

THE SEVENTH CIRCUIT MISSED THE BULLSEYE IN WALLEYE

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ABSTRACT

The structure of agency relationships in a transaction should have no bearing on the outcome when the only difference between two hypothetical transactions is solely the facial structure. In the same vein, investor protection is at the forefront of the securities laws; commonly used limiting language for market announcements should not be enough to absolve a company from fraudulent disclosures, e.g., “preliminary results.”

In *Walleye Trading LLC v. AbbVie, Inc.*,[†] a Seventh Circuit decision, the Court did the opposite and found that, based on pleadings at the motion to dismiss stage, an issuer is not liable for the misstatements of an outside agent in preliminary Dutch auction tender offer results. This finding is even more shocking when taking into account that the issuer had access to the raw data suitable to find and correct the misstatement.

The ruling created an effective safe harbor for dissemination of hastily prepared information. Alone, the typical market practice of releasing preliminary tender offer results seems innocuous; but when paired with the reactionary nature of the market, it can guess artificial changes in stock pricing, and therefore harm investors, on an artificial basis. Insert bad actors, and the safe harbor allows them to utilize the artificial changes in pricing to game the market.

The safe harbor needs to be closed. The rise in retail investor market participation evidences a need for greater investor protections.

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[†] 962 F.3d 975 (7th Cir. 2020).

Without this change, the market is set to lose investor confidence, which is especially important as retail investing reaches all-time highs.

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INTRODUCTION

Yudhijit Bhattacharjee, a journalist writing about the science of lying, stated: “Our capacity for dishonesty is as fundamental to us as our need to trust others, which ironically makes us terrible at detecting lies. Being deceitful is woven into our very fabric, so much so that it would be truthful to say that to lie is human.”¹ To protect the nest eggs of

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Americans and the economy from collapse, the securities laws were adopted to limit lying and untruthfulness.

Rule 10b-5 (the “Rule”),² which interprets the securities laws, embraces the idea that the nation’s securities markets, private and public, should be honest places. In the words of Professor Charles Murdock, in these markets, it is “‘sinful’ not just to lie, but to tell half-truths as well.”³ This is based in the spirit of the securities laws: Caveat emptor has no place in the United States’ capital markets.⁴ These laws are intended to embody the spirit of full and fair disclosure, creating a high standard of business ethics.⁵

Neither Section 10(b) nor Rule 10b-5 of the Securities Exchange Act of 1934 (the “Securities Exchange Act” or “‘34 Act”) creates a private right of action.⁶ The U.S. Securities and Exchange Commission (SEC) is tasked with enforcing the intended full and fair disclosure;⁷ however, the Supreme Court has created an implied private right of action under Rule 10b-5.⁸

Under the private implied right of action, private litigants can only bring suits against primary violators of the Rule.⁹ A primary violator is the person who holds the ultimate responsibility for the making of the untruthful statement, or another violation of the rule.¹⁰ A person or entity who helps to prepare an untruthful statement, or another violation of the rule, would be an aider or abettor.¹¹

1. *Why Lying Is Human Nature*, AXIOS (May 23, 2017), <https://www.axios.com/why-lying-is-human-nature-1513302505-c8487b94-a3ed-4d0d-b4e8-feb5fa5a0ffb.html> [<https://perma.cc/HK4V-3NY7>].

2. 17 C.F.R. § 240.10b-5.

3. Charles W. Murdock, *Janus Capital Group, Inc. v. First Derivative Traders: The Culmination of the Supreme Court’s Evolution From Liberal to Reactionary in Rule 10b-5 Actions*, 91 DENV. UNIV. L. REV. 369, 373 (2014).

4. See SEC v. Zandford, 535 U.S. 813, 819 (2002) (first quoting United States v. O’Hagan, 521 U.S. 642, 658 (1997); then quoting Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 151 (1972)).

5. See *Zandford*, 535 U.S. at 819 (quoting *O’Hagan*, 521 U.S. at 658).

6. *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011) (citing Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 & n.9 (1971)).

7. *Zandford*, 535 U.S. at 819.

8. *Janus Cap. Grp.*, 564 U.S. at 142.

9. See *id.*

10. See *id.*

11. *Id.* at 143.

By the Supreme Court’s interpretation, “Rule 10b-5’s private right of action does not include suits against aiders and abettors [P]ersons or entities without control over the content of a statement” are not the “primary violators who ‘made’ the statement,” and therefore cannot be held liable.¹² An individual who is not the primary violator would hold secondary liability.¹³ “Even when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it [I]t is the speaker who takes credit—or blame—for what is ultimately said.”¹⁴ When a person makes a statement, they are liable for the information contained in the statement.¹⁵ Even if the person did not write his own statement, he has total control over what he says and does.¹⁶ If a speaker, who would typically be a primary violator, explicitly attributes his statement to another, the attribution is persuasive evidence that it is not the speaker’s statement, but the person to whom it is attributed.¹⁷

The Seventh Circuit created an effective safe harbor to primary liability for making a false statement in *Walleye Trading LLC v. AbbVie, Inc.*¹⁸ Circuit Judge Frank Easterbrook, writing for the court, effectively raised the pleading standard to sufficiently allege securities fraud in a specific circumstance.¹⁹ A panel of the Seventh Circuit affirmed a decision by the Northern District of Illinois, ruling that allegations of recklessness by a contractor in creating information and the release of this information by an issuer, who had access to the data to confirm the statement, are not sufficient to establish that the issuer acted with scienter if the information disclosed was “accurately reported” from the information supplied to the principal.²⁰

The Seventh Circuit’s decision is directly contrary to the spirit of the securities laws.²¹ However, it is possible to harmonize the Seventh Circuit’s interpretation with the spirit of the securities laws and guidance

12. *Id.*

13. *See id.* at 152.

14. *Id.* at 143.

15. *Id.* at 142–44.

16. *Id.*

17. *Id.* at 142–43.

18. *See generally* *Walleye Trading LLC v. AbbVie, Inc.*, 962 F.3d 975 (7th Cir. 2020) (affirming the Northern District of Illinois’ ruling to dismiss Plaintiff’s allegations of fraud under Rule 10b-5(b) and Section 10(b) of the ‘34 Act).

19. *Id.*

20. *See id.* at 978.

21. *See infra* Parts II–III.

of the Supreme Court's case law. The effective safe harbor allows an issuer to rely on the work of an outside agent in its own written or verbal statements to evade liability. This is so long as the issuer explicitly attributes the statement to the outside agent. This use of an outside agent is a bar to liability established through the agent's, and potentially the issuer's, recklessness. Without this liability, only the outside agent is responsible under secondary liability to the SEC and the private litigant has no path for pecuniary relief.

Instead of allowing the safe harbor to shield issuers, the Seventh Circuit—or the SEC—could establish a new duty to confirm data, when bases are available, or create somewhat arbitrary but necessary guidelines for an issuer's transactions over a certain aggregate value. This is not the proper solution. The effective safe harbor should be reversed by the Seventh Circuit, the Supreme Court on a potential appeal, or supplemented by SEC rulemaking. Keeping the safe harbor will allow harm to investors and provide artificial price fluctuations in the capital markets.

I. THE SEVENTH CIRCUIT, THE SUPREME COURT, AND OCCASIONALLY THE SECOND CIRCUIT.

It is necessary to recite judicially created standards before discussing the safe harbor itself. The standards to be discussed include first, the standard for Rule 10b-5 claims set by the Supreme Court; second, the Seventh Circuit's interpretation of this baseline; and third, the Second Circuit's interpretation of this baseline. Lastly, the pleading standards to satisfy the recklessness standards are set forth.

