponderance of the evidence:

1. [*Name[s] of applicable defendant[s]*] searched the plaintiff's [person] [residence] [vehicle] [*other object of search*];

2. in conducting the search, [*name[s]*] acted intentionally; and

3. the search was unreasonable.

[A person acts "intentionally" when the person acts with a conscious objective to engage in particular conduct. Therefore, the plaintiff must prove the defendant intended to search the plaintiff's [person] [residence] [vehicle] [*other object of search*]. It is not enough if the plaintiff only proves the defendant acted negligently, accidentally or inadvertently in conducting the search. However, the plaintiff does not need to prove the defendant intended to violate the plaintiff's Fourth Amendment rights.]

[In determining whether the search was unreasonable, consider all of the circumstances, including:

(a) the scope of the particular intrusion;
(b) the manner in which it was conducted;
(c) the justification for initiating it; and
(d) the place in which it was conducted.]

Comment

Use this instruction in conjunction with the applicable elements instructions, Instructions 9.3–9.8, and an applicable definition of an unreasonable search, such as Instruction 9.13 (Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Search Incident to Arrest) and Instruction 9.15 (Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Consent). In cases in which there is no applicable definition of unreasonableness in another instruction, consider using the second bracketed paragraph of this instruction, which sets out general principles for

assessing the reasonableness of a search, derived from *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). *See also Byrd v. Maricopa Cnty. Sherriff's Dep't*, 629 F.3d 1135, 1141 (9th Cir. 2011) (en banc).

In *United States v. Thomas*, 726 F.3d 1086, 1092-93 (9th Cir. 2013), the Ninth Circuit discussed how the Supreme Court's decision in *United States v. Jones*, 565 U.S. 400 (2012), altered the *Katz* reasonable-expectation-of-privacy focus and stated that case law now directs "if the Government obtains information by physically intruding on persons, houses, papers, or effects, a 'search' within the original meaning of the Fourth Amendment has 'undoubtedly occurred.'" In *Jones*, government officials installed a GPS-tracking device to the underside of a vehicle located in a public parking lot, and then utilized the device to monitor the vehicle's movements. The Court held that when "[t]he Government physically occupied private property for the purpose of obtaining information," a physical intrusion occurred and constituted a search under Fourth Amendment principles. *Jones*, 565 U.S. at 404-11.

The Supreme Court has also held that the government's use of a drug dog within the curtilage of a home used "to investigate the home and its immediate surroundings" was a search within the meaning of the Fourth Amendment. *Florida v. Jardines*, 133 S. Ct. 1409, 1414-18 (2013).

The Fourth Amendment's protection against unreasonable searches extends beyond criminal investigations. *Grady v. North Carolina*, 135 S. Ct. 1368 (2015) (per curiam) (holding that state conducts search subject to Fourth Amendment when it attaches tracking device to recidivist sex offender's person without consent after civil proceedings).

Section 1983 "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." *OSU Student All. v. Ray*, 699 F.3d 1053, 1072 n.12 (9th Cir. 2012) (quoting *Daniels v. Williams*, 474 U.S. 327, 328 (1986)). It is well settled that "negligent acts do not incur constitutional liability." *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002), *abrogated on other grounds by County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017). Specific intent to violate a person's rights "is not a prerequisite to liability under § 1983." *Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992) (citations omitted).

With respect to the Fourth Amendment, the Supreme Court has defined a seizure as "a governmental termination of freedom of movement *through means intentionally applied*." *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) (emphasis in original); *see also Nelson v. City of Davis*, 685 F.3d 867, 876-77 (9th Cir. 2012) (discussing intent and concluding that defendant officers intentionally seized plaintiff under the Fourth Amendment). The Committee assumes the same intentional mental state is required to prove a § 1983 claim based on an unreasonable search in violation of the Fourth Amendment, although there does not appear to be any Supreme Court or Ninth Circuit decision directly on point. Thus, this instruction includes an optional definition of the term "intentionally" for use when it would be helpful to the jury.

"Determining the reasonableness of any search involves a two-fold inquiry: first, one must consider whether the … action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances

which justified the interference in the first place." *C.B. v. City of Sonora*, 769 F.3d 1005, 1023 (9th Cir.2014) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985)); *see also Ortega v. O'Connor*, 146 F.3d 1149, 1156 (9th Cir. 1998) (examining search of private office); *cf. Maryland v. King*, 133 S. Ct. 1958, 1970 (2013) (holding that court should weigh "the promotion of legitimate governmental interests against the degree to which [the search] intrudes upon an individual's privacy" (alteration in original) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)) (internal quotation marks omitted~~)).~~)), *Blight v. City of Manteca*, 944 F.3d 1061, 1067 (9th Cir. 2019) (concluding search of property with two residences supported by probable cause that suspect controlled whole premises).

When a warrantless search is conducted pursuant to a condition of probation, the court may wish to consider drafting a "totality of the circumstances" instruction. *See United States v. Knights*, 534 U.S. 112, 118 (2001); *Smith v. City of Santa Clara*, 876 F.3d 987, 992 (9th Cir. 2017).

9.24 PARTICULAR RIGHTS—FOURTH AMENDMENT—UNREASONABLE SEIZURE OF PERSON—DETENTION DURING EXECUTION OF SEARCH WARRANT

In general, a law enforcement officer may detain [a person in the immediate vicinity] [an occupant] of a premises during a search of that premises authorized by a search warrant so long as the officer detains the person in a reasonable manner and does not detain the person any longer than the time it takes to complete the search.

~~In order to~~To prove the seizure in this case was unreasonable, the plaintiff must prove by a preponderance of the evidence that [he] [she] was detained in an unreasonable manner or for an unreasonable period of time after the search was completed or both.

In determining whether the officer[s] detained the plaintiff unreasonably in this case, consider all of the circumstances known to the officer[s] on the scene, including:

(1) the severity of the suspected crime or other circumstances that led to the search warrant;

(2) whether the plaintiff was the subject of the investigation that led to the search warrant;

(3) whether the plaintiff posed an immediate threat to the safety of the officer[s] or to others or to the ability of the officer[s] to conduct the search safely;

(4) whether the plaintiff was actively resisting arrest or attempting to flee;

(5) whether the detention of the plaintiff was unnecessarily painful, degrading, prolonged, or involved an undue invasion of privacy;

(6) whether the detention of the plaintiff facilitated the orderly completion of the search; and

[(7) *insert other factors particular to the case.*]

Under the Fourth Amendment, an officer may use only such force to detain a person as is "objectively reasonable" under the circumstances. In other words, you must judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene and not with the 20/20 vision of hindsight.

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3–9.8, and in conjunction with Instruction 9.20 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Generally).

