Revitalizing Motive and Opportunity Pleading after Tellabs

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NOTE

REVITALIZING MOTIVE AND OPPORTUNITY PLEADING AFTER TELLABS

Marvin Lowenthal*

Congress passed the Private Securities Litigation Reform Act of 1995 ("PSLRA") to prevent frivolous lawsuits that had been draining resources from businesses. This legislation included provisions for heightening the pleading requirements for the scienter, or state of mind, requirement for securities law violations. Many circuit courts debated whether the motive and opportunity test for scienter, applied initially by the Second and Third Circuits, survived the passage of the PSLRA. This Note argues that while the motive and opportunity test has been discounted by numerous circuits, it not only remains viable for pleading scienter under the PSLRA, but it accomplishes the PSLRA's goals better than any other standard presently available. Despite the concerns voiced by many circuit courts, the PSLRA was not passed to eliminate the motive and opportunity test, nor is the motive and opportunity test, as it is now applied by the Second Circuit, inconsistent with the PSLRA. In addition, while the recent Supreme Court decision in Tellabs, Inc. v. Makor Issues & Rights, Ltd. convinced the Third Circuit to abandon the motive and opportunity test, the language of Tellabs demonstrates that the decision did not eliminate the test. Not only is the motive and opportunity test still viable, but it serves the policy reasons behind enacting the PSLRA better than the holistic approach utilized by other circuit courts.

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* J.D. Candidate, May 2011. I would like to thank my note editors, Kyle Aarons and Kate Stamell, for their advice and comments, as well as professor Margaret Jane Radin and the participants in the Winter 2010 Student Scholarship Workshop for their feedback on this piece.
INTRODUCTION

In 1994, the U.S. securities industry earned $1 trillion.\(^1\) However, our securities markets were also facing substantial litigation pressure. While private securities class actions are an important part of the Securities and Exchange Commission’s (“SEC”) enforcement strategy, they can also be a burden on corporations. A study in the early 1990s conducted by Janet Cooper Alexander analyzed settlements in securities class actions and determined that companies settled for a similar amount, roughly one-quarter the potential damages, regardless of the merits of the case.\(^2\) Her analysis considered the incentives of both plaintiffs and defendants in securities class actions and concluded that defendants had a strong incentive to settle, as did plaintiffs.\(^3\)

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2. Janet Cooper Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, 43 STAN. L. REV. 497, 500 (1991). Alexander also listed potential problems that could result from a settlement system that does not relate to the merits of the cases, including deterring valuable corporate risk-taking, dissuading qualified people from becoming corporate directors, and undercompensation for meritorious claims. Id. at 570. One of her recommended solutions was to enact a structural change to litigation procedures that would more easily allow the claim to be resolved without the need for trial. See id. at 585–86. The discussion in the article focused on the summary judgment standard and why, while it might serve as a good way to remove claims on the merits before trial, it would also be dangerous: if courts relax the summary judgment rules in one area, it would relax summary judgment rules across the board since those rules apply across all subject matter. Id. at 587. To avoid these problems, Alexander suggested substantive changes would target specific elements, like the scienter standard. Id.

3. Id. at 524–57.
Taking advantage of the incentives to settle, plaintiffs' firms have been accused of "legal extortion," filing baseless lawsuits against corporations in order to extract settlements, which the corporation agrees to in order to save the expense of litigation.4 For example, within days or even hours of a drop in stock price, firms initiate lawsuits, even when there is little or no evidence of wrongdoing.5 Congress's report on the problems of meritless suits designed to provoke settlement—known as "strike suits"—was highlighted by James Kimsey's testimony, the co-founder, CEO, and first chairman of America Online: "Even when a company committed no fraud, indeed no negligence, there is still the remote possibility of huge jury verdicts, not to mention the costs of litigation. In the face of such exposure, defendant companies inevitably settle these suits rather than go to trial."6 Even though companies may have done nothing wrong, litigation can be unpredictable, and with the massive potential harm, companies consider settlement the safer option. Thus, strike suits lead to a needless drain on the resources of law-abiding companies whenever any negative news is presented.

Not only are law-abiding companies damaged, but Congress felt that if left unchecked, the whole of the United States would suffer as a result of these strike suits.7 Professor David Fischel testified on this issue using hypothetical pharmaceutical companies to illustrate:

[Once a similarly-situated company has been sued, other companies] have several options, none of which are socially desirable. Some companies may decide not to go public. In this way, they can avoid possible liability but only by incurring the costs associated with more expensive private financing. Other companies may decide not to experiment with risky drugs. By avoiding risky projects, firms can avoid adverse outcomes that result in dramatic stock price declines. This solution, too, is undesirable, because society does not get the benefit of products that are never developed. The drug in the above example, after all, should be introduced because it is beneficial even though its benefits were less than was initially anticipated. A third solution is to remain silent about the drug because the company cannot later be accused of "fraud" if it chose not to speak in the first place. These "solutions" are perverse because investors—the supposed beneficiaries of the existing law—are denied the opportunity to invest in and learn about attractive but risky ventures.8

As Fischel explains, the public is harmed when corporations are forced to take action to protect themselves from strike suits. In exchange for the damage that could result from these strike suits, the lawyers initiating the

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7. See infra notes 19, 21–23.
suits recover significant fees, while each shareholder recovers mere pennies. Under these circumstances, the securities laws fail to prevent fraud, because lawsuits are filed whether or not fraud existed. A company's shareholders are the ones harmed by corporate fraud, because it is their money in the corporation being used improperly. Thus, an anti-fraud legal system could work either by preventing fraud from happening or by reimbursing the shareholders when fraud does happen. If there is no deterrent value, a recovery of fractions of a dollar for shareholders does not seem to counterbalance the harm from strike suits.

In response to this issue, Congress passed the Private Securities Litigation Reform Act of 1995 ("PSLRA") to reign in securities fraud suits. The PSLRA established certain requirements for pleading securities class actions, as well as other provisions designed to check abusive filings by attorneys. The required state of mind, or "scienter," for securities law violations targeted by the PSLRA has been defined by the Supreme Court as "a mental state embracing intent to deceive, manipulate, or defraud." The circuit courts have long split in interpreting how the scienter element of the PSLRA's pleading standard should be satisfied. After the passage of the PSLRA, there were three viewpoints: the Second and Third Circuits allowed allegations of motive and opportunity to deceive, manipulate, or defraud alone to satisfy the pleading requirement; the Ninth Circuit did not consider allegations of motive and opportunity sufficient; and the First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits employed what is known as the "intermediate approach," allowing allegations of motive and opportunity to help show scienter, but not considering them sufficient in every case.

The Supreme Court recently resolved a different but related circuit split in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.* The full effect of the decision is not yet clear. However, after *Tellabs* the Third Circuit declared that

9. Id. at 17–18.
10. See *supra* note 2 and accompanying text.
14. *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 979 (9th Cir. 1999).
15. *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 195–97 (1st Cir. 1999); *Ottmann v. Hanger Orthopedic Grp.*, 353 F.3d 338, 345–46 (4th Cir. 2003); *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 410–12 (5th Cir. 2001); *In re Comshare, Inc. Sec. Litig.*, 183 F.3d 542, 551 (6th Cir. 1999); *Fla. State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 654–67 (8th Cir. 2001); *City of Phila. v. Fleming Cos.*, 264 F.3d 1245, 1261–63 (10th Cir. 2001); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1282–83 (11th Cir. 1999). While there were variations in the way some of these circuits formulated this middle standard, discussion of the pre-*Tellabs* variations is not necessary for this Note.
the motive and opportunity test is no longer viable, while the Second Circuit continues to use it.

This Note argues that not only does pleading motive and opportunity according to the Second Circuit's current standards still satisfy the PSLRA's scienter requirement, it also accomplishes the PSLRA's goals better than the tests used in other circuits. Part I supplies a brief background regarding the PSLRA and the divergent interpretations the circuits have adopted for the scienter pleading requirements. Part II shows that the motive and opportunity test utilized by the Second and Third Circuits was not eliminated by the PSLRA. Part III then focuses on the language of Tellabs and how different circuits have interpreted it, concluding that Tellabs did not eliminate the motive and opportunity test. Part IV argues that allowing scienter to be pled through motive and opportunity better serves the policy goals of the PSLRA: the intermediate approach does not appear to be any better at filtering out meritless suits, and the motive and opportunity test better promotes uniformity in application than the intermediate approach.

I. BACKGROUND

The PSLRA establishes requirements for pleading securities class actions, which are typically filed under Section 10(b) of the Securities Exchange Act of 1934. In these lawsuits, a class alleges that it was harmed by fraud or misrepresentation in connection with the sale or purchase of securities. The legislative history of the PSLRA notes a concern that if corporations were threatened with class actions every time they announced bad news, they would stop making voluntary disclosures. For example, the PSLRA regulates the calculation of damages and determination of attorney fees, settlements, discovery stays, and provides sanctions for attorneys who pursue unwarranted suits.

