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SCIENTER AFTER *TELLABS*

INTRODUCTION

Private securities fraud actions once prospered in the American federal court system. However, as more shareholders brought these time-consuming and money-consuming actions to court, judges began to take notice of their frivolous and abusive nature.¹ To remedy these perceived abuses, Congress passed a sweeping reform in the form of the Private Securities Litigation Reform Act of 1995 (PSLRA).² The PSLRA modified several aspects of securities fraud litigation³ and was intended to “curb frivolous, lawyer-driven litigation, while preserving investors’ ability to recover on meritorious claims.”⁴ Most notably, in seeking to unify the scienter standard among differing circuits, the PSLRA raised the pleading requirement, which had formerly followed Rule 9(b) of the Federal Rules of Civil Procedure (FRCP).⁵ The new standard required a complainant to plead facts with sufficient particularity to create a “strong inference” of scienter.⁶ Although the PSLRA was modeled on the standard employed by the Second Circuit, Congress expressly rejected codifying the Second Circuit’s two-prong test interpreting “strong inference.”⁷ Moreover, Congress failed to set forth how a “strong inference” may be established.⁸

After the passage of the PSLRA, circuit courts diverged in construing the term “strong inference,”⁹ and as a result of such discrepancies, the United States Supreme Court granted certiorari to hear *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*¹⁰ In an effort to harmonize the circuits, the Court in *Tellabs* established that the pleaded facts in their totality must imply a scienter that is “cogent and at least as compelling as any opposing inference of nonfraudulent intent.”¹¹ The Court believed it had found a

1. See Thomas O. Gorman, *Tellabs Inc. v. Makor Issues & Rights, Ltd.: Pleading a Strong Inference of Scienter* 153, 159 (PLI Corp. L. & Prac., Course Handbook Ser. No. 11072) (2007).

2. *Id.*; Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

3. 15 U.S.C. § 78u-4(a)(3)(B) (2006) (mandating the court pick the lead plaintiff of the class action); *id.* § 78u-4(b)(1) (requiring a plaintiff to “specify each statement alleged to have been misleading” and the reasons why); *id.* § 78u-4(b)(3)(B) (staying discovery during pendency of a 12(b)(6) motion).

4. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

5. Before the enactment of PSLRA, Rule 9(b) applied to actions brought under the federal securities laws. *E.g.*, *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1545 (9th Cir. 1994).

6. 15 U.S.C. § 78u-4(b)(2) (2006).

7. Gorman, *supra* note 1, at 162.

8. *Tellabs*, 551 U.S. at 314; *see also* Gorman, *supra* note 1, at 162.

9. *See, e.g.*, *Helwig v. Vencor, Inc.*, 251 F.3d 540, 551 (6th Cir. 2001) (adopting a “quantum” of the evidence approach as opposed to focusing on the type of evidence); *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 974 (9th Cir. 1999) (rejecting motive and opportunity test and requiring that each particularized allegation give rise to a “strong inference of deliberate recklessness”); *Press v. Chem. Inv. Serv. Corp.* 166 F.3d 529, 538 (2d Cir. 1999) (requiring either motive and opportunity or recklessness to meet scienter).

10. *Tellabs*, 551 U.S. at 317.

11. *Id.* at 314.

workable definition of the strong inference standard that achieved Congress' intent of the PSLRA.¹² This note argues that while many circuit courts modified their standards in consideration of *Tellabs*, these changes were merely superficial and did not materially alter the frameworks each circuit already had established. However, all is not lost; *Tellabs* was able to unify many of the intermediate circuits, particularly regarding the "motive and opportunity test" for establishing scienter. Even though the Supreme Court tacitly stripped the motive and opportunity test of its value, the Court's seeming desire to stop usage of this test has not resonated with all circuits.¹³ Because the Supreme Court directed all federal courts to apply a holistic approach when reviewing allegations for scienter, circuit courts are able to disguise their former tests within the holistic review. As such, many circuits only superficially adopted the *Tellabs* decision.¹⁴ However, although recent discussions speculate as to the continued use of the motive and opportunity test,¹⁵ practically all circuits, apart from the Second Circuit, have, explicitly or implicitly, rejected that method as an independent means to scienter.¹⁶

To place the Supreme Court's *Tellabs* ruling in its proper context, Part I of this note lays out the foundation of securities fraud pleadings before the PSLRA, and Congress' rationale behind such reform. Part II focuses on the Supreme Court decision in *Tellabs* itself: its facts, holding, and the interpretation given to it on remand by the Seventh Circuit. This Part illustrates the Supreme Court's effort to adhere to the goals set out in the PSLRA. Part III analyzes the various approaches adopted by the circuit courts after *Tellabs*. This Part explores the paths each of the circuits has taken¹⁷ and examines whether the new approaches are consistent with both the spirit of *Tellabs* and the intent of the PSLRA. The note concludes by discussing whether the varying circuit courts have harmonized their preexisting frameworks with the *Tellabs* decision. Ultimately, even though the circuit courts were putatively adapting to *Tellabs*, few of the standards adopted by the circuits were changed. It is this note's position that the *Tellabs* standard did not achieve the complete harmonization the Supreme

12. *Id.* at 322.

13. The Second Circuit still adamantly permits a showing of motive and opportunity as a separate method to meet the requisite scienter. *See, e.g.,* ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 99 (2d Cir. 2007).

14. *See, e.g.,* Institutional Investors Grp. v. Avaya, Inc., 564 F.3d 242, 276 (3d Cir. 2009); Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp., 565 F.3d 200, 209–10 (5th Cir. 2009); Elam v. Neidorff, 544 F.3d 921, 928 (8th Cir. 2008); *ATSI Commc'ns*, 493 F.3d at 99.

15. *See, e.g.,* Marvin Lowenthal, Note, *Revitalizing Motive and Opportunity Pleading After Tellabs*, 109 MICH. L. REV. 625, 656 (2011).

16. *See, e.g.,* *Avaya*, 564 F.3d at 276; *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1069 (9th Cir. 2008); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1285–86 (11th Cir. 1999).

17. Circuits that have shifted their scienter analysis similarly are categorized together in order to provide a clearer examination.

Court intended, due to the test's holistic all-encompassing nature. However, it did establish the boundaries for a reliable approach to securities fraud jurisprudence. Furthermore, while uniformity among the circuits is a virtue, chiefly for parties seeking predictability and consistency in judgments, so is judicial discretion especially for nuanced concepts.¹⁸ The interpretive flexibility left by the *Tellabs* decision may, in fact, be a positive feature, and may be enough to take care of the concerns that originally caused Congress to enact the PSLRA.

I. SECURITIES FRAUD LAWS

A. THE LAW BEFORE THE PSLRA

According to the Federal Rules of Civil Procedure, a plaintiff need only provide “a short and plain statement of the claim showing that the pleader is entitled to relief”¹⁹ in order to properly bring an action before the court. Recently, the Supreme Court heightened this permissive standard requiring that a pleading be made on “plausible grounds.”²⁰ In addition, rule 9(b) has long required that allegations of fraud or mistake must be set forth with “particularity,”²¹ meaning a plaintiff must allege the specific circumstances constituting the fraud, but need only to show general allegations of the defendant's state of mind.²² Because only generalized facts are needed to prove scienter, circuit courts diverged greatly on the requisite standard.²³ However, due to this divergence and the increased filing of frivolous

18. See generally Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1613 (2003) (explaining that the framers of the Federal Rules of Civil Procedure envisioned a system that allowed for judicial discretion).

19. FED. R. CIV. P. 8(a)(2).

20. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (holding that at least in antitrust cases, a plaintiff must plead “enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement”).