A. THE SECURITIES EXCHANGE ACT'S STANDARDS

Section 10(b) of the Securities Exchange Act of 1934 states:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the

Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.²²

The SEC, under the authority granted by Section 10(b), promulgated Rule 10b-5 to define manipulative or deceptive devices as:

- (a) To employ any device, scheme, or artifice to defraud,
- (b) 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
- (c) 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.²³

The elements of a Section 10(b) claim are:

- (1) A material misrepresentation or omission;
- (2) Scienter;
- (3) Reliance;
- (4) Economic loss; and
- (5) Loss causation.²⁴

As illustrated above, in a test articulated by the Supreme Court: “To establish liability under . . . Rule 10b-5, a private plaintiff must prove that the defendant acted with scienter”²⁵ Every federal circuit court of appeals has found that recklessness can constitute the requisite scienter; although the federal circuit courts of appeals have derived different tests.²⁶

The Private Securities Litigation Reform Act (“PSLRA”), which heightened pleading standards for Section 10(b) and consequently Rule 10b-5, requires a private securities complaint alleging a false

22. 15 U.S.C. § 78j(b) (Section 10 of the Securities Exchange Act of 1934).

23. 17 C.F.R. § 240.10b-5 (1951) (Rule 10b-5).

24. *See* Anchor Bank, FSB v. Hofer, 649 F.3d 610, 617 (7th Cir. 2011).

25. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007).

26. *See id.* at 319 n.3 (citing *Ottman v. Hanger Orthopedic Grp., Inc.*, 353 F.3d 338, 343 (4th Cir. 2003)).

or misleading statement to “(1) specify each statement alleged to have been misleading and the reason or reasons the statement is misleading; and (2) state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”²⁷ The complaint as a whole, with all of its allegations taken together, must establish the required strong inference.²⁸ But, even on a motion to dismiss, plausible opposing inferences must be taken into account.²⁹

In reality, “the inquiry is inherently comparative: How likely is it that one conclusion, as compared to others, follows from the underlying facts?”³⁰ “[P]ersons or entities without control over the content of a statement” are not the “primary violators who ‘made’ the statement,” and therefore cannot be held liable for it.³¹ An individual who is not the primary violator would hold secondary liability.³² “Even when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it [I]t is the speaker who takes credit—or blame—for what is ultimately said.”³³ When a person makes a statement, they are liable for the information contained in the statement.³⁴ Even if the person did not write his own statement, he has total control of what he says and does.³⁵ If a speaker, who would typically be a primary violator, explicitly attributes his statement to another, the attribution is persuasive evidence that it is not the speaker’s statement, but the statement of the person to whom it is attributed.³⁶

The Supreme Court has found that “[c]onduct itself can be deceptive”; acts or statements can be relied upon by investors, and as

27. *Id.* at 321 (citing 15 U.S.C. § 78u-4(b)(1)-(2)) (internal quotation marks omitted) (discussing the PSLRA and its requirements in place of those established through federal common law by the individual circuit courts of appeal in interpreting Fed. R. Civ. P. 9(b)).

28. *Id.* at 322–23.

29. *Id.* (reversing the Seventh Circuit’s analysis of § 10(b) and Rule 10b-5 motion to dismiss based on reasonable inference from the pleadings).

30. *Id.* at 323.

31. *See id.*

32. *See id.*

33. *Id.*

34. *Id.* at 141–43.

35. *Id.*

36. *Id.*

a result, conduct can establish liability.³⁷ Therefore, any discussion of liability, in theory, can apply to conduct itself.

Aiding and abetting liability—which is the liability of secondary actors who are tangentially related to the maker of a statement or actor engaging in deceptive conduct—cannot be obtained in a private action under Section 10(b) and Rule 10b-5.³⁸ Aiding and abetting liability is solely actionable by the SEC.³⁹ It applies when a misstatement or omission was made by a party with no privity to the harmed investor.⁴⁰ This is effectively an extension of the reliance prong of a Rule 10b-5 claim because the investor must rely on the action of the defendant for a private action.⁴¹ If harmed investors were able to bring private rights of action against aiding and abetting entities, the investors would be able to circumvent establishing reliance, thereby disregarding the artificial limits placed on private liability under Rule 10b-5.⁴² Issuers are often not primarily liable for misrepresentations or omissions made by their agents as long as the issuer acted in good faith.⁴³ The attribution of acts and statements is discussed further below.⁴⁴

Conversely, aiding and abetting liability—where liability is imposed on secondary actors—can result when a principal relays statements made by an agent containing misstatements or omissions.⁴⁵ The maker of a statement, not the preparer, is ultimately liable for any misrepresentation or misleading element of the statement.⁴⁶ Liability of

37. See *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 158 (2008) (citing *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476–77 (1977) as an example) (applying the logical equivalent of this statement to find that non-corporate defendant with no public statements, misrepresentations, or omissions is not liable to private investor as aiding and abetting).

38. *Id.* at 157–58 (citation omitted).

39. *Id.* at 158 (citing 15 U.S.C. § 78t(e)).

40. *Id.* at 158–59.

41. See *id.* at 159.

42. *Id.* at 157 (quoting *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 180 (1994), *superseded by statute on other grounds*).

43. *Hollinger v. Titan Cap. Corp.*, 914 F.2d 1564, 1578 (9th Cir. 1990). *Contra Vento & Co. of N.Y. v. Metromedia Fiber Network*, No. 97 Civ. 7751 (JGK), 1999 WL 147732, at *12–13 (S.D.N.Y. Mar. 18, 1999).

44. See *infra* Section II.C.

45. *Cf. Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142–43 (2011).

46. *Id.* But see *AT&T v. Winback & Conserve Program*, 42 F.3d 1421, 1430–31 (3d Cir. 1994) (analyzing *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994), *superseded by statute on other grounds*, and finding that between Justice

an agent for his actions, and respondeat superior liability for the principal, is a common law doctrine; the common law doctrine is inapplicable to Rule 10b-5 private implied right of action claims.⁴⁷ It is still possible that an aider and abettor can be primarily liable in certain circumstances.⁴⁸

B. THE SEVENTH CIRCUIT'S INTERPRETATION

The Seventh Circuit Court of Appeals defines recklessness sufficient to establish scienter for a Rule 10b-5 claim as acting where “the danger of misleading [investors is] known or so obvious that any reasonable man would be legally bound as knowing, and the [material misstatement, or otherwise,] must derive from something more egregious than even ‘white heart/empty head’ good faith.”⁴⁹

In an elaboration, the Seventh Circuit wrote that “reckless conduct” can be sufficient to constitute scienter.⁵⁰

Reckless conduct may be defined as a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.⁵¹

This “is akin to a [common law] reckless[ness] standard though phrased in terms of ‘blinded by conflict of interest’ and ‘wantonly ignored.’”⁵² But this definition is restricted because “the definition of ‘reckless behavior’ should not be a liberal [test] lest any discernible distinction between ‘scienter’ and ‘negligence’ be obliterated for these purposes.”⁵³ Recklessness is “a lesser form of [voluntary] intent [but

Kennedy’s majority opinion and Justice Stevens’ dissent, common law doctrines such as respondeat superior do not apply to private § 10(b) actions as to prevent holding secondary actors liable under aiding and abetting liability).

47. See *Stoneridge Inv. Partners, LLC*, 552 U.S. at 157.

48. See, e.g., *Novak v. Kasaks*, 216 F.3d 300, 311 (2d Cir. 2000) (listing circumstances that would be probative or satisfy a finding of scienter).

49. *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977).

50. *Sanders v. John Nuveen & Co.*, 554 F.2d 790, 792 (7th Cir. 1977).

