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Comment

Pleading Scienter Under the Private Securities Litigation Reform Act of 1995: Did Congress Eliminate Recklessness, Motive, and Opportunity?

Nicole M. Briski*

I. INTRODUCTION

Shareholders are filing federal securities fraud class action lawsuits in record numbers.¹ The likelihood that a corporation will be the subject of a shareholder class action lawsuit currently lies at 57.5%.² From December 22, 1995, to January 13, 2000, 737 companies were sued in federal court.³ Furthermore, companies in the high technology industry, the most frequently sued industry, are particularly vulnerable to shareholder lawsuits.⁴ In Silicon Valley, the epicenter of this industry, one out of every two corporations has been subjected to a securities class action lawsuit.⁵

* J.D. expected May 2001. I would like to thank my husband, David Leatherwood, for his guidance, support, encouragement, and love.

1. See Cindy Krischer Goodman, *Shareholders Find Benefits, Limits to Suing Firms When Stock Price Plummets*, MIAMI HERALD, Jan. 3, 2000, at 2 (describing the recent increase in the number of shareholder lawsuits filed); Kelly Greene & Carrick Mollenkamp, *MedPartners Settles Suits By Investors*, WALL ST. J., July 28, 1999, at F1 (proclaiming that the number of shareholder securities lawsuits in the Southeast is "skyrocketing"). In fact, in 1998, the number of securities lawsuits filed in the southeastern states of Alabama, Florida, Tennessee, Georgia, South Carolina, and North Carolina has increased six-fold from that of 1997. See Greene & Mollenkamp, *supra*, at F1.

2. See Goodman, *supra* note 1, at 2 (citing the National Economics Research Associates in New York).

3. See *Stanford Securities Class Action Clearinghouse* (visited Jan. 12, 2000) <<http://securities.stanford.edu/>>.

4. See *id.*; see also Richard A. Rosen, *US Securities Litigation in a Time of Change*, 18 INT'L. FIN. L. REV. 1923, 1925 (1999) (remarking that "[t]he largest portion of the lawsuits are against high technology companies"). Young, high technology companies are particularly vulnerable to suits because they generally experience volatile stock prices. See S. REP. NO. 104-98, at 16 (1995), *reprinted in* 1995 U.S.C.A.N. 679, 695.

5. See 141 CONG. REC. H15216 (daily ed. Dec. 20, 1995) (statement of Rep. Fields).

Once a securities fraud lawsuit survives a motion to dismiss, the prohibitive cost of discovery⁶ provides an incentive for a corporation to settle the lawsuit, regardless of the company's culpability.⁷ Approximately 93% of the securities class action lawsuits filed each year settle, at an average cost of \$8.6 million each.⁸ The high settlement value of securities lawsuits has led to many abusive practices, including the filing of frivolous litigation in the hopes of surpassing a motion to dismiss and achieving a high settlement.⁹ These suits, termed "strike suits,"¹⁰ ultimately harm the shareholders of public corporations who must bear the costs of settlements and attorney fees.¹¹ Additionally, "strike suits" harm the market because the suits hamper corporate innovation and discourage corporations from releasing information to the public.¹² The high settlement value associated with securities class actions also encourages plaintiffs' attorneys to file numerous suits on behalf of shareholders in the hopes that at least one will succeed,¹³ a practice known as "saturation bombing."¹⁴

6. See Robert J. Giuffra Jr., *CEOs Beware: The Strike Suit Lives*, WALL ST. J., Sept. 13, 1999, at A45 ("Discovery costs account for about 80% of the total costs of securities class actions."). During discovery, plaintiffs can require a corporation, "at great expense, to turn over hundreds of thousands of pages of memos, e-mail and notes." *Id.* Additionally, key employees must spend a significant amount of time responding to discovery requests, such as providing deposition testimony. See S. REP. NO. 104-98, at 14 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 693.

7. See Giuffra, *supra* note 6, at A45; see also S. REP. NO. 104-98, at 6 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 685 (noting that securities class actions "have a much higher settlement rate than other types of class actions").

8. See S. REP. NO. 104-98, at 9 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 688.

9. See *id.*; see also 141 CONG. REC. H15215 (daily ed. Dec. 20, 1995) (statement of Rep. Bliley) (likening "strike suits" to extortion). Shareholders routinely file lawsuits immediately after a company announces that its earnings have decreased. See Greene & Mollenkamp, *supra* note 1, at 1; see also 141 CONG. REC. H15216 (daily ed. Dec. 20, 1995) (statement of Rep. Fields) (recognizing that many shareholders file lawsuits "only because the market price on the securities has dropped"); Cindy Krischer Goodman, *Lawyer King of Stock Fraud Suits: When Prices Take Dramatic Fall, Shareholders Call Melvin Weiss*, HOUS. CHRON., Jan. 9, 2000, at 2 (noting that "[w]hen a company's stock drops precipitously, [shareholders' attorneys] often file a lawsuit within days, sometimes hours").

10. Strike suits are defined as a "[s]hareholder derivative action begun with hope of winning large attorney fees or private settlements, and with no intention of benefiting [the] corporation on behalf of which suit is theoretically brought." BLACK'S LAW DICTIONARY 1423 (6th ed. 1990).

11. See Giuffra, *supra* note 6, at A45; see also S. REP. NO. 104-98, at 5 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 684 (explaining that "meritorious suits do not benefit when strike suit artists wreak havoc on the Nation's boardrooms and courthouses").

12. See Giuffra, *supra* note 6, at A45.

13. See *id.*; see also H.R. CONF. REP. NO. 104-369, at 37 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 736 (likening discovery in a securities class action to a fishing expedition).

14. See Goodman, *supra* note 1, at 2 (defining "saturation bombing" as "filing enough cases so that maybe one will pay off").

Because most securities class action lawsuits settle after the plaintiff has survived a motion to dismiss, the pleading standard imposed on the plaintiff's complaint is extremely important.¹⁵ The weaker the standard, the more likely frivolous lawsuits will reach settlement.¹⁶ Conversely, the more stringent the standard, the more likely that "strike suits" will be eliminated at the pleading stage.¹⁷ Prior to 1995, the federal circuit courts that had addressed this issue disagreed on the requisite pleading standard of securities fraud actions, namely the requirements that a plaintiff had to meet when pleading scienter.¹⁸

In an attempt to establish uniform pleading standards and reduce frivolous litigation, the United States Congress enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA").¹⁹ Every circuit to address the issue has agreed that the PSLRA has heightened the pleading standard for scienter that a plaintiff must meet in order to withstand a motion to dismiss.²⁰ The circuits, however, disagree on the appropriate standard to adopt for pleading scienter under the PSLRA.²¹ Specifically, the circuits are split as to whether scienter under the PSLRA encompasses recklessness or, rather, a deliberate and knowing state of mind.²² Additionally, the circuits disagree on whether the

15. See Marc J. Sonnenfeld & Karen Pieslak Pohlmann, *Circuit Courts Address Standards for Pleading Scienter in Dismissing Complaints*, 7 METRO. CORP. COUNS. 52, 52 (1999) (explaining that the viability of "securities class actions can turn on the level of particularity that is required and the types of allegations that suffice to aver scienter"); Giuffra, *supra* note 6, at A45 (stating that "[t]he main check on strike suit-lawyers is the ability of a federal judge to throw out a flawed complaint before discovery").

16. See Giuffra, *supra* note 6, at A45.

17. See *id.*

18. See *infra* Part II.A.3 (discussing the disparity among the circuit courts prior to 1995 as to the applicable scienter pleading requirements). Scienter refers to "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976).

19. See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, 758 (codified as amended at 15 U.S.C.A. § 78u-4 (West 1997 and Supp. 2000)).

20. See *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 193 (1st Cir. 1999); *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 620-21 (4th Cir. 1999); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1283 (11th Cir. 1999); *In re Comshare, Inc.*, 183 F.3d 542, 552 (6th Cir. 1999); *In re Silicon Graphics, Inc.*, 183 F.3d 970, 974 (9th Cir. 1999); *In re Advanta Corp.*, 180 F.3d 525, 531-32 (3d Cir. 1999); *Press v. Chemical Inves. Servs. Corp.*, 166 F.3d 529, 537-38 (2d Cir. 1999); *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 178 (5th Cir. 1997).

21. See *Greebel*, 194 F.3d at 193-94; *Phillips*, 190 F.3d at 620; *Bryant*, 187 F.3d at 1287; *Comshare*, 183 F.3d at 549; *Silicon Graphics*, 183 F.3d at 974; *Advanta*, 180 F.3d at 534-35; *Press*, 166 F.3d at 538; *Williams*, 112 F.3d at 178; see also *infra* Part III (discussing the various circuit courts' approaches to scienter and state of mind requirements).

22. See *Greebel*, 194 F.3d at 193; *Phillips*, 190 F.3d at 620; *Bryant*, 187 F.3d at 1287; *Comshare*, 183 F.3d at 549; *Silicon Graphics*, 183 F.3d at 974; *Advanta*, 180 F.3d at 534-35; *Press*, 166 F.3d at 538; *Williams*, 112 F.3d at 178; see also *infra* Part III.A (comparing the standard of recklessness to deliberate recklessness).

pleading of facts demonstrating the defendant's motive and opportunity to commit securities fraud is sufficient to withstand a motion to dismiss.²³

This Comment begins with a brief description of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, which is a rule promulgated thereunder by the Securities Exchange Commission.²⁴ Specifically, this Comment will examine the history of the scienter requirement and the varied pleading standards adopted by the circuit courts prior to the enactment of the PSLRA.²⁵ Next, the Comment will address the purposes behind the enactment of the PSLRA and trace the legislative history of the PSLRA.²⁶ This Comment will then discuss the current disagreement among the circuits regarding the requisite state of mind that must be pled under the PSLRA.²⁷ The Comment will then further discuss the three different approaches adopted by the circuits regarding a plaintiff's ability to withstand a motion to dismiss through factual allegations that demonstrate the defendant's motive and opportunity to commit securities fraud.²⁸ Further, this Comment will analyze the varied approaches to the pleading of scienter in light of the PSLRA's rationale, legislative history and text.²⁹ Finally, the Comment will propose that the PSLRA attempted to retain the severe recklessness standard and eliminate the sufficiency of the bare pleading of motive and opportunity.³⁰

II. BACKGROUND

Before examining the current disagreement among the circuits as to the proper pleading standard for scienter in securities fraud litigation,³¹

23. See *Greebel*, 194 F.3d at 193; *Phillips*, 190 F.3d at 620; *Bryant*, 187 F.3d at 1287; *Comshare*, 183 F.3d at 549; *Silicon Graphics*, 183 F.3d at 974; *Advanta*, 180 F.3d at 534-35; *Press*, 166 F.3d at 538; *Williams*, 112 F.3d at 178; see also *infra* Part III.B (discussing the various circuit courts' requirements that a plaintiff must allege in order to survive a motion to dismiss).

24. See *infra* Part II.A.1 (describing Section 10(b) and Rule 10b-5).

25. See *infra* Parts II.A.1-3 (outlining the status of securities fraud before the PSLRA was enacted).

26. See *infra* Part II.B (discussing the PSLRA and its history).

27. See *infra* Part III.A (comparing the standard of recklessness to deliberate recklessness).

28. See *infra* Part III.B (discussing the varying interpretations of the circuits as to whether pleading motive and opportunity alone satisfies the scienter pleading requirements).

29. See *infra* Part IV (analyzing the various circuit court approaches in the context of the text, legislative history, and policies behind the PSLRA).

30. See *infra* Part V (proposing the Supreme Court intervene to clarify the correct standard under the PSLRA).

31. See *infra* Part III (discussing the circuit courts' disagreement over the required state of mind and level of specificity regarding scienter that a plaintiff must allege).

it is important to understand federal securities laws and policies.³² First, this section will discuss the status of securities fraud litigation prior to the enactment of the PSLRA.³³ This section will then examine the rationale behind the enactment of the PSLRA and the PSLRA's legislative history.³⁴ This section will conclude with a discussion of legislation enacted subsequent to the PSLRA.³⁵

A. Securities Fraud Pre-PSLRA

1. Section 10(b) and Rule 10b-5

Section 10(b) of the Securities Exchange Act of 1934 regulates the secondary trading of all securities.³⁶ Rule 10b-5, promulgated thereunder by the Securities Exchange Commission, is the most important anti-fraud provision of the securities laws.³⁷ Rule 10b-5

32. See *infra* Parts II.A-C (describing securities fraud before the PSLRA was enacted, the PSLRA, and legislation following the enactment of the PSLRA).

33. See *infra* Part II.A (discussing securities fraud litigation prior to the enactment of the PSLRA).

34. See *infra* Part II.B (discussing the PSLRA and its history).

35. See *infra* Part II.C (outlining securities fraud legislation enacted after the PSLRA).

36. See Securities Exchange Act of 1934, 15 U.S.C.A. § 78j (West 1997); see also Paul Vizcarrondo, Jr. & Andrew C. Houston, *Liabilities Under Sections 11, 12, 15, and 17 of the Securities Act of 1933 and Sections 10, 18 and 20 of the Securities Exchange Act of 1934*, 1138 *PLI/Corp* 583, 611 (1999) (explaining the applicability of Section 10(b)). Section 10(b) of the Securities Exchange Act of 1934 provides:

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

...

To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C.A. § 78j.

37. See Employment of Manipulative and Deceptive Devices, 17 C.F.R. § 240.10b-5 (2000); Vizcarrondo & Houston, *supra* note 36, at 611 ("[Section] 10(b) and Rule 10b-5 continue to dwarf in importance other liability rules under the securities laws."). Rule 10b-5 provides:

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 any 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 or would operate as a fraud or deceit upon any person, in connection with the purchase or

gives a purchaser or seller of securities a private cause of action for securities fraud.³⁸ To state a cause of action under Section 10(b) and Rule 10b-5, a plaintiff must plead that the defendant made a misstatement or omission of a material fact in connection with the purchase or sale of securities, upon which the plaintiff justifiably relied and was injured.³⁹ In 1976, the Supreme Court held that scienter is an essential element of a Rule 10b-5 cause of action.⁴⁰ The Court defined scienter as "a mental state embracing intent to deceive, manipulate, or defraud."⁴¹ The Court, however, declined to determine whether recklessness satisfies the scienter definition.⁴²

2. Scienter Includes Recklessness

Since the Supreme Court concluded that scienter is a required element under Section 10(b) and Rule 10b-5 in 1976,⁴³ each circuit court to address the issue held that scienter encompasses recklessness.⁴⁴

sale of any security.

17 C.F.R. § 240.10b-5.

38. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731-32 (1975); see also *Vizcarrondo & Houston*, *supra* note 36, at 611-12 (tracing judicial decisions that led to the conclusion that there is an implied private cause of action for securities fraud under Rule 10b-5).

39. See 15 U.S.C.A. § 78j(b); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1281 (11th Cir. 1999); *Press v. Chemical Inves. Servs. Corp.*, 166 F.3d 529, 534 (2d Cir. 1999); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 (1976); 17 C.F.R. § 240.10b-5.

40. See *Hochfelder*, 425 U.S. at 193 (holding that a private cause of action under Section 10(b) and Rule 10b-5 necessitates the pleading of scienter). Scienter is defined as "a mental state embracing intent to deceive, manipulate or defraud." *Id.* at 194 n.12. The Supreme Court reasoned that the use in Section 10(b) of the terms manipulative or deceptive, used in conjunction with device and contrivance "strongly suggest that § 10(b) was intended to proscribe knowing or intentional misconduct." *Id.* at 197.

41. *Id.* at 194 n.12.

42. See *id.* The Court acknowledged that recklessness could at times amount to a type of "intentional conduct for purposes of imposing liability." *Id.* On the other hand, the Court held that scienter under Section 10(b) and Rule 10b-5 does not encompass negligent conduct. See *id.* at 214.

43. See *id.* at 193.

44. See *SEC v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992) (recognizing recklessness as a form of scienter in Section 10(b) and Rule 10b-5 actions); accord *Backman v. Polaroid Corp.*, 910 F.2d 10, 14 (1st Cir. 1990); *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1569-70 (9th Cir. 1990) (en banc); *VanDyke v. Coburn Enter., Inc.*, 873 F.2d 1094, 1100 (8th Cir. 1989); *Currie v. Cayman Resources Corp.*, 835 F.2d 780, 785 n.11 (11th Cir. 1988); *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 495 (7th Cir. 1986); *Davis v. Avco Fin. Servs., Inc.*, 739 F.2d 1057, 1063 (6th Cir. 1984); *Zobrist v. Coal-X, Inc.*, 708 F.2d 1511, 1516 (10th Cir. 1983); *Sharp v. Coopers & Lybrand*, 649 F.2d 175, 193 (3d Cir. 1981); *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 961-62 (5th Cir. 1981); *IIT v. Cornfeld*, 619 F.2d 909, 923 (2d Cir. 1980). But see *McDonald v. Alan Bush Brokerage Co.*, 863 F.2d 809, 814 (11th Cir. 1989) (holding that "severe recklessness" qualifies as scienter under Section 10(b) and Rule 10b-5). See generally William S. Lerach & Eric Alan Isaacson, *Pleading Scienter Under Section 21D(b)(2) of the Securities Exchange Act of 1934: Motive, Opportunity, Recklessness, and the*

All the circuits believed that recklessness conformed to the Supreme Court definition of scienter because recklessness is a form of knowing or conscious misconduct, differing from ordinary negligence.⁴⁵ The courts held that reckless behavior is akin to a lesser form of intentional conduct.⁴⁶ The circuits also uniformly defined recklessness.⁴⁷ Specifically, the courts adopted the “Sundstrand standard,”⁴⁸ which describes reckless conduct as a highly unreasonable and extreme departure from ordinary care, as opposed to simple or even inexcusable negligence.⁴⁹ The departure must create “a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the [defendant] must have been aware of it.”⁵⁰

Private Securities Litigation Reform Act of 1995, 33 SAN DIEGO L. REV. 893, 913-18 (1996) (tracing the adoption of recklessness by the circuit courts prior to the PSLRA); John F. X. Pelosa & Stuart M. Sarnoff, *Pleading Scienter Under the Reform Act*, 222 N.Y.L.J. 3, 3 (1999) (commenting on the uniformity among the circuits regarding recklessness); Vizcarrondo & Houston, *supra* note 36, at 616 (analyzing the circuit courts approach to recklessness before the PSLRA).

45. See, e.g., *Hollinger*, 914 F.2d at 1568-69 (holding that recklessness satisfies the scienter definition as expressed by the Supreme Court in *Ernst & Ernst v. Hochfelder*); *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977) (explaining that recklessness is distinct from negligence). In fact, definitions of recklessness routinely envision a form of conscious misconduct. See MODEL PENAL CODE § 2.02(2)(c) (1985) (explaining that an individual “acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct”).

46. See, e.g., *Hollinger*, 914 F.2d at 1569 (explaining that recklessness more resembles intent than negligence); *Sundstrand*, 553 F.2d at 1045 (defining recklessness “as the functional equivalent of intent”).

47. See *Steadman*, 967 F.2d at 641-42; *K&S Partnership v. Continental Bank*, 952 F.2d 971, 978 (8th Cir. 1991); *Hollinger*, 914 F.2d at 1569-70; *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1324 (11th Cir. 1982); *Hackbart v. Holmes*, 675 F.2d 1114, 1118 (10th Cir. 1982); *Sharp*, 649 F.2d at 193; *Broad*, 642 F.2d at 960-61; *Ohio Drill & Tool Co. v. Johnson*, 625 F.2d 738, 741 (6th Cir. 1980); *Hoffman v. Estabrook & Co.*, 587 F.2d 509, 516 (1st Cir. 1978); *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 46 (2d Cir. 1978); *Sundstrand*, 553 F.2d at 1044-45.

