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Where to Point the Finger: *Omnicare's* Attempt to Rectify the Collective Scierter Debate

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WHERE TO POINT THE FINGER: OMNICARE'S ATTEMPT TO RECTIFY THE COLLECTIVE SCIENTER DEBATE

Abstract: The crucial element in pleading a securities fraud case under the 1934 Exchange Act is proving that the defendant had the requisite intent, or scienter. Circuit courts are divided over the issue of pleading scienter against a corporation for section 10(b) and Rule 10b-5 securities fraud cases. Since a corporation can only act through its agents, courts have struggled to determine which agents' mental states can be imputed against a corporation. In 2014, in *In re Omnicare, Inc. Securities Litigation*, the U.S. Court of Appeals for the Sixth Circuit created a new rule to address pleading scienter against a corporation in securities fraud cases. This rule incorporates positions from both sides of the scienter debate, and is likely an appealing approach for those circuits that have not fully ruled against either side of the split. This Note discusses the corporate scienter debate, and argues that the Sixth Circuit's *Omnicare* ruling must be further refined in order to establish a conclusive and widely applicable pleading standard.

INTRODUCTION

Over the past three years, an overwhelming majority of securities fraud class action claims have alleged section 10(b) and Rule 10b-5 violations.¹ Financial scandals result in lawsuits brought by true victims and opportunistic plaintiffs alike.² To distinguish meritorious and frivolous suits, Congress established the Private Securities Litigation Reform Act ("PSLRA") in

¹ See CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2014 YEAR IN REVIEW 8 (2015) (illustrating that Rule 10b-5 claims account for nearly 85% of all securities claims in the last three years). Section 10(b) and Rule 10b-5 make it illegal to employ any type of manipulative device or fraudulent scheme in connection with the purchase or sale of any registered security. See 15 U.S.C. § 78j(b) (2012); 17 C.F.R. § 240.10b-5 (2015). In 2013 alone, securities class action settlements totaled \$4.77 billion. See CORNERSTONE RESEARCH, SECURITIES CLASS ACTION SETTLEMENTS: 2013 REVIEW AND ANALYSIS 3 (2014).

² See H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.), as reprinted in 1995 U.S.C.C.A.N. 730, 730 (describing evidence of plaintiffs suing frivolously in order to collect settlements from deep-pocketed defendants); see also Allan Horwich & Sean Siekkinen, *Pleading Reform or Unconstitutional Encroachment? An Analysis of the Seventh Amendment Implications of the Private Securities Litigation Reform Act*, 35 SEC. REG. L.J. 4, 4 (2006) (discussing the overly vague pleading standard for securities fraud cases and the effect it has on both valid and meritless plaintiffs); David S. Ruder et al., *The Securities and Exchange Commission's Pre- and Post-Enron Responses to Corporate Financial Fraud: An Analysis and Evaluation*, 80 NOTRE DAME L. REV. 1103, 1106-07 (2005) (describing some of the most notorious major financial scandals at the turn of the century).

1995, which heightened the pleading requirements in securities fraud cases.³ Unfortunately, Congress failed to define explicitly the requirements for pleading a defendant's mental state, otherwise known as scienter.⁴

Although the concept of scienter is well established, the circumstances in which it is imputed to a corporation is unsettled.⁵ The federal circuits are split on the applicability of a theory known as collective scienter to the pleading standards of securities fraud cases.⁶ Collective scienter attaches corporate liability by aggregating the mental states of numerous agents within a corporation, regardless of whether those employees had any role in the alleged fraud.⁷ Numerous circuits have rejected collective scienter, looking no further than the state of mind of the corporate officials who make or issue alleged fraudulent statements to analyze scienter.⁸

³ See 15 U.S.C. § 78u-4(b)(2)(A) (2012); Bruce Cannon Gibney, Comment, *The End of the Unbearable Lightness of Pleading: Scienter After Silicon Graphics*, 48 UCLA L. REV. 973, 973 (2001) ("One of [Congress's] primary weapons to combat strike suits was to heighten the mens rea pleading requirement for securities fraud.").