51. *Id.* at 793 (adopting standard from *Sundstrand Corp.*, 553 F.2d at 1033).

52. *Id.*

53. *Id.*

greater than] ordinary negligence” which is an inherently different standard and not just a sliding scale.⁵⁴

The Seventh Circuit and associated district courts have yet to directly address any possible exceptions to explicit attribution in a statement to another speaker.⁵⁵

Due to the absence of Seventh Circuit case law determining exceptions to explicit attribution, other tests or standards can be adopted to fill this gap. Another standard may not fit squarely into the gap being filled but may provide guidance to a reviewing court. One possible test is one that determines whether allegations of erroneous accounting statements can establish scienter.

In 2000, in *Chu v. Sabratek Corp.*,⁵⁶ the Northern District of Illinois articulated a fairly novel test to determine whether allegations of erroneous accounting statements can establish scienter.⁵⁷ According to this court, the factors relevant to whether preparation of erroneous statements is evidence of scienter are:

- (1) Magnitude of the accounting error;
- (2) Facts showing that the defendants had prior notice of the error; and
- (3) Whether a defendant was responsible for calculating and disseminating the financial information.⁵⁸

54. *Id.*

55. *See, e.g., Lane v. Money Masters, Inc.*, No. 14-CV-1715, 2015 WL 225427, at *8 (N.D. Ill. Jan. 15, 2015) (discussing applicability of respondeat superior liability for principal when statement is made and attributed to agent); *SEC v. Bengert*, 931 F. Supp. 2d 908, 911 (N.D. Ill. 2013) (citing *SEC v. Carter*, No. 10 C 6145, 2011 WL 5980966, at *1 (N.D. Ill. Nov. 28, 2011)) (finding that drafter of distributed statement is not liable for actionable misstatement, but allegations that the maker of the statement who ultimately approved and adopted the statement is sufficient to establish scienter for purposes of a motion to dismiss). *But see McConville v. SEC*, 465 F.3d 780, 787 (7th Cir. 2006) (finding insider who prepared Form 10-K with financial misstatements liable even though she did not sign the form).

56. 100 F. Supp. 2d 827, 837–39 (N.D. Ill. 2000) (analyzing non-compliance with Generally Accepted Accounting Principles (“GAAP”) in preparing financial statements).

57. *See id.* at 837–39.

58. *See id.* at 838.

This test has not been evaluated by the Seventh Circuit, but it has been used throughout the lower courts under the Seventh Circuit, primarily in the Northern District of Illinois.⁵⁹

C. THE SECOND CIRCUIT'S INTERPRETATION

The Second Circuit Court of Appeals similarly defines recklessness as acting with “an intent to deceive, manipulate or defraud,”⁶⁰ established for purposes of pleading by “alleging facts . . . constituting strong circumstantial evidence of conscious misbehavior or recklessness.”⁶¹ The Second Circuit Court of Appeals further defines recklessness as ignoring “a clear duty to disclose . . . facts supporting a strong inference of ‘conscious recklessness—i.e., a state of mind approximating actual intent, and not merely a heightened form of negligence,’ . . .”⁶²

An inference of scienter may be based on recklessness when “the defendants: (1) benefitted in a concrete and personal way from the purported fraud . . . (2) engaged in deliberately illegal behavior . . . (3) knew facts or had access to information suggesting that their public statements were not accurate . . . or (4) failed to check information they had a duty to monitor . . .”⁶³ Contrary to the Seventh Circuit, the Second Circuit has explicitly stated “that the inference [of scienter] may arise where the complaint sufficiently alleges that the defendants . . . knew

59. *E.g.*, *In re Motorola Sec. Litig.*, No. 03 C 287, 2004 WL 2032769, at *27 (N.D. Ill. Sept. 9, 2004); *SEC v. Sys. Software Assocs.*, 145 F. Supp. 2d 954, 958 (N.D. Ill. 2001); *In re SCB Comput. Tech., Inc.*, 149 F. Supp. 2d 334, 350 (W.D. Tenn. 2001); *see also, e.g.*, *In re Rent-Way Sec. Litig.*, 209 F. Supp. 2d 493, 508–09 (W.D. Pa. 2002).

60. *Setzer v. Omega Healthcare Invs., Inc.*, 968 F.3d 204, 212 (2d Cir. 2020) (quoting *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 168 (2d Cir. 2000)).

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

62. *Id.* at 213 (emphasis omitted) (quoting *Stratt-McClure v. Morgan Stanley*, 776 F.3d 94, 106 (2d Cir. 2015)).

63. *Novak v. Kasaks*, 216 F.3d 300, 311 (2d Cir. 2000). The Seventh Circuit disagreed with the Second Circuit's interpretation of the PSLRA in determining the standard for pleadings and their requirements as intended by Congress in *Makor Issues & Right, Ltd. v. Tellabs, Inc.*, 437 F.3d 588, 601 (7th Cir. 2006), *rev'd by*, 551 U.S. 308 (2007). While the Second Circuit's interpretation of the pleading was stricter than that decided by the Supreme Court, the Seventh Circuit's interpretation was expressly overturned. *Id.*; *Tellabs, Inc.*, 551 U.S. at 322.

facts or had access to information suggesting that their public statements were not accurate . . . [or] failed to check information they had a duty to monitor.”⁶⁴

Applying the above to statements with clear and explicit attribution, the Southern District of New York has repeatedly stated: “[E]xplicit attribution is not absolutely dispositive.”⁶⁵ “[T]he proper inquiry is whether a plaintiff sufficiently pleads that a particular defendant ‘made it necessary or inevitable that any falsehood would be contained in the statement.’”⁶⁶ Further, the Second Circuit has elaborated that “a plaintiff must prove that an agent of the corporation committed a culpable act with the requisite scienter, and that the act (and the accompanying mental state) are attributable to the corporation.”⁶⁷ This is typically used for finding corporate scienter.⁶⁸ But the limits to this test are potentially susceptible to ambiguity given the multitude of principal-agent relationships incidental to the corporate form.

64. *Novak*, 216 F.3d at 311 (internal citations omitted).

65. *Doubleline Cap. LP v. Odebrecht Fin., Ltd.*, 323 F. Supp. 3d 393, 452 (S.D.N.Y. 2018) (quoting *IOP Cast Iron Holding, LLC v. J.H. Whitney Cap. Partners, LLC*, 91 F. Supp. 3d 456, 473 (S.D.N.Y. 2015)). In *Doubleline Capital LP*, Judge Woods of the S.D.N.Y. explained:

[T]here is not even a suggestion in Plaintiffs’ allegations that Odebrecht Finance ‘made it necessary or inevitable’ that CNO’s false and misleading disclosures would be contained in the offering memoranda. Rather, as the documents themselves show, CNO prepared the offering memoranda; CNO attested to the accuracy of its disclosures contained in the offering memoranda; and CNO accepted responsibility for the accuracy of its statements. There is no indication that Odebrecht Finance either ratified CNO’s financial disclosures or had any role in the preparation of the offering memoranda In light of *Janus*’s clear rejection of [this] argument . . . the Court cannot conclude that on these allegations, Odebrecht Finance was a maker of CNO’s financial statements contained in the offering memoranda.

Id. (quoting *Janus*, 564 U.S. at 146–47). Odebrecht is the parent company of CNO. CNO was alleged to have been bribing a Latin American government to attain opportunities for success. The claimed success in the offering memoranda of CNO was allegedly misleading because the bribes were not disclosed. *See id.* at 408–10.

66. *Id.* (quoting *IOP Cast Iron Holding, LLC*, 91 F. Supp. 3d at 473 (quoting *In re Lehman Bros. Sec. & ERISA Litig.*, 2013 WL 5730020, at *2 (S.D.N.Y. Oct. 22, 2013))).