48. See *Steadman*, 967 F.2d at 641-42; *Hollinger*, 914 F.2d at 1569-70; *Hackbart*, 675 F.2d at 1118; *Sharp*, 649 F.2d at 193; *Broad*, 642 F.2d at 960-61; *Ohio Drill & Tool*, 625 F.2d at 741; *Sundstrand*, 553 F.2d at 1044-45 (adopting the “Sundstrand Standard”); see also *K&S Partnership*, 952 F.2d at 978; *Carriba Air*, 681 F.2d at 1324; *Hoffman*, 587 F.2d at 516; *Rolf*, 570 F.2d at 46. District courts in the Fourth Circuit adopted the “Sundstrand standard” for recklessness as well. See *Frankel v. Wyllie & Thornhill, Inc.*, 537 F. Supp. 730, 740 (W.D. Va. 1982). See generally *Lerach & Isaacson, supra* note 44, at 913-14 (discussing the widespread acceptance of the “Sundstrand standard”). The “Sundstrand standard” defines recklessness as a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and 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.

Sundstrand, 553 F.2d at 1045 (quoting *Franke v. Midwestern Oklahoma Dev. Auth.*, 428 F. Supp. 719 (W.D. Okla. 1976)).

49. See *Sundstrand*, 553 F.2d at 1044-45.

50. *Id.* at 1045.

3. Conflicting Views Regarding the Pleading of Scienter

Although the circuit courts agreed that recklessness satisfied the scienter pleading requirement imposed by the Supreme Court in Section 10(b) and Rule 10b-5 private causes of action, the circuit courts were divided as to the specificity of facts the plaintiff had to plead in order to withstand a motion to dismiss.⁵¹ The courts relied on Rule 9(b) of the Federal Rules of Civil Procedure,⁵² which sets forth two requirements concerning pleadings.⁵³ The Rule first asserts that a plaintiff must plead facts that constitute fraud with particularity.⁵⁴ The Rule also states that a plaintiff may plead conditions of the mind generally.⁵⁵ Each circuit reached a different conclusion on the level of specificity required when pleading scienter, however, based on which part of Rule 9(b) it found persuasive.⁵⁶

For example, in *In re Time Warner, Inc.*,⁵⁷ the Second Circuit, relying on the first sentence of Rule 9(b), held that Rule 9(b) requires the plaintiff to allege facts in the complaint that create a strong inference of scienter.⁵⁸ The court established two different approaches whereby a

51. Compare *In re Time Warner Inc.*, 9 F.3d 259, 268 (2d Cir. 1993) (holding that plaintiffs must plead facts that create a strong inference of scienter), with *In re GlenFed, Inc.*, 42 F.3d 1541, 1547-48 (9th Cir. 1994) (holding that plaintiffs only need to aver scienter generally). See generally Laurence A. Steckman & Kenneth M. Moltner, *Pleading Scienter in Securities Fraud Cases Under Rule 9(b) - Is the Pleading of Facts Sufficient to Give Rise to a "Strong Inference" of Fraudulent Intent Really Incompatible with the Federal Rules?*, 1995 ANN. SURV. AM. L. 99, 99-112 (1995) (analyzing the conflicting views adopted by the circuit courts in respect to pleading scienter under Section 10(b) and Rule 10b-5 and Federal Rule of Civil Procedure 9(b)); Vizcarrondo & Houston, *supra* note 36, at 617 (discussing the lack of uniformity among the circuits regarding pleading scienter).

52. See *Time Warner*, 9 F.3d at 265; *GlenFed*, 42 F.3d at 1545 (both examining Rule 9(b) in order to determine the scienter pleading requirements).

53. See FED. R. CIV. P. 9(b) (requiring circumstances of fraud to be stated with particularity and allowing conditions of the mind to be averred generally).

54. See *id.* ("In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity.").

55. See *id.* ("Malice, intent, knowledge, and other condition of mind of a person may be averred generally.").

56. Compare *Time Warner*, 9 F.3d at 265 (relying on the first sentence of Rule 9(b), thereby requiring the plaintiff to plead with particularity), with *GlenFed*, 42 F.3d at 1545 (relying on the second sentence of Rule 9(b), thereby allowing the plaintiff to omit facts during pleading that give rise to a strong inference of a fraudulent intent).

57. *In re Time Warner, Inc.*, 9 F.3d 259 (2d Cir. 1993).

58. See *id.* at 268. The court did not, however, require the plaintiff to plead scienter with great specificity. See *id.*; accord *Greenstone v. Cambex Corp.*, 975 F.2d 22, 25 (1st Cir. 1992) (holding that the plaintiff must plead specific facts demonstrating that the defendant had possessed the requisite scienter); *DiLeo v. Ernst & Young*, 901 F.2d 624, 629 (7th Cir. 1989) (stating that the complaint must afford a factual basis from which scienter can be inferred). See generally Steckman & Moltner, *supra* note 51, at 104-08 (analyzing the Second Circuit's pleading standard); Vizcarrondo & Houston, *supra* note 36, at 617 (describing the Second Circuit

plaintiff may plead scienter.⁵⁹ First, the plaintiff may allege facts demonstrating that the defendant had a motive to commit securities fraud⁶⁰ and the opportunity to do so.⁶¹ Second, the plaintiff may “allege facts constituting circumstantial evidence of either reckless or conscious behavior.”⁶²

The Ninth Circuit, however, relying on the second sentence of Rule 9(b), held that scienter may be averred generally.⁶³ In *In re Glenfed, Inc.*,⁶⁴ the court rejected the Second Circuit’s strong inference test and instead declared that a plaintiff may plead scienter merely by claiming that scienter was present.⁶⁵ This division among the circuits led Congress to enact legislation that purported to establish uniform guidelines with respect to the pleading of scienter under Section 10(b) and Rule 10b-5.⁶⁶

standard of pleading as the most rigorous of all of the circuits); William C. Baskin III, Note, *Using Rule 9(b) to Reduce Nuisance Securities Litigation*, 99 YALE L.J. 1591, 1601 (1990) (advocating the use of pleading facts to raise an inference of scienter in order to screen out frivolous lawsuits at the pleading stage).

59. See *Time Warner*, 9 F.3d at 268-69; accord *Shields v. Citytrust*, 25 F.3d 1124, 1128 (2d Cir. 1994).

60. See *Time Warner*, 9 F.3d at 269; accord *Shields*, 25 F.3d at 1128. Motive entails concrete benefits that the defendant could realize as a result of the misstatements or omissions alleged. See *id.* at 1130.

61. See *Time Warner*, 9 F.3d at 269; accord *Shields*, 25 F.3d at 1128. Opportunity entails “the means and likely prospect of achieving concrete benefits by the means alleged.” *Id.* at 1130.

62. *Time Warner*, 9 F.3d at 269; accord *Shields*, 25 F.3d at 1128.

63. See *In re Glenfed, Inc.*, 42 F.3d 1541, 1547 (9th Cir. 1994). The court relied on the second sentence of Rule 9(b) when concluding that particularity is not required when pleading the defendant’s state of mind. See *id.* at 1545. The court expressly rejected the Second Circuit’s standard of pleading facts that give rise to a strong inference of scienter. See *id.* at 1545-46. Therefore, the court held that a plaintiff “may aver scienter generally, just as the rule states - that is, simply by saying that scienter existed.” *Id.* at 1547.

64. *In re Glenfed, Inc.*, 42 F.3d 1541 (9th Cir. 1994).

65. See *id.* at 1547. The court similarly rejected the proposal that a plaintiff must plead facts sufficient to establish some inference of scienter. See *id.* at 1546. Instead, the court held that a conclusory allegation of scienter is sufficient to withstand a motion to dismiss. See *id.* at 1547; see also *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 285 (3d Cir. 1992) (holding that scienter may be averred generally). See generally *Steckman & Moltner, supra* note 51, at 99-104 (arguing against the general pleading standard espoused by the Ninth Circuit). Additionally, the court held that the circumstances constituting fraud must be averred with particularity. See *Glenfed*, 42 F.3d at 1547-48. The complaint “must set forth what is false or misleading about a statement, and why it is false.” *Id.* at 1548.

66. See *Pelosa & Sarnoff, supra* note 44, at 5 (discussing the rationale behind the PSLRA); *Vizcarrondo & Houston, supra* note 36, at 617-19 (stating that the purpose of the PSLRA was “[t]o eliminate the lack of uniformity among the circuits”); see also 15 U.S.C.A. §§ 78u-4(b)(1), (2) (West 1997). Congress agreed that the pleading standards announced in Rule 9(b) did not prevent the abuse of the system by private litigants. See H.R. CONF. REP. NO. 104-369, at 41 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 740.

B. The PSLRA

1. The Rationale Behind the PSLRA

In an effort to clarify the standard that a plaintiff must satisfy when pleading scienter under Section 10(b) and Rule 10b-5, Congress enacted the PSLRA in December of 1995.⁶⁷ The PSLRA purported to establish a clear standard of pleading by demanding that a plaintiff "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."⁶⁸ Additionally, the PSLRA heightened the pleading requirements for the circumstances constituting the alleged fraud, requiring a plaintiff to specify the facts that surrounded the defendant's misleading statements or omissions.⁶⁹ Failure to meet the pleading requirements results in a dismissal of the plaintiff's complaint.⁷⁰

Congress proposed this legislation to curb the abuses of the securities class action system.⁷¹ The lenient and conflicting pleading standards

67. See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, 758; H.R. CONF. REP. NO. 104-369, at 41 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 740 (explaining that the goal behind the enactment of the PSLRA is "to establish uniform and more stringent pleading requirements to curtail the filing of meritless lawsuits"); S. REP. NO. 104-98, at 7 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 686 (expressing the desire to adopt a standard pleading model).

68. 15 U.S.C.A. § 78u-4(b)(2). The PSLRA provides:

In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

69. See 15 U.S.C.A. § 78u-4(b)(1). The PSLRA provides:

[T]he complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

Id. See generally Lerach & Isaacson, *supra* note 44, at 894-95 (arguing that the PSLRA adopted the Ninth Circuit's standard as pronounced in *In re Glenfed, Inc.* with respect to pleading falsity).

70. See 15 U.S.C.A. § 78u-4(b)(3)(A) (West 1997).

71. See S. REP. NO. 104-98, at 5 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 684 (discussing the need to eliminate frivolous strike suits); *Securities Litigation: Hearings on Securities Litigation Reform Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 104th Cong. 8 (1995) (statement of Alfonse M. D'Amato, U.S. Senator) (expressing the desire to curb frivolous lawsuits without depriving legitimate victims of securities fraud of a remedy). *But see Securities Litigation Revision 1995: Hearings on Title II of H.R. 10 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce*, 104th Cong. 143 (1995) (statement of Mark J. Griffin, Director, Division of Securities, North American Securities Administrators Association) (opposing the heightened pleading requirements as a bar to meritorious cases). See generally HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, 3 SEC. & FED. CORP. L. § 16.1 (2d ed. 2000) (discussing the need to reform Section 10(b) and Rule

adopted by some circuits encouraged the emergence of several abusive practices.⁷² First, the standards inspired the frequent filing of lawsuits in response to any negative fluctuation in the price of stocks.⁷³ Second, the ease of surpassing a motion to dismiss created an incentive to target deep pocket corporate defendants.⁷⁴ Third, the system encouraged the exploitation of the expensive discovery process as a means to achieve a settlement.⁷⁵ Accordingly, when Congress proposed the PSLRA, it

10b-5 procedures).

72. See H.R. CONF. REP. NO. 104-369, at 31-32 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 730-31; S. REP. NO. 104-98, at 5-7 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 684-86 (both detailing the rationale behind the enactment of the PSLRA).

73. See H.R. CONF. REP. NO. 104-369, at 31; S. REP. NO. 104-98, at 4 (proclaiming that frivolous strike suits "are often based on nothing more than a company's announcement of bad news"); see also *Securities Litigation: Hearings on Securities Litigation Reform Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 104th Cong. 9 (1995) (statement of Alfonse M. D'Amato, U.S. Senator) (declaring that professional plaintiffs and class action attorneys who bring strike suits "wreak havoc on the Nation's boardrooms and courthouses"); *Securities Litigation Revisions, 1995: Hearings on Securities Litigation Reform Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 104th Cong. 239 (1995) (statement of Charles C. Cox, Senior Vice-President, Lexecon, Inc.) (describing the incentives of filing a securities class action lawsuit every time "a company's stock price drops significantly for any reason"). Securities class action lawsuits are routinely filed the day of or shortly after a stock price drops. See *id.* (statement of Charles C. Cox, Senior Vice-President, Lexecon, Inc.). See generally BLOOMENTHAL & WOLFF, *supra* note 71, at xxvi (stating that "[i]f the price of the stock dropped substantially immediately after the bad news announcement, a class action in many instances was soon to follow").

74. See H.R. CONF. REP. NO. 104-369, at 31; S. REP. NO. 104-98, at 9 (stating that "[t]he deeper the pocket," the more susceptible a firm is to frivolous litigation). Young firms, especially those in the technology industry, are particularly vulnerable to meritless actions because they are more likely to experience volatile stock prices. See S. REP. NO. 104-98, at 33 (recognizing "a pattern of targeting high technology companies"); *Securities Litigation Revisions, 1995: Hearings on Securities Litigation Reform Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 104th Cong. 239-44 (1995) (statement of Charles C. Cox, Senior Vice-President, Lexecon, Inc.); *Securities Litigation, 1995: Hearings on Securities Fraud Litigation Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 104th Cong. 61-64 (1995) (statement of James Morgan, President-Elect, National Venture Capital Association).

75. See H.R. CONF. REP. NO. 104-369, at 37 (stating that "discovery costs account for roughly 80% of total litigation costs in securities fraud cases"); S. REP. NO. 104-98, at 9 (noting that most securities lawsuits settle "at an average settlement cost of \$8.6 million"); see also *Securities Litigation, 1995: Hearings on Securities Fraud Litigation Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 104th Cong. 61 (1995) (statement of James Morgan, President-Elect, National Venture Capital Association) (arguing that the high costs associated with discovery and trial force companies to settle even frivolous lawsuits, a practice amounting to "legal extortion"); *Securities Litigation Revisions, 1995: Hearings on Securities Litigation Reform Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 104th Cong. 239 (1995) (statement of Charles C. Cox, Senior Vice-President, Lexecon, Inc.) (observing that most class action securities lawsuits that surpass a motion to dismiss settle regardless of the merits of the case). Mr. Cox claims that while courts dismiss approximately one percent of class action securities lawsuits before trial, approximately

aimed to eliminate these abusive practices by heightening the pleading requirements for Section 10(b) and Rule 10b-5 plaintiffs.⁷⁶

2. The PSLRA's Legislative History

The House of Representatives passed House Bill 1058 ("H.R. 1058") in March of 1995, after undergoing much debate and making substantial modifications regarding the requisite pleading standards.⁷⁷ Originally, the House defined scienter as knowledge or intent, thus eliminating recklessness as a sufficient state of mind.⁷⁸ The House, however, subsequently revised the proposal and restored the recklessness standard of scienter, utilizing the "Sundstrand standard."⁷⁹ Also, H.R. 1058 ultimately required a complaint to state specific factual allegations demonstrating that the defendant possessed the requisite scienter.⁸⁰

Thereafter, the Senate adopted Senate Bill 240 ("S. 240"), requiring the complaint to "specifically allege facts giving rise to a strong inference that the defendant acted with" scienter.⁸¹ The Senate Banking Committee's Report asserted that the Senate had adopted a pleading standard modeled after the Second Circuit's strong inference standard,

ninety-six percent of the lawsuits settle. *See id.*

76. *See* H.R. CONF. REP. NO. 104-369, at 32-48; S. REP. NO. 104-98, at 15 (urging for the adoption of "a uniform and stringent pleading requirement to curtail the filing of abusive lawsuits").

77. *See* 141 CONG. REC. H2818-01 (daily ed. March 8, 1995). House Bill 1058 required a plaintiff to plead "specific allegations which if true, would be sufficient to establish scienter as to each defendant at the time the alleged violation occurred." H.R. 1058, 104th Cong. § 4 (1995). *See generally* Lerach & Isaacson, *supra* note 44, at 930-40 (discussing the evolution of H.R. 1058).

78. *See* H.R. 10, 104th Cong. § 10 (1995) (requiring that the plaintiff plead "specific facts" demonstrating "that the defendant knew the statement was misleading at the time it was made, or intentionally omitted to state a fact knowing the omission would render misleading the statements made at the time they were made"). This early House proposal met considerable opposition from the SEC. *See Securities Litigation Revision 1995: Hearings on Securities Litigation Reform Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce*, 104th Cong., 191-220 (1995) (statement of Arthur Levitt, SEC Chairman). Mr. Levitt endorsed the recklessness standard and admonished a requirement of knowledge or intent. *See id.* at 201-03. Further, Mr. Levitt argued that requiring plaintiffs to allege specific facts regarding scienter without conducting discovery was too burdensome. *See id.* at 199.

79. *See* 141 CONG. REC. H2818-26 (daily ed. March 8, 1995). H.R. 1058 defined recklessness as "highly unreasonable conduct that (A) involves not merely simple or even gross negligence, but an extreme departure from standards of ordinary care, and (B) presents a danger of misleading buyers, sellers, or security holders that was either known to the defendant or so obvious that the defendant must have been aware of it." H.R. 1058, 104th Cong. § 10(a) (1995); *see also supra* note 48 and accompanying text (describing the "Sundstrand standard").

80. *See* H.R. 1058, 104th Cong. § 10(b) (1995).

81. S. 240, 104th Cong. § 104 (1995).

even though it had not adopted the Second Circuit's relevant caselaw.⁸² Moreover, the Senate Report recognized that every federal circuit had held that recklessness satisfied the definition of scienter.⁸³ Subsequently, however, the Senate passed an amendment to S. 240 ("Specter Amendment"), proposed by Senator Arlen Specter, which expressly incorporated the entire Second Circuit caselaw pleading standard.⁸⁴ This amendment included the recklessness standard as an adequate scienter and the ability to plead scienter by alleging that the defendant had both the motive and the opportunity to commit fraud.⁸⁵ S. 240 included the Specter Amendment when it passed the Senate on June 28, 1995.⁸⁶

After the passage of the amendment, the Committee of Conference,⁸⁷ in an attempt to reconcile the conflicting legislation of the House and the Senate, accepted the language of the Senate Banking Committee's text that combined aspects of Rule 9(b) with the "strong inference" pleading standard of the Second Circuit.⁸⁸ Specifically, the Conference

82. See S. REP. NO. 104-98, at 15 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 694. The Senate Committee on Banking, Housing and Urban Affairs reported that:

The Committee does not adopt a new and untested pleading standard that would generate additional litigation. Instead, the Committee chose a uniform standard modeled upon the pleading standard of the Second Circuit. Regarded as the most stringent pleading standard, the Second Circuit requires that the plaintiff plead facts that give rise to a "strong inference" of defendant's fraudulent intent. The Committee does not intend to codify the Second Circuit's caselaw interpreting this pleading standard, although courts may find this body of law instructive.

Id.; see also *supra* notes 57-62 and accompanying text (describing the Second Circuit pleading standard).

83. See S. REP. NO. 104-98, at 44. The Senate Report noted that "common law has long recognized recklessness as a form of scienter for purposes of proving fraud." *Id.* (citing RESTATEMENT (SECOND) OF TORTS, § 526(b), cmt. e; PROSSER AND KEETON ON THE LAW OF TORTS, § 107). Further, the Senate Report observed that courts have generally accepted the "Sundstrand standard" when defining recklessness. See *id.*

84. See 141 CONG. REC. S9170 (daily ed. June 27, 1995).

85. See *id.* The Specter Amendment provided:

[A] strong inference that the defendant acted with the required state of mind may be established either - (A) by alleging facts to show that the defendant had both motive and opportunity to commit fraud; or (B) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness by the defendant.