⁴ See Horwich & Siekkinen, *supra* note 2, at 4 ("The PSLRA's language is problematically vague, which has led to several circuit splits . . . most significantly the extent to which the PSLRA requires securities fraud plaintiffs to aver detailed facts supporting the rule 10b-5 cause of action element of scienter."); Gibney, *supra* note 3, at 977 (discussing the split amongst circuits regarding scienter pleading requirements for securities fraud); see also Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193-94 n.12 (1976) (defining scienter as "a mental state embracing intent to deceive, manipulate, or defraud"). Compare *In re Omnicare, Inc. Sec. Litig. (Omnicare II)*, 769 F.3d 455, 476-77 (6th Cir. 2014) (implementing a ruling, in part, to encourage public accountability of large corporate defendants), with *Phillips v. Scientific-Atlanta, Inc.*, 374 F.3d 1015, 1018 (11th Cir. 2004) (relying on the plain meaning of the statutory language and congressional intent to infer pleading requirements).

⁵ See *Omnicare II*, 769 F.3d at 473.

⁶ See Bradley J. Bondi, *Dangerous Liaisons: Collective Scienter in SEC Enforcement Actions*, 6 N.Y.U. J.L. & BUS. 1, 3 (2009) (describing the emergence of collective scienter and its acceptance and rejection in various federal circuits). Compare *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital, Inc.*, 531 F.3d 190, 195 (2d Cir. 2008) (concluding it is possible for a plaintiff to plead a strong inference of scienter without focusing on a single expressly named officer), and *In re Maxwell Techs., Inc., Sec. Litig.*, 18 F. Supp. 3d 1023, 1032 (S.D. Cal. 2014) (holding that this case was not an appropriate circumstance for plaintiffs to plead collective scienter), with *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 366 (5th Cir. 2004) (concluding that collective scienter or group pleading was inapplicable).

⁷ Patricia S. Abril & Ann Morales Olazábal, *The Locus of Corporate Scienter*, 2006 COLUM. BUS. L. REV. 81, 86; Kevin M. O'Riordan, Note, *Clear Support or Cause for Suspicion? A Critique of Collective Scienter in Securities Litigation*, 91 MINN. L. REV. 1596, 1605 (2007) (explaining that through collective scienter, the fraudulent act and scienter of the corporation can exist in two completely independent employees); see also Heather F. Crow, Comment, *Riding the Fence on Collective Scienter: Allowing Plaintiffs to Clear the PSLRA Pleading Hurdle*, 71 LA. L. REV. 313, 314 (2010) (illustrating corporate liability through collective scienter by presenting a hypothetical in which a corporate officer makes a public statement about positive clinical trials regarding a new drug, while at the same time a company scientist discovers negative side effects to the drug but remains silent).

⁸ See *Southland*, 365 F.3d at 366 (rejecting plaintiffs' attempt to establish collective scienter); Warren R. Stern & Geoffrey A. Starks, *Defining Corporate Scienter*, SEC. LITIG. REP., Sept. 2006,

Recently, in 2014 in *In re Omnicare, Inc. Securities Litigation* (“*Omnicare II*”), the U.S. Court of Appeals for the Sixth Circuit set forth a new approach to corporate scierter.⁹ Combining the theories of several other circuits, the Sixth Circuit laid out a hybrid collective scierter rule in order to rectify the ideological flaws in each circuit’s stance.¹⁰ The Sixth Circuit’s new theory of corporate scierter liability has established a “middle-ground” in the collective scierter debate, and made the issue ripe for U.S. Supreme Court review.¹¹

This Note argues that the *Omnicare II* ruling, with a small change, should serve as the prevailing standard for corporate scierter.¹² Part I provides an overview of corporate scierter and the competing scholarly stances on the issue.¹³ Part II discusses both the traditional and somewhat unclear positions on collective scierter adopted throughout the federal circuits.¹⁴ Part III examines the Sixth Circuit’s position on corporate scierter leading up to *Omnicare II*, and how the court’s new approach relates to other circuits.¹⁵ Finally, Part IV argues that the *Omnicare* standard is ideal for undecided circuits, but the term “high managerial agent” in its standard must be further defined in order to avoid ambiguities in securities fraud pleading.¹⁶

I. PLEADING SCIENTER AND ITS COMPETING THEORIES

An enduring tension between accountability and legitimacy in federal securities claims underlies the various scierter approaches among the feder-

at 21 (describing *Southland’s* conformity with narrower common law principles); see also Matthew Agliatoro, Note, *The New Group Pleading Doctrine*, 99 CORNELL L. REV. 457, 464 (2014) (discussing the Fifth Circuit’s rejection of the group pleading doctrine).

