

MOTIVE AND OPPORTUNITY TEST SURVIVES CONGRESSIONAL DEATH KNELL IN PRIVATE SECURITIES LITIGATION REFORM ACT

Abstract: Congress enacted the Private Securities Litigation Reform Act in 1995, in an effort to stop frivolous securities fraud suits. Key to the effort was the imposition of a heightened pleading standard requiring plaintiffs to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." There has been considerable controversy regarding whether Congress codified the "motive and opportunity" prong of the pleading standard historically used by the United States Court of Appeals for the Second Circuit. This Note argues that Congress intended to halt use of the motive and opportunity test in favor of a heightened and uniform pleading standard.

INTRODUCTION

Congress enacted the Private Securities Litigation Reform Act (PSLRA) in 1995, in an effort to stop frivolous securities fraud suits.¹ Key to the effort was the imposition of a heightened pleading standard requiring plaintiffs to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."² Congress intended federal courts to apply the new standard uniformly.³ It was Congress's hope that a stringent pleading standard would keep plaintiffs pushing baseless suits from reaching the discovery stage, thereby reducing the sums such plaintiffs could extract in settlements from defendant companies.⁴ Conflicting accounts of the

¹ See Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U.S.C. § 78-u4 (Supp. 1999); Scott H. Moss, *The Private Securities Litigation Reform Act: The Scienter Debacle*, 30 SETON HALL L. REV. 1279, 1281 (2000).

² See 15 U.S.C. § 78-u4(b)(2) (Supp. 1999); Moss, *supra* note 1, at 1281-82.

³ See SECURITIES LITIGATION REFORM ACT, H.R. CONF. REP. NO. 104-369, at 13702 (1995) [hereinafter Conference Report].

⁴ See Michael A. Dorelli, *Striking Back at "Extortionate" Securities Litigation: Silicon Graphics Leads the Way to a Truly Heightened and Uniform Pleading Standard*, 31 IND. L. REV. 1189, 1194-95 (1998). The PSLRA provides that discovery be stayed during the pendency of any motion to dismiss unless the court finds upon the motion of any party that particularized

legislative history documenting the inclusion of this heightened pleading standard, together with subsequent interpretations by the courts, however, has thwarted the hope of a uniform standard.⁵

Central to the controversy is whether Congress intended to codify the "motive and opportunity" prong of the pleading standard historically used by the United States Court of Appeals for the Second Circuit in securities fraud suits under the Securities Exchange Act of 1934.⁶ Part I of this Note discusses the origin of the motive and opportunity test⁷ and the legislative history of the PSLRA as it relates to congressional adoption or rejection of that test.⁸ Part II of this Note will discuss the divergent interpretations of the PSLRA's heightened pleading standard by the United States Courts of Appeals.⁹ Part IV of this Note will argue that Congress intended to end use of the motive and opportunity test.¹⁰ This Note concludes by suggesting that the failure of federal courts uniformly to reach this conclusion calls for remedial action by Congress or a resolution by the Supreme Court in order to ensure that the goal of the PSLRA—namely, the dismissal of frivolous suits before discovery increases the value of settlement—does not go unmet.

discovery is necessary to preserve evidence or to prevent undue prejudice to that party. See 15 U.S.C. 78-u4((b)(3)(B)).

⁵ See, e.g., Moss, *supra* note 1, at 1279–80; Lisa A. Herrera, Comment, *Will Motive, Opportunity and Recklessness No Longer Constitute Scienter for Fraud? A Survey of Recent Federal District Court Decisions After the Enactment of the 1995 Private Securities Litigation Reform Act*, 26 PEPP. L. REV. 379, 382 (1999); Dorelli, *supra* note 4, at 1190; Michael B. Dunn, Note, *Pleading Scienter After the Private Securities Litigation Reform Act: Or, a Textualist Revenge*, CORNELL L. REV. 193 (Nov. 1998).

⁶ See 15 U.S.C. § 78a *et seq.* (Supp. 1999); Dorelli, *supra* note 4, at 1189–90. Many of the complaints to which this pleading standard is applied allege insider trading by corporate insiders in contravention of the Securities Exchange Act of 1934. See 15 U.S.C. § 78a *et seq.* Rule 10b–5, promulgated by the Securities and Exchange Commission under that Act, makes it unlawful for any person to use any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, (1) to employ any device, scheme or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security. See 17 C.F.R. § 240.10b–5 (2000). The Securities and Exchange Commission has held that Rule 10b–5 requires insiders to abstain from trading when they possess non-public, material information, or to disclose the information prior to trading. See *In the Matter of Cady, Roberts & Co.*, 40 S.E.C. 907, 911 (1961).

⁷ See *infra* notes 11–14 and accompanying text.

⁸ See *infra* notes 15–25 and accompanying text.

⁹ See *infra* notes 26–214 and accompanying text.

¹⁰ See *infra* notes 215–288 and accompanying text.

I. THE MOTIVE AND OPPORTUNITY TEST

In 1987, in *Beck v. Manufacturers Hanover Trust Co.*, the United States Court of Appeals for the Second Circuit held that plaintiffs pursuing securities fraud actions must plead "factual allegations [that] give rise to a "strong inference" that the defendants possessed the requisite fraudulent intent."¹¹ Effectively, the Second Circuit's standard allowed securities fraud plaintiffs to establish this strong inference of fraudulent intent by (1) showing the defendant had motive to commit fraud and the opportunity to commit it, or (2) by presenting strong circumstantial evidence of conscious misbehavior or recklessness.¹² The shared usage of the "strong inference" language in the PSLRA and in Second Circuit decisions might be interpreted to suggest Congress sought to make all courts apply the Second Circuit standard.¹³ After all, "where Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."¹⁴

Despite the PSLRA's use of similar language, the legislative history of the PSLRA suggests Congress likely did not intend to adopt the Second Circuit standard in all its contours.¹⁵ In fact, Congress rejected an amendment to the PSLRA offered by Senator Arlen Specter of Pennsylvania, which would have adopted explicitly the Second Circuit's motive and opportunity test.¹⁶ Senator Specter's amendment would have allowed courts to find a strong inference of scienter where the plaintiff had alleged facts showing the defendant had both motive and opportunity to commit fraud, or facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness by the defendant.¹⁷ Additional evidence that Congress did not seek to codify the Second Circuit's standard is found in the Conference Report on the PSLRA, in which the Conference Managers stated:

Regarded as the most stringent pleading standard, the Second Circuit requirement is that the plaintiff must state facts with particularity, and that these facts, in turn, must give rise

¹¹ 820 F.2d 46, 50 (2d. Cir. 1987) (internal citations omitted).

¹² See Dorelli, *supra* note 4, at 1196-97.

¹³ See *id.* at 1200-01.

¹⁴ *Id.* at 1201 (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981)).

¹⁵ See *id.* at 1196, 1201; Moss, *supra* note 1, at 1283; Herrera, *supra* note 5, at 384.

¹⁶ See Dorelli, *supra* note 4, at 1201-02.

¹⁷ See *id.*

to a "strong inference" of the defendant's fraudulent intent. Because the Conference Committee intends to strengthen existing pleading requirements, it does not intend to codify the Second Circuit's case law interpreting this pleading standard.¹⁸

Furthermore, a footnote to the above statement goes on to explain that, "[f]or this reason, the Conference Report chose not to include in the pleading standard certain language relating to motive, opportunity or recklessness."¹⁹

Moreover, in his veto message, President Clinton made it clear that he interpreted the PSLRA as passed by Congress as calling for a tougher pleading standard than that used by the Second Circuit.²⁰ The President's message included this passage:

I am prepared to support the high pleading standard of the U.S. Court of Appeals for the Second Circuit—the highest pleading standard of any Federal circuit court. But the conferees make crystal clear in the Statement of Managers their intent to raise the standard even beyond that level. I am not prepared to accept that.²¹

The President went on to say that Congress "specifically indicated that they were not adopting the Second Circuit case law but instead intended to 'strengthen' the existing pleading requirements of the Second Circuit. All this shows that the conferees meant to erect a higher barrier to bringing suit than any now existing."²²

Although the Conference Report and the President's veto message would appear to make matters "crystal clear," Congress itself has ensured that some murkiness remains.²³ In 1998, in comments on the passage of the Securities Litigation Uniform Standards Act of 1998, the Senate Committee on Banking, Housing, and Urban Affairs stated:

¹⁸ *Id.* at 1202 (quoting Conference Report, *supra* note 3, at 13702).

¹⁹ *Id.* at 1202 (quoting Conference Report, *supra* note 3, at note 23).

²⁰ *See id.*; Dunn, *supra* note 5, at 219.

²¹ PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995, VETO MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H. DOC. NO. 104-150, at 15215.

²² *Id.*

²³ *See* Laura R. Smith, Comment, *The Battle Between Plain Meaning and Legislative History: Which Will Decide the Standard for Pleading Scienter After the Private Securities Litigation Reform Act of 1995?*, 39 SANTA CLARA L. REV. 577, 582-83 (1999) (discussing new legislative history on subject that resulted from passage of Securities Litigation Uniform Standards Act of 1988).