67. *Teamsters Loc. 445 Freight Div. Pension Fund v. Dynex Cap., Inc.*, 531 F.3d 190, 195 (2d Cir. 2008).

68. *See, e.g., Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1038 (7th Cir. 1977).

II. WALLEYE, THE FACTS, AND HOW THE SEVENTH CIRCUIT ERRED

On June 22, 2020, the Seventh Circuit implicitly raised the pleading standard for sufficiently alleging securities fraud in *Walleye Trading LLC v. AbbVie, Inc.*⁶⁹ In an opinion by Judge Frank Easterbrook, the court affirmed a ruling by the Northern District of Illinois that the alleged recklessness of an agent in creating information is not sufficient to establish allegations of scienter, or sufficient to support scienter of the issuer, if the information disclosed was “accurately reported” from the information supplied to the issuer.⁷⁰ The false disclosure was in relation to a tender offer by the defendant, AbbVie, to repurchase shares through a Dutch auction.⁷¹

A. THE FACTS AND THE SEVENTH CIRCUIT

The plaintiff—Walleye Trading LLC, a Minnesota-based broker-dealer firm⁷²—alleged that it was injured when it purchased shares of AbbVie stock relying on the erroneous press release AbbVie issued.⁷³

The dispute arose from a tender offer by AbbVie, conducted by Dutch auction, to repurchase \$7.5 billion worth of shares of its own common stock.⁷⁴ AbbVie hired Computershare to act as its depository.⁷⁵

A depository is a facility where something is deposited for storage or safekeeping.⁷⁶ A depository can be an entity that holds securities and

69. See generally *Walleye Trading LLC v. AbbVie, Inc.*, 962 F.3d 975 (7th Cir. 2020) (affirming the Northern District of Illinois’ ruling to dismiss Plaintiff’s allegations of fraud under Rule 10b-5(b) and Section 10(b) of the Exchange Act).

70. See *id.* at 978.

71. *Walleye Trading LLC v. AbbVie, Inc.*, No. 18-C-05114, 2019 WL 4464392, at *3 (N.D. Ill. Sept. 18, 2019). A Dutch auction is where “a company sets a range of prices at which it is willing to repurchase a fixed dollar amount of stock from its stockholders. Willing stockholders then choose a price within the specified range at which they would sell. The company then calculates a purchase price for the stock based on the lowest price it must spend per share such that its total expenditure is the previously specified, fixed amount.” *Id.* at *1 n.1.

72. *Walleye Trading LLC*, BLOOMBERG, <https://www.bloomberg.com/profile/company/0977300D:US> [<https://perma.cc/9WG9-46A5>] (last visited Aug. 23, 2020).

73. *Walleye Trading LLC*, 2019 WL 4464392, at *2.

74. See *id.* at *1.

75. *Id.* at *1.

76. Will Kenton, *Depository*, INVESTOPEDIA (May 26, 2020), <https://www.investopedia.com/terms/d/depository.asp> [<https://perma.cc/5RVR-M4YZ>].

aids in trading them.⁷⁷ In a Dutch auction tender offer, a depository receives the tendered shares, and at the completion of the tender offer, either pays tenderers for their shares or returns them.⁷⁸ Corporations repurchasing shares in Dutch auction tender offers typically announce a preliminary count of tendered shares by the depository, followed by a final count.⁷⁹ The announced price is minimally changed, if changed at all, and the size of the auction is rarely as high as \$7.5 billion—the size of AbbVie’s Dutch auction.⁸⁰

The morning after the tender offer closed, and shortly before a new trading day was about to begin, AbbVie released a statement declaring: “In accordance with the terms and conditions of the tender offer, and based on the preliminary count by the depository, AbbVie expects to acquire approximately 71.4 million shares of its common stock at a price of \$105 per share[.]”⁸¹ In that day’s trading, AbbVie’s stock price rose from \$99.47 to close at \$103.01, with a trading volume of more than 31 million shares.⁸² Then, forty-six minutes after the market closed, AbbVie filed a corrective statement and issued a press release noting that the purchase price in the tender offer would actually be only \$103.00 per share.⁸³ AbbVie’s trading price dropped significantly on the day following the announcement, closing at \$98.94.⁸⁴ The corrective statement also provided an updated stock count, explaining that

77. *Id.*

78. See, e.g., *Washington Federal, Inc. Announces Final Results of Tender Offer*, BUSINESS WIRE (Mar. 12, 2021 8:00 AM), <https://www.morningstar.com/news/business-wire/20210312005086/washington-federal-inc-announces-final-results-of-tender-offer> [<https://perma.cc/XZ2U-8P9C>]; *AMC Networks Announces Preliminary Results of Modified Dutch Auction Tender Offer*, A.P. NEWS (Oct. 15, 2020), <https://apnews.com/press-release/globenewswire-mobile/44f99022aea2bf9f240bc02b68fccf91> [<https://perma.cc/B22Y-TAQ9>]; *AMC Networks Announces Final Results of Modified Dutch Auction Tender Offer*, YAHOO NEWS (Oct. 21, 2020), <https://news.yahoo.com/amc-networks-announces-final-results-110000499.html> [<https://perma.cc/Q5FL-58M8>].

79. See, e.g., *Walleye Trading LLC*, 2019 WL 4464392, at *1.

80. See, e.g., *Kenton*, *supra* note 76.

81. *Walleye Trading LLC v. AbbVie, Inc.*, No. 18 C 05114, 2019 WL 4464392, at *1 (N.D. Ill. Sept. 18, 2019) (quoting defendant’s Tender Offer Statement announcing the Auction’s preliminary results); Brief for Appellee at 2, *Walleye Trading LLC v. AbbVie, Inc.*, 962 F.3d 975 (7th Cir. 2020) (No. 19-3063).

82. *Walleye Trading LLC*, 2019 WL 4464392, at *2.

83. *Id.* (emphasis added); Brief for Appellee at 3, *Walleye Trading LLC v. AbbVie, Inc.*, 962 F.3d 975 (7th Cir. 2020) (No. 19-3063).

84. *Walleye Trading LLC*, 2019 WL 4464392, at *2.

“additional shares that were validly tendered by notice of guaranteed delivery . . . were erroneously omitted from the initial preliminary results provided to AbbVie by Computershare.”⁸⁵

A failure by Computershare to account for a substantial number of tendered shares caused the pricing discrepancy.⁸⁶ This raw data was available to AbbVie before its initial, morning announcement, and it presumably could have caught Computershare’s error had it double-checked its calculations.⁸⁷ The plaintiff alleged that “AbbVie executives acted with the requisite mental state because they failed to perform ‘grammar school arithmetic’ to verify Computershare’s numbers.”⁸⁸

But Judge Easterbrook rejected this allegation, writing that “neither the statute nor any regulation requires an issuer to verify someone else’s data before reporting them. (And, given the size of this transaction, a sixth grader would not be the right person to do the math).”⁸⁹ His knockout punch for the plaintiff was: “Most curiously, Walleye claims that AbbVie violated Section 10(b) and the corresponding rule because it failed in its duty to correct the initial statement. Yet AbbVie did correct the initial statement. That correction led to this suit! Walleye has failed to plead a plausible Section 10(b) claim.”⁹⁰

While this was Judge Easterbrook’s final statement regarding the plaintiff’s Section 10(b) claims, he failed to discuss scienter outside of glossing over a shorter recitation of the standard, phrased as: “allegations of scienter must be as compelling as any opposing inference.”⁹¹

B. THE NORTHERN DISTRICT OF ILLINOIS

In *Walleye Trading LLC*,⁹² at the trial level, Judge Charles Kocoras determined that the plaintiff’s allegations of scienter were lacking because the “allegations concern the ‘typical’ practice by depositories to

85. Brief for Appellee at 4, *Walleye Trading LLC v. AbbVie, Inc.*, 962 F.3d 975 (7th Cir. 2020) (No. 19-3063) (quoting updated statement).