Id. See generally *Lerach & Isaacson, supra* note 44, at 944-47 (discussing the Specter Amendment).

86. See 141 CONG. REC. S9219-26 (daily ed. June 28, 1995).

87. The House and Senate managers responsible for reconciling differences between House and Senate bills comprise the Committee of Conference. See H.R. CONF. REP. NO. 104-369, at 31 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 730.

88. See H.R. CONF. REP. NO. 104-369, at 41. The Statement of Managers explains that "[t]he Conference Committee language is based in part on the pleading standard of the Second Circuit . . . [and is also] specifically written to conform the language to Rule 9(b)'s notion of

Committee required the plaintiff in a Section 10(b) and Rule 10b-5 action to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."⁸⁹ The Committee, however, deleted the recklessness definition proposed by the House⁹⁰ and the Specter Amendment proposed by the Senate.⁹¹ The Statement of Managers, which accompanied the Conference Committee's report, explained that the Conference Committee did not intend to codify Second Circuit caselaw interpreting the scienter pleading requirements because the goal was "to strengthen existing pleading requirements."⁹² Therefore, the Conference Report refused to include requirements regarding recklessness, motive, or opportunity.⁹³

Although the PSLRA did not define the "required state of mind" a plaintiff must allege in Section 10(b) and Rule 10b-5 cases,⁹⁴ the PSLRA did specify knowledge⁹⁵ as the required state of mind in two other sections.⁹⁶ First, the PSLRA created a "safe harbor" for forward-looking statements by eliminating liability for the maker of such a statement unless the maker had actual knowledge that the statement was false or misleading.⁹⁷ Second, the PSLRA allows a defendant to be

pleading with particularity." *Id.* The Statement adopted this language because the Second Circuit's "strong inference" pleading requirement is "[r]egarded as the most stringent pleading standard" among the circuits. *Id.*

89. *Id.*

90. See Draft Conference Report, Oct. 23, 1995, at 27; H.R. CONF. REP. 104-369, at 41 & n.23; see also *supra* note 79 and accompanying text (discussing H.R. 1058's inclusion of the "Sundstrand standard" definition of recklessness).

91. See Draft Conference Report, Oct. 23, 1995, at 32; H.R. CONF. REP. 104-369, at 41 & n.23; see also *supra* notes 84-86 and accompanying text (discussing S. 240's inclusion of the Specter Amendment).

92. H.R. CONF. REP. 104-369, at 41. The Statement of Managers expressed the desire to "strengthen existing pleading requirements." *Id.* Therefore, "the Second Circuit's caselaw interpreting" the pleading standard is not codified. *Id.*

93. See *id.* at 41 n.23. The Conference Report declined "to include in the pleading standard certain language relating to motive, opportunity, or recklessness." *Id.*

94. See *supra* note 93 and accompanying text (discussing the elimination of the recklessness standard).

95. The definition of knowledge in the PSLRA specifically excludes recklessness as a ground for liability. See 15 U.S.C.A. § 78u-4(g)(10)(B) (West 1997).

96. See 15 U.S.C.A. § 78u-4(g)(2)(A) (West 1997) (concerning joint and several liability); 15 U.S.C.A. § 78u-5(c)(1)(B) (West 1997) (involving forward-looking statements).

97. See 15 U.S.C.A. § 78u-5(c)(1)(B). The safe harbor provision provides that a defendant "may not be held liable . . . for projections and other forward-looking statements . . . that later prove to be inaccurate if . . . the plaintiff fails to prove the statement was made with actual knowledge that it was materially false or misleading." *Id.* The purpose of this provision was to encourage companies to disclose forward-looking information without fear of being subjected to frivolous strike suits. See S. REP. NO. 98, at 16 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 695; see also Jay B. Kasner, *The Safe Harbor for Forwardlooking Statements under the Private*

jointly and severally liable for damages only if the defendant knowingly violated the securities laws.⁹⁸

3. President Clinton's Veto and the Veto-Override

President Clinton vetoed the revised PSLRA in December of 1995.⁹⁹ The President objected to several provisions of the bill, including the imposition of a heightened pleading requirement for scienter.¹⁰⁰ President Clinton expressed concern that the Conference Committee raised the pleading standard beyond the level required by the Second Circuit, thereby creating an insurmountable hurdle to plaintiffs.¹⁰¹ He explained that he would support the legislation if Congress reinserted the Specter Amendment into the bill and expressly adopted the Second Circuit's pleading requirements.¹⁰²

Despite President Clinton's concerns that Congress raised the pleading standard for scienter above that of the Second Circuit, Congress overrode President Clinton's veto and enacted the PSLRA into law without changing the pleading standard.¹⁰³ During the veto-override debates, several congressional members declared that, despite legislative history to the contrary, the Statement of Managers, and the rejection of the Specter Amendment, the PSLRA did adopt the Second Circuit's pleading standard.¹⁰⁴ On the other hand, other members of

Securities Litigation Reform Act of 1995, 1136 PLI/Corp 119, 130-31 (1999) (analyzing the rationale behind the safe harbor provision).

98. See 15 U.S.C.A. § 78u-4(g)(2)(A). Further, the joint and several liability provisions provide that "nothing in this subsection shall be construed to create, affect, or in any manner modify, the standard for liability associated with any action arising under the securities laws." § 78u-4(g)(1).

99. See H.R. DOC. NO. 104-150 (1995), 141 CONG. REC. H15214-15 (daily ed. Dec. 20, 1995) (veto message of President Clinton).

100. See 141 CONG. REC. S19035 (daily ed. Dec. 21, 1995).

101. See *id.* President Clinton believed that the Conference Committee's pleading requirements "with regard to a defendant's state of mind impose[d] an unacceptable procedural hurdle to meritorious claims being heard in Federal courts." *Id.* Moreover, the President was "prepared to support the high pleading standards of the . . . Second Circuit." *Id.* The President worried, however, that the Conference Committee made "crystal clear in the Statement of the Managers their intent to raise the standard even beyond that level." *Id.* The President asserted that he was not prepared to endorse legislation that went beyond the Second Circuit's level. See *id.*

102. See *id.*; see also *supra* notes 84-91 and accompanying text (discussing the Specter Amendment). See generally BLOOMENTHAL & WOLFF, *supra* note 71, § 16.5 (discussing President Clinton's veto).

103. See Pub. Law 104-67, 109 Stat. 737, 747 (codified as amended in 15 U.S.C.A. § 78u-4).

104. See, e.g., 141 CONG. REC. H15219 (daily ed. Dec. 20, 1995) (statement of Rep. Lofgren) (stating that the Second Circuit standard for pleading scienter is incorporated in the legislation); 141 CONG. REC. H15218 (daily ed. Dec. 20, 1995) (statement of Rep. Moran) (concluding that the text of the legislation incorporates the Second Circuit standard and that the Second Circuit

Congress concluded that the new standard did not incorporate the Second Circuit's caselaw regarding recklessness, motive, and opportunity.¹⁰⁵

C. Subsequent Securities Fraud Legislation

Initially, because the PSLRA applies only to actions filed in federal court, plaintiffs in securities fraud class actions were able to avoid the PSLRA requirements by filing lawsuits in state court under state law.¹⁰⁶ In order to impose uniform nationwide standards, however, Congress enacted the Securities Litigation Uniform Standards Act of 1998 ("SLUSA").¹⁰⁷ SLUSA mandates the filing of securities class actions in federal court when the action involves nationally traded securities and is based on allegations of the same type as those of Section 10(b) and Rule 10b-5.¹⁰⁸ The SLUSA, however, does not alter or amend the text of the PSLRA or even mention scienter.¹⁰⁹ Nonetheless, in the legislative history of the SLUSA, Congress attempted to clarify the scienter pleading standards enunciated in the PSLRA.¹¹⁰ The Committee Report expressed that Congress, when enacting the PSLRA, did not intend to alter the scienter requirements established by the Second Circuit with

standard will be applied because "when legislation is at variance with legislative history or report language, . . . it is the bill itself that prevails"); 141 CONG. REC. S19068 (daily ed. Dec. 21, 1995) (statement of Sen. Dodd) (explaining that courts will continue to follow Second Circuit guidance even though it has not been codified). *See generally* Lerach & Isaacson, *supra* note 44, at 952-56 (arguing that the veto-override debates support the conclusion that Congress intended to adopt Second Circuit caselaw regarding recklessness, motive, and opportunity).

105. *See, e.g.*, 141 CONG. REC. H15216 (daily ed. Dec. 20, 1995) (statement of Rep. Markey) (arguing that the legislation should include the Specter Amendment, which adopted the Second Circuit pleading standard in regards to recklessness, motive, and opportunity, because otherwise, the legislation heightens the standard beyond the Second Circuit level); 141 CONG. REC. H15216 (daily ed. Dec. 20, 1995) (statement of Rep. Dingell) (agreeing with the President that the legislation heightens the pleading requirements above those of the Second Circuit).

106. *See* 15 U.S.C.A. § 78u-4(a)(1) (West 1997) (providing that the PSLRA applies to private actions arising under federal law); Daniel J. Kramer, *Reforming the Securities Reform Act with National Pleading Standards*, 221 N.Y.L.J. 1, 1 (1999) (commenting on the ability to avoid the PSLRA by filing in state court). State courts experienced a dramatic increase in the number of securities cases brought before them in the years following the enactment of the PSLRA. *See* Rosen, *supra* note 4, at 1923.

107. *See* Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified at 15 U.S.C.A. §§ 77p (West 1997 & Supp. 2000), 78bb(f) (West Supp. 2000)).

108. *See id.* The SLUSA provides that a securities class action lawsuit must be pursued in federal court if the complaint alleges "a misrepresentation or omission of a material fact" or "that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." *Id.*

109. *See* 15 U.S.C.A. §§ 77p, 78bb(f).

110. *See* S. REP. NO. 105-182, at 6 (1998); H.R. CONF. REP. NO. 105-803, at 15 (1998).

regard to recklessness, motive, and opportunity.¹¹¹ Further, President Clinton signed the SLUSA into law after receiving assurances from members of Congress that the PSLRA maintained the Second Circuit's pleading standard.¹¹² During the floor debates in both the House and the Senate, however, disagreement continued about whether the PSLRA codified the Second Circuit pleading standard.¹¹³

III. DISCUSSION

Congress enacted the PSLRA to solve the aforementioned disagreement among the circuits concerning the requirements necessary to plead scienter under Section 10(b) and Rule 10b-5.¹¹⁴ The circuits, however, continue to disagree on the requisite state of mind that a plaintiff must allege¹¹⁵ and the level of specificity the plaintiff must meet in the complaint with regard to scienter.¹¹⁶ With respect to the defendant's state of mind, the circuits are split as to whether recklessness satisfies the scienter requirement¹¹⁷ or whether a heightened degree of recklessness, such as deliberate recklessness or conscious misconduct,¹¹⁸ is necessary to satisfy the requirement.

111. See S. REP. NO. 105-182, at 6; H.R. CONF. REP. NO. 105-803, at 15. The Conference Report provides "that the clear intent in 1995 and . . . in this legislation is that neither the Reform Act nor [the SLUSA] in any way alters the scienter standard in federal securities fraud suits." S. REP. NO. 105-182, at 6; see also *supra* notes 57-62 and accompanying text (discussing the Second Circuit's scienter pleading requirements).

112. See 1998 U.S.C.C.A.N. 767 (statement by President William J. Clinton). President Clinton claimed that Congress made clear its intent to codify the Second Circuit standard during the veto-override debate. See *id.* at 767-68. President Clinton stated that the Statement of Managers that accompanied the SLUSA assured him "that reckless conduct will continue to be actionable and that complaints meeting the Second Circuit pleading standard will permit investors access to our Nation's courts." *Id.* at 768.

113. See *Uniform Securities Litigation Standards Act Signed into Law*, Fed. Sec. L. Rep. (CCH) No. 1844, at 2 (Nov. 11, 1998) (concluding that "despite Congress' efforts to clarify its intent, some uncertainty may still persist").

114. See 15 U.S.C.A. § 78u-4(b)(2) (West 1997); see also Pelosa & Sarnoff, *supra* note 44, at 3 (stating that the PSLRA attempted to create "a uniform national standard for pleading scienter"); *supra* Part II.A.3 (discussing the conflicting views among the circuits regarding the pleading of scienter prior to the enactment of the PSLRA).

115. See, e.g., *In re Silicon Graphics, Inc.*, 183 F.3d 970, 974 (9th Cir. 1999) (adopting deliberate recklessness or conscious misconduct standard); *In re Advanta Corp.*, 180 F.3d 525, 535 (3d Cir. 1999) (adopting recklessness as the scienter standard).

116. See *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 199 (1st Cir. 1999); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1286-87 (11th Cir. 1999); *In re Comshare, Inc.*, 183 F.3d 542, 551 (6th Cir. 1999); *Silicon Graphics*, 183 F.3d at 979; *Advanta*, 180 F.3d at 534-35; *Press v. Chemical Inves. Servs. Corp.*, 166 F.3d 529, 538 (2d Cir. 1999).

117. See *infra* Part III.A.1 (discussing the recklessness standard); see also *Advanta*, 180 F.3d at 535; *Press*, 166 F.3d at 538 (both adopting the recklessness standard).

118. See *infra* Part III.A.2 (discussing the deliberate recklessness standard); see also *Silicon*

Regarding the degree of specificity a plaintiff must plead in order to withstand a motion to dismiss, the issue remains whether the pleading of motive and opportunity alone is sufficient to survive a motion to dismiss.¹¹⁹ The circuits have essentially established three distinct approaches: (1) the Second Circuit's pre-PSLRA approach;¹²⁰ (2) the Ninth Circuit's heightened pleading standard approach;¹²¹ and (3) the totality of the circumstances approach.¹²² The Second Circuit's pre-PSLRA approach, the most lenient, allows allegations of motive and opportunity to suffice when pleading scienter.¹²³ The Ninth Circuit's heightened pleading standard approach, the most stringent, does not allow the pleading of motive and opportunity alone to satisfy the plaintiff's burden.¹²⁴ The totality of the circumstances approach mandates a fact specific, case-by-case inquiry into whether the plaintiff has established that the defendant possessed the requisite scienter.¹²⁵ These conflicting approaches result from divergent interpretations of the PSLRA's text,¹²⁶ the PSLRA's legislative history,¹²⁷ and the policy concerns underlying the enactment of the PSLRA.¹²⁸

A. The Defendant's State of Mind: Recklessness v. Deliberate Recklessness

Virtually every circuit to address the issue of the scienter requirement has held that recklessness satisfies the PSLRA.¹²⁹ These circuits remain

Graphics, 183 F.3d at 974 (adopting the deliberate recklessness or conscious misconduct standard).

119. See *infra* Part III.B (discussing the varying interpretations of the circuits as to whether pleading motive and opportunity alone satisfies the scienter pleading requirements).

120. See *infra* Part III.B.1 (discussing the adoption of the pre-PSLRA Second Circuit approach to motive and opportunity pleading).

121. See *infra* Part III.B.2 (discussing the Ninth Circuit's approach to motive and opportunity pleading).

122. See *infra* Part III.B.3 (discussing the totality of the circumstances approach).

123. See *infra* Part III.B.1 (discussing the adoption of the pre-PSLRA Second Circuit approach to motive and opportunity pleading).

124. See *infra* Part III.B.2 (discussing the Ninth Circuit approach to motive and opportunity pleading).

125. See *infra* Part III.B.3 (discussing the totality of the circumstances approach).

126. See *supra* notes 68-70 and accompanying text (discussing the language of the PSLRA).

127. See *supra* Part II.B.2 (tracing the PSLRA's legislative history).

128. See *supra* Part II.B.1 (summarizing the rationale behind the enactment of the PSLRA).

129. See *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 199 (1st Cir. 1999) (deciding that scienter includes a narrowly defined concept of recklessness); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1287 (11th Cir. 1999) (holding that the PSLRA did not eliminate recklessness as a basis for liability); *In re Comshare, Inc.*, 183 F.3d 542, 550 (6th Cir. 1999) (concluding that "a plaintiff may survive a motion to dismiss by pleading facts that give rise to a strong inference of recklessness"); *In re Advanta Corp.*, 180 F.3d 525, 535 (3d Cir. 1999) (concluding that

committed to the “Sundstrand standard” of recklessness set forth before the PSLRA enactment.¹³⁰ The Ninth Circuit, however, departed from the recklessness standard when it declared that mere recklessness no longer suffices under the PSLRA because the PSLRA heightened the pleading standards for Section 10(b) and Rule 10b-5 plaintiffs.¹³¹ Accordingly, the Ninth Circuit held that, instead of mere recklessness, scienter encompasses deliberate recklessness or conscious misconduct.¹³²

1. Recklessness: Adoption of the Pre-PSLRA “Sundstrand Standard”

The Fifth and Second Circuits were the first circuits to conclude that recklessness satisfies the scienter requirement under the PSLRA.¹³³ The Fifth Circuit, in dicta and without discussion, noted that the PSLRA codified the pleading standard set forth by the Second Circuit before the enactment of the PSLRA, including the acceptance of recklessness as an adequate scienter.¹³⁴ Subsequently, in *Press v. Chemical Investment Services Corp.*,¹³⁵ the Second Circuit, without explanation or analysis, concluded that the PSLRA adopted the Second Circuit’s pre-PSLRA requirements for pleading scienter in Section 10(b) and Rule 10b-5 actions.¹³⁶ Therefore, plaintiffs can defeat a motion to dismiss by

recklessness “remains a sufficient basis for liability”); *Press v. Chemical Inves. Servs. Corp.*, 166 F.3d 529, 538 (2d Cir. 1999) (holding that scienter encompasses “conscious misbehavior or recklessness”); see also *Phillips v. LCI Int’l, Inc.*, 190 F.3d 609, 620 (4th Cir. 1999) (noting that “a plaintiff must still prove that the defendant acted intentionally, which may perhaps be shown by recklessness”). But see *In re Silicon Graphics, Inc.*, 183 F.3d 970, 974 (9th Cir. 1999) (adopting the heightened deliberate recklessness or conscious misconduct standard for scienter).

130. See *Greebel*, 194 F.3d at 201 (holding that the PSLRA did not alter the definition of scienter previously used by the First Circuit); *Bryant*, 187 F.3d at 1284 (defining recklessness using the “Sundstrand standard”); *Comshare*, 183 F.3d at 550 (maintaining that recklessness embodies the “Sundstrand standard”); *Advanta*, 180 F.3d at 535 (adhering to the “Sundstrand standard”); see also *Phillips*, 190 F.3d at 621 (4th Cir. 1999) (noting that securities laws generally utilize the “Sundstrand standard” when defining recklessness). See generally *supra* Part II.A.2 (describing the pre-PSLRA acceptance of recklessness and the “Sundstrand standard”).

131. See *Silicon Graphics*, 183 F.3d at 974 (adopting the deliberate recklessness or conscious misconduct standard for scienter); see also *supra* note 48 (describing the “Sundstrand standard”).

132. See *Silicon Graphics*, 183 F.3d at 974.

133. See *Press*, 166 F.3d at 538; *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 178 (5th Cir. 1997).

134. See *Williams*, 112 F.3d at 178 (citing H.R. CONF. REP. NO. 369, 104th Cong., 1st Sess. 41 (1995); 15 U.S.C. § 78u-4(b) (West 1997)). The provisions of the PSLRA, however, did not apply in *Williams* because the plaintiffs filed the lawsuit before the effective date of the PSLRA. See *id.*

135. *Press v. Chemical Inves. Servs. Corp.*, 166 F.3d 529 (2d Cir. 1999).