Neither the PSLRA nor S.1260 in any way alters the scienter standard in federal securities fraud suits. It was the intent of Congress, as was expressly stated during the legislative debate on the PSLRA, and particularly during the debate on overriding the President's veto, that the PSLRA establish a uniform federal standard on pleading requirements by adopting the pleading standard applied by the Second Circuit Court of Appeals.²⁴

Subsequently, upon signing the Securities Litigation Uniform Standards Act, the President indicated he did so only because it made the Second Circuit standard the uniform standard for pleading securities fraud.²⁵

II. DIFFERING INTERPRETATIONS

Not surprisingly, in the wake of ambiguous statutory language and mixed messages from Congress, the United States Courts of Appeals have not interpreted the pleading terms of the PSLRA uniformly.²⁶ The Second and Third Circuits have adhered to the motive and opportunity test.²⁷ The Sixth and Eleventh Circuits have indicated the motive and opportunity test is no longer applicable, but that such pleadings continue to be relevant, nonetheless.²⁸ The First Circuit has held that pleadings of motive and opportunity will survive a motion to dismiss, provided they are sufficient to give rise to the required strong inference of fraudulent intent.²⁹ Finally, the Ninth Circuit has held that the PSLRA amounted to an unequivocal prohibition on the motive and opportunity test.³⁰

²⁴ See *id.* at 583 (quoting THE SECURITIES LITIGATION UNIFORM STANDARDS ACT OF 1998, S. REP. NO. 105-182 (1998)). The Securities Litigation Uniform Standards Act was passed in response to the fact that plaintiffs' attorneys had begun filing securities suits in state courts to avoid the heightened pleading standards of the PSLRA. See *Developments in the Law—The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives*, 113 HARV. L. REV. 1806, 1820-21 (2000).

²⁵ See Smith, *supra* note 23, at 583.

²⁶ See Bruce Rubenstein, *A New Attempt to Torpedo Class Actions*, CORPORATE LEGAL TIMES, Sept. 2000, at 1.

²⁷ See *In re Advanta Corp. Securities Litigation*, 180 F.3d 525, 533-35 (3d Cir. 1999); *Press v. Chemical Investment Services Corp.*, 166 F.3d 529, 537-38 (2d Cir. 1999).

²⁸ See *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1285-86 (11th Cir. 1999); *In re Comshare, Inc., Securities Litigation*, 183 F.3d 542, 551 (6th Cir. 1999).

²⁹ See *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 195-96 (1st Cir. 1999).

³⁰ See *In re Silicon Graphics, Inc. Securities Litigation*, 183 F.3d 970, 974 (9th Cir. 1999).

A. *The Second and Third Circuits Adhere to Motive and Opportunity*

The United States Courts of Appeals for the Second and Third Circuits, as noted, have upheld the validity of the motive and opportunity test while acknowledging that under the PSLRA such allegations must be stronger to withstand a motion to dismiss than had been the case previously.³¹ In 1999, in *Press v. Chemical Investment Services Corp.*, the Second Circuit became the first federal appeals court to declare that the motive and opportunity test survived enactment of the PSLRA.³² The Second Circuit addressed the PSLRA pleading standard in the context of a suit filed by Donald Press, who had purchased a Treasury bill (T-bill) from Chemical.³³ Chemical sold the T-bill to Press for \$99,488.42, to mature in six months at \$102,000.³⁴ Following the purchase, Press asked Chemical either to express-mail him the proceeds at maturity or to allow him to pick up the proceeds on the day of maturity.³⁵ Chemical informed Press that he could not pick up the proceeds.³⁶ Chemical indicated, however, that the proceeds could be express-mailed or wired, but at an additional cost.³⁷ Having chosen to have Chemical express-mail the proceeds to him, Press received a check for \$101,985 four days after the date of maturity.³⁸ One of those days was a Saturday and another was a Sunday.³⁹

Press's claim against Chemical was three-fold.⁴⁰ First, he asserted that Chemical fraudulently failed to disclose that the funds would not be immediately available upon maturity.⁴¹ The result, Press complained, was that the period for which the yield should have been calculated was longer than indicated by Chemical, producing a fraudulently inaccurate yield rate.⁴² Press contended that Chemical was motivated by a desire to use his funds for a longer period of time.⁴³ Second, Press said he was not told by Chemical that it would take a

³¹ See *Advanta*, 180 F.3d at 534-35; *Press*, 166 F.3d at 538.

³² See 166 F.3d at 538.

³³ See *id.* at 532.

³⁴ See *id.*

³⁵ See *id.* at 533.

³⁶ See *id.*

³⁷ See *Press*, 166 F.3d at 533.

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See *Press*, 166 F.3d at 533. A yield rate is the total periodic profit an investor receives, or is entitled to, for an investment in a certain asset. See EITAN A. AVNEYON, *DICTIONARY OF FINANCE* 485 (1988).

⁴³ See *Press*, 166 F.3d at 533.

\$158.86 markup on the transaction, a sum he described as an excessive fee relative to the bill's yield and one requiring disclosure by Chemical.⁴⁴ Finally, Press maintained that Chemical had a fiduciary duty to disclose the fee to him.⁴⁵

In reviewing Press's complaint to determine whether it satisfied the pleading standard set out in the PSLRA, the Second Circuit reiterated its support for the motive and opportunity test.⁴⁶ The court wrote: "As a pleading requirement, a plaintiff must either (a) allege facts to show that defendants had both motive and opportunity to commit fraud' or (b) allege facts that 'constitute strong circumstantial evidence of conscious misbehavior or recklessness."⁴⁷ The court acknowledged its historical leniency, noting it had on prior occasions found scienter on "fairly tenuous inferences."⁴⁸ The court said its approach had been to reject general scienter allegations that could be applicable to any publicly-held business that sought to have its stock priced highly, while declining to establish a "nearly impossible" standard where a corporation's intent is at issue.⁴⁹

According to the court, Press's complaint "barely" alleged motive and opportunity, but satisfied the standard nevertheless.⁵⁰ He pled that Chemical's motive was its desire to have the use of his funds and that the opportunity was present because the proceeds were in Chemical's control.⁵¹ The court added that Press's complaint was the "barest of all pleading that would be acceptable."⁵² To find that it had not met the motive and opportunity test, however, would have been to make it "virtually impossible" for a plaintiff to plead scienter on the part of a corporation, institution, bank or other financial entity when the plaintiff could not point to "specifically greedy comments from an authorized corporate individual."⁵³ In reaching its conclusion, the court did not engage in a lengthy interpretation of the PLSRA pleading standard or its legislative history, instead simply declaring that the

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See *id.*, at 538.

⁴⁷ *Id.* at 538 (internal quotations omitted).

⁴⁸ See *Press*, 166 F.3d at 538.

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² *Id.* at 538.

⁵³ See *Press*, 166 F.3d at 538.

Act "heightened the requirement for pleading scienter to the level used by the Second Circuit."⁵⁴

The United States Court of Appeals for the Third Circuit, in 1999, in *In re Advanta Corp. Securities Litigation*, gave greater attention to the plain meaning of the statute and its legislative history.⁵⁵ Ultimately, however, the court reached a conclusion similar to the Second Circuit, holding that motive and opportunity allegations would suffice if supported by particular facts and giving rise to a strong inference of scienter.⁵⁶ The Third Circuit confronted allegations that Advanta, an innovative and leading issuer of MasterCard and Visa credit cards, had made false and misleading statements and material omissions regarding its earnings potential and the value of its stock.⁵⁷

The plaintiffs in the case alleged that Advanta began issuing cards carrying lower "teaser" rates and longer introductory periods than was customary in the industry, decisions the plaintiffs said led to riskier customers, many of whom defaulted.⁵⁸ The plaintiffs further contended that these practices produced Advanta's \$20 million first-quarter loss in 1997.⁵⁹ The plaintiffs also complained that even when it knew losses were inevitable, Advanta failed to disclose the situation, and, in fact, made false or materially misleading statements.⁶⁰ In particular, the plaintiffs pointed to a statement by the company's Vice President for Investor Relations in which the officer indicated that Advanta would, over the next six months, be converting more than \$5 billion in accounts from the teaser rate of about 7% to its standard rate of about 17%.⁶¹ This statement was allegedly contradicted by a subsequent statement by Advanta's chairman and former CEO in which he said the company was not as aggressive as it could have been in repricing.⁶² According to this statement, instead of repricing to 19%, the company repriced closer to 13% or 14%.⁶³ The plaintiffs contended that the second statement proved the first was false and misleading.⁶⁴ Furthermore, the plaintiffs alleged that two individual

⁵⁴ See *id.* at 537-38.

⁵⁵ See 180 F.3d 525, 531-35 (3d Cir. 1999).

⁵⁶ See *id.* at 533-34.

⁵⁷ See *id.* at 528.

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ See *Advanta*, 180 F.3d at 528.

⁶¹ See *id.*

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See *id.*

defendants at Advanta traded significant numbers of Advanta shares while in possession of material, nonpublic information, violating insider trading strictures.⁶⁵

The Third Circuit said the PSLRA's legislative history was "ambiguous and even contradictory" on the subject of whether the Act adopted the motive and opportunity test.⁶⁶ The court then recounted much of that legislative history in its decision.⁶⁷ Declining to give much weight to a history it considered complicated, however, the court reached its decision based in large part on the plain language of the statute.⁶⁸ The court noted that the "strong inference" wording is very similar to the language used by the Second Circuit and that, leaving aside the "state with particularity" requirement included in the PSLRA, the two standards are "virtually identical."⁶⁹ This led the court to conclude that Congress intended to enforce a pleading standard "approximately equal in stringency" to the Second Circuit standard.⁷⁰ The court explained this conclusion by pointing out that the Second Circuit standard was regarded as the toughest prior to passage of the PSLRA, making its adoption consistent with the legislature's intent to deter frivolous securities litigation by strengthening pleading requirements.⁷¹ The court also noted that when Congress passed the PSLRA requiring plaintiffs to state facts "with particularity" would have amounted to a heightened pleading standard even in jurisdictions already applying the Second Circuit standard.⁷²

Regarding the state of the motive and opportunity test, the court reasoned that if Congress wished to eliminate it, the PSLRA's drafters could have done so explicitly in the statute.⁷³ The fact that Congress chose not to do so, after considering including language that would directly address the Second Circuit's case law, implies the legislature elected to leave it to judicial interpretation, according to the Third Circuit.⁷⁴ Taking advantage of that discretion, the court held that in

⁶⁵ See *Advanta*, 180 F.3d at 529. The Securities and Exchange Commission requires that insiders disclose such material information or abstain from trading before the material becomes public knowledge. See *In the Matter of Cady Roberts & Co.*, 40 S.E.C. 907, 911 (1961).