This instruction is based on the district court's jury instructions approved in *Muehler v. Mena*, 544 U.S. 93, 104 n.2, 108 (2005) (Stevens, J., concurring). In *Muehler*, the Supreme Court reiterated its holding in *Michigan v. Summers*, 452 U.S. 692 (1981), that "officers executing a search warrant for contraband have the authority 'to detain the occupants of the premises while a proper search is conducted.'" *Id*. at 98. The Court noted that *Summers* had

> posited three legitimate law enforcement interests that provide substantial justification for detaining an occupant: "preventing flight in the event that incriminating evidence is found"; "minimizing the risk of harm to the officers"; and facilitating "the orderly completion of the search," as detainees' "self-interest may induce them to open locked doors or locked containers to avoid the use of force . . . . Inherent in *Summers*' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention.

Id. at 98-99; *see also* ~~*Meredith*~~*Blight v.* ~~*Erath,* 342~~*City of Manteca*, 944 F.3d ~~1057,~~ 1061, 1068 (9th Cir. ~~2003~~2019). *Summers* applies only to search warrants, and does not give law enforcement officers the categorical authority to detain home occupants incident to the execution of an arrest warrant. *Sharp v. County of Orange*, 871 F.3d 901, 915 (9th Cir. 2017). Whether such a detention is authorized depends on the particular circumstances confronting the officer, such as the need to detain "occupants to stabilize the situation while searching for the subject of an arrest warrant or conducting a lawful protective sweep of the premises." ~~*Sharp*, 871 F.3d at 915.~~*Id. See also Blight v. City of Manteca*, 944 F.3d at 1068 (holding that detention of elderly person not per se unreasonable).

After *Muehler v. Mena*, the Ninth Circuit noted in *Dawson v. City of Seattle* that "[t]o determine whether a detention incident to a search is constitutionally reasonable, [a court should] balance the law enforcement interests served by the detention against the public's privacy interests." 435 F.3d 1054, 1065-66 (9th Cir. 2006). "[D]etaining a building's occupants serves at least three law enforcement interests: first, detention prevents a suspect from fleeing before the police discover contraband; second, detention minimizes the risk that an officer or an occupant might be harmed during the search; and third, detention often expedites a search." *Id*. at 1066. The court held:

> [T]he duration of a detention may be coextensive with the period of a search, and require no further justification. The police do not, however, have unfettered authority to detain a building's occupants in any way they see fit. *Muehler* confirms an officer's authority to detain a building's occupants during a search so long as the officer conducts the detention in a reasonable manner.

Id. (citations omitted); *see also Howell v. Polk*, 532 F.3d 1025, 1026 (9th Cir. 2008) (per curiam) (holding that whether "knock-and-announce" search warrant was unreasonably executed was a jury question to be determined under the totality of the circumstances).

In *Bailey v. United States*, 568 U.S. 186, 201 (2013), the Supreme Court concluded that because the rule announced in *Summers* "grants substantial authority to police officers to detain outside of the traditional rules of the Fourth Amendment, it must be circumscribed." The Court

decided "[a] spatial constraint defined by the immediate vicinity of the premises to be searched is therefore required for detentions incident to the execution of a search warrant." *Id.* (holding that detention of person one mile from premises, who had left premises before search began, was not sufficiently connected to search of premises). "Confining an officer's authority to detain under *Summers* to the immediate vicinity of a premises to be searched is a proper limit because it accords with the rationale of the rule." *Id.* Thus, as in *Bailey,* when law enforcement waits to stop or detain a suspect until after he or she has left the search location, "the lawfulness of detention is controlled [not by *Summers*, but] by other standards," namely, probable cause or reasonable suspicion. *Id.* at 202.

9.25 PARTICULAR RIGHTS—FOURTH AMENDMENT—UNREASONABLE SEIZURE OF PERSON—EXCESSIVE ~~(DEADLY AND NONDEADLY)~~ FORCE

In general, a seizure of a person is unreasonable under the Fourth Amendment if a police officer uses excessive force [in making a lawful arrest] [and] [or] [in defending [himself] [herself] [others]] [and] [or] [in attempting to stop a fleeing or escaping suspect]. Therefore, ~~in order~~ to ~~prove~~establish an unreasonable seizure in this case, the plaintiff must prove by a preponderance of the evidence that the officer[s] used excessive force when [*insert factual basis of claim*].

Under the Fourth Amendment, a police officer may use only such force as is "objectively reasonable" under all of the circumstances. You must judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene and not with the 20/20 vision of hindsight. Although the facts known to the officer are relevant to your inquiry, an officer's subjective intent or motive is not relevant to your inquiry.

In determining whether the officer used excessive force in this case, consider all of the circumstances known to the officer on the scene, including:

(1) the nature of the crime or other circumstances known to the officer[s] at the time force was applied;

(2) whether the [plaintiff] [decedent] posed an immediate threat to the safety of the officer[s] or to others;

[(3) whether the plaintiff was actively resisting arrest or attempting to evade arrest by flight;]

(4) the amount of time the officer had to determine the type and amount of force that reasonably appeared necessary, and any changing circumstances during that period;

(5) the type and amount of force used;

[(6) the availability of alternative methods [to take the plaintiff into custody] [to subdue the plaintiff;]]

[(7) the number of lives at risk (motorists, pedestrians, police officers) and the parties' relative culpability; *i.e.*, which party created the dangerous situation, and which party is more innocent;]

[(8) whether it was practical for the officer[s] to give warning of the imminent use of force, and whether such warning was given;]

[(9) whether the officer[s] [was] [were] responding to a domestic violence disturbance;]

[(10) whether it should have been apparent to the officer[s] that the person [he] [she] [they] used force against was emotionally disturbed;]

[(11) whether a reasonable officer would have or should have accurately perceived a mistaken fact;]

[(12) whether there was probable cause for a reasonable officer to believe that the suspect had committed a crime involving the infliction or threatened infliction of serious physical harm; and]

[(13) *insert other factors particular to the case.*]

"Probable cause" exists when, under all of the circumstances known to the officer[s] at the time, an objectively reasonable police officer would conclude there is a fair probability that the plaintiff has committed or was committing a crime.

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3–9.8, and in conjunction with Instruction 9.20 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Generally).

In general, all claims of excessive force, whether deadly or not, should be analyzed under the objective reasonableness standard of the Fourth Amendment as applied in *Scott v. Harris*, 550 U.S. 372, 381-85 (2007), *Graham v. Connor*, 490 U.S. 386, 397 (1989), *Tennessee v. Garner*, 471 U.S. 1, 7-12 (1985), and *Nehad v. Browder*, 929 F.3d 1125, 1132 (9th Cir. 2019). If a suspect no longer poses an immediate threat, then the subsequent use of deadly force is unreasonable. *Zion v. County of Orange*, 874 F.3d 1072, 1076 (9th Cir. 2017). Whether the use of deadly force is reasonable is highly fact-specific. *Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir. 2010).

> In assessing reasonableness, the court should give "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than

> with the 20/20 vision of hindsight." *Id.* (citation omitted). In addition, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

Id. at 550.

