Practical Guidance

Scienter Defenses in Securities Fraud Actions

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This practice note provides guidance for defending against scienter-based claims in securities fraud class actions brought by private plaintiffs under Section 10(b) (15 U.S.C. § 78j) of the Securities Exchange Act of 1934, as amended (Exchange Act), and Rule 10b-5 (17 C.F.R. § 240.10b-5) (collectively, Section 10(b)). Public companies are frequent targets of Section 10(b) lawsuits when the company's stock price drops following the disclosure of a negative event. Plaintiffs often seek to turn such circumstances into securities fraud class actions, alleging that a company acted with scienter (i.e., an intent to defraud investors) when making earlier public statements about the subject of the disclosed event. However, the Private Securities Litigation Reform Act of 1995 (PSLRA), 104 P.L. 67, requires that a plaintiff plead a strong inference of scienter and provides an important tool for defendants to seek early dismissal of securities fraud claims. This note discusses the requirements for pleading scienter in Section 10(b) cases, common pleading tactics by plaintiffs, and strategies you can employ as defense counsel to challenge scienter claims at various stages of the litigation.

For further information on liability provisions and defenses under the federal securities laws, see U.S. Securities Laws, Securities Act and Exchange Act Liability Provisions, Section 11 Elements and Defenses under the Securities Act, Section 12(a)(2) Elements and Defenses under the Securities Act, Control Person Liability, Reliance in Securities Fraud Actions, Materiality in Securities Fraud Actions, Securities Litigation under the Private Securities Litigation Reform Act (PSLRA), Special Litigation Committees, U.S. Supreme Court Securities Litigation Decisions, Liability under the Federal Securities Laws for Securities Offerings, and Liability for Securities Offerings Checklist.

For additional practical guidance on how to defend against securities fraud claims, see Jurisdictional Defenses under the Exchange Act, Jurisdictional Defenses under the Securities Act, and Defense Strategies under the Securities Act.

Elements of a Section 10(b) Claim

Section 10(b) of the Exchange Act makes it unlawful to "use or employ, in connection with the purchase or sale of any security" a "manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange Commission] may prescribe." Rule 10b-5 further makes it unlawful to: (1) "employ any device, scheme, or artifice to defraud;" (2) "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made not misleading;" or (3) "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."

To bring a Section 10(b) claim, a plaintiff must plead the following:

- A material misrepresentation or omission
- Scienter
- A connection with the purchase or sale of a security
- Reliance
- Damages
- Loss causation

See Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341–42 (2005).

What Is Scienter?

Scienter is a key element of a securities fraud claim. To establish scienter under Section 10(b), a plaintiff must prove that an individual defendant acted with "a mental state embracing intent to deceive, manipulate, or defraud." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 319 (2007). Courts have defined scienter to mean either:

- An actual intent to defraud –or–
- Recklessness

Although the Supreme Court "ha[s] not [yet] decided whether recklessness suffices to fulfill the scienter requirement," (Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 48 (2011)), lower courts have nevertheless concluded that it does. The definition of recklessness varies by circuit and counsel should be mindful of the jurisdictional distinctions at the outset of the litigation. For example, in the First Circuit, recklessness means 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 the actor must have been aware of it." Miss. Pub. Employees' Ret. Sys. v. Boston Scientific Corp., 649 F.3d 5, 20 (1st Cir. 2011). The Second Circuit defines recklessness similarly but also found an inference of recklessness where a plaintiff alleged facts demonstrating that defendants "failed to review or check information that they had a duty to monitor, or ignored obvious signs of fraud." Novak v. Kasaks, 216 F.3d 300, 308 (2d Cir. 2000). The Second Circuit also found recklessness in "[a]n egregious refusal to see the obvious, or to investigate the doubtful." South Cherry St., LLC v. Hennessee Group LLC, 573 F.3d 98, 109 (2d Cir. 2009). In contrast, the Ninth Circuit requires a more stringent showing of "deliberate recklessness," which is something closer to actual intent. Nat'l Elevator Industry Pension Fund v. VeriFone Holdings, Inc. (In re VeriFone Holdings, Inc. Sec. Litig.), 704 F.3d 694, 702 (9th Cir. 2012).

Corporate Scienter

Securities fraud class actions invariably name a corporation or other organization as a defendant and therefore must plead scienter as to the corporation itself. That task is often difficult to do, as it requires ascribing the mental state of fraudulent intent to a corporate entity that acts through company officials—generally a company's officers, executives, and other members of senior management. The relevant inquiry, therefore, is whose mental state can be imputed to the company and under what circumstances.

Plaintiffs often attempt to plead corporate scienter by alleging scienter against an individual defendant who made a challenged statement that can be imputed to the corporate defendant. See, e.g., Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital, Inc., 531 F.3d 190, 195 (2d Cir. 2008). A plaintiff may also attempt to allege corporate scienter through the alleged acts of senior members of a corporation who are not individual defendants and did not utter an alleged misstatement but were involved in its dissemination (e.g., a senior manager drafted or approved of the alleged misstatement). Jackson v. Abernathy, 960 F.3d 94, 98 (2d Cir. 2020); Southland Sec. Corp. v. INSpire Ins. Solutions Inc., 365 F.3d 353, 366 (5th Cir. 2004). In some situations, "[t]he scienter alleged against the company's agents is enough

to plead scienter for the company." Bielski v. Cabletron Sys. (In re Cabletron Sys.)., 311 F.3d 11, 40 (1st Cir. 2002). The Sixth Circuit's definition of corporate scienter combines these formulations, explaining that the state(s) of minds of any of the following individuals are probative of corporate scienter:

- "The individual agent who uttered or issued the misrepresentation"
- "Any individual agent who authorized, requested, commanded, furnished information for, prepared (including suggesting or contributing language for inclusion therein or omission therefrom), reviewed, or approved the statement in which the misrepresentation was made before its utterance or issuance"
- "Any high managerial agent or member of the board of directors who ratified, recklessly disregarded, or tolerated the misrepresentation after its utterance or issuance"

See KBC Asset Mgmt. N.V. v. Omnicare, Inc. (In re Omnicare, Inc. Sec. Litig.), 769 F.3d 455, 476 (6th Cir. 2014).