⁶⁶ *Advanta*, 180 F.3d at 531.

⁶⁷ See *id.* at 531-33.

⁶⁸ See *id.* at 533.

⁶⁹ *Id.*

⁷⁰ See *id.* at 534.

⁷¹ See *Advanta*, 180 F.3d at 534.

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See *id.*

the Third Circuit, a plaintiff could plead scienter by alleging facts "establishing a motive and an opportunity to commit fraud, or by setting forth facts that constitute circumstantial evidence of either reckless or conscious behavior."⁷⁵ According to the court, requiring that motive and opportunity be supported by particular facts and that such facts give rise to a strong inference of scienter would address the "previous ease" of alleging motive and opportunity in cases of corporate officers alleged to have committed securities fraud.⁷⁶ Henceforth, wrote the court, "catch-all allegations that defendants stood to benefit from wrongdoing and had the opportunity to implement a fraudulent scheme are no longer sufficient, because they do not state facts with particularity or give rise to a strong inference of scienter."⁷⁷

Applying its new standard, the court found the plaintiffs' allegations about the statement indicating Advanta planned to reprice \$5 billion in accounts to 17% did not contain any specific facts to support an inference that the executive who made that remark, nor anyone else at Advanta, had actual knowledge of the statement's falsity.⁷⁸ The court said the plaintiff produced no evidence to rebut the possibility that Advanta intended to reprice accounts to 17% when the first statement was made, but subsequently changed its business strategy.⁷⁹ Regarding optimistic statements by the company in the face of deteriorating results, the court found the plaintiffs merely made the conclusory assertion that Advanta acted knowingly and made "blanket statements" that the individual defendants had to have been aware of the coming losses because of their positions in the company, rather than offering particular facts that would support a strong inference that the company possessed the requisite scienter.⁸⁰

B. *The Ninth Circuit Clearly Rejects Motive and Opportunity*

Among the federal appeals courts, the United States Court of Appeals for the Ninth Circuit has embraced the most stringent inter-

⁷⁵ *Id.* at 534-35.

⁷⁶ *See Advanta*, 180 F.3d at 535.

⁷⁷ *Id.*

⁷⁸ *See id.* at 536. The court found the statement was covered by the PSLRA's "safe harbor," which protects certain "forward-looking" statements from Rule 10b-5 liability unless the plaintiff proves it was made with "actual knowledge." *See id.* at 535-36.

⁷⁹ *See Advanta*, 180 F.3d at 536.

⁸⁰ *See id.*

pretation of the pleading standard under the PSLRA.⁸¹ In 1999, in *In re Silicon Graphics, Inc. Securities Litigation*, the Ninth Circuit famously interpreted the PSLRA pleading standard, holding that the motive and opportunity test was no longer applicable and concluding that plaintiffs must henceforth plead specific facts indicating at least a degree of recklessness suggesting actual intent.⁸² Silicon Graphics was the target of a securities fraud class action alleging that the company and six executives made misleading statements in an effort to drive up the company's stock price while they engaged in insider trading.⁸³ In July 1995, the company reported 45% revenue growth for fiscal year 1995 and projected similar results for the coming year.⁸⁴ Simultaneously, Silicon Graphics described plans for a new graphic design computer that would help maintain its success.⁸⁵ According to the plaintiffs, however, the company experienced quality control problems with an ASIC chip, a primary component of the new computer.⁸⁶ The plaintiffs averred that, despite having knowledge of the problems, the defendant officers told investors that production was continuing on pace.⁸⁷

The plaintiffs further maintained that the problem with the ASIC chips was not the only difficulty facing Silicon Graphics.⁸⁸ Sales to the United States government and original equipment manufacturers were declining, demand in Europe was slumping and a reorganization of the Silicon Graphics sales force was proving difficult.⁸⁹ When investors recognized these problems, Silicon Graphics stock fell to a low of \$29 on October 9, 1995.⁹⁰ Ten days later, the company declared revenue had grown only 33% during the first quarter of 1996, which, according to the plaintiffs, prompted a series of statements designed to

⁸¹ See *Silicon Graphics*, 183 F.3d at 977; Rubenstein, *supra* note 27, at 1. The Ninth Circuit is also alone in holding that enactment of the PSLRA resulted in a heightened substantive state-of-mind requirement: deliberate recklessness. See *Silicon Graphics*, 183 F.3d at 977.

⁸² See *id.* at 979.

⁸³ See *id.* at 979–80.

⁸⁴ See *id.* at 980.

⁸⁵ See *id.*

⁸⁶ See *Silicon Graphics*, 183 F.3d at 980. An ASIC, or application-specific integrated circuit, is a computer chip designed for a specific use. See MICHAEL D. SCOTT, INTERNET AND TECHNOLOGY LAW DESK REFERENCE 26, 307 (2001).

⁸⁷ See *Silicon Graphics*, 183 F.3d at 980–81.

⁸⁸ See *id.* at 981.

⁸⁹ See *id.*

⁹⁰ See *id.*

raise the price of Silicon Graphics stock.⁹¹ The company also announced a stock repurchase plan.⁹²

Meanwhile, problems with demand and the sales force reorganization continued.⁹³ The plaintiffs alleged in their complaint that company officers were aware of the difficulties as a result of internal reports, but continued to make positive statements, which produced a hike in Silicon Graphics' stock price.⁹⁴ It was around this time, in November 1986, that company officers made the stock sales complained of in the suit.⁹⁵

Shortly after the officers sold Silicon Graphics stock, investors began to fear the company would again miss its growth targets and the price of company stock began to drop.⁹⁶ Again, according to the plaintiffs, the company responded with false statements about company prospects.⁹⁷ By the end of December, the stock had fallen once again to \$26, and in January 1996 the company confirmed that it would not meet its projections.⁹⁸ The following day, company stock plunged to \$21 and the plaintiffs filed suit several days later.⁹⁹

The Ninth Circuit considered two issues related to the PSLRA: (1) what a plaintiff must allege to satisfy the requirement that she state facts giving rise to a strong inference of the required state of mind; and (2) the definition of the required state of mind.¹⁰⁰ Regarding the latter question, the court broke with most jurisdictions to find that the scienter required under the PSLRA is "deliberate recklessness."¹⁰¹

To arrive at what it considered the correct pleading standard, the court toured the PSLRA's legislative history.¹⁰² The court took note of the Conference Report and Congressional concern with abusive securities litigation, and determined that a heightened pleading standard was one of the procedural barriers to non-meritorious lawsuits created

⁹¹ See *id.*

⁹² See *Silicon Graphics*, 183 F.3d at 981.

⁹³ See *id.*

⁹⁴ See *id.* at 981-82.

⁹⁵ See *id.* at 982.

⁹⁶ See *id.*

⁹⁷ See *Silicon Graphics*, 183 F.3d at 982.

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *id.* at 973, 975.

¹⁰¹ See *id.* at 977. The court based its holding on the fact that case law indicates that recklessness in the context of the Securities Exchange Act must be a form of intentional conduct. See *Silicon Graphics*, 183 F.3d. at 977.

¹⁰² See *id.* at 977-80.

by the PSLRA.¹⁰³ The court also noted that the Joint Conference Committee declined to adopt the Specter Amendment, which would have incorporated the Second Circuit standard.¹⁰⁴ In doing so, said the court, Congress had "implicitly rejected" the two-prong test established by the Second Circuit.¹⁰⁵ The court brushed aside Congressional adoption of the "strong inference" language from the Second Circuit standard by reasoning that this was used only because it was "facially more stringent" than wording from other circuits.¹⁰⁶ The Ninth Circuit also pointed to President Clinton's veto message as evidence Congress had rejected the Second Circuit standard.¹⁰⁷

The Ninth Circuit concluded that under the PSLRA, plaintiffs "can no longer aver intent in general terms of mere 'motive and opportunity' or 'recklessness,' but rather, must state specific facts indicating no less than a degree of recklessness that strongly suggests actual intent."¹⁰⁸ The court decided that although a showing of mere recklessness or motive and opportunity might support a reasonable inference of intent, such a complaint is "not sufficient to establish a strong inference of deliberate recklessness."¹⁰⁹ Instead, PSLRA plaintiffs in the Ninth Circuit would have to plead, in great detail, facts that constitute strong circumstantial evidence of deliberately reckless or conscious misconduct.¹¹⁰

Turning to the complaint against Silicon Graphics, the court declared that to avoid dismissal, the plaintiff must have provided a list of all the relevant circumstances in great detail.¹¹¹ The court described the complaint as resting on two grounds: the existence of internal reports that were contrary to positive public comments, and the sale of Silicon Graphics stock by the officers.¹¹² The court faulted the plaintiffs for failing to give details about the reports, such as their contents, who prepared them, who reviewed them and from whom the plaintiffs learned of them.¹¹³ This failure left the court unable to determine whether there was any support for the allegation that the

¹⁰³ See *id.* at 977.