Moreover, as the Ninth Circuit has noted, the Supreme Court did not limit the reasonableness inquiry to the factors set forth in *Graham*:

> Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, the reasonableness of a seizure must instead be assessed by carefully considering the objective facts and circumstances that confronted the arresting officers. In some cases, for example, the availability of alternative methods of capturing or subduing a suspect may be a factor to consider.

Smith v. City of Hemet, 394 F.3d 689, 701 (9th Cir. 2005) (citation and internal quotation marks omitted).

On the other hand, it is not error for a trial court to decline to instruct explicitly on the availability of "alternative courses of action" when the instructions as a whole "fairly and adequately cover[ed] the issues presented." *Brewer v. City of Napa*, 210 F.3d 1093, 1096-97 (9th Cir. 2000). Importantly, although officers must consider the availability of other, less intrusive means, officers "need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable." *Hughes v. Kisela*, 841 F.3d 1081, 1087 (9th Cir. 2016) (quoting *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1995)).

The Ninth Circuit has repeatedly emphasized that the most important factor is "whether the suspect posed an immediate threat to the safety of the officers or others." *See, e.g., S.B. v. ~~County~~Cty. of San Diego*, 864 F.3d 1010, 1013 (9th Cir. 2017) (internal quotation marks omitted~~).~~); *Orn v. City of Tacoma*, 949 F.3d 1167 (9th Cir. 2020); *Tuuamalemalo v. Greene*, 946 F.3d 471, 477 (9th Cir. 2019) (concluding that "use of a chokehold on a non-resisting restrained person violates the Fourth Amendment"). If deadly force is used the officer must have "probable cause to believe that the suspect poses a significant threat of death or serious physical injury." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

It is not error for a trial court to decline to single out one factor in the reasonableness inquiry, when the instructions properly charge the jury to consider all of the circumstances that

confronted the officer. *See Lam v. City of San Jose*, 869 F.3d 1077, 1087 (9th Cir. 2017) (affirming district court declining "bad tactics" instruction).

The first factor, "the nature of the crime or other circumstances known to the officer at the time force was applied," should be modified as appropriate when the officers are acting under their community caretaking function rather than to counter crime. In such circumstances, "the better analytical approach" focuses the inquiry on the seriousness of the situation that gives rise to the community-caretaking function. *See Ames v. King Cnty*., 846 F.3d 340, 349 (9th Cir. 2017).

Other relevant factors may include (1) whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed, *see Glenn v. Washington County*, 673 F.3d 864, 872 (9th Cir. 2011); *see also Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001) ("Even when an emotionally disturbed individual is 'acting out' and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual."), and (2) how quickly the officer(s) used deadly force after encountering the plaintiff or decedent. *A. K. H. v. City of Tustin*, 837 F.3d 1005, 1012 (9th Cir. 2016).

The "relative culpability" of the parties— *i.e.*, which party created the dangerous situation and which party is more innocent— may also be considered in determining the reasonableness of the force used. *Espinosa v. City & County of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010) (citing *Scott*, 550 U.S. at 384).

Whether the officers are facing or expecting a domestic disturbance is a specific factor relevant to the totality of the circumstances in assessing an excessive force claim. *George v. Morris*, 736 F.3d 829, 839 (9th Cir. 2013) ("Domestic violence situations are 'particularly dangerous' because 'more officers are killed or injured on domestic violence calls than on any other type of call.'").

"When an officer's particular use of force is based on a mistake of fact, we ask whether a reasonable officer would have or should have accurately perceived that fact." *Torres v. City of Madera*, 648 F.3d 1119, 1124 (9th Cir. 2011) (citing *Jensen v. City of Oxnard*, 145 F.3d 1078, 1086 (9th Cir. 1998)) (emphasis in original). "[W]hether the mistake was an honest one is not the concern, only whether it was a reasonable one." *Id*. at 1127 (emphasis in original).

A police officer's attempt to "terminate a dangerous high-speed chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2021-22 (2014) ("[I]f officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.").

In *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017), the Supreme Court rejected the Ninth Circuit's "provocation rule" and abrogated *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002). That rule had permitted a law enforcement officer to be held responsible for an

otherwise reasonable use of force when the officer intentionally or recklessly provoked a violent confrontation through a warrantless entry that was itself an independent Fourth Amendment violation. In *Mendez*, the Supreme Court eliminated this rule.

Revised ~~Oct. 2019~~May 2020

9.25A PARTICULAR RIGHTS—SIXTH AMENDMENT—RIGHT TO COMPULSORY PROCESS—INTERFERENCE WITH WITNESS

Under the Sixth Amendment, a criminal defendant has the right to have compulsory process for obtaining witnesses in his or her favor. This right includes both the right to offer the testimony of witnesses, and to compel their attendance, if necessary. [*Name of plaintiff*] asserts that [*name of defendant*] interfered with this right and caused a favorable witness not to testify in [*name of plaintiff*]'s trial.

To prove that [*name of defendant*] unlawfully interfered with [*name of plaintiff*]'s right to present testimony, [*name of plaintiff*] must prove:

1. That [*name of defendant*]'s conduct substantially interfered with [*name of plaintiff*]'s witness;

2. that [*name of defendant*]'s conduct caused the witness not to testify; and

3. that the witness' testimony would have been favorable and material.

Testimony is material if it would have been sufficient to cast doubt on the government's case.

[Testimony could have been material to [*name of plaintiff*]'s trial even if [*name of plaintiff*] was not convicted.]

Comment

This instruction is based on *Park v. Thompson*, 851 F.3d 910 (9th Cir. 2017). As discussed in *Park*, the Ninth Circuit has not yet decided what the appropriate standard is to satisfy the causation element of this claim. *See id.* at 921-22 (comparing the various circuit court tests, including "plausible showing," "plausible nexus," "but for," and "decisive factor"). Although the Committee recognizes that trial courts may need to instruct juries regarding the standard for proving causation, it takes no position on the appropriate test pending further guidance from the Ninth Circuit or the Supreme Court.

Added June 2017

9.26 PARTICULAR RIGHTS—EIGHTH AMENDMENT—CONVICTED PRISONER'S CLAIM OF EXCESSIVE FORCE

As previously explained, the plaintiff has the burden of proving that the act[s] of the defendant [*name*] deprived the plaintiff of particular rights under the United States Constitution. In this case, the plaintiff alleges the defendant deprived [him] [her] of [his] [her] rights under the Eighth Amendment to the Constitution when [*insert factual basis of the plaintiff's claim*].

Under the Eighth Amendment, a convicted prisoner has the right to be free from "cruel and unusual punishments." ~~In order to prove~~To establish the defendant deprived the plaintiff of this Eighth Amendment right, the plaintiff must prove the following elements by a preponderance of the evidence:

1. the defendant used excessive and unnecessary force under all of the circumstances;

2. the defendant acted maliciously and sadistically for the purpose of causing harm, and not in a good faith effort to maintain or restore discipline; and

3. the act[s] of the defendant caused harm to the plaintiff.

