

Uldaho Law

Digital Commons @ Uldaho Law

Articles

Faculty Works

2012

The Falsity-Scienter Inference

Wendy Gerwick Couture

University of Idaho College of Law, wgcouture@uidaho.edu

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/faculty_scholarship



Part of the [Securities Law Commons](#)

Recommended Citation

40 Sec. Reg. L.J. 303 (2012)

This Article is brought to you for free and open access by the Faculty Works at Digital Commons @ Uldaho Law. It has been accepted for inclusion in Articles by an authorized administrator of Digital Commons @ Uldaho Law. For more information, please contact annablaine@uidaho.edu.

The Falsity-Scienter Inference

Copyright 2012 by Thomson Reuters. All rights reserved. Reprinted by permission of Thomson Reuters/West from Securities Regulation Law Journal.

By Wendy Gerwick Couture*

I. Introduction

This column argues that, under certain circumstances in securities fraud cases, a statement's well-pleaded falsity gives rise to a strong inference that the speaker acted with scienter. Imagine that a plaintiff pleaded with particularity that this column's author had stated, "My middle name is 'Miller,'" and that this statement was false because the author's middle name is "Gerwick." This column contends that these allegations would give rise to a strong inference that this author spoke at least recklessly when misstating her middle name.

In particular, this column argues that the well-pleaded falsity of a statement is sufficient to create a strong inference of scienter when (1) the truth is necessarily within the speaker's core knowledge; and (2) the statement is sufficiently false to have necessarily caught the speaker's attention. Applied to the above example, the author's middle name was necessarily within the author's core knowledge (as opposed, perhaps, to the author's blood type), and the falsity was extreme enough to have necessarily caught the author's attention (as opposed, perhaps, to misstating her middle name as "Gerwig").

The falsity-scienter inference potentially applies in a variety of securities fraud contexts, including falsified CEO résumés, objectively unreasonable analyst opinions, and cooked books. In addition, the falsity-scienter inference sheds light on the controversial "core operations inference," which assumes that senior management have knowledge of the company's core operations,² explaining the rationale underlying the inference and providing guidance on the proper scope of the inference.

This column proceeds in four additional parts. Part II summarizes the "strong inference of scienter" pleading requirement in securities fraud cases. Part III proposes the falsity-scienter inference test. Part IV applies the falsity-scienter inference test and analyzes its intersection with the core operations inference. Part V briefly concludes.

II. A Strong Inference of Scienter

Under current precedent, the element of scienter in securities fraud

*Wendy Gerwick Couture is an Associate Professor at the University of Idaho College of Law, where she teaches securities regulation, white collar crime, and other business and commercial law courses.

cases is established if the defendant acted intentionally or recklessly.⁴ Recklessness in this context is usually defined as "an extreme departure from the standards of ordinary care, . . . which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it."⁵

In order to survive a motion to dismiss, a securities fraud complaint must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."⁶ As explained by the Supreme Court in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, the "strong inference" inquiry is "inherently comparative."⁶ A court must compare the inference of scienter with any contrary inference.⁷ In order to avoid dismissal of the claim, the inference of scienter "must be cogent and at least as compelling as any opposing inference of nonfraudulent intent."⁸ When making this comparison, the court should "assess all the allegations holistically."⁹

A plaintiff must also plead the element of falsity with particularity.¹⁰ Sometimes, the same allegations that support the falsity of a statement also support the element of scienter.¹¹

A plaintiff's failure to plead a strong inference of scienter is one of a securities fraud defendant's strongest arguments. In order to provide a snapshot of this argument's potency, this author analyzed a sample set of 36 recent district court rulings on motions to dismiss private federal securities fraud claims.¹² The court analyzed the adequacy of the scienter allegations in 26 of these rulings, at least partially granting a motion to dismiss on this basis in 20 cases. In other words, the court analyzed the adequacy of the scienter pleadings in 72% of the rulings; and the court found the scienter pleadings to be inadequate with respect to at least some claims in 77% of these cases.