¹⁰⁴ See *id.* at 978.

¹⁰⁵ See *id.*

¹⁰⁶ See *Silicon Graphics*, 183 F.3d at 979.

¹⁰⁷ See *id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 974.

¹¹⁰ See *id.*

¹¹¹ See *Silicon Graphics*, 183 F.3d at 984.

¹¹² See *id.* at 984.

¹¹³ See *id.*

officers knew their statements were false when they made them.¹¹⁴ Regarding the stock sales, the court noted that all but two of the officers named in the complaint sold a relatively small portion of their holdings during the class period and that the tradings of the other two officers were not sufficiently suspicious when considered alone.¹¹⁵ The court reasoned that although these assertions about the reports and stock sales were sufficient to suggest an inference of deliberate recklessness, they were not enough to raise a strong inference of such conduct.¹¹⁶ In sum, the court found the plaintiff's allegations indistinguishable from the countless "fishing expeditions" that Congress passed the PSLRA to deter.¹¹⁷

C. The Sixth and Eleventh Circuits Hold Motive and Opportunity Still Relevant

The United States Courts of Appeals for the Sixth and Eleventh Circuits have taken a middle path between the Second and Third Circuits on the one hand, and the Ninth Circuit on the other.¹¹⁸ The Sixth and Eleventh Circuits have held that although bare allegations of motive and opportunity may be relevant to a showing of scienter, without more they are not sufficient to demonstrate the required state of mind.¹¹⁹

In 1999, in *In re Comshare, Inc. Securities Litigation*, the Sixth Circuit held that a bare pleading of motive and opportunity was insufficient under the PSLRA.¹²⁰ Software company Comshare and several of its officers and directors were the targets of a class action suit.¹²¹ On July 30, 1996, it was reported that Comshare had delayed publication of its quarterly report because an audit of its United Kingdom subsidiary was incomplete.¹²² A week later, the company indicated it would delay releasing fourth-quarter and year-ending results

¹¹⁴ See *id.* at 985.

¹¹⁵ See *id.* at 987. The court further noted that it had not failed to notice five securities action complaints filed in various United States District Courts by plaintiffs' counsel all containing the same "boilerplate" charges of "negative internal reports" found in the *Silicon Graphics* complaint. See *Silicon Graphics*, 183 F.3d at 984, n.14.

¹¹⁶ See *id.* at 984.

¹¹⁷ See *id.* at 988 (quoting Conference Report, *supra* note 3, at 13701).

¹¹⁸ See *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1288 (11th Cir. 2000); *In re Comshare, Inc. Securities Litigation*, 183 F.3d 542, 552 (6th Cir. 1999).

¹¹⁹ See *Bryant*, 187 F.3d at 1285-86; *Comshare*, 183 F.3d at 551.

¹²⁰ See 183 F.3d at 551.

¹²¹ See *id.* at 544.

¹²² See *id.* at 546.

pending completion of a year-end audit, which had now been expanded to include a detailed review of United Kingdom orders, among others.¹²³ The company acknowledged that it had discovered letters making \$4 million worth of United Kingdom orders conditional.¹²⁴ At closing on August 6, Comshare stock was at \$18 ½, but by the end of the following day's trading it had fallen by almost \$7.¹²⁵ On September 5, following its year-end audit, the company reported \$26.6 million in revenues for the fourth quarter, a decline from \$28.8 million in the same quarter a year before.¹²⁶ The company also announced total revenue for the year was up 9.8% over 1995, even recognizing the problems with the conditional orders.¹²⁷

The complaint against Comshare alleged that the defendants knowingly or recklessly disregarded the problems with conditional orders and, through public misrepresentations about revenue, fraudulently induced the plaintiffs to purchase Comshare stock at artificially inflated prices.¹²⁸ The Comshare defendants maintained that they took corrective measures upon discovering the side letter agreements during the audit.¹²⁹

The United States District Court for the Eastern District of Michigan dismissed the complaint, reasoning that the PSLRA required plaintiffs to allege facts giving rise to a strong inference of knowing misrepresentation or intent.¹³⁰ The Sixth Circuit found the District Court's interpretation of the PSLRA deficient, but affirmed the result.¹³¹ Rejecting the position of the District Court—and the Ninth Circuit in *In re Silicon Graphics*—that the PSLRA altered the state of mind requirement for securities fraud, the court held that the PSLRA merely changed the pleading standard to require plaintiffs to plead a "strong inference" of the requisite state of mind.¹³²

In rejecting the motive and opportunity test, the Sixth Circuit noted that the Second Circuit and other jurisdictions using the motive and opportunity test had held only that satisfaction of that test is sufficient to adequately allege scienter, not that a showing of motive

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ See *Comshare*, 183 F.3d at 546.

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ See *id.* at 547.

¹²⁹ See *id.*

¹³⁰ See *Comshare*, 183 F.3d at 552.

¹³¹ See *id.* at 544, 552.

¹³² See *id.* at 552–53.

and opportunity amounts to proof of the required state of mind—i.e., the defendant acted recklessly or knowingly.¹³³ Accordingly, the court concluded that under its plain interpretation of PSLRA, plaintiffs may withstand a motion to dismiss by alleging facts that give rise to a strong inference of reckless behavior, but not by alleging solely that the defendants had a motive and the opportunity to commit fraud.¹³⁴ In the court's view, facts showing motive and opportunity may be relevant to a pleading of the required state of mind, but a bare pleading of motive and opportunity would never alone be sufficient to give rise to the required strong inference.¹³⁵

The court then held that the plaintiff's complaint essentially was such a bare pleading of motive and opportunity.¹³⁶ According to the court, the plaintiffs simply alleged that the defendant officers and directors would garner greater compensation if Comshare's stock prices increased and that the defendants profited by selling shares during the class period.¹³⁷ The court wrote that such claims of motive and opportunity might be relevant on the question of recklessness, but they did not, in the case of Comshare, support a strong inference that the defendants acted with recklessness.¹³⁸

Similarly, in 1999, in *Bryant v. Avado Brands, Inc.*, the Eleventh Circuit passed on the pleading standard question, holding that the motive and opportunity test was no longer applicable and stating that plaintiffs suing under the PSLRA must plead scienter with particular facts that give rise to a strong inference of severe recklessness.¹³⁹ Avado Brands, formerly known as Apple South, Inc., was a corporation that owned and operated several chain restaurants, including "Applebee's Neighborhood Grill and Bar" and "Tomato Rumba's."¹⁴⁰ Shareholders of the company brought a class action alleging that the corporation and several officers made false and misleading statements and material omissions to inflate the price of the company's stock.¹⁴¹

During the class period of May 26, 1995 to September 24, 1996, the company was expanding aggressively, purchasing restaurants and

¹³³ See *id.* at 551.

¹³⁴ See *id.*

¹³⁵ See *Comshare*, 183 F.3d at 551.

¹³⁶ See *id.* at 553.

¹³⁷ See *id.*

¹³⁸ See *id.*

¹³⁹ See *Bryant*, 187 F.3d at 1285.

¹⁴⁰ See *id.* at 1273.

¹⁴¹ See *id.*

entering new territories.¹⁴² In particular, it acquired eighteen "Applebee's" restaurants in the Midwest, the integration of which the plaintiffs said proved difficult and ultimately unprofitable.¹⁴³ Similar complaints were made regarding the earlier acquisition of the "Tomato Rumba's" chain.¹⁴⁴ The plaintiffs alleged that the assimilation harmed Apple South's core business—namely, its restaurants in the Southeast.¹⁴⁵

The complaint alleged that the corporation's officers knew of the problems because of a sophisticated internal reporting system, but nevertheless continued to pursue the aggressive growth plan while concealing negative material information.¹⁴⁶ In fact, the plaintiffs alleged that the company told analysts the new restaurants would have a positive impact on profit margins and earnings-per-share.¹⁴⁷ According to the plaintiffs, such predictions facilitated the company's sale of more than 10 million shares, plus \$125 million in debt securities, which enabled the corporation to adhere to its aggressive growth without diluting the value of the insider defendant's holdings.¹⁴⁸ During the class period of May 26, 1995 to September 24, 1996, according to the complaint, the insider defendants sold more than \$19.6 million in personal corporate holdings.¹⁴⁹ On the final day of the class period, the defendants announced that the purchase of the eighteen Applebee's restaurants had negatively impacted the company, earnings-per-share would not reflect the 30%-35% growth predicted and would likely not exceed the 1995 earnings-per-share rate, and expansion plans would have to be scaled back.¹⁵⁰ Following the announcement, Apple South stock fell 40%, to \$12.25.¹⁵¹

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ See *Bryant*, 187 F.3d at 1274.

¹⁴⁵ See *id.* at 1273. Specifically, the plaintiffs charged that management problems attending the company's expansion into the Midwest produced a high rate of turnover, forcing the corporation to transfer managers from its core Southeast restaurants to the new Midwest operations. See *id.* at 1274. This move left the core establishments devoid of experienced employees, harming results in those locations. See *id.* The plaintiffs contended that the company responded by firing employees and cutting costs to meet short-term earnings-per-share estimates. See *id.* Poor service resulted and the return customer base diminished, dimming the company's long-term outlook. See *id.*

¹⁴⁶ See *id.* at 1274.

¹⁴⁷ See *id.*

¹⁴⁸ See *id.*

¹⁴⁹ See *Bryant*, 187 F.3d at 1274.