86. *Walleye Trading LLC*, 2019 WL 4464392, at *2.

87. *Id.* at *4.

88. *Walleye Trading LLC v. AbbVie, Inc.*, 962 F.3d 975, 978 (7th Cir. 2020).

89. *Id.*

90. *Id.*

91. *See id.* at 977.

92. *Walleye Trading LLC v. AbbVie, Inc.*, No. 18 C 05114, 2019 WL 4464392 (N.D. Ill. Sept. 18, 2019).

advise issuers of the number of shares duly tendered on each day, [the shares'] delivery methods, the number of shares withdrawn, and the cumulative totals for each day."⁹³

The data at issue were allegedly available to the defendant to perform the simple arithmetic to confirm the numbers given.⁹⁴ Alas, the defendant did not confirm the numbers received from its agent, but rather released them as received.⁹⁵ Judge Kocoras found that the allegations were not sufficient to satisfy the PSLRA's heightened pleading standard requiring particular facts providing a strong inference the defendant acted with the required state of mind.⁹⁶

Judge Kocoras opened his discussion with analysis later to be ignored by, and possibly contrary to, Judge Easterbrook's short opinion.⁹⁷ Judge Kocoras discussed the *ex ante* approach⁹⁸ of the false statement of material fact for a Section 10(b) and Rule 10b-5 claim.⁹⁹ But he states that AbbVie correctly relayed the information given to it by Computershare from falsity as a matter of fact.¹⁰⁰

Judge Kocoras—in a creative manner—dismissed the plaintiff's pleadings as failing to satisfy the PSLRA.¹⁰¹ But Judge Kocoras failed to conduct the balancing required by the PSLRA as to the reality of the situation and gave no examples to anchor his finding.¹⁰² Although both Judge Kocoras and Judge Easterbrook appreciated the massive size of the transaction, they refused to recognize a heightened standard of care given the size of the transaction, or to even discuss potential liability for disseminating similar materially false information.¹⁰³

93. *Id.* at *4.

94. *Id.*

95. *Id.* at *1, *4.

96. *Id.* at *4.

97. *See id.* at *3–4. *See generally Walleye Trading LLC*, 962 F.3d at 977.

98. When the statement is found to be false after the making of the statement instead of being known as false at the time the statement was made. *Cf. Walleye Trading LLC*, 2019 WL 4464392, at *3.

99. *See id.* (citing *Higginbotham v. Baxter Int'l Inc.*, 495 F.3d 753, 759–60 (7th Cir. 2007) (deriving standard from Judge Friendly's opinion in *Denny v. Barber*, 576 F.2d 465, 470 (2d Cir. 1978) (There is no "fraud by hindsight."))). *Higginbotham* also discusses the intent of the PSLRA as balancing costs between baseless litigation and hiring teams of accountants. 495 F.3d at 760.

100. *See Walleye Trading LLC*, 2019 WL 4464392, at *4.

101. *See id.*

102. *See id.*

103. *See id.*; *Walleye Trading LLC v. AbbVie, Inc.*, 962 F.3d 975, 978 (7th Cir. 2020).

It is clear that Judge Kocoras and Judge Easterbrook, at a minimum, implicitly had frivolous lawsuits in mind when dismissing *Walleye*. Frivolous securities lawsuits are abundant¹⁰⁴ and need to be disposed of by judges. But a court cannot use the existence of frivolous lawsuits to find ways to dismiss those that do not fit into the specific judge's subjective view of the proscribed violations of the securities laws.¹⁰⁵

III. JUDGE EASTERBROOK WAS WRONG AND SHOULD BE OVERRULED OR OVERTURNED

Judge Kocoras' and Judge Easterbrook's improper treatment of *Walleye* rests on four pillars. First, neither Judge Kocoras or Judge Easterbrook was clear in his rationale of determining the existence of a material misstatement and scienter, aiming solely to dismiss the claim as frivolous. Second, in their evaluation of scienter and determination of whether the statement was false or misleading, neither judge separated the relatively distinct inquiries. In the seemingly rushed decisions to dismiss the claims at the pleading stage, the courts failed to examine the complaint in its totality as mandated by the PSLRA.¹⁰⁶ In evaluating the Seventh Circuit's precedent, Judges Kocoras and Easterbrook could have, consistent with precedent, found that *Walleye Trading's* allegations established scienter. Third, the courts effectively created a safe harbor by allowing ignorance of reported numbers by issuers conducting Dutch auction tender offers. Fourth, by determining there was no duty to review the information as reported by Computershare, the courts undermined the spirit and force of the securities laws.

104. See, e.g., *ILR Urges SEC to Protect Companies From Pandemic-Related Securities Suits*, U.S. CHAMBER INST. LEGAL REFORM (Nov. 5, 2020), <https://instituteforlegalreform.com/ilr-urges-sec-to-protect-companies-from-pandemic-related-securities-suits> [<https://perma.cc/B3ER-C3R6>] (discussing a petition to the SEC due to a rise in frivolous securities lawsuits and a foreseen increase due to COVID-19 pandemic).

105. See, e.g., *Higginbotham v. Baxter Int'l Inc.*, 495 F.3d 753, 760 (7th Cir. 2007) (discussing the intent of the PSLRA as balancing costs between baseless litigation and hiring teams of accountants); see also *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (first quoting *United States v. O'Hagan*, 521 U.S. 642, 658 (1997); then quoting *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972)).

106. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322–23 (2007).

A. NEITHER JUDGE WAS CLEAR IN HIS RATIONALE TO DISMISS THE
PLAINTIFF'S § 10(B) AND RULE 10B-5 CLAIM

Both courts failed to consider the analysis required by the PSLRA to properly rebut the allegations as pleaded in the plaintiff's well-pleaded complaint; only Judge Easterbrook even referenced the inquiry.¹⁰⁷ Both judges relied on the typical practice of depositories to dismiss the claims.¹⁰⁸ Judge Kocoras began and vaguely engaged in this analysis.¹⁰⁹ Judge Easterbrook did not engage in this analysis and instead took a limited approach in analyzing the plaintiff's claims.¹¹⁰

1. *Judge Kocoras*

Judge Kocoras found that because a depository's numbers are typically reported as AbbVie did here, this negates any inference of scienter under the pleading standards of the PSLRA.¹¹¹ But this analysis does not satisfy the balancing test required by the PSLRA. The allegations of scienter must outweigh plausible innocent explanations.¹¹² It is an inherently comparative inquiry, and Judge Kocoras did not explicitly engage in this analysis.¹¹³ Even though something may be a common practice, that does not necessarily make it an innocent one.