The PSLRA also seeks to block frivolous lawsuits while permitting meritorious claims by establishing a uniform, high pleading standard across the United States. The PSLRA requires that in order to bring suit a plaintiff must allege facts that give rise to a "strong inference" that the defendant acted with the necessary state of mind, and the facts must be stated with particularity in the complaint. Accordingly, the complaint has to specify

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18. E.g., ECA & Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co., 553 F.3d 187, 201 (2d Cir. 2009).
19. SENATE REPORT, supra note 1, at 4.
21. SENATE REPORT, supra note 1, at 4.
22. Id. at 10–15, 19–20.
the statements that are allegedly misleading and why they are misleading.\(^\text{25}\)
However, the PSLRA nowhere explains exactly what facts are necessary to satisfy its strong inferences standard.\(^\text{26}\)

The Second Circuit settled on a two-prong test to satisfy the strong inference standard: a strong inference of scienter can be pled either by showing the defendant had "both motive and opportunity to commit fraud" or by alleging facts showing "strong circumstantial evidence of conscious misbehavior or recklessness."\(^\text{27}\) Satisfying either prong alone is sufficient to successfully plead scienter, and therefore any case that is dismissed must fail the motive and opportunity test. While satisfying the second prong without showing a motive is possible, it requires that the plaintiff present stronger circumstantial evidence.\(^\text{28}\) Before the PSLRA was passed, the motive and opportunity test was widely considered the most stringent scienter test.\(^\text{29}\) After the PSLRA was passed, some courts have argued that the test is too lenient, although recent decisions from the Second Circuit evince an intention to ensure that the motive and opportunity test is not too easily met.\(^\text{30}\)

As the Second Circuit applies the test, motives that are possessed by most corporate directors and officers do not satisfy the motive and opportunity test.\(^\text{31}\) For example, the motive and opportunity test would not be satisfied by allegations of a corporate executive’s motive to "maintain the appearance of corporate profitability, or of the success of an investment."\(^\text{32}\) Thus, alleging such motives does not make a finding of scienter more likely.\(^\text{33}\) Allegations of motive also require that "a concrete and personal benefit to the individual defendants resulting from the fraud" is shown.\(^\text{34}\) Opportunity is present if the defendant has a means of receiving the benefits of a fraud, and that fraud is likely to succeed.\(^\text{35}\) For example, key directors and

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25. Id. § 78u-4(b)(1).
26. Tellabs, 551 U.S. at 321–22; see also § 78u-4(b)(2).
28. Kalnit v. Eichler, 264 F.3d 131, 142–43 (2d Cir. 2001). This Note references the Second Circuit’s second prong only as an illustration of a possible test that can be employed. The focus here is on the motive and opportunity test and the benefits it offers over the standards employed in other circuits. While this Note acknowledges that some supplemental test, like the Second Circuit’s second prong, must be employed by courts utilizing the motive and opportunity test, see infra Part III, the second prong is not the only supplemental test a court could use.
29. See infra Section II.A.
30. See infra Section II.B.
31. Kalnit, 264 F.3d at 139.
33. See, e.g., Malin v. XL Capital, Ltd., 312 F. App’x 400, 402 (2d Cir. 2009).
34. Kalnit, 264 F.3d at 139.
officers are considered to have the opportunity to manipulate their company's stock price.36

Most of the circuit courts have rejected the motive and opportunity test in favor of what is termed the "intermediate approach"—a generalized, case-by-case examination—developed after the passage of the PSLRA. This standard is essentially a holistic balancing test.37 It instructs the court to look at the complaint as a whole and determine whether or not it sufficiently alleges facts giving rise to a strong inference of scienter.38 Under this standard, pleading motive and opportunity may sometimes be enough to give rise to a strong inference of scienter, but not always.39 According to courts following the intermediate approach, the PSLRA did not endorse or prohibit any particular method of pleading scienter, so the complaint must be viewed in its entirety.40

The Ninth Circuit's interpretation of the PSLRA pleading standard was the strictest until it was recently abandoned. Its Silicon Graphics approach, employed from 1999 to 2008, required the plaintiff to show "deliberately reckless or conscious misconduct."41 Under Silicon Graphics, pleading motive and opportunity alone was never sufficient to give rise to a strong inference of scienter.42 The standard refused to allow vague allegations to contribute in any way to a finding of scienter.43 The complaint had to "state specific facts indicating no less than a degree of recklessness that strongly suggests actual intent,"44 meaning that without a substantial number of corroborating details, the pleading would be inadequate.45 The Silicon Graphics standard was recently deemed by the Ninth Circuit too harsh in light of the recent Supreme Court decision in Tellabs, Inc. v. Makor Issues & Rights, Ltd.46 The other two approaches are still in use; a substantial circuit split still exists.47

In Tellabs the Supreme Court resolved another circuit split that concerned a different but related aspect of pleading securities law violations.48 In that case, shareholders filed suit against a company president for

37. See infra notes 181–189.
40. E.g., Ottmann, 353 F.3d at 345.
41. In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 974 (9th Cir. 1999).
42. Id. at 979.
43. See, e.g., S. Ferry L.P. No. 2 v. Killinger, 542 F.3d 776, 782–84 (9th Cir. 2008).
44. Id. at 782 (citing Silicon Graphics, 183 F.3d at 979).
45. Id. at 783.
46. See infra notes 175–178 and accompanying text.
47. It is not clear what the current standard is in the Ninth Circuit, now that Silicon Graphics is not longer valid. However, the issue is beyond the scope of this Note.
48. See 551 U.S. 308, 320–22 (2007); see also infra Part III.
allegedly inflating his company’s stock price. While examining whether scienter had been adequately pled, the Seventh Circuit asked only if a reasonable factfinder could infer that the defendant acted with the required state of mind from the facts alleged. The Supreme Court granted certiorari to address whether other possible inferences had to be considered when deciding whether a pleading sufficiently alleges scienter, and determined that such competing inferences must be taken into account. While certiorari was not granted to resolve the circuit split regarding the proper scienter standard, the Third Circuit still decided that Tellabs required it to abandon the motive and opportunity test. The Second Circuit, however, still applies the test.

II. The PSLRA’s Passage Does Not Prevent Motive and Opportunity Pleading

Before the Supreme Court’s decision in Tellabs, nothing in the PSLRA prohibited pleading motive and opportunity to satisfy the requirement of scienter. Rather, pre-Tellabs jurisprudence produced no clear answer regarding whether pleading motive and opportunity satisfied the scienter pleading requirement of the PSLRA. In interpreting the act, circuits were split concerning whether and to what extent the motive and opportunity test was sufficient. Section II.A examines the legislative history, finding no evidence that the PSLRA was intended to eliminate the motive and opportunity test. Section II.B argues that the motive and opportunity test is not inherently too weak to meet the elevated PSLRA standard, particularly in the more stringent form recently applied by the Second Circuit. Finally, Section II.C argues that the legislative history surrounding the rejection of the Specter Amendment, which would have codified the Second Circuit’s two-prong test, does not demonstrate congressional intent to ban the motive and opportunity test.

A. The PSLRA Does Not Eliminate Motive and Opportunity Pleading by Raising the National Pleading Standard

While the PSLRA was designed to raise the pleading standard for scienter, its heightened requirements do not prohibit a motive and opportunity test. Arguments advanced by scholars that Congress intended to create a

49. [Id. at 315-16.]
50. [Id. at 314.]
51. [Id.]
52. [Institutional Investors Grp. v. Avaya, Inc., 564 F.3d 242, 276 (3d Cir. 2009).]
53. [E.g., ECA & Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co., 553 F.3d 187, 201 (2d Cir. 2009).]
54. [SENATE REPORT, supra note 1, at 15.]
pleading standard so high that no pre-PSLRA test is capable of satisfying it \(^5\) are not supported by the text or legislative history. The text of the PSLRA establishes a pleading standard that requires the plaintiff to plead "facts giving rise to a strong inference that the defendant acted with the required state of mind." \(^5\) The requirement to plead facts giving rise to a "strong inference" of the necessary state of mind was already the standard utilized by the Second Circuit before the PSLRA. \(^5\) Indeed, Congress chose to model its pleading standard on that of the Second Circuit, rather than adopt a new pleading standard. \(^5\)

Congress did not fully adopt the Second Circuit's standard with the PSLRA, because Congress did not codify the Second Circuit's caselaw into the act. Nevertheless, Congress did not intend to prevent courts from using the motive and opportunity test. Although the legislative history makes clear that the statute did not codify the caselaw of the Second Circuit, it does mention that other circuits may find the body of law within the Second Circuit "instructive." \(^5\) While the act was not intended to specifically promote the Second Circuit's test, if the PSLRA was written to eliminate the test employed by the Second Circuit, Congress would not have referred other courts to learn from the Second Circuit's cases. Thus, the text of the PSLRA does not evince congressional intent to eliminate the motive and opportunity test.

Legislative history does not indicate Congress concluded the Second Circuit's pleading standard was not strict enough to meet the policy goals of the PSLRA. Some circuit courts analyzing the PSLRA's pleading requirement have started from the premise that the motive and opportunity test is a low standard to satisfy and therefore is inconsistent with the goal of creating a stringent pleading requirement. \(^6\) But assuming that the motive and opportunity standard is inherently low is inaccurate, and is contrary to the statements made by courts and Congress at the time the PSLRA was drafted.

Before the passage of the PSLRA, the Second Circuit's standard was recognized, even in Congress's discussions leading to the PSLRA's enactment, as the most stringent pleading requirement in the country. \(^6\) Although

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57. Novak, 216 F.3d at 310.
58. SENATE REPORT, supra note 1, at 15 ("[T]he Committee chose a uniform standard modeled upon the pleading standard of the Second Circuit.").
59. Id.
60. See, e.g., Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1285–86 (11th Cir. 1999) (holding that the plain meaning of the statute raised the pleading standard beyond the motive and opportunity test).
61. SENATE REPORT, supra note 1, at 15 ("Regarded as the most stringent pleading standard, the Second Circuit requires that the plaintiff plead facts that give rise to a 'strong inference' of defendant's fraudulent intent.") (footnote omitted); cf. In re Comshare, Inc. Sec. Litig., 183 F.3d 542,
Congress selected a standard based on the Second Circuit's, the PSLRA's statutory language "strong inference" alone did not fully explain how the standard should function. Therefore, Congress directed other courts to the Second Circuit's caselaw to illustrate how strict the standard was. Under the Second Circuit's law, one way to define the threshold of scienter is the motive and opportunity test.\textsuperscript{6} If Congress felt the motive and opportunity test applied the standard too leniently, it would either not refer courts to the Second Circuit's precedent or would specifically exclude cases where the pleading requirement was satisfied under the motive and opportunity analysis. As Congress did neither, its enactment should be interpreted to mean that motive and opportunity was sufficiently strict to meet the PSLRA's policy goals.