¹⁵⁰ See *id.*

¹⁵¹ See *id.*

The United States District Court for the Middle District of Georgia held that the Second Circuit standard and motive and opportunity test applied, and thus, denied Apple South's motion to dismiss.¹⁵² The District Court did, however, recommend that the Sixth Circuit allow an interlocutory appeal to determine whether the PSLRA had changed the pleading standard for securities suits.¹⁵³

As the Eleventh Circuit saw it, the question was whether motive and opportunity was sufficient to plead scienter—as it was in the Second Circuit—or had Congress “merely borrow[ed]” the Second Circuit’s “strong inference” language without adopting the motive and opportunity test.¹⁵⁴ According to the court, the plain language of the PSLRA meant that a plaintiff must plead with particularity facts giving rise to a strong inference that the defendant acted in a severely reckless fashion.¹⁵⁵ Sounding a note similar to the Sixth Circuit in *In re Comshare*, the court said allegations of motive and opportunity may be relevant to a showing of recklessness, but without more they are not sufficient to demonstrate the required state of mind.¹⁵⁶ The court said the PSLRA phrase “required state of mind” clearly referred to a substantive standard, like willfulness or recklessness.¹⁵⁷ Motive and opportunity, by contrast, are kinds of evidence, which, when combined with other evidence, might give rise to an inference of recklessness or willfulness.¹⁵⁸ In short, the motive and opportunity test can no longer be applied because motive and opportunity do not constitute a state of mind.¹⁵⁹ To support its rejection of the motive and opportunity test, the court noted that at the time of the PSLRA’s passage, only the Second and Ninth Circuits favored its usage, suggesting it was not so well-established that Congress would codify it *sub silentio*.¹⁶⁰

Because it was hearing only an interlocutory appeal, the Eleventh Circuit simply held that a securities fraud plaintiff must plead scienter with particular facts that give rise to a strong inference of severe reck-

¹⁵² See *id.* at 1274–75.

¹⁵³ See *id.* at 1275.

¹⁵⁴ See *Bryant*, 187 F.3d at 1282. The court also addressed the substantive state of mind question and found that the Eleventh Circuit’s “severe recklessness” standard was unaffected by the PSLRA. See *id.* at 1283.

¹⁵⁵ See *id.* at 1285.

¹⁵⁶ See *id.* at 1285–86.

¹⁵⁷ See *id.* at 1286.

¹⁵⁸ See *id.*

¹⁵⁹ See *Bryant*, 187 F.3d at 1285–86.

¹⁶⁰ See *id.* at 1286.

lessness.¹⁶¹ The court then remanded the matter back to the District Court to determine if the complaint against Apple South satisfied the newly-articulated standard.¹⁶² On remand, the District Court dismissed the plaintiffs' complaint, finding it failed to give rise to a strong inference that Apple South and the individual defendants either knew the statements were false or were reckless with regard to their accuracy.¹⁶³

D. *The First Circuit Requires Stronger Evidence of Motive and Opportunity*

The United States Court of Appeals for the First Circuit took a unique approach to the problem, deciding that the question of whether the PSLRA adopted the motive and opportunity test was beside the point.¹⁶⁴ Instead, on its way to concluding that pleadings of motive and opportunity would suffice if sufficiently strong, the First Circuit reasoned that the categorization of certain patterns of facts, such as motive and opportunity, to determine whether a sufficient showing of scienter has been made at the pleading stage, is not the correct approach.¹⁶⁵ For the First Circuit, the PSLRA amounted not to a prohibition on the motive and opportunity test, but to a call for a showing of a "strong" inference of fraud, rather than the "reasonable" inference standard sometimes used previously in that circuit.¹⁶⁶

In 1999, in *Greebel v. FTP Software, Inc.*, the First Circuit rejected the defendant's argument that facts showing motive and opportunity can never be enough to withstand a motion to dismiss, but noted that merely pleading motive and opportunity, regardless of the strength of the inferences conveyed by such facts will not be enough.¹⁶⁷ Lawrence M. Greebel and others purchased FTP stock from July 14, 1995 to January 3, 1996, and subsequently filed a securities suit against the company.¹⁶⁸ During the class period, the stock peaked at \$38.875.¹⁶⁹ On January 4, 1996, when the company announced that sales growth was in decline and earnings would be lower, the stock fell 52%, drop-

¹⁶¹ See *id.* at 1287.

¹⁶² See *id.*

¹⁶³ See *Bryant v. Apple South, Inc.*, 100 F. Supp. 2d 1368, 1385 (M.D. Ga. 2000).

¹⁶⁴ See *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 196 (1st Cir. 1999).

¹⁶⁵ See *id.* at 196.

¹⁶⁶ See *id.* at 197.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.* at 188.

¹⁶⁹ See *Greebel*, 194 F.3d at 188.

ping from \$25.25 to \$11.875 per share.¹⁷⁰ By August 9, 1996, FTP stock was trading at \$8 per share.¹⁷¹

Like *In re Comshare*, the FTP litigation arose in part from conditional orders the company booked as revenues.¹⁷² According to the plaintiffs, the defendants had regularly "whited out" purchase order terms inserted by customers that made their purchases conditional.¹⁷³ The plaintiffs alleged this was done to inflate revenues by improperly booking as final sales transactions that were contingent.¹⁷⁴ The United States District Court for the District of Massachusetts, after limited discovery, found the plaintiffs could not prove the claims and entered judgment.¹⁷⁵ The defendants sought dismissal, but the plaintiffs sought to make their complaint more specific by referring to newly discovered documents, though they made no formal motion to amend.¹⁷⁶ The District Court then dismissed with prejudice.¹⁷⁷

According to the plaintiffs, demand for FTP's internet and intranet software was diminishing due to the development of substitutes by end-users, as well as the availability of alternatives from Microsoft, Netscape and others.¹⁷⁸ The plaintiffs further alleged that FTP was not keeping pace with technological changes in the industry.¹⁷⁹ The plaintiffs asserted FTP and several of its directors and officers failed to disclose these threats to the company's business and also failed to disclose "questionable" sales practices, including "warehouse shipments," in which a sale of a product to a fictitious buyer was booked, but the product was shipped to a warehouse for storage and then returned to FTP.¹⁸⁰ The plaintiffs also objected to excessively discounted sales and "channel stuffing," in which sales and orders were compressed into the final weeks of a quarter, to improve the reported results for the period.¹⁸¹ The plaintiffs also complained of the undisclosed "white-out" practice, in which the company persuaded distributors to order excessively by promising unsold product could be returned.¹⁸² The

¹⁷⁰ See *id.*

¹⁷¹ See *id.*

¹⁷² See *id.*

¹⁷³ See *id.* at 188.

¹⁷⁴ See *Greebel*, 194 F.3d at 188.

¹⁷⁵ See *id.*

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

¹⁷⁸ See *id.* at 189.

¹⁷⁹ See *Greebel*, 194 F.3d at 189.

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

¹⁸² See *id.*

plaintiffs also charged that FTP made several false and misleading statements during the class period.¹⁸³

For the First Circuit, the case raised a number of questions about the PSLRA.¹⁸⁴ The court wrote:

First, did the PSLRA alter the standards for pleading particularity previously adhered to by this circuit? Second, did the PSLRA restrict the characteristic patterns of facts that may be pleaded in order to establish a 'strong inference' of scienter? Specifically, are the two methods of showing scienter endorsed by the Second Circuit—motive and opportunity or circumstantial evidence of reckless or conscious behavior sufficient to raise a "strong inference" of fraudulent intent—now available?¹⁸⁵

Like other circuits before it, the court noted that "on some of the points neither text nor history is indisputably clear."¹⁸⁶ Indeed, on the question of which characteristic patterns of facts may be pleaded, specifically whether motive and opportunity satisfies the PSLRA, the court stated that the history is "irretrievably conflicted."¹⁸⁷ The court then succinctly set forth the limited common ground on the question:

About all that can be said with confidence on that issue is that Congress agreed on the need to curb abuses, that it attempted to do so in the guise of what are articulated as procedural requirements, and that there was agreement on the

¹⁸³ See *id.* For example, on the first day of the class period, the company's president and chief executive officer touted the second-quarter results and said sales continued to be strong, despite the cancellation of a planned \$10 million purchase by the French Post Office. See *id.* At the same time, the president announced a reorganization; according to the plaintiffs, however, he failed to disclose that its costs would be continued over the long term. See *id.* Subsequent optimistic statements followed, which the plaintiffs alleged were false and misleading. See *id.* During the class period, moreover, several individual defendants sold more than \$23 million in FTP stock. See *id.* at 190. The complaint charged that the truth came to light on January 4, 1996 when FTP announced fourth-quarter results would fall below those of the prior year, prompting a \$27 drop in market value from the class period high. See *id.* at 189–90.

¹⁸⁴ See *Greebel*, 194 F.3d at 191–92.

¹⁸⁵ *Id.* at 191–92. The court also questioned, as other circuits had before it, whether the PSLRA altered the substantive scienter requirement, ultimately holding that the PSLRA did not alter the substantive definition of scienter. See *id.* at 192, 198–201.

¹⁸⁶ See *id.* at 192.