At least one court "neither [has] accepted nor rejected the doctrine of corporate scienter in securities fraud actions." Rahman v. Kid Brands, Inc., 736 F.3d 237, 246 (3d Cir. 2013).

Scienter Pleading Standards

Rule 9(b) and the PSLRA

Plaintiffs asserting securities fraud class action claims under Section 10(b) face several heightened pleading hurdles. First, because all Section 10(b) class action claims must be brought in federal court, any complaint alleging securities fraud must satisfy Federal Rules of Civil Procedure Rule 9(b) (U.S.C.S. Fed Rules Civ Proc R 9), which requires stating with particularity the facts constituting the alleged fraud. See Securities Litigation under the Private Securities Litigation Reform Act (PSLRA). Second, securities fraud pleadings are subject to the rigorous requirements of the PSLRA. Under the PSLRA, a plaintiff must "with respect to each act or omission . . . state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2)(A). In elaborating on this pleading standard, the Supreme Court stated:

- A strong inference is "more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent."
- The relevant inquiry is "whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard."
- In determining whether a claim satisfies this standard on a motion to dismiss, the court must engage in a "comparative assessment" that considers all of the facts alleged in a complaint, "collectively" and "holistically."
- This is a case-by-case inquiry and requires consideration of a plaintiff's proffered inference of fraud, plausible opposing inferences, and nonculpable explanations for the defendant's conduct.

See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 314, 322–24, 326–27 (2007).

When there are equally strong inferences for and against scienter, the plaintiff wins the tie. City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Waters Corp., 632 F.3d 751, 757 (1st Cir. 2011).

Consideration of Extrinsic Documents

Although courts must consider the complaint in its entirety and accept all well-pled factual allegations as true, the court may consider sources outside the pleadings when ruling on motions to dismiss under Federal Rules of Civil Procedure Rule 12(b)(6). USCS Fed Rules Civ Proc R 12. Such sources include extrinsic documents incorporated into the complaint by reference or that are integral to the complaint, and matters of which a court may take judicial notice. Tellabs, 551 U.S. at 322. For practical guidance on how to use extrinsic documents to defend against allegations of scienter, see Use of Extrinsic Documents to Undercut Allegations of Scienter below.

Common Pleading Tactics and Corresponding Defenses

Plaintiffs employ several common pleading tactics in Section 10(b) cases in an effort to allege a "strong inference of scienter."

Use of Confidential Witnesses

Plaintiffs often use confidential witness allegations in complaints to try to bolster their scienter allegations. Confidential witnesses are usually (but not always) former employees of a defendant company identified by private investigators hired by plaintiffs' law firms. Because the identities of these confidential witnesses are hidden from defendants and the court initially, it is difficult to test the accuracy or veracity of the witnesses' statements at the pleading stage. But the identities of the so-called confidential witnesses must be revealed in discovery, rendering their designation a misnomer. When unveiled, confidential witnesses have often been found to lack firsthand knowledge

of the allegations attributed to them or to not be a viable witness at all. Some courts heavily discount confidential witness allegations because of their inherent lack of credibility: "[t]he sources may be ill-informed, may be acting from spite rather than knowledge, may be misrepresented, may even be nonexistent—a gimmick for obtaining discovery costly to the defendants and maybe forcing settlement or inducing more favorable settlement terms." City of Livonia Emple. Ret. Sys. v. Boeing Co., 711 F.3d 754, 759 (7th Cir. 2013).

Defendants can nevertheless challenge the facial sufficiency of confidential witness allegations at the pleading stage. To satisfy the heightened pleading standards of Federal Rules of Civil Procedure Rule 9(b) and the PSLRA, a complaint relying on confidential witnesses must describe the witnesses with "sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged." N. J. Carpenters Pension & Annuity Funds v. Biogen IDEC Inc., 537 F.3d 35, 51 (1st Cir. 2008); Sparling v. Daou (In re Daou Sys.), 411 F.3d 1006, 1015 (9th Cir. 2005).

Courts therefore take a "hard look" at confidential witness allegations, evaluating factors such as "the level of detail provided by the confidential sources, the corroborative nature of the other facts alleged (including from other sources), the coherence and plausibility of the allegations . . . and similar indicia." N. J. Carpenters Pension & Annuity Funds, 537 F.3d at 51; Novak, 216 F.3d at 314; Rahman, 736 F.3d at 244.

If you are defending against securities fraud claims based on statements attributed to confidential witnesses, you should look for weaknesses or gaps in the allegations describing the confidential witnesses themselves, and the statements attributed to them. Courts are skeptical of confidential witness allegations where:

- The witness is a low-level former employee with little or no access to, or interaction with, any individual defendant or senior management.
    - Fire & Police Pension Ass'n of Colo. v. Abiomed, Inc., 778 F.3d 228, 245 (1st Cir. 2015); Metzler Asset Mgmt. GmbH v. Kinglsey, 928 F.3d 151, 162 (1st Cir. 2019) (discrediting confidential witness allegations where they had little ongoing contact with senior management)
    - Woolgar v. Kingstone Cos., 2020 U.S. Dist. LEXIS 143251, at *35–37 (S.D.N.Y. Aug. 10, 2020) (confidential sources did not have any contact with the individual defendants)
- The witness's job title or alleged department or group is unrelated to the subject matter of the witness's statements.
    - The Sorkin, LLC v. Fischer Imaging Corp., 2005 U.S. Dist. LEXIS 19934, at *27 (D. Colo. June 21, 2005) (discounting allegations where the witness's job title was inconsistent with the subject of the statements)
    - NECA-IBEW Health & Welfare Fund v. Pitney Bowes Inc., 2013 U.S. Dist. LEXIS 40788, at *106–107 (D. Conn. Mar. 23, 2013) (confidential witnesses who were not "alleged to have had any connection to" financial projections were not credited)
- The witness did not work at the company during the putative class period.
    - In re Ceridian Corp. Secs. Litig., 542 F.3d 240, 247 (8th Cir. 2008) (discounting confidential witness who left the company well before the start of the class period)
    - Rahman, 736 F.3d at 245 (confidential witness did not begin working for the company until after the end of the class period)
- The witness's work activities were limited to a geographic region and the witness made statements about conduct that spanned the entire company's operation.
    - Metzler, 928 F.3d at 164; City of Austin Police Ret. Sys. v. ITT Educ. Servs., Inc., 388 F. Supp. 2d 932, 945 (S.D. Ind. 2005) (allegations attributed to former employees who worked at local company locations discussing local financial figures failed to satisfy plaintiff's "burden . . . to raise an inference of fraud concerning [defendant]'s business on a national scale during the class period")

