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I. INTRODUCTION

The Private Securities Litigation Reform Act of 1995 ("PSLRA," "Reform Act," or "Act")\(^1\) was a major overhaul of the largely judicially created litigation system that emerged from the 1934 Securities Exchange Act ("34 Act").\(^2\) Starting with *Kardon v. National Gypsum Co.*\(^3\) in 1946, the federal courts recognized an implied private right of action under § 10(b)\(^4\) of the 34 Act and rule 10b-5\(^5\) thereunder. This

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   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, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), 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.

5. 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,
cause of action became the preferred choice of plaintiffs in securities fraud suits since it was not circumscribed by congressionally legislated limits.\(^6\)

In 1971, twenty-five years after *Kardon*, the Supreme Court decided its first case under rule 10b-5 and began to put its stamp on the parameters of these implied private actions for securities fraud.\(^7\) Early on, the Supreme Court expressed concerns about the peculiarly vexatious nature of securities fraud claims.\(^8\) While the Supreme Court has often restrictively interpreted the scope of rule 10b-5 claims,\(^9\) the Court could not easily stop baseless lawsuits. In the paradigm for an abusive

\[^{17}\text{C.F.R. \(\S\) 240.10b-5 (2002).}\]

6. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), where the Supreme Court referenced the Congressional limits on express causes of action under the 34 Act and the 1933 Securities Act, 15 U.S.C. \(\S\) 77 (2000), in order to inform its decision that simple negligence would not support a private action under \(\S\) 10(b). See also *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975), where the Supreme Court stated:

Despite the contrast between the provisions of Rule 10b-5 and the numerous carefully drawn express civil remedies provided in the Acts of both 1933 and 1934, it was held in 1946 by the United States District Court for the Eastern District of Pennsylvania that there was an implied right of action under the Rule. This Court had no occasion to deal with the subject until 25 years later, and at that time we confirmed with virtually no discussion the overwhelming consensus of the District Courts and Courts of Appeals that such a cause of action did exist (citations and footnote omitted).


8. In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, where the Supreme Court held that every plaintiff bringing a Rule 10b-5 action must be a purchaser or seller, the Court went on to say:

There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.

Judge Friendly in commenting on another aspect of Rule 10b-5 litigation has referred to the possibility that unduly expansive imposition of civil liability 'will lead to large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers.'

*Id.* at 739 (citations omitted).

9. See, e.g., *Blue Chip Stamps*, 421 U.S. 723 (only purchasers or sellers could sue privately under Rule 10b-5); *Hochfelder*, 425 U.S. 185 (private party must show more than simple negligence to prevail under Rule 10b-5); *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) (in private lawsuit, no liability for aiding and abetting a violation of Rule
lawsuit, a corporation issues a statement that is a negative surprise for the market. The corporation’s stock falls and several shareholder securities fraud class actions are filed. Plaintiffs commence discovery immediately which serves to impose costs on the corporation and acts as a means of investigating whether there might be securities fraud. Without a prompt dismissal of the lawsuits, corporations might settle for large sums even where the claims had little merit in order to minimize corporate defense costs.

One major aim of the PSLRA was to prevent such “abusive and meritless lawsuits”. One device designed to deter meritless lawsuits is a heightened pleading standard for private securities fraud cases. The PSLRA provides:

[i]n any private action arising under this chapter in which the plain-
tiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with re-
spect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the de-
fendant acted with the required state of mind.


11. Id. at 1189-90. In Blue Chip Stamps, the Supreme Court observed:

The potential for possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure may likewise exist in [rule 10b-5 cases] to a greater extent than they do in other litigation. The prospect of extensive deposition of the defendant’s officers and associates and the concomitant opportunity for extensive discovery of business documents, is a common occurrence in this and similar types of litigation. To the extent that this process eventually produces relevant evidence which is useful in determining the merits of the claims asserted by the parties, it bears the imprematur of those Rules and of the many cases liberally interpreting them. But to the extent that it permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.

Blue Chip Stamps, 421 U.S. at 741.

12. Again, as the Supreme Court stated in Blue Chip Stamps:

[In] the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit.

Blue Chip Stamps, 421 U.S. at 740 (citations omitted).


14. 15 U.S.C. § 78u-4(b)(2) (2000). By the plain language of this section, Congress did not specify what state of mind would lead to liability, but left the question of state of mind for judicial determination. John F. Olson, David C. Mahaffey & Brian E. Casey, Pleading Reform,
The PSLRA also provides a stay on discovery until motions to dismiss on the adequacy of the pleadings are decided.15 This pleading standard would thus keep plaintiffs with baseless suits from reaching the discovery stage; thereby reducing the sums such suits could potentially extract in settlement.16 Effectively, plaintiffs must investigate the merits of any claim before filing a lawsuit.

The Circuits have taken divergent positions in interpreting the PSLRA's heightened pleading standard for scienter. While the Second Circuit and others adopted the belief that Congress intended to codify the Second Circuit's pre-PSLRA test, which can be satisfied by showing "motive and opportunity,"17 the Ninth Circuit rejected it and


In Hochfelder, the Supreme Court decided that for implied private rights of action under § 10(b) and Rule 10b-5, simple negligence is insufficient for liability. Hochfelder, 425 U.S. at 193. At one point the Supreme Court defined the requisite scienter as "a mental state embracing intent to deceive, manipulate, or defraud." Id. at 193 n.12. The Supreme Court expressly reserved the question of whether reckless behavior would be sufficient for civil liability under Rule 10b-5. Id. Between the Hochfelder decision and the adoption of the PSLRA, those circuits that considered whether recklessness satisfies the scienter requirements of § 10(b) and Rule 10b-5 uniformly agreed that recklessness did indeed satisfy the requirement. See Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1569-70 (9th Cir. 1990) (adopting the Sundstrand recklessness standard); In re Phillips Petroleum Sec. Litig., 881 F.2d 1236, 1244 (3d Cir. 1989) ("recklessness on the part of a defendant meets the scienter requirement of Section 10(b) and Rule 10b-5"); McDonald v. Alan Bush Brokerage Co., 863 F.2d 809, 814 (11th Cir. 1989) ("showing of 'severe recklessness' satisfies the scienter requirement"); Van Dyke v. Coburn Enters., Inc., 873 F.2d 1094, 1100 (9th Cir. 1989) ("Congress intended to create civil liability when one recklessly violates 10(b)."); Hackbart v. Holmes, 675 F.2d 1114 (10th Cir. 1982) (recklessness satisfies the scienter requirement); Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1023-24 (6th Cir. 1979); Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47 (2d Cir. 1978) ("[T]he scienter element may be satisfied by proof of reckless conduct."); Sundstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033 (7th Cir. 1977) [hereinafter Sundstrand] (defining recklessness for the purposes of securities fraud). In the Sundstrand opinion, the court stated:

[R]ecklessness . . . may be defined 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.

