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# *COMMENTARY*

## *Does April Fools' Allow Corporations to Fool Rule 10b-5?*

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April Fools' Day is a day of jokes, but what if a corporation's jokes lead to a Rule 10b-5 violation? Rule 10b-5 regulates the employment of manipulative and deceptive devices that are used in connection with the sale of securities. More specifically Rule 10b-5 states that,

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ and device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates as a fraud or deceit upon any person, in connection with the purchase or sale of any security. [1]

In today's day and age, publicly held companies make numerous social media posts which have the potential to impact the sale of securities. Around April Fools' Day it has become a trend for companies to make April Fools' jokes. For example, in *In Re Volkswagen AG Securities Litigation*, Volkswagen made a post that it was changing its name to Voltswagen; however, this statement was just an April Fools' joke. [2] Unfortunately for stockholders, Volkswagen did not release that the name change was a marketing tactic until after the stock market had closed. [3] At first glance, these April Fools' jokes, such as

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[1] Commodity and Securities Exchanges, 17 C.F.R. § 240.10b-5.

[2] In re Volkswagen AG Sec. Litig., No. 122CV00045RDAWEF, 2023 WL 2505539 at *5 (E.D. Va. Mar. 14, 2023).

[3] *Id.*

Volkswagen's post, would seem to invoke Rule 10b-5, but shareholders have additional elements that are required to be met in order to bring a claim under Rule 10b-5.

In order to bring a Rule 10b-5 claim, a shareholder would have to prove that "(1) the defendant made a false statement or omission of material fact (2) with scienter (3) upon which the plaintiff justifiably relied (4) that proximately caused the plaintiff's damages." [4] In most of these corporation's posts and advertisements, courts have found all of the elements of a Rule 10b-5 claim to have been met, except for scienter. [5] Because the scienter element is not met, shareholders are not able to recover after buying or selling securities on behalf of these consequential April Fools' jokes.

These social media posts constitute a material fact under Rule 10b-5 when a reasonable seller or purchaser would find the information in the post influential when considering whether to buy or sell securities. [6] In addition to the material posts, the company would have to act with scienter, "a mental state embracing intent to deceive, manipulate, or defraud." [7] Due to the fact that companies are posting these material posts as an April Fools' joke, they evade Rule 10b-5 since the intent is to make a joke or marketing tactic rather than to deceive, manipulate, or defraud. However, shareholders are unaware of these jokes and the "jokes" have real impacts on securities.

The question then arises whether publicly traded companies should be allowed to make these "jokes" or "advertisements." This question remains unanswered; so, before investing in the stock market this April, conduct due diligence to ensure that the publicly held company is not making an April Fools' joke because this joke will likely fool Rule 10b-5, which will consequently result in the inability to state a claim, if fooled.

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[4] In re PEC Sols., Inc. Sec. Litig., 418 F.3d 379, 386–87 (4th Cir. 2005) (quoting Hillson Partners Ltd. P'ship v. Adage, Inc., 42 F.3d 204, 208 (4th Cir. 1994).

[5] *See generally*, In re Volkswagen AG Sec. Litig., No. 122CV00045RDAWEF, 2023 WL 2505539. *See e.g.*, Champions League, Inc. v. Woodard, 224 F. Supp. 3d 317, 325 (S.D.N.Y. 2016).

[6] In re PEC Sols., Inc. Sec. Litig., 418 F.3d 379, 387 (4th Cir. 2005) (quoting Longman v. Food Lion, Inc., 197 F.3d 675, 683 (4th Cir. 1999).

[7] Tellabs, Inc. v. Makor Issues & Rts., Ltd., 127 S. Ct. 2499, 2507 (2007) (quoting Ernst & Ernst, 425 U.S. 185, 193–194).