136. See *Press*, 166 F.3d at 537-38. The Second Circuit stated that the PSLRA “heightened the requirement for pleading scienter to the level used by the Second Circuit.” See *id.*

alleging "facts that 'constitute strong circumstantial evidence of conscious misbehavior or recklessness.'"¹³⁷

The Third Circuit followed, accepting the view expressed by the Second Circuit¹³⁸ and elaborating on the rationale behind the decision.¹³⁹ In *In re Advanta Corp.*,¹⁴⁰ after examining the PSLRA's purpose,¹⁴¹ legislative history, and text, the Third Circuit concluded that the PSLRA did not alter the substantive definition of scienter established prior to its enactment.¹⁴² The Third Circuit, referring to the PSLRA's legislative history as ambiguous, contradictory, and inconclusive,¹⁴³ focused on the PSLRA's text when determining

137. *Id.* at 538 (citing *Shields v. Citytrust Bankcorp., Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994)); see also *Chill v. General Elec. Co.*, 101 F.3d 263, 267 (2d Cir. 1996) ("As a pleading requirement, a plaintiff must either (a) allege facts to show that defendants had both motive and opportunity to commit fraud or (b) allege facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness."). In *Press*, the court determined that the plaintiff satisfied the pleading requirements because he alleged facts demonstrating that the defendant possessed both the motive and the opportunity to commit fraud. See *Press*, 166 F.3d at 538.

138. See *In re Advanta Corp.*, 180 F.3d 525, 533-34 (3d Cir. 1999) (adhering to the Second Circuit standard of pleading scienter by alleging facts that establish the motive and opportunity to commit fraud or alleging facts that constitute evidence of reckless or conscious misbehavior); see also *supra* notes 135-37 and accompanying text (summarizing the Second Circuit's standard).

139. See *Advanta*, 180 F.3d at 530-35 (discussing the PSLRA's background).

140. *In re Advanta Corp.*, 180 F.3d 525 (3d Cir. 1999). Former shareholders of the defendant corporation brought suit against the corporation and several of its officers under Section 10(b) and Rule 10b-5 after the corporation suffered a \$20 million loss. See *id.* at 528. The plaintiffs alleged that the corporation, a credit card issuer, maintained a practice of issuing credit cards at low introductory rates in an effort to boost revenues. See *id.* The plaintiffs further allege that this practice resulted in attracting riskier customers who later defaulted in their payments, causing losses for the company. See *id.* When these losses became imminent, the plaintiffs contend that the defendants issued misleading statements that portrayed the company in a favorable light, including the assurance that the company would continue to achieve earnings growth. See *id.* at 528-29. Further, the plaintiffs pled that the defendants either knew the statements were misleading or must have known that the statements were misleading due to their positions within the company. See *id.* at 539.

141. The *Advanta* court recognized that the PSLRA's purpose was to curb the abuses of the securities class action system, including the practice of filing frivolous lawsuits in response to any negative fluctuation in stock price, the targeting of deep pocket corporate defendants, the exploitation of the expensive discovery process to encourage settlement, and the manipulation of clients by plaintiff attorneys. See *id.* at 531.

142. See *id.* at 530-35.

143. See *id.* at 531. The *Advanta* court discussed the activity in the House, including House Bill 10, which eliminated recklessness as a satisfactory scienter, and House Bill 1058, which reinstated recklessness as a sufficient scienter, and the Senate, including the deletion of the Specter Amendment, which expressly adopted recklessness as an acceptable scienter. See *id.* at 531-32. Further, the court analyzed President Clinton's veto and the veto-override debate. See *id.* at 532-33. Moreover, the court gave little effect to the legislative history of the SLUSA, which attempted to clarify Congress' intent when enacting the PLSRA. See *id.* at 533 (stating that their interpretation of the PSLRA "is unaffected by the legislative history of the" SLUSA).

whether scienter encompasses recklessness.¹⁴⁴ While the PSLRA intended to heighten pleading requirements and establish uniform standards for plaintiffs in Section 10(b) and Rule 10b-5 actions, the text did not modify the substantive law of scienter.¹⁴⁵ Therefore, according to the Third Circuit, recklessness, as defined by the “Sundstrand standard,”¹⁴⁶ remains a satisfactory basis for liability.¹⁴⁷

In *In re Comshare, Inc.*,¹⁴⁸ the Sixth Circuit joined the Fifth, Second, and Third Circuits when it held that a plaintiff may survive a motion to dismiss by pleading facts that give rise to a strong inference of recklessness.¹⁴⁹ The *Comshare* court took notice of the fact that the PSLRA expressly specified knowledge or intent as the requisite scienter in the context of forward-looking statements and joint and several liability,¹⁵⁰ yet declined to define scienter in cases involving Section

144. *See id.*

145. *See id.* at 534. The Third Circuit elaborated that “if Congress had desired to eliminate . . . recklessness as a basis for scienter, it could have done so expressly in the text” *Id.* at 534 n.8. Instead, Congress choose “to leave the matter to judicial interpretation.” *Id.* The *Advanta* court acknowledged and rejected the Ninth Circuit’s deliberate recklessness standard on this ground. *See id.* at 534; *see also infra* Part III.A.2 (summarizing the Ninth Circuit’s scienter standard).

146. *See supra* note 48 (describing the “Sundstrand standard”).

147. *See Advanta*, 180 F.3d at 535. The court dismissed the plaintiff’s complaint because it failed to allege facts that lead to a strong inference of recklessness. *See id.* at 541. The plaintiffs did not plead facts to support their allegations that “the defendants acted knowingly” and the “defendants must have been aware of the impending losses by virtue of their positions within the company.” *Id.* at 539. The court noted that conclusory assertions are insufficient when pleading scienter. *See id.* Moreover, “generalized imputations of knowledge” are insufficient even where the defendants hold high positions within the company. *Id.* Further, the court held that the plaintiff’s allegations that the defendants recklessly embarked on a risky strategy of attracting new credit card customers do not establish the extreme departure from ordinary care as mandated by the “Sundstrand standard.” *See id.* at 540. Accordingly, the court held that the defendant’s positive portrayals did not amount to recklessness. *See id.*

148. *In re Comshare, Inc.*, 183 F.3d 542 (6th Cir. 1999). The plaintiffs, shareholders of Comshare, Inc., a computer software developer, brought suit under Section 10(b) and Rule 10b-5 against the corporation and several of its officers, alleging that the defendants perpetrated a scheme to defraud investors. *See id.* at 545-47. Specifically, the complaint alleged that the company’s United Kingdom subsidiary violated the company’s policy when it recognized revenue from transactions not yet completed, thereby inflating the company’s value. *See id.* at 546-47. The district court dismissed the plaintiffs’ complaint because the plaintiffs failed to plead specific facts creating a strong inference that the defendants committed a knowing misrepresentation. *See id.* at 549.

149. *See id.* at 549. The Sixth Circuit relied on the plain language of the PSLRA because they believed the legislative history of the PSLRA to be contradictory and ambiguous. *See id.* at 552 & n.10 (citing *Rust v. Sullivan*, 500 U.S. 173, 185-86 & n.3 (1991); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 412 n.29 (1971)).

150. *See id.* at 549-50; *see also* 15 U.S.C.A. § 78u-5(c)(1)(B) (West 1997); 15 U.S.C.A. § 78u-4(f)(2)(A) (West Supp. 2000); *supra* notes 94-98 and accompanying text (discussing forward-looking statements and joint and several liability under the PSLRA).

10(b) and Rule 10b-5.¹⁵¹ According to the *Comshare* court, this omission illustrated Congress' intent to preserve the substantive law regarding scienter.¹⁵² The court assumed that Congress, when enacting the PSLRA, was cognizant of the then prevailing acceptance of recklessness as an adequate level of scienter under Section 10(b) and Rule 10b-5.¹⁵³ The court, therefore, concluded that Congress, by its silence, sustained the recklessness standard.¹⁵⁴

Moreover, the *Comshare* court steadfastly adhered to the "Sundstrand standard" when it defined recklessness.¹⁵⁵ The court interpreted the standard as more akin to conscious misbehavior than to a mere heightened form of negligence.¹⁵⁶ The Sixth Circuit ruled that the district court erred by limiting scienter to knowledge or intent.¹⁵⁷ The *Comshare* court, however, affirmed the dismissal of the plaintiffs' complaint because the plaintiffs' failed to allege facts that created a strong inference of recklessness.¹⁵⁸

Subsequently, the Eleventh Circuit, in *Bryant v. Avado Brands, Inc.*,¹⁵⁹ conducted an analysis that closely resembled that of the Sixth Circuit in *Comshare*.¹⁶⁰ The *Bryant* court relied on the PSLRA's plain

151. See *Comshare*, 183 F.3d at 549-50.

152. See *id.* at 550.

153. See *id.*; see also *supra* Part II.A.2 (discussing the pre-PSLRA acceptance of recklessness).

154. See *Comshare*, 183 F.3d at 552 (noting "that the PSLRA nowhere altered the state of mind requirements for securities fraud cases").

155. See *id.* at 550; see also *supra* note 48 (describing the "Sundstrand standard").

156. See *Comshare*, 183 F.3d at 550. The *Comshare* court described the "Sundstrand standard" as a stringent formulation that is close to a lesser form of intent. See *id.*

157. See *id.* at 552.

158. See *id.* at 553. The *Comshare* court held that the plaintiffs failed to allege facts demonstrating that the revenue recognition errors committed by the company's United Kingdom subsidiary were so obvious that the defendants should have known of them. See *id.* The plaintiffs also failed to plead any facts illustrative of "red flags that should have put Defendants on notice of the revenue recognition errors." *Id.* The court concluded that recklessness will not be presumed "from a parent corporation's reliance on its subsidiary's internal controls." *Id.* at 554. Because claims of scienter cannot be based "on speculation and conclusory allegations," the court determined that the plaintiffs failed to adequately plead scienter. *Id.* at 553 (quoting *San Leandro Emergency Med. Plan v. Philip Morris Cos.*, 75 F.3d 801, 813 (2d Cir. 1996)).

159. *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271 (11th Cir. 1999). The plaintiff shareholders brought suit against the Avado Brands, Inc. and several of its officers, alleging that the defendants failed to disclose information relating to two problematic acquisitions and misrepresented the financial outlook of the company in order to inflate the value of the company's stock. See *id.* at 1273-74.

160. See *id.* at 1281-84 (analyzing the PSLRA's scienter requirements); *Comshare, Inc.*, 183 F.3d at 548-53 (analyzing the scienter pleading requirements under the PSLRA); see also *supra* notes 148-58 and accompanying text (discussing the Sixth Circuit's analysis in *Comshare*).

language¹⁶¹ and concluded that since Congress declined to define the defendant's "required state of mind"¹⁶² in Section 10(b) and Rule 10b-5 actions,¹⁶³ Congress intended to uphold the pre-PSLRA rule that pleading facts which constitute recklessness satisfies the scienter requirement.¹⁶⁴ Therefore, the *Bryant* court held that plaintiffs could survive a motion to dismiss by pleading facts that demonstrate that the defendant acted with "severe recklessness."¹⁶⁵

The Fourth Circuit was the next circuit to address the issue of whether recklessness satisfies the scienter requirement under the PSLRA.¹⁶⁶ The Fourth Circuit acknowledged the controversy surrounding the proper scienter pleading standard, noting that the Second and Ninth Circuits have reached divergent results regarding the necessary level of scienter a plaintiff must allege to withstand a motion to dismiss.¹⁶⁷ The Fourth Circuit then concluded that the PSLRA did

161. The Eleventh Circuit declared that "[w]hen interpreting a statute, we look to its plain language, resorting to legislative history in an attempt to discern congressional intent only when the language of the statute is unclear." *Bryant*, 187 F.3d at 1283 (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

162. 15 U.S.C.A. § 78u-4(b)(2) (West 1997).

163. See *Bryant*, 187 F.3d at 1283-84. The Eleventh Circuit also commented on the inclusion of a knowledge requirement for forward-looking statements. See *id.* at 1284 (citing 15 U.S.C. § 78u-5(c)(1)(B) (West 1997)) (noting the safe-harbor provision in the PSLRA). The court concluded that if Congress had desired to raise the scienter requirement to knowledge or intent, it would have done so expressly, as it had done with forward-looking statements. See *id.*; see also *supra* notes 96-97 and accompanying text (discussing forward-looking statements under the PSLRA).

164. See *Bryant*, 187 F.3d at 1283-84. The Eleventh Circuit expressly rejected the Ninth Circuit's deliberate recklessness standard, claiming that the Ninth Circuit ignored the plain meaning behind the PSLRA's statutory language. See *id.* at 1284-85 & n.21. The *Bryant* court admonished the Ninth Circuit for attempting "to import into the law a new and uncertain super-recklessness . . . [that] is inconsistent with the plain statutory language." *Id.* at 1285 n.21 (citation omitted); see also *infra* Part III.A.2 (summarizing the Ninth Circuit's deliberate recklessness standard).

165. See *Bryant*, 187 F.3d at 1283. The definition for "severe recklessness" mirrors that of the "Sundstrand standard." See *id.* at 1282 & n.18; see also *supra* note 48 (describing the "Sundstrand standard"). In fact, the *Bryant* court noted that the Eleventh Circuit's "severe recklessness" standard is based on the "Sundstrand standard." See *Bryant*, 187 F.3d at 1284 & n.21. After establishing the scienter pleading guidelines, the court vacated the district court decision and remanded the case. See *id.* at 1287.

166. See *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 621 (4th Cir. 1999). The plaintiffs, former shareholders of LCI, filed suit against LCI and its chief executive under Section 10(b) and Rule 10b-5. See *id.* at 613. The complaint alleged that the executive had issued a public statement asserting that LCI was not for sale. See *id.* The plaintiffs claim they sold their stock at this time, when the stock price was artificially depressed. See *id.* at 613. Shortly thereafter, however, another company acquired LCI and the plaintiffs allege that the companies were negotiating the merger at the time of the executive's statement. See *id.* The plaintiffs filed suit after LCI's stock price rose in reaction to the announcement of the merger. See *id.*

167. See *id.* at 620-21 (discussing the approaches established by the Second and Ninth

not purport to alter the level of scienter a plaintiff must plead in a Section 10(b) and Rule 10b-5 action.¹⁶⁸ Therefore, a plaintiff must plead facts that demonstrate that the defendant acted with intent, which may perhaps encompass recklessness.¹⁶⁹ The Fourth Circuit applied the “Sundstrand standard” of recklessness¹⁷⁰ and ultimately determined that it need not resolve the issue of the requisite pleading standard because the plaintiffs had failed to meet even the more lenient Second Circuit standard of pleading.¹⁷¹

The First Circuit, in *Greebel v. FTP Software, Inc.*,¹⁷² was the final circuit to address the issue of whether recklessness satisfies the scienter requirement in Section 10(b) and Rule 10b-5 actions.¹⁷³ In *Greebel*, the First Circuit joined the Second, Third, Sixth, Eleventh, and Fourth Circuits in holding that recklessness is a sufficient scienter under the PSLRA because Congress, when enacting the PSLRA, did not intend to alter the pre-PSLRA definition of scienter accepted by the circuits.¹⁷⁴ The *Greebel* court adhered to its pre-PSLRA definition of

Circuits); *see also supra* notes 135-37 and accompanying text (summarizing the Second Circuit’s holding); *infra* Part III.A.2 (summarizing the Ninth Circuit’s holding).

168. *See Phillips*, 190 F.3d at 620 (favorably citing *In re Comshare, Inc.*, 183 F.3d 542, 548 (6th Cir. 1999)).

169. *See id.* (citing *Malone v. Microdyne Corp.*, 26 F.3d 471 (4th Cir. 1994)).

170. *See id.* at 621 (noting that “[t]he securities laws generally define recklessness as” the “Sundstrand standard”); *see also supra* note 48 (describing the “Sundstrand standard”).

171. *See Phillips*, 190 F.3d at 621; *see also supra* notes 135-37 and accompanying text (summarizing the Second Circuit’s standard). The court held that the executive had not made a material misstatement of fact because a reasonable investor would not have considered the statement significant. *See Phillips*, 190 F.3d at 615. The Fourth Circuit determined that because the plaintiffs had failed to prove that the executive had made a material misstatement of fact, the plaintiffs had obviously failed to adequately allege that the defendants acted intentionally or recklessly when making the statements. *See id.* at 620-21. Additionally, the plaintiffs failed to allege facts sufficient to establish that the defendants possessed the motive and the opportunity to commit securities fraud. *See id.* at 621.

172. *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 188-89 (1st Cir. 1999) (affirming dismissal of suit alleging failure to “disclose the threats to [FTP’s] continued success . . . and several ‘questionable’ sales practices”).

173. *See id.* at 198.

174. *See id.* at 199-201. The First Circuit rejected the Ninth Circuit’s position that only deliberate recklessness or conscious misconduct is a sufficient scienter under the PSLRA. *See id.* at 199; *see also infra* Part III.A.2 (summarizing the Ninth Circuit’s holding). The court reasoned that if Congress had intended to modify the existing definition of scienter, it would have done so expressly, as it had done with forward-looking statements and joint and several liability. *See Greebel*, 194 F.3d at 200-01; *see also* 15 U.S.C.A. § 78u-5(c)(1)(B) (West 1997); 15 U.S.C.A. § 78u-4(f)(2)(A) (West Supp. 2000); *supra* notes 94-98 and accompanying text (discussing the imposition of knowledge as a requisite scienter for forward-looking statements and joint and several liability under the PSLRA).

recklessness,¹⁷⁵ the “Sundstrand standard.”¹⁷⁶

2. A Heightened Level of Scienter: Deliberate Recklessness or Conscious Misconduct

In *In re Silicon Graphics, Inc.*,¹⁷⁷ the Ninth Circuit, over a strong dissent, dramatically departed from the recklessness standard established before the enactment of the PSLRA¹⁷⁸ and subsequently embraced by the Second,¹⁷⁹ Third,¹⁸⁰ and Sixth¹⁸¹ Circuits.¹⁸² The Ninth Circuit held that, under the PSLRA, a plaintiff in a Section 10(b) and Rule 10b-5 action must plead facts in the complaint that comprise strong evidence that the defendant acted with deliberate recklessness or conscious misconduct.¹⁸³ After analyzing the PSLRA’s purpose, legislative history, and text, the *Silicon Graphics* court concluded that deliberate recklessness best embodied Congress’ intent when enacting the PSLRA.¹⁸⁴

The *Silicon Graphics* court acknowledged that, prior to the enactment of the PSLRA, the Ninth Circuit adopted the “Sundstrand standard” of

175. See *Greebel*, 194 F.3d at 198 (citing *Cook v. Avien, Inc.*, 573 F.2d 685, 692 (1st Cir. 1978); *Hoffman v. Estabrook & Co.*, 587 F.2d 509, 515-16 (1st Cir. 1978)) (discussing the First Circuit’s pre-PSLRA adoption of the “Sundstrand standard”).

176. See *Greebel*, 194 F.3d at 198; see also *supra* note 48 (describing the “Sundstrand standard”). The *Greebel* court described the “Sundstrand standard” of recklessness as close to “a lesser form of intent,” different from negligence in degree and kind. *Greebel*, 194 F.3d at 199.