In determining whether these three elements have been met in this case, consider the following factors:

(1) the extent of the injury suffered;

(2) the need to use force;

(3) the relationship between the need to use force and the amount of force used;

(4) any threat reasonably perceived by the defendant; and

(5) any efforts made to temper the severity of a forceful response, such as, if feasible, providing a prior warning or giving an order to comply.

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3–9.8, and when the plaintiff is a convicted prisoner. For claims of sexual assault when the plaintiff is a convicted prisoner, use Instruction 9.26A (Particular Rights—Eighth Amendment—Convicted Prisoner's Claim of Sexual Assault). When the plaintiff is a pretrial detainee, use Instruction 9.29 (Particular Rights—Fourteenth Amendment—Pretrial Detainee's Claim of Excessive Force). When the plaintiff is not in custody, use Instruction 9.25 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Excessive ~~(Deadly and Nondeadly)~~ Force).

When the prisoner claims unconstitutional conditions of confinement, including inadequate medical care, use Instruction 9.27 (Particular Rights—Eighth Amendment—Convicted Prisoner's Claim re Conditions of Confinement/Medical Care), which sets out the applicable deliberate indifference standard.

The Eighth Amendment prohibits cruel and unusual punishment in penal institutions. *Wood v. Beauclair*, 692 F.3d 1041, 1045 (9th Cir. 2012). "[U]nnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Furnace v. Sullivan*, 705 F.3d 1021, 1027 (9th Cir. 2013) (quoting *Hudson v. McMillian*, 503 U.S. 1, 5 (1992)).

The Ninth Circuit has identified five factors set forth in *Hudson* to be considered in determining whether the use of force in a penal institution was excessive: "(1) the extent of injury suffered by an inmate; (2) the need for application of force; (3) the relationship between that need and the amount of force used; (4) the threat reasonably perceived by the responsible officials; and (5) any efforts made to temper the severity of a forceful response." *Furnace*, 705 F.3d at 1028. In *Furnace*, the court also considered whether verbal warnings were given prior to the administration of force. *Id.* at 1029 ("Officers cannot justify force as necessary for gaining inmate compliance when inmates have been given no order with which to comply.").

"Whether a particular event or condition in fact constitutes 'cruel and unusual punishment' is gauged against 'the evolving standards of decency that mark the progress of a maturing society.'" *Schwenk v. Hartford*, 204 F.3d 1187, 1196 (9th Cir. 2000) (quoting *Hudson*, 503 U.S. at 8. Although *de minimis* use of physical force is insufficient to prove an Eighth Amendment violation, *Hudson*, 503 U.S. at 8, a prison guard's use of force violates the Eighth Amendment when the guard acts maliciously for the purpose of causing harm whether or not significant injury is evident. *See* Wilkins v. Gaddy, 559 U.S. 34, 36-38 (2010) ("An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury.").

The "malicious and sadistic" standard applies when prison guards "use force to keep order . . . [w]hether the prison disturbance is a riot or a lesser disruption." *Hudson*, 503 U.S. at 6 (citing *Whitley v. Albers*, 475 U.S. 312 (1986)); *see also LeMaire v. Maass*, 12 F.3d 1444, 1452-53 (9th Cir. 1993) (finding malicious and sadistic "heightened state of mind" controlling when applied to any "measured practices and sanctions either used in exigent circumstances or imposed with considerable due process and designed to alter [the] manifestly murderous, dangerous, uncivilized, and unsanitary conduct" of repeat offenders housed in disciplinary segregation); *Jordan v. Gardner*, 986 F.2d 1521, 1528 (9th Cir. 1993) (en banc) (noting that "greater showing" than deliberate indifference is required "in the context of a prison-wide disturbance or an individual confrontation between an officer and a prisoner," when "corrections officers must act immediately and emphatically to defuse a potentially explosive situation").

In the appropriate case, the trial court may instruct the jury that in considering the listed factors, it should give deference to prison officials in the adoption and execution of policies

and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison. "It is well established that judges and juries must defer to prison officials' expert judgments." *Norwood v. Vance*, 591 F.3d 1062, 1066 (9th Cir. 2010). In *Norwood*, the Ninth Circuit approved of an instruction that the jury "should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison." More recently, however, the Ninth Circuit has cautioned that such deference is not appropriate when the prison practice in question serves no legitimate penological purpose, or plaintiff has produced substantial evidence that the practice was an unnecessary, unjustified, or exaggerated response to jail officials' need for prison security. *Shorter v. Baca*, 895 F.3d 1176, 1184 (9th Cir. 2018). The *Shorter* court emphasized that "determinations about whether to defer to jail officials are often fact-intensive and context-dependent. *Id*. at 1189. *See also Chess v. Dovey*, 790 F.3d 961, 974 (9th Cir. 2015) (holding that deference generally should not be given in medical care context absent actual security considerations).

~~The Committee~~

Revised May 2020

9.26A PARTICULAR RIGHTS—EIGHTH AMENDMENT—CONVICTED PRISONER'S CLAIM OF SEXUAL ASSAULT

As previously explained, [*name of applicable plaintiff*] has ~~not formulated an instruction~~the burden of proving that ~~relates~~the act[s] of [*name of applicable defendant*] deprived the plaintiff of particular rights under the United States Constitution. In this case, the plaintiff alleges the defendant deprived [him] [her] of [his] [her] rights under the Eighth Amendment to the Constitution when [*insert factual basis of the plaintiff's claim*].

Under the Eighth Amendment, a convicted prisoner has the right to be free from "cruel and unusual punishments." To prove the defendant deprived [*name of applicable plaintiff*] of this Eighth Amendment right, the plaintiff must establish the following elements by a preponderance of the evidence:

1. [*Name of applicable defendant*] acted under color of law;

2. [*Name of applicable defendant*] acted without penological justification; and

3. [*Name of applicable defendant*] [touched the prisoner in a sexual manner] [engaged in sexual conduct for the defendant's own sexual gratification] [acted for the purpose of humiliating, degrading, or demeaning the prisoner].

Comment

"We now hold that a prisoner presents a viable Eighth Amendment claim where he or she proves that a prison staff member, acting under color of law and without legitimate penological justification, touched the prisoner in a sexual manner or otherwise engaged in sexual conduct for the staff member's own sexual gratification, or for the purpose of humiliating, degrading, or demeaning the prisoner." *Bearchild v. Cobban*, 947 F.3d 1130, 1144 (9th Cir. 2020).