III. The Falsity-Scienter Inference

This column argues that, under certain circumstances, the well-pleaded falsity of a statement is sufficient, in and of itself, to create a strong inference of scienter. In other words, consistent with the above-quoted definition of recklessness, a strong inference of scienter exists when falsity is "so obvious that the actor must have been aware of it."¹³

Take as an example the following statement by a janitor in a museum housing Justice Scalia's infamous jade falcon:¹⁴ "I saw B steal the jade falcon." If a plaintiff pleaded with particularity that this statement was false because the janitor witnessed nothing, the falsity would give rise to a strong inference that the janitor was, at the very least, reckless in making the statement. Certainly, the janitor knew whether he or she witnessed something, and an erroneous statement of this magnitude could not have been merely negligent.

Despite the intuitive appeal of the falsity-scienter inference in examples like this one, some courts reject the falsity-scienter inference out of hand at the motion to dismiss stage, labeling it insufficient "must have known" pleading.¹⁵ Of course, these courts are correct that falsity does not always give rise to a strong inference of scienter. Therefore, the key is to identify the circumstances in which the falsity-scienter inference is appropriate.

This column proposes that the falsity-scienter inference is appropriate when the following two elements are satisfied: (1) the truth is necessarily within the speaker's core knowledge; and (2) the statement is sufficiently false to have necessarily caught the speaker's attention.

(a) The Truth Is Necessarily Within The Speaker's Core Knowledge

The first prong of the proposed test recognizes that the truth or falsity of some statements is, by necessity, within the speaker's core knowledge and that, therefore, falsity supports an inference of scienter. The Supreme Court acknowledged the logic underlying the first prong of the falsity-scienter inference test in *Merck & Co., Inc. v. Reynolds*: "We recognize that certain statements are such that, to show them false is normally to show scienter as well. It is unlikely, for example, that someone would falsely say 'I am not married' without being aware of the fact that his statement is false."¹⁶ In other words, because the truth of the speaker's marital status is necessarily within the speaker's core knowledge, a false statement of one's marital status gives rise to a strong inference of, at the very least, recklessness.

(b) The Statement Is Sufficiently False to Have Necessarily Caught The Speaker's Attention

The second prong of the proposed test recognizes that, even if the truth is necessarily within a speaker's core knowledge, the speaker could negligently fail to catch a trivial error. Therefore, unless the falsity is extreme enough to have necessarily caught the speaker's attention, falsity does not give rise to a strong inference of scienter. The Fourth Circuit recognized the logic underlying the second prong of the falsity-scienter inference test in the following example:

But the size of BearingPoint's revenue stream does bear on whether the misstatements of net income were of a size that BearingPoint officers must have known about them. In other words, an individual is more likely to realize that she is missing \$10 if she has \$50 in her bank account than if she has \$50,000 in her bank account.¹⁷

This prong is similar to the materiality inquiry because it analyzes the significance of the misrepresentation, but the foci of the analyses differ. The falsity-scienter inference test analyzes whether the falsity is significant enough to have caught the *speaker's* attention, while the

materiality inquiry analyzes whether the misrepresentation is significant enough to have been important to a reasonable *listener* when making an investment decision.¹⁸ Although the two analyses overlap, they are not coextensive. For example, although an overstatement of net income by 8% might not be large enough to catch the attention of a CEO signing an SEC filing, a reasonable investor might consider this statement to be materially misleading.¹⁹ Conversely, a CEO's misrepresentation about earning a college degree would undoubtedly be significant enough to catch the CEO's attention, but it might be immaterial as a matter of law.²⁰

IV. Application of the Falsity-Scienter Inference Test

The aforementioned jade falcon example—in which, despite having witnessed nothing, the janitor stated, “I saw B steal the jade falcon”—satisfies both prongs. First, it was necessarily within the janitor's core knowledge whether he or she witnessed B steal the jade falcon. Second, the degree of the statement's falsity was such that the janitor could not have misspoken with mere negligence. Therefore, consistent with the falsity-scienter inference test, the falsity of the janitor's statement is sufficient, in and of itself, to give rise to a strong inference of the janitor's scienter.

The jade falcon example can be altered slightly to exemplify why the falsity-scienter inference fails if either element of the proposed test is not met. First, imagine that an unconnected third party stated baldly: “B stole the jade falcon.” Here, unlike the above janitor example, well-pleaded falsity—whether because someone other than B stole the falcon or because B stole something other than the falcon—would not support an inference of scienter. The truth of the statement was not necessarily within the speaker's core knowledge because he or she did not witness the event. Therefore, there is no reason to infer that the speaker acted other than innocently, or at most negligently, in making this false statement. For instance, the speaker could have been passing along facially accurate information from the janitor.