B. A Strong Inference of Scienter Is Required

After the PSLRA was enacted, some circuit courts recognized that the motive and opportunity test was not necessarily too lenient to satisfy the PSLRA's strict standard requirement. These circuit courts, all of which have adopted the intermediate approach, noted that there might be certain cases in which motive and opportunity will be sufficient to plead scienter.\textsuperscript{63} These courts argue, however, that not every set of facts in which a motive and an opportunity are present gives rise to a "strong inference of scienter."\textsuperscript{64} Using this reasoning, these courts concluded that while motive and opportunity can contribute to an allegation of scienter, motive and opportunity is not dispositive for a finding of a strong inference.\textsuperscript{65}

A stringent implementation of the motive and opportunity test, which is only satisfied where the facts demonstrating motive and opportunity are sufficient to give rise to a "strong inference of scienter," would resolve the concerns voiced by these courts. Implicitly, these circuit courts have assumed that the motive and opportunity test, as administered by the Second Circuit, can be satisfied in situations where the facts do not give rise to a strong inference of scienter.\textsuperscript{66}

\textsuperscript{549} (6th Cir. 1999) (stating that before the PSLRA, the Second Circuit employed the most stringent test, requiring facts showing either motive and opportunity or conscious or reckless behavior).

\textsuperscript{62} There is another way to test for scienter in the Second Circuit that, while not the focus of this Note, is discussed in more detail later. See infra notes 135--136 and accompanying text.

\textsuperscript{63} See, e.g., Nathenson v. Zonagen Inc., 267 F.3d 400, 412 (5th Cir. 2001); In re Comshare, 183 F.3d at 551; Greebel v. FTP Software, Inc., 194 F.3d 185, 196--97 (1st Cir. 1999).

\textsuperscript{64} See, e.g., In re Comshare, 183 F.3d at 551 ("[T]hose courts addressing motive and opportunity in Securities Act cases have held only that facts showing a motive and opportunity may adequately allege scienter, not that the existence of motive and opportunity may support, as scienter itself, liability . . . .").

\textsuperscript{65} E.g., Greebel, 194 F.3d at 197.

\textsuperscript{66} See, e.g., City of Phila. v. Fleming Cos., 264 F.3d 1245, 1262 (10th Cir. 2001) ("[M]otive and opportunity may be important . . . but are typically not sufficient in themselves to establish a 'strong inference' of scienter."); In re Comshare, 183 F.3d at 551 (stating that motive and opportunity may occasionally be sufficient to show scienter, but not always); Greebel, 194 F.3d at 197 (quoting In re Comshare).
While there may have once been a more lenient standard in the Second Circuit where scienter could be sufficiently alleged without facts demonstrating a strong inference, the present standard employed for motive and opportunity is more stringent. Before the PSLRA, the Second Circuit struggled to ensure that the motives captured by the motive and opportunity test would not be so sweeping that meritless lawsuits would satisfy the standard. The court discussed the need for balancing the goal of catching fraud against preventing undeserved settlements from being extracted from corporations, and seemed to have come down on the side of reducing the number of undeserved settlements at the cost of allowing more fraud to escape judicial scrutiny. The Second Circuit noted that "[w]hile some fraud may go unpunished as a result of Rule 9(b)’s heightened pleading standard, we recently acknowledged that we cannot eliminate all opportunities for ‘unremedied fraud’ without creating opportunities for ‘undeserved settlements.’"

After the PSLRA was enacted, the Second Circuit’s motive and opportunity standard entered a period of fluctuation. Scholars recognize that different panels of the Second Circuit applied inconsistent standards for evaluating whether a plaintiff adequately pled motive and opportunity. This split began in 1999 with Press v. Chemical Investment Services Corp. In Press, a man bought a Treasury bill through a company but was not told that the funds would only be available to him four days after the bill matured; he believed he would have access to them on the bill’s maturity date. The court found motive and opportunity for the misrepresentation adequately pled: the company had a motive to keep his money so it could use the funds after the Treasury bill matured and had an opportunity since the money was in its possession. However, the court later held that the company’s representation that the funds would be available the day the bill matured was immaterial. The focus of the court in Press was on creating a lenient standard when considering intent to ensure that plaintiffs did not face overly burdensome hurdles in bringing private securities law actions.

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standard cannot be very strict if allegations of immaterial facts can satisfy the requirements.\textsuperscript{77}

In contrast, Novak v. Kasaks,\textsuperscript{78} decided only one year later, employed a stricter motive and opportunity test. After categorizing the Press court’s comments about the PSLRA’s pleading standard as dicta,\textsuperscript{79} Novak defined motive and opportunity: “Motive would entail concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged. Opportunity would entail the means and likely prospect of achieving concrete benefits by the means alleged.”\textsuperscript{80} Notably, the court disqualified motives that almost all corporate insiders possess from satisfying the motive and opportunity test, such as a desire to have their company appear profitable.\textsuperscript{81} Here the focus was not on creating a lenient standard for plaintiffs, as in Press, but on confining motive and opportunity pleading to make sure it was not too easily satisfied.

The Second Circuit oscillated between these two standards,\textsuperscript{82} partly because one panel of the Second Circuit may not overrule a decision by another panel unless an intervening Supreme Court decision affects the prior decision.\textsuperscript{83} The key difference between the two standards is in the goal the court sought to achieve: whereas the Press court strove to create a lenient standard for plaintiffs, Novak worked to confine motive and opportunity pleading to make sure it was not overly inclusive and too easily satisfied. Since no such Supreme Court decision occurred between Press and Novak, the Second Circuit was deciding cases with two different, yet precedentially valid, means of conducting the motive and opportunity test. As a result, some decisions, following the Novak line, strongly stated that generalized allegations of motive were insufficient, while others, following the Press line, tempered that concept with the idea that motive and opportunity standard should not be overly harsh.\textsuperscript{84}


\textsuperscript{78} 216 F.3d 300 (2d Cir. 2000).

\textsuperscript{79} \textit{Id.} at 309–10.

\textsuperscript{80} \textit{Id.} at 307 (quoting Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1130 (2d Cir. 1994)).

\textsuperscript{81} \textit{Id.} at 307–08.

\textsuperscript{82} See Grundfest & Pritchard, supra note 77, at 672–73.

\textsuperscript{83} See United States v. Falcone, 257 F.3d 226, 227 n.1 (2d Cir. 2001) (quoting Finkel v. Stratton Corp., 962 F.2d 169, 174–75 (2d Cir. 1992)).

\textsuperscript{84} Compare Rothman v. Gregor, 220 F.3d 81, 90 (2d Cir. 2000) (“[W]hat is required when endeavoring to plead facts supporting a strong inference of scienter by showing motive and opportunity is not a bare invocation of magic words such as ‘motive and opportunity’ but an allegation of facts showing the type of particular circumstances that our case law has recognized will render motive and opportunity probative of a strong inference of scienter.”) (citing Novak v. Kasaks, 216 F.3d 300, 311 (2d Cir. 2000)), with Ganino v. Citizens Utils. Co., 228 F.3d 154, 169 (2d Cir. 2000) (“Although speculation and conclusory allegations will not suffice, neither do we require ‘great specificity’ provided the plaintiff alleges enough facts to support a strong inference of fraudulent intent.”) (quoting Stevelman v. Alias Research Inc., 174 F.3d 79, 84 (2d Cir. 1999)).
Further evidence of the internal conflict within the Second Circuit over the stricter or more lenient standard is shown by the precedent cited in two of the cases decided during these oscillations, Rothman v. Gregor and Ganino v. Citizens Utilities, both decided in 2000. Rothman, the strict standard case, repeatedly cited Novak but never cited Press, and Ganino, the lenient standard case, repeatedly cited Press but never Novak.

Eventually, Novak's more stringent version emerged as the dominant standard in the Second Circuit after Kalnit v. Eichler. Kalnit reaffirmed and reduced the scope of motive and opportunity pleading by examining the trends in Novak's survey of precedent and in other circuits. The court determined that allegations that were too general or conclusory were insufficient to establish a strong inference of scienter, and at no point referenced the view from Press that the standard must be lenient when considering the intent of corporations. Since 2001, the Second Circuit stopped relying on the Press line of cases entirely when applying the motive and opportunity test, in favor of the Novak and Kalnit line. The decisions in Novak and Kalnit have repeatedly been cited for their formulation of the requirements necessary to satisfy the motive and opportunity test. While the Second Circuit has not explicitly overruled Press and its progeny, the fact that it has discontinued use of the lenient standard and consistently utilized the more stringent one indicates the court has chosen to follow that stricter standard.

Under this stricter implementation of the motive and opportunity test, allegations of motive and opportunity that do not give rise to a strong inference of scienter are blocked by the restrictions described in Novak and Kalnit.

Examining the Second Circuit caselaw in 1999, the Sixth Circuit recognized that pleadings should only pass the motive and opportunity test when they allege sufficient facts to give rise to a strong inference, but then went

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85. Rothman, 220 F.3d at 81.
86. Ganino, 228 F.3d at 154.
87. Rothman, 220 F.3d at 81.
88. Ganino, 228 F.3d at 154.
89. 264 F.3d 131 (2d Cir. 2001).
90. Id. at 139-42.
91. See id.
92. A survey of the Second Circuit's opinions assessing motive and opportunity reveals that the Second Circuit did not issue an opinion citing Press for its description of standards for the motive and opportunity test since Kalnit was decided in 2001. The author examined all Second Circuit decisions citing Press.
on to reason that the test was invalid because it could be satisfied absent such facts. That case, however, establishing the holistic balancing test that became known as the intermediate approach, was decided when the Second Circuit's standard was in flux. Thus, the problems that led the Sixth Circuit to declare the motive and opportunity test invalid have since been resolved with the dominance of the stricter motive and opportunity standard.