Id. at 1045. Since Sundstrand, most courts have adopted the Seventh Circuit's recklessness standard. This, however, is not the topic of this paper and therefore will only briefly be discussed in the notes.

15. The PSLRA provides that discovery "be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party." See 15 U.S.C. § 78u-4(b)(3)(B) (2000).

16. See Dorelli, supra note 10, at 1194-95.

17. See, e.g., Press v. Chem. Inv. Servs., 166 F. 3d 529, 537-38 (2d Cir. 1999) (interpreting the pleading standard of the Reform Act to be the same standard as that in the Second Circuit); see also In re Advanta Corp. Sec. Litig., 180 F. 3d 525, 534 (3d Cir. 1999) (adopting the position...
took the view that Congress intended a standard more stringent than
that existing in the Second Circuit.18 Still, a third group, represented
by the Sixth Circuit, takes an approach, which at first glance, appears
to be somewhere in the middle.19

Part II begins with a brief summary of the two pleading standards in
use prior to the enactment of the PSLRA.20 Part III outlines the legis-

cative history of the PSLRA relating to the heightened pleading stan-
dard.21 Part III then explores the current disagreement among the
circuits regarding the pleading standard for scienter under the
PSLRA.22 The divergence of standards revolves around whether a
defendant's decision to plead motive and opportunity gives rise to a
strong inference of scienter. Part IV discusses the strengths and weak-
nesses of each of the three positions.23 Specifically, Part V argues that
the standards used by the Second and Sixth Circuits are functionally
the same and that the Ninth Circuit's standard should be rejected.

II. THE PRIVATE SECURITIES LITIGATION
REFORM ACT OF 1995

A. Pre-PSLRA Pleading Standards

Prior to the passage of the PSLRA, the federal circuit courts of ap-
peal had adopted one of two different requirements for plaintiffs to
plead fraud under rule 10b-5, in order to survive a motion to dismiss.24
The circuits relied on Rule 9(b) of the Federal Rules of Civil Proce-
dure, which provides that "in all averments of fraud and mistake the
underlying circumstances shall be pleaded with particularity," but

established by the Second Circuit); Williams v. WMX Techs., Inc., 112 F.3d 175, 177-78 (5th Cir.
1997).

18. See, e.g., In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 974 (9th Cir. 1999), reh'g and
reh'g en banc denied, 195 F. 3d 591 (9th Cir. 1999).

19. See, e.g., In re Comshare, Inc. Sec. Litig., 183 F.3d 542, 549 (6th Cir. 1999); Bryant v.
Avado Brands, Inc., 187 F.3d 1271 (11th Cir. 1999).

20. See infra text accompanying notes 24-38 (discussing the pleading standards used by the
Second and the Ninth Circuits prior to the enactment of the PSLRA).

21. See infra text accompanying notes 39-77 (discussing the legislative history of the PSLRA).

22. See infra text accompanying notes 78-104 (discussing the various interpretations used by
the circuits to apply the PSLRA's heightened pleading standard).

23. See infra text accompanying notes 105-146 (analyzing the various approaches used by the
circuits).

24. Compare In re Time Warner Inc. Sec. Litig., 9 F.3d 259 (2d Cir. 1993); In re Advanta Corp.
Sec. Litig., 180 F.3d 525, 534-35 (3d Cir. 1999), and Press v. Chem. Inv. Servs., 166 F.3d 529, 538
(2d Cir. 1999), with In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994), and In re
Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 973-74, reh'g and reh'g en banc denied, 195 F.3d
591 (9th Cir. 1999).
“[m]alice, intent, knowledge, and other conditions of mind of a person may be averred generally.”

Prior to the PSLRA, the Second Circuit’s pleading standard was said to be the most stringent standard employed by any circuit. This standard was an attempt to limit the number of frivolous securities fraud suits filed. Under this standard, coupling factual statements alleging fraud with conclusory allegations that the defendant was reckless, or had knowledge of falsity, would not withstand a motion to dismiss. In In re Time Warner Inc. Securities Litigation, the Second Circuit held that the facts alleged in a securities fraud complaint must give rise to a “strong inference of fraudulent intent.” Later, in Shields v. Citytrust Bancorp., Inc., the Second Circuit amplified its pleading standard by holding that a plaintiff may plead scienter if he/she alleges either “motive and opportunity” on the part of the defendant to commit fraud; or “facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.” In order to plead “motive”, plaintiff had to show “concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged,” while pleading “opportunity” would require show-

25. Fed. R. Civ. P. 9(b) provides that “in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition[s] of [the] mind of a person may be averred generally.”

26. In re Advanta Corp., 180 F.3d at 534 (stating that the Second Circuit’s standard was the most stringent pleading standard prior to the enactment of the PSLRA); see also Olson, supra note 14, at 1108.

27. See Joseph T. Phillips, A New Pleading Standard Under the Private Securities Litigation Reform Act?, 69 U. CIN. L. REV. 969, 976 (2001); In re GlenFed, 42 F.3d at 1546 (“We are not permitted to add new requirements to Rule 9(b) simply because we like the effects of doing so.”). Other developments under Rule 10b-5 are the result, at least in part, of judicial concern over frivolous lawsuits under the rule. In Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), the Supreme Court held that only actual purchasers or sellers of securities can enforce Rule 10b-5 in part on the policy grounds that this requirement would limit the number of vexatious lawsuits under the rule. Some courts have adopted the “bespeaks caution” doctrine, which enables a court to dispose of claims of misleading statements when there is sufficient cautionary language. See, e.g., In re Donald J. Trump Casino Sec. Litig. – Taj Mahal Litig. (Kaufman v. Trump’s Castle Funding), 7 F.3d 357, 371-74 (3d Cir. 1993), cert. denied sub nom. Gollomp v. Trump, 510 U.S. 1178 (1994); Cf. Rubinstein v. Collins, 20 F.3d 160, 166-68 (5th Cir. 1994). The PSLRA contains provisions similar to this doctrine in providing safe harbors from litigation risks for forward looking statements in § 21E of the Securities Exchange Act of 1934, 15 U.S.C. § 78 (2000).

28. In re Advanta Corp., 180 F.3d at 535.

29. Id. at 268 (citing O'Brien v. Nat'l Prop. Analysts Partners, 936 F.2d 674, 676 (2d Cir. 1991)).

30. 25 F.3d 1124 (2d Cir. 1994).