Courts also reject as inadequate confidential witness allegations where they are based on or contain:

- No personal knowledge but rather secondhand information, speculation, rumors, or hearsay
    - In re Vertex Pharms., Inc., Sec. Litig., 357 F. Supp. 2d 343, 354 (D. Mass. 2005) (discrediting confidential witness allegations based on multi-layer hearsay and rumors)
    - Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 996–97 (9th Cir. 2009) (confidential witnesses had secondhand information about accounting practices and based their assertions on vague hearsay)
- Opinions or abstract commentary
    - Rahman, 736 F.3d at 245 (not crediting confidential witness allegation stating that he "had a feeling something suspicious was going on")

- Allegations full of vague statements or adjectives and adverbs, and not particularized or concrete facts
    - Metzler, 928 F.3d at 164; Nguyen v. Endologix, Inc., 962 F.3d 405, 416 (9th Cir. 2020) (rejecting confidential witness allegations that were "high on alarming adjectives" but "short on the facts" that would establish a strong inference of scienter); Vertex Pharms., 357 F. Supp. 2d at 354 (vague confidential witness statement are insufficient)
- Generalized and conclusory claims of company-wide knowledge
    - South Ferry LP v. Killinger, 542 F.3d 776, 784–85 (9th Cir. 2008) ("As a general matter, 'corporate management's general awareness of the day-to-day workings of the company's business does not establish scienter'")

Allegations of Motive and Opportunity to Commit Fraud

Complaints alleging securities fraud that survive a motion to dismiss are often accompanied by allegations of a motive and opportunity to commit fraud. Motive and opportunity allegations come in various forms, but they are all generally designed to show that a company or corporate officer benefited financially in some way from the alleged fraud.

In the majority of circuits, allegations of motive and opportunity may buttress an inference of scienter but do not alone establish a strong inference of scienter. See, e.g., Greebel v. FTP Software, Inc., 194 F.3d 185, 197 (1st Cir. 1999) ("evidence of motive and opportunity to commit fraud d[oes] not, of itself, constitute scienter"); Abrams v. Baker Hughes, Inc., 292 F.3d 424, 430 (5th Cir. 2002); In re VeriFone Holdings, 704 F.3d at 701; Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1285–86 (11th Cir. 1999).

In the Second Circuit, however, a plaintiff may raise a strong inference of scienter through allegations of motive and opportunity to defraud if the allegations raise an inference that a defendant benefited in a concrete and personal way from the purported fraud. Although the absence of motive allegations is not dispositive, if a complaint fails to allege motive, the strength of the circumstantial allegations of conscious misbehavior or recklessness generally must be correspondingly greater. ECA & Local 134 IBEW Joint Pension Trust of Chi., 553 F.3d at 198–99.

In defending against a securities fraud pleading, you should determine whether there are any allegations of motive and opportunity, such as insider trading or the issuance of secondary stock. Pointing out a lack of motive and opportunity allegations is relevant to a court's scienter analysis, although not dispositive. Matrixx, 563 U.S. at 48.

When motive and opportunity allegations are found in a complaint, you should evaluate whether the motives are cast as generalized financial motives universally held by corporations and their executives. Courts consistently find these types of motives insufficient to support an inference of scienter. For example, courts have found the following motives insufficient:

- Maintain or boost a company's stock price
    - Acito v. IMCERA Group, Inc., 47 F.3d 47, 54 (2d Cir. 1995) ("If scienter could be pleaded on that basis alone, virtually every company in the United States that experiences a downturn in stock price could be forced to defend securities fraud actions.")
- Maintain or increase a company's credit rating, financial results, or profitability
    - South Cherry St., 573 F.3d at 109 (desire to maintain a high credit rating or sustain appearance of corporate profitability is insufficient)
- Raise capital through debt or equity offerings
    - Horizon Asset Mgmt. v. H & R Block, Inc., 580 F.3d 755, 766 (8th Cir. 2009) (desire to ensure subsidiary's success in issuing $400 million in promissory notes held insufficient)
    - Cozzarelli v. Inspire Pharms. Inc., 549 F.3d 618, 628 (4th Cir. 2008) ("[M]otivation[] to raise capital . . . [is] common to every company and thus add[s] little to an inference of fraud.")
- Maintain or increase an executive's compensation or bonuses
    - Brennan v. Zafgen, Inc., 853 F.3d 606, 616 (1st Cir. 2017) ("catch-all allegations" that executive's compensation was tied to company's success were insufficient to plead scienter)
    - In re Rigel Pharms., Inc. Secs. Litig., Inter-Local Pension Fund GCC/IBT v. Deleage, 697 F.3d 869, 884 (9th Cir. 2012) (improper to infer scienter merely because a defendant's compensation was based on company's success)
- Maintain an individual's employment
    - Kalnit v. Eichler, 264 F.3d 131, 139–40 (2d Cir. 2001) (recognizing that "a plaintiff must do more than merely charge that executives aim to prolong the benefits of the positions they hold" (citation omitted))

Allegations of Conscious Misbehavior or Recklessness

Plaintiffs rarely allege direct evidence of scienter, such as a defendant's clear admission in a communication or internal records demonstrating fraudulent intent. Plaintiffs instead heavily rely on alleged circumstantial evidence of conscious misbehavior or recklessness. Such circumstantial evidence includes:

- Insider trading
- Defendants' positions and access to information
- Adverse internal reports
- Resignations
- Generally accepted accounting principles (GAAP) violations
- Parallel government investigations
- Other lawsuits or settlements
- Core operations theory
- Alleged omissions

Insider Trading

The federal securities laws require certain company insiders, such as officers and directors, to report purchases, sales, and holdings of their company's securities by filing certain forms with the Securities and Exchange Commission (SEC). See Section 16 Compliance, Insiders, and Liability. Plaintiffs will often rely on these public filings to plead that stock trades made by company insiders before and during the putative class period and in advance of a negative disclosure demonstrate scienter.