The restrictions in Novak and Kalnit have the effect of limiting the motive and opportunity test so it is only satisfied in those situations that the Sixth Circuit, and other courts using the intermediate approach, would consider appropriate. In a post-Kalnit decision, the Eighth Circuit, one of the courts that adopted the intermediate approach, noted that the Second Circuit's approach looks for facts that strongly suggest wrongdoing, just like the intermediate approach. Thus the fear that induced courts to subscribe to the intermediate approach—that the motive and opportunity test will let cases survive on pleadings that do not establish a strong inference of scienter—is unfounded.

C. The Specter Amendment

After the enactment of the PSLRA, the Ninth Circuit advanced the theory that the legislative history of the Specter Amendment demonstrated that the PSLRA eliminated the motive and opportunity test. The amendment would have codified the Second Circuit's two-part test into the PSLRA, but it was deleted by the conference committee. The Ninth Circuit interpreted this as an implicit rejection by Congress of the Second Circuit's test. The Ninth Circuit further supported its theory with the fact that President Clinton vetoed the PSLRA with a statement that the bill raised the pleading standard above the Second Circuit, and Congress overrode his veto. However, an examination of the legislative history demonstrates that neither the committee notes nor the circumstances surrounding the veto override invalidate the motive and opportunity test.

95. In re Comshare, Inc. Sec. Litig., 183 F.3d 542, 551 (6th Cir. 1999).
96. The Press decision, announcing the less stringent standard, came out in February 1999. Press v. Chem. Inv. Servs. Corp., 166 F.3d 529, 538 (2d Cir. 1999). In re Comshare was decided in July 1999. 183 F.3d at 551. Courts around the country cited to In re Comshare when deciding to adopt the intermediate approach themselves.
98. Fla. Slate Bd. of Admin. v. Green Tree Fin. Corp., 270 F.3d 645, 659 (8th Cir. 2001). While the standards may be similar in this respect, there are still important differences in the effects of applying each. See infra Part IV.
99. Green Tree Fin. Corp., 270 F.3d at 659 ("Taken as a whole, the cases simply do not substantiate the fear that courts applying the motive-and-opportunity formulation will permit pleadings to go forward without facts strongly suggesting wrongdoing.").
100. Grundfest & Pritchard, supra note 77, at 671–72.
101. In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 978 (9th Cir. 1999). The Supreme Court has previously interpreted statutes using the presumption that when Congress includes limiting language in a draft of a bill, and then later removes that language, those limitations are not intended to be part of the final bill. Russello v. United States, 464 U.S. 16, 23–24 (1983).
1. The Conference Committee Notes

The Ninth Circuit supported its view that the conference committee’s re-

dection of the Specter Amendment was a rejection of the motive and

portunity test by looking to the conference committee’s notes. These

otes state, “Because the Conference Committee intends to strengthen exis-
ting pleading requirements, it does not intend to codify the Second Circuit’s

case law interpreting this pleading standard.” The footnote to this sen-
tence, footnote twenty-three reads, “For this reason, the Conference Report
chose not to include in the pleading standard certain language relating to
motive, opportunity, or recklessness.”

However, there are other possible interpretations of the history besides
the one advanced by the Ninth Circuit. Congress may have rejected the
Specter Amendment to avoid binding the courts to a narrowly defined stan-
dard, a view expressed by Senator D’Amato, a vocal member of the
conference committee. This would allow courts to choose exactly how to
evaluate a “strong inference” of scienter so that perhaps they could improve
on the standard. Rejection of the Specter Amendment may have also been
much more political than substantive. Passage of the PSLRA required broad
support in order to override the presidential veto, and it is possible that the
Specter Amendment could have upset the political balance needed in order
to assure the passage of the bill.

The meaning of the committee’s notes is also ambiguous. The footnote
quoted above could mean that the language about motive, opportunity, and
recklessness was not included either because the committee wanted to raise
the pleading standard above the Second Circuit’s standard or simply because
it did not intend to codify the Second Circuit’s caselaw. The conference
committee could not have intended the former because the PSLRA is based
on the Second Circuit’s standard, and the standard is reflected in the case-
law. Congress would not have directed courts to look at the Second Circuit
standard if it intended to create a higher standard. Furthermore, Congress
explicitly said that the PSLRA does not create a “new and untested pleading standard.”

102. Grundfest & Pritchard, supra note 77, at 654.


105. Eugene P. Caioia, Comment, Retroactive Legislative History: Scienter Under the Uni-

106. See id. The political balancing for this bill was particularly precarious; if two senators
had switched sides the override would have failed.

107. Grundfest & Pritchard, supra note 77, at 656.

108. Id.; see supra notes 56–59 and accompanying text.

109. Senate Report, supra note 1, at 15.
2. The Congressional Override of President Clinton’s Veto

The Ninth Circuit finds additional support for its view that Congress rejected the Second Circuit’s test in the override of President Clinton’s veto. President Clinton said he vetoed the PSLRA because he would not endorse a higher standard than the Second Circuit’s, but Congress chose to override that veto and pass the PSLRA anyway.\(^\text{110}\) If the president vetoed the bill because he felt the pleading standard was higher than the Second Circuit’s and Congress overrode the veto (rather than modify the law), this might show that Congress intended the bill to impose the higher standard. The discussions in Congress after the president’s veto run contrary to the Ninth Circuit’s interpretation, however. President Clinton’s veto message focused on how the wording of the PSLRA, supplemented by the conference committee notes described above, indicated a pleading standard higher than the Second Circuit’s.\(^\text{111}\) The committee members distanced themselves from the president’s interpretation in discussions on the Senate floor, with Senator Dodd arguing that the pleading provision met the Second Circuit’s standard and that the Specter Amendment was omitted because it did not really follow that standard.\(^\text{112}\) These statements from the committee members refute the Ninth Circuit’s interpretation of the legislative history as prohibiting the use of the motive and opportunity test. Other circuits have likewise examined and rejected the Ninth Circuit’s interpretation as “giv[ing] the deletion of the Specter amendment a more pointed reading than it will bear.”\(^\text{113}\)

Thus, before the Supreme Court decided \textit{Tellabs}, the motive and opportunity test was still applicable as a means of satisfying scienter under the PSLRA. As pleading motive and opportunity was part of the Second Circuit’s pre-PSLRA standard—which was the strictest in the country and upon which the PSLRA was based—the PSLRA’s new heightened pleading requirement did not eliminate the test. Now that the Second Circuit has settled on the more stringent interpretation advanced in \textit{Novak} and \textit{Kalnit}, there is no danger of pleadings passing the motive and opportunity test without giving rise to a “strong inference of scienter” as the circuits following the intermediate approach feared. Finally, despite the Ninth Circuit’s interpretation,\(^\text{114}\) the legislative history surrounding the Specter Amendment does not prohibit use of the test.

\begin{itemize}
\item \textbf{III. The Motive and Opportunity Test Is Not Prohibited by \textit{Tellabs}}
\end{itemize}

The Supreme Court’s most recent major ruling discussing the PSLRA’s pleading requirements does not prohibit the use of the motive and opportu-
nity test. The 2007 decision in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*\(^{115}\) addressed and clarified the pleading standard for scienter under the PSLRA. In *Tellabs*, shareholders brought suit against the president of a manufacturing company for allegedly inflating his company’s stock price by falsely informing investors that demand for the company’s products was strong.\(^{116}\) The district court found that scienter had not been adequately pled, but the Seventh Circuit reversed.\(^{117}\)

Vacating the Seventh Circuit’s decision and declaring its standard inappropriate, the Supreme Court laid out a three-step process for determining when pleadings gave rise to a “‘strong inference’ of scienter”: (1) take all facts alleged in the complaint to be true; (2) rather than focusing on only an individual allegation, consider whether all the facts alleged, taken together, give rise to a strong inference of scienter; and (3) compare opposing inferences and other possible explanations to ensure that a reasonable person would find the inference of scienter “cogent and at least as compelling as any opposing inference one could draw from the facts alleged.”\(^{118}\)

The Supreme Court’s decision in *Tellabs* was not meant to address the circuit split on whether the motive and opportunity test was a viable means of alleging scienter. Certiorari was granted only to determine whether courts were required to consider competing inferences that could arise from the same set of facts when determining whether a complaint adequately alleges a strong inference of scienter.\(^{119}\) Therefore, any part of the decision discussing the motive and opportunity test is dictum. Yet, Supreme Court dictum itself is still persuasive precedent for all lower courts,\(^{120}\) so if the Supreme Court, even in dictum, denigrated the motive and opportunity test, it would be a substantial blow to the test’s legitimacy.

Despite the limitations on the question the Supreme Court sought to answer, the Third Circuit concluded that *Tellabs* prohibited the use of motive and opportunity pleading, either explicitly or by implication.\(^{121}\) Section III.A

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116. *Id.* at 315–16.
117. *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588, 605 (7th Cir. 2006). In reversing the district court, the Seventh Circuit determined that rather than permitting complaints to survive when the most plausible of competing inferences is that the defendant acted with the requisite scienter, a complaint should survive when it alleges facts from which a reasonable person could infer the defendant acted with the necessary scienter. *Id.* at 602.
119. *Id.* at 317–18 (“We granted certiorari to resolve the disagreement among the Circuits on whether, and to what extent, a court must consider competing inferences in determining whether a securities fraud complaint gives rise to a ‘strong inference’ of scienter.”).
120. *E.g.*, Brannigan v. Bateman (*In re Bateman*), 515 F.3d 272, 282 (4th Cir. 2008) (citing Myers v. Loudoun County Pub. Schs., 418 F.3d 395, 406 (4th Cir. 2005)); Gaylor v. United States 74 F.3d 214, 217 (10th Cir. 1996) (“[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court’s outright holdings . . . .”); McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991) (“[F]ederal appellate courts are bound by the Supreme Court’s considered dicta almost as firmly as by the Court’s outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement.”).
examines the language of the decision, concluding that the Supreme Court
does not specifically eliminate motive and opportunity pleading. Section
III.B argues that requiring courts to examine the complaint as a whole is not
contrary to use of the motive and opportunity test. Section III.C discusses
the requirement that courts take competing inferences into account when
assessing the adequacy of allegations of scienter and concludes that it does
not imply that use of the motive and opportunity test is prohibited.