Now imagine that the janitor signed under oath the following statement: “I saw B steal the jade falcon last Friday.” As pleaded with particularity, the janitor actually witnessed B steal the falcon last Thursday. This time the falsity-inference test fails because the second element is not met. The first element of the test is satisfied because the truth—that this occurred on Thursday rather than Friday—was necessarily within the janitor's core knowledge as an eyewitness. The second element is not met, however, because the falsity was not of sufficient magnitude to have necessarily caught the attention of the janitor at the time of signing.

These jade falcon examples demonstrate the logic underlying the proposed falsity-inference test, but their triviality should not detract

from the relevance of the falsity-inference test in real-life securities fraud cases.

(a) Securities Analyst Opinions

One real-life example arises in the context of securities analyst opinions. The well-pleaded objective unreasonableness of a securities analyst's opinion (and, thus, its falsity) could, if extreme enough, give rise to a strong inference that the analyst was at least reckless in expressing his or her opinion. The First Circuit recognized this potentiality in *In re Credit Suisse First Boston Corp.*:

[I]t is unlikely that a trained analyst would actually believe in the truth of a recommendation that, from an objective standpoint, was totally unfounded. One can imagine cases in which the facts so strongly suggest that an opinion was objectively false when made that an inference of subjective falsity may be drawn.²¹

This factual scenario would satisfy both prongs of the falsity-scienter inference test. First, whether an opinion is completely unfounded would necessarily be within a trained analyst's core knowledge. Second, a totally unfounded opinion would be glaring enough to, by necessity, catch the analyst's attention.

(b) Cooked Books

Another real-life example arises in the context of so-called "cooked books" cases. As several courts have recognized, if—as pleaded with particularity—the company's financial statements amounted to a "night-and-day difference" from the company's true financial position, the discrepancy would give rise to a strong inference that the individuals preparing the statements acted with scienter.²² One court, recognizing that significant GAAP violations could provide "powerful indirect evidence of scienter," explained: "After all, books do not cook themselves."²³ This factual scenario would satisfy the falsity-inference test. Those preparing the financial statements would necessarily possess within their core knowledge a general sense of the company's financial well-being. If the financial statements presented a vastly different financial picture, this error would be extreme enough to necessarily catch the attention of those preparing the statements.

(c) The Core Operations Inference

Finally, the falsity-scienter inference applies to the controversial "core operations inference," explaining the rationale underlying the inference and providing guidance on its proper scope.

(i) Elements of the Core Operations Inference

The core operations inference assumes that "senior management, by virtue of their positions, were or should have been aware of facts so material to the company's core operations," thereby enabling plaintiffs to plead scienter without particularized allegations about mental

state.²⁴ In other words, pursuant to the core operations inference, allegations about a statement's falsity may be sufficient to allege a strong inference of management's scienter "where the nature of the relevant fact is of such prominence that it would be 'absurd' to suggest that management was without knowledge of the matter."²⁵

For example, in *Berson v. Applied Signal Technology, Inc.*, the plaintiff shareholders alleged with particularity that Applied Signal's backlog reports were misleading because they continued to count a significant amount of work subject to "stop-work orders."²⁶ The plaintiffs did not, however, plead any particular facts showing that Applied Signal's CEO and CFO knew about the stop-work orders.²⁷ Relying on the core operations inference, the Ninth Circuit nonetheless held that the plaintiffs had alleged a strong inference of scienter. "[The CEO and CFO] were directly responsible for Applied Signal's day-to-day operations, so it is hard to believe that they would not have known about stop-work orders that allegedly halted tens of millions of dollars of the company's work."²⁸

As another example, in *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, on remand from the Supreme Court to the Seventh Circuit, the plaintiff investors alleged that Tellabs had flooded its customers with tens of millions of dollars of unordered equipment in order to falsify demand.²⁹ The court held that the plaintiffs had alleged a strong inference of scienter:

The 5500 and the 6500 were Tellab's most important products . . . They were to Tellabs as Windows XP and Vista are to Microsoft. That no member of the company's senior management who was involved in authorizing or making public statements about the demand for the 5500 and 6500 knew that they were false is very hard to credit . . .³⁰

In other words, because the alleged misrepresentation related to a core operation, the company's senior management must have known the truth.