"Sexual harassment ~~claimed by~~ or abuse of an inmate by a corrections officer is a violation of the Eighth Amendment" as "sexual contact between a prisoner and a prison guard serves no legitimate role . . . [and] is simply not 'part of the penalty that criminal offenders pay for their offenses against society.' Because there is no 'legitimate penological purpose' served by sexual assault, the subjective component of 'malicious and sadistic intent' is presumed if an inmate~~. *See*~~ can demonstrate that a sexual assault occurred (citations omitted)." *Wood v. Beauclair*, 692 F.3d 1041 at 1046~~;~~, 1050 (9th Cir. 2012). Further, "an inmate need not prove that an injury resulted from sexual assault in order to maintain an excessive force claim under the Eighth Amendment." *Schwenk v. Hartford*, 204 F.3d 1187, 1196~~ 97.~~ (9th Cir. 2000).

17.3 COPYRIGHT—SUBJECT MATTER—GENERALLY (17 U.S.C. § 102)

The work[s] [*identify the works at issue*] involved in this trial are known as:

[1.] [literary works [in which words, numbers, or other verbal or numerical symbols are expressed];]

[2.] [musical works, including any accompanying words;]

[3.] [dramatic works, including any accompanying music;]

[4.] [pantomimes;]

[5.] [choreographic works;]

[6.] [pictorial works] [graphic works] [sculptural works][;] [, such as two- and three-dimensional works of fine, graphic or applied art, photographs, prints, and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans;]

[7.] [motion pictures] [and other audiovisual works] [in which a series of related images convey an impression of motion when shown in succession];]

[8.] [sound recordings][;] [, which are works that result from fixation of a series of musical, spoken, or other sounds;]

[9.] [architectural works][;] [, which are building designs as embodied in buildings, architectural plans, drawings, or other modes of expression;]

[10.] [computer programs][, that is, sets of statements or instructions to be used directly or indirectly in a computer to bring about a certain result].]

You are instructed that a copyright may be obtained in [*identify the work[s] at issue*].

[[This] [These] work[s] can be protected by copyright law. Only that part of the work[s] consisting of original works of authorship [fixed] [produced] in any tangible [medium] [form] of expression from which it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, is protected by the Copyright Act.]

[Copyright protection for an original work of authorship does not extend to any [idea] [procedure] [process] [system] [method of operation] [concept] [principle] [discovery], regardless of the form in which it is described, explained, illustrated, or embodied.]

Comment

Generally, whether a subject matter is copyrightable is a question of law to be determined by the court. This instruction is designed to inform the jury that the court has determined the subject matter to be appropriately copyrightable.

The court may wish to supplement this instruction by providing further instructions addressing these additional terms. For example, the term "literary works" "does not connote any criterion of literary merit or qualitative value: it includes catalogs, directories and similar factual, reference, or instructional works and compilations of data. It also includes computer data bases, and computer programs to the extent that they incorporate authorship in the programmer's expression of original ideas, as distinguished from the ideas themselves." H.R. Rep. No. 94-1476, at 54 (1976).

The Ninth Circuit has recognized that characters in comic books, television or motion pictures can be afforded copyright protection when they satisfy a three-part test. *DC Comics v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015) (Batmobile). The character (1) must generally have physical as well as conceptual qualities; (2) must be sufficiently delineated to be recognizable as the same character whenever it appears by displaying consistent, identifiable character traits and attributes, although it need not have a consistent appearance; and (3) must be especially distinctive and contain some unique elements of expression. *Id*.

For additional definitions of terms used in this instruction, *see* 17 U.S.C. § 101 (defining numerous terms used here).

The United States Supreme Court has ruled that no copyright protection is available for material authored by a judge or a legislative body acting in an official capacity. *See Georgia v. Public Resources*, ___ U.S. ___, 140 S. Ct. 1498 (2020).

17.5 COPYRIGHT INFRINGEMENT—ELEMENTS—OWNERSHIP AND COPYING (17 U.S.C. § 501(a)–(b))

Anyone who copies original expression from a copyrighted work during the term of the copyright without the owner's permission infringes the copyright.

On the plaintiff's copyright infringement claim, the plaintiff has the burden of proving by a preponderance of the evidence that:

1. the plaintiff is the owner of a valid copyright; and

2. the defendant copied original expression from the copyrighted work.

If you find that the plaintiff has proved both of these elements, your verdict should be for the plaintiff. If, on the other hand, you find that the plaintiff has failed to prove either of these elements, your verdict should be for the defendant.

Comment

The elements in this instruction are explained in Instructions 17.6 (Copyright Infringement—Ownership of Valid Copyright—Definition), 17.14 (Copyright Infringement—Originality), and 17.17 (Copying—Access and Substantial Similarity). Copying and improper appropriation are issues of fact for the jury. *See Three Boys Music Corp v. Bolton*, 212 F.3d 477, 481-82 (9th Cir. 2000).

The elements of copyright infringement cited in this instruction were stated in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). *See id.* at 361 ("To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original."); *see also Seven Arts Filmed Entm't Ltd. v. Content Media Corp.*, 733 F.3d 1251, 1254 (9th Cir. ~~2013).~~2013); *Great Minds v. Office Depot*, 945 F.3d 1106, 1110 (9th Cir. 2019). To establish the defendant's liability on a direct infringement theory, the plaintiff must show that the defendant was the cause of the infringement. *See Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 666 (9th Cir. 2017) ("where it is clear that infringement has occurred, courts must determine 'who is close enough to the [infringing] event to be considered the most important cause'" (citation omitted)); *see also VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 732 (9th Cir. 2019) ("'[D]irect infringement requires 'active' involvement."). If causation is contested, it may be appropriate to modify this instruction to explicitly include causation as an element.

In *VHT, Inc. v. Zillow Group, Inc.*, the Ninth Circuit provided an extensive discussion of the causation requirement in a case involving alleged copyright infringement of website images. 918 F.3d at 731-32 ("[T]here must be actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could conclude that the machine owner himself trespassed on the exclusive domain of the copyright owner.").

"We have described the inducement theory as having 'four elements: (1) the distribution of a device or product, (2) acts of infringement, (3) an object of promoting its use to infringe copyright, and (4) causation.'" *Giganews*, 847 F.3d at 672.

The Ninth Circuit considers the word "copying" as "shorthand" for the various activities that may infringe a copyright owner's six exclusive rights described at 17 U.S.C. § 106. *Range Rd. Music, Inc. v. E. Coast Foods, Inc.*, 668 F.3d 1148, 1153-54 (9th Cir. 2012).

In *Skidmore v. Led Zeppelin*, 905 F.3d 1116 (9th Cir. 2018), a case involving the alleged copyright infringement of a musical composition, the Ninth Circuit worded the elements slightly differently. The Ninth Circuit stated: "In order to prove copyright infringement, a plaintiff must show (1) that he owns a valid copyright in his work, and (2) that the defendants copied protected aspects of the work's expression." *Skidmore*, 905 F.3d at 1125 (citation, quotation marks, and brackets omitted). The Ninth Circuit added: "Whether Defendants copied protected expression contains two separate and distinct components: 'copying' and 'unlawful appropriation.'" *Skidmore*, 905 F.3d at 1125 (citing *Rentmeester v. Nike, Inc*., 883 F.3d 1111, 1117 (9th Cir. 2018)).