A. Motive and Opportunity Can Still Be Sufficient Even Though
a Lack of Motive Is Not Fatal to a Complaint

The wording of the *Tellabs* decision demonstrates that the Supreme
Court did not adopt the Seventh Circuit’s position that allegations of motive
and opportunity are insufficient. Instead, the Court said that a lack of motive
allegations is not necessarily fatal, nor is a motive allegation always suffi-
cient.122 Despite this, the language of the *Tellabs* decision convinced the
Third Circuit to abandon the motive and opportunity test and join other cir-
cuits in using the intermediate approach.123

Differences between the language used by the Supreme Court and the
Seventh Circuit indicate that the *Tellabs* decision did not endorse the Sev-
enth Circuit’s position that motive and opportunity are insufficient to
demonstrate scienter. In refusing to utilize the motive and opportunity test,
the Seventh Circuit examined the pleading requirements under the PSLRA:

“Congress chose neither to adopt nor reject particular methods of pleading
scienter . . . .”

. . . .

. . . [T]he best approach is for courts to examine all of the allegations in the
complaint and then to decide whether collectively they establish such an
inference. Motive and opportunity may be useful indicators, but nowhere
in the statute does it say that they are either necessary or sufficient.124

In decreeing the Supreme Court’s agreement with this proposition,125 the
Third Circuit relied on the statement, “[W]e agree with the Seventh Circuit
that the absence of a motive allegation is not fatal. . . . [A]llegations must be
considered collectively; the significance that can be ascribed to an allegation
of motive, or lack thereof, depends on the entirety of the complaint.”126

122. *See supra* notes 93–99 and accompanying text.

123. *See Avaya*, 564 F.3d at 277 (noting agreement with the Seventh Circuit’s approach); 
*supra* notes 63–65 and accompanying text (discussing the intermediate approach and how those
courts were concerned motive and opportunity might sometimes, but not always, establish a strong
inference of scienter).

*Ottmann v. Hanger Orthopedic Grp.*, 353 F.3d 338, 345 (4th Cir. 2003)).

125. *Avaya*, 564 F.3d at 276–77.

Issues & Rights, Ltd.*, 437 F.3d at 601).
Comparing the language of the Seventh Circuit’s decision with the Supreme Court’s shows that the Supreme Court did not fully endorse the Seventh Circuit’s declaration that the motive and opportunity test is impermissible. First, while the Seventh Circuit specifically says that “motive and opportunity” are neither necessary nor sufficient, the Supreme Court never discusses motive and opportunity. Instead, the Supreme Court limits its discussion to motive alone. If the Supreme Court intended to specifically eliminate the motive and opportunity test, it would have used the phrase “motive and opportunity,” as the Seventh Circuit did. The Supreme Court only said motive is not always necessary, and that the significance of motive depends on the rest of the complaint. The concept that the significance of a motive depends on the entirety of the complaint is consistent with the Second Circuit’s motive and opportunity jurisprudence.

Second, the Seventh Circuit stated that the PSLRA does not say motive and opportunity “are either necessary or sufficient.” Declaring the combination insufficient would destroy the motive and opportunity test. However, the PSLRA’s failure to state that it is either necessary or sufficient does not require that conclusion. Although the Seventh Circuit attempted to declare the motive and opportunity standard invalid, the Supreme Court’s Tellabs opinion did not do so.

The requirement imposed by Tellabs that the absence of allegations of motive is not fatal does not prevent utilization of the motive and opportunity test; it simply means courts cannot use it as their exclusive test for scienter. The Supreme Court agreed that a complaint could survive dismissal

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127. Tellabs, 551 U.S. at 325.
128. Id.
129. Id.
130. See infra notes 141-148 and accompanying text.
131. Makor Issues & Rights, Ltd., 437 F.3d at 601 (emphasis added).
132. The legal citations used by the Supreme Court further support this interpretation. The language of the Seventh Circuit’s decision directly supports the proposition that the motive and opportunity test is not sufficient to allege scienter. Yet, when agreeing with the Seventh Circuit, the Supreme Court cited to the Seventh Circuit’s decision using the introductory signal “see.” Tellabs, 551 U.S. at 325 (citing Makor Issues & Rights, Ltd., 437 F.3d at 601). The Bluebook, describing the guidelines for use of legal citations, states that “see” is used “when the proposition is not directly stated by the cited authority but obviously follows from it . . . .” The Bluebook: A Uniform System of Citation R. 1.2(a), at 54 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010). If the Court wanted to agree that the motive and opportunity test is inapplicable after the PSLRA, it would have used no signal, which is appropriate when the cited authority “directly states the proposition.” The introductory signal “see” was used here, because one can infer that if the Seventh Circuit felt both motive and opportunity could only be evaluated when looking at the whole complaint, then certainly motive alone, one of the two aspects of that standard, could only be evaluated by viewing it in light of the whole complaint. See id. Thus, the Supreme Court, while expressing partial agreement with the Seventh Circuit, adopted only one piece of that court’s position.
133. Additionally, even though the Supreme Court declared that motive is not necessary for scienter to be adequately pled, courts do still consider motive a critical component in assessing whether a complaint adequately alleges scienter, and courts do not allow complaints without economically rational motives to survive. See infra notes 213–216 and accompanying text. Thus, one would not expect too many complaints to fail motive but still successfully plead scienter, even though such complaints may occasionally exist.
even though it fails to allege motive.\textsuperscript{134} The motive and opportunity test always requires a showing of motive, and therefore using that test as a court’s only method of determining scienter would run afoul of the express language in \textit{Tellabs}. However, courts can avoid this problem by allowing a supplemental test for determining scienter, which can be satisfied without allegations of motive. The Second Circuit has long employed such a two-pronged approach, allowing that “[t]he requisite ‘strong inference’ of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.”\textsuperscript{135} The courts recognize that absent a showing of motive, the second prong can still be satisfied if the plaintiff can show conscious misbehavior or recklessness through circumstantial evidence.\textsuperscript{136} Thus, a multipronged approach will allow courts to use the motive and opportunity test without contradicting the decree from \textit{Tellabs} that lack of motive allegations is not fatal to a complaint.

\textbf{B. The Complaint Is Examined as a Whole}

Requiring that motive be considered in the context of the entire complaint to determine whether scienter has been sufficiently pled is consistent with the motive and opportunity test as implemented by the Second Circuit. Courts and commentators have agreed that “bare allegations of motive and opportunity” will not satisfy the PSLRA pleading requirement.\textsuperscript{137} The Second Circuit also does not allow bare allegations of motive and opportunity to suffice.\textsuperscript{138} This may have been more of a concern prior to \textit{Kalnit} when the Second Circuit still vacillated between more and less stringent variants of the motive and opportunity test,\textsuperscript{139} but the more stringent implementation of

\begin{footnotesize}
\begin{enumerate}
\item \textit{Tellabs}, 551 U.S. at 325 (citing Makor Issues & Rights, Ltd., 437 F.3d at 601).
\item Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994). This Note does not argue that the second prong must be maintained when utilizing the motive and opportunity test. Other courts might be able to design a better supplemental test that does not require motive. However, as the Second Circuit’s second prong is a possible supplemental test, it provides an example of how such a supplemental test could be designed. However this Note is only focusing on the benefits provided by the motive and opportunity test itself.
\item Kalnit v. Eichler, 264 F.3d 131, 142 (2d Cir. 2001) (citing Beck v. Mfrs. Hanover Trust Co., 820 F.2d 46, 50 (2d Cir. 1987)).
\item \textit{See, e.g.,} Rosenzweig v. Azurix Corp., 332 F.3d 854, 867 (5th Cir. 2003) (“[B]are allegations of motive and opportunity will not suffice to demonstrate scienter . . . .”); Nicole M. Briski, Comment, \textit{Pleading Scienter Under the Private Securities Litigation Reform Act of 1995: Did Congress Eliminate Recklessness, Motive, and Opportunity?}, 32 Loy. U. Chi. L.J. 155, 201 (advocating that the Supreme Court adopt the standard that bare allegations of motive and opportunity do not satisfy scienter).
\item James D. Cox et al., \textit{Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analysis}, 2009 Wis. L. Rev. 421, 437 (noting various limitations the Second Circuit has placed on what motives will satisfy the motive and opportunity test); \textit{see also} Novak v. Kasaks, 216 F.3d 300, 307–08 (2d Cir. 2000).
\item \textit{See supra} notes 71–88 and accompanying text.
\end{enumerate}
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the test used since Kalnit is not satisfied by motives that almost all corporate insiders possess.\textsuperscript{140}