Courts find that unusual or suspicious stock sales by corporate insiders may constitute circumstantial evidence of scienter. City of Miami v. Quality Sys. (In re Quality Sys.), 865 F.3d 1130, 1146 (9th Cir. 2017). Factors courts consider when assessing insider trading allegations include:

- The amount and percentage of shares sold
- The timing of the sales
- Prior trading patterns

Id.

Plaintiffs bear the burden of pleading the facts and circumstances behind the trades, and a failure to do so is generally fatal. Leavitt v. Alnylam Pharms., Inc., 2020 U.S. Dist. LEXIS 49638, at *23 (D. Mass. Mar. 23, 2020) ("Plaintiffs do not provide the necessary evidence or context surrounding the trades that would allow the Court to draw the strong inference required.").

Yet, a Rule 10b5–1 (17 C.F.R. § 240.10b5-1) trading plan provides an affirmative defense to allegations of insider trading on the basis of material nonpublic information and may undercut an inference of scienter in securities fraud actions. To be valid, the plan must:

- List the amount and price of the securities to be sold or purchased (or include a written formula for determining such)
- Provide the date of the transactions
- Prevent the insider from exercising any subsequent influence over how, when, or whether to effect purchases or sales
- Have been executed according to the plan's terms and entered "in good faith and not as part of a plan or scheme to evade the prohibitions" of Rule 10b5-1 (See Rule 10b5-1(c)(1)(i)-(ii))

In cases where plaintiffs rely on insider trading to demonstrate scienter, as defense counsel, you should analyze the insiders' stock trades—before, during, and after the class period—to determine whether:

- An insider's stock sales were made pursuant to a trading plan entered into before the class period.
    - Harrington v. Tetraphase Pharms. Inc., 2017 U.S. Dist. LEXIS 71274, at *21 (D. Mass. May 9, 2017) ("The presence of a Rule 10b5-1 trading plan 'rebuts an inference of scienter and supports the reasonable inference that stock sales were prescheduled and not suspicious,'" especially when adopted prior to the start of a class period)
- An insider's stock sales were made to satisfy preexisting tax obligations.
    - Simon v. Abiomed, Inc., 37 F. Supp. 3d 499, 511 ("sales to cover taxes due to vesting" not suspicious)
    - Zamir v. Bridgepoint Educ., Inc., 2016 U.S. Dist. LEXIS 97566, at *7 (S.D. Cal. July 25, 2016) (discounting sales for "tax withholding obligations")
    - In re Radian Sec. Litig., 612 F. Supp. 2d 594, 611 (E.D. Pa. 2009) (sales "to cover tax liabilities" on vesting stock "weigh[ed] against . . . scienter")

An insider's stock holdings increased or decreased during the class period by only a small percentage or insider retained a significant portion of stock.

- Acito, 47 F.3d at 54 (11% of "shares and/or options" not unusual in amount)

- City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Waters Corp., 699 F. Supp. 2d 331, 344–46 (D. Mass. 2010) (individual sales of 7.06% and 21.65% not suspicious)
- Abiomed, 778 F.3d at 246 (insider increases in total holdings negate an inference of a motive to defraud)
- In re Sunterra Corp. Sec. Litig., 199 F. Supp. 2d 1308, 1330 (M.D. Fla. 2002) (if an insider's trading history is consistent with pre-class-period sales, no inference of scienter can be drawn)

- The insider is a new executive.
  - Abiomed, 778 F.3d at 246 ("hardly suspicious" that new executive would wait more than a year before making first sale of stock)
- There were only a few insiders who sold stock.
  - In re Advanta Corp. Sec. Litig., 180 F.3d 525, 540 (3d Cir. 1999) (no scienter where several of the insiders did not sell any stock)
  - In re eSpeed, Inc. Sec. Litig., 457 F. Supp. 2d 266, 291 (S.D.N.Y. 2006) ("[T]he dispositive factor is that other insiders, including the other two individual defendants, did not sell during the putative class period.")

For more information on insider trading, see Insider Trading Claims: Defenses.

Defendants' Positions and Access to Information

Plaintiffs often allege that individual defendants must have made alleged misleading statements with scienter because of their positions within a company and their access to internal corporate information. Scienter allegations may not rest on the inference that the defendants "must have" been aware of the alleged misstatement solely based on their positions within the company. Key cases involving scienter claims based on defendants' positions and access to information include:

- Maldonado v. Dominguez, 137 F.3d 1, 9–10 (1st Cir. 1998)(rejecting that defendants "must have known" of facts due to their positions; "these are precisely the types of inferences which this court, on numerous occasions, has determined to be inadequate to withstand Rule 9(b) scrutiny")
- City of Philadelphia v. Fleming Cos., 264 F.3d 1245, 1260 (10th Cir. 2001)(allegations that defendants possessed knowledge of facts without more is not sufficient to demonstrate an intent to deceive)
- Abrams v. Baker Hughes Inc., 292 F.3d 424, 432 (5th Cir. 2002)("A pleading of scienter may not rest on the inference that defendants must have been aware of the misstatement based on their positions within the company.")

Adverse Internal Reports

Another common plaintiff tactic is to allege that defendants had access to negative internal reports that are contrary to defendants' public statements. But plaintiffs often fail to allege any particulars about those reports. Generalized allegations of adverse internal reports without details about the content of those reports do not support an inference of scienter. For more information on cases involving adverse internal reports, see:

- Novak, 216 F.3d at 309("Where plaintiffs contend defendants had access to contrary facts, they must specifically identify the reports or statements containing this information.")
- Woolgar, 2020 U.S. Dist. LEXIS 143251, at *77–79(rejecting scienter premised on "conscious misbehavior or recklessness" where confidential witness allegations did not plead with specificity "the reports or statements containing [contrary] information.")
- Guerra v. Teradyne Inc., 2004 U.S. Dist. LEXIS 28548, at *71–73 (D. Mass. Jan. 16, 2004)(same)

Resignations

Plaintiffs often allege that an executive's resignation near in time to the alleged fraud supports an inference of scienter. Courts recognize, however, that an executive may leave a company for a number of reasons unrelated to any alleged fraud and universally hold that mere allegations of resignations, without more, are insufficient to raise an inference of scienter. Metzler, 305 F. Supp. 3d at 219 (rejecting allegation of resignation as alone insufficient to support inference of scienter). Also see, N. Collier Fire Control & Rescue Dist. Firefighter Pension Plan v. MDC Partners, Inc., 2016 U.S. Dist. LEXIS 136929, at *78 (resignations were not "highly unusual [or] suspicious" when defendants resigned "several months after the Class Period ended").