21. FED. R. CIV. P. 9(b).

22. *Id.*

23. The circuit courts split into three distinct approaches in interpreting the requisite scienter standard from Rule 9(b). The Second Circuit's more demanding approach, which required a plaintiff to plead facts that give rise to a “strong inference” of fraudulent intent can be satisfied either by establishing facts of motive-and-opportunity or recklessness. See, e.g., *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 268–69 (2d Cir. 1993). This approach is currently followed by both the First and Third Circuits. See, e.g., *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 196–201 (1st Cir. 1999); *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 534–35 (3d Cir. 1999). Another path was the Ninth Circuit's more permissive approach, which required plaintiffs to plead the requisite state of mind generally, without regard to the specificity requirement of Rule 9(b). See, e.g., *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1545–46 (9th Cir. 1994); *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1404 (9th Cir. 1996). Lastly, most circuits adopted the intermediate approach, which required a plaintiff to plead a “reasonable basis” that the requisite scienter existed. See, e.g., *In re HealthCare Compare Corp. Sec. Litig.*, 75 F.3d 276, 281 (7th Cir. 1996).

attorney-led investor suits²⁴ and strike suits,²⁵ the federal court system became inundated with these types of private actions;²⁶ not to mention the negative impact that varying circuit standards had on plaintiffs' propensity to forum shop—i.e., filing in the most favorable jurisdiction for their case.²⁷ In response, Congress held hearings to reform the nation's securities litigation system, and ultimately passed the PSLRA.²⁸

B. EFFECTS OF THE PSLRA

The PSLRA curbed “nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and ‘manipulation by class action lawyers’”²⁹ by imposing both procedural and substantive controls.³⁰ One significant reform imposed a uniform and stringent scienter standard modeled on the Second Circuit approach.³¹ The PSLRA stated that private securities complaint allegations must: (1) “specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading;” and (2) “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”³² Congress, however, failed to provide clear and precise guidance on what satisfied its “strong inference” standard.³³ Furthermore, while Congress adopted part of the Second Circuit's scienter approach, it refrained from specifically codifying the circuit's case law interpreting that standard.³⁴ As a result, even though the goals set forth in the PSLRA were clear, the method of its application was not.³⁵

After Congress enacted the PSLRA, circuit courts were left to their own devices to apply Congress' new standard.³⁶ The Second Circuit remained

24. S. Rep. No. 104-98, at 4 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 683. A frivolous suit is “[a] lawsuit having no legal basis, often filed to harass or extort money from the defendant.” BLACK'S LAW DICTIONARY 1572 (9th ed. 2009).

25. A strike suit is “[a] suit (esp. a derivative action), often based on no valid claim, brought either for nuisance value or as leverage to obtain a favorable or inflated settlement.” BLACK'S LAW DICTIONARY 1572 (9th ed. 2009).

26. Chauncey M. Lane, Comment, *To Plead or Not to Plead: The Plaintiff's Growing Burden in Securities Class Action Litigation*, 41 TEX. TECH L. REV. 615, 627 (2009).

27. James D. Cox et al., *Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses*, 2009 WIS. L. REV. 421, 439.

28. H.R. REP. NO. 104-369, at 2-6 (1995) (Conf. Rep.).

29. *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71, 81 (2006) (quoting H.R. REP. NO. 104-369, at 31 (1995)).

30. *See supra* note 3 and accompanying text.

31. 15 U.S.C. § 78u-4(b)(2) (2006).

32. *Id.* § 78u-4(b)(1)-(2).

33. John M. Wunderlich, Note, *Tellabs v. Makor Issues & Rights, Ltd.: The Weighing Game*, 39 LOY. U. CHI. L.J. 613, 623 (2008).

34. Gorman, *supra* note 1, at 162; Cox et al., *supra* note 27, at 431.

35. *See* Wunderlich, *supra* note 33, at 623-26.

36. *See, e.g., Press v. Chem. Inv. Serv. Corp.*, 166 F.3d 529 (2d Cir. 1999); *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 974 (9th Cir. 1999).

faithful to the two-pronged test it had established prior to the PSLRA,³⁷ while the Ninth Circuit modified its standard from one of the most liberal scienter requirements to a test even stricter than the Second Circuit's.³⁸

The Ninth Circuit required that a "private securities plaintiff . . . must plead, in great detail, facts that constitute strong circumstantial evidence of deliberately reckless or conscious misconduct" and that "[i]n order to show a strong inference of deliberate recklessness, plaintiffs must state facts that come closer to demonstrating intent, as opposed to mere motive and opportunity."³⁹ In *In re Silicon Graphics Inc. Securities Litigation*, the Ninth Circuit explicitly rejected the "motive and opportunity" test used by the Second Circuit and required, at minimum, "particular[ized] facts giving rise to a strong inference of deliberate recklessness."⁴⁰ The court stated that Congress "expressly rejected" codifying the Second Circuit standard in its entirety, and since it did not, the Ninth Circuit reasoned that Congress must have intended its standard to be more stringent than that of the Second Circuit.⁴¹

Other circuits adopted standards that fell between the two extremes of the Second and the Ninth Circuit tests.⁴² Most notable of these intermediate circuits was the Seventh Circuit, whose less stringent standard countered the Sixth Circuit's "most plausible" standard, and ultimately presented the scienter issue before the Supreme Court in *Tellabs*.⁴³

37. See *Press*, 166 F.3d at 538 (allowing either facts of "motive and opportunity" or recklessness to satisfy the requisite scienter). The Third Circuit adopted a position similar to that of the Second Circuit's. See *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 534-35 (3d Cir. 1999).

38. Compare *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1554 (9th Cir. 1994) (requiring only circumstances of fraud, excluding scienter, to be pled with particularity), with *In re Silicon Graphics*, 183 F.3d at 974 (requiring, at minimum, particularized facts showing a strong inference of deliberate recklessness).

39. *In re Silicon Graphics*, 183 F.3d at 974.

40. *Id.*

41. *Id.* at 979.

42. The First Circuit held that the PSLRA did not change its previous case law on scienter and that the court will conduct individualized case-by-case analyses "to determine whether the allegations were sufficient to support scienter." *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 196 (1st Cir. 1999). The Eleventh Circuit held the Second Circuit's motive and opportunity test, standing alone, is insufficient to establish a strong inference of scienter, but that evidence of motive and opportunity plus more could potentially suffice. See *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1285-86 (11th Cir. 1999). The Sixth Circuit focused on the "quantum" of proof rather than on the type of evidence. See *Helwig v. Vencor, Inc.*, 251 F.3d 540, 551 (6th Cir. 2001). The Fourth Circuit, Eighth Circuit, and Tenth Circuit all adopted a position similar to the Sixth Circuit's position by looking at whether the plaintiff's allegations, as a whole, give rise to a strong inference of scienter. See *Ottoman v. Hanger Orthopedic Grp., Inc.*, 353 F.3d 338, 345-46 (4th Cir. 2003); *Florida State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 659 (8th Cir. 2001); *Philadelphia v. Fleming Cos., Inc.*, 264 F.3d 1245, 1263 (10th Cir. 2001).

43. Compare *Makor Issues & Rights, Ltd., v. Tellabs*, 437 F.3d 588, 601-02 (7th Cir. 2006) ("[W]e will allow the complaint to survive if it alleges facts from which, if true, a reasonable person could infer that the defendant acted with the required intent."), with *Helwig*, 251 F.3d at 554 (requiring plaintiffs to demonstrate that the inference of scienter is more plausible than any exculpatory justification).