The manner in which the more stringent standard is implemented demonstrates that the motives are assessed in light of the entirety of the complaint. Whether a motive is so general that all corporate insiders are likely to possess it or is specific enough to satisfy the motive and opportunity test depends on the entirety of the facts in the case.\textsuperscript{141} Comparing how the Second Circuit handled two cases that allege the same motive but resulted in opposite holdings illustrates this evaluative process. In \textit{ECA \& Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.}, the allegations were that the company misstated its dealings to artificially inflate its stock price and thus more cheaply acquire another company.\textsuperscript{142} However, the motive was found insufficient because the misstatements had been occurring for eight years before the acquisition and did not stop until years afterwards, indicating that the inflation was unrelated to the purchase.\textsuperscript{143} In \textit{Rothman v. Gregor}, the allegations were again that a company misstated its dealings to artificially inflate its stock price and thus more cheaply acquire another company.\textsuperscript{144} However, here the court found that the plaintiff had sufficiently alleged motive where the company refused to expense royalties—which increased its stock price—and then acquired a company with some cash and 700,000 shares of stock.\textsuperscript{145}

Since it is possible for the same motive allegation in two different factual situations to result in different rulings, it is clear that the Second Circuit looks beyond the “bare allegations” of motive and opportunity to make sure the facts alleged give rise to a strong inference of scienter.\textsuperscript{146} Thus, the Supreme Court’s declaration that “the significance that can be ascribed to an allegation of motive, or lack thereof, depends on the entirety of the complaint”\textsuperscript{147} is in full accord with the Second Circuit’s implementation of the motive and opportunity test.\textsuperscript{148} Rather than eliminating the motive and opportunity test as insufficient, the Supreme Court’s \textit{Tellabs} decision merely agreed with the Second Circuit’s position that not all allegations of motive are enough to satisfy that aspect of the test.

\begin{itemize}
\item \textsuperscript{140} See supra\textsuperscript{ notes 80–99 and accompanying text.}
\item \textsuperscript{141} Compare \textit{ECA \& Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co.}, 553 F.3d 187, 201 (2d Cir. 2009), with \textit{Rothman v. Gregor}, 220 F.3d 81, 93–94 (2d Cir. 2000). Specificity itself does not satisfy the motive and opportunity test, but a complaint is viewed in context. Some motives will seem generally applicable when taken out of context but seem clear evidence of scienter in a particular situation. See infra\textsuperscript{ notes 142–148 and accompanying text.}
\item \textsuperscript{142} \textit{ECA}, 553 F.3d at 201.
\item \textsuperscript{143} \textit{Id.}
\item \textsuperscript{144} \textit{Rothman}, 220 F.3d at 93.
\item \textsuperscript{145} \textit{Id.}
\item \textsuperscript{146} See supra\textsuperscript{ note 142–145 and accompanying text.}
\item \textsuperscript{147} \textit{Tellabs, Inc. v. Makor Issues \& Rights, Ltd.}, 551 U.S. 308, 325 (2007).
\item \textsuperscript{148} See \textit{ECA}, 553 F.3d at 201.
\end{itemize}
C. Competing Inferences

The motive and opportunity test is capable of weighing competing inferences as required by Tellabs. In Institutional Investors Group v. Avaya, Inc., the Third Circuit did not rely only on the language from Tellabs quoted in Section III.A in determining that the motive and opportunity test was no longer viable, but also reasoned that the requirement that culpable and nonculpable inferences be weighed was incompatible with the motive and opportunity test. This argument from Avaya consists of two parts: (1) merely because a situation exists where motive and opportunity are present, it does not follow that the most likely outcome of the situation is a securities violation; and (2) if it is not true that the most likely outcome of the presence of motive is always a violation, then there is no reason to separate out motive and opportunity with a distinct test. The Third Circuit reasoned that there are situations where a motive and opportunity to make misleading statements exists, but the actor nevertheless chooses not to do so. Since culpable inferences need to be weighed against nonculpable inferences, if people do not make misleading statements every time they have the motive and opportunity to do so, one should not infer scienter just from motive and opportunity.

The fact that certain types of motives are insufficient to satisfy the motive and opportunity test satisfies the Third Circuit’s concern by filtering out nonculpable actors. Restricting the types of motives that can apply and the situations in which certain motives do apply, the motive and opportunity test screens out nonculpable actors. This restriction also allows the motive and opportunity test to take account of competing inferences. The more general motives applicable to most corporate insiders, such as helping the corporation appear profitable or an executive’s keeping his position in the corporation, are eliminated, because the limitations on motives apply to situations where courts have determined that the culpable inferences are not at least as compelling as the nonculpable inferences. For example, when all that is alleged regarding an executive’s motive for inflating stock price or improving corporate performance is to receive more compensation, that motive is one that applies to every executive in the country. Assuming that executives are more often working to improve their company rather than to commit fraud or misrepresentation, it is more likely that the motives and opportunities present in these situations lead to a nonculpable inference than

149. See supra notes 124–126 and accompanying text.
151. Id.
152. Id.
153. Id.
155. See ECA & Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co., 553 F.3d 187, 201 (2d Cir. 2009).
156. Id.
a culpable one. As a result, plaintiffs in these situations would not pass the motive and opportunity test because the inference of scienter is not "at least as compelling as any opposing inference one could draw from the facts alleged."\(^{157}\)

The fact-specific inquiry courts conduct to determine if a particular motive is sufficient in light of the facts of the particular case encompasses the comparative standard of \textit{Tellabs}. The Second Circuit does not just look at the motive alleged, check if there was an opportunity, and rubber stamp the complaint through the pleading stages. Whether or not the PSLRA's requirements for pleading scienter have been satisfied by certain motives depends on the facts of each case.\(^{158}\) The nature of this factual inquiry is whether the particular situation makes the culpable inference more plausible than the nonculpable inference. The previously discussed example of two companies that allegedly inflated their stock prices to make an acquisition cheaper demonstrates this point. Motive was sufficiently pled when one company avoided paying royalties to raise its stock's value, but not when another company misstated dealings for eight years before an acquisition and for years afterwards.\(^{159}\) The first company seems to be making a concerted effort to raise its stock price illegitimately, while the second company appears to just be making a mistake. In such situations, where there is a plausible, nonculpable way to explain the defendant's actions that is more likely than the culpable inference, the motive and opportunity test is not satisfied.\(^{160}\) Thus, the motive and opportunity test already accounts for the comparing of inferences required by \textit{Tellabs} by both ruling out certain motives that do not lead to a more compelling inference of culpability and requiring a fact-specific inquiry into certain motives.

The Supreme Court's decision in \textit{Tellabs} did not discredit the use of the motive and opportunity test as a valid means of demonstrating scienter. Despite the contrary view expressed by the Third Circuit in \textit{Avaya}, the Supreme Court did not endorse the Seventh Circuit's position that the PSLRA's pleading requirements prohibit using the motive and opportunity test to establish scienter. The statement that absence of motive allegations is not fatal to a complaint accords with the Second Circuit's two-pronged approach and the fact-specific inquiry used to determine which motives are sufficient in which situations looks at the complaint in its entirety, as \textit{Tellabs} requires. Furthermore, the motive and opportunity test weighs competing inferences by setting up categories of motive as insufficient in situations when that motive would not give rise to a culpable inference that was at

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  \item \textsuperscript{157} \cite{157, tellabs1}
  \item \textsuperscript{158} \textit{See supra} notes 138–148 and accompanying text.
  \item \textsuperscript{159} \textit{See supra} note 141.
  \item \textsuperscript{160} \textit{See Atsi Commc'ns, Inc. v. Shaar Fund, Ltd.}, 493 F.3d 87, 104 (2d Cir. 2007) (citing \textit{Tellabs}, 551 U.S. at 324) (stating that because the circumstances of this situation are present for any investor in this type of security, the nonculpable explanation that the parties engaged in a mutually beneficial business transaction is more likely than the culpable explanation that they intended to manipulate the market).
\end{itemize}
least as compelling as a nonculpable inference. Since it has not been prohibited by the Supreme Court’s interpretation of the PSLRA’s pleading requirement, the motive and opportunity test is still a viable means of establishing scienter, despite contrary opinions by the Third and Seventh Circuits.

IV. THE PSLRA’S POLICY GOALS FAVOR IMPLEMENTATION OF THE MOTIVE AND OPPORTUNITY TEST

Congress passed the PSLRA with two purposes in mind: reduce frivolous lawsuits alleging securities violations and promote uniformity in securities laws throughout the country.161 Of the three different positions circuit courts have taken on the issue of pleading scienter,162 the motive and opportunity test is the best method of realizing these two goals. Section IV.A examines how the motive and opportunity test balances blocking warrantless claims against allowing meritorious ones, concluding that the evidence does not show that the motive and opportunity test strikes this balance less effectively than the other circuit courts’ standards. Section IV.B then argues that the motive and opportunity test promotes more uniformity in resolving lawsuits than the intermediate approach. Section IV.C examines the practical effects of implementing the intermediate approach compared to the motive and opportunity test, concluding that the vagueness of the intermediate approach will result in additional costs to companies. Additionally, since all courts still consider motive crucial, no matter which approach they employ, the test the courts claim to utilize should recognize the importance of motive so lawyers know that it is an important area on which to focus their attention.

A. Balancing Stopping Meritless Lawsuits Against Allowing Meritorious Claims

A primary purpose of the PSLRA was to reduce the number of warrantless lawsuits without blocking proper claims. While considering the PSLRA, the Senate Subcommittee on Securities heard testimony that attorneys were filing strike suits in the hope that the target company would quickly settle to avoid the costs of litigation.163 The Senate Committee on Banking, Housing and Urban Affairs determined that such strike suits chill corporate disclosure and recommended that the PSLRA address this problem.164 Recognizing that proper private securities lawsuits are vital to a well-

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162. See supra notes 13–15 and accompanying text.
163. Senate Report, supra note 1, at 4.
164. Id.
functioning economy, however, the PSLRA allows private actions to be successfully brought against violators.