⁹ See *Omnicare II*, 769 F.3d at 476 (establishing an approach that clarifies the Sixth Circuit’s previous position and addresses issues from other circuits).

¹⁰ See ROBERT J. HAFT ET AL., LIABILITY OF ATTORNEYS & ACCOUNTANTS FOR SECURITIES TRANSACTIONS, § 3:15.50, Westlaw (database updated May 2015) (discussing *Omnicare II’s* attempt to reconcile various approaches adopted throughout the circuits); see also Robert Anello, *Corporate State of Mind in Securities Cases: The Sixth Circuit Blazes a New Trail*, FORBES (Oct. 15, 2014, 3:10 PM), <https://web.archive.org/web/20150915061356/http://www.forbes.com/sites/insider/2014/10/15/corporate-state-of-mind-in-securities-cases-the-sixth-circuit-blazes-a-new-trail/>.

¹¹ See *Omnicare II*, 769 F.3d at 476 (“Given that neither [collective scierter] approach is ideal, a middle ground is necessary.”); David V. McCaughey & Gregory L. Demers, *Revisiting Corporate Scierter: In Search of a Middle Ground*, 47 SEC. REG. & L. REP. (BNA) No. 17, at 858 (Apr. 27, 2015) (speculating that it is only a matter of time before the Supreme Court weighs in on the collective scierter debate).

¹² See *infra* notes 181–228 and accompanying text.

¹³ See *infra* notes 17–83 and accompanying text.

¹⁴ See *infra* notes 87–123 and accompanying text.

¹⁵ See *infra* notes 128–175 and accompanying text.

¹⁶ See *infra* notes 181–228 and accompanying text.

al circuits.¹⁷ This Part provides a historical overview of securities fraud and section 10(b) jurisprudence, and the competing approaches of collective scienter resulting therefrom.¹⁸ Section A discusses both the Securities Exchange Act of 1934 (the “Exchange Act”) and the Private Securities Litigation Reform Act, explaining the role of each statute in the perceived need for pleading collective scienter.¹⁹ Section B analyzes the competing stances on collective scienter, and the corresponding deficiencies that courts and scholars have identified.²⁰

A. *The Exchange Act and Pleading Under the PSLRA*

Congress enacted the Exchange Act to ensure full disclosure by publicly traded corporations and to provide investors with complete and accurate information about potential investments.²¹ Section 10(b) of the Exchange Act broadly declares it unlawful to engage in any deceptive or manipulative conduct in connection with the purchase or sale of securities.²² Pursuant to authority granted by the Exchange Act, the Securities and Exchange Commission (“SEC”) created Rule 10b-5, which makes employment of manipulative devices or fraudulent practices illegal.²³ Specifically, the rule polices false statements or omissions of material fact that serve to mislead the public in the purchase and sale of securities.²⁴

¹⁷ See Gibney, *supra* note 3, at 975–77 (describing how the lack of clarity in the PSLRA has led to disagreement among the federal circuits); Ryan Lee Hart, Comment, *Deterrence and Fairness: Why the Current Financial Crisis Demands a Product-Oriented Relaxation of the PSLRA*, 5 SETON HALL CIRCUIT REV. 411, 413 (2011) (contrasting the deterrent nature of securities class actions with the challenges of pleading under the PSLRA).

¹⁸ See *infra* notes 21–83 and accompanying text.

¹⁹ See *infra* notes 21–44 and accompanying text.

²⁰ See *infra* notes 45–83 and accompanying text.