31. Id. at 1128 (citing In re Time Warner, 9 F.3d at 268-69).

32. Id. at 1130.
ing "the means and likely prospect of achieving concrete benefits by the means alleged." 34

The Ninth Circuit's standard, on the other hand, was a much less demanding pleading standard than the Second Circuit's. 35 The Ninth Circuit recognized that Rule 9(b) does not require "any particularity in connection with an averment of intent, knowledge or condition of the mind." 36 To meet the burden of pleading a securities fraud claim in the Ninth Circuit, a plaintiff was simply required to give a description of circumstances alleged to constitute fraud with an accompanying conclusory statement that those actions were fraudulent. 37 A plaintiff bringing a securities fraud suit in the Ninth Circuit could, therefore, survive a motion to dismiss by alleging state of mind with no particular factual basis. 38

B. Legislative History of the Heightened Pleading Standard in the PSLRA

Congress passed the Private Securities Litigation Reform Act in December of 1995. The PSLRA was enacted to "protect investors, issuers, and all who are associated with [the] capital markets from abusive securities litigation." 39 Among other things, the Reform Act imposed higher pleading standards, and stayed discovery during the determination of any motion to dismiss for failing to meet those stan-

34. Id.
36. Id. (emphasis omitted). The purposes of Rule 9(b) are "to provide a defendant with fair notice of a plaintiff's claim, to safeguard a defendant's reputation from 'improvident charges of wrongdoing,' and to protect a defendant against the institution of a strike suit." See Olson, supra note 14, at 1108.
37. In re GlenFed, Inc. Sec. Litig., 42 F.3d at 1546. In GlenFed, the Ninth Circuit held that a plaintiff could plead scienter with conclusory allegations as long as the complaint set forth the circumstances indicating the fraudulent nature of the statements. Id. at 1548-49. The Court in GlenFed allowed a plaintiff to draw on "contemporaneous statements or conditions" to demonstrate why statements were false when made, and "allegations of specific problems undermining a defendant's optimistic claims suffice to explain how the claims are false." Id. at 1549.
38. Id. at 1546-47; see also Phillips, supra note 27 at 976.
These hurdles made bringing a shareholders' lawsuit more difficult.\footnote{15 U.S.C. \S 78u-4(b)(3)(B) (2000). The PSLRA also made it easier for courts to grant sanctions against plaintiffs in securities actions, 15 U.S.C. \S 78u-4(e), limited joint and several liability, 15 U.S.C. \S 78u-4(c), prescribed strict causation standards, 15 U.S.C. \S 78u-4(b)(4), placed limitations on securities class actions, 15 U.S.C. \S 78u-4(a), and provided a "safe harbor" for forward-looking statements that prove to be false. See Joshua D. Ratner, \textit{Stockholders' Holding Claim Class Actions Under State Law After the Uniform Standards Act of 1998}, \textit{U. CHI. L. REV.} 1035, 1041-51 (2001); Thad A. Davis, \textit{A New Model of Securities Law Enforcement}, \textit{32 CUMB. L. REV.} 69, 79 (2001-2002).} The Conference Committee based the need for a heightened pleading standard on two findings. First, the Committee felt the requirement of Rule 9(b) of the Federal Rule of Civil Procedure, which requires plaintiffs to "plead with particularity" when alleging fraud, had failed to prevent abusive securities litigation. Secondly, the federal courts of appeal had split over the interpretation of 9(b)'s pleading requirements and Congress felt that a new pleading standard would bring desired uniformity.\footnote{15 U.S.C. \S 78u-4(b)(2). See \textit{Lerach & Isaacson}, \textit{supra} note 35 at 931 (explaining the state of mind pleading standard under proposed \S 10A).}

The history of the Reform Act is rather complicated. Originally there were two versions of the bill, one from the House of Representatives\footnote{H.R. 10, 104th Cong. Tit. II (1995).} and the other from the Senate.\footnote{S. REP. No. 104-98, at 1 (1995).} The first draft of the Act was introduced in the House of Representatives.\footnote{H.R. CONF. REP. No. 104-369, at 42-43 (quoting testimony of former SEC Chairman Richard Breeden); \textit{see also} \textit{Common Sense Legal Reform Act: Hearings Before the Subcommittee on Telecommunications and Finance of the House Committee on Commerce, 104th Cong. 233, 234-35 (1995) (describing the Ninth Circuit's refusal to apply the Second Circuit's pleading standard).} The House's version, H.R. 1058, did not adopt the Second Circuit pleading standard but, instead, required the plaintiff to plead specific facts which demonstrate the state of mind of each defendant.\footnote{H.R. 10, \S 204.} The Conference Committee ultimately amended this version of the bill in favor of the language found in the Senate's version.\footnote{\textit{Id.} ("[T]he complaint shall allege specific facts demonstrating the state of mind of each defendant at the time the alleged violation occurred.")}

Senator Pete Domenici introduced the Senate version of the PSLRA, Senate bill 240, on January 18, 1995, where it was sent to the Subcommittee on Securities of the Committee on Banking, Housing and Urban Affairs for hearings.\footnote{Id. at 1113.} Arthur Levitt, the Chairman of the
SEC, testified before the Subcommittee that it was his belief that the pleading standard "should . . . conform to [that of] the Second Circuit." The Senate Banking Committee then added the Second Circuit's test of "strong inference" of state of mind to unify the scienter requirements of all of the circuits. The Banking Committee, however, did not adopt the Second Circuit's interpretation of the pleading standard, but it did state that Courts "may find the [Second Circuit's] body of [case] law instructive.

The full Senate amended Senate Bill 240 in June 1995 at the prompting of Senator Arlen Specter. Senator Specter attempted to make the law's reliance on the Second Circuit tests more explicit. He offered a floor amendment that provided:

2) [s]trong 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.

The Specter amendment included language defining how a "strong inference" of scienter could be alleged, codified the Second Circuit's "motive and opportunity" test, and expressly provided for liability for reckless behavior. "Senator Specter reasoned that without this [language], the strong-inference-of-scienter standard posed an impossible
task for plaintiffs. ‘How do you get into somebody else’s head?’ he asked.”

Senator D’Amato, the Senate Banking Committee Chairman, opposed the Specter amendment saying that it “placed too great a burden” on plaintiffs because it limited the ways in which scienter can be plead and “straightjackets the court.” His opposition seems to be based more on a concern that the Specter amendment would preclude otherwise acceptable ways of alleging scienter by limiting the standard solely to the motive and opportunity test, rather than an attack on the use of motive and opportunity to plead the required level of scienter. Senator Bennett, who also served on the Senate Banking Committee, took a similar view in stating his own objection. Bennett felt that it was preferable to give the courts the ability to determine what fact patterns would satisfy the scienter standard. The Senate ultimately adopted the Specter amendment over these objections and the Senate’s version of the Reform Act, with the Specter amendment, made its way to the House-Senate Conference Committee for reconciliation with the House version.