Evidence that the dismissal rates from the Second Circuit are similar to those of the Ninth Circuit and other circuits utilizing the intermediate approach suggests that the motive and opportunity test is not overly lenient. While some courts and commentators have considered the Second Circuit's motive and opportunity test too lenient, a statistical analysis of cases throughout the country suggests that the Second Circuit's standard is comparable in stringency to the approaches taken by other courts. That study, which examined federal securities law class actions, determined that roughly 20 percent of the suits were dismissed within the first two years of filing in both the Second and the Ninth Circuit. The circuits implementing the intermediate approach have fewer cases than the Second and Ninth Circuits, and the information obtained for those circuits is less dependable. Still, averaging the dismissal rates for the various intermediate approach circuits shows that they average around 20 percent as well.

Weighing the quantity of cases dismissed would be meaningless without considering the types of cases heard in each circuit. If a circuit's test could perfectly identify strike suits, lawyers would stop filing them, because there would be no point in wasting the time and resources or risking sanctions by filing strike suits that will just be dismissed. Thus, a stricter pleading standard could lower the dismissal rate by reducing the number of weak claims alleged. The intermediate approach leaves open the possibility that motive and opportunity may establish scienter, but requires that there also be sufficient facts supporting the inference. However, the Second Circuit's stricter
motive and opportunity test is only satisfied in situations where there are sufficient facts to give rise to a strong inference of scienter, so there should be no difference in the quality of cases between circuits implementing the intermediate approach and the Second Circuit. On the other end of the spectrum, the Ninth Circuit’s Silicon Graphics approach may have resulted in higher quality cases, but that standard can no longer be applied in light of Tellabs.

Although the motive and opportunity standard is not as strict as the Silicon Graphics standard, the Silicon Graphics standard proved too strict to comply with Tellabs. The Ninth Circuit expressly rejected the idea that motive and opportunity could ever establish scienter, and instead required particular facts that demonstrate a strong inference of deliberate recklessness. The complaint would be found deficient if the plaintiff did not provide a large amount of corroborating detail for the facts upon which the complaint was based. Recently, in light of the Supreme Court’s decision in Tellabs requiring the complaint to be viewed in its entirety, the Ninth Circuit agreed that the Silicon Graphics standard was overly demanding in the level of detail required and in eliminating vague statements from consideration. Thus, the Ninth Circuit abandoned its Silicon Graphics pleading standard.

The remaining two approaches, the intermediate approach and the Second Circuit’s motive and opportunity test, both result in similar dismissal rates. Therefore, the motive and opportunity test appears no less capable of meeting the goal of dismissing unwarranted claims while still allowing meritorious suits to proceed.

172. See supra notes 94–99 and accompanying text.

173. Michael A. Perino, Did the Private Securities Litigation Reform Act Work?, 2003 U. Ill. L. Rev. 913, 946–47 (“That position is, for all practical purposes, identical to that of the Second Circuit . . . .”).

174. Studies conducted before Tellabs showed insider trading and accounting misrepresentation cases, considered stronger types of cases, constituted a higher percentage of the total cases heard in the Ninth Circuit than in other circuits. Id. at 950–51. There were also greater declines in filings in the Ninth Circuit compared to other circuits, id. at 956, which might suggest that attorneys were more afraid to file weak claims in the Ninth Circuit than in other circuits. However, the difference by which filings in the Ninth Circuit declined compared to the other circuit courts was slight, and thus may not have been significant. See id. Taken together, these facts suggest the Ninth Circuit’s strict Silicon Graphics approach might have led to better quality cases.

175. In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 974 (9th Cir. 1999).

176. S. Ferry LP, No. 2 v. Killinger, 542 F.3d 776, 783 (9th Cir. 2008) (construing Silicon Graphics, 183 F.3d at 985). Other circuit courts and commentators argued that the Silicon Graphics standard was overly harsh, going beyond Congress’s intentions in passing the PSLRA. E.g., Fla. State Bd. of Admin. v. Green Tree Fin. Corp., 270 F.3d 645, 659 (8th Cir. 2001); Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1284 n.21 (11th Cir. 1999) (calling it “super-recklessness”); Glen M. Vogel & Nathan S. Slavin, Despite Initial Fears to the Contrary, It Appears that Sarbanes-Oxley Gave Private Litigants a “Dull Sword” When it Comes to Piercing the Corporate Veil, 14 FORDHAM J. CORP. & FIN. L. 415, 426 (2009).

177. S. Ferry, 542 F.3d at 784.

Establishing a uniform pleading standard was one of the goals of the PSLRA. Before its passage, differing interpretations of Federal Rule of Civil Procedure 9(b) resulted in widely varied pleading standards between the circuit courts. Since the PSLRA was passed, not only have circuit courts split, but district courts and even panels of the same circuit have rendered conflicting decisions about the pleading standard. The vagueness of the intermediate approach does not provide the uniformity sought by the PSLRA.

The intermediate approach merely offers a general guideline that courts should examine evidence that raises a strong inference of scienter. This produces excessive variation among the circuits. Commentators note that the wide freedom given to the courts under the intermediate approach makes it the most ambiguous standard. In a study examining dismissal rates, the National Economic Research Associates ("NERA") found that both the highest and the lowest rates of dismissals occurred in courts employing the intermediate approach (31 percent in the Fourth Circuit and 5 percent in the Tenth Circuit). Courts applying the same approach should not show such substantial variations if the standard hopes to achieve uniformity.

Since the intermediate approach does not provide clear guidance on how to evaluate scienter, the various circuit courts applying it have developed different, and sometimes conflicting, approaches. For example, the Sixth Circuit established a series of factors in Helwig v. Vencor, Inc. that guide courts in determining whether a complaint sufficiently pleads scienter. The

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180. Senate Report, supra note 1, at 15. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b).
181. See Grundfest & Pritchard, supra note 77, at 678 ("[A]ggregate patterns of [district court] behavior . . . are, to a remarkable degree, statistically indistinguishable from a 'coin-toss' model of judicial behavior."). The coin-toss model is that judges flip a coin to decide if the Second Circuit standard should apply, and then if that standard does not apply, they flip a coin again to decide between the intermediate approach and the Silicon Graphics standard. Id. at 643.
183. E.g., Grundfest & Pritchard, supra note 77, at 672 ("The Intermediate standard is in many ways the most ambiguous, giving courts wide latitude in determining whether to dismiss or not based on a given set of facts.").
184. Foster et al., supra note 168, at 4.
185. Helwig, 251 F.3d at 552. The Helwig factors are:

(1) insider trading at a suspicious time or in an unusual amount; (2) divergence between internal reports and external statements on the same subject; (3) closeness in time of an allegedly fraudulent statement or omission and the later disclosure of inconsistent information; (4) evidence of bribery by a top company official; (5) existence of an ancillary lawsuit charging fraud by a company and the company's quick settlement of that suit; (6) disregard of the most current factual information before making statements; (7) disclosure of accounting information in such a way that its negative implications could only be understood by someone with a high
Helwig factors were taken from the First Circuit's decision in Greebel v. FTP Software, Inc., where the First Circuit collected cases and provided a list of examples of the types of evidence often used in that circuit to demonstrate scienter. The Eighth Circuit often applies the Sixth Circuit's Helwig factors, but will sometimes also use the Second Circuit's precedent. In one case, the Eighth Circuit agreed with the Second Circuit's determination that an officer's desire to keep stock prices high to increase his compensation is not sufficient for motive, even though one of the Helwig factors is that the defendants can be motivated by a desire to protect their salary. Even if a court were to try to follow all of the Helwig factors, the list is not exhaustive and there are no guidelines explaining what weight should be accorded to each.

The Second Circuit's motive and opportunity test provides structured guidance, explaining exactly what types of motives to look for and how much weight certain factors should be accorded, leading to more reliable decisions. Sufficient motives require the defendant to benefit in a concrete and personal way from the alleged fraud. Generalized allegations are insufficient, as are motives that all corporate officers possess. Further clarifying which motives fail the test, the Second Circuit considers certain classes of motive insufficient, including making the corporation appear successful, increasing performance-based compensation, and retaining the benefits of one's position.

The Second Circuit standard should lead to uniform results, because what the court needs to look for is clear. While individual courts could disagree over whether all corporate officers possess a certain motive, the numerous Second Circuit decisions declaring certain classes of motive sufficient or insufficient provide guidance. There are still tough borderline decisions that need to be made on a case-by-case basis, and therefore the motive and opportunity test does not artificially force securities law cases into a black-and-white framework. Yet, specifically eliminating certain degree of sophistication; (8) the personal interest of certain directors in not informing disinterested directors of an impending sale of stock; and (9) the self-interested motivation of defendants in the form of saving their salaries or jobs.

Id.