¹⁸⁷ See *id.*

words of the statute and on little else. And so we return to the text of the statute and its purpose.¹⁸⁸

The First Circuit then determined that the PSLRA's pleading standard is consistent with the prevailing First Circuit interpretation of Rule 9(b) of the Federal Rules of Civil Procedure, which it described as "strict and rigorous."¹⁸⁹

Beginning its consideration of the viability of the motive and opportunity test, the court noted that Congress intended that scienter could be proven by inference, thus acknowledging the role of indirect and circumstantial evidence.¹⁹⁰ According to the court, it is also true that the words of the PSLRA "neither mandate nor prohibit the use of any particular method" of establishing the requisite strong inference.¹⁹¹ Furthermore, the court wrote, the PSLRA pleading standard is tougher than that for other civil litigation because under Rule 12(b)(6) of the Federal Rules of Civil Procedure, all inferences must be drawn in favor of the plaintiffs; under the PSLRA, however, inferences of scienter survive a motion to dismiss only if they are both reasonable and strong.¹⁹²

With the benefit of the decisions by several other Courts of Appeals, the First Circuit suggested "the debate about adoption or rejection of prior Second Circuit standards strikes us as somewhat beside the point. The categorization of patterns of facts as acceptable or unacceptable to prove scienter or to prove fraud has never been the approach this circuit has taken to securities fraud."¹⁹³ Rather, the court wrote, it has analyzed particular facts in each individual complaint and weighed them to see if they were sufficient to support scienter.¹⁹⁴ The court then described a number of fact patterns it has held rele-

¹⁸⁸ *Id.* at 192.

¹⁸⁹ See *Greebel*, 194 F.3d at 193. In particular, the First Circuit required fraud plaintiffs to specify each allegedly misleading statement or omission. See *id.* The First Circuit also demanded that securities plaintiffs explain why the contested statement or omission is misleading by requiring that the complaint include factual support for the fraud allegations. See *id.* This requirement has been satisfied by the provision of specific details such as the time, place and content of the alleged misrepresentations, as well as "factual allegations that would support a reasonable inference that adverse circumstances existed at the time of the offering, and were known and deliberately or recklessly disregarded by defendants." *Id.* at 193-94 (citing *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 878 (1st Cir. 1991)).

¹⁹⁰ See *id.* at 195.

¹⁹¹ See *id.* at 195.

¹⁹² See *id.* at 195-96; see FED. R. Civ. P. 12(b)(6).

¹⁹³ See *id.*

¹⁹⁴ See *Greebel*, 194 F.3d at 196.

vant to show scienter, including insider trading, the personal interest of certain directors in not informing disinterested directors of an impending sale of stock and the self-interested motivation of defendants who seek to save their salaries or jobs.¹⁹⁵ The court concluded that, "[w]hile a number of these cases could be thought of as falling into motive and opportunity patterns, this court continues to prefer a more fact-specific inquiry."¹⁹⁶ The court acknowledged that it had in some decisions indicated that a "reasonable" inference was necessary to survive a motion to dismiss, although it required a "strong" inference on other occasions.¹⁹⁷ The court then stated that henceforth the strong inference standard would prevail, in light of its explicit inclusion in the PSLRA.¹⁹⁸

In considering the complaint against FTP, the court divided the allegations into those that amounted to direct evidence of scienter and those that were indirect evidence of scienter.¹⁹⁹ In the former category were the allegations of white-outs and warehousing.²⁰⁰ Because the District Court had determined that the plaintiffs could not produce admissible evidence to support the white-out charges they were disregarded by the court.²⁰¹ With respect to the warehousing allegations, particularly the charge that an employee who refused to sign for the "returned" product and complained about the practice was terminated, the court found the complaint deficient.²⁰² The complaint said only that this incident took place before the class period and alleged, on information and belief, that the practice continued during the class period.²⁰³ There were no specifics, however, about why the plaintiffs believed the practice continued or how it harmed

¹⁹⁵ *See id.*

¹⁹⁶ *See id.* at 196. Adopting the approach of several other circuits, the court wrote that although it rejected FTP's argument that facts showing motive and opportunity can never be enough to withstand a motion to dismiss, it cautioned plaintiffs that merely pleading motive and opportunity, regardless of the strength of the inferences of scienter such facts convey, will not be enough. *See id.* at 196. The court made similar statements about insider trading allegations, noting that the trading must take place when the defendants have incentives to withhold material, non-public information and the trading must be well beyond the defendant's normal trading patterns. *See id.* at 197-98.

¹⁹⁷ *See id.* at 197.

¹⁹⁸ *See id.*

¹⁹⁹ *See id.* at 201-07.

²⁰⁰ *See Greebel*, 194 F.3d at 201-02.

²⁰¹ *See id.*

²⁰² *See id.* at 202.

²⁰³ *See id.*

the plaintiffs.²⁰⁴ As a result, the court found the warehousing allegations insufficient to support a strong inference of scienter.²⁰⁵

Chief among the indirect evidence, according to the court, were the charges of channel stuffing, contingent sales and insider trading.²⁰⁶ The court read the plaintiffs' channel stuffing complaint to suggest that management knew revenues would be low in the class period and that management attempted to conceal that by shifting income.²⁰⁷ Although such allegations have some probative value, the court found them to be weak because there are several legitimate reasons for attempting to achieve sales earlier than actualized.²⁰⁸ The court then acknowledged that reporting contingent sales as revenue could provide evidence of scienter, but agreed with the District Court that the plaintiffs' complaint did not provide enough details about the practice.²⁰⁹ Finally, the court faulted the insider trading allegations in part because the timing was not suspicious.²¹⁰ None of the three key players sold their stock at its high points and each sold their stock after FTP announced the reorganization but before a favorable analyst's report that was allegedly manipulated.²¹¹ Furthermore, the vast majority of the more than \$23 million in stock sold by the insiders was sold by an officer just before and after he left the company.²¹² In sum, the plaintiffs "did not have enough weight on their side of the balance to meet the requirements" of the PSLRA.²¹³ Accordingly, the First Circuit affirmed the dismissal of the complaint.²¹⁴

IV. THE THWARTED LEGISLATIVE INTENT OF THE PSLRA

Although the preceding discussion shows some courts clearly have decided otherwise, it is difficult to view the legislative history of the PSLRA as manifesting anything other than congressional rejection

²⁰⁴ See *id.*

²⁰⁵ See *Greebel*, 194 F.3d at 202.

²⁰⁶ See *id.* at 202-07.

²⁰⁷ See *id.* at 202-03.

²⁰⁸ See *id.* at 203.

²⁰⁹ See *id.* at 203-04. Missing were basic details such as the approximate amount by which revenue and earnings were overstated, the products involved, the dates of any transactions and the identities of customers or FTP employees involved. See *id.* at 204.

²¹⁰ See *Greebel*, 194 F.3d at 206.

²¹¹ See *id.*

²¹² See *id.*

²¹³ See *id.* at 207.

²¹⁴ See *id.*

of the motive and opportunity test.²¹⁵ This is true for four reasons: (1) removal of the Specter Amendment by the Conference Committee; (2) the clear import of the Conference Report and its footnote 23; (3) the dubious interpretive value of comments surrounding the Securities Litigation Uniform Standards Act of 1998;²¹⁶ and (4) most importantly, the fact that continued application of the motive and opportunity test would undermine Congress's effort to deter frivolous securities litigation.²¹⁷

Congress's intent to shut the door on the motive and opportunity test is made most clear when one considers the history of the Specter Amendment, which would have codified the test and which won passage in the Senate by a vote of 52-47.²¹⁸ After Senate passage, Conference Committee members confronted a House version that left out the motive and opportunity language and the Senate bill, which included the Specter Amendment.²¹⁹ Thus, the Committee members had a clear choice to make and they elected to abandon the motive and opportunity test.²²⁰ As discussed above, some courts have suggested that a rejection of the motive and opportunity test should not be read into Congress's failure to adopt its terms.²²¹ This might be persuasive if Congress simply had never addressed the test in clear terms, but the action in the Conference Committee can only be interpreted as Congress's reasoned resolution of the question of whether to permit continued use of the motive and opportunity test.²²² If the Conference Committee had wanted the motive and opportunity test to remain in use, and, in fact, to be adopted uniformly, the easiest way to do so would have been to keep the Specter Amendment intact in the bill reported out of the Conference Committee.²²³ It chose to excise the Specter Amendment and the implication is clear.²²⁴

Perhaps concerned that courts would fail to heed this implication, Congress made two further explicit statements, that when taken

²¹⁵ See Dorelli, *supra* note 4, at 1217.

²¹⁶ For a discussion of the role of subsequent legislative history, see Smith, *supra* note 23, at 606-07.

²¹⁷ See *supra*, note 4 and accompanying text.

²¹⁸ See Dorelli, *supra* note 4, at 1202 n.79.

²¹⁹ See *id.* at 1202.

²²⁰ See *id.*

²²¹ See *supra*, notes 73-74 and accompanying text.

²²² See Dorelli, *supra* note 4, at 1201-02.

²²³ See *id.*

²²⁴ See *id.*

together, should resolve any doubt.²²⁵ First, in the Conference Report, the Conference Committee wrote that it did not intend to codify case law from the Second Circuit interpreting the strong inference standard.²²⁶ In footnote 23, in which the Conference Committee indicated it had declined the opportunity to include Specter's amendment, the Conference Committee again made it clear that Congress was rejecting the motive and opportunity test.²²⁷ Essentially, the two statements read together mean that to further its goal of strengthening existing pleading requirements, it was instructing courts that allegations of motive and opportunity were no longer sufficient to give rise to a strong inference of scienter.²²⁸

Proponents of the motive and opportunity test have had to make this clear legislative history less so to justify their continued employment of the motive and opportunity test.²²⁹ Their cause may initially appear bolstered by the comments of the Senate Committee on Banking, Housing and Urban Affairs about the Uniform Standards Act and President Clinton's remarks in signing that legislation.²³⁰ Emphasis on these remarks, which suggest that Congress intended to adopt the Second Circuit pleading standard and that President Clinton signed the Uniform Standards Act because of that fact, however, is misplaced.²³¹ If a subsequent Congress was displeased with the pleading standard called for by the PSLRA, it retained the option to enact new legislation codifying the motive and opportunity test.²³² Permitting future Congresses to change the plain meaning of statutes enacted by past Congresses by issuing remarks that are never voted on nor signed into law would be a dangerous precedent.