GAAP Violations

In cases involving accounting restatements or alleged accounting fraud, plaintiffs often attempt to plead scienter based on violations of GAAP. Courts routinely find that GAAP violations alone do not support an inference of scienter. See Banker v. Gold Res. Corp. (In re Gold Res. Corp. Sec. Litig.), 776 F.3d 1103, 1113 (10th Cir. 2015) (holding that allegations of GAAP violations are not sufficient to establish a strong inference of scienter unless they are "coupled with evidence that the violations or irregularities were the result

of the defendant's fraudulent intent to mislead investors"); Yates v. Mun. Mortg. & Equity, LLC, 744 F.3d 874, 887 (4th Cir. 2014) (same).

Parallel Government Investigations

Plaintiffs often file securities class actions parallel to, or as follow-on actions to, a government investigation of or enforcement action taken against the company by the SEC, Department of Justice, Food and Drug Administration (FDA), or other regulatory or criminal authority. Some courts hold that a government investigation alone is not enough to support a strong inference of scienter, particularly where the outcome of the investigation is not alleged or the investigation did not uncover any evidence of fraud. Key cases involving scienter claims based on parallel government investigations include:

- In re Ceridian Corp. Sec. Litig., 542 F.3d 240, 248–49 (8th Cir. 2008); Carlton v. Cannon, 184 F. Supp. 3d 428, 479–80 (S.D. Tex. 2016); Brophy v. Jiangbo Pharms., Inc., 781 F.3d 1296, 1304 (11th Cir. 2015) («The ‹mere existence of an SEC investigation› likewise does not equip a reviewing court to explain which inferences might be available beyond a general suspicion of wrongdoing.")
- Abiomed, 778 F.3d at 245(FDA investigation not probative of scienter where the FDA "eventually closed out its investigation of [the company] without taking any action adverse to the company")

Other Lawsuits or Settlements

If a company has previously settled a related lawsuit, including with a government body, a plaintiff might attempt to allege a pattern of bad behavior as suggestive of scienter. Courts have rejected that notion where other viable scienter allegations are lacking:

- Liu v. Intercept Pharms., Inc., 2020 U.S. Dist. LEXIS 53252, at *52 (S.D.N.Y. Mar. 26, 2020)(previous securities class action settlement not indicative of scienter in subsequent securities action)
- In re Envision Healthcare Corp. Sec. Litig., 2019 U.S. Dist. LEXIS 200986, at *64, n.14 (M.D. Tenn. Nov. 19, 2019)(settlement of False Claims Act action related to allegations of misconduct does not support an inference of scienter where "conduct underlying the settlement took place two to six year[s] prior to the start of the class period and was not related to misrepresentations at issue here")
- Shoemaker v. Cardiovascular Sys., Inc., 300 F. Supp. 3d 1046, 1054 (D. Minn. 2018)(Department of Justice settlement and associated Corporate Integrity Agreement not indicative of scienter where alleged misconduct was phased out as a result of settlement)
- In re Cardinal Health, Inc. Sec. Litigs., 426 F. Supp. 2d 688, 779 (S.D. Ohio 2006)(related shareholder derivative suits for securities fraud alone do not show an inference of knowing or reckless conduct)

Core Operations Theory

When a securities fraud class action involves a company's core product or operation, plaintiffs will often ask a court to infer scienter on the basis that senior management must have known about wrongdoing concerning the company's "core operations." Standing alone, however, the core operations theory is generally not sufficient to support an inference of scienter. For cases involving core operations theory, see:

- Jackson v. Abernathy, 960 F.3d 94, 99 (2d Cir. 2020)(naked assertions based solely on the core importance of disputed issues are plainly insufficient to raise a strong inference of corporate scienter)
- In re Psychemedics Corp. Secs. Litig., 2017 U.S. Dist. LEXIS 183955, at *15 (D. Mass. Nov. 7, 2017)(finding that "plaintiff's 'core operations' theory stands naked, unadorned by any other piece of evidence purporting to establish the essential 'plus' factor—guilty knowledge on the part of [the defendants]")

Alleged Omissions

In cases involving alleged omissions, pleading "conscious recklessness" requires specific facts indicating defendants had knowledge of, or access to, undisclosed information that if left undisclosed would mislead a reasonable investor. See Setzer v. Omega Healthcare Inv'rs, Inc., 968 F.3d 204 (2d Cir. Aug. 3, 2020); Liu v. Intercept Pharms., Inc., 2020 U.S. Dist. LEXIS 53252 (S.D.N.Y. Mar. 26, 2020).

Other Common Rejected Theories of Scienter

As defense counsel, you should also determine whether plaintiff's theory of scienter—based on all the facts alleged—amounts to conduct that courts have historically found to be insufficient to state a claim for securities fraud. Some examples include:

- **Corporate mismanagement or negligence.** Allegations that essentially accuse defendants of poor management or corporate negligence will not suffice. See Singh v. Cigna Corp., 918 F.3d 57, 59–60 (2d Cir. 2019); Abiomed, 778 F.3d at 246; Ceridian, 542 F.3d at 249.
- **Corporate optimism.** Allegations that a defendant was overly optimistic when making public statements will generally be insufficient. See In re Biogen Inc., Sec. Litig., 193 F. Supp. 3d 5, 53–54 (D. Mass. 2016) and Rahn v. Genzyme Corp. (In re Genzyme Corp. Sec. Litig.), 2012 U.S. Dist. LEXIS 44336, at *34–35 (D. Mass. Mar. 30, 2012)

("nonculpable explanation" that defendants "did not expect . . . the setbacks the company experienced" was "stronger" than culpable inference plaintiff alleged).