The Conference Committee sorted out the differences between the House and the Senate version by looking at the Second Circuit’s pleading standard, while referring to it as “the most stringent pleading standard.” The Conference Committee took the language of the Second Circuit’s pre-PSLRA standard, which required a plaintiff to state facts that indicate a ‘‘strong inference’ of the defendant’s fraudulent intent,’ and added the phrase “with particularity”. This new standard required that the plaintiff “shall, with respect to each act or omission . . . state with particularity facts giving rise to a strong infer-

57. 141 CONG. REC. S9200 (daily ed. June 28, 1995) (Senator D’Amato’s statement saying that “S. 240 codifies the second circuit [sic] pleading standard, but this amendment goes further, to say precisely what evidence a party may present to show a strong inference of fraudulent intent. I think this straitjackets the court.”).
58. Id.
59. Id. (“My understanding . . . is that . . . the committee decided they wanted to codify the standard from the second circuit [sic]. Now, the committee intentionally did not provide language to give guidance on exactly what evidence would be sufficient to prove facts giving rise to a strong inference of fraud. They felt that adopting the standard would be sufficient [and] that with the second circuit [sic] standard being written into the bill, it was best to stop at that point and allow the courts then the latitude that would come beyond that point.”).
60. 141 CONG. REC. S9200 (daily ed. June 28, 1995).
61. The Conference Committee consists of House and Senate managers charged with reconciling differences between the House and Senate bills.
63. Id.
ence that the defendant acted with the required state of mind."64 Ultimately, the Specter amendment was eliminated65 and the "motive and opportunity" language was removed. The Committee explained, "because the Conference Committee intends to strengthen existing pleading requirements, it does not intend to codify the Second Circuit's case law interpreting this pleading standard."66

Soon after, the amended version of H.R. 1058 was presented to the President for approval. President Clinton vetoed the PSLRA on December 19, 1995.67 Although the President said he supported the need for securities litigation reform, he stated, "the pleading requirements of the Conference Report with regard to a defendant’s state of mind impose an unacceptable procedural hurdle to meritorious claims being heard in Federal courts."68 The President indicated that both deletion of the Specter amendment, resulting in the omission of the Second Circuit standard from the language of the PSLRA, and the language in the Statement of Managers, indicating that the Committee wished to “strengthen” the existing pleading requirement, led the President to believe that the intent of Congress in passing the bill was to create a higher pleading standard than that already in existence in the Second Circuit.69

Subsequent to Clinton's veto, the bill was debated once more and Congress voted to override the veto. On December 22, 1995, H.R. 1058, as revised by the Conference Committee and without the Specter amendment, became Public Law No. 104-67, "The Private Securities Litigation Reform Act of 1995."70

The most controversial issue that Congress faced when drafting the PSLRA was determining the level of specificity with which plaintiffs would be required to plead scienter in order to survive a motion to

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64. Id. at 12.

65. Id. at 1-30 (Conference Committee’s approved version of the PSLRA without the Specter Amendment.).

66. H.R. Rep. No. 104-369 (Nov. 28, 1995). Another consequence of the removal of the Specter amendment was that the PSLRA failed to define both the required state of mind and what must be alleged to prove it. Many of the members of Congress felt that the PSLRA would not make any changes to the state of mind requirements of existing law when removing the Specter Amendment. See id. at 950 (The Statement of the Managers indicates that the PSLRA was not going to alter the existing law regarding the state of mind requirement.).


68. Id.

69. Id. ("I will support a bill that submits all plaintiffs to the tough pleading standards of the Second Circuit, but I am not prepared to go beyond that.").

The goal was to end the disparity between the circuits and "erect procedural barriers to prevent [opportunistic] plaintiffs from asserting baseless securities fraud claims" which would, in turn, curb the perceived problem of abusive litigation. "Rule 9(b)’s provision allowing state of mind to be averred generally conflicts with the Reform Act’s requirement that plaintiffs ‘state with particularity facts giving rise to a strong inference’ of scienter." Under the PSLRA, the lenient standard of GlenFed no longer constitutes an adequate pleading requirement for scienter in §10(b) and 10b-5 cases.

While it is clear that the GlenFed test is no longer the standard, what is not clear is to what extent Congress adopted the views of the Second Circuit. Congress did use the Second Circuit’s “strong inference” test, but what was less clear is whether Congress expected the federal courts to accept that alleging “motive and opportunity” would satisfy the heightened pleading standards of the PSLRA.

III. COURT INTERPRETATIONS OF THE HEIGHTENED PLEADING STANDARD

This ambiguous legislative history and nonspecific legislative language has led to three interpretations of the PSLRA’s heightened pleading standard. A discussion of the three variations is essential to an understanding of the differing views of the PSLRA.

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71. Miest, supra note 14, at 1112.
72. See Id. at 930.
73. In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 977 (9th Cir. 1999), reh’g and reh’g en banc denied, 195 F.3d 521 (9th Cir. 1999).
75. In re Advanta Corp. Sec. Litig., 180 F.3d 525, 531 n.5 (3d Cir. 1999).
76. See discussion on Pre-PSLRA pleading standards supra text accompanying notes 24-38.
78. See Press v. Chem. Inv. Servs. Corp., F. 3d 529, 538 (2d Cir. 1999) (adopting the Pre-PSLRA Second Circuit standard where plaintiff must plead either motive and opportunity or conscious recklessness); In re Advanta Corp., 180 F.3d at 534-35 (following Second Circuit view in Press); In re Comshare Inc. Sec. Litig., 183 F.3d 542, 551 (6th Cir. 1999) (adopting a modified Second Circuit standard where although bare assertions of motive and opportunity may be relevant to showing of scienter, without more, they are not sufficient to demonstrate the required state of mind); In re Silicon Graphics, 183 F.3d at 973-74, reh’g and reh’g en banc denied, 195 F. 3d 521 (9th Cir. 1999) (Court rejected the Second Circuit standard and held that the motive and opportunity test is no longer applicable. Plaintiffs must now plead specific facts indicating at least a degree of recklessness suggesting actual intent).
79. Some circuits have declined to adopt a standard when the facts of the pleading in the case do not rise to a level that would survive even the Second Circuit’s standard. See, e.g., Phillips v. LCI Int’l, Inc. 190 F.3d 609, 621 (4th Cir. 1999) (Court did not address the issue of which pleading standard best reflected Congress’ intent because it found that the plaintiffs failed to allege facts sufficient to meet even the most lenient standard possible under the PSLRA – the Second
In February 1999, the Second Circuit in Press v. Chemical Investment Services became the first federal appellate court to decide what Congress meant when it enacted the PSLRA pleading requirement for scienter. Donald Press purchased a Treasury bill from Chemical for $99,488.42, which, after six months would mature and be valued at $102,000. Press brought a claim against Chemical under §10(b) because the firm had delayed paying funds to him when the T-bill matured. To plead scienter, Press alleged that Chemical had a motive to keep possession of the T-bill proceeds for its own use, and that the broker had the opportunity to do so because the firm controlled the money at all times.

In addressing whether Press adequately pleaded scienter, the Press court treated the heightened pleading standard of the PSLRA as merely codifying the Second Circuit's pre-PSLRA standards. The court stated that to satisfy the pleading requirement, a plaintiff must either "allege facts to show that 'defendants had both motive and opportunity to commit fraud'" or "allege facts that 'constitute strong circumstantial evidence of conscious misbehavior or recklessness.'