Regarding a material misrepresentation,¹¹⁴ Judge Kocoras used the accurate reporting of untrue information calculated by Computershare to determine that it was not a misrepresentation.¹¹⁵ He used the typical practice of depositories to determine that it was not an untrue statement.¹¹⁶ With this determination, Judge Kocoras defied his own statement of

107. See generally *Walleye Trading LLC*, 2019 WL 4464392; *Walleye Trading LLC*, 962 F.3d at 975.

108. See *Walleye Trading LLC*, 2019 WL 4464392, at *4; *Walleye Trading LLC*, 962 F.3d at 978.

109. See *Walleye Trading LLC*, 2019 WL 4464392, at *4.

110. See *Walleye Trading LLC*, 962 F.3d at 978.

111. See *id.*

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

113. See generally *Walleye Trading LLC*, 2019 WL 4464392, at *4; *Tellabs, Inc.*, 551 U.S. at 324.

114. See *Walleye Trading LLC*, 2019 WL 4464392, at *4.

115. See *id.*

116. Judge Kocoras' statement that the typical practice of depositories was followed does give the *innocent* explanation as an alternative to the plaintiff's allegations. See *id.*

the legal standard.¹¹⁷ Even further, a widespread violation of the law does not make any specific violation less of a violation. Regardless of such, Judge Kocoras actually engaged in this analysis, unlike Judge Easterbrook.¹¹⁸

Judge Kocoras' analysis is potentially excusable. As a trial judge, he most likely did not want to expand the implied private right of action to a new situation. Allowing this line of reasoning is logical for application to the law as it stands. The case provided an easy situation for a higher court to reverse. The preliminary count at issue provided no benefit that could outweigh the potential reliance by investors on faulty calculations.

2. Judge Easterbrook

Judge Easterbrook affirmed Judge Kocoras' dismissal of the plaintiff's Rule 10b-5 claim without very much, if any, original analysis.¹¹⁹ A judge's opinion is typically not evaluated by originality. In an area consisting of common law development, such as the securities laws, when a new situation appears a judge must faithfully apply the available precedent to reach an equitable resolution.

Instead of applying the law to the facts, Judge Easterbrook viewed the current practice of depositories as insulation for properly pleaded claims.¹²⁰ Under this hyper-textualist approach,¹²¹ because the disclosure stated the preliminary count (directly attributed to Computershare) of the Dutch auction results, it was not an untrue statement.¹²² This was the end of Judge Easterbrook's analysis of Walleye Trading's Rule 10b-5 claim.¹²³

at *4. What is still lacking is weighing of the explanations: Does the seemingly innocent explanation abdicate any potential, and alleged, wrongdoing?

117. See *id.* at *3–4 (providing standard of ex ante approach in analyzing whether a statement was untrue while sanctioning the disclosure of untrue statements based on industry practice).

118. Compare *id.*, with *Walleye Trading LLC v. AbbVie, Inc.*, 962 F.3d 975, 978 (7th Cir. 2020).

119. See *Walleye Trading LLC*, 962 F.3d at 978.

120. See *id.*

121. This hyper-textualist approach applied each and every clause of the press release instead of viewing the full intended, or effective, nature of the press release.

122. See *id.*

123. See generally *id.*

Relying on a preliminary statement of the depository understates the potential, and most likely correct, duty for such a large transaction. Judge Easterbrook's hyper-textualist approach undermines the ethos of the securities laws and allows market manipulation so long as it facially appears to be common industry practice, giving an innocent explanation.

B. THE INQUIRY OF SCIENTER AND THE MAKING OF AN UNTRUE STATEMENT ARE DISTINCT (AND CAN BE DISCRETE)

In evaluating scienter and determining whether the statement was untrue, neither judge separated the relatively distinct inquiries.¹²⁴ Existence of a material misrepresentation or omission is separate from scienter as an element of a Section 10(b) and Rule 10b-5 claim.¹²⁵ For purposes of this analysis, they are somewhat conflated because the judges utilized similar rationales to find both elements lacking.

Judge Kocoras used the same evidence to satisfy both inquiries;¹²⁶ this is not improper. He still differentiated the two elements, defining the legal standard for both inquiries and somewhat illustrating his rationale.¹²⁷ Taking the untrue statement as a postulate,¹²⁸ or perhaps applying the same hyper-textualist approach as Judge Easterbrook, satisfies the asserted standard for scienter.¹²⁹

Judge Easterbrook quickly reached the issue of scienter in a nature reminiscent of a summary affirmance.¹³⁰ He glossed over the claims of

124. See generally *Walleye Trading LLC*, 2019 WL 4464392; *Walleye Trading LLC*, 962 F.3d at 975.

125. See *Anchor Bank, FSB v. Hofer*, 649 F.3d 610, 617 (7th Cir. 2011) (listing elements of § 10(b) and Rule 10b-5 claim).

126. See *Walleye Trading LLC*, 2019 WL 4464392, at *3–4; see also *supra* Section IV(1)(a).

127. See *Walleye Trading LLC*, 2019 WL 4464392, at *3–4.

128. The PSLRA does require analysis of opposing inferences, but this is not a forward-looking statement. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007). At the time the statement was given, it was a current fact, to be viewed under an *ex ante*, not an *ex post* approach. See *Walleye Trading LLC*, 2019 WL 4464392, at *3 (citing *Higginbotham v. Baxter Int'l Inc.*, 495 F.3d 753, 759–60 (7th Cir. 2007) (deriving standard from Judge Friendly's opinion in *Denny v. Barber*, 576 F.2d 465, 470 (2d Cir. 1978) (There is no "fraud by hindsight."))).

129. See *Walleye Trading LLC*, 962 F.3d at 978.

130. See *id.*

the rest of Walleye Trading's complaint and then viewed the final Rule 10b-5 claim as contrary to the plaintiff's own pleadings.¹³¹

There is no interpretation of the disclosure aside from the hyper-textualist approach that defeats the fact that the statement is untrue. Under the hyper-textualist approach, all blame is effectively shifted to Computershare, even though AbbVie was the mouthpiece of the statement.

The misstatement was material. The effect on the market in raising AbbVie's share price—around four dollars, almost four points—illustrates that at least some traders relied upon the disclosure and considered it material.¹³²

The Seventh Circuit's definition of recklessness is somewhat mute on whether this sort of misstatement would be covered.¹³³ While requiring something more than ordinary negligence, a showing that the reckless conduct "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."¹³⁴ It would be a somewhat flexible test without the clarification that "the definition of 'reckless behavior' should not be a liberal [test] lest any discernible distinction between 'scienter' and 'negligence.'"¹³⁵

The case does not squarely fit into this test: The defendant hired Computershare, a well-known depository, to aid in a Dutch auction tender offer, a relatively common way for an issuer to buy back equity, and it relayed the information from Computershare to the public.¹³⁶ The caveat: This tender offer was for \$7.5 billion; a massive amount compared to other Dutch auction tender offers.¹³⁷ Is it then a gross—almost intentional—deviation from the reasonable standard of care to release the numbers as is?

131. See *id.* ("Most curiously, Walleye claims that AbbVie violated § 10(b) and the corresponding rule because it failed in its duty to correct the initial statement. Yet AbbVie did correct the initial statement. That correction led to this suit!").

132. See *Walleye Trading LLC*, 2019 WL 4464392, at *1–2 (providing numbers illustrating the artificial, albeit natural, effect of the untrue statement on the market price of AbbVie's stock).

133. See *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977); *Sanders v. John Nuveen & Co.*, 554 F.2d 790, 792–93 (7th Cir. 1977).

134. *Sanders*, 554 F.2d at 793.