- **Fraud by hindsight.** Plaintiffs will often use hindsight to assert securities fraud, particularly in cases that were triggered by the disclosure of some adverse event. But courts uniformly hold that "[p]leading 'fraud by hindsight,' essentially making general allegations 'that defendants knew earlier what later turned out badly,' is not sufficient." See Ezra Charitable Trust v. Tyco Int'l, Ltd., 466 F.3d 1, 6 (1st Cir. 2006); Metzler, 305 F. Supp. 3d at 223 (defendants' "failure to predict the future does not support a claim for securities fraud"); and Novak, 216 F.3d at 309 (allegations that defendants should have anticipated future events and made earlier disclosures does not make out a securities fraud claim).
- **Scientific disagreement.** In life sciences-related securities cases, courts have rejected securities fraud claims in which plaintiff's allegations amount to nothing more than a disagreement about the interpretation of data or science. See Hirtenstein v. Cempra, Inc., 348 F. Supp. 3d 530, 564 (M.D.N.C. 2018) and Kleinman v. Elan Corp., 706 F.3d 145, 154 (2d Cir. 2013).
- **Interim communications with regulators.** Companies often face securities fraud claims on the basis that the company failed to disclose interim negative communications made by a regulator. The most common securities cases asserting such a theory involve life sciences companies' discussions with the FDA during the drug or device approval process. In those cases, courts have established that there is no affirmative duty to "divulge the details of interim 'regulatory back-and-forth' with the FDA." Yan v. ReWalk Robotics Ltd., 2020 U.S. App. LEXIS 26988, at *34 (1st Cir. Aug. 25, 2020). See also Abiomed, 778 F.3d at 243–44 ("There must be some room for give and take between a regulated entity and its regulator."); and Sanofi Secs. Litig. v. Meeker, 87 F. Supp. 3d 510, 534 (S.D.N.Y. 2015) ("The law [does] not impose an affirmative duty to disclose the FDA's interim feedback just because it would be of interest to investors.").
- **Contract dispute.** Claims that amount to nothing more than a contract dispute are not generally actionable as a securities fraud. Alfandary v. Nikko Asset Mgmt., Co., No. 17-CV-5137 (LAP), 2019 U.S. Dist. LEXIS 169524, at *17 (S.D.N.Y. Sept. 30, 2019) ("Whether or not Defendants violated their contractual obligations, however, is not a question suited for resolution under federal securities law."); Drexel Burnham Lambert, Inc. v. Saxony Heights Realty Assocs., 777 F. Supp. 228, 235 (S.D.N.Y. 1991) (granting dismissal of securities fraud claim where it was a "contract dispute dressed up in the language of fraud").

Use of Extrinsic Documents to Undercut Allegations of Scienter

Plaintiffs alleging securities fraud claims will often rely on public documents to investigate and plead their claims. These documents can consist of a company's SEC filings, such as a company's annual report on Form 10-K and quarterly report on Form 10-Q, earnings call transcripts, investor conference transcripts, and public documents published by a company's regulator. In many cases, plaintiffs will either reference the documents expressly in their complaint or rely on the documents to form the basis for their scienter claims. Rarely, however, do plaintiffs attach those documents to their complaints. Plaintiffs therefore may try to plead scienter claims by selectively citing documents and omitting other public information that undermines their allegations.

The Supreme Court has held that courts overseeing securities fraud actions may consider relevant extrinsic materials—such as documents of public record and matters of which the court may take judicial notice—when determining "whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter." See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322–23 (2007). You should therefore review and consider all documents that are referenced or cited in a securities fraud complaint, as well as documents that a complaint relies on explicitly or implicitly to make scienter allegations. Based on this review, you can determine whether the documents should be introduced as exhibits to a motion attacking the pleading.

Some common scenarios when introduction of an extrinsic document may help defeat scienter allegations include:

- The complaint makes scienter allegations that are directly contradicted by the documents.
    - In re Bristol-Myers Squibb Sec. Litig., 312 F. Supp. 2d 549, 566 (S.D.N.Y. 2004) (rejecting plaintiffs' scienter allegations and characterizations because they were inconsistent with the documents on which the complaint was based)
- The complaint alleges selective or isolated information from a document that is taken out of context or misleading and the complete document undermines allegations of intent.
    - Hirtenstein, 348 F. Supp. 3d at 551 (affirming dismissal of securities fraud complaint and considering FDA advisory committee materials and briefing documents that were "highly relevant" to the issue of intent)

- Noble Asset Mgmt. v. Allos Therapeutics, Inc., 2005 U.S. Dist. LEXIS 24452, at *36–37 (D. Colo. Oct. 20, 2005) (FDA approval committee transcript that undermined allegations that defendants intended to deceive investors about the approvability of the company's drug application was properly considered)

- The complaint alleges insider trading and the SEC filings (Form 4s) contain information about the circumstances of the trades that undermines the allegations. Form 4 filings contain information about the number of securities that an insider acquired or sold and the amount owned following the reported transaction. See Section 16 Forms: Guidance for Completing, Filing, and Amending. The form will often note whether the insider's sales were effected pursuant to a Rule 10b5–1 trading plan (and when the plan was adopted) or whether the transactions were effected to meet a tax obligation. Courts regularly consider these Form 4s on a motion to dismiss.
  - In re Aratana Therapeutics Inc. Sec. Litig., 315 F. Supp. 3d 737, 762 n.12 (S.D.N.Y. 2018) (granting motion to dismiss securities fraud action and taking judicial notice of individual defendants' SEC Form 4 filings that showed no unusual trading)
  - Ash v. PowerSecure Int'l, Inc., 2015 U.S. Dist. LEXIS 122692, at *12 (E.D.N.C. Sept. 15, 2015)

- The company made disclosures to investors in publicly available documents before or during the class period that undermine an inference of scienter. Courts routinely hold that attempts to provide investors with warnings of risk generally weaken the inference of scienter.
  - Brennan, 853 F.3d at 617–18 (company's disclosures before and during the class period weaken the complaint's scienter showing)
  - Horizon Asset Mgmt. v. H & R Block, Inc., 580 F.3d 755, 763–64 (8th Cir. 2009) (continued disclosures weakened scienter inference)

When defending against scienter in a securities fraud claim, you should consider attaching documents containing disclosures made by the company—such as risk factor disclosures found in a company's periodic reports or statements made to investors in a press release—that may undermine or rebut an inference of fraud.