17.17 COPYING—ACCESS AND SUBSTANTIAL SIMILARITY

Instruction [*insert cross reference to the pertinent instruction, e.g., Instruction 17.5*] states that the plaintiff has the burden of proving that the defendant copied original elements from the plaintiff's copyrighted work. The plaintiff may show the defendant copied from the work by proving by a preponderance of the evidence that the defendant had access to the plaintiff's copyrighted work and that there are substantial similarities between the defendant's work and original elements of the plaintiff's work.

Comment

Regarding access, substantial similarity, and independent creation, *see Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1018 (9th Cir. 1985). *See also* Instruction 17.14 (Copyright Infringement—Originality), 17.18 (Copyright Infringement—Copying—Access Defined), and 17.19 (Substantial Similarity—Extrinsic Test; Intrinsic Test). The word "copying" is described by the Ninth Circuit as "shorthand" for the various activities that may infringe any of the copyright owner's "exclusive rights," which are described in 17 U.S.C. § 106. *Range Rd. Music, Inc. v. E. Coast Foods, Inc.*, 668 F.3d 1148, 1154 (9th Cir. 2012) (quoting *S.O.S., Inc. v. Payday, Inc.,* 886 F.2d 1081, 1085 n.3 (9th Cir. 1989)).

Supplemental Instruction

For guidance in modifying the instruction so that the jury may consider evidence of a "striking similarity" between works to infer access, *see Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) ("[I]n the absence of any proof of access, a copyright plaintiff can still make out a case of infringement by showing that the songs were 'strikingly similar.'" (citing *Smith v. Jackson*, 84 F.3d 1213, 1220 (9th Cir. 1996), and *Baxter v. MCA, Inc.*, 812 F.2d 421, 423, 424 n.2 (9th Cir. 1987)).

If the plaintiff shows that the defendant had access to the plaintiff's work and that there is a substantial similarity between the infringed and infringing works, a presumption of copying arises shifting the burden to the defendant to rebut the presumption or to show that the alleged infringing work was independently created. *Three Boys Music*, 212 F.3d at 486 ("By establishing reasonable access and substantial similarity, a copyright plaintiff creates a presumption of copying. The burden shifts to the defendant to rebut that presumption through proof of independent creation." (citing *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 721 (9th Cir. 1976))); *see also Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 741 (9th Cir. 1971) ("It is true that defendants had access to plaintiff's [copyrighted] pin and that there is an obvious similarity between plaintiff's pin and those of defendants. These two facts constitute strong circumstantial evidence of copying. But they are not conclusive, and there was substantial evidence to support the trial court's finding that defendant's pin was in fact an independent creation." (citations omitted)).

In the Ninth Circuit, the access and substantial similarity elements of infringement are "inextricably linked" by an inverse ratio rule. *Benay* The Ninth Circuit has overruled its precedent employing the inverse ratio rule. Therefore, that theory is no longer a factor in the substantial similarity. *See Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1069 (9th Cir. 2020) (en banc).

v. *Warner Bros. Entm't, Inc.*, 607 F.3d 620, 625 (9th Cir. 2010) ("Under the 'inverse ratio' rule, if a defendant had access to a copyrighted work, the plaintiff may show infringement based on a lesser degree of similarity between the copyrighted work and the allegedly infringing work."); *see also Three Boys Music Corp.*, 212 F.3d at 486 (stating that rule "requires a lesser showing of substantial similarity if there is a strong showing of access" but noting that "[w]e have never held…the inverse … [that] a weak showing of access requires a stronger showing of substantial similarity."); *Swirsky v. Carey*, 376 F.3d 841, 844-45 (9th Cir. 2004) (holding that when high degree of access is shown, lower standard of proof of substantial similarity is required and noting that this burden is carried by plaintiff); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178 (9th Cir. 2003) (stating that under "inverse ratio rule," court requires lower standard of proof of substantial similarity when high degree of access is shown and "a prominent factor" in using inverse ratio analysis is "concession of access by the defendant to the plaintiff's copyrighted work").

In *Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1130-31 (9th Cir. 2018), the Ninth Circuit provided an extensive discussion of the "inverse ratio rule" in the context of a case involving the alleged copyright infringement of a musical composition.

17.22 COPYRIGHT—AFFIRMATIVE DEFENSE—FAIR USE (17 U.S.C. § 107)

One who is not the owner of the copyright may use the copyrighted work in a reasonable way under the circumstances without the consent of the copyright owner if it would advance the public interest. Such use of a copyrighted work is called a fair use. The owner of a copyright cannot prevent others from making a fair use of the owner's copyrighted work.

Defendant contends that defendant made fair use of the copyrighted work for the purpose of [criticism] [comment] [news reporting] [teaching] [scholarship] [research] [*other purpose alleged*]. The defendant has the burden of proving this defense by a preponderance of the evidence.

In determining whether the use made of the work was fair, you should consider the following factors:

(1) the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;

(4) the effect of the use upon the potential market for or value of the copyrighted work; and

[(5)] [*insert any other factor that bears on the issue of fair use*].

If you find that the defendant has proved by a preponderance of the evidence that the defendant made a fair use of the plaintiff's work, your verdict should be for the defendant.

Comment

Fair use is generally an affirmative defense. *See e.g. Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1068 (9th Cir. 2014). However, in Digital Millenium Copyright Act "takedown" cases, fair use is "treated differently than traditional affirmative defenses." *Lenz v. Universal Music Corp*., 815 F.3d 1145, 1152-53 (9th Cir. 2016) (noting that in DMCA cases, copyright holder must have good faith belief that allegedly infringing use was not fair use before sending "takedown" notice). *See* Instruction 17.29 (Copyright–Affirmative Defense–Limitation on Liability for System Caching). "The fair use doctrine 'permits and requires courts to avoid

rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'" *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1175 (9th Cir. 2013) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994)).

The first paragraph of this instruction describing the effect of a fair use finding is drawn from *Triad Systems Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1336 (9th Cir. 1995) (holding that fair use permits use of copyrighted material in reasonable manner without consent of copyright owner), *superseded by statute as stated in Apple Inc. v. Psystar Corp*., 658 F.3d 1150, 1158-59 (9th Cir. 2011). The fifth numbered paragraph of this instruction reflects the fact that the elements set forth in the statutory test of fair use in 17 U.S.C. § 107 are by no means exhaustive or exclusive. *See Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 627 (9th Cir. 2003) ("[W]e may not treat the [fair use] factors in isolation from one another."), *overruling on other grounds recognized by Seltzer v. Green Day, Inc*., 725 F.3d 1170, 1177 (9th Cir. 2013); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399 (9th Cir. 1997). In appropriate circumstances, the court may enumerate additional factors. *See Campbell*, 510 U.S. at 585 n.18 (considering defendant's state of mind/good faith as factor).