The court recognized that its pre-PSLRA standards were lenient. The Second Circuit felt that the standard could not be any higher because it would create a nearly impossible pleading standard where the "intent" of a corporation would be at issue. Even though the Press court found that the plaintiff "barely alleged motive and opportunity," it held that the pleading standard was nonetheless satisfied.

The Press opinion lacked much in the way of analysis. In fact, the court ignored the purpose of the PSLRA pleading standard coupled with the stay on discovery pending any motion to dismiss. The court

Circuit's test). See also In re Criimi Mae, Inc. Sec. Litig., 94 F. Supp. 2d 652, 659 (D. Md. 2000) ("this court need not decide the appropriate standard for pleading under the PSLRA because the court finds that Plaintiffs have failed to satisfy the Second Circuit standard").

80. 166 F.3d 529 (2d Cir. 1999).

81. Id. at 532.

82. Id. at 533. Press' claim against Chemical was based on three theories. First, Chemical failed to disclose that the proceeds of the T-bill would not be available immediately upon maturity, making the period for which the yield was calculated longer than indicated by Chemical which made the disclosed interest rate inaccurate. Second, Press said that Chemical failed to tell him that there was a markup of over $150 on the transaction. Finally, Press claimed that there was a fiduciary duty to disclose the fee to him. Id.

83. Id.

84. Id.

85. See id. (citing Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994).

86. Id.

87. Id.
recognized as motive the ubiquitous one of making money off the transaction. Consequently, the Press pleading standard provided no hurdle to plaintiff's discovery and ignored the Congressional intent to use the pleading standard to curb baseless lawsuits. When Congress said that the Second Circuit's case law may be instructive, it clearly did not adopt all of it, particularly that which was "lenient". However, the Press court provided the benchmark against which other circuits, particularly the Ninth Circuit, interpreted the pleading standard of the PSLRA. Since this interpretation provided little barrier to abusive lawsuits, it did not serve the Congressional purpose of curbing such lawsuits.

The next year, the Second Circuit revisited the issue and provided a more detailed analysis. In Novak v. Kasaks, the court again held that "the PSLRA effectively raised the nationwide pleading standard to that previously existing in [the Second Circuit]." The Second Circuit again affirmed the two-part test of the Press court. However, the Novak court effectively restricted the motive and opportunity test for pleading scienter. The court said that "[p]laintiffs could not proceed on motives possessed by virtually all corporate insiders," but

88. Press, 166 F.3d at 538.
89. 216 F.3d 300 (2d Cir. 2000).
90. Id. at 310.
91. Id. at 311. The Third Circuit joined the Second Circuit when it reached a similar result in In re Advanta Corp. Sec. Litig., 180 F.3d 525, 533 (3d Cir. 1999). Advanta was an issuer of MasterCard and Visa credit cards who made its reputation by attracting new customers with its "teaser rates." Id. at 528. (A "teaser rate" is an unusually low introductory interest rate, which remains in effect for a limited period of time. At the end of this period, the rate returns to a higher, permanent level.) Advanta, using this technique, grew rapidly and realized large profits. Id. However, after announcing a $20 million loss, shareholders filed suit based on a claim that Advanta had not fully disclosed these "risky" practices. Id. In Advanta, the court felt that "there [was] little to gain in attempting to reconcile the conflicting expressions of legislative intent" and instead looked to the "plain language" of the Act for its interpretation. Id. at 533. Stating that the text of the Reform Act "closely mirrors language employed by the Second Circuit," ("We believe that the use of the Second Circuit's language compels the conclusion that the Reform Act establishes a pleading standard approximately equal in stringency to that of the Second Circuit," particularly as it requires the plaintiff to allege facts supporting a 'strong inference' of scienter," the Third Circuit held the use of standard "approximately equal to that of the Second Circuit," although the pleading standard was in fact heightened with the addition of the words "with particularity." Id. at 533-34 (emphasis added) ("[T]his interpretation is consistent with Congress's [sic] stated intent of strengthening pleading requirements and deterring frivolous securities litigation. [E]ven in jurisdictions already employing the Second Circuit standard, the additional requirement that plaintiffs state facts 'with particularity' represents a heightening of the standard."). Id. at 534. Furthermore, the court noted that except for the Act's "state with particularity" requirement, the PSLRA is "virtually identical" to the Second Circuit standard. Id. at 533.
“had to allege that defendants benefited in some concrete and personal way from the purported fraud.”

B. Ninth Circuit

Refusing to follow the lead of the Second Circuit in Press, the Ninth Circuit adopted a more stringent pleading standard. In In re Silicon Graphics, Inc. Securities Litigation, the court looked almost solely at the legislative history to interpret the PSLRA standard, determining that Congress "sought... to raise the pleading standard above that in the Second Circuit." The Silicon Graphics court held that in order to meet the pleading standard called for in the PSLRA, the plaintiff must "plead, in great detail, facts that constitute strong circumstantial evidence of deliberately reckless or conscious misconduct."

Addressing the Second Circuit's standard, the Silicon Graphics court held that "although facts showing mere recklessness or a motive to commit fraud and opportunity... may provide some reasonable inference of intent, they are not sufficient to establish a strong inference of deliberate recklessness." To show a strong inference of deliberate recklessness, plaintiffs must now allege facts that "come closer to demonstrating intent."

93. Id. at 307-08.
95. 183 F. 3d 970 (9th Cir. 1999), reh'g and reh'g en banc denied, 195 F.3d 521 (9th Cir. 1999).
96. Id. at 978.
97. Id. While the Ninth Circuit noted in Silicon Graphics that it would continue to adhere to the Sundstrand definition of recklessness, the court changed its application of the Sundstrand definition by indicating that recklessness would only satisfy scienter under §10(b) if "it reflects some degree of intentional or conscious misconduct." Id. The Ninth Circuit, therefore, took the position that the scienter requirement under the PSLRA is "deliberate recklessness." Id. at 977. This new requirement changed the substantive requirements under §10(b) and pushed the Ninth Circuit in a new direction. The new recklessness standard adopted by the Silicon Graphics court contradicted the previous application of the Sundstrand definition, which called for a highly unreasonable omission or extreme departure from the standards of ordinary care which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the defendant must have been aware of it. See supra note 14; see also Howard v. Everex Sys., Inc., 228 F.3d 1057, 1064 (9th Cir. 2000) (seeming to limit Silicon Graphics' holding to only the pleading portion and holding that the substantive requirements under §10(b) had not been altered).
98. Id. at 974.
C. Sixth Circuit

In *In re Comshare Inc. Securities Litigation*¹⁰⁰ the Sixth Circuit adopted a position that falls between the Second and the Ninth Circuits' standards. The court in *Comshare* analyzed the text of the statute and concluded that Congress' decision to use the "strong inference" language compels the conclusion that the PSLRA adopted a method of pleading, "approximately equal in stringency to that of the Second Circuit."¹⁰¹ The court then went on to hold that "plaintiffs may plead scienter . . . by alleging facts giving rise to a strong inference of recklessness, but not by alleging facts *merely* establishing that a defendant had the motive and opportunity to commit securities fraud."¹⁰² The court, however, did recognize that facts establishing motive and opportunity could be "relevant to pleading circumstances from which a strong inference of fraudulent scienter may be inferred,"¹⁰³ and could, perhaps, even "rise to the level of creating a strong inference of reckless or knowing conduct."¹⁰⁴ The Sixth Circuit test drops pleading of motive and opportunity as a separate sufficient means to satisfy the pleading standard.