II. THE *TELLABS* DECISION AND ITS IMPLICATIONS

A. SUPREME COURT DECISION

1. Facts

In *Tellabs*, the U.S. Supreme Court reviewed the decision of the Seventh Circuit Court of Appeals.⁴⁴ Plaintiff-shareholders brought a class action suit against Tellabs, Inc. (Tellabs) and against Richard Notebaert, the CEO and president during the class period, which was between December 11, 2000 and June 19, 2001.⁴⁵ The shareholders accused both Tellabs and Notebaert of “engaging in a scheme to deceive the investing public about the true value of Tellabs’ stock.”⁴⁶ The main issue rested on the shareholders’ claim that the company and Notebaert had issued misstatements about the company’s new device, TITAN 6500. These misstatements allegedly gave shareholders the impression that the products were still in demand and that a new version would be ready for delivery soon. Thus, shareholders relied on this information to their financial detriment.⁴⁷

Specifically, shareholders claimed that beginning on December 11, 2000, Notebaert continuously impressed onto them the company’s strong financial situation when he knew the opposite to be true.⁴⁸ In the following months, Notebaert and Tellabs, allegedly knowingly issued false statements about the current demand for Tellabs’ products and prospects for its new product.⁴⁹ Finally, in March 2001, signs of Tellabs’ unhealthy financial situation appeared and the company was forced to reduce its projected monthly sales statements until June 19, 2001, when Tellabs disclosed that demand for its product actually had been dropping significantly.⁵⁰ After the disclosure, the price of Tellabs’ stock dropped almost fifty-two dollars.⁵¹

A year and a half later, “[o]n December 3, 2002, the Shareholders filed a class action [against Tellabs] in the District Court for the Northern District of Illinois.”⁵² The complaint alleged that Tellabs and Notebaert violated § 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and SEC Rule 10b-5.⁵³ The complaint also alleged that Notebaert acted as a

44. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 308–09 (2007).

45. *Id.* at 308. Plaintiffs also brought claims against other Tellabs executive but many of the claims were dismissed. Thus, the Court only focused on the allegations as they relate to Notebaert.

46. *Id.* at 315.

47. *Id.*

48. *Id.*

49. *Id.* at 315–16.

50. *Id.* at 316.

51. *Id.*

52. *Id.* (citing *Johnson v. Tellabs, Inc.*, 303 F. Supp. 2d 941, 944 (N.D. Ill. 2004)).

53. *Id.* See Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2006); 17 C.F.R. § 240.10b-5 (2010).

“controlling person” under § 20(a) of the Exchange Act and was “derivatively liable for the company’s fraudulent [misstatements].”⁵⁴ “Tellabs moved to dismiss the [action] on the ground that the [s]hareholders” did not meet the requisite particularity as stated in the PSLRA, thus advocating the court to adopt the Sixth Circuit’s standard that requires plaintiffs to show that the scienter inference is more likely than non-culpable inferences.⁵⁵

2. Procedural History

The district court agreed with Tellabs and dismissed the complaint without prejudice for failure to meet the heightened pleadings standard.⁵⁶ The shareholders then amended their complaint to include specific facts about Notebaert’s scienter that were gathered, in part, from numerous additional confidential sources.⁵⁷ Nevertheless, the district court again dismissed the amended complaint because plaintiffs still did not sufficiently allege Notebaert’s scienter.⁵⁸

The shareholders appealed the dismissal, which the Seventh Circuit affirmed in part and dismissed in part. The court affirmed that the facts sufficiently pleaded the misleading statements,⁵⁹ but reversed the district court regarding scienter,⁶⁰ holding that the plaintiffs “sufficiently alleged [facts] that Notebaert acted with the requisite state of mind.”⁶¹ The Seventh Circuit recognized that although the PSLRA “unequivocally raise[d] the bar for pleading scienter,” upon examination of all the allegations of the entire complaint, that bar was met in the case.⁶² Further, the court explicitly refused to adopt the Sixth Circuit’s scienter test—in which the “plaintiffs are entitled only to the most plausible of competing inferences.”⁶³ The Seventh Circuit steadfastly maintained that a plaintiff met the scienter standard so long as “a reasonable person could infer that the defendant acted with the required intent.”⁶⁴ Because this literalized a difference of opinion among the circuits, the Supreme Court granted certiorari to hear the case.⁶⁵

54. *Tellabs*, 551 U.S. at 316. See 15 U.S.C. § 78t(a) (2006).

55. See *Tellabs*, 551 U.S. at 316–26.

56. *Id.* at 316.

57. *Id.*

58. *Id.*

59. *Id.* at 317 (citing *Makor Issues & Rights, Ltd., v. Tellabs, Inc.*, 437 F.3d 588, 595–600 (7th Cir. 2006)).

60. *Id.* (citing *Makor Issues*, 437 F.3d at 603–05).

61. *Id.* (citing *Makor Issues*, 437 F.3d at 602).

62. *Id.* (quoting *Makor Issues*, 437 F.3d at 601–05).

63. *Id.* (quoting *Makor Issues*, 437 F.3d at 601).

64. *Id.* (quoting *Makor Issues*, 437 F.3d at 602). See also Wunderlich, *supra* note 33, at 633–34.

65. *Tellabs*, 551 U.S. at 317–18.

3. Holding

Upon an examination of the litigation system and the legislative process behind the reform, the Supreme Court held that the test for “strong inference” must be stricter than the one applied by the Seventh Circuit, so as to achieve the goals of the PSLRA.⁶⁶ The Court emphasized that Congress modeled the PSLRA standard after one of the most stringent standards available, and because of such, the intent of Congress must have been to make all the circuits’ standards stricter.⁶⁷ The Supreme Court offered the following prescriptions: first, when faced with a motion to dismiss a § 10(b) action, the “court must accept all factual allegations in the complaint as true.”⁶⁸ Second, the court must examine the complaint in its entirety.⁶⁹ This inquiry must consist of examining all the facts alleged, collectively, and whether as a whole, the facts give rise to a “strong inference” of scienter.⁷⁰ The court should not consider each allegation individually or in isolation.⁷¹ The Supreme Court defined a “strong inference” as one that is compelling, cogent, and more than reasonable.⁷² Lastly, the Court established that the strength of the inference could not be examined in a vacuum; rather a comparison between the culpable and non-culpable explanations is necessary.⁷³ Thus, the requisite scienter standard must be one that is collectively “cogent and compelling . . . in light of other explanations” (*Tellabs* rule).⁷⁴

The Supreme Court’s decision in *Tellabs* not only heightened the definition of strong inference, but also the context in which the inference is to be viewed.⁷⁵ A merely reasonable or permissible inference of scienter is no longer sufficient for pleading securities fraud. The Court reasoned that because determining the strength of an inference is an inherently comparative analysis, the inferences of scienter must be weighed against all plausible, non-culpable inferences as well.⁷⁶ Furthermore, the Court noted the inference does not need to be irrefutable or even the most plausible of competing inferences, but that it does need to be at least as strong as other non-culpable inferences.⁷⁷ In deciding on a holistic approach for examining the allegations, the Supreme Court adopted the position held by many of the

66. *Id.* at 318–24.

67. *Id.* at 321–23.

68. Wunderlich, *supra* note 33, at 637 (citing *Tellabs*, 551 U.S. at 322).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Tellabs*, 551 U.S. at 324.

73. Wunderlich, *supra* note 33, at 637 (citing *Tellabs*, 551 U.S. at 324).

74. *Tellabs*, 551 U.S. at 324.

75. *Id.* at 323–24. *See also* Wunderlich, *supra* note 33, at 636–38.

76. *See* Wunderlich, *supra* note 33, at 637 (citing *Tellabs*, 551 U.S. at 324–25).