177. *In re Silicon Graphics, Inc.*, 183 F.3d 970 (9th Cir. 1999). The plaintiff, a shareholder of Silicon Graphics, Inc., filed this lawsuit under Section 10(b) and Rule 10b-5 against the company and several of its officers, alleging that the defendants made a series of misleading, positive statements regarding the financial condition of Silicon Graphics, Inc. See *id.* at 980-81. The complaint alleges that, during the time it made these statements, the company experienced severe quality control problems and declining sales. See *id.* at 981. The plaintiff contended that the statements omitted the negative information and artificially inflated the value of the company’s stock. See *id.* When rumors of the problems began to circulate, the stock price dropped and soon thereafter the defendants confirmed the rumors to the public. See *id.* at 982. The district court dismissed the plaintiff’s complaint because “it failed to satisfy the heightened pleading standard imposed by the PSLRA.” *Id.* at 982-83.

178. See *supra* Part II.A.2 (discussing the pre-PSLRA acceptance of recklessness).

179. See *Press v. Chemical Inves. Servs. Corp.*, 166 F.3d 529, 538 (2d Cir. 1999) (adopting recklessness as an adequate scienter under the PSLRA on February 4, 1999).

180. See *In re Advanta Corp.*, 180 F.3d 525, 534-35 (3d Cir. 1999) (adopting recklessness as an adequate scienter under the PSLRA on June 17, 1999).

181. See *In re Comshare, Inc.*, 183 F.3d 542, 549 (6th Cir. 1999) (adopting recklessness as an adequate scienter under the PSLRA on July 8, 1999).

182. See *Silicon Graphics*, 183 F.3d at 974.

183. See *id.* (holding that plaintiffs “must plead, in great detail, facts that constitute strong circumstantial evidence of deliberately reckless or conscious misconduct”).

184. See *id.* at 975.

recklessness with regard to Section 10(b) and Rule 10b-5 actions.¹⁸⁵ The court, however, determined that only recklessness that reflects a form of intentional misconduct can satisfy the scienter requirement under the PSLRA.¹⁸⁶ Accordingly, the *Silicon Graphics* court adopted the deliberate recklessness standard, which necessitates the finding of intentional or conscious behavior.¹⁸⁷

Because the PSLRA's text is silent as to the issue of recklessness, the Ninth Circuit then examined the PSLRA's legislative history.¹⁸⁸ First, the *Silicon Graphics* court analyzed the conference report¹⁸⁹ and concluded that Congress had intended to raise the scienter pleading standards above that of the pre-PSLRA Second Circuit standard¹⁹⁰ in order to deter abusive securities litigation.¹⁹¹ The court found that the Conference Committee's deletion of the Specter Amendment¹⁹² supported the argument that Congress had implicitly rejected recklessness as a sufficient scienter.¹⁹³ Second, the *Silicon Graphics* court determined that Congress' override of President Clinton's veto¹⁹⁴ implied that Congress had raised the scienter pleading standards above

185. See *id.* at 976 (citing *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564 (9th Cir. 1990) (en banc)); see also *supra* note 48 (describing the "Sundstrand standard").

186. See *Silicon Graphics*, 183 F.3d at 975 & n.5, 976-77 (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193-94 (1976)).

187. See *id.* at 977 (holding that under the PSLRA, a plaintiff must plead facts that "create a strong inference of, at a minimum, deliberate recklessness"). The *Silicon Graphics* court likened the "Sundstrand standard" of recklessness to a form of knowing or intentional behavior. See *id.* at 976-77. In fact, the court approved of the Sixth Circuit's holding in *Comshare*, which adopted the "Sundstrand standard" of recklessness, describing it as similar to conscious disregard. See *id.* at 977 n.8 (citing *In re Comshare, Inc.*, 183 F.3d 542, 550 (6th Cir. 1999)).

188. See *id.* at 977 ("In the absence of a clear command in the text, we turn to the legislative history for guidance" (citing *Northwest Forest Resource v. Glickman*, 82 F.3d 825, 830-31 (9th Cir. 1996))); see also 15 U.S.C.A. § 78u-4(b) (West 1997).

189. The court described the conference report "as the most reliable evidence of congressional intent." *Silicon Graphics*, 183 F.3d at 977 (citing *Glickman*, 82 F.3d at 835).

190. See *supra* notes 57-62 and accompanying text (describing the pre-PSLRA Second Circuit standard).

191. See *Silicon Graphics*, 183 F.3d at 977-78 (citing H.R. CONF. REP. NO. 104-369, at 31, 41 (1995)).

192. See *supra* note 84 and accompanying text (describing the Specter Amendment).

193. See *Silicon Graphics*, 183 F.3d at 978 (citing H.R. CONF. REP. NO. 104-369, at 41 (1995)) (noting the deletion of the Specter Amendment, which codified recklessness as a satisfactory scienter). Moreover, the court emphasized the Conference Report, which stated that because Congress is heightening existing pleading standards, the Conference Report eliminated language relating to recklessness. See *id.* (citing H.R. CONF. REP. NO. 104-369, at 41 n.23 (1995)).

194. See *supra* Part II.B.3 (discussing President Clinton's veto of the PSLRA and the veto-override debates).

that of pre-PSLRA levels.¹⁹⁵ The Ninth Circuit decided that had Congress intended to allow recklessness to suffice as an adequate scienter under Section 10(b) and Rule 10b-5, it would have expressly provided for it in the PSLRA.¹⁹⁶ The court, therefore, concluded that Congress adopted a stringent pleading standard whereby plaintiffs must specify facts demonstrating that the defendant acted with deliberate recklessness.¹⁹⁷

Judge Browning dissented from the *Silicon Graphics* majority, urging instead for the adoption of the “Sundstrand standard” of recklessness.¹⁹⁸ Judge Browning agreed with the Second, Third, and Sixth Circuits’ approaches, which asserted that Congress intended to keep recklessness as a sufficient basis for liability.¹⁹⁹ First, the dissent stated that the PSLRA’s text does not support the conclusion that proof of recklessness is no longer sufficient to meet the scienter standard.²⁰⁰ Second, although the dissent believed that reliance on the PSLRA’s legislative history is unnecessary because the text is unambiguous,²⁰¹ the dissent analyzed the PSLRA’s legislative history.²⁰² Relying on various statements made by Congressmen during the Specter Amendment

195. See *Silicon Graphics*, 183 F.3d at 979. The Ninth Circuit determined that, because President Clinton expressed concern that Congress heightened the pleading requirements beyond that of the pre-PSLRA Second Circuit standard, Congress’ veto-override evidenced “its intent to elevate the pleading standard to a level beyond that in the Second Circuit.” *Id.*

196. See *id.*

197. See *id.* (concluding that the plaintiff “must state specific facts indicating no less than a degree of recklessness that strongly suggests actual intent”). Applying the new standard, the court affirmed the dismissal of the plaintiff’s complaint because, while the plaintiff stated facts that gave “rise to some inference of fraudulent intent, her factual allegations are insufficient to create a *strong* inference of deliberate recklessness.” *Id.* at 980. The court held that the plaintiff failed to plead corroborating facts to support the allegations in the complaint, including facts demonstrating that the defendants knew of the company’s problems at the time they made the optimistic comments. See *id.* at 985.

198. See *id.* at 991 (Browning, J., concurring in part and dissenting in part).

199. See *id.* at 991-92 (Browning, J., concurring in part and dissenting in part) (noting that the *Silicon Graphics* holding “places the Ninth Circuit at odds with both the Second and Third Circuits”).

200. See *id.* at 992 (Browning, J., concurring in part and dissenting in part). The dissent defines recklessness utilizing the “Sundstrand standard.” See *id.* at 992 & n.6 (Browning, J., concurring in part and dissenting in part) (citing *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1569 (9th Cir. 1990)).

201. See *id.* at 992 (Browning, J., concurring in part and dissenting in part) (noting that “[a]ppeals to statutory history are well taken only to resolve ‘statutory ambiguity’”) (citing *Pennsylvania Dep’t of Corrections v. Yeskey*, 524 U.S. 206 (1998)).

202. See *id.* at 992-93 (Browning, J., concurring in part and dissenting in part).

elimination process²⁰³ and the veto-override debates,²⁰⁴ the dissent concluded that the PSLRA raised the level of scienter to the pre-PSLRA Second Circuit level, incorporating recklessness within the scienter definition.²⁰⁵ Third, the dissent deferred to the Security Exchange Commission's interpretation of the PSLRA, which opined that recklessness remains sufficient for scienter under the PSLRA.²⁰⁶ Accordingly, the dissent admonished the *Silicon Graphics* majority's standard of deliberate recklessness and adhered to the concept of the "Sundstrand standard" of recklessness.²⁰⁷

203. See *id.* at 993-94 (Browning, J., concurring in part and dissenting in part). The dissent remarked that Congress discarded the Specter Amendment because "it was 'an incomplete and inaccurate codification' of Second Circuit caselaw." *Id.* at 993 (Browning, J., concurring in part and dissenting in part) (quoting 141 CONG. REC. S19067 (daily ed. Dec. 21, 1995) (statement of Sen. Dodd)). Further, Senator Dodd assured supporters of the Specter Amendment that recklessness would continue to be accepted as a sufficient scienter. See *id.* (Browning, J., concurring in part and dissenting in part) (citing 141 CONG. REC. S19071 (daily ed. Dec. 21, 1995) (statement of Sen. Dodd)). See generally *supra* note 91 and accompanying text (discussing the elimination of the Specter Amendment). The dissent concluded that the task of determining whether recklessness suffices as an adequate scienter is "left to the courts." *Silicon Graphics*, 183 F.3d at 994 (Browning, J., concurring in part and dissenting in part).

204. See *id.* (Browning, J., concurring in part and dissenting in part). The dissent notes that during the veto-override debate, several members of Congress asserted that the PSLRA's pleading standard "was faithful to the Second Circuit's test." *Id.* (Browning, J., concurring in part and dissenting in part) (quoting 141 CONG. REC. S19067 (daily ed. Dec. 21, 1995) (statement of Sen. Dodd)); see also *supra* Part II.B.3 (discussing the veto-override debates).

205. See *Silicon Graphics*, 183 F.3d at 995 (Browning, J., concurring in part and dissenting in part) (concluding that "if Congress had intended to proscribe liability for recklessness . . . it would have done so directly"). See generally *supra* notes 57-62 and accompanying text (summarizing the pre-PSLRA Second Circuit scienter pleading standard).

206. See *Silicon Graphics*, 183 F.3d at 995. (Browning, J., concurring in part and dissenting in part). The SEC asserted that "recklessness is 'essential to the effective functioning of Section 10(b),' and 'necessary to protect investors and the integrity of the disclosure process.'" *Id.* (Browning, J., concurring in part and dissenting in part) (quoting Brief for Amicus SEC at 17, 20-21, *In re Silicon Graphics, Inc.* 183 F.3d 970 (9th Cir. 1999) (No. 97-16204, 97-16240)).

207. See *id.* at 996 (Browning, J., concurring in part and dissenting in part). The dissent urged that the majority's pleading standard of deliberate recklessness is "a formulation not found in the text of the statute, in the legislative history, or in any case heretofore litigated, and rejected by the responsible administrative agency." *Id.* (Browning, J., concurring in part and dissenting in part). On October 27, 1999, the Ninth Circuit denied a petition for rehearing. See *In re Silicon Graphics, Inc.*, 195 F.3d 521, 522 (9th Cir. 1999). The dissent noted that other circuits, including the Eleventh Circuit, had not followed the Ninth Circuit's lead in holding that recklessness is not a sufficient scienter under the PSLRA. See *id.* at 523 (Reinhardt, J., dissenting). The dissent urged the Ninth Circuit to reconsider its prior ruling and reestablish recklessness as an adequate scienter under Section 10(b) and Rule 10b-5 actions. See *id.* at 522 (Reinhardt, J., dissenting).

B. The Requirements for Pleading Scienter: Motive and Opportunity

While the circuits are split on whether recklessness satisfies the substantive definition of scienter under the PSLRA,²⁰⁸ they are more deeply divided over what facts a plaintiff must allege to withstand a motion to dismiss.²⁰⁹ Specifically, the circuits disagree over whether a plaintiff may survive a motion to dismiss by alleging facts demonstrating that the defendant had the motive²¹⁰ and the opportunity²¹¹ to commit securities fraud.²¹² The courts have developed three different approaches: (1) the pre-PSLRA Second Circuit two-pronged test;²¹³ (2) the heightened pleading standard that eliminates the bare pleading of motive and opportunity;²¹⁴ and (3) a totality of the circumstances approach to pleading scienter.²¹⁵

1. Acceptance of the Pre-PSLRA Second Circuit Approach: Allegations of Motive and Opportunity Satisfy the Pleading Standard

The Second and Third Circuits adopted the most lenient interpretation of the PSLRA, which accepts the Second Circuit's pre-

208. See *supra* Part III.A (discussing the circuit split regarding the issue of recklessness as an adequate scienter under the PSLRA).

209. See, e.g., *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 188 (1st Cir. 1999) (concluding that all cases should be decided on a fact specific, case-by-case basis); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1287 (11th Cir. 1999) (concluding that, while motive and opportunity remain relevant, the pleading of motive and opportunity alone will not suffice); *Silicon Graphics*, 183 F.3d at 979 (holding that the pleading of motive and opportunity alone will never withstand a motion to dismiss); *In re Advanta Corp.*, 180 F.3d 525, 534-35 (3d Cir. 1999) (holding that the pleading of motive and opportunity suffices); see also Wilmer, Cutler & Pickering, *Circuit Courts Begin to Coalesce on Private Securities Litigation Reform Act Standards*, MONDAQ BUSINESS BRIEFING, Dec. 1, 1999, at 4, available at 1999 WL 30590492, (stating that "[t]he appellate courts have been more varied in their approach towards the 'procedural' aspect of the PSLRA's mandate—the details needed in a complaint to allow a securities fraud claim to proceed").

210. See *supra* note 60 (defining motive).

211. See *supra* note 61 (defining opportunity).

212. See, e.g., *Greebel*, 194 F.3d at 188 (concluding that all cases should be decided on a totality of the circumstances basis); *In re Comshare, Inc.*, 183 F.3d 542, 553 (6th Cir. 1999) (holding that the pleading of motive and opportunity, while relevant, do not satisfy the pleading burden); *Silicon Graphics*, 183 F.3d at 979 (holding that the pleading of motive and opportunity alone will never withstand a motion to dismiss); *Press v. Chemical Inves. Servs. Corp.*, 166 F.3d 529, 537-38 (2d Cir. 1999) (adopting the two-pronged test).

213. See, e.g., *Advanta Corp.*, 180 F.3d at 534-35; see also *infra* Part III.B.1 (discussing the two-pronged test for pleading scienter).

214. See, e.g., *Silicon Graphics*, 183 F.3d at 979; see also *infra* Part III.B.2 (discussing the Ninth Circuit heightened pleading standard).

215. See, e.g., *Greebel*, 194 F.3d at 188; see also *infra* Part III.B.3 (discussing the totality of the circumstances test).

PSLRA standard for pleading scienter.²¹⁶ In addition, in dicta and without discussion, the Fifth Circuit opined that the PSLRA adopted the Second Circuit's pre-PSLRA approach.²¹⁷ The Second Circuit standard for pleading scienter involves a two-pronged test, wherein the plaintiff must either (a) plead facts demonstrating that the defendant had both the motive²¹⁸ and the opportunity²¹⁹ to commit securities fraud, or (b) plead facts that establish strong circumstantial evidence of recklessness or conscious misconduct.²²⁰ If a plaintiff proceeds under the first prong of the test, in order to survive a motion to dismiss, the plaintiff must state the facts with particularity demonstrating that the defendant possessed the motive and the opportunity to engage in fraud.²²¹

In *Press v. Chemical Investment Services Corp.*,²²² the Second Circuit adhered to the two-pronged test when it concluded that the plaintiff satisfied the standard for pleading scienter by alleging that the defendants had both the motive and the opportunity to commit securities fraud.²²³ The court acknowledged that the plaintiff met the scienter

216. See *Advanta Corp.*, 180 F.3d at 534-35; *Press*, 166 F.3d at 537-38; see also *supra* notes 57-62 and accompanying text (describing the Second Circuit's pre-PSLRA two-pronged test for pleading scienter). Additionally, district courts in the Seventh and Eighth Circuits have adopted the Second Circuit's two-pronged test for pleading scienter. See *In re BankAmerica Corp.*, 78 F. Supp. 2d 967, 990 (E.D. Mo. 1999) (holding that plaintiffs can establish scienter "by alleging facts establishing a motive and an opportunity to commit fraud or by setting forth facts that constitute circumstantial evidence of either reckless or conscious misbehavior"); *Fugman v. Aprogenex, Inc.*, 961 F. Supp. 1190, 1195 (N.D. Ill. 1997) (holding that Congress intended to adopt the Second Circuit two-pronged standard).

217. See *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 178 (5th Cir. 1997) (citing H.R. CONF. REP. NO. 369, 104th Cong., 1st Sess., at 41 (1995); 15 U.S.C. § 78u-4(b) (West 1997)); see also *supra* notes 57-62 and accompanying text (describing the Second Circuit's pre-PSLRA two-pronged test for pleading scienter).

218. See *supra* note 60 (defining motive).

219. See *supra* note 61 (defining opportunity).

220. See *Advanta*, 180 F.3d at 534-35 (citing *Weiner v. Quaker Oats Co.*, 129 F.3d 310, 318 n.8 (3d Cir. 1997)); *Press*, 166 F.3d at 538 (citing *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 267 (2d Cir. 1996); *Shields v. Citytrust Bankcorp., Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994)).

221. See *Advanta*, 180 F.3d at 535 (citing 15 U.S.C.A. § 78u-4(b)(2) (West 1997)); *Press*, 166 F.3d at 538 (citing 15 U.S.C. § 78u-4(b)(2) (West 1997)).

222. In *Press*, the plaintiff had purchased a \$99,488.42 Treasury bill ("T-bill") through the defendants, securities broker-dealers, to mature at \$102,000. See *Press*, 166 F.3d at 532. After the plaintiff had purchased the T-bill, he learned that, at maturity, he would not be allowed to pick up the proceeds immediately and the funds would either be mailed to him via regular mail or express delivered to him for an extra charge. See *id.* at 533. Therefore, the plaintiff maintains that the defendants structured this transaction so as to allow themselves more time to utilize the funds. See *id.* The plaintiff then brought suit under Section 10(b) and Rule 10b-5. See *id.* The district court dismissed the plaintiff's complaint because, inter alia, the plaintiff had failed to allege facts that create a sufficient inference of scienter. See *id.* at 537.

223. See *id.* at 538.

pleading requirements²²⁴ even though he had “barely alleged” facts demonstrating motive and opportunity.²²⁵ The *Press* court admitted the Second Circuit’s leniency in allowing allegations of scienter to survive even when they are based on “tenuous inferences.”²²⁶

The Third Circuit, in *In re Advanta Corp.*,²²⁷ elaborated on the rationale behind the conclusion that the PSLRA adopted the Second Circuit’s two-pronged test for pleading scienter.²²⁸ After examining the PSLRA’s legislative history, the *Advanta* court ultimately decided that it could not reconcile the contradictory expressions of Congress’ intent.²²⁹ Therefore, the Third Circuit looked to the plain language of the PSLRA, noting that the PSLRA incorporated the “strong inference” language of the pre-PSLRA Second Circuit standard.²³⁰ Accordingly, the *Advanta* court concluded that the inclusion of pre-PSLRA Second Circuit language clearly showed that Congress established a pleading standard approximately equal to that of the Second Circuit prior to the enactment of the PSLRA.²³¹

In *Advanta*, the Third Circuit expressly agreed with the Second Circuit that pleading facts which demonstrate that the defendant possessed the motive and the opportunity to commit securities fraud remains sufficient under the PSLRA.²³² A plaintiff, however, must state

224. See *id.* The court acknowledged that “this is the barest of all pleading that would be acceptable.” *Id.* Nonetheless, the court refused to “take this issue of fact from the finder of fact.” *Id.* (citing *Grandon v. Merrill Lynch & Co.*, 147 F.3d 184, 194 (2d Cir. 1998)).