IV. Analysis Of The Interpretations

A. Second Circuit and Sixth Circuit Tests as Two Sides of the Same Coin

Although at first glance the Sixth Circuit seems to have adopted a different and more stringent standard than the Second Circuit's by dropping motive and opportunity as a separate test, the variation is more apparent than real. The Second Circuit held to its pre-PSLRA standard that a plaintiff may satisfy pleading requirements for scienter by alleging motive and opportunity to commit fraud on the part of the defendant; the Sixth Circuit held that the "bare pleading of motive and opportunity does not, standing alone, constitute the pleading of a strong inference of scienter."¹⁰⁵ Case law has, however, qualified what "motive and opportunity" can satisfy the pleading standard so

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¹⁰⁰ 183 F.3d 542 (6th Cir. 1999). The plaintiffs alleged that Comshare's officers were involved in a scheme to defraud investors by selling stock while knowingly or recklessly disregarding revenue recognition errors. *Id.* at 547.
¹⁰¹  *Id.* See *Novak v. Kasaks*, 216 F.3d 300, 310 (2d Cir. 2000).
¹⁰² *Id.* at 549. (emphasis added).
¹⁰³ *Id.* at 551.
¹⁰⁴ *In re Comshare*, 183 F.3d at 551.
¹⁰⁵ *Id.*
that "motive and opportunity" means something far narrower than what it implies.\textsuperscript{106}

First, motive and opportunity is not a two-part test for whether scienter is adequately pleaded – opportunity is always present. The named individual defendants will always have positions of responsibility for the alleged disclosure deficiencies.\textsuperscript{107} Consequently, the two-part rule reduces to one: adequacy of motive.

Not all alleged motives will be sufficient. For example, virtually all corporate insiders possess certain motives, such as the desire to maintain a high corporate credit rating,\textsuperscript{108} sustain the "appearance of corporate profitability, or of the success of an investment,"\textsuperscript{109} the desire to maintain a high stock price in order to increase executive compensation,\textsuperscript{110} or prolong the benefits of holding corporate office,\textsuperscript{111} that have all been held insufficient to meet the motive and opportunity requirement. Additionally, the avoidance of personal liability has been held to be "too speculative and conclusory to support scienter."\textsuperscript{112} Not even allegations of corporate insider trading before release of the correct information, in order to take advantage of incorrectly priced stock, will necessarily be sufficient. Money and greed are "ubiquitous motive[s]" and people in power always have the opportunity to commit fraud.\textsuperscript{113}

The net effect of restrictively defining motive is to confine it to a method of showing facts that can give rise to a strong inference of scienter. Indeed, those courts considering motive and opportunity in 34 Act cases have held only that "facts showing a motive and opportunity may adequately allege scienter," not that the existence of any motive and opportunity must support a strong inference of scienter itself.\textsuperscript{114} Motive and opportunity is no longer in fact a separate, sufficient test to determine whether scienter has been adequately

\textsuperscript{107} Miest, supra note 14, at 1130 (citing Cohen v. Koenig, 25 F.3d 1168, 1173-74 (2d Cir. 1994)).
\textsuperscript{110} See Acito v. IMCERA Group, Inc., 47 F.3d 47, 51 (2d Cir. 1995).
\textsuperscript{111} See Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1130 (2d Cir. 1994).
\textsuperscript{112} Kalnit v. Eichler, 264 F.3d 131, 140 (2d Cir. 2001).
\textsuperscript{114} In re Comshare, 183 F.3d at 551 (emphasis added).
pleaded. Consequently, the Circuits accepting motive and opportunity as a separate test are administering a standard no different from the 6th Circuit’s.

What all the Circuits following the Second and Sixth Circuit tests are doing is making a particularized examination of allegations in complaints to determine whether what is alleged can be used to infer a defendant’s particular state of mind. Such an exercise is fact and judgment intensive; consequently, the outcomes of individual cases may not be consistent with each other. However, the net result accomplishes what Congress wanted: prevention of abusive lawsuits by insisting there be grounds to sue before resorting to discovery procedures.

B. The Ninth Circuit Analyzed

The Ninth Circuit standard fails as a result of its undue reliance on a legislative history which does not support it, its combining a heightened scienter standard to the pleading standard and its inherent uncertainty. The preliminary difficulty is deciding what Second Circuit standard the Ninth Circuit used when it said, “Congress expressly rejected the Second Circuit case law interpreting the ‘strong inference’ standard.” As previously argued, a lenient interpretation of motive and opportunity, as in Press, results in no heightened pleading standard. If Press were the standard, the Ninth Circuit was clearly warranted in concluding that Congress wanted a more stringent standard.

The Ninth Circuit looked almost solely at the legislative history of the PSLRA in holding that “Congress sought . . . to raise the pleading standard above that in the Second Circuit.” In examining legislative history, the Ninth Circuit read the rejection of the Specter amendment which prescribed “motive and opportunity” as sufficient for the pleading standard, a footnote in the Conference Report, and Clinton’s veto as a rejection of the Second Circuit standard and, in particular, of the “motive and opportunity” test. However, the totality of the PSLRA’s legislative history supports no such conclusion.