135. *Id.*

136. See *supra* pages 18–19.

137. See *id.*

A complementary test has been used in the district courts of the Seventh Circuit.¹³⁸ While the issue still does not fit into this test, it provides guidance on how to apply the law to the facts. Erroneous accounting statements are evaluated for recklessness by (1) the magnitude of the error, (2) the facts showing that the defendants had prior notice of the error, and (3) whether a defendant was responsible for calculating and disseminating financial information.¹³⁹

This test is not facially applicable to the situation. The accounting error was made by Computershare, not AbbVie,¹⁴⁰ although AbbVie potentially holds liability to private plaintiffs as the speaker of the statement.¹⁴¹ If this test is extended to AbbVie, it would be considered reckless in the release of the preliminary count. First, the magnitude of error was large considering it was a \$7.5 billion tender offer with a difference in price of two dollars per share tendered.¹⁴² Second, AbbVie had constructive notice of the error by virtue of its access to information as alleged in the complaint. The complaint alleged that all calculations and underlying data were accessible by AbbVie.¹⁴³ Lastly, although AbbVie was not responsible for calculating the results of the Dutch auction, it was responsible for disseminating the information, either by virtue of being an issuer, or through a duty assumed by making the disclosure. AbbVie hired Computershare to act as the depository and to calculate the results, seemingly the reason it was able to escape liability for the misstated disclosure.

When a fact pattern does not fit squarely into the law, policy justifications must be made to rule one way or the other. As a judge-made doctrine, the implied private right of action under Section 10(b) and Rule 10b-5 is the province of the judiciary to develop.¹⁴⁴ *Walleye* is one such fact pattern.

By failing to recognize scienter, the Seventh Circuit and the Northern District of Illinois morphed scienter to a more stringent

138. See *supra* pages 13–14.

139. See *Chu v. Sabratek Corp.*, 100 F. Supp. 2d 827, 838 (N.D. Ill. 2000).

140. See *generally Walleye Trading LLC v. AbbVie, Inc.*, No. 18 C 05114, 2019 WL 4464392, at *2 (N.D. Ill. Sept. 18, 2019).

141. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323 (2007).

142. See *id.* (describing amount of the tender offer and price discrepancy).

143. See *id.* at *4.

144. “When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has which has grown from little more than a legislative acorn.” *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975) (discussing the development of the private cause of action under § 10(b) and Rule 10b-5).

standard. This standard is inapplicable for situations such as Computershare's error without a more definitive showing of recklessness—one that comes closer to showing wanton conduct. Neither Judge Kocaras in his dismissal, nor Judge Easterbrook in his affirmance, enunciates this standard. The standard rewards a lack of diligence, an effective safe harbor to conduct that should be unlawful.

The Second Circuit's test for scienter based on recklessness is applicable in this situation. The Second Circuit will find recklessness sufficient to establish scienter when "the defendants . . . knew facts or had access to information suggesting their public statements were not accurate."¹⁴⁵

AbbVie's actions fit into prong three of the Second Circuit's standard. Aside from Judge Easterbrook's finding that no duty to verify the numbers existed,¹⁴⁶ there is potential for a duty to be judicially created for this specific situation satisfying prong four.¹⁴⁷

Instead of being labeled as an activist judge who is "legislating from the bench," Judge Easterbrook could have adopted the Second Circuit's standard. Adopting the Second Circuit's standard would have allowed the plaintiff's complaint to survive the pleading stage and let the plaintiff have its day in court.

This is not to say that Walleye Trading had a meritorious claim; there is still a high likelihood that its claim was frivolous, as with any shareholder lawsuit.¹⁴⁸ In an instance where bad actors are at play, the Seventh Circuit's decisions bless their actions, which are directly contrary to the intent of the '34 Act. The thrust of the securities laws, especially the implied private right of action,¹⁴⁹ is to protect investors and require full and fair disclosure from issuers.¹⁵⁰

145. *Novak v. Kasaks*, 216 F.3d 300, 311 (2d Cir. 2000) (emphasis added).

146. *See Walleye Trading LLC v. AbbVie, Inc.*, 962 F.3d 975, 978 (7th Cir. 2020).

147. If the Seventh Circuit had been willing to create a duty, it would have. Judge Easterbrook recognized that there was no duty and did not recognize the policy considerations towards finding one. *See id.*

148. *Frequent Filers: The Problems of Shareholder Lawsuits and the Path to Reform*, U.S. CHAMBER INST. LEGAL REFORM (Feb. 27, 2014), <https://instituteforlegalreform.com/research/frequent-filers-the-problems-of-shareholder-lawsuits-and-the-path-to-reform> [<https://perma.cc/XA8V-UN6S>].

149. The Supreme Court took twenty-five years to affirm the lower federal courts' creation of the implied private right of action, even then only doing so by recognizing "the unique history of Rule 10b-5." *Cannon v. Univ. of Chi.*, 441 U.S. 677, 738 (1979)

C. THE SEVENTH CIRCUIT CREATED A SAFE HARBOR FOR BLISSFUL IGNORANCE, WHICH HAS THE POTENTIAL TO SWAY THE MARKET

Walleye creates, or illuminates, a discrete safe harbor for issuers and their executives to evade liability by shifting responsibilities from in-house to outside entities.¹⁵¹ Once responsibility shifts to outside of a corporation, the corporation and their executives cannot be held liable by misled investors, as long as the statement is attributed to the outsider. This is *Walleye*'s effect, so long as the information—or some other purpose for hiring an outside entity—is accurately disclosed. The safe harbor permits inside bad actors to influence the market. Inside bad actors can take advantage of the safe harbor's effects to generate potentially devastating effects on the market. Lastly, *Walleye* has the prime facts to create a new duty for issuers when making public disclosures.

When responsibility shifts outside of a corporation, the corporation and its executives cannot be liable for misleading investors.¹⁵² Even more troubling is the inability for sellers and buyers to receive vindication for losses they suffered because of an issuer's disclosure due to the solely liable party's status as a secondary actor. Under the implied private right of action of Section 10(b) and Rule 10b-5, the individual investor can only receive his vindication from actors with primary liability.¹⁵³

AbbVie accurately reported the information relayed to it by Computershare.¹⁵⁴ The information was obtained by Computershare, acting as an outside depository, on AbbVie's behalf.¹⁵⁵ Solely attributing this information to Computershare, through explicit attribution and a notice that information was subject to change, allowed AbbVie to escape liability. The conduct of AbbVie is sufficient to establish scienter

(Powell, J., dissenting) (citing *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971)).

150. See *Murdock*, *supra* note 3, at 373.

151. Cf. *Walleye Trading LLC v. AbbVie, Inc.*, No. 18 C 05114, 2019 WL 4464392 (N.D. Ill. Sept. 18, 2019).

152. Compare *McConville v. SEC*, 465 F.3d 780, 787 (7th Cir. 2006) (holding insider liable who prepared Form 10-K with financial misstatements, even though she did not sign the form), with, *Walleye Trading LLC*, 2019 WL 4464392, at *4.

153. See *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 157–58 (2008) (citation omitted).

154. See *Walleye Trading LLC v. AbbVie Inc.*, 962 F.3d 975, 978 (7th Cir. 2020).

155. See *id.* at 977.

and attaching this duty would be enough to cure a future misstatement. Then Walleye Trading, and other harmed investors, would have cognizable claims.

The Seventh Circuit Court of Appeals and its associated district courts have not sufficiently defined what conduct would be suitable to defeat the protection generally afforded through explicit attribution by a speaker to another. Under the current Seventh Circuit framework, aggrieved investors have no path to vindication for their harm.¹⁵⁶ The Southern District of New York has, by contrast, defined what conduct would be able to push the weight of the scale to support a finding of scienter.¹⁵⁷

As the Supreme Court has set out: “[T]he proper inquiry is whether a plaintiff sufficiently pleads that a particular defendant ‘made it necessary or inevitable that any falsehood would be contained in the statement.’”¹⁵⁸ In the instant case, as alleged, “Computershare’s duties were largely ministerial; they included accepting tenders of shares and cataloging how many shares were tendered for auction and in what form.”¹⁵⁹ AbbVie had this information, released the preliminary statement, and waited until an entire day of trading passed before issuing a corrective statement. Performance of solely ministerial duties, while those duties with a material effect are contracted away, should make no difference in this case. Walleye Trading alleged that AbbVie, at an unknown time, had actual knowledge of the incorrect statement and failed to correct until after the trading day had ended.¹⁶⁰

A lapse of judgement by an issuer performing its own calculations of this magnitude would likely establish scienter. This would not establish primary liability for those traditionally secondarily liable; this situation would preserve a duty that *Walleye* seemingly establishes can be contracted away.