For an analysis of the fair use factors, *see Campbell v. Acuff-Rose Music, Inc*., 510 U.S. 569, 578-94 (1994); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560-69 (1985~~).~~*); Tresóna Multimedia, LLC v. Burbank High School Music Ass'n*, 953 F.3d 638, 647-52 (9th Cir. 2020). The instruction provided here is a basic instruction that could be supplemented by the court to suggest how the presence or absence of any particular factor may tend to support or detract from a finding of fair use. Similarly, the court may find it appropriate to supplement this instruction to suggest to the jury how to weigh the factors. *See Dr. Seuss Enters.*, 109 F.3d at 1399 ("Congress viewed these four criteria as guidelines for 'balancing the equities,' not as 'definitive or determinative' tests." (citation omitted)).

The Ninth Circuit has considered numerous cases involving application of the fair use factors. The following citations identify cases that might be consulted concerning facts helpful to assessing whether a particular fair use factor exists:

1. Purpose and Character of the Defendant's Use, including whether such use is of a commercial nature or is for nonprofit educational purposes: *Campbell*, 510 U.S. at 579-80, 583, 588 (explaining that the purpose of this element is to investigate the commercial nature of the use, whether the use was transformative, whether the use tended to supplant or supersede the infringed work, and whether the use parodied or "conjure[d] up" the infringed work); *VHT, Inc. v. Zillow Grp., Inc*., 918 F.3d 723, 743 (9th Cir. 2019) (concluding website's tagging of photos for searchable functionality was not transformative); *Seltzer*, 725 F.3d at 1176-77 (finding band's use of artist's original work in its four-minute concert video backdrop transformative because original work took on new and different meaning in video); ~~*Disney Enterprises, Inc.*~~*Tresóna Multimedia, LLC v. Burbank High School Music Ass'n*, 953 F.3d at 648 (observing that use of song in show was for "nonprofit educational purposes and the resulting work was transformative"); *Disney Enterprises, Inc. v. VidAngel, Inc.*, 869 F.3d 848 (9th Cir. 2017) (concluding that removing objectionable content from film for streaming to customers is not transformative); *SOFA Entm't, Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273, 1278 (9th Cir. 2013)

(stating that use of seven-second television clip that introduces band as "biographical anchor" in musical about band supports finding of fair use); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1176–77 (9th Cir. 2012) (concluding that publisher's use of newsworthy wedding photographs of celebrities was not fair use because such use was, among other things, minimally transformative and indisputably commercial); *Elvis Presley Enters.*, 349 F.3d at 629 ("Courts have described new works as 'transformative' when works use copyrighted material for purposes distinct from the purpose of original material."); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (stating that commercial use does not require direct financial benefit and that "commercial use weighs against a finding of fair use but is not conclusive"); *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 606–07 (9th Cir. 2000) (finding that computer virtual game station was fair use of reverse-engineered television game console because it was transformative and done to produce compatible product); *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1121 (9th Cir. 1997) (examining whether unauthorized use of news report by defendant news station competed with infringed work). Generally, "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Campbell*, 510 U.S. at 579. "[P]arody has an obvious claim to transformative value." *Id.*

2. Nature of Copyrighted Work: 17 U.S.C. § 107 ("The fact that a work is unpublished shall not itself bar a finding of fair use."); *Campbell*, 510 U.S. at 586 (considering whether work is factual or creative in nature and whether it was published); *Seltzer*, 725 F.3d at 1178 (noting that prior publication by original author tends to support finding of fair use); *Napster*, 239 F.3d at 1016 (stating that use of copyrighted creative work cuts against fair use finding); *Bleem*, 214 F.3d at 1028 (explaining that nature

of copyrighted work is most relevant when "the original material and the copy are of a different nature"); *L.A. News Serv.*, 108 F.3d at 1122 (reasoning that fair use finding is strongly favored when infringed work is informational, factual and news); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1524 (9th Cir. 1992) (examining fictitious or functional nature of work and "idea/expression distinction" with regard to utilitarian articles); *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 970 (9th Cir. 1992) (recognizing that audiovisual displays created by device that can alter features of copyrighted video game are not derivative in nature because "technology often advances by improvement rather than replacement").

3. Amount and Substantiality of Portion of Infringed Work Used by Infringing Work in Relation to the Copyrighted Work as a Whole: *Campbell*, 510 U.S. at 586–88 (explaining importance of quantity of materials used, as well as their quality and importance); *Seltzer*, 725 F.3d at 1178–79 (addressing when original works are copied in full because they are "not meaningfully divisible"); *Bleem*, 214 F.3d at 1028 (noting that fair use finding is not likely when there is high degree of copying and "essence" of copyrighted work and copy are similar); *Connectix Corp.*, 203 F.3d at 606–07 (considering whether use occurs in reverse engineering of copyrighted work to gain access to unprotected functional elements of software); *Dr. Seuss Enters.*, 109 F.3d at 1402 (expressing that focus of this factor is question of substantial similarity and whether use was "reasonable in relation to the purpose of the copying" rather than whether use was fair~~).~~); *Tresóna*, 953 F.3d at 651 (noting that although "qualitatively significant" portion of original work was used, because of transformative nature of new material, this factor "did not weigh against fair use").

4. Effect of Use of Infringing Work on the Potential Market for or Value of the Copyrighted Work: *Campbell*, 510 U.S. at 590–91, n.21 (assessing harm use can cause to plaintiff's market and market effect if others also infringe through such use; considering if use displaces or substitutes for original work; examining effect of use on derivative market for protected work; noting that "the importance of this [fourth] factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors"); *Harper & Row, Publishers*, 471 U.S. at 566 (noting that effect of defendant's infringing work on market for or value of plaintiff's work is most important of fair use factors); *SOFA Entm't, Inc.*, 709 F.3d at 1280 (explaining that this factor favors finding of fair use when use "advances [the alleged infringers'] own original creation without any reasonable threat to [the original author's] business model"); *Monge*, 688 F.3d at 1181 (emphasizing that potential market exists independent of copyright owner's present intent not to publish copyrighted work); *Bleem*, 214 F.3d at 1026–27 (noting that effect on market "factor may be the most important, [but] all factors must be considered, and the commercial nature of the copies is just one element"; use for comparative advertising can support first fair use factor but negate fourth fair use factor); *Dr. Seuss Enters.*, 109 F.3d at 1403 (balancing public benefit that will result from defendant's use against personal gain copyright owner will receive if use is denied); *Triad Sys. Corp.*, 64 F.3d at 1336–37 (noting that when defendant's work competes in same market it is less likely fair use); *Tresóna*, 953 F.3d at 651 (commenting that due to transformative nature of newly created work, consumer interested in original work would not substitute the newly created work).

5. Additional Factors: *Campbell*, 510 U.S. at 585 n.18 (considering defendant's state of mind and explaining that permission is not necessary if use is fair); *Harper & Row, Publishers*, 471 U.S. at 562 (stating fair use presupposes good faith and fair dealing); *Fisher v. Dees*, 794 F.2d 432, 437

(9th Cir. 1986) ("courts may weigh 'the propriety of the defendant's conduct' in the equitable balance of a fair use determination" (citation omitted)).