Finally, continued use of the motive and opportunity test conflicts with the clearly-articulated goal of the PSLRA—the elimination before discovery of frivolous securities fraud suits.²³³ Simply put, allowing plaintiffs to proceed to discovery on the bare allegation of motive and opportunity would offer publicly-traded companies in-

²²⁵ See *id.* at 1202.

²²⁶ See *id.*; *supra* notes 18–19 and accompanying text.

²²⁷ See *supra* note 19 and accompanying text; Dorelli, *supra* note 4, at 1202.

²²⁸ See Dorelli, *supra* note 4, at 1202.

²²⁹ See *supra* notes 66–68, 186–188 and accompanying text.

²³⁰ See *supra* notes 23–25 and accompanying text; Smith, *supra* note 23, at 606.

²³¹ See Smith, *supra* note 23, at 606.

²³² See *id.*

²³³ See *supra* note 4 and accompanying text; *In re Silicon Graphics, Inc. Securities Litigation*, 183 F.3d 970, 977–78 (9th Cir. 1999).

adequate protection.²³⁴ As the Supreme Court has noted, when insufficiently stringent pleading standards allow frivolous securities suits to advance to the discovery stage, the settlement cost to defendants rises in a way unrelated to the merits of the complaint.²³⁵

Despite these facts, nearly all the circuit courts that have reached the question of the PSLRA pleading standard have left the door open to pleadings of motive and opportunity. The Second and Third Circuits explicitly interpreted the PSLRA's legislative history as a codification of the motive and opportunity test.²³⁶ The Sixth and Eleventh Circuits claimed to have read the history as rejecting the test, but allowed that allegations of motive and opportunity continue to have relevance to plaintiffs' pleadings.²³⁷ The First Circuit upheld the continued vitality of motive and opportunity pleadings, holding only that they must be stronger in the wake of the PSLRA.²³⁸ Only the Ninth Circuit interpreted the PSLRA as an outright rejection of the motive and opportunity test.²³⁹

Nonetheless, those that fear judicial unwillingness to stand firm against pleadings of motive and opportunity can take a small amount of comfort; despite questionable conclusions about the intent of the PSLRA regarding the motive and opportunity test, only in the case of *Press v. Chemical Investment Services Corp.*, can it be said that a complaint that should have been dismissed was allowed to proceed.²⁴⁰ In the other cases discussed in this Note, the courts dismissed complaints that were clearly of the sort Congress sought to deter when it passed the PSLRA.

In *Press*, in which the plaintiff asserted that Chemical fraudulently maintained the use of his funds for four days, the Second Circuit acknowledged the bareness of the claim and accurately described it as one alleging motive and opportunity.²⁴¹ The language of the decision suggests that such a pleading is the barest that would survive a motion to dismiss.²⁴² This establishment of *Press*'s pleading as a baseline is ineffective, however, for the purpose of achieving Congress's

²³⁴ See *Silicon Graphics*, 183 F.3d at 977-78.

²³⁵ See *Dorelli*, *supra* note 4, at 1195-96 (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739-41 (1975)).

²³⁶ See *supra* notes 31-80 and accompanying text.

²³⁷ See *supra* notes 118-163 and accompanying text.

²³⁸ See *supra* notes 164-214 and accompanying text.

²³⁹ See *supra* notes 81-117 and accompanying text.

²⁴⁰ See 166 F.3d at 532-33; *supra* notes 32-54 and accompanying text.

²⁴¹ See *supra* notes 50-51 and accompanying text.

²⁴² See *supra* note 52 and accompanying text.

goal of deterring frivolous securities litigation because the facts in *Press* were so innocuous that it is hard to imagine how any competent plaintiffs' attorney could ever fail to top them.

On the facts, the Second Circuit's refusal to dismiss *Press*'s claim is at odds with the objectives of the PSLRA.²⁴³ Standing alone, Chemical's failure to tell *Press* in advance that he would have to wait four days beyond the maturity date to collect his deposit and interest and that the bank would charge a mark-up of \$158.86 hardly gives rise to a suggestion that Chemical intended to defraud the plaintiff.²⁴⁴ Instead, *Press*'s complaint merely alleged motive—and a weak one at that—and opportunity.²⁴⁵ His complaint should have been dismissed.

Unlike the Second Circuit, the Third Circuit engaged in an extensive discussion of legislative history to reach its conclusion that the PSLRA codified the motive and opportunity test.²⁴⁶ The court stumbles in that effort, however, because, while disclaiming reliance on comments about the PSLRA made in the context of the Uniform Standards Act, it nevertheless uses that background to support its position that Congressional intent is uncertain.²⁴⁷ Furthermore, in *In re Advanta Corp. Securities Litigation*, the Third Circuit based its conclusion in part on its belief that the Second Circuit standard was the most stringent in place at the time the PSLRA was enacted.²⁴⁸ This argument, however, ignores the footnote in the Conference Report indicating Congress was not locking in the Second Circuit approach because it wanted a heightened standard.²⁴⁹ Additionally, the Third Circuit said Congress could have explicitly eliminated the motive and opportunity test, but chose not to.²⁵⁰ In fact, as suggested earlier, Congress's actions should be viewed as having explicitly rejected the motive and opportunity test.²⁵¹ Indeed, the House-Senate Conference Committee removed the Specter Amendment, an action that should be seen as having the same strength as excising the language from an

²⁴³ See *supra* notes 32–45 and accompanying text.

²⁴⁴ See *supra* notes 32–45 and accompanying text.

²⁴⁵ See *supra* notes 32–45 and accompanying text.

²⁴⁶ See *supra* notes 55–77 and accompanying text.

²⁴⁷ See *In re Advanta Securities Corp. Litigation*, 180 F.3d 525, 533 (3d Cir. 1999). The Third Circuit suggested "there is little to gain in attempting to reconcile the conflicting expressions of legislative intent," including comments related to the Uniform Standards Act, and used what it considered to be a conflicting legislative history to justify a reading of the statute's plain language that supported the motive and opportunity test. See *id.* at 533.

²⁴⁸ See *id.* at 534.

²⁴⁹ See *supra* note 19 and accompanying text.

²⁵⁰ See *supra* notes 73–74 and accompanying text.

²⁵¹ See *supra* notes 218–224 and accompanying text; Dorelli, *supra* note 4, at 1201–02.

already-enacted piece of legislation.²⁵² Finally, the Third Circuit's argument that requiring that pleadings be made with particularity would result in a heightened pleading standard in the Third Circuit and, therefore, satisfy the PSLRA is faulty.²⁵³ Although it may be true that such an innovation would make life more difficult for securities plaintiffs in the Third Circuit, it is not proof that the court had gone far enough to satisfy Congress. The fact that "catch-all allegations" would no longer suffice in the Third Circuit only serves as a recognition that Congress was right to see past practices as demonstrating the need for a heightened pleading standard, not as proof that the pleading standard had now been raised to the level sought by Congress.²⁵⁴

Despite its continued adherence to the motive and opportunity test, the Third Circuit correctly affirmed dismissal of the complaint against Advanta. The allegations in the case, the use of low teaser rates to win customers, the subsequent repricing of those accounts at rates lower than one company official once stated was Advanta's plan, and trades in company stock by executives, failed to give rise to a strong inference that the company had defrauded investors.²⁵⁵ The plaintiffs' complaint offered no evidence to suggest repricing decisions were based on anything other than a desire to retain those customers induced by the teaser rates and that an apparent change in position on the post-introductory rates was intended to defraud investors.²⁵⁶ Absent such evidence, and in light of the fact that trading by insiders was not sufficient to give rise to a strong inference of fraudulent intent, dismissal was the correct disposition.²⁵⁷

Meanwhile, the Sixth and Eleventh Circuits wrote their decisions as if they were heeding the Congressional call to cease using the motive and opportunity test.²⁵⁸ A close look at the language in their decisions, however, suggests otherwise.²⁵⁹ To wit, in *In re Comshare, Inc. Securities Litigation*, the Sixth Circuit indicated that although bare motive and opportunity allegations would not be enough to show a strong inference of scienter, such allegations may be relevant to a pleading of the required state of mind.²⁶⁰ The problem with this

²⁵² See *id.*

²⁵³ See *supra* note 72 and accompanying text.

²⁵⁴ See *supra* notes 76-77 and accompanying text.

²⁵⁵ See *supra* notes 57-65 and accompanying text.

²⁵⁶ See *supra* notes 78-79 and accompanying text.

²⁵⁷ See *Advanta*, 180 F.3d at 541.

²⁵⁸ See *supra* notes 118-163 and accompanying text.

²⁵⁹ See *supra* notes 135, 156 and accompanying text.