Another set of standards can be used from the Second Circuit Court of Appeals that there is liability if GAAP is not followed in the preparation of an inaccurate public statement and the issuer had access

156. See generally *supra* Part III.

157. See *Doubleline Cap. LP v. Odebrecht Fin., Ltd.*, 323 F. Supp. 3d 393, 452 (S.D.N.Y. 2018) (quoting *IOP Cast Iron Holdings, LLC v. J.H. Whitney Cap. Partners, LLC*, 91 F. Supp. 3d 456, 473 (S.D.N.Y. 2015)).

158. *Id.*

159. Brief for Appellant at 4, *Walleye Trading LLC v. AbbVie, Inc.*, 962 F.3d 975 (7th Cir. 2020) (No. 19-3063).

160. See *id.* at 6–7.

to the facts of the misstatement.¹⁶¹ Without discovery, it should be sufficient to allege that AbbVie's access to information should have prompted it to confirm the calculations.

The safe harbor permits inside bad actors—or incompetent insiders—to influence the market, shielded by a so-called ignorance of outside-actors recklessness. Inside bad actors can take advantage of the safe harbor to generate potentially devastating effects on the market. Discovery of AbbVie's actual process is not available because the *Walleye* court dismissed Walleye Trading's complaint. Without discovery, the courts are unable to determine whether bad actors intended to influence the market. AbbVie may, or may not, be guilty of bad intentions; *Walleye* bars discovery in similar situations where bad actors intended to influence the market.

D. THE RULINGS UNDERMINE THE PURPOSE AND DRIVING FORCE OF THE SECURITIES LAWS

The securities laws historically place a heightened duty on sophisticated investors to investigate; this consequently enforces a policy in protection of unsophisticated investors.¹⁶² The general ethos of the securities laws is investor protection.¹⁶³ The PSLRA has alternative intentions, but the exception can swallow the intent of the whole. Sophisticated investors bear greater risk with their unprotected investments, but they do so with their own investigation. Much has changed since the enactment of the '34 Act; entities such as Robinhood now allow everyday people to trade as if they are a sophisticated day trader.

As previously stated, a comparative analysis is used when determining whether to establish a new duty.¹⁶⁴ The benefit to unsophisticated investors of confirming calculations prior to release, or

161. See *Novak v. Kasaks*, 216 F.3d 300, 311 (2d Cir. 2000). The Seventh Circuit disagreed with the Second Circuit's interpretation of the PSLRA in determining the standard for pleadings and their requirements as intended by Congress in *Makor Issues & Right, Ltd. v. Tellabs, Inc.*, 437 F.3d 588, 601 (7th Cir. 2006), *rev'd*, 551 U.S. 308 (2007). While the Second Circuit's interpretation of the pleading was stricter than that decided by the Supreme Court, the Seventh Circuit's interpretation was expressly overturned. See *id.*; *Tellabs, Inc.*, 551 U.S. at 322.

162. Cf. *Terra Sec. ASA Konkursbo v. Citigroup, Inc.*, 740 F. Supp. 2d 441, 455–56 (S.D.N.Y. 2010).

163. See generally *supra* Part I.

164. See generally *supra* Part II.

shifting the duty to confirm to the issuer, outweighs the additional cost of confirming final calculations before issuing a press release. The securities laws have developed through the federal common law, and the “judicial oak which has grown from little more than a legislative acorn”¹⁶⁵ can continue to grow.

Two proper solutions exist to remedy the safe harbor *Walleye* created:¹⁶⁶ (1) The Seventh Circuit can find a duty to confirm calculations of outsiders; or (2) the Seventh Circuit can adopt the Second Circuit’s standards interpreted to find liability for AbbVie.

The new duty would shift liability for recklessness from outside contractors, or secondary violators, to issuers, or primary violators. In this situation, the size of the transaction will have a direct effect on the issuer’s stock price.¹⁶⁷ The tender offer had a direct effect on the market due to the massive scale of the offer at \$7.5 billion—almost five percent of the ABBV market cap at the time.¹⁶⁸ The duty would be effective in curbing unnecessary disclosures, providing benefits to the typical investor following market-related press releases. Further, the duty could only benefit the market. By preventing disclosure of potentially misleading information related artificial elevations and drops in an issuer’s stock price will no longer occur, effectively balancing out to the natural ebbs and flows of the market.

While disclosure is typically beneficial for the market, the preliminary-count press release for a tender offer is redundant as the final calculations will later be released. Failing to release preliminary calculations may facially be contrary to Regulation FD, promoting disclosure of information to the public that may otherwise be shared through selective disclosure.¹⁶⁹ But the preliminary press release can only be intended to influence the issuer’s share price, and it is likely bad actors will do so. By creating this duty, at a minimum, issuers could

165. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975).

166. Other alternatives, such as SEC rulemaking and the Seventh Circuit being overruled by the Supreme Court, are much less likely and therefore omitted.

167. As evidenced by the price escalation and drop from the preliminary announcement to release of the corrected preliminary count. *See generally supra* Part III.

168. *ABBV Market Cap Chart*, MACROTRENDS.NET, <https://www.macrotrends.net/stocks/charts/ABBV/abbvie/market-cap> [<https://perma.cc/6LLG-65SW>] (last visited Jan. 4, 2021) (Market cap as of May 30, 2018, when preliminary statement issued).

169. *See* 17 C.F.R. § 243 (2011).

forgo a preliminary court press release or limit the disclosure to solely shareholders that tendered shares.

Alternatively, the Seventh Circuit could adopt the Second Circuit's potentially applicable precedent, as it relates to preparing financial statements, allowing an inference of recklessness when the issuer had access to information that would have shown its public statements were inaccurate.¹⁷⁰ This would effectively have the same result as imputing a new duty when information is calculated by a third party. Under the Second Circuit's attribution framework and considering the statement AbbVie made was explicitly attributed to Computershare,¹⁷¹ AbbVie would have had made it necessary—or inevitable—that its statement would contain Computershare's false statement.¹⁷² It is also possible Computershare's statement would have to be ratified by AbbVie's conduct, which likely did occur.¹⁷³

CONCLUSION

The *Walleye* safe harbor is bad for unsophisticated investors. This error is relatively extreme. If there is no standard to evaluate a potentially heightened duty—or any version of respondeat superior liability—a bad actor will intentionally and drastically take advantage of this rule. Reform is necessary to preserve the intent of the securities laws. The Seventh Circuit, or the Supreme Court, must rework this standard. Attribution, in and of itself, cannot purge the taint from a materially misleading statement when the statement was prepared and reviewable by its maker. Is it not contradictory to charge a market participant with the duty not to lie, then allow him to act like the proverbial three wise monkeys?

170. See *Novak v. Kasaks*, 216 F.3d 300, 311 (2d Cir. 2000).

171. See generally *supra* Part III.

172. See *Doubleline Cap. LP v. Odebrecht Fin., Ltd.*, 323 F. Supp. 3d 393, 452 (S.D.N.Y. 2018) (quoting *IOP Cast Iron Holding, LLC v. J.H. Whitney Cap. Partners, LLC*, 91 F. Supp. 3d 456, 473 (S.D.N.Y. 2015)).

173. See *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 158 (2008).