²¹ See 15 U.S.C. § 78(b) (2012); SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963) (noting that the underlying function of the Exchange Act was “to substitute a philosophy of full disclosure for the philosophy of caveat emptor”). Along with other fundamental securities legislation, the Exchange Act was enacted in response to the 1929 stock market crash and the ensuing Great Depression. See Browning Jeffries, *The Implications of Janus on Issuer Liability in Jurisdictions Rejecting Collective Scienter*, 43 SETON HALL L. REV. 491, 497–98 (2013) (giving historical context for the Exchange Act and other major 1930s securities legislation).

²² 15 U.S.C. § 78j(b) (“It shall be unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe . . .”). Although section 10(b) covers many different types of securities violations, this Note focuses on fraudulent misrepresentation.

²³ See 17 C.F.R. § 240.10b-5 (establishing an administrative prohibition relating to manipulative securities practices); Jeffries, *supra* note 21, at 498 (highlighting Rule 10b-5).

²⁴ See 17 C.F.R. § 240.10b-5 (“It shall be unlawful for any person, directly or indirectly . . . (b) [t]o make any untrue statement of 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 . . .”).

Both section 10(b) and Rule 10b-5 implicitly grant private litigants the power to pursue claims under those provisions.²⁵ To plead a valid Rule 10b-5 claim, a private litigant must prove a number of elements.²⁶ First, a plaintiff must establish that the defendant made a material misrepresentation or omission.²⁷ Second, a plaintiff must establish scienter and a connection between the misrepresentation or omission and the purchase or sale of a security.²⁸ Next, a plaintiff must prove reliance upon the misrepresentation or omission and economic loss.²⁹ Finally, a successful plaintiff must establish loss causation.³⁰

Scienter is “a mental state embracing intent to deceive, manipulate, or defraud.”³¹ When the SEC or private plaintiffs allege a corporation committed securities fraud, proving scienter is often the toughest challenge.³² A corporation cannot operate on its own, but acts solely through its agents.³³

²⁵ *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12–13 & n.9 (1971); *see also Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 173 (1994) (“Of course, a private plaintiff now may bring suit against violators of § 10(b).”).

²⁶ *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008) (describing the elements of a 10(b) action); *Dura Pharm., Inc. v. Boudo*, 544 U.S. 336, 341–42 (2005) (laying out the elements for private litigants in securities actions against publicly traded companies).

²⁷ *Stoneridge*, 552 U.S. at 157. A fact is material if there is a substantial likelihood that its disclosure would have been considered significant by a reasonable investor. *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (citing *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

²⁸ *Stoneridge*, 552 U.S. at 157; *see also Ernst & Ernst*, 425 U.S. at 193–94 & n.12 (holding that a private cause of action under section 10(b) will not survive without pleading scienter). *See generally* Thomas J. Molony, *Beyond the Target Market: Product Advertising and Rule 10b-5’s “in Connection with” Requirement*, 61 CLEV. ST. L. REV. 101, 108–12 (2013) (providing an overview of the jurisprudence regarding the “in connection with” requirement).

²⁹ *Stoneridge*, 552 U.S. at 157. Reliance can be established through the “fraud on the market theory,” which presumes that well-developed markets reflect all publicly-available information including material misrepresentations. *See Basic Inc.*, 485 U.S. at 231 (explaining the rationale behind the reliance presumption).

³⁰ 15 U.S.C. § 78u-4(b)(4) (detailing the plaintiff’s burden to prove loss causation); *Dura Pharm.*, 544 U.S. at 341–42.

³¹ *Ernst & Ernst*, 425 U.S. at 193–94 n.12; *see Omnicare II*, 769 F.3d at 472; *In re Digi Int’l, Inc. Sec. Litig.*, 14 F. App’x 714, 717 (8th Cir. 2001); *see also* Ann M. Lipton, *Slouching Towards Monell: The Disappearance of Vicarious Liability Under Section 10(b)*, 92 WASH. U. L. REV. 1261, 1263 (2015) (defining scienter).