The core operations inference is not widely accepted.³¹ Moreover, application of the inference requires a resolution of the following issues: (1) To which members of "senior management" does the inference apply? (2) Which operations qualify as "core" so as to trigger the inference?³² This column's proposed falsity-scienter inference supports the viability of the core operations inference and provides guidance on its appropriate contours.

(ii) Application of the Falsity-Scienter Inference to the Core Operations Inference

In essence, the core operations inference is a subset of the falsity-scienter inference proposed in this column. The falsity-scienter inference applies anytime the speaker, by necessity, both knew the truth and noticed the falsity. The core operations inference is merely an ap-

plication of the falsity-scienter inference to the specific factual scenario involving a corporate officer and a false statement about the company's operations. When a member of the senior management speaks about the company's core operations, the first element of the falsity-scienter inference test is met because the truth of the statement about the company's core operations is necessarily within the senior officer's core knowledge. When the statement about core operations is so false as to necessarily catch the officer's attention, the second element of the falsity-scienter inference test is met.

This column, by arguing for the recognition of the falsity-scienter inference, agrees with the eminent scholars who have urged the adoption of the narrower core operations inference. Michael J. Kaufman and John M. Wunderlich convincingly argue that the core operations inference "represents the quotidian notion that it is likely that senior management charged with knowing facts material to the company's core operations do in fact know these facts, and that they would not make misleading statements about them if cognizant that doing so would cause investors harm."³³ Ann Morales Olazábal similarly explains that "while no officer is expected to, nor can she, know every detail about a large publicly traded corporation, it is the epitome of recklessness for a highly paid corporate head to speak to the market about important corporate matters without knowing the truth."³⁴

In addition, the falsity-scienter inference test proposed in this column sheds lights on the proper scope of the core operations inference. First, the falsity-scienter inference test demonstrates that the "senior management" and "core operations" inquiries should be iterative, centering on whether the truth about the subject operations would necessarily have been known to the identified officer. Under the first prong of the falsity-scienter inference test, the crux of the analysis is whether the truth of the statement was necessarily within the speaker's knowledge. Therefore, to the extent that the subject operations are so essential that the entire top tier of management necessarily knew the truth, the inference should apply to that entire tier. On the other hand, if the subject operations are specialized and thus necessarily known only to a subset of senior management, the inference should apply only to that subset. This iterative process is consistent with Professor Kaufman's and Mr. Wunderlich's observation that courts appear to use a "sliding-scale approach [when applying the core operations inference], the more material the fact is to the company, the less the need for particularized allegations concerning senior-level management's actual knowledge, and vice versa."³⁵

Second, the falsity-scienter inference test shows that courts and commentators are mistaken when tying the core operations inference directly to the element of materiality.³⁶ The core operations inference

analysis should center on the speaker's state of mind, not on the effect of the statement on investors. Although there is undoubtedly some overlap between misrepresentations that satisfy the falsity-scienter inference test and misrepresentations that are material to investors, these two analyses have different foci.³⁷ Therefore, incorporating the concept of materiality into the core operations inference diverts the analysis away from its appropriate focus: the speaker's state of mind.

Finally, the falsity-scienter inference test demonstrates that the degree of the statement's falsity should bear on the application of the core operations inference, with the inference invoked only if a person with knowledge of the truth would by necessity notice the falsity of the statement. This argument is consistent with Professor Olazábal's argument that the magnitude of the misrepresentation and the atypicality of the subject are relevant to the core operations inference, although she focuses on their relevance to the speaker's likely knowledge of the subject matter rather than their additional relevance to the speaker's likely awareness of the misstatement itself.³⁸

In sum, this column's proposed falsity-scienter inference test adds four points to the debate about the core operations inferences. First, because the core operations inference is a subset of the broader falsity-scienter inference, adoption of the falsity-scienter inference compels adoption of the narrower core operations inference. Second, the classifications of "senior management" and "core operations" should be iterative, centering on whether the subject operations would necessarily be known to the identified officer. Third, the core operations inference should not be tied to the element of materiality. Finally, the degree of the statement's falsity should bear on the application of the core operations inference.