The Ninth Circuit has considered a number of cases involving copying of computer software. In all cases, the trial courts appropriately made use of the four-factor test for fair use. *See, e.g., Connectix Corp.*, 203 F.3d at 608; *Triad Sys. Corp.*, 64 F.3d at 1336-37.

Parody often presents difficulties because the success of its imitative character depends on its ability to "conjure up" the original work that it parodies. This may create an issue of fair use. *See, e.g., Campbell*, 510 U.S. at 588-89 (explaining importance of context when evaluating parodies and how parodies usually serve different market functions than original); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803 (9th Cir. 2003); *Dr. Seuss Enters.*, 109 F.3d at 1399-1401.

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17.25A COPYRIGHT—AFFIRMATIVE DEFENSE—EXPRESS LICENSE

The defendant contends that [he] [she] [it] is not liable for copyright infringement because the plaintiff granted [him] [her] [it] an express license in the plaintiff's copyrighted work. The plaintiff cannot claim copyright infringement against a defendant who [copies] [distributes] [uses] the plaintiff's copyrighted work if the plaintiff granted the defendant an express license to [copy] [distribute] [use] the work.

In order to show the existence of an express license, the defendant has the burden of proving that the defendant received an express license to [copy] [distribute] [use] the plaintiff's copyrighted work.

If the defendant proves this, the burden shifts to the plaintiff to show that the defendant's [copying] [distribution] [use] of the plaintiff's copyrighted work exceeded the scope of the license.

[I have separately instructed you on the scope of the license agreement between the parties.]

If you find that the defendant has proved that the plaintiff granted [him] [her] [it] an express license to [copy] [distribute] [use] the copyrighted work, your verdict should be for the defendant [on that portion of the plaintiff's copyright infringement claim], unless the plaintiff proves the defendant's [copying] [distribution] [use] of the plaintiff's copyrighted work exceeded the scope of the license. If the plaintiff proves this, your verdict must be for the plaintiff.

Comment

"[A]nyone who is authorized by the copyright owner to use the copyrighted work in a way specified in the statute . . . is not an infringer of the copyright with respect to such use.'' *Sony Corp. of Am. v. Universal City Studios, Inc*., 464 U.S. 417, 433 (1984) (quoting 17 U.S.C. § 501(a)). "Thus, '[t]he existence of a license creates an affirmative defense to a claim of copyright infringement.'" *Oracle USA, Inc. v. Rimini St., Inc*., 879 F.3d 948, 954 (9th Cir. 2018) (quoting *Worldwide Church of God v. Phila. Church of God, Inc*., 227 F.3d 1110, 1114 (9th Cir. 2000)), *rev'd on other grounds*, 139 S. Ct. 873 (2019). ~~"However, '[~~A claim for copyright infringement fails "if the challenged use of the work falls within the scope of a valid license." *Great Minds v. Office Depot*, 945 F.3d 1106, 1110 (9th Cir. 2019) (citations omitted). Further, "'[w]hen a licensee exceeds the scope of the license granted by the copyright holder, the licensee is liable for infringement.'" ~~*Id.*~~*Oracle USA, Inc*., 879 F.3d at 954 (quoting *LGS Architects, Inc. v. Concordia Homes of Nev*., 434 F.3d 1150, 1156 (9th Cir. 2006)).

The trial court should modify this instruction as necessary to reflect the nature of the defendant's alleged copyright infringement. In a case in which the defendant claims to have acted under an express license, it is likely that the trial court will need to construe the terms of the license for the jury. *See, e.g.*, *id*. at 955, 958. Federal courts "rely on state law to provide the canons of contractual construction, but only to the extent such rules do not interfere with

federal copyright law or policy." *Great Minds v. Office Depot*, 945 F.3d at 1110 (quoting *Cohen v. Paramount Pictures Corp*., 845 F.2d 851, 854 (9th Cir. 1988)).

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18.1 SECURITIES—~~DEFINITION~~DEFINITIONS OF RECURRING TERMS

Congress has enacted securities laws designed to protect the integrity of financial markets. The plaintiff claims to have suffered a loss caused by the defendant'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 is 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 in essence 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~~where 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 had 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 can also 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 policy-making of the enterprise. A broker or a dealer may be a controlling person.]

["In connection with" means that there was some nexus or relationship 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

As to "investment contract," whether the specific instrument qualifies as a security can be a threshold issue. *SEC v. Hui Feng*, 935 F.3d 721, 728-729 (9th Cir. 2019). The Supreme Court's decision in *Howey* and later case law holds 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. 298-99 (1946); *United Housing Fund., Inc. v. Forman*, 421 U.S. 837, 851-852 (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.

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 Retirement 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 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).

As to "omission," 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").

A duty of disclosure may also 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. Electric Capital Corp.*, 96 F.3d 1151, 1157 (9th Cir. 1996) (citations and internal quotation marks omitted) (holding that financer of leveraged buyout of corporation did not have duty to disclose material information regarding corporation to investors in 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).

As to "broker," courts in the Ninth Circuit have used the totality-of-the-circumstances approach. *See Hui Feng*, 935 F.3d at 731-31. 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.

As to "controlling person," *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), for a discussion of controlling person liability.

As to "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. Diamanthuset, Inc., 950 F.2d 1478, 1485-86 (9th Cir. 1991) (citations omitted) (first alteration in original). The defendant need not, however, have actually participated in any securities transaction so long as the 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 found to be "touching" the securities transaction).

As to "instrumentality of interstate commerce," it is not necessary that interstate mailings, telephone calls, or other 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).

As to "omission," 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").

A duty of disclosure may also 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. Electric Capital Corp.*, 96 F.3d 1151, 1157 (9th Cir. 1996) (citations and internal quotation marks omitted) (holding that financer of leveraged buyout of corporation did not have duty to disclose material information regarding corporation to investors in 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).

Statements of opinion may be actionable if the opinion (1) amounts to an untrue statement of material fact or (2) is misleading due to the omission of a material fact. *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 135 S. Ct. 1318, 1326-30 (2015). In *Omnicare*, pension funds brought suit after purchasing stock from a pharmaceutical services company, alleging that the registration statement contained opinions of legal compliance that were materially false and misleading. 135 S. Ct. at 1324. The Supreme Court held that a speaker may be liable in the securities context for making certain statements of opinion. *Id.* Generally, 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. *Id.* at 1326-27. Additionally, an opinion may be actionable if the speaker omits material facts necessary to make the opinion not misleading: 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 1328-30. Although *Omnicare* was decided under §11 of the Securities Act of 1933, the Ninth Circuit recently 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). 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 Retirement Fund v. Hewlett Packard Co.*, 845 F.3d 1268, 1275-76 (9th Cir. 2017).