³² *See* Crow, *supra* note 7, at 325 (highlighting scienter as one of the most challenging hurdles for plaintiffs in securities fraud cases); Gibney, *supra* note 3, at 976 (“Because scienter is often the hardest element to plead in securities cases, section 21D(b)(2) takes on enormous significance for defendants seeking to dismiss claims.”); *see also* Paul B. Maslo, *The Case for Semi-Strong-Form Corporate Scienter in Securities Fraud Actions*, 108 MICH. L. REV. FIRST IMPRESSIONS 95, 95 (2010), http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1051&context=mlr_fi [<https://perma.cc/L9DM-3B2P>] (explaining that a corporation does not have a unified mind).

³³ Bondi, *supra* note 6, at 2–3 (discussing the challenges of establishing scienter against a corporation); *see also* Yedidia Z. Stern, *Corporate Criminal Liability—Who Is the Corporation?*, 13 J. CORP. L. 125, 125 (1987) (explaining that a corporation can only act through its agents);

Determining which agent's scienter is imputed to the corporation, however, is problematic.³⁴

After many years of what Congress viewed as abuse of securities laws by private litigants, Congress enacted the PSLRA in order to impose heightened pleading standards.³⁵ With regard to scienter, the PSLRA requires that a plaintiff plead with particularity facts giving rise to a strong inference that a defendant acted with the required state of mind.³⁶ A crucial distinction of the pre-PSLRA pleading standard is that a plaintiff only needed to plead with particularity regarding the fraudulent act, but could plead generally to the state of mind of the individual committing the fraud.³⁷

What constituted a "strong inference" was the subject of debate for the next decade until the U.S. Supreme Court settled the issue in 2007, in *Tell-*

Aglialoro, *supra* note 8, at 557–58 (noting the problems for plaintiffs trying to identify the proper agent in a pleading against a corporation).

³⁴ See *Omnicare II*, 769 F.3d at 473; Donald C. Langevoort, *Lies Without Liars? Janus Capital and Conservative Securities Jurisprudence*, 90 WASH. U. L. REV. 933, 959 (2013) (noting how corporate scienter has never been effectively established despite many years of jurisprudence); see also McCaughey & Demers, *supra* note 11, at 858 (detailing the issues with deciphering corporate mens rea).

³⁵ H.R. REP. NO. 104-369, at 41.

³⁶ 15 U.S.C. § 78u-4(b)(2)(A). The law states,

[I]n any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

Id. Prior to the PSLRA, plaintiffs had to meet the normal fraud pleading standards of Rule 9(b) of the Federal Rules of Civil Procedure to survive a motion to dismiss. See FED. R. CIV. P. 9(b); Jeffries, *supra* note 21, at 521.

³⁷ See FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."); see also *Omnicare II*, 769 F.3d at 472–73 ("In run-of-the-mill fraud causes, [plaintiff] could allege this mental state 'generally,' but in securities fraud actions, Congress has imposed a higher standard, requiring plaintiffs to 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'" (quoting 15 U.S.C. § 78u-4(b)(2)(A); FED. R. CIV. P. 9(b))). Post-PSLRA, a plaintiff must plead particularized facts giving rise to a strong inference of scienter, or the court will grant the defendant's motion to dismiss. See Jeffries, *supra* note 21, at 523. The PSLRA addresses abuses caused by meritless cases brought for the purposes of forcing large settlements, which result in exorbitant costs to investors and corporations. H.R. REP. NO. 104-369, at 32; see *Stoneridge*, 522 U.S. 148 at 163–64 (describing instances of meritless lawsuits being filed in the hope of extorting large settlements). The legislative history noted that of approximately 300 securities lawsuits filed each year, almost 93% settled for an average cost of \$8.6 million. S. REP. NO. 104-98, at 9 (1995), as reprinted in 1995 U.S.C.C.A.N. 679, 688. These settlements were often not based on the merits of the case, but rather on corporations' deep pockets. *Id.* The PSLRA addresses this issue by imposing a number of changes in rules regarding discovery, lead plaintiffs, proportionate liability, and most importantly, a heightened pleading requirement for securities litigation. See H.R. REP. NO. 104-369, at 32; Crow, *supra* note 7, at 319.