Note, however, some courts may refuse to consider extrinsic documents when analyzing scienter allegations where the document is ambiguous or otherwise not publicly available. For example:

- Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 1001 (9th Cir. 2018)(finding that district court abused its discretion in considering government report and drawing an inference against scienter where the report was subject to varying interpretations)

- Tomaszewski v. Trevena, Inc., 2020 U.S. Dist. LEXIS 156618, at *15–19 (E.D. Pa. Aug. 28, 2020)(declining to consider confidential communications between company and the FDA, even though the complaint made references to certain portions of those FDA communications that were published by the FDA in a publicly available briefing book, because the full communications attached to defendant's motion were not public)

Practical Considerations

How to Defeat Claims at the Pleading Stage

When seeking to dismiss a securities fraud complaint on the basis that a plaintiff has failed to adequately allege a strong inference of scienter, you should:

- Analyze the complaint and determine whether the plaintiff's primary theory of fraud is one which a court has previously rejected as insufficient to meet the strong inference of scienter standard under the PSLRA.

- Identify the documents that contain each of the challenged statements and review the context in which the statement was made to determine if a challenged statement as quoted and alleged in the complaint was taken out of context or omits relevant information that undercuts plaintiff's scienter theory.

- Review the challenged statements attributed to each individual defendant and assess whether there is a lack of particularized allegations showing what each individual defendant purportedly knew, when they knew it, or why each individual defendant's statements were allegedly false at the time the statement when made.

- Analyze confidential witness allegations and look for gaps in how the witnesses are described or the particularity of the statements attributed to them.

- If a complaint involves allegations of knowing omissions, identify all relevant disclosures made by the company before and during the alleged class period regarding the business practices at issue.

- Attempt to develop a countervailing theory of nonculpable conduct based on the totality of the facts alleged and the public-record facts. For example, if the facts alleged lead to a stronger inference that a company acted in good faith or reasonably believed that its statements were true at the time they were made, courts must weigh that inference against any alleged counter inference of fraud.

Defending Scienter at Summary Judgment

If a securities fraud complaint survives a motion to dismiss and proceeds through discovery, summary judgment will be the next opportunity to disprove allegations of scienter. Courts will resolve scienter at summary judgment in favor of a defendant where there is no rational basis in the record for concluding that any of the challenged statements were made with requisite scienter. See, e.g., Ok. Firefighters Pension & Ret. Sys. v. Smith & Wesson Holding Corp. (In re Smith & Wesson Holding Corp. Sec. Litig., 669 F.3d 68 (1st Cir. 2012) (affirming summary judgment where the plaintiff failed to provide evidence creating a genuine issue of material fact as to the defendants' state of mind)); Miss. Pub. Employees.' Ret. Sys. v. Boston Scientific Corp., 649 F.3d 5, 29–30 (1st Cir. 2011); In re Puda Coal Secs., Inc., Litig., 30 F. Supp. 3d 230, 259 (S.D.N.Y. 2014), aff'd sub nom. Querub v. Hong Kong, 649 F. App'x 55 (2d Cir. 2016) (summary judgment was appropriate as to Section 10(b) claim where the plaintiffs failed to raise a triable issue as to scienter); Steed Fin. LDC v. Nomura Sec. Int'l, Inc., 2004 U.S. Dist. LEXIS 18580, at *32 (S.D.N.Y. Sept. 14, 2004) (granting summary judgment in favor of defendants where plaintiff could not demonstrate that defendants "acted with an intent to deceive, manipulate, or defraud"). A plaintiff opposing summary judgment bears a high burden of presenting "significant probative evidence" of scienter. In re Twitter, Inc. Secs. Litig., 2020 U.S. Dist. LEXIS 86978, at *18 (N.D. Cal. Apr. 17, 2020).

When moving for (or opposing) summary judgment, you should seek to introduce evidence that may rebut an inference of scienter. Evidence disproving scienter might include:

- Documents showing that a company disclosed to investors facts that are alleged to have been undisclosed
- Documents showing consistency between internal data known to or possessed by an individual defendant and the challenged statements
- Documents showing that the individual defendant did not have access to any alleged contrary reports or data
- Documents permitting an inference of good faith or proper behavior
- SEC filings showing that an insider's stock sales were not unusual or suspicious or were made for other proper purposes (e.g., to satisfy a tax obligation)
- The absence of any insider trading or other financial motive
- Documents, deposition testimony, or affidavits from the individual defendants or company employees about their mental state or lack of knowledge about the alleged issues
    - See In re Fannie Mae Sec., 905 F. Supp. 2d 63, 73 (D.D.C. 2012) (granting summary judgment where no record evidence, including email communications, demonstrated that defendant knew about improper accounting practices)
- Deposition testimony of confidential witnesses showing that statements made at the depositions did not corroborate the statements attributed to them in the complaint
    - See Campo v. Sears Holdings Corp., 635 F. Supp. 2d 323, 330 & n.54, 335 (S.D.N.Y. 2009), *aff'd*, 371 F. App'x 212 (2d Cir. 2010)
- Expert testimony showing that an individual defendant's actions were reasonable and consistent with industry practices

Other Defenses

Other specific defenses to scienter allegations that may be asserted at summary judgment include:

- **Rule 10b5-1 trading plan.**

If you are seeking to assert a Rule 10b5-1 affirmative defense at summary judgment, you should submit affirmative evidence that the plan was entered into in good faith. See CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP, 654 F.3d 276, 302 n.13 (2d Cir. 2011) ("[T]he affirmative defense is available only when the plan to purchase or sell securities was 'given or entered into in good faith.'" (quoting Rule 10b5-1(c)(1)(ii))); Elec. Workers Pension Trust Fund of IBEW Local Union No. 58 v. CommScope, Inc., 2013 U.S. Dist. LEXIS 110457, at *19 (W.D.N.C. Aug. 6, 2013) ("[Rule 10b5-1] clearly requires a showing of good faith [that] . . . require[s] additional evidence to be presented by Defendants[.]").

Some courts have found, however, that a Rule 10b5–I trading plan may give rise to an inference of scienter where the plan was adopted during the class period to dispose of significant amounts of stock during the class period. Freudenberg v. E*Trade Fin. Corp., 712 F. Supp. 2d 171, 200 (S.D.N.Y. 2010). For information on Rule 10b5-1 plans, see Rule 10b5-1 Plans.