V. Conclusion

In conclusion, this column argues that the well-pleaded falsity of a statement is sufficient to create a strong inference of scienter when (1) the truth is necessarily within the speaker's core knowledge; and (2) the statement is sufficiently false to have necessarily caught the speaker's attention. This falsity-scienter inference potentially applies in a variety of securities fraud contexts, including falsified CEO résumés, objectively unreasonable analyst opinions, and cooked books. Finally, the falsity-scienter inference supports adoption of the narrower core operations inference, and the falsity-scienter inference test provides guidance on the proper scope of the core operations inference.

NOTES:

²Kaufman and Wunderlich, *Messy Mental Markers: Inferring Scienter From Core*

Operations in Securities Fraud Litigation, 73 Ohio St. L.J. 507, 524 (2011-12).

³*Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1323, 179 L. Ed. 2d 398, 62 A.L.R. Fed. 2d 737 (2011) (“We have not decided whether recklessness suffices to fulfill the scienter requirement.”); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007) (“Every Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly.”). If the alleged misrepresentation qualifies as “forward-looking,” the applicable scienter standard rises to “actual knowledge.” 15 U.S.C.A. § 78u-5(c)(1)(B).

⁴*Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977) (quotation removed).

⁵15 U.S.C.A. § 78u-4(b)(2).

⁶*Tellabs, Inc.*, 551 U.S. at 323.

⁷*Id.* at 314.

⁸*Id.*

⁹*Id.* at 326.

¹⁰15 U.S.C.A. § 78u-4(b)(1) (“[T]he complaint shall specify . . . the reason or reasons why the statement is misleading.”); Fed. R. Civ. P. 9(b) (“[A] party must state with particularity the circumstances constituting fraud . . .”).

¹¹*In re Read-Rite Corp.*, 335 F.3d 843, 846 (9th Cir. 2003) (“[F]alsity and scienter are generally inferred from the same set of facts.”).

¹²On June 20, 2012, the author conducted the following “terms and connectors” search in the Westlaw federal district court database: “securities fraud” & “motion to dismiss” & DA(last 90 days) % TI (“U.S.” “United States” “s.e.c.”). Of the 100 search results, 36 were district court rulings on motions to dismiss private federal securities fraud claims.

¹³*Sundstrand Corp.*, 553 F.2d at 1045.

¹⁴Justice Scalia memorably criticized the *Tellabs* “at least as compelling” standard with the following example: “If a jade falcon were stolen from a room to which only A and B had access, could it possibly be said there was a ‘strong inference’ that B was the thief? I think not, and I therefore think that the Court’s test must fail.” *Tellabs*, 551 U.S. at 329 (Scalia, J., concurring in the judgment).

¹⁵*Indiana Elec. Workers’ Pension Trust Fund IBEW v. Shaw Group, Inc.*, 537 F.3d 527, 535 (5th Cir. 2008) (rejecting the plaintiffs’ assertions that “the individual defendants must have known of the irregularities because of their executive positions in the company”); *Podany v. Robertson Stephens, Inc.*, 318 F. Supp. 2d 146, 156 (S.D. N.Y. 2004) (“While a jury may consider evidence that an opinion was not soundly based on assessing scienter, such evidence is not sufficient to allege scienter . . .”); *In re Advanta Corp. Securities Litigation*, 180 F.3d 525, 539, 44 Fed. R. Serv. 3d 136 (3d Cir. 1999) (rejecting “allegations that a securities-fraud defendant, because of his position within the company, ‘must have known’ a statement was false or misleading”).

¹⁶*Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784, 1796–97, 176 L. Ed. 2d 582 (2010). In *Merck*, the securities fraud defendants—in an interesting role reversal—argued for a lower scienter burden in order to trigger the running of the statute of limitations.

¹⁷*Matrix Capital Management Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 185 (4th Cir. 2009); *In re MicroStrategy, Inc. Securities Litigation*, 115 F. Supp. 2d 620,

636 (E.D. Va. 2000) ("Indeed, common sense and logic dictate that the greater the magnitude of a restatement or violation of GAAP, the more likely it is that such a restatement or violation was made consciously or recklessly.").

¹⁸*Basic Inc. v. Levinson*, 485 U.S. 224, 231, 108 S. Ct. 978, 99 L. Ed. 2d 194, 24 Fed. R. Evid. Serv. 961, 10 Fed. R. Serv. 3d 308 (1988).