abs, Inc. v. Makor Issues & Rights, Ltd. (“*Tellabs I*”).³⁸ The Court held that a plaintiff must plead facts rendering an inference of scierter at least as likely as any plausible opposing inference.³⁹ Only at trial must a plaintiff prove that the defendant more likely than not acted with scierter.⁴⁰ Although *Tellabs I* clarified the proper pleading standard for scierter under the PSLRA, it left the issue of imputation to a defendant corporation unresolved.⁴¹

The heightened pleading requirements for securities fraud actions underscores the continuing tension between preventing meritless “strike suits” under the PSLRA and maintaining corporate accountability under the Exchange Act.⁴² For plaintiffs, the difficulty lies in proving both the identity and requisite mental state of guilty actors that exist within vast corporate organizations.⁴³ Even with strong circumstantial evidence of corporate

³⁸ See *Tellabs, Inc. v. Makor Issues & Rights, Ltd. (Tellabs I)*, 551 U.S. 308, 322 (2007) (defining “strong inference” in light of the PSLRA’s goals); see also Jeffries, *supra* note 21, at 522–23. In “*Tellabs I*,” the U.S. Supreme Court established a three-part test for assessing the sufficiency of a plaintiff’s scierter allegations. See 551 U.S. at 322–24. First, as with a typical motion to dismiss, the court must accept the complaint’s factual allegations as true. *Id.* at 322. Second, courts must analyze all allegations in the complaint to determine if, taken together, a strong inference of scierter is asserted. *Id.* at 322–23. Finally, in concluding whether the facts plead the requisite strong inference of scierter, the court must account for all possible opposing inferences. *Id.* at 323. The court will allow the complaint to go forward “only if a reasonable person would deem the inference of scierter cogent and at least as compelling as any opposing inference.” *Id.* at 324.

³⁹ *Tellabs I*, 551 U.S. at 328; see also 2 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 12.8[4][B] (4th ed. 2002), (asserting that the *Tellabs* standard strikes the right balance between plaintiff and defendant interests).

⁴⁰ *Tellabs I*, 551 U.S. at 328–29; see also Michael S. Pardo, *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation*, 51 B.C. L. REV. 1451, 1493 (2010) (discussing the *Tellabs I* standard). The burden of proof in section 10(b) securities fraud cases is a preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 375 (1983). Preponderance of the evidence requires evidence sufficient to incline a fair and impartial mind to one side of the issue rather than the other. See *Preponderance of the Evidence*, BLACK’S LAW DICTIONARY 1301 (9th ed. 2009).

⁴¹ *Tellabs I*, 551 U.S. at 326 n.6 (“The Seventh Circuit held that allegations of scierter made against one defendant cannot be imputed to all other individual defendants Though there is a disagreement among the circuits as to whether the group pleading doctrine survived the PSLRA . . . we do not disturb it.”).

⁴² See H.R. REP. NO. 104-369, at 31 (arguing that the private securities litigation system’s importance to the integrity of American markets speaks to the need to limit frivolous suits); Maslo, *supra* note 32, at 97 (discussing how narrow scierter standards prevent strike suits but allow corporations to evade liability); Crow, *supra* note 7, at 317 (noting the clear tension between the need to prevent wasteful claims and protect shareholders from fraud).

⁴³ *Abril & Olazábal, supra* note 7, at 107 (detailing the evidentiary obstacles of pleading facts regarding a single individual within a large corporation); see also Donald C. Langevoort, *Agency Law Inside the Corporation: Problems of Candor and Knowledge*, 71 U. CIN. L. REV. 1187, 1213–14 (2003) (discussing the difficulty in attributing an agent’s knowledge to a corporation principal); Aglialoro, *supra* note 8, at 458 (recognizing the problem with needing to identify a responsible agent when pleading all security fraud elements with particularity).

fraud, it is incredibly difficult to locate a single guilty agent or group within a corporation.⁴⁴

B. Competing Positions on Corporate Scienter

Responding to the challenge of identifying an imputable mental state to a corporation, courts and scholars have developed competing theories on corporate scienter.⁴⁵ Virtually all courts agree that scienter can be imputed to a corporate defendant