77. *See Tellabs*, 551 U.S. at 324.

intermediate circuits after the enactment of the PSLRA;⁷⁸ but the Court's additional requirement that the inference must be a comparative analysis allowed the Court to differentiate its stance, and avoid choosing from the competing approaches of the various circuit courts.⁷⁹ The Supreme Court armed the Seventh Circuit with these new instructions on remand.⁸⁰

B. SEVENTH CIRCUIT DECISION ON REMAND

On remand, the Seventh Circuit was obligated to examine whether the plaintiffs' complaint had met the new interpretation of "strong inference" of scienter.⁸¹ As the Seventh Circuit's standard prior to *Tellabs* was looser than the one adopted by the Supreme Court, one might have expected the complaint not to survive the new heightened standard.⁸² However, in a majority opinion penned by Judge Posner, the court found that even under the heightened standard, the plaintiffs' complaint survived the 12(b)(6) motion to dismiss and once again reversed the district court's dismissal.⁸³ The court applied the *Tellabs* rule by first examining all the allegations holistically.⁸⁴ In its thorough analysis, the court found two plausible inferences: one was a non-culpable inference drawn from the upper-level management failing to catch lower employees' accidental overstatements or knowing embezzlements; the other, that the company knowingly made misstatements sufficiently establishing an inference of scienter.⁸⁵ Here, the court held that the inference of corporate scienter was not only as likely as a non-culpable inference, but more likely.⁸⁶ Moreover, the court held that it was "exceedingly unlikely" that Notebaert, the CEO of the company, was unaware of the problems with its leading product.⁸⁷ In light of all this, the court considered the inference of scienter cogent and much more likely than the non-culpable inference.⁸⁸

In complying with the *Tellabs* rule, Judge Posner expressed discomfort with the level of factual analysis the rule required pre-discovery, stating that "[t]o judges raised on notice pleading, the idea of drawing a 'strong

78. These circuits all used approaches similar to the quantum of the evidence, totality approach that the Supreme Court adopted. See *Ottoman v. Hanger Orthopedic Grp., Inc.*, 353 F.3d 338, 345–46 (4th Cir. 2003); *Florida State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 659–661 (8th Cir. 2001); *Helwig v. Vencor, Inc.*, 251 F.3d 540, 551 (6th Cir. 2001); *Philadelphia v. Fleming Co., Inc.*, 264 F.3d 1245, 1263 (10th Cir. 2001).

79. *Cox et al.*, *supra* note 27, at 438.

80. See *Tellabs*, 551 U.S. at 329.

81. *Makor Issues & Rights, Ltd. v. Tellabs, Inc. (Tellabs II)*, 513 F.3d 702, 704 (7th Cir. 2008).

82. Wunderlich, *supra* note 33, at 684–85.

83. *Tellabs II*, 513 F.3d at 710–12. See also Wunderlich, *supra* note 33, at 684–89.

84. Wunderlich, *supra* note 33, at 685–89.

85. *Tellabs II*, 513 F.3d at 707. See also Wunderlich, *supra* note 33, at 686.

86. *Tellabs II*, 513 F.3d at 711. See also Wunderlich, *supra* note 33, at 686.

87. *Tellabs II*, 513 F.3d at 711.

88. *Id.* at 710–11.

inference' from factual allegations is mysterious."⁸⁹ Posner emphasized that in order to proceed with such an analysis, more work would be required from the defendant to show a non-culpable inference, a result "outwardly at odds with the PSLRA's goal of saving a defendant from the expense and burden of answering a complaint until it has been deemed to pass muster."⁹⁰ This discomfort with the *Tellabs* rule has been expressed by other circuits after lower courts attempted to apply a rule consistent with both *Tellabs* and the case law established within their respective circuits.⁹¹

III. APPLICATION OF THE *TELLABS* RULE

After the *Tellabs* decision, the circuit courts struggled to reconcile the decision with their own standards.⁹² While the *Tellabs* rule did provide a general direction for the circuit courts to follow, it left considerable leeway for judicial discretion and interpretation.⁹³ The circuit courts used varying methods to apply *Tellabs*; some merely tacked on *Tellabs*' holistic approach as an additional prong,⁹⁴ while others continued to permit alternative methods of establishing scienter, such as the "bare allegation of motive and opportunity [which, most likely, would] not meet *Tellabs*' call for a cogent and compelling inference."⁹⁵ A few circuits, however, conformed their analyses to fall squarely within the four corners of *Tellabs*.⁹⁶ These differing attempts to reconcile *Tellabs* are analyzed below.

A. THE SECOND, THIRD, AND EIGHTH CIRCUITS

The *Tellabs* rule instructed lower courts to compare an inference of scienter with competing inferences ensuring that the former is cogent and compelling enough to survive a Rule 12(b)(6) motion to dismiss.⁹⁷ However, before *Tellabs* was decided, many circuits had already established alternative methods to show scienter, such as by pleading facts of motive and opportunity, or strong circumstantial evidence of recklessness or conscious misbehavior.⁹⁸ These circuits have continued to

89. *Id.* at 705.

90. C. Neil Gray, *Seventh Circuit Upholds Scienter Allegations Following Tellabs Decision*, INSIGHTS, Feb. 2008, at 8, 9.

91. See Gorman, *supra* note 1, at 187.

92. See discussion *infra* Part III.A–C.

93. Cox et al., *supra* note 27, at 436–37.

94. See *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 991–92 (9th Cir. 2009).

95. Cox et al., *supra* note 27, at 436.

96. See, e.g., *Flaherty & Crumrine Preferred Income Fund Inc., v. TXU Corp.*, 565 F.3d 200, 213 (5th Cir. 2009).

97. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007).

98. E.g., *Press v. Chem. Inv. Serv. Corp.*, 166 F.3d 529, 538 (2d Cir. 1999).

use alternative methods of establishing scienter, reading *Tellabs*' comparative, holistic approach as merely another available method.⁹⁹

In *Elam v. Neidorff*, the Eighth Circuit affirmed the dismissal of a complaint for “failure to plead a strong inference of scienter as required by the PSLRA and . . . *Tellabs*.”¹⁰⁰ *Neidorff* was a securities fraud action brought against Centene Corporation (Centene), a middleman for Medicaid recipients and the government, and certain executive officers.¹⁰¹ When Centene made its quarterly reports, it failed to account for possible unexpected claims liability. This misrepresented the company's income, which was further harmed by the company promoting its accurate medical claims estimations.¹⁰² In rejecting the plaintiffs' argument, the court noted that the “pleading fail[ed] to point to any contemporaneous reports, witness statements, or any information that had actually been provided to defendants . . . that indicated that Centene would need to increase estimated medical costs,”¹⁰³ and thus, lacked the requisite specificity.

Superficially, it appears that the Eighth Circuit complied with the *Tellabs* rule in affirming the dismissal, but closer scrutiny shows that the court actually entertained three distinct ways of establishing a strong scienter inference: (1) by pleading “facts establishing a mental state embracing an intent to deceive; (2) from conduct [that] amounts to severe recklessness; or (3) from allegations of motive and opportunity.”¹⁰⁴ While the first and second methods seem consistent with *Tellabs*, the Supreme Court never mentioned a motive and opportunity test as a possible alternative to satisfy the strong inference requirement.¹⁰⁵ Furthermore, under the *Tellabs* rule, merely pleading motive and opportunity is insufficient to meet a cogent and compelling scienter inference.¹⁰⁶ Even though the court ultimately found the plaintiffs failed to meet the strong inference requirement—giving the appearance of compliance with *Tellabs*—the analysis the court used essentially followed the Second Circuit's motive and opportunity test.¹⁰⁷ Because *Tellabs* and the PSLRA were meant to toughen pleading requirements for plaintiffs to weed out meritless and frivolous claims,¹⁰⁸ permitting alternate methods to establish

99. See, e.g., *Neidorff*, 544 F.3d at 930; *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007).

100. Thomas O. Gorman, *Pleading a Strong Inference of Scienter, Tellabs and Core Operations*, SEC ACTIONS (Oct. 20, 2008, 1:51 AM), <http://www.secactions.com/?p=497> [hereinafter Gorman, *Core Operations*]. See *Neidorff*, 544 F.3d at 930.

101. *Neidorff*, 544 F.3d at 925; Gorman, *Core Operations*, *supra* note 100.

102. *Neidorff*, 544 F.3d at 925–26.

103. *Id.* at 927.

104. Gorman, *Core Operations*, *supra* note 100.

105. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007).