At least two possible explanations can be derived from the removal of the Specter amendment, which proposed to codify the Second Cir-

116. In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 979 (9th Cir. 1999).
117. Id. at 978.
118. Id. at 978-79.
cuit tests. The interpretation that the Ninth Circuit adopted is that Congress intended to reject Second Circuit precedent as a basis for the interpretation of the “strong inference” provision.\textsuperscript{119} Indeed, Supreme Court precedent suggests that when Congress expressly declines to adopt specific statutory language, “its action strongly militates against a judgment that Congress intended a result that it expressly declined to enact.”\textsuperscript{120} With the deletion of the Specter amendment, courts could presume that Congress did not intend for them to follow the Second Circuit tests.\textsuperscript{121} However, looking at a failed legislative proposal may not be a solid basis to ascertain the intent of Congress.\textsuperscript{122}

Other plausible explanations for the deletion of the Specter amendment exist. The Specter amendment was not dropped from the PSLRA because Congress wanted to reject the Second Circuit’s standard because motive and opportunity are irrelevant or that at all times the Second Circuit standard was too low. One possible reason for its removal was that Congress felt the Specter Amendment did not effectively represent this standard.\textsuperscript{123}

Additionally, Senator D’Amato’s strong objections to the adoption of the Specter amendment provide other reasons.\textsuperscript{124} His opposition was not based on a belief that the test was inappropriate to demonstrate scienter, but rather was based on a fear that it would cause a “straitjacketing” of courts by codifying this test.\textsuperscript{125} Since Senator D’Amato was one of the most vocal members of that Committee to oppose the amendment, it is plausible to conclude that the Conference Committee adopted D’Amato’s view that codification of the “motive

\textsuperscript{119} Id.
\textsuperscript{121} See In re Silicon Graphics, 183 F.3d at 978, reh'g and reh'g en banc denied, 195 F. 3d 591 (9th Cir. 1999) (“[T]he joint conference committee . . . declined to incorporate the Specter Amendment in the final version of the [Reform Act]. In doing so, they implicitly rejected the Second Circuit's two-pronged test.”) (citation omitted) (relying on Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 (1974) (If the conference committee expressly declined to adopt proposed statutory language, its action “strongly militates against a judgment that Congress intended the result that it expressly declined to enact.”)).
\textsuperscript{122} See, e.g., Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 187 (1994) (warning that “failed legislative proposals are ‘a particularly dangerous ground’” for statutory interpretation and that “several equally tenable inferences may be drawn from [congressional] inaction, including the inference that the existing legislation already incorporated the offered change”).
\textsuperscript{123} See 141 CONG. REC. S19068 (daily ed. Dec. 21, 1995) (Sen. Dodd’s statement that the Specter Amendment did not really follow the guidance of the Second Circuit and thus was the reason it was taken out.).
\textsuperscript{124} See 141 CONG. REC. S9201 (daily ed. June 28, 1995).
\textsuperscript{125} Id.
and opportunity language would limit courts’ evaluation of whether facts that are plead would survive dismissal, not that motive and opportunity are irrelevant.\textsuperscript{126}

The Ninth Circuit also incorrectly placed significant weight on a certain passage of text, in the Conference Report and its accompanying note, in finding that the legislative history of the PSLRA rejected the motive and opportunity analysis.\textsuperscript{127} This specific passage states that: “[b]ecause the Conference Committee intends to strengthen existing pleading requirements, it does not intend to codify the Second Circuit’s case law interpreting this pleading standard.”\textsuperscript{128} The accompanying note, footnote twenty-three, then adds: “[f]or this reason, the Conference Report chose not to include in the pleading standard certain language relating to motive, opportunity, or recklessness.”\textsuperscript{129} The report of the Senate Banking Committee took the same approach but went on to state “courts may find this body of [Second Circuit case] law instructive.”\textsuperscript{130} Although the Silicon Graphics court cited this quote, it failed to account for this language.\textsuperscript{131}

The Ninth Circuit oversimplifies the explanation of this passage and assumes that, when Congress said it intended to “strengthen existing pleading requirements,” it must have meant above the standard in the Second Circuit. Similar to the Specter analysis above, it is more likely that Congress refused to codify the Second Circuit case law because it wanted to give courts the flexibility to address facts that show scienter on a case-by-case basis and that the Second Circuit’s case law did not always serve purposes of the heightened pleading standard. This conclusion is strengthened in light of Senator Dodd’s position that the decision to take the guidance of the Second Circuit out of the PSLRA was based on the assumption that courts would look to Second Circuit case law for guidance anyway.\textsuperscript{132} A better explanation is that Congress sought to achieve uniformity by strengthening the weaker standards and aligning them with what was considered, at the time, to be the most stringent standard, that of the Second Circuit. Congress,

\textsuperscript{126} See Caiola, supra note 115, at 349.
\textsuperscript{127} See In re Silicon Graphics, 183 F.3d at 978.
\textsuperscript{129} H.R. CONF. REP. No. 104-369, at 41 n.23.
\textsuperscript{131} See In re Silicon Graphics, 183 F.3d at 978.
\textsuperscript{132} See 141 CONG. REC. S19068 (daily ed. Dec. 21, 1995) (Senator Dodd shed light on the Committee’s position when he stated: “We have left out the guidance. That does not mean you disregard it.”).
however, did not adopt all Second Circuit applications of its standard.\footnote{133}

In his veto, President Clinton voiced his apprehension that this legislation would raise the pleading standard above that previously adopted in the Second Circuit.\footnote{134} The Ninth Circuit took the position that, in its decision to override the President's veto, "Congress . . . provided very strong evidence of its intent to go beyond the Second Circuit standard."\footnote{135} The Ninth Circuit assumed that, when the veto was overridden, Congress agreed with Clinton's interpretation that the Reform Act adopted a pleading standard higher than the Second Circuit's standard.\footnote{136} Nowhere in the record is there evidence that this was in fact the understanding of Congress.\footnote{137}

Of significant importance to this analysis is recognition that the Congressional override of Clinton's veto was based on their belief that the PSLRA had in fact already adopted, at least in part, the Second Circuit's standard, rather than their desire to adopt a pleading standard higher than that existing in the Second Circuit.\footnote{138} During the Senate's veto debate, "the sponsors of the bill explicitly disagreed with the President's interpretation and reaffirmed their own view that, contrary to the President's belief, the Reform Act's pleading standard was "faithful to the Second Circuit's test."\footnote{139} Illustrative of this is Senator Dodd's statements that the PSLRA had "met the second circuit [sic]
standard” and that the Committee expected the courts to look to the Second Circuit’s case law for guidance.\(^{140}\) Later, in a further attempt to ease any fears that courts would ignore the Second Circuit precedent because the Specter amendment was dropped, Senator Dodd went on to say: “we have met the second circuit [sic] standard here . . . [w]e have left out the guidance. That does not mean you disregard it.”\(^{141}\) Since the Second Circuit pre-PSLRA standard may have been too lenient in some cases to curb abusive litigation and was not uniform, Congress and the President may simply have been talking about two different standards.