186. 194 F.3d 185, 196 (1st Cir. 1999).
187. E.g., Elam v. Neidorff, 544 F.3d 921, 930 (8th Cir. 2008); In re Navarre Corp. Sec. Litig., 299 F.3d 735, 745 (8th Cir. 2005).
188. E.g., In re K-tel Int'l, Inc. Sec. Litig., 300 F.3d 881, 894 (8th Cir. 2002).
189. Id. The Eighth Circuit finds it important whether or not there is a sufficient motive because it requires stronger allegations when there is no motive. See Fla. State Bd. of Admin. v. Green Tree Fin. Corp., 270 F.3d 645, 660 (8th Cir. 2001).
190. Helwig, 251 F.3d at 552.
194. See supra notes 137-141 and accompanying text.
classes of motive provides more guidance than the intermediate standard's broader, case-by-case determination.\footnote{195}{While at least one group of commentators argues that the motive and opportunity test is hard to apply because the Second Circuit reversed more district court decisions than any other circuit court, see Grundfest & Pritchard, supra note 77, at 668–69, 674, that problem should be resolved now that the lenient formulation from Press has been eliminated. See supra notes 91–93 and accompanying text. However, the study by Pritchard and Grundfest only considered cases through November 2001 (i.e., before the lenient formulation from Press was eliminated). id. at 668; see supra notes 71–88 and accompanying text, which explains the reversals. Now that the Second Circuit has settled on a single interpretation, that variation should be eliminated. See supra notes 93–99 and accompanying text.}

Uniformity is further augmented by the motive and opportunity test because it describes certain insufficient motives that are entitled to no weight when assessing the complaint in its entirety. The Second Circuit has determined that different allegations of scienter can be examined individually without violating Tellabs and that certain inadequate motives can never combine to establish scienter.\footnote{196}{In re Carter-Wallace, Inc. Sec. Litig., 1999 WL 1029713, at *5 (S.D.N.Y. Nov. 10, 1999) cited with approval in Malin v. XL Capital, Ltd., 312 F. App’x 400, 402 (2d Cir. 2009).} As a result, if a complaint alleges one of the motives the circuit has deemed always insufficient—such as the general allegations that a corporate officer wanted to keep his job, increase his incentive-based compensation, or make the company seem profitable—it will not add anything to the complaint.\footnote{197}{See Malin, 312 F. App’x at 402 (stating that when the allegations do not individually provide even a weak inference of scienter, there is no way they could combine to form a strong inference of scienter).}

Reading Tellabs to prohibit the elimination of certain claims from consideration would be illogical, since allowing such allegations would weaken the standard below the pre-PSLRA level and excluding a small number of specific claims is not overly harsh. The Supreme Court held that the PSLRA instituted a high pleading standard.\footnote{198}{Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 321 (2007).} However, even before the PSLRA was passed, the Second Circuit did not permit scienter to be established through allegations that a corporate officer wanted to maintain the privileges of his job\footnote{199}{Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1130 (2d Cir. 1994).} or increase his incentive-based compensation.\footnote{200}{Acito v. IMCERA Grp., 47 F.3d 47, 54 (2d Cir. 1995).} Neither is the motive and opportunity standard so strict as to run afoul of Tellabs in the same way the Silicon Graphics standard did: that standard eliminated all general allegations from consideration,\footnote{201}{See supra notes 41–45 and accompanying text.} whereas motive and opportunity only blocks consideration of certain types of allegations determined not probative of scienter.\footnote{202}{See supra notes 41–45 and accompanying text.} Thus, the motive and opportunity test’s assignment of zero weight to certain types of allegations is consistent with the goals of Tellabs and, as the listings of unacceptable motives provide a bright-line rule, better ensures uniform application.
C. Practical Difficulties in the Intermediate Approach Are Not Present in the Motive and Opportunity Test

The intermediate approach emphasizes a case-by-case, fact-specific approach to determine when a complaint adequately pleads scienter. As a result, there is no clear, singular way to evaluate scienter under the intermediate approach. Some courts employ a list of factors which can help inform whether scienter allegations are sufficient while other courts rely instead on a general assessment of the complaint in its entirety. A lack of clear requirements in the intermediate approach makes it harder to determine which criteria are important in any given circuit.

As previously explained, the intermediate approach provides little guidance on how to actually determine whether a complaint adequately alleges scienter, which makes it difficult to prepare and successfully argue cases. The Sixth Circuit's Helwig factors, also adopted by the First Circuit and partially adopted by the Eighth Circuit, provide some structure to the scienter inquiry, but still prove problematic. Although the Sixth Circuit set out a list of factors, those factors provide very little help in actually reaching decisions. The factors do not provide an exhaustive list of the possible ways to prove scienter, as Helwig clearly states, and therefore other types of arguments can still be made. Additionally, no specific weights are attached to any of the factors. The relative weight of the factors also may depend on the case at hand.

The other circuits that have adopted the intermediate approach do not utilize the Helwig factors, or any other specific list of criteria. These courts inspected the PSLRA and decided that since Congress did not intend to single out any particular way to prove scienter, decisions should be made by looking at the complaint in its entirety without focusing on "specific catego-

203. See, e.g., Ottmann v. Hanger Orthopedic Grp., 353 F.3d 338, 345 (4th Cir. 2003); In re Navarre Corp. Sec. Litig., 299 F.3d 735, 745 (8th Cir. 2002); Helwig v. Vencor, Inc., 251 F.3d 540, 552 (6th Cir. 2001).
204. The factors originally came from the First Circuit's opinion in Greebel v. FTP Software, Inc., 194 F.3d 185 (1st Cir. 1999).
205. See supra notes 187–190 and accompanying text.
206. Helwig, 251 F.3d at 552.
207. See Helwig, 251 F.3d 540. In City of Monroe, scienter was adequately alleged when the court found one of the factors highly probative of scienter and three or four not probative. City of Monroe Emps. Ret. Sys. v. Bridgestone Corp., 399 F.3d 651, 688–89 (6th Cir. 2005). In another case, allegations against one defendant were sufficient when the court found three factors satisfied: the defendant gained benefits in the form of a loan and renegotiated salary, made optimistic comments four months before declaring bankruptcy, and there were violations of GAAP. D.E. & J. Ltd. P'ship v. Conaway, 284 F. Supp. 2d 719, 743–44 (E.D. Mich. 2003).
208. Compare Conaway, 284 F. Supp. 2d at 743–44 (listing factors that were met where the strongest factor supporting scienter against one defendant seemed to be the large loan and salary renegotiation he received), with PR Diamonds, Inc. v. Chandler, 91 F. App'x 418, 438 (6th Cir. 2004) (stating that the evidence of their interest in saving their salaries only mildly suggests scienter).
The inquiry, then, is just a holistic examination of the complaint to determine whether the court believes the facts alleged give rise to a strong inference of scienter.

When lawyers and business people are uncertain about exactly what the court will look for and what is sufficient to meet the pleading standard, both the cost of preparing and adjudicating claims increase. Preparing for cases where the lawyer does not know exactly what the court will want takes more time than does preparing for a case where the lawyer knows exactly what the court will look for in the complaint. For example, if the court will allow a pleading to survive with just a few clear Helwig factors, then the lawyer can focus on providing just those few; but if the lawyer is not sure how many factors are necessary, and how strong those presented should be, he must spend more time trying to argue every factor in every way to maximize the chances he will pass the court's unknown threshold of sufficiency. Such complaints might take additional time to draft, costing clients money, and additional time to analyze, draining judicial resources. The problem is further aggravated if the court has not given any guidance other than that it will examine the totality of the complaint. Such complaints will include an even wider assortment of possible issues, further increasing drafting and review time.

In contrast, even though there will still be borderline cases, the motive and opportunity test provides clear examples of what will and will not suffice. The Second Circuit has listed categories of motive that will fail to sufficiently allege scienter, and therefore there is no need to waste time arguing over whether such allegations will allow a complaint to survive the pleading stage. Complaints are also easier to review because what the court is looking for is clear: both motive and opportunity must be alleged, and the motive cannot be from one of the categories of motives that are prohibited.

Courts already consider motive a critical factor in determining whether scienter is adequately pled, and therefore any standard should openly acknowledge that fact. Although Tellabs states that absence of motive allegations is not fatal to a complaint, commentators found that no case

209. Ottmann v. Hanger Orthopedic Grp., 353 F.3d 338, 345–46 (4th Cir. 2003) ("[C]ourts should not restrict their scienter inquiry by focusing on specific categories of facts."); see also, e.g., Pugh v. Tribune Co., 521 F.3d 686 (7th Cir. 2008) (examining the complaint holistically without mentioning any particular factors the court was looking for); Goldstein v. MCI WorldCom, 340 F.3d 238, 246–47 (5th Cir. 2003) (looking at the totality of the circumstances of the complaint, rather than any categories). While these circuits cited Helwig with approval when adopting the intermediate approach, they do not utilize the Helwig factors when determining whether a complaint adequately alleges scienter.

210. E.g., Ottmann, 353 F.3d at 345–46.

211. See Kalnit v. Eichler, 264 F.3d 131, 139–40 (2d Cir. 2001) (listing several types of motive allegations that do not give rise to a strong inference of scienter, including the desire to maintain the appearance of corporate profitability, the desire of an executive to maintain his job or salary, the desire to keep stock prices high, and the existence of incentive-based compensation structures).

212. See infra notes 78–81, 89–94.

without an economically rational motive has survived dismissal. Circuit courts applying the intermediate approach have even noted that there are times when motive and opportunity may give rise to a strong inference of scienter. Some of these courts even analyze motive separately, which shows they find it important enough to examine carefully. Since motive plays such an important role in establishing scienter anyway, it makes sense to have the standard courts use for evaluating scienter take motive into account more directly. Thus, implementing the motive and opportunity test openly directs the courts’ focus to a factor many already consider to be crucial.

CONCLUSION

Not only is the motive and opportunity test, as developed and utilized by the Second Circuit, still a viable standard after Tellabs, but it also best accomplishes the dual goals of the PSLRA. Because the courts now use a stricter version of the original test, the likelihood of too many frivolous suits surviving dismissal is low, meaning the test furthers the PSLRA’s goal of establishing a stringent pleading standard. Furthermore, because the motive and opportunity test weighs competing inferences, it does not run afoul of the Supreme Court’s mandate in Tellabs that evaluating scienter is a comparative inquiry weighing the culpable inferences from the facts provided against the nonculpable inferences. The motive and opportunity test also balances the dual objectives of dismissing unwarranted litigation while permitting legitimate suits at least as well as any other standard, and it provides clear guidelines to ensure a uniform application. Moreover, it promotes easier administration. Thus, not only is the motive and opportunity test still appropriate after Tellabs, but it accomplishes the two goals of the PSLRA—allowing meritorious lawsuits to succeed while dismissing frivolous lawsuits and establishing a uniform pleading standard throughout the country—better than any other standard.

215. See supra note 63 and accompanying text.