225. See *id.* The plaintiff pled that the defendants were motivated to maintain possession of the T-bill proceeds in order to have use of the funds. See *id.* Further, the plaintiff pled that the defendants had the opportunity to use the T-bill funds as they were in the defendant’s control at maturity. See *id.*

226. See *id.* The Second Circuit declared that they “are not inclined to create a nearly impossible pleading standard when the ‘intent’ of a corporation is at issue.” *Id.*

227. See *supra* note 138 (summarizing the holding of *Advanta*). Additionally, in *Advanta*, the plaintiffs alleged that several “of the individual defendants . . . traded large blocks of Advanta stock . . . while in possession of material, nonpublic information.” *In re Advanta Corp.*, 180 F.3d 525, 529 (3d Cir. 1999).

228. See *Advanta*, 180 F.3d at 530-35 (analyzing the applicable pleading requirements of the Second Circuit test).

229. See *id.* at 533 (concluding that the legislative history, “including the President’s veto statement,” is ambiguous and inconclusive and thus carries little weight).

230. See *id.* (noting that “the two standards are virtually identical” except for the “state with particularity requirement”).

231. See *id.* at 534. Moreover, the *Advanta* court believed that the PSLRA’s inclusion of the pre-PSLRA Second Circuit pleading standard “is consistent with Congress’ stated intent of strengthening pleading requirements and deterring frivolous securities litigation.” *Id.*

232. See *id.* at 534-35 (agreeing with *Weiner v. Quaker Oats Co.*, 129 F.3d 310, 318 n.8 (3d Cir. 1997)); see also *Press v. Chemical Inves. Servs. Corp.*, 166 F.3d 529, 538 (2d Cir. 1999) (adopting the motive and opportunity pleading standard); *supra* notes 135-37 (summarizing the Second Circuit pleading standard).

the facts demonstrating motive and opportunity with particularity.²³³ Furthermore, these facts must create a “strong inference” that the defendant acted with the requisite scienter.²³⁴ Applying the two-pronged test,²³⁵ the *Advanta* court dismissed the plaintiff’s complaint because the plaintiff failed to plead facts giving rise to a strong inference that the defendants acted with scienter.²³⁶

Although the Fourth Circuit, in *Phillips v. LCI International, Inc.*,²³⁷ failed to adopt a specific pleading standard, it noted the split among the circuits regarding the pleading of scienter under the PSLRA.²³⁸ The *Phillips* court declined to adopt a pleading standard because the plaintiffs had failed to meet the Second Circuit two-pronged test.²³⁹ Specifically, the plaintiffs did not establish that the defendant had the motive and the opportunity to commit securities fraud because the

233. Requiring plaintiffs to plead facts with particularity directs “plaintiffs to plead ‘the who, what, when, where, and how: the first paragraph of any newspaper story.’” *Advanta*, 180 F.3d at 534 (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990)).

234. *See id.* at 535 (citing 15 U.S.C.A. § 78u-4(b)(2) (West 1997)). The Third Circuit warned that “catch-all allegations that defendants stood to benefit from wrongdoing and had the opportunity to implement a fraudulent scheme are no longer sufficient” under the PSLRA because allowing blanket assertions would undermine the PSLRA’s rigorous pleading standard. *Id.*

235. *See supra* notes 218-21 and accompanying text (describing the two-pronged test for pleading scienter).

236. *See Advanta*, 180 F.3d at 541; *see also supra* note 147 (describing the *Advanta* court’s conclusion that the plaintiffs had failed to meet the second prong of the two-pronged test when they did not allege facts constituting strong circumstantial evidence of either recklessness or conscious misbehavior). The plaintiffs alleged that the sale of company stock by several of the individual defendants at a time when the stock price was artificially inflated indicates that the individual defendants had the motive and the opportunity to commit securities fraud. *See Advanta*, 180 F.3d at 540. The *Advanta* court, however, held that they “‘will not infer fraudulent intent from the mere fact that some officers sold stock.’” *Id.* (quoting *In re Burlington Coat Factory*, 114 F.3d 1410, 1424 (3d Cir. 1997)). The sale of stock might create an inference of scienter only “‘if the stock sales were unusual in scope or timing.’” *Id.* (citing *Burlington Coat Factory*, 114 F.3d at 1424). In *Advanta*, several of the individual defendants did not sell stock at all and the defendants that did sell stock sold only “small percentages of their holdings.” *Id.* Additionally, the stock sales at issue were consistent with the individual defendants’ prior trading practices. *See id.* at 541. Accordingly, the *Advanta* court dismissed the plaintiffs’ complaint because the plaintiffs failed to adequately plead facts with particularity that demonstrate that the defendants possessed the motive and the opportunity to commit securities fraud. *See id.*

237. *Phillips v. LCI Int’l, Inc.*, 190 F.3d 609 (4th Cir. 1999); *see also supra* note 166 (summarizing the facts of *Phillips*).

238. *See Phillips*, 190 F.3d at 620-21. The court demarcated the Second and Third Circuits’ lenient two-pronged test, the Ninth Circuit’s stringent approach requiring deliberate recklessness and not allowing for the pleading of motive and opportunity, and the Sixth Circuit’s middle-ground standard, retaining the recklessness standard but eliminating the sufficiency of merely pleading motive and opportunity. *See id.*

239. *See id.* at 621. The Fourth Circuit described the Second Circuit two-pronged test as “the most lenient standard possible under the PSLRA.” *Id.*; *see also supra* notes 218-21 and accompanying text (describing the two-pronged Second Circuit standard).

allegations of motive in the complaint were tenuous and strained.²⁴⁰ The Fourth Circuit declared that a plaintiff must support an allegation of motive, based on benefits resulting from an increase in stock price, with assertions that the defendant engaged in insider trading or with assertions that the defendant sold personal stock.²⁴¹ Therefore, although the Fourth Circuit refused to adopt a pleading standard, the court did elaborate on the requisite motives that a plaintiff must plead to withstand a motion to dismiss.²⁴²

2. Adoption of a Heightened Standard of Pleading: Averments of Motive and Opportunity do not Satisfy the Pleading Standard

In *In re Silicon Graphics, Inc.*,²⁴³ the Ninth Circuit departed from the Second Circuit two-pronged test, and held that facts demonstrating that a defendant had the motive and the opportunity to commit securities fraud are not sufficient to adequately plead scienter under the PSLRA.²⁴⁴ Determining that the PSLRA's text does not indicate whether the pleading of motive and opportunity create a strong inference of scienter,²⁴⁵ the Ninth Circuit relied on the PSLRA's legislative history for guidance.²⁴⁶ The *Silicon Graphics* court, after

240. See *Phillips*, 190 F.3d at 621-24; see also *supra* note 171 (stating that the *Phillips* court concluded that the plaintiffs had failed to satisfy the second prong of the Second Circuit two-pronged test because the allegations in the complaint did not give rise to a strong inference that the defendant acted recklessly). The plaintiffs alleged that the executive, when claiming that LCI was not for sale, attempted to "retain a position on the corporation's board and obtain a higher price for his stock." *Phillips*, 190 F.3d at 622. The Fourth Circuit declared, however, that these motives do not suffice under the PSLRA because they pertain to all corporate mergers. See *id.*

241. See *id.* The Fourth Circuit determined that allegations that a defendant "committed fraud in order to retain an executive position" do not suffice under the PSLRA. *Id.* Similarly, "allegations that corporate officers 'were motivated to defraud the public because an inflated stock price would increase their compensation'" do not satisfy the PSLRA pleading requirements. *Id.* (quoting *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 54 (2d Cir. 1995)).

242. See *id.* For example, "[t]o support a claim of motive based on the benefit a defendant derives from an increase in the value of his holdings, a plaintiff must demonstrate some sale of 'personally-held stock' or 'insider trading' by the defendant." *Id.*

243. See *supra* note 177 (summarizing the facts of *Silicon Graphics*). Additionally, the plaintiffs alleged that individual defendants "took advantage of SGI's inflated stock value by selling" their own personal stock in the company. *In re Silicon Graphics, Inc.*, 183 F.3d 970, 982 (9th Cir. 1999).

244. See *Silicon Graphics*, 183 F.3d at 974 (holding that "plaintiffs must state facts that come closer to demonstrating intent, as opposed to mere motive and opportunity").

245. See *id.* at 977 (stating that the PSLRA's text lacks a "clear command").

246. See *id.*

analyzing the PSLRA's conference report,²⁴⁷ the President's veto,²⁴⁸ and the veto-override,²⁴⁹ concluded that Congress intended to heighten the scienter pleading standard employed by the Second Circuit prior to the enactment of the PSLRA.²⁵⁰ According to the Ninth Circuit, a plaintiff may survive a motion to dismiss only by pleading facts that create a strong inference of deliberate recklessness or conscious misconduct.²⁵¹

The dissent in *Silicon Graphics* argued for the adoption of the Second Circuit two-pronged test for pleading scienter under the PSLRA.²⁵² According to the dissent, the plain text of the PSLRA mandates the inclusion of the Second Circuit two-pronged test; therefore, the majority unnecessarily relied upon the PSLRA's legislative history.²⁵³ The

247. See *id.* The Ninth Circuit discussed the purposes behind the enactment of the PSLRA, including the goal of reducing abusive securities litigation. See *id.* Also, the *Silicon Graphics* court analyzed Congress' deletion of the Specter Amendment, which would have codified the Second Circuit's two-pronged test, including the ability to withstand a motion to dismiss by pleading motive and opportunity. See *id.* at 978; see also *supra* notes 84-86 and accompanying text (discussing the Specter Amendment). The court determined that Congress, by eliminating the Specter Amendment, "implicitly rejected the Second Circuit's two-pronged test." *Silicon Graphics*, 183 F.3d at 978 (citing *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974)). Therefore, the Ninth Circuit held that the PSLRA "did not codify the Second Circuit caselaw." *Id.*

248. See *id.* at 979; see also *supra* Part.II.B.3 (describing President Clinton's veto of the PSLRA). The *Silicon Graphics* court noted that President Clinton vetoed the PSLRA because of concern that the PSLRA raised "the pleading standard above that required in the Second Circuit." *Silicon Graphics*, 183 F.3d at 979.

249. See *id.*; see also *supra* Part.II.B.3 (discussing the veto-override debates). The Ninth Circuit stated that Congress, by overriding President Clinton's veto, "provided powerful evidence of its intent to elevate the pleading standard to a level beyond that in the Second Circuit." *Silicon Graphics*, 183 F.3d at 979.

250. See *id.*

251. See *id.* The court dismissed the plaintiff's complaint because it was "too generic and contain[ed] little more than evidence of mere motive and opportunity to commit fraud." *Id.* at 988. The court found that the individual defendants' stock sales did not give rise to a strong inference of deliberate recklessness because the sales were not dramatically different from the defendants' prior trading practices. See *id.* at 987. The court listed the relevant factors courts must consider when determining whether insider trading is suspicious: "(1) the amount and percentage of shares sold by insiders; (2) the timing of the sales; and (3) whether the sales were consistent with the insider's prior trading history." *Id.* at 986. Regarding two of the individual defendants that sold significant percentages of their total holdings, the court concluded that these sales did not amount to suspicious insider trading because, *inter alia*, these defendants had not made any of the optimistic statements. See *id.* at 988. Accordingly, the *Silicon Graphics* court dismissed the complaint because, "[i]n the absence of greater particularity and more incriminating facts," the court cannot distinguish the "allegations from the countless 'fishing expeditions' which the PSLRA was designed to deter." *Id.* (quoting H.R. CONF. REP. NO. 104-369, at 37).

252. See *id.* at 991-92 (Browning, J., concurring in part and dissenting in part).

253. See *id.* at 992 (Browning, J., concurring in part and dissenting in part) (stating that a court should resort to legislative history only when the statute is ambiguous).

dissent, however, proceeded to examine the legislative history and concluded that Congress intended to retain the pre-PSLRA Second Circuit's caselaw, including the ability of plaintiffs to withstand a motion to dismiss by pleading that defendants had the motive and the opportunity to commit securities fraud.²⁵⁴ The dissent reasoned that Congress would have expressly eliminated motive and opportunity pleading if it had desired to heighten the pleading requirements beyond that of the Second Circuit.²⁵⁵ Accordingly, the dissent urged for the denial of the defendant's motion to dismiss on the basis that the plaintiffs had stated, with particularity, facts demonstrating that the defendants possessed both the motive and the opportunity to commit fraud.²⁵⁶

While the Sixth and Eleventh Circuits disagree with the Ninth Circuit on the issue of whether recklessness satisfies the scienter requirement,²⁵⁷ they agree with the Ninth Circuit on the issue of whether plaintiffs can satisfy the pleading standard by alleging facts demonstrating that the defendant had both the motive and the opportunity to commit securities fraud.²⁵⁸ Both the Sixth and the Eleventh Circuits have held that plaintiffs may not plead scienter under Section 10(b) and Rule 10b-5 merely by alleging facts that demonstrate

254. See *id.* at 993 (Browning, J., concurring in part and dissenting in part). Judge Browning examined the statements of various Congressmen suggesting that the Second Circuit caselaw remains available for guidance. See *id.* (Browning, J., concurring in part and dissenting in part) (citing 141 CONG. REC. S19068 (daily ed. Dec. 21, 1995)).

255. See *id.* at 993-94 (Browning, J., concurring in part and dissenting in part) (citing *In re Advanta Corp.*, 180 F.3d 525, 534 n.8 (3d Cir. 1999)).

256. See *id.* at 996 (Browning, J., concurring in part and dissenting in part). First, the dissent noted that the complaint alleged facts demonstrating that the defendants knew negative internal information regarding the company while contemporaneously issuing positive public statements regarding the company's financial condition. See *id.* at 1000-01 (Browning, J., concurring in part and dissenting in part). Second, the dissent concluded that the individual defendants' stock sales amounted to suspicious insider trading because all of the defendants sold stock during the class period and two of the defendants sold significant portions of their stock holdings. See *id.* at 1001 (Browning, J., concurring in part and dissenting in part). Therefore, the dissent concluded that the plaintiffs successfully surpassed the PSLRA's "pleading hurdle." See *id.* at 1002 (Browning, J., concurring in part and dissenting in part).

257. See *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1287 (11th Cir. 1999) (holding that severe recklessness satisfies the pleading requirement); *In re Comshare, Inc.*, 183 F.3d 542, 549 (6th Cir. 1999) (holding that recklessness satisfies the pleading standard); *In re Silicon Graphics, Inc.*, 183 F.3d 970, 974 (9th Cir. 1999) (holding that deliberate recklessness satisfies the scienter requirement); see also *supra* notes 148-58, 181 and accompanying text (discussing *Comshare*); *supra* notes 159-65 and accompanying text (discussing *Bryant*); *supra* notes 177, 189-207 and accompanying text (discussing *Silicon Graphics*).

258. Plaintiffs may not survive a motion to dismiss by merely alleging facts that demonstrate that the defendant had both the motive and the opportunity to commit securities fraud. See *Bryant*, 187 F.3d at 1287; *Comshare*, 183 F.3d at 549; *Silicon Graphics*, 183 F.3d at 974.

the defendant possessed both the motive and the opportunity to engage in securities fraud.²⁵⁹

In *In re Comshare, Inc.*,²⁶⁰ the Sixth Circuit, relying on the PSLRA's plain language, determined that Congress altered the pleading requirements of Section 10(b) and Rule 10b-5 actions, consistent with Congress' purpose of deterring frivolous securities litigation.²⁶¹ Accordingly, the *Comshare* court concluded that pleading facts alleging motive and opportunity do not alone establish a strong inference of scienter under the PSLRA.²⁶² While the Sixth Circuit noted that facts demonstrating that the defendant possessed the motive and the opportunity to commit fraud may be "relevant to pleading circumstances from which a strong inference of fraudulent scienter may be inferred," merely pleading motive and opportunity do not satisfy the pleading burden.²⁶³

The Eleventh Circuit, in *Bryant v. Avado Brands, Inc.*,²⁶⁴ joined the Ninth and Sixth Circuits in holding that allegations of the defendant's motive and opportunity to commit securities fraud do not satisfy the

259. See *Bryant*, 187 F.3d at 1286-87; *Comshare*, 183 F.3d at 549.

260. See *supra* note 148 (summarizing the facts of *Comshare*). Additionally, the plaintiffs in *Comshare* alleged that the individual defendants artificially inflated the stock prices in order to sell their own personal shares at high prices. See *Comshare*, 183 F.3d at 547. Further, the plaintiffs alleged that the individual defendants benefited from artificially inflating the value of the stock because their compensation packages were related to the value of the company's stock. See *id.*

261. See *Comshare*, 183 F.3d at 548.

262. See *id.* at 551. The Sixth Circuit expressly disagreed with the Third Circuit's interpretation of pleading motive and opportunity when it declared that it "cannot agree that under the PSLRA, plaintiffs may establish a 'strong inference' of scienter merely by alleging facts demonstrating motive and opportunity where those facts do not simultaneously establish that the defendant acted recklessly or knowingly." *Id.*

263. See *id.* (quoting *In re Baesa*, 969 F. Supp. 238, 242 (S.D.N.Y. 1997)). The *Comshare* court added that while the pleading of motive and opportunity "may, on occasion, rise to the level of creating a strong inference of reckless or knowing conduct, the bare pleading of motive and opportunity does not, standing alone, constitute the pleading of a strong inference of scienter." *Id.* Applying the pleading standard, the *Comshare* court examined the allegations that the individual defendants artificially inflated the value of the company's stock in order to increase their compensation and sell their personal stock at high prices. See *id.* at 553. The court declared that, while allegations of insider trading "at unusual or suspicious levels 'is probative of motive,'" the allegations in this complaint do not create a strong inference of recklessness. *Id.* (quoting *Stevelman v. Alias Research Inc.*, 174 F.3d 79, 85 (2d Cir. 1999)). Accordingly, the *Comshare* court dismissed the plaintiffs' complaint because merely pleading motive and opportunity do not satisfy the PSLRA standard. See *id.*

264. See *supra* note 159 (summarizing the facts of *Bryant*). Additionally, the plaintiffs pled that the individual defendants artificially inflated the value of the company's stock in order to sell their own personal stock at a higher price. See *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1274 (11th Cir. 1999).

PSLRA pleading requirements.²⁶⁵ The *Bryant* court listed three separate reasons for concluding that Congress did not retain the motive and opportunity test established by the Second Circuit prior to the enactment of the PSLRA.²⁶⁶ First, the PSLRA's language does not expressly mention nor codify the motive and opportunity test; rather it refers to the state of mind of the defendant.²⁶⁷ The *Bryant* court reasoned that motive and opportunity represent types of evidence as opposed to a state of mind.²⁶⁸ Therefore, Congress did not expressly codify the sufficiency of pleading allegations of motive and opportunity.²⁶⁹ Second, allowing a plaintiff to withstand a motion to dismiss based on a bare pleading that the defendant had the motive and opportunity to commit securities fraud is inconsistent with the PSLRA's purpose, namely to curb the abuses of frivolous securities litigation.²⁷⁰ Third, prior to the enactment of the PSLRA, few circuits had adopted the Second Circuit motive and opportunity test.²⁷¹ Therefore, it is unlikely that Congress intended to codify a standard that was not well established at the time of the PSLRA's enactment.²⁷² Accordingly, the Eleventh Circuit held that the bare pleading of motive and opportunity will not satisfy the PSLRA's pleading standard.²⁷³

3. The Totality of the Circumstances Approach

The First Circuit, the final circuit to address the PSLRA pleading issue, established a pleading standard different from the pleading standards of the circuits that preceded it.²⁷⁴ In *Greebel v. FTP Software, Inc.*,²⁷⁵ rather than adopting any bright line rules, the First

265. See *Bryant*, 187 F.3d at 1287 (requiring "particular facts that give rise to a strong inference that the defendant acted in a severely reckless manner").