¹⁹*E.g., Gebhardt v. ConAgra Foods, Inc.*, 335 F.3d 824, 830 (8th Cir. 2003).

²⁰*Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 658 (4th Cir. 2004) (holding that a CEO's lie about finishing college was immaterial as a matter of law).

²¹*Credit Suisse First Boston Corp., In re*, 431 F.3d 36, 52 (1st Cir. 2005).

²²*In re MicroStrategy, Inc. Securities Litigation*, 115 F. Supp. 2d 620, 636-37 (E.D. Va. 2000) ("[I]t cannot be gainsaid that some restatements of financials are so significant that they, at the very least, support the inference that conscious fraud or recklessness as to the danger of misleading the investing public was present. In this case, the alleged GAAP violations and the subsequent restatements are of such a great magnitude—amounting to a night-and-day difference with regard to MicroStrategy's representations of profitability—as to compel an inference that fraud or recklessness was afoot."); see also *In re Oxford Health Plans, Inc. Securities Litigation*, 51 F. Supp. 2d 290, 294 (S.D. N.Y. 1999) ("[P]laintiffs alleged 'in your face facts,' that cry out, 'how could [defendants] not have known that the financial statements were false.'").

²³*In re McKesson HBOC, Inc. Securities Litigation*, 126 F. Supp. 2d 1248, 1273 (N.D. Cal. 2000).

²⁴*Kaufman & Wunderlich*, supra note 1, at 524.

²⁵*South Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 786 (9th Cir. 2008) (quoting *Berson v. Applied Signal Technology, Inc.*, 527 F.3d 982, 988 (9th Cir. 2008)).

²⁶*Berson v. Applied Signal Technology, Inc.*, 527 F.3d 982, 984 (9th Cir. 2008).

²⁷*Id.* 987.

²⁸*Id.* at 988.

²⁹*Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 706 (7th Cir. 2008).

³⁰*Id.* at 709.

³¹*Elam v. Neidorff*, 544 F.3d 921, 929 (8th Cir. 2008) ("We need not determine whether the core operations approach can be utilized to plead scienter."); *Abrams v. Baker Hughes Inc.*, 292 F.3d 424, 432, 53 Fed. R. Serv. 3d 1 (5th Cir. 2002) ("[P]leadings of scienter may not rest on the inference that defendants must have been aware of the misstatement based on their positions within the company."); *City of Philadelphia v. Fleming Companies, Inc.*, 264 F.3d 1245, 1264 (10th Cir. 2001) ("[T]he mere fact that the individual Defendants occupied senior positions in the company, and that two of them knew of the litigation at least by early 1995, is not sufficient to imply knowledge of the specific fact of materiality."); *In re Advanta Corp. Sec. Litig.*, 180 F.3d at 539 ("Generalized imputations of knowledge do not suffice, regardless of the defendants' positions within the company."); *In re Wachovia Equity Securities Litigation*, 753 F. Supp. 2d 326, 353 (S.D. N.Y. 2011) ("In the absence of Circuit guidance, the Court considers 'core operations' allegations to constitute supplementary but not independently sufficient means to plead scienter.").

³²*Kaufman & Wunderlich*, supra note 1, at 517-24.

³³*Id.* at 524.

³⁴Olazábal, *Defining Recklessness: A Doctrinal Approach to Deterrence of Secondary Market Securities Fraud*, 2010 Wis. L. Rev. 1415, 1420 (2010).

³⁵Kaufman & Wunderlich, *supra* note 1, at 527.

³⁶*Id.* at 517 (explaining that many courts “view[] core operations as anything material to investors”); *id.* at 536 (“[W]e can infer scienter when senior management makes misleading statements about core operations-facts that are material to the company and to its investors.”).

³⁷See text, *supra*, at Part III.B.

³⁸Olazábal, *supra* note 33, at 1435 (“Where a discrepancy is large, where a fraud is endemic, where a misstated fact relates to one of the company’s biggest clients or products—these are the types of facts an officer is either deemed to know or is reckless in not informing himself about before speaking unequivocally to the market.”); *id.* at 1436 (“While atypical events can lead to cogent and compelling inferences that officers are aware of them, the reverse is also true. Matters which can be categorized as ‘run of the mill’ or ‘par for the course’ in a company or industry should not give rise to an inference of recklessness for failure to be aware of them.”).