²⁶⁰ See *supra* note 135 and accompanying text.

stance is two-fold: first, it is unhelpful in illuminating precisely what relevance allegations of motive and opportunity might have; second, it simply runs afoul of Congress's intent to do away with the motive and opportunity test.²⁶¹

In *In re Comshare*, however, the Sixth Circuit was correct to dismiss the allegations.²⁶² The facts of *In re Comshare* show a company that made quick and candid disclosure of newly-discovered conditional orders previously booked as revenue.²⁶³ Furthermore, in the year in which the accounting errors took place, a corrected accounting showed that total revenue for the year had still risen 9.8%.²⁶⁴ Making companies in such situations vulnerable to litigation would only discourage disclosure; thus frustrating one of the overarching aims of the nation's securities laws.²⁶⁵ The Sixth Circuit's affirmance of the complaint's dismissal was correct.

The Eleventh Circuit in *Bryant v. Avado Brands, Inc.*, repeated the Sixth Circuit's interpretive mistake, rejecting the motive and opportunity test but indicating that pleadings of motive and opportunity still may be relevant.²⁶⁶ The Eleventh Circuit also was wrong to suggest that because the PSLRA requires pleadings to give rise to a strong inference of whatever substantive standard of scienter a given circuit applies and because motive and opportunity is not the required state of mind, a showing of motive and opportunity would be insufficient.²⁶⁷ As discussed by the First Circuit in *Greebel v. FTP Software*,

²⁶¹ See *supra* note 135 and accompanying text. What the court said is that "while facts regarding motive and opportunity may be 'relevant to pleading circumstances from which a strong inference of fraudulent scienter may be inferred,' and may, on occasion, rise to the level of creating a strong inference of reckless or knowing conduct, the bare pleading of motive and opportunity does not, standing alone, constitute the pleading of a strong inference of scienter." See *In re Comshare, Inc. Securities Litigation*, 183 F.3d 542, 551 (6th Cir. 1999) (quoting *In re Baesa Securities Litigation*, 969 F. Supp. 238, 242 (S.D.N.Y. 1997)). In effect, the Sixth Circuit's analysis tends to lead to a holding close to that of the First Circuit, which held that allegations of motive and opportunity must simply be stronger than required in the past to satisfy the PSLRA. See *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 197 (1st Cir. 1999).

²⁶² See *Comshare*, 183 F.3d at 546-47.

²⁶³ See *supra* notes 122-127 and accompanying text.

²⁶⁴ See *supra* note 127 and accompanying text.

²⁶⁵ In *Basic, Inc. v. Levinson*, 485 U.S. 224, 230 (1988), the Supreme Court noted that it had "repeatedly . . . described the 'fundamental purpose' of [the Securities Exchange Act of 1934] as implementing a 'philosophy of full disclosure.'" *Id.* (citing *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477-78 (1977) (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963))).

²⁶⁶ See *supra* note 156 and accompanying text.

²⁶⁷ See *supra* notes 157-159 and accompanying text.

Inc., however, by using the word "inference," Congress clearly envisioned that the required state of mind may be pled based on circumstantial and indirect evidence, of which motive and opportunity would be examples had Congress not made it clear it disfavored this particular breed of circumstantial evidence.²⁶⁸ Instead of rejecting the motive and opportunity test for its stated reason, the Eleventh Circuit should have rejected it for all the reasons noted earlier.

When *Bryant* was remanded to the District Court, the lower court correctly dismissed the complaint, although the Eleventh Circuit's rejection of the motive and opportunity test was more equivocal than warranted by the statute.²⁶⁹ In essence, the plaintiffs' complaint against Avado Brands amounted to a disagreement over the defendants' aggressive growth plans.²⁷⁰ The complaint alleged nothing to suggest that the new restaurants and the sale of debt securities to facilitate Avado's growth were designed to defraud investors, rather than make the company more profitable.²⁷¹ Trades by insiders, offering only an inference of motive, failed to raise the allegations to the level necessary to avoid dismissal and, thus, the District Court properly dismissed the case.²⁷²

The First Circuit, meanwhile, erred in suggesting that, if sufficiently strong, pleadings of motive and opportunity would be sufficient to survive a motion to dismiss.²⁷³ In *Greebel*, the court said Congressional history is conflicted and took advantage of these circumstances to attempt to achieve Congress's goal of a heightened pleading standard by tinkering with the circuit's historical pleading standards.²⁷⁴ It is only true that the PSLRA's history is conflicted, however, if one emphasizes comments by the Senate Banking Committee and President Clinton upon the passage of legislation that followed the PSLRA by four years.²⁷⁵ As noted repeatedly, an assessment of the Conference Committee report and the history of Senator Specter's amendment makes clear that the motive and opportunity test should not survive.²⁷⁶ Like the Third Circuit, the First Circuit also ap-

²⁶⁸ See 194 F.3d at 195.

²⁶⁹ See *Bryant v. Apple South, Inc.*, 100 F. Supp. 2d 1368 (M.D. Ga. 2000) [hereinafter *Bryant II*].

²⁷⁰ See *supra* notes 142–148 and accompanying text.

²⁷¹ See *supra* note 163 and accompanying text.

²⁷² See *Bryant II*, 100 F. Supp. 2d at 1385–86.

²⁷³ See *supra* notes 164–214 and accompanying text.

²⁷⁴ See *supra* notes 186–188, 197–198 and accompanying text.

²⁷⁵ See *supra* notes 230–231 and accompanying text; Smith, *supra* note 23, at 582–83.

²⁷⁶ See *supra* notes 218–228 and accompanying text; Dorelli, *supra* note 4, at 1201–02.

peared to believe that by raising its own pleading standards in some way it would be satisfying Congress's wishes.²⁷⁷ For the First Circuit, this took the form of insisting that future complaints give rise to a strong inference of scienter, rather than merely a reasonable inference, as the court had sometimes required prior to the PSLRA.²⁷⁸ Although this is a step in the right direction, it is not enough.

The First Circuit dramatically illustrated the effect of a properly-interpreted PSLRA when it listed various fact patterns that it had held sufficient to withstand a motion to dismiss and went on to acknowledge that many of them could be said to fall into the category of motive and opportunity.²⁷⁹ If such motive and opportunity allegations could no longer survive a motion to dismiss, plaintiffs would be discouraged from filing complaints based on such fact patterns and the Congressional goal of reducing the number of frivolous securities suits would be achieved.

Despite its continued allowance of motive and opportunity pleadings, the First Circuit did reach the correct result on the facts before it in *Greebel*, affirming the District Court's dismissal of the complaint.²⁸⁰ *Greebel*'s complaint failed the "state with particularity" requirement of the PSLRA with regard to many of its allegations.²⁸¹ Although the allegations of "white-out" activity and warehousing would give rise to a strong inference of fraudulent intent if sufficiently detailed, the plaintiff's complaint lacked the necessary facts.²⁸² Additionally, the allegations of insider trading simply did not describe sales that were "out of the ordinary or suspicious."²⁸³ The court was right to uphold the District Court's dismissal.

Finally, unlike the First Circuit, the Ninth Circuit correctly found that Congress intended to foreclose a successful pleading based on motive and opportunity.²⁸⁴ In *In re Silicon Graphics*, the Ninth Circuit artfully explained that showings of motive and opportunity might, in some cases, be sufficient to support a *reasonable* inference of intent, but would never be enough to create a *strong* inference of the required state of mind.²⁸⁵

²⁷⁷ See *supra* notes 197-198 and accompanying text.

²⁷⁸ See *supra* notes 197-198 and accompanying text.

²⁷⁹ See *supra* notes 194-196 and accompanying text.

²⁸⁰ See *supra* notes 172-183 and accompanying text.

²⁸¹ See *Greebel*, 194 F.3d at 201.

²⁸² See *id.* at 201-02.

²⁸³ See *id.* at 207.

²⁸⁴ See *supra* note 82 and accompanying text.

²⁸⁵ See *Silicon Graphics*, 183 F.3d at 974.

The Ninth Circuit has been the only federal appeals court to combine the correct interpretation of the PSLRA with the appropriate result on the facts. Instead of particular facts giving rise to a strong inference of fraud, the plaintiffs' complaint simply made a blanket allegation that the Silicon Graphics defendants were aware of negative internal reports when they made optimistic statements about the company.²⁸⁶ The complaint was devoid of details about these reports, however.²⁸⁷ Furthermore, although the trades by insiders were sufficiently detailed, given the amounts involved and the timing no court could have found they gave rise to the requisite strong inference.²⁸⁸ Accordingly, the court was correct in affirming the dismissal.

CONCLUSION

The foregoing analysis makes clear that Congress intended to halt use of the motive and opportunity test in favor of a heightened and uniform pleading standard for securities suits. Cases decided since passage of the PSLRA, however, show that federal courts have not only continued to find a place for the motive and opportunity test, but have also failed to coalesce around a single pleading standard. Although the above analysis suggests that these failings generally have not kept the federal courts from deciding these cases properly, Congress's goals would be better served if the motive and opportunity test were unequivocally rejected.

A uniform and heightened standard would deter more suits than one in which mere allegations of motive and opportunity were sufficient, or at least had some relevance. A tougher standard would allow defendant companies to better resist the extortionate settlement demands of plaintiffs. In a time of stock market volatility, such as exists today, honest enterprise needs the protection a uniform and truly heightened pleading standard would provide. Congress should re-examine the issue and pass remedial legislation making it clear allegations of motive and opportunity no longer suffice to open the door to discovery. If Congressional action is not forthcoming, the Supreme Court should step in to resolve this split among the circuits.

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²⁸⁶ See *supra* notes 112-114 and accompanying text.

²⁸⁷ See *id.*

²⁸⁸ See *supra* note 115 and accompanying text.