106. Cox et al., *supra* note 27, at 436–37.

107. Gorman, *Core Operations*, *supra* note 100.

108. See *Neidorff*, 544 F.3d at 927.

scienter seems wholly inconsistent with the spirit of the Supreme Court's decision.¹⁰⁹

The Second Circuit has similarly continued to apply the motive and opportunity test post-*Tellabs*.¹¹⁰ It asserted that the purpose of *Tellabs* is to be consistent with the PSLRA, which adopted the Second Circuit's scienter standard; therefore, the reasoning continues, use of its previous framework must be consistent with the *Tellabs* rule.¹¹¹ In *ATSI Communications, Inc. v. Shaar Fund, Ltd.*, the plaintiff corporation issued multiple series of convertible preferred stock in order to raise capital; the terms of the conversion allowed "floorless" convertibles, which are very favorable to investors, and less so for the corporation.¹¹² In the complaint, plaintiffs alleged that defendants manipulated the market by short selling the plaintiffs' common stock and then converting the preferred stock into common stock to cover their short position.¹¹³ Even though the court affirmed dismissal of the complaint because plaintiff failed to allege a compelling inference of scienter, its test still allowed the plaintiff to satisfy the scienter requirement by: (1) "showing that the defendants had both motive and opportunity to commit the fraud or (2) constituting strong circumstantial evidence of conscious misbehavior or recklessness."¹¹⁴ Admittedly, the Supreme Court left unanswered what degree of recklessness may establish a strong inference of scienter.¹¹⁵ However, it seems doubtful that the Second Circuit's flexibility in allowing plaintiffs to rely on the bare allegation of motive and opportunity is consistent with the *Tellabs* rule.¹¹⁶

Prior to *Tellabs*, the Third Circuit had formally adopted the Second Circuit's position in *In re Advanta Corp. Securities Litigation*.¹¹⁷ However, in *Institutional Investors Group v. Avaya, Inc.*, the Third Circuit, relying on *Tellabs*, decided that as a general rule, "motive and opportunity" may no

109. See Gorman, *Core Operations*, *supra* note 100.

110. See *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007).

111. See Lane, *supra* note 26, at 646.

112. *ATSI Commc'ns*, 493 F.3d at 94.

113. *Id.* at 96. This type of market manipulation is known as a "death spiral" in the victim corporation's common stock prices. *Id.* The market manipulators are able to profit from the conversion because they can cover their short position with the discounted common shares not purchased on the open market. *Id.* Essentially, depleting the existence of common shares on the market, and then relying on the convertible securities as a hedge against risk of loss. *Id.*

114. *Id.* at 99. See also Richard D. Bernstein & Frank M. Scaduto, *Lower Courts' Handling of 'Tellabs' 'Inference of Scienter'*, 238 N.Y.L.J. 112 (2007).

115. Lane, *supra* note 26, at 645-46.

116. See *id.* at 646; see also Cox et al., *supra* note 27, at 436-37.

117. *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 534-35 (3d Cir. 1999) (allowing a plaintiff to plead scienter in one of two ways: (1) allege facts to establish "a motive and an opportunity to commit fraud" or (2) set "forth facts that constitute circumstantial evidence of either recklessness or conscious behavior" (quoting *Weiner v. Quaker Oats Co.*, 129 F.3d 310, 318 n.8 (3d Cir. 1997))).

longer serve as an independent route to show scienter.¹¹⁸ In *Avaya*, shareholders brought a class action against the company for making misstatements regarding the company's earnings growth potential despite the presence of price competition.¹¹⁹ The court ultimately found that parts of the plaintiffs' pleading were sufficiently particular and established a strong inference of scienter, while other statements did not.¹²⁰ In its analysis of the complaint as a whole, the court explicitly rejected the "motive and opportunity" test.¹²¹ The court reasoned that, in light of *Tellabs*' instruction to compare competing inferences,

[i]t cannot be said that, in every conceivable situation in which an individual makes a false or misleading statement and has a strong motive and opportunity to do so, the nonculpable explanations will necessarily not be more compelling than the culpable ones. And if that is true, then allegations of motive and opportunity are not entitled to a special, independent status.¹²²

While it appears as though the Third Circuit altered its test due to *Tellabs*, scholars argue that the practical implications of eliminating the motive and opportunity test reflect few changes in pleadings' actual success.¹²³ In practice, generalized theories of motive have "rarely saved a complaint from dismissal" and few motive theories have passed muster in the Third Circuit post-PSLRA.¹²⁴ And even though eliminating the "motive and opportunity" test did not drastically alter the way securities fraud actions are pled, the decision was significant in its outright rejection of the Second Circuit's standard, which gave motive and opportunity special independent status.¹²⁵ Furthermore, it ought to be recognized that the reason for this rejection was the court's consideration of the Supreme Court's instructions given in *Tellabs*.¹²⁶ These circuits ostensibly adhered to the *Tellabs* rule by considering all the allegations together as a whole. However, in the analyses of these courts' decisions, there seemed to be leeway in how the courts found scienter, or lack of it. Such judicial discretion may be problematic for plaintiffs in determining how to plead a case; however, it also may be beneficial to plaintiffs because now judges

118. *Institutional Investors Grp. v. Avaya, Inc.*, 564 F.3d 242, 276–77 (3d Cir. 2009).

119. *Id.* at 246.

120. *Id.* at 280.

121. *Id.* at 276–77. See also Robert L. Hickok & Gay Parks Rainville, *Implications of the Decision to Ax Motive, Opportunity for Scienter Pleading*, THE LEGAL INTELLIGENCER, June 23, 2009.

122. *Avaya*, 564 F.3d at 277.

123. See Hickok & Rainville, *supra* note 121.

124. See *id.* But see *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 276–78 (3d Cir. 2006) (deciding in a post-PSLRA decision that the plaintiff's motive and opportunity allegations sufficiently pleaded scienter due to unusual scope and timing of corporate officer stock sales).

125. *Avaya*, 564 F.3d at 277 n.51.

126. *Id.*

have some latitude when looking at the bigger picture of the aggregate claims.

B. THE NINTH CIRCUIT

The Ninth Circuit has always been the most temperamental in determining a standard for a strong inference of scienter.¹²⁷ As circuit courts cannot outright reject controlling Supreme Court precedent, the Ninth Circuit must abide by *Tellabs*. However, since the *Tellabs* rule was insufficiently explicit, it could not prevent the Ninth Circuit from reconciling its established standard with the rule. Soon after *Tellabs*, it maintained, in *Metzler Investment GMBH v. Corinthian Colleges, Inc.*, that its *Silicon Graphics* holding, decided prior to *Tellabs*, was still viable; to achieve the requisite scienter, plaintiff must show a “strong inference of deliberate recklessness,” a standard that evidence of motive and opportunity alone were not enough to satisfy.¹²⁸ The court even suggested that *Tellabs*’ holistic review of the complaint required scienter to be individually established for each allegation.¹²⁹

In *Metzler*, plaintiffs brought an action against Corinthian, operator of private for-profit vocational colleges, claiming that it was manipulating student enrollment figures to acquire additional federal funding.¹³⁰ The *Metzler* court held that plaintiffs failed to allege facts that revealed widespread financial aid manipulation by operator and that plaintiffs cannot rely “on an isolated statement that stands in contrast to a host of other insufficient allegations.”¹³¹ The court concluded that even though *Tellabs*’ holistic application prohibits “de-contextualization,” it still “requires a coherent theory of wrongdoing.”¹³²

A month later, the Ninth Circuit decided *South Ferry LP v. Killinger*, and concluded that while *Tellabs* did not overrule its earlier decisions, its previous standard may be “too demanding and focused too narrowly” under the new rule.¹³³ The Ninth Circuit appeared reluctant in its prior statements regarding *Tellabs*’ insignificance¹³⁴ and acceded to its holistic approach.¹³⁵ *South Ferry* seemed to indicate that the Ninth Circuit was prepared to take *Tellabs* into full consideration.¹³⁶

127. See *supra* note 38 and accompanying text.

128. *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1069 (9th Cir. 2008).