266. See *id.* at 1285-86; see also *supra* notes 218-21 and accompanying text (describing the Second Circuit's pre-PSLRA two-pronged test).

267. See *Bryant*, 187 F.3d at 1285-86; see also 15 U.S.C.A. § 78u-4(b) (West 1997).

268. See *Bryant*, 187 F.3d at 1286.

269. See *id.*; see also 15 U.S.C.A. § 78u-4(b).

270. See *Bryant*, 187 F.3d at 1286.

271. See *id.* In fact, only two circuits, the Second Circuit and the Ninth Circuit, had utilized the motive and opportunity test prior to the enactment of the PSLRA. See *id.*

272. See *id.* (concluding that Congress did not intend to codify the standard).

273. See *id.* at 1286-87. Having announced the pleading standard, the *Bryant* court remanded the case to the district court. See *id.* at 1287.

274. See *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 188 (1st Cir. 1999) (adopting a totality of the circumstances approach to pleading scienter); see also *supra* Part.III.B.1 (discussing the Second Circuit two-pronged test to pleading scienter); *supra* Part.III.B.2 (discussing the approach wherein allegations of motive and opportunity do not satisfy the PSLRA's pleading requirements).

275. In *Greebel*, the plaintiffs alleged that the defendant company and several of its officers

Circuit established a fact specific, totality of the circumstances test to determine whether the plaintiff has plead facts creating a strong inference that the defendant acted with the requisite scienter.²⁷⁶ The *Greebel* court held that the PSLRA does not endorse the sufficiency mandate of pleading motive and opportunity alone.²⁷⁷ The PSLRA also does not endorse the proposition that the pleading of motive and opportunity never suffices to withstand a motion to dismiss.²⁷⁸ Rather, the First Circuit concluded that a court should consider all evidence together when determining whether a plaintiff has pled sufficient facts to create an inference of scienter.²⁷⁹

First, the *Greebel* court concluded that the PSLRA's legislative history was inconclusive, contradictory, and ambiguous on the issue of whether the PSLRA codified the pre-PSLRA Second Circuit two-pronged test.²⁸⁰ Second, the First Circuit relied on the PSLRA's text when it declared that the words of the PSLRA do not require nor proscribe any type of evidence, including evidence regarding motive and opportunity.²⁸¹ Third, the *Greebel* court examined the approach the First Circuit had taken prior to the PSLRA, stating that the First Circuit had never adopted the Second Circuit's two-pronged test because it preferred to analyze the particular facts on a case-by-case basis to determine whether a plaintiff had provided a sufficient basis to support the inference of scienter.²⁸² In sum, the First Circuit adopted a fact-

issued misleading, positive statements and made material omissions regarding the financial condition of the company, thereby artificially inflating the value of the company's stock. *See Greebel*, 194 F.3d at 203. The plaintiffs allege that the defendants failed to disclose threats to the company's success and questionable sales practices. *See id.* at 189. Further, the complaint alleges that several of the individual defendants took advantage of the inflated stock price and sold portions of their holdings of the company stock. *See id.* at 189-90. When news became public that the company's earnings fell, the stock price fell 70% from the class period high. *See id.* at 191.

276. *See id.* at 188.

277. *See id.* at 196-97 (rejecting the Second Circuit two-pronged test).

278. *See id.* at 195 (rejecting the Sixth, Ninth, and Eleventh Circuits' approaches).

279. *See id.* at 196. Examples of types of evidence a court should consider include evidence of insider trading, "closeness in time of an allegedly fraudulent statement or omission and the later disclosure of inconsistent information," evidence of bribery, and the personal interest of defendants in "saving their salaries or jobs." *Id.*

280. *See id.* at 191-98 (discussing the purposes behind the enactment of the PSLRA, the Conference Report, and the veto-override). The *Greebel* court noted that "it would be unusual for Congress to legislate on what fact patterns could or could not prove fraud or scienter." *Id.* at 195.

281. *See id.* (holding that the PSLRA "neither mandate[s] nor prohibit[s] the use of any particular method to establish an inference of scienter").

282. *See id.* at 196. The First Circuit noted that "many different types of evidence" are relevant to demonstrate scienter, including insider trading and the defendants' interest in saving their positions in the company and preserving their compensation. *See id.* The court, however,

specific approach wherein the courts will examine all relevant evidence to determine whether the plaintiff has pled facts giving rise to a strong inference of scienter.²⁸³

IV. ANALYSIS

The three most important considerations in determining the correct pleading standard to apply under the PSLRA are: (1) the PSLRA's text;²⁸⁴ (2) the PSLRA's legislative history;²⁸⁵ and (3) the purposes and policies behind the enactment of the PSLRA.²⁸⁶ In respect to the standard that satisfies the pleading requirement, the Eleventh Circuit's "severe recklessness" standard,²⁸⁷ which is virtually identical to the "Sundstrand standard,"²⁸⁸ best complies with the text, legislative history, and purpose of the PSLRA.²⁸⁹ Furthermore, in respect to the requisite pleading standard for scienter under the PSLRA, the approach taken by the Sixth, Ninth, and Eleventh Circuits²⁹⁰ best exemplifies the goals of Congress when enacting the PSLRA.²⁹¹ Specifically, the Sixth, Ninth, and Eleventh Circuits have held that Congress did not intend the bare pleading of motive and opportunity to suffice under the PSLRA.²⁹²

cautioned that the evidence must support a strong inference of scienter and mere blanket assertions of motive and opportunity are insufficient. *See id.* at 196-97.

283. *See id.* at 197. Applying the totality of the circumstances test, the *Greebel* court dismissed the plaintiff's complaint because the allegations did not create a sufficient inference of scienter. *See id.* at 201. The court held that the individual defendants' stock sales did not occur at suspicious times and the plaintiff did not present evidence that the sales were unusual or out of line with prior trading practices. *See id.* at 206-07. Additionally, the plaintiff failed to plead facts with particularity and instead pled general assertions. *See id.* at 201. Accordingly, the *Greebel* court concluded that the plaintiff did not satisfy the pleading standard. *See id.*

284. *See* 15 U.S.C.A. § 78u-4(b) (West 1997); *see also supra* notes 67-70 and accompanying text (discussing the language of the PSLRA).

285. *See supra* Part II.B.2 (discussing the PSLRA's legislative history).

286. *See supra* Part II.B.1 (discussing the rationale behind the enactment of the PSLRA).

287. *See Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1283 (11th Cir. 1999); *see also supra* note 165 and accompanying text (describing the "severe recklessness" standard).

288. *See supra* note 48 (explaining the "Sundstrand standard").

289. *See supra* Part II.B (summarizing the PSLRA's text, legislative history, and rationale).

290. *See Bryant*, 187 F.3d at 1287; *In re Comshare, Inc.*, 183 F.3d 542, 549 (6th Cir. 1999); *In re Silicon Graphics, Inc.*, 183 F.3d 970, 974 (9th Cir. 1999); *see also supra* Part III.B.2 (discussing the heightened pleading standard).

291. *See supra* Part II.B.1 (describing the rationale behind the enactment of the PSLRA).

292. *See Bryant*, 187 F.3d at 1287; *Comshare*, 183 F.3d at 549; *Silicon Graphics*, 183 F.3d at 974; *see also supra* Part III.B.2 (discussing the heightened pleading standard).

A. Severe Recklessness Satisfies the Scierter Requirement

The Eleventh Circuit's "severe recklessness" standard best satisfies the PSLRA's scierter requirements for several reasons.²⁹³ First, the "severe recklessness" standard complies with the PSLRA's textual language.²⁹⁴ Second, the Eleventh Circuit's "severe recklessness" standard is consistent with the legislative history of the PSLRA.²⁹⁵ Third, allowing the "severe recklessness" standard to satisfy the PSLRA's scierter requirement furthers the purposes behind the enactment of the PSLRA.²⁹⁶ Finally, the "severe recklessness" standard mirrors that of the "Sundstrand standard" of recklessness,²⁹⁷ the standard adopted by each circuit to address the issue of the requisite level of scierter under the PSLRA.²⁹⁸ Therefore, the "severe recklessness" standard remains faithful to the prevailing view that Sundstrand-type recklessness satisfies the scierter requirement.

First, the "severe recklessness" standard is consistent with the text of the PSLRA.²⁹⁹ The PSLRA refrains from defining scierter and instead requires a plaintiff to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."³⁰⁰ At the time of the PSLRA's enactment, every circuit court to address the issue had held that recklessness satisfied the scierter definition in Section 10(b) and Rule 10b-5 actions.³⁰¹ Additionally, these circuits adhered to the "Sundstrand standard" of recklessness, which defined recklessness as highly unreasonable conduct, akin to a lesser form of intentional conduct.³⁰² When Congress drafted the

293. See *supra* note 165 and accompanying text (discussing the "severe recklessness" standard).

294. See *supra* notes 67-70 and accompanying text (describing the PSLRA's text).

295. See *supra* Part II.B.2 (discussing the PSLRA's legislative history).

296. See *supra* Part II.B.1 (stating the purposes behind the enactment of the PSLRA).

297. See *supra* note 48 and accompanying text (describing the "Sundstrand standard" of recklessness).

298. See *supra* Part III.A.1 (describing the acceptance of the "Sundstrand standard" of recklessness).

299. See 15 U.S.C.A. § 78u-4(b)(2) (West 1997); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1286 (11th Cir. 1999) (describing the "severe recklessness" standard); see also *supra* notes 67-70 and accompanying text (describing the PSLRA's text).

300. 15 U.S.C.A. § 78u-4(b)(2).

301. See *supra* Part II.A.2 (examining the acceptance of recklessness prior to the enactment of the PSLRA).

302. See *supra* Part III.A.1 (describing the circuit courts' adherence to the "Sundstrand standard"). Moreover, the "Sundstrand standard" of recklessness complies with the Supreme Court's definition of scierter in *Hochfelder*. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193-94 n.12 (1976) (defining scierter as a "mental state embracing intent to deceive, manipulate, or defraud"). The *Hochfelder* court acknowledged that recklessness may be considered a form of

PSLRA, it clearly knew of the unanimous acceptance of the “Sundstrand standard” of recklessness.³⁰³ Because Congress did not expressly alter the scierter requirement, it left the well-accepted standard undisturbed.³⁰⁴ Therefore, on its face, the PSLRA does not purport to alter the well-settled substantive definition of scierter.³⁰⁵

Moreover, Congress’ express inclusion of an actual knowledge level of scierter in other sections of the PSLRA³⁰⁶ provides support that Congress did not mandate an actual knowledge level of scierter in the general PSLRA text.³⁰⁷ Congress explicitly mandated a specific, heightened level of scierter for forward-looking statements³⁰⁸ and for the imposition of joint and several liability.³⁰⁹ Congress, however, declined to expressly adopt actual knowledge as the “required state of mind” for the general imposition of liability under the PSLRA.³¹⁰ Accordingly, the failure of Congress to specifically mandate actual knowledge in the PSLRA’s text supports the conclusion that the “Sundstrand standard” of recklessness satisfies the scierter standard under the PSLRA.³¹¹

Second, the “severe recklessness” standard³¹² is consistent with the PSLRA’s legislative history.³¹³ While the PSLRA’s legislative history is inconsistent and inconclusive with regard to whether recklessness satisfies the scierter requirement, the legislative history includes more compelling evidence that Congress intended to retain the recklessness

intentional behavior. *See id.*

303. *See* 141 CONG. REC. H2863-64 (daily ed. March 8, 1995); S. REP. NO. 104-98, at 15 (1995), *reprinted in* 1995 U.S.C.A.N. 679, 694 (acknowledging the general acceptance of the “Sundstrand standard” of recklessness).

304. *See* 15 U.S.C.A. § 78u-4(b); *see also* *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 195 (1st Cir. 1999); *Bryant*, 187 F.3d at 1284; *In re Comshare, Inc.*, 183 F.3d 542, 549-50 (6th Cir. 1999); *In re Silicon Graphics, Inc.*, 183 F.3d 970, 996 (9th Cir. 1999) (Browning, J., concurring in part and dissenting in part); *In re Advanta Corp.*, 180 F.3d 525, 534 (3d Cir. 1999).

305. *See* 15 U.S.C.A. § 78u-4(b); *see also* *Greebel*, 194 F.3d at 195; *Bryant*, 187 F.3d at 1284; *Comshare*, 183 F.3d at 549.

306. *See* 15 U.S.C.A. § 78u-5(c)(1)(B) (West 1997) (forward-looking statements); 15 U.S.C.A. § 78u-4(f)(2)(A) (West Supp. 2000) (joint and several liability).

307. *See* 15 U.S.C.A. § 78u-4(b); *see also* *Greebel*, 194 F.3d at 194-95; *Bryant*, 187 F.3d at 1284; *Comshare*, 183 F.3d at 549.

308. *See* 15 U.S.C.A. § 78u-5(c)(1)(B) (forward-looking statements).

309. *See* 15 U.S.C.A. § 78u-4(f)(2)(A) (joint and several liability).

310. *See* 15 U.S.C.A. § 78u-4(b).

311. *See id.*; *see also* *Greebel*, 194 F.3d at 194-95; *Bryant*, 187 F.3d at 1284; *Comshare*, 183 F.3d at 549.

312. *See* *Bryant*, 187 F.3d at 1286 (describing the “severe recklessness” standard).

313. *See supra* Part II.B.2 (discussing the PSLRA’s legislative history).

standard.³¹⁴ The House deleted an early attempt to eliminate recklessness as a basis for liability under the PSLRA.³¹⁵ Additionally, the Senate Report declared that Congress did not intend to “adopt a new and untested pleading standard.”³¹⁶ Critics of the recklessness standard find support in the elimination of the Specter Amendment³¹⁷ and President Clinton’s veto³¹⁸ of the PSLRA.³¹⁹ Several members of Congress, however, argued that the PSLRA did incorporate the “Sundstrand standard” of recklessness in the PSLRA’s text.³²⁰ Therefore, the legislative history of the PSLRA as a whole indicates that Congress did not eliminate recklessness as a basis for liability under the PSLRA.³²¹

Third, allowing the “Sundstrand standard” of recklessness to satisfy the scienter requirement furthers the purposes and policies behind the enactment of the PSLRA.³²² Congress enacted the PSLRA to restrict abusive practices in securities fraud litigation, including the filing of frivolous lawsuits in the hope of attaining settlements.³²³ The “Sundstrand standard” of recklessness is a severe form of recklessness, closely resembling a lesser form of intent.³²⁴ Moreover, under the PSLRA, a plaintiff must now support allegations of scienter with facts stated with particularity.³²⁵ Additionally, these facts must create a

314. See *supra* Part II.B.2 (summarizing the PSLRA’s legislative history); see also *Greebel*, 194 F.3d at 195; *Bryant*, 187 F.3d at 1284; *Comshare*, 183 F.3d at 549; *In re Silicon Graphics, Inc.*, 183 F.3d 970, 994-96 (9th Cir. 1999) (Browning, J., concurring in part and dissenting in part); *In re Advanta Corp.*, 180 F.3d 525, 534-35 (3d Cir. 1999).

315. See 141 CONG. REC. H2863-64 (daily ed. March 8, 1995); see also *supra* notes 77-80 and accompanying text (summarizing H.R. 1058).

316. S. REP. NO. 104-98, at 15 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 694; see also *supra* notes 82-83 and accompanying text (discussing the Senate Report).

317. See *supra* notes 84-85 and accompanying text (discussing the Specter Amendment).

318. See *supra* Part II.B.3 (discussing President Clinton’s veto and the veto-override debates).

319. See *Silicon Graphics*, 183 F.3d at 978-79 (arguing that the legislative history supports the conclusion that Congress heightened the level of scienter to deliberate recklessness or conscious misconduct).

320. See 141 CONG. REC. H15219 (daily ed. Dec. 20, 1995); 141 CONG. REC. S19068 (daily ed. Dec. 21, 1995); see also *supra* Part II.B.3 (discussing the veto-override debates).

321. See *supra* Part II.B.2 (summarizing the PSLRA’s legislative history); see also *Silicon Graphics*, 183 F.3d at 993-94 (Browning, J., concurring in part and dissenting in part).

322. See *supra* Part II.B.1 (discussing the rationale behind the enactment of the PSLRA); see also *In re Advanta Corp.*, 180 F.3d 525, 535 (3d Cir. 1999).

323. See H.R. CONF. REP. NO. 104-369, at 31-32 (1995) *reprinted in* 1995 U.S.C.C.A.N. 730, 730-31; see also *supra* Part II.B.1 (discussing the rationale behind the enactment of the PSLRA).

324. See *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 198-99 (1st Cir. 1999); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1284 (11th Cir. 1999); *In re Comshare, Inc.*, 183 F.3d 542, 549-50 (6th Cir. 1999); see also *supra* note 48 (defining the “Sundstrand standard” of recklessness).

325. See 15 U.S.C.A. § 78u-4(b)(2) (West 1997).

strong inference of scienter.³²⁶ Therefore, the additional procedural requirements, combined with the condition that scienter must encompass a severe form of recklessness, furthers the PSLRA's goals in eliminating abusive, non-meritorious lawsuits.³²⁷

Although the Ninth Circuit described the required state of mind as deliberate recklessness,³²⁸ it actually embraced the "Sundstrand standard" of recklessness.³²⁹ The *Silicon Graphics* court recognized that the "Sundstrand standard" views recklessness as a form of intentional conduct, apart from negligence and mere recklessness.³³⁰ Therefore, although the Ninth Circuit appeared to heighten the requisite level of scienter, it actually adhered to the well-accepted "Sundstrand standard."³³¹

In sum, each circuit to address the issue of scienter under the PSLRA has adopted recklessness in some form.³³² Furthermore, each circuit, including the Ninth Circuit, has applied the "Sundstrand standard" of recklessness.³³³ Therefore, while the circuits have expressed the standards differently, a consensus has developed toward the "Sundstrand standard" of recklessness, best served by the term "severe recklessness."³³⁴

326. See *id.*

327. See *Greebel*, 194 F.3d at 199-200; *Bryant*, 187 F.3d at 1284; *Comshare*, 183 F.3d at 549; see also *supra* Part II.B.1 (discussing the purposes behind the enactment of the PSLRA). Also, the "severe recklessness" standard promotes the policy objective of protecting defrauded investors who do not have the access to information that would enable them to adequately plead that the defendant acted intentionally. See *Advanta*, 180 F.3d at 535 (stating that the inclusion of the "Sundstrand standard" of recklessness discourages "deliberate ignorance and [it] prevent[s] defendants from escaping liability solely because of the difficulty of proving conscious intent to commit fraud"). "Severe recklessness" provided a balance between the lenient recklessness standard and the stringent deliberate recklessness standard. See *id.*

328. See *In re Silicon Graphics, Inc.*, 183 F.3d 970, 974 (9th Cir. 1999).

329. See *id.* at 976; see also note 48 (describing the "Sundstrand standard" of recklessness).

330. See *Silicon Graphics*, 183 F.3d at 977.

331. See *id.*; see also *Wilmer, Cutler & Pickering*, *supra* note 209, at 3 (noting that the *Silicon Graphics* court never explained how deliberate recklessness differs from the "Sundstrand standard" of recklessness). Furthermore, the Ninth Circuit likened their approach to the standard adopted by the Sixth Circuit in *Comshare*. See *Silicon Graphics*, 183 F.3d at 977 n.7.