- **Due diligence defense.**

Accountants and underwriters may be held liable under Section 11 of the Securities Act of 1933, as amended, for material misrepresentations or omissions in a registration statement. Section 11, however, provides both accountants and underwriters with a "due diligence" defense, which protects them from liability where they conduct a reasonable investigation of a company's financials in connection with an issuer's offering. 15 U.S.C. § 77k(b). This due diligence

defense may negate an inference of scienter in claims brought under Section 10(b).

- **Advice of counsel defense.**

Evidence that a defendant relied on the advice of counsel in connection with disclosures made to investors is a factor that courts consider in assessing scienter. United States SEC v. ITT Educ. Servs., 303 F. Supp. 3d 746, 763 (S.D. Ind. 2018) (advice of counsel defense is a proper consideration in analyzing a defendant's state of mind in connection with securities fraud claims); SEC v. Sethi Petro., LLC, 2017 U.S. Dist. LEXIS 124429, at *11 (E.D. Tex. Aug. 7, 2017) ("Reliance on counsel is not a formal defense, but rather it is simply a means of demonstrating good faith and represents possible evidence of an absence of any intent to defraud." (citation omitted)), *aff'd*, 910 F.3d 198 (5th Cir. 2018), *cert*. *denied*, 140 S. Ct. 95 (2019); Steed Fin. LDC v. Nomura Sec. Int'l, Inc., 148 F. App'x 66, 69 (2d Cir. 2005) (affirming summary judgment in securities action for defendant who relied in good faith on the advice of law firm).

To demonstrate an advice of counsel defense, a defendant must show that:

- Legal advice was sought from an attorney concerning the material facts of the disclosure or omission.
- All relevant facts known at the time were disclosed to the attorney.
- An opinion sanctioning the conduct was rendered by the attorney.
- The defendant reasonably relied on the attorney's opinion.

See United States v. Peterson, 101 F.3d 375, 381 n.4 (5th Cir. 1996); United States v. Bush, 626 F.3d 527, 539 (9th Cir. 2010).

To invoke the advice of counsel defense, a defendant must generally disclose the attorney-client communications that form the basis for the defense. SEC v. Strategic Glob. Invs., Inc., 262 F. Supp. 3d 1007, 1024 (S.D. Cal. 2017).

Before asserting an advice of counsel defense at summary judgment, you should evaluate and weigh the benefits of asserting the defense against the potential negative consequences of disclosing otherwise protected attorney-client communications.

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James R. Carroll is the global head of Skadden's litigation/controversy practices. He is recognized as a go-to litigator, successfully guiding clients through litigations and arbitrations on a range of issues, including securities, investment management, ERISA, insurance and reinsurance, antitrust and restrictive covenants.

Mr. Carroll's decades-long jury trial experience spans courts across the country and involves bet-the-company and other complex, high-profile cases. His practice also includes representing corporations and individuals in enforcement matters before the Securities and Exchange Commission (SEC), the Department of Justice (DOJ), the Massachusetts Attorney General's Office, the Massachusetts Securities Division and the Financial Industry Regulatory Authority.

Mr. Carroll has been selected regularly for inclusion in *Chambers USA: America's Leading Lawyers for Business*, in which clients note his "incredible diplomacy skills" and that he is "very powerful in deposition settings and negotiations," as well as in *The Best Lawyers in America*. Additionally, he was named the 2021 Boston Bet-the-Company Litigation Lawyer of the Year by *Best Lawyers* and was selected as a 2021 Top Lawyer by *Boston Magazine*. Under his leadership, Skadden was named a 2021 Litigation Department of the Year finalist by *The American Lawyer*.

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Eben Colby's practice includes advising on a wide range of complex securities, corporate and regulatory matters. He has litigated in trial and appellate courts, state and federal, around the United States — including jury and bench trials — as well as regulatory investigations, administrative proceedings, and private arbitrations and mediations.

Mr. Colby particularly focuses on the mutual fund and asset management industry, having represented many of the largest firms in the industry's most significant issues over the last two decades. Mr. Colby's experience spans from the market timing investigations and litigation of the early 2000s to excessive fee litigation under Section 36(b) of the Investment Company Act and "proprietary funds" cases brought under the Employee Retirement Income Security Act (ERISA). This experience includes successful outcomes on billions of dollars of claims after bench and jury trials, as well as at the summary judgment and pleading stages.

Mr. Colby has extensive experience litigating against, and advising boards regarding, activist investors in closed-end funds. This includes shareholder activists and other issues involving proxy voting, control, board elections and undisclosed group activity.

Mr. Colby has been named a Winning Litigator by *The National Law Journal* for his victories in high-stakes matters, as well as a Rising Star in Boston by the same publication. He also has been named to *The Best Lawyers in America*, was previously recognized as an Asset Management Rising Star by Law360 and was named among *Boston Magazine's* Top Lawyers in 2021 and 2022, showcasing "the region's finest legal minds."

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Michael Hines' practice involves representing publicly traded and privately held corporations, investment advisers, and individual officers, directors and trustees in a wide array of complex civil litigation.

Mr. Hines regularly litigates putative class actions and shareholder derivative proceedings brought under state and federal securities laws, including the Employee Retirement Income Security Act (ERISA) and the Securities Exchange Act of 1934. Mr. Hines also has broad experience in strategic litigation in connection with mergers and acquisitions, trade secret and noncompetition cases, and corporate governance disputes. Mr. Hines has represented special committees and individual and corporate clients in internal investigations and in proceedings before various federal and state regulatory authorities, including the U.S. Securities and Exchange Commission (SEC) and the Massachusetts Securities Division. In addition, Mr. Hines has advised clients in connection with Foreign Corrupt Practices Act investigations and disputes arising from breach of contract, insurance and employment matters. In recognition of his work, he has been repeatedly named to *Chambers USA* in the Litigation Securities category, in addition to being recognized by *The Best Lawyers in America* and selected as a 2021 Top Lawyer by *Boston Magazine*.

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Mr. DuBois has an active pro bono practice, which has included advising a non-governmental organization representing low-income citizens, seniors and other members of underserved communities on Social Security Administration issues, and representing a Massachusetts state prisoner in civil rights litigation in federal court.