129. *Id.* See also Gareth T. Evans & Alexander K. Mircheff, *Pleading Scienter in the Ninth Circuit: Did Tellabs Really Change Much?*, 4 BLOOMBERG LAW REP., Sec. Law., Jan. 4, 2011, 74, 76–77.

130. *Metzler Inv.*, 540 F.3d at 1055.

131. *Id.* at 1069. See also Evans & Mircheff, *supra* note 129, at 77.

132. Evans & Mircheff, *supra* note 129, at 76, 77 (citing *Metzler Inv.*, 540 F.3d at 1069).

133. *Id.* at 77 (quoting *South Ferry LP No. 2 v. Killinger*, 542 F.3d 776, 784 (9th Cir. 2008)).

134. Evans & Mircheff, *supra* note 129, at 77.

135. *South Ferry*, 542 F.3d at 784; Evans & Mircheff, *supra* note 129, at 77.

136. *South Ferry*, 542 F.3d at 784; Evans & Mircheff, *supra* note 129, at 77.

In early 2009, the Ninth Circuit decided *Zucco*,¹³⁷ which involved claims that the defendant corporation purposefully overstated its earnings and wrongfully capitalized expenditures that ought to have been expensed.¹³⁸ The court's tone contrasted dramatically with the *South Ferry* opinion, but the court acknowledged and addressed head-on the tension and issues between the *Tellabs* rule and the Ninth Circuit's existing scienter jurisprudence.¹³⁹ In its attempt to reconcile the two standards, the Ninth Circuit developed a new test.¹⁴⁰ The court conducted a dual inquiry, in which it would first “determine whether any of the plaintiff's allegations, standing alone, are sufficient to create a strong inference of scienter” and then, if no individual allegations are sufficient, the court will “conduct a ‘holistic’ review of the same allegations to determine whether the [individually] insufficient allegations combine to create a strong inference.”¹⁴¹

Though the *Zucco* plaintiffs argued that the Supreme Court implicitly rejected the individual allegation approach previously taken by the Ninth Circuit, the court concluded that “*Tellabs* does not materially alter the particularity requirements for scienter claims established in [our] previous decisions.”¹⁴² Under its analysis, the court found the plaintiffs' individual allegations did not sufficiently plead scienter.¹⁴³ Thus, following its dual inquiry, the court reviewed all the allegations collectively, noting that “[e]ven if a set of allegations may create an inference of scienter greater than the sum of its parts, it must still be at least as compelling as an alternative innocent explanation.”¹⁴⁴ With this in mind, the court wrote no more than a mere paragraph on its holistic review, and quickly found that the allegations were “not as cogent or compelling as a plausible alternative inference.”¹⁴⁵ The “brevity [of the court's] holistic review” compared to the depth of its evaluation of the individual scienter allegations suggests that *Tellabs*' impact on the Ninth Circuit is no more than a mere afterthought.¹⁴⁶

Under this new two-prong analysis, if a plaintiff's allegations are not individually strong enough to meet the scienter requirement, then it seems plaintiffs are given a second opportunity to have their allegations

137. *Zucco Partners, LLC. v. Digimarc Corp.*, 552 F.3d 981 (9th Cir. 2009).

138. *Id.* at 992.

139. Michael Hartley, *9th Circuit Explains Impact of Tellabs and Affirms Dismissals for Failure to Plead Scienter*, SECURITIES LITIGATION BLOG (Jan. 30, 2009 12:05 PM), <http://securities.litigation.alston.com>. See also *Zucco*, 552 F.3d at 991–92; Evans & Mircheff, *supra* note 129, at 77–79.

140. *Zucco*, 552 F.3d at 992; Evans & Mircheff, *supra* note 129, at 77–79.

141. Evans & Mircheff, *supra* note 129, at 77 (quoting *Zucco*, 552 F.3d at 992).

142. *Id.* (quoting *Zucco*, 552 F.3d at 987).

143. *Zucco*, 552 F.3d at 1006. See also Evans & Mircheff, *supra* note 129, at 77–79.

144. Evans & Mircheff, *supra* note 129, at 78 (quoting *Zucco*, 552 F.3d at 1006).

145. *Id.* at 79 (quoting *Zucco*, 552 F.3d at 1007).

146. See *id.*

considered holistically as required in *Tellabs*.¹⁴⁷ It is inherently more difficult and places a stronger burden on the plaintiff to plead allegations that will individually meet the requisite standard.¹⁴⁸ By still requiring plaintiffs to pass the individual allegations test, the Ninth Circuit essentially undercuts the significance of the *Tellabs* rule.¹⁴⁹ Even though the court is willing to apply the *Tellabs* rule once a complaint has failed the first prong of the test, it would appear that this use of *Tellabs* does not conform to the purpose of the Supreme Court decision. *Tellabs* was meant to harmonize circuits, by bringing the extremes towards the middle ground. While the Ninth Circuit is putatively applying *Tellabs*, it is implicitly ignoring the harmonization sought by the Supreme Court by retaining its former test and treating it with relative primacy over the *Tellabs* approach.

Under the Ninth Circuit's analysis, *Tellabs* is the backstop to the Ninth Circuit's more stringent standard. The court does not place an additional burden on the plaintiff, but by first examining the strength of scienter for each allegation individually, the Ninth Circuit's test indirectly clashes with the *Tellabs* rule. Further, such an analysis may prejudice the strength of certain allegations in the judge's mind when he conducts a second holistic review of all the allegations together. The purpose of *Tellabs* was to enhance uniformity and predictability for both courts and plaintiffs.¹⁵⁰ However, by preserving its former test and using the *Tellabs* rule as a mere backstop, the Ninth Circuit failed to whole-heartedly adopt the goals of *Tellabs*.¹⁵¹

Soon after *Zucco*, in *Rubke v. Capitol Bancorp Ltd.*, the court followed the dual approach and swiftly affirmed dismissal of plaintiff's complaint.¹⁵² *Rubke* involved claims against the defendant corporation for deliberately understating stock value subject to a pending tender offer.¹⁵³ Defendant allegedly called key minority shareholders and made various false statements so that the company could purchase shares at below market value.¹⁵⁴ The court examined the scienter allegations relating to the telephone calls, and much like in *Zucco*, concluded that the allegations did not individually support a strong inference of scienter.¹⁵⁵ After examining the allegations separately, the court then conducted a brief holistic review

147. *Zucco*, 552 F.3d at 992.

148. See Evans & Mircheff, *supra* note 129, at 79.

149. See Hartley, *supra* note 139.

150. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 317 (2007); Dan A. Bailey, *The U.S. Supreme Court Decision in Tellabs: Major Victory or Minor Benefit for Defendants in Securities Class Actions?*, RISKVUE (July 2007), <http://www.riskvue.com/articles/fs/fs0707b.htm>.

151. See Evans & Mircheff, *supra* note 129, 77–79.

152. *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1167 (9th Cir. 2009).

153. Hartley, *supra* note 139 (citing *Rubke*, 551 F.3d at 1159–60).

154. *Id.* (citing *Rubke*, 551 F.3d at 1159–61).

155. *Id.* (citing *Rubke*, 551 F.3d at 1165).

only to conclude, again, that the allegations as a whole still were not strong enough to infer scienter.¹⁵⁶

In *Zucco*, the court observed that in few instances the allegations “may create an inference of scienter greater than the sum of its parts,”¹⁵⁷ but often times, it seems the intense scrutiny of the individual allegations prejudices the holistic review of the set of allegations. As such, the additional *Tellabs* inquiry appears to have had little effect on the Ninth Circuit’s preexisting analysis.¹⁵⁸ So while the Ninth Circuit may have expressed initial desires to integrate the *Tellabs* rule,¹⁵⁹ it seems as if the dual approach¹⁶⁰ fails to incorporate the goals of *Tellabs*. In practicality for plaintiffs pleading in the Ninth Circuit, this means essentially having to meet a stricter standard than plaintiffs in other circuits. This would require more work at the start of an action to ensure an inference of scienter is found, and would create a proclivity for plaintiffs to forum shop.