332. See, e.g., *Bryant*, 187 F.3d at 1285 (severe recklessness); *Silicon Graphics*, 183 F.3d at 974 (deliberate recklessness); *Advanta*, 180 F.3d at 534-35 (recklessness); see also *supra* Part III.A (discussing the acceptance of recklessness as an adequate scienter under the PSLRA).

333. See *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 198 (1st Cir. 1999); *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 620-21 (4th Cir. 1999); *Bryant*, 187 F.3d at 1284; *In re Comshare, Inc.*, 183 F.3d 542, 550 (6th Cir. 1999); *Silicon Graphics*, 183 F.3d at 976-77; *Advanta*, 180 F.3d at 534-35; *Press v. Chemical Inves. Servs. Corp.*, 166 F.3d 529, 538 (2d Cir. 1999); see also *supra* Part III.A (discussing the circuit court's adoption of the "Sundstrand standard" of recklessness).

334. See *Wilmer, Cutler & Pickering*, *supra* note 209, at 4 (observing that "the consensus in the post-PSLRA appellate decisions is that factual pleadings giving rise to a 'strong inference' of

B. The PSLRA Did Not Adopt the Motive and Opportunity Test

The Ninth, Sixth, and Eleventh Circuits correctly held that the PSLRA did not adopt the Second Circuit's motive and opportunity test.³³⁵ First, the PSLRA's text reveals that Congress did not expressly or impliedly codify the motive and opportunity standard.³³⁶ Second, the legislative history of the PSLRA indicates Congress' intent to heighten the scienter pleading standard beyond the level of the Second Circuit.³³⁷ Additionally, President Clinton's veto of the PSLRA and Congress' veto-override support the conclusion that the PSLRA eliminated the Second Circuit's motive and opportunity test.³³⁸ Finally, the adoption of the Second Circuit's motive and opportunity standard would have defeated the purposes underlying the enactment of the PSLRA.³³⁹

The PSLRA's statutory language reveals that Congress did not attempt to explicitly or implicitly codify the Second Circuit's motive and opportunity test.³⁴⁰ The text of the PSLRA does not expressly codify or even mention the Second Circuit's motive and opportunity standard.³⁴¹ Instead, the express language of the PSLRA refers to the substantive standard of scienter.³⁴² Therefore, the omission of the motive and opportunity test from the PSLRA's text indicates that Congress, when enacting the PSLRA, did not intend to adopt the Second Circuit's motive and opportunity standard.³⁴³

Additionally, the PSLRA's legislative history supports the conclusion that Congress intended to elevate the pleading standard beyond that of the Second Circuit.³⁴⁴ The Statement of Managers explicitly declared that the PSLRA's goal was to strengthen the existing pleading

Sundstrand-type recklessness are sufficient to state securities fraud claims under the PSLRA").

335. See *Bryant*, 187 F.3d at 1285; *Comshare*, 183 F.3d at 551-53; *Silicon Graphics*, 183 F.3d at 979; see also Part III.B (discussing the Sixth, Ninth, and Eleventh Circuit's rejection of the motive and opportunity test).

336. See *supra* notes 67-70 (describing the statutory language of the PSLRA).

337. See *supra* Part II.B.2 (summarizing the PSLRA's legislative history); see also *supra* notes 57-62 and accompanying text (discussing the Second Circuit's pleading standard).

338. See *supra* Part II.B.3 (discussing President Clinton's veto and the veto-override).

339. See *supra* Part II.B.1 (discussing the rationale behind the enactment of the PSLRA).

340. See 15 U.S.C.A. § 78u-4(b) (West 1997); *Bryant*, 187 F.3d at 1285; *Comshare*, 183 F.3d at 551; *Silicon Graphics*, 183 F.3d at 979; see also notes 67-70 and accompanying text (discussing the PSLRA's text).

341. See 15 U.S.C.A. § 78u-4(b); see also notes 67-70 and accompanying text (discussing the statutory language of the PSLRA).

342. See 15 U.S.C.A. § 78u-4(b); see also notes 67-70 and accompanying text (discussing the PSLRA's text).

343. See 15 U.S.C.A. § 78u-4(b); see also *Bryant*, 187 F.3d at 1285.

344. See *supra* Part II.B.2 (summarizing the PSLRA's legislative history); see also *supra* notes 57-62 and accompanying text (discussing the Second Circuit's pleading standard).

standard.³⁴⁵ Also, the Conference Committee deleted the Second Circuit's motive and opportunity test from the final version of the PSLRA.³⁴⁶ The Ninth Circuit accurately noted that Congress knew of the motive and opportunity test at the time of the PSLRA enactment, yet declined to codify the standard.³⁴⁷ Further, as the Eleventh Circuit recognized, at the time of the PSLRA's enactment, only two circuits had adopted the motive and opportunity standard.³⁴⁸ Therefore, Congress did not intend to codify *sub silentio* a standard that was not well accepted by the courts.³⁴⁹

President Clinton's veto and Congress' veto-override further support the conclusion that Congress did not incorporate the motive and opportunity test in the PSLRA.³⁵⁰ The President based his veto entirely on the notion that Congress had elevated the pleading requirements above those of the Second Circuit.³⁵¹ Congress, however, without altering the PSLRA's text, overrode the President's veto and enacted the PSLRA into law.³⁵² Congress' decision to override President Clinton's veto illustrates the Congressional intent to eliminate the Second Circuit's motive and opportunity standard.³⁵³ Consequently, the PSLRA's legislative history demonstrates that the PSLRA heightened the scienter pleading standard beyond the level of the Second Circuit.³⁵⁴

345. See H.R. CONF. REP. NO. 104-369, at 41 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 740.

346. See H.R. CONF. REP. NO. 104-369, at 41 & n.23; see also *supra* notes 84-93 and accompanying text (describing the Specter Amendment).

347. See *In re Silicon Graphics, Inc.*, 183 F.3d 970, 979 (9th Cir. 1999); see also *supra* Part II.B.2 (discussing the PSLRA's legislative history).

348. See *Bryant*, 187 F.3d at 1286.

349. See *id.* The Eleventh Circuit determined that, although Congress implicitly codified recklessness as an actionable scienter, Congress "did not intend to codify the lesser-known, lesser-accepted, and certainly not well-established notion that allegations of motive and opportunity to commit fraud are sufficient to show scienter." *Id.*

350. See *supra* Part II.B.3 (discussing President Clinton's veto and the veto-override debates).

351. See 141 CONG. REC. H15214 (daily ed. Dec. 20, 1995) (veto message of President Clinton); see also *supra* notes 57-62 and accompanying text (discussing the Second Circuit's pleading standard).

352. See *supra* Part II.B.3 (discussing the veto-override debates).

353. See *id.*

354. See *supra* Part II.B.2 (discussing the PSLRA's legislative history); *supra* notes 57-62 and accompanying text (describing the Second Circuit's pleading standard). Moreover, reliance on the legislative history of the SLUSA is misplaced, as several members of Congress and President Clinton attempted to create PSLRA legislative history after the fact. See *supra* Part II.C (discussing the legislative history of SLUSA). "The legislative history of [SLUSA] is . . . more an attempt to rewrite, than to clarify the legislative history of the" PSLRA. Kramer, *supra* note 106, at 1. As the Supreme Court noted, "the interpretation given by one Congress . . . to an earlier statute is of little assistance in discerning the meaning of that statute." *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 185 (1994) (quoting *Pub. Employees Retirement*

Similarly, the rationale behind the enactment of the PSLRA indicates that Congress intended to eliminate the sufficiency of merely pleading that the defendant had the motive and the opportunity to commit fraud.³⁵⁵ Congress intended to limit the abuses of the securities class action system, including the exploitation of the discovery process as a means of attaining large settlements.³⁵⁶ The low standard of allowing the pleading of motive and opportunity to withstand a motion to dismiss is inconsistent with the goal of deterring frivolous lawsuits.³⁵⁷ The First Circuit's totality of the circumstances approach,³⁵⁸ like the Second Circuit's two-pronged test,³⁵⁹ ignores the purposes underlying the PSLRA.³⁶⁰ Congress clearly intended to heighten the pleading standard above that of the Second Circuit to alleviate the abusive practices that flourished under the prior securities class action system.³⁶¹

While the Ninth, Sixth, and Eleventh Circuits acknowledge that allegations of motive and opportunity remain relevant under the PSLRA,³⁶² they hold that merely pleading that the defendant possessed

Sys. of Ohio v. Betts, 492 U.S. 158, 168 (1989)).

355. See *supra* Part II.B.1 (discussing the rationale behind the enactment of the PSLRA).

356. See *supra* notes 9-12 and accompanying text (discussing strike suits).

357. See *supra* Part II.B.1 (discussing the rationale behind the enactment of the PSLRA); see also *supra* Part III.B.1 (discussing the adoption of the motive and opportunity standard). The Second Circuit, contrary to the PSLRA's purpose of heightening the scienter pleading standard, admitted its lenience in allowing allegations based on tenuous inferences to satisfy the scienter pleading standard. See *Press v. Chemical Inves. Servs. Corp.*, 166 F.3d 529, 538 (2d Cir. 1999). Realistically, corporate officers often possess a motive and an opportunity to commit fraud. See *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1286 (11th Cir. 1999). After all, "[g]reed is a ubiquitous motive, and corporate insiders and upper management always have the opportunity to lie and manipulate." *Id.* (quoting *Carley Capital Group v. Deloitte & Touche, L.L.P.*, 27 F. Supp. 1324, 1339 (N.D. Ga. 1998)). Motive and opportunity alone, however, do not amount to securities fraud. See *id.* Additionally, companies are increasingly compensating their executives and officers with stock options, thereby encouraging the officers and executives to engage in routine stock sales. See Giuffra, *supra* note 6, at A45.

358. See *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 199 (1st Cir. 1999); see also *supra* Part III.B.3 (discussing the totality of the circumstances approach).

359. See *supra* notes 217-42 and accompanying text (discussing the two-pronged test).

360. See *supra* Part II.B.1 (examining the rationale behind the enactment of the PSLRA).

361. See *supra* Part II.B.2 (describing the PSLRA's legislative history). See generally Edward Brodsky, *Circuits Split on Stock Fraud Scienter Pleading Standard*, 222 N.Y.L.J. 3 (1999) (arguing that Congress intended to heighten the scienter pleading standard above that of the Second Circuit's two-pronged standard).

362. See *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1286 (11th Cir. 1999); *In re Comshare, Inc.*, 183 F.3d 542, 551 (6th Cir. 1999); *In re Silicon Graphics, Inc.*, 183 F.3d 970, 974 (9th Cir. 1999); see also *supra* Part III.B.2 (discussing the heightened pleading standard). The Ninth Circuit held that allegations that the defendant had the motive and the opportunity to commit securities fraud might "provide some reasonable inference of intent," but these allegations do not suffice to establish a strong inference of scienter. *Silicon Graphics*, 183 F.3d at 974.

both the motive and the opportunity to commit securities fraud does not satisfy the PSLRA's pleading standard.³⁶³ Accordingly, the Ninth, Sixth, and Eleventh Circuit's heightened pleading standard that eliminates the Second Circuit's motive and opportunity test is consistent with the PSLRA's text, legislative history, and purpose.³⁶⁴

V. PROPOSAL

Because the circuits have adopted conflicting standards regarding the pleading of scierter under the PSLRA, uncertainty exists among shareholders and corporations.³⁶⁵ This uncertainty breeds forum shopping among circuit courts because the outcome of a case can turn on whether the action is filed in a circuit that has adopted a stringent pleading standard or a circuit that has adopted a lenient pleading standard.³⁶⁶ Therefore, in order to reconcile the current circuit split, the Supreme Court should resolve the conflict regarding scierter pleading standards under the PSLRA. In light of the importance of the issues,³⁶⁷ the Supreme Court must establish uniformity among the circuits.

When the Supreme Court does resolve the split among the circuits, it should adopt the "severe recklessness" standard as the requisite level of scierter under the PSLRA.³⁶⁸ Furthermore, the Supreme Court should adopt the heightened standard of pleading whereby bare allegations that the defendant had both the motive and the opportunity to commit securities fraud do not satisfy the scierter standard under the PSLRA.³⁶⁹

The "severe recklessness" standard, as formulated by the Eleventh Circuit, is consistent with the PSLRA's text, legislative history, and rationale.³⁷⁰ Because Congress clearly knew, at the time of the PSLRA's enactment, of the predominant view that a heightened form of

363. See *Bryant*, 187 F.3d at 1286; *Comshare*, 183 F.3d at 551; *Silicon Graphics*, 183 F.3d at 974; see also *supra* Part III.B.2 (discussing the heightened pleading standard).

364. See *supra* Part III.B.2 (discussing the heightened pleading standard).

365. See *supra* Part III (discussing conflicting standards adopted by various circuits).

366. See Robert A. Horowitz & Karen Y. Bitar, *Pleading Scierter in Securities Fraud Class Actions*, 222 N.Y. L.J. 1, 1 (1999) (stating that "there is an incentive for plaintiffs' counsel to file their cases in the jurisdictions with the most lenient pleading requirement, currently the Second and Third Circuits"). One commentator analogized the selection of an appropriate forum to "a game of roulette, with the outcome turning on whether a securities class action is filed in New York or Silicon Valley." Giuffra, *supra* note 6, at A45.

367. See *supra* Part I (discussing the significance of the scierter pleading standard).

368. See *supra* note 165 and accompanying text (discussing the "severe recklessness" standard).

369. See *supra* Part III.B.2 (discussing the heightened pleading approach).

370. See *supra* Part IV.A (discussing the "severe recklessness" standard); see also *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1284 (11th Cir. 1999).

recklessness satisfies the scienter requirement, Congress' failure to provide an explicit definition of scienter supports the conclusion that "severe recklessness" qualifies as an adequate level of scienter under the PSLRA.³⁷¹ Moreover, during the course of the PSLRA's enactment, Congress acknowledged the acceptance of a severe form of recklessness as an acceptable scienter standard.³⁷² Furthermore, "severe recklessness" advances the PSLRA's goal of discouraging frivolous lawsuits.³⁷³

The "severe recklessness" standard will provide a high pleading standard to combat abusive securities fraud litigation.³⁷⁴ "Severe recklessness" discourages the filing of strike-suits, in contrast to the lenient standard of mere recklessness that contradicts the PSLRA's clear purpose of heightening the scienter pleading requirements.³⁷⁵ The "severe recklessness" standard, however, will not present an insurmountable obstacle to defrauded investors, as would the stringent deliberate recklessness standard.³⁷⁶

"Severe recklessness" accurately describes the "Sundstrand standard," which defines recklessness as a lesser form of intent, as opposed to negligence or mere recklessness.³⁷⁷ As courts have consistently applied the "Sundstrand standard" of recklessness to Section 10(b) and Rule 10b-5 actions,³⁷⁸ the "severe recklessness" standard faithfully adheres to a well-accepted formulation.³⁷⁹ The "severe recklessness" standard, therefore, provides the most appropriate formulation of the scienter requirement under the PSLRA.

Additionally, the Supreme Court should adopt the heightened standard of pleading, as proposed by the Ninth, Sixth, and Eleventh

371. See *supra* Part IV.A (analyzing "severe recklessness" in the context of the PSLRA's statutory language).

372. See *supra* notes 312-21 and accompanying text (examining the PSLRA's legislative history).

373. See *supra* notes 322-27 and accompanying text (analyzing the PSLRA's rationale).

374. See *supra* note 165 (describing the "severe recklessness" standard).

375. See Brad S. Karp & Daniel A. Crane, *Is Circuit Split on PSLRA Intensifying?*, 222 N.Y. L.J. S3, S3 (1999) (arguing that "[l]enient recklessness standards, including that of the Second Circuit, are squarely at odds with the concerns addressed by Congress in the PSLRA").

376. See *supra* note 165 and accompanying text (discussing the effects of the "severe recklessness" standard); see also *In re Silicon Graphics, Inc.*, 183 F.3d 970, 974 (9th Cir. 1999) (adopting a deliberate recklessness standard).

377. See *supra* note 165 (comparing "severe recklessness" to the "Sundstrand standard"). Moreover, "severe recklessness" conforms to the Supreme Court definition of scienter as "intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976).

378. See *supra* Part III.A.1 (discussing the acceptance of the "Sundstrand standard").

379. See *supra* note 165 (discussing the "severe recklessness" standard).

Circuits, whereby allegations that the defendant had both the motive and the opportunity to commit securities fraud do not suffice to adequately plead scienter under the PSLRA.³⁸⁰ The heightened pleading standard is based on the PSLRA's text, legislative history, and rationale.³⁸¹ Congress refused to codify, either explicitly or implicitly, the Second Circuit's motive and opportunity test.³⁸² Moreover, the PSLRA's legislative history confirms that Congress intended to heighten the pleading standards associated with scienter.³⁸³ Further, Congress' purpose in enacting the PSLRA was to heighten scienter pleading standards to deter frivolous securities litigation.³⁸⁴

Adoption of the heightened pleading standard will curtail the practice of filing frivolous lawsuits because the courts will no longer allow a complaint to withstand a motion to dismiss based on tenuous inferences.³⁸⁵ Both the Second Circuit's approach and the totality of the circumstances approach ignore Congress' intentions in enacting the PSLRA.³⁸⁶ As Congress clearly intended to heighten the pleading standard to deter frivolous litigation, lenient pleading standards conflict with the goals of the PSLRA.³⁸⁷

Under the heightened pleading standard, more detailed factual allegations that the defendant had the motive and the opportunity to commit securities fraud will be relevant and may create a reasonable inference that the defendant acted with the requisite scienter.³⁸⁸ The bare pleading of motive and opportunity, however, will not create a strong inference that the defendant possessed the necessary level of scienter.³⁸⁹ This position is consistent with the goals of the PSLRA, balancing the need for legitimately defrauded investors to have access to the federal courts with the need of corporations to be safeguarded against non-meritorious claims.

380. See *supra* Part III.B.2 (describing the PSLRA's heightened standard of pleading); see also *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1286 (11th Cir. 1999); *In re Comshare, Inc.*, 183 F.3d 542, 549 (6th Cir. 1999); *Silicon Graphics*, 183 F.3d at 974.

381. See *supra* Part IV.B (analyzing the heightened standard of pleading).

382. See *supra* notes 335-39 and accompanying text (examining the heightened standard of pleading in light of the PSLRA's text).

383. See *supra* notes 344-49 and accompanying text (discussing the legislative history of the PSLRA).

384. See *supra* Part II.B.1 (discussing the rationale behind the PSLRA).

385. See *supra* Part III.B.2 (discussing the heightened pleading standard).

386. See *supra* Part III.B.1 (discussing the Second Circuit's motive and opportunity standard); *supra* Part III.B.3 (discussing the totality of the circumstances approach).

387. See *supra* Part II.B.1 (discussing the rationale behind the enactment of the PSLRA).

388. See *In re Silicon Graphics, Inc.*, 183 F.3d 970, 974 (9th Cir. 1999).

389. See *id.*

VI. CONCLUSION

Under the PSLRA, “severe recklessness” should be adopted as the requisite level of scienter because “severe recklessness” is consistent with the PSLRA’s text, the legislative history of the PSLRA, and the purposes behind the enactment of the PSLRA. Also, a heightened pleading standard should be adopted whereby allegations that the defendant had both the motive and the opportunity to commit securities fraud will not be sufficient to withstand a motion to dismiss. These pleading standards are consistent with the rationale of the PSLRA because they guard against frivolous litigation while allowing defrauded investors access to the federal courts.