The Ninth Circuit raises the scienter level to ‘deliberate recklessness’ as its means to heighten the pleading standard. The Ninth Circuit makes its pleading standard more stringent than the Second Circuit’s by raising the scienter level to be pled, rather than requiring a greater showing than strong inference of state of mind. Thus, the Ninth Circuit parts company with either the Second or Sixth Circuit on scienter level, not pleading standard. The Ninth Circuit is mistaken in raising the pleading standard by raising the level of scienter. The PSLRA’s pleading standard does not expressly define the state of mind to be alleged. While the legislative history and statutory structure can be read to mean that Congress did expect ‘recklessness’ to not be sufficient for a rule 10b-5 claim, more likely Congress left the question of state of mind to the judiciary to resolve.\(^{142}\) What the Ninth Circuit did was make the pleading standard in the PSLRA more stringent than the Second Circuit’s by raising the scienter level to be pled to “deliberate reckless,” but only requiring the same strong inference of this heightened scienter level. As even the Ninth Circuit has conceded, “the PSLRA did not alter the substantive requirements for scienter under Section 10(b).”\(^{143}\) The plain language of Section 21D (b)(2) leaves the scienter issues unresolved. Even a panel of the Ninth Circuit has concluded that its heightened scienter standard only ap-

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\(^{140}\) See 141 CONG. REC. S19068 (daily ed. Dec. 21 1995) (Senator Dodd’s statement that other courts were expected to look to Second Circuit precedent in interpreting the pleading standard).

\(^{141}\) Id. See also Lerach & Isaacson, supra note 35, at 899 (“A careful review of the legislative history of section 21D(b)(2) shows that Congress intended to adopt the ‘strong-inference’ pleading standard from Second Circuit case law and to leave courts free to seek guidance from the existing precedents whenever appropriate.”).

\(^{142}\) See Olson, supra note 14, at 1122-26.

\(^{143}\) Howard v. Everex Sys., Inc., 228 F.3d 1057, 1064 (9th Cir. 2000).
plied to pleading but not proof, so for liability, recklessness is sufficient.\footnote{144}

The Ninth Circuit standard gives rise to new uncertainty. When the Ninth Circuit applies its new standard, it makes the same particularized assessment of allegations as the Second and Sixth Circuit. In \textit{Silicon Graphics}, the company reported a 45\% increase in revenue for fiscal year 1995 and then projected similar results in the future.\footnote{145} At the same time, the company introduced plans for a new computer that would help maintain its current and future success.\footnote{146} Shortly thereafter, the company began having quality control problems with the primary component of this new computer.\footnote{147} The plaintiffs alleged that despite having knowledge of such problems, the company and six executives made misleading statements and told investors that production was continuing on schedule in an effort to inflate the company’s stock price while the executives sold their shares for large profits.\footnote{148}

As two examples of this particularized Assessment of Allegations, the Ninth Circuit looked at part of the complaint entitled “Basis of Allegations” and the defendants’ stock trading. Under “Basis of Allegations,” plaintiffs alleged

\begin{quote}
[The foregoing based upon the investigation of their counsel, which included a review of SGI’s SEC filings, securities analysts reports and advisories about the Company, press releases issued by the Company, media reports about the Company and... that substantial evidentiary support will exist for the allegations [ ] after a reasonable opportunity for discovery.\footnote{149}]
\end{quote}

The Ninth Circuit rightly concludes that these conclusory allegations, without “adequate corroborating details,”\footnote{150} cannot meet the pleading standards.

The Ninth Circuit also examined whether the defendants’ stock trading before the negative news was announced might provide a strong inference of scienter. The mere fact that defendants traded before the announcement was not enough. Instead, the Ninth Circuit looked at how typical the trades were, how much stock the defendants retained and that the defendant who sold the most had special circumstances. Ultimately, what the Ninth Circuit did was take a particular-

\footnotesize
144. \textit{Id.}
145. \textit{In re Silicon Graphics}, 183 F.3d at 980.
146. \textit{Id.}
147. \textit{Id.}
148. \textit{Id.} at 979-80.
149. \textit{In re Silicon Graphics}, 183 F.3d at 985.
150. \textit{Id.}
ized look at the allegations of scienter much like the Second and Sixth Circuits.

Other than stating that its standard is more stringent than the Second Circuit’s, the Ninth Circuit provides little guidance for how lower courts should evaluate pleading allegations. Plaintiffs are to plead "deliberate recklessness," but it is unclear how this standard is different from the generally recognized recklessness standard. This uncertainty in application, particularly in a fact driven inquiry, cannot lead to predictability.

While it remains clear that the PSLRA’s heightened pleading standard is anything but precise, it is equally clear that the Ninth Circuit has adopted a standard that lies somewhere outside the acceptable scope of interpretation.151

V. Conclusion

The text and legislative history of the PSLRA do not lead to a conclusive answer regarding the proper interpretation of the heightened scienter pleading standard. Considering the totality of the legislative history, along with the language of the statute and the goals of Congress in enacting the PSLRA, the evidence strongly suggests that the Sixth Circuit’s position should be followed. The Sixth Circuit lays out a test that adequately accommodates the role of motive and opportunity. There is no reason to continue motive and opportunity as a separate test. When the Second Circuit restrictively applies what constitutes motive and opportunity, it adds nothing to the approach of the Sixth Circuit.

The view of the Sixth Circuit is far superior to that of the Ninth Circuit in pleading. The Ninth Circuit raises the scienter level to deliberate recklessness as its method of making pleading securities fraud more difficult. However, the plain language of the statute did not change the required level of scienter.

151. Although not particularly persuasive, but of further interest, is the language that is found in the Congressional Record from the debate over the Securities Litigation Uniform Standards Act. In it, Congress made clear that their intent “was expressly stated during the legislative debate on the PSLRA, and particularly during the debate overriding the President’s veto, that the PSLRA establish a uniform standard on pleading requirements by adopting the pleading standard applied by the Second Circuit Court of Appeals.” Pub. L. No. 105-353, 112 Stat. 3227 (1998); Laura R. Smith, The Battle Between Plain Meaning and Legislative History: Which Will Decide the Standard for Pleading Scienter After The Private Securities Litigation Reform Act Of 1995?, 39 SANTA CLARA L. REV. 577, 583 (1999) (quoting The Securities Litigation Uniform Standards Act of 1998, S. REP. NO. 105-182 (1998) (The Securities Reform Act was passed in response to the fact that plaintiffs were filing their securities suits in state court rather than federal court in an effort to avoid the heightened pleading standards of the PSLRA.).
As with any disagreement among the circuits regarding the interpretation of federal legislation, the Supreme Court seems to be the appropriate and logical venue for resolution. However, plaintiffs in these actions may be content to fight their battles at the District and Circuit Court levels rather than asking the Supreme Court to resolve the conflict between the Circuits. A Supreme Court decision in favor of the Ninth Circuit view will not only devastate the rights of shareholders, but will also destroy the plaintiff's securities bar and in turn seriously hinder private securities regulation.

In the absence of judicial intervention, the only course that can be taken in reconciling the split is through legislative action. Currently there is legislation pending in Congress that addresses some of the problems found in the PSLRA. However, Congress may not be capable of producing a resolution. As is apparent in the Congressional record of the PSLRA, many times the members of Congress do not agree on the application and interpretation of legislation. When legislators perceive a need to compromise they can, among other strategies, "obscur[e] the particular meaning of a statute, allowing different legislators to read the obscured provisions the way they wish." Whatever happens, the resolution is almost certain to lead to similar debates.