C. THE FIRST, FIFTH, SIXTH, AND D.C. CIRCUITS

Other circuits have adjusted their former standards to comply with the *Tellabs* rule in a manner that seems wholly consistent with the rule’s goals.¹⁶¹ The Fifth Circuit, which previously supported a more lenient standard for scienter,¹⁶² recently affirmed the dismissal of a complaint specifically for its failure to meet the *Tellabs* scienter requirement.¹⁶³

In *Flaherty & Crumrine Preferred Income Fund Inc. v. TXU Corp.*,¹⁶⁴ the complaint focuses on the plaintiffs’ claim that the “defendants misrepresented the dividend policy and an eventual dividend increase to induce [plaintiffs] to tender their shares.”¹⁶⁵ The court applied the *Tellabs* rule and understood it to be a four-step test requiring that: “(1) all allegations must be assumed to be true; (2) the facts must be viewed collectively and not in isolation; (3) the court must consider plausible inferences opposing as well as supporting a strong inference of scienter; and (4) omissions and ambiguities count against an inference of scienter.”¹⁶⁶ The court noted that allegations of motive and opportunity, although

156. *Id.* (citing *Rubke*, 551 F.3d at 1166).

157. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1006 (9th Cir. 2009).

158. Hartley, *supra* note 139.

159. *South Ferry LP No. 2 v. Killinger*, 542 F.3d 776, 784 (9th Cir. 2008).

160. *Zucco*, 552 F.3d at 987.

161. *See Flaherty & Crumrine Preferred Income Fund Inc. v. TXU Corp.*, 565 F.3d 200, 212 (5th Cir. 2009); *Miss. Pub. Emps.’ Ret. Sys. v. Bos. Scientific Corp.*, 523 F.3d 75, 89–90 (1st Cir. 2008).

162. *See Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017–19 (5th Cir. 1996).

163. *See Thomas O. Gorman, The Impact of Tellabs: Another Suit Dismissed*, SEC ACTIONS (Apr. 14, 2009, 4:00 AM), <http://www.secactions.com/?p=1014> (citing *Flaherty*, 565 F.3d 200) [hereinafter Gorman, *Another Suit Dismissed*].

164. *Flaherty*, 565 F.3d 200.

165. Gorman, *Another Suit Dismissed*, *supra* note 163 (citing *Flaherty*, 565 F.3d at 209–10).

166. *Id.*

previously permitted to satisfy scienter, now “standing alone will not suffice to meet the scienter requirement,” but may be used to strengthen the scienter inference.¹⁶⁷ Next, the court examined the facts and considered “opposing inference,” and held that since the company did “disclose[] that the dividend policy was under review during the tender period,” the “inference of non-fraudulent intent weigh[ed] in favor of the’ [Appellees].”¹⁶⁸

Similarly, in *Central Laborers’ Pension Fund v. Integrated Electrical Services Inc.*, the Fifth Circuit dismissed a class action securities fraud claim against defendants, “an electrical contracting service company and . . . its officers” for lack of scienter.¹⁶⁹ The court found that there was no sufficient link between the misstatements regarding internal controls and the actual failed reporting.¹⁷⁰ Further, the court reviewed the collective impact of the allegations and found it was not strong enough to infer scienter.¹⁷¹ As such, the Fifth Circuit modified its previous test and conducted a scienter analysis that is wholly consistent with the goals of *Tellabs*.¹⁷²

The First and Sixth Circuits similarly tailored their previous tests to conform to the *Tellabs* rule. Both ultimately concluded that the Supreme Court’s decision lowered the plaintiff’s burden for pleadings from each circuit’s preexisting tests.¹⁷³

Previously, the First Circuit had held that if two competing inferences were equally strong, then the finding will be in favor of the defendant.¹⁷⁴ In *Mississippi Public Employees’ Retirement System v. Boston Scientific Corp.*, the company’s officers withheld material information about problems with its new product and its eventual recall.¹⁷⁵ Under the *Tellabs* rule, the court held that if a plaintiff’s inferences were at least equally as strong as the defendant’s, then the plaintiff’s case would survive a motion to dismiss.¹⁷⁶ The court reasoned it “cannot hold plaintiffs to a standard that would effectively require them, pre-discovery, to plead evidence.”¹⁷⁷ Furthermore, the Supreme Court explicitly stated that a strong inference of scienter is satisfied when it is at least as compelling as other plausible

167. *Id.* (citing *Flaherty*, 565 F.3d at 208).

168. *Id.* (quoting *Flaherty*, 565 F.3d at 212).

169. Bernstein & Scaduto, *supra* note 114 (citing *Cent. Laborers’ Pension Fund v. Integrated Elec. Servs. Inc.*, 497 F.3d 546, 549 (5th Cir. 2007)).

170. *Cent. Laborers’*, 497 F.3d at 555. *See also* Bernstein & Scaduto, *supra* note 114.

171. *Cent. Laborers’*, 497 F.3d at 552–55.

172. *See* Gorman, *Another Suit Dismissed*, *supra* note 163.

173. *Id.* (citing *Miss. Pub. Emps.’ Ret. Sys. v. Bos. Scientific Corp.*, 523 F.3d 75, 89–90 (1st Cir. 2008); *Frank v. Dana Corp.*, 547 F.3d 564, 571 (6th Cir. 2008)).

174. *See* *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 196 (1st Cir. 1999).

175. *Bos. Scientific Corp.*, 523 F.3d at 78.

176. *Id.* at 89–90. *See* Gorman, *Another Suit Dismissed*, *supra* note 163.

177. *Bos. Scientific Corp.*, 523 F.3d at 90 (quoting *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1225 (1st Cir. 1999)). *See also* Gorman, *Another Suit Dismissed*, *supra* note 163.

inferences, and did not require it to be more compelling.¹⁷⁸ The First Circuit understood this analysis to be a lower standard, permitting rulings in favor of plaintiffs so long as their claim is just as compelling. Thus, it has continued to apply the *Tellabs* rule with this understanding in later cases, reversing its previous test.¹⁷⁹

The Sixth Circuit similarly lowered its previous test in light of *Tellabs*, but in a different manner. In *Frank v. Dana*, shareholders alleged that the CEOs caused the corporation to use a variety of accounting manipulations to falsify its financial results, which harmed shareholders who had purchased artificially inflated stocks.¹⁸⁰ The court reviewed a case that was dismissed because the controlling pleading standard in the Sixth Circuit required plaintiffs to plead the “most plausible of competing inferences” in order to meet the requisite scienter.¹⁸¹ The court held that the “most plausible” standard is no longer good law.¹⁸² The “most plausible” standard was based on an understanding that the PSLRA entitled plaintiffs only to such.¹⁸³ However, the court concluded in *Frank v. Dana* that *Tellabs* instructs for a finding in favor of the plaintiff if there are two equally compelling competing inferences.¹⁸⁴ Thus, a plaintiff’s complaint would survive a motion to dismiss so long as the inference of scienter was “at least as compelling as any opposing inferences.”¹⁸⁵ Employing an analysis similar to that of the First Circuit, the Sixth Circuit understood *Tellabs* to lower the pleading burden for plaintiffs such that they only need an inference that is equally compelling, giving plaintiffs the benefit of the doubt.¹⁸⁶

The District of Columbia Circuit also handed down similar decisions emphasizing that *Tellabs* instructed the courts to review all the allegations in toto in light of any plausible non-fraudulent intent.¹⁸⁷ In following *Tellabs*’ prescriptions, the court conformed its analyses to adhere to the Supreme Court’s goals.¹⁸⁸ The circuits that have incorporated *Tellabs* in form and spirit fully understood the Court’s desire to provide plaintiffs with

178. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323–24 (2007).

179. *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46 (1st Cir. 2008) (acknowledging the lower standard but affirming the dismissal). *See also* Gorman, *Another Suit Dismissed*, *supra* note 163.

180. *Frank v. Dana Corp.*, 547 F.3d 564, 567–68 (6th Cir. 2008).

181. *Id.* at 567 (quoting *Frank v. Dana Corp.*, 525 F.Supp.2d 922, 930 (N.D. Ohio 2007) (emphasis added)).

182. *Id.* at 571.

183. *Helwig v. Vencor, Inc.*, 251 F.3d 540, 553 (6th Cir. 2001).

184. *Frank*, 547 F.3d at 571. *See also* *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323–24 (2007); *Advest*, 512 F.3d at 59 (“In other words, where there are equally strong inferences for and against scienter, *Tellabs* now awards the draw to the plaintiff.”).

185. *Frank*, 547 F.3d at 567 (quoting *Tellabs*, 551 U.S. at 325 (emphasis added)).

186. *See* *Miss. Pub. Emps.’ Ret. Sys. v. Bos. Scientific Corp.*, 523 F.3d 75, 89–90 (1st Cir. 2008); *Frank*, 547 F.3d at 567.

187. *See, e.g.*, *Belizan v. Hershon*, 495 F.3d 686, 692 (D.C. Cir. 2007).

188. *Id.* at 694.

a more stable approach to plead securities fraud claims and to lessen the burden of frivolous claims on the court system.

IV. THE *TELLABS* RULE'S INTERPRETIVE DISCRETION

In *Tellabs*, the Supreme Court specifically declined to choose one circuit's standard over another's, even though the PSLRA standard for scienter is modeled after the Second Circuit's. Instead, the Court prescribed a holistic approach to finding scienter, such that circuit courts could incorporate their previous methods into the *Tellabs* approach.¹⁸⁹ While both the PSLRA and *Tellabs* sought to achieve a uniform standard among the circuits, the Supreme Court also recognized the difficulties in reconciling a variety of circuit standards. Thus, the Court opted for an approach that hopefully would achieve enough harmonization for consistency, but also stringent enough to limit frivolous securities fraud lawsuits; this would help to increase predictability in case outcomes, and would lessen the risk of forum shopping by plaintiffs.¹⁹⁰ Because of the difficulty in creating such a standard, the Court crafted a test that would include all the various circuits' standards; hence, the holistic approach. Some scholars theorized that the Supreme Court avoided the issue in not creating an exacting pleading standard, and others postulate that the Court's approach actually benefits defendants.¹⁹¹ However, this kind of interpretive flexibility afforded to lower federal courts is not as flawed as some may suggest, and even could be a good thing. Even though plaintiffs may desire an absolute uniform standard, there are benefits to giving judges some interpretive latitude. A determination of scienter sometimes requires judges to look beyond the facts to the nuances of the case.¹⁹² Proving the mental state of a defendant is already difficult; thus, by allowing judges to look holistically at all of the claims to get the bigger picture, they are able to come to a more equitable conclusion. For this reason, it is possible the Supreme Court purposefully constructed the holistic approach in *Tellabs*. The Court tried to reach a happy medium between two very extreme circuits, the Second and the Ninth. Knowing neither would stray far from its former approaches, the

189. *Tellabs*, 551 U.S. at 323.

190. Cox et al., *supra* note 27.

191. Compare Wunderlich, *supra* note 33, at 649–51 (illustrating possible scenarios that may result from *Tellabs*' vague rule), with Lane, *supra* note 26, at 645–48 (speculating that the *Tellabs* decision will create a safe harbor and benefit corporate defendants).

192. See, e.g., Brandy L. Fulkerson, Note, *Extraterritorial Jurisdiction and U.S. Securities Law: Seeking Limits for Application of the 10(b) and 10b-5 Antifraud Provisions*, 92 KY. L. J. 1051, 1056 (2004); Roger J. Magnuson, *Aggressive Securities Law Litigation and Compliance Strategies*, in INSIDE THE MINDS, NEW DEVELOPMENTS IN SECURITIES LITIGATION: LEADING LAWYERS ON ANALYZING RECENT LEGISLATIVE AND REGULATORY TRENDS, UNDERSTANDING ENFORCEMENT CHALLENGES, AND DEVELOPING EFFECTIVE CLIENT COMPLIANCE STRATEGIES 77 (2010), available at http://www.dorsey.com/files/upload/magnuson_chapter_book_bio_april10.pdf.

Tellabs Court decided to allow essentially all forms of pleading so long as judges base their finding on all of the alleged claims. For example, the motive and opportunity test, though not utterly unfavorable, had lost much of its appeal as an independent route to scienter because now judges must base the strength of the inference on all of the claims, not just claims involving motive and opportunity.¹⁹³ The Court's methodology sought to heighten the pleading standard by using a more nuanced approach, rather than the rigid check box system other circuits had established. This afforded judges some flexibility, but other requirements, such as comparing the culpable and non-culpable inferences against each other, helped to guard against abuses of discretion. Ultimately, this comprehensive rule has harmonized the circuits such that there should be sufficient consistency and the circuit courts do not feel encroached upon because they were given enough freedom to deliberate the nuances of each case. Nevertheless, because of this latitude, circuits are able to maintain their former tests and, simultaneously, outwardly adopt *Tellabs*. However, judicial discretion is not always adverse to harmonization.

CONCLUSION

This note has illustrated the difficulties numerous circuits experienced in reconciling the *Tellabs* rule with their former tests.¹⁹⁴ Some circuits have decidedly disregarded *Tellabs*' call for more evidentiary proof of an inference of scienter by still permitting bare allegations of motive and opportunity to satisfy a strong inference of scienter.¹⁹⁵ The Ninth Circuit attempted to harmonize *Tellabs* by creating a two-pronged test, in which it first reviews individual allegations, and secondly conducts a holistic review of the allegations as instructed in *Tellabs*.¹⁹⁶ Though the Ninth Circuit attempted to incorporate *Tellabs*, the new test has not significantly changed the court's outcomes regarding scienter. Lastly, this note presented circuit courts that have adjusted their previous tests to abide by the goals set forth in *Tellabs*.¹⁹⁷

Consequently, it appears that while many circuits have changed their previous frameworks in consideration of *Tellabs*, these changes have had no great effect on how the circuits continue to define the requisite scienter standard. The purpose of *Tellabs* and of the PSLRA was to reform the circuit courts' approaches to finding inferences of scienter such that the tests across the circuits are uniform.¹⁹⁸ The Supreme Court, in an effort to

193. See *Institutional Investors Group v. Avaya, Inc.*, 564 F.3d 242, 276–77 (3d Cir. 2009) (rejecting special independent status for motive and opportunity).

194. See discussion *supra* Part III.

195. See discussion *supra* Part III.A.

196. See discussion *supra* Part III.B.

197. See discussion *supra* Part III.C.

198. See Wunderlich, *supra* note 33, at 623–26.

achieve the goals of the PSLRA, established a holistic test that would allow circuit courts to incorporate other tests so long as the allegations are considered in their entirety. Though this test has not achieved complete harmonization among the circuits, especially between the Second and Ninth Circuits, *Tellabs*' guidance was not completely wasted; several circuits, such as the First, Fifth, and Sixth have employed a more unified scienter analysis. Further, the Third Circuit, which previously followed the Second Circuit's test, has expressly rejected motive and opportunity as a separate means to scienter.¹⁹⁹ Moreover, an absolute unification of the circuit courts' tests may not be necessary to achieve consistency and a heightened standard. The interpretive discretion *Tellabs* left to judges does not blatantly go against harmonization, but rather recognizes that there is a benefit to allowing judges some flexibility, particularly for nuanced concepts, and that determinations of scienter sometimes warrant such flexibility.

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199. See discussion *supra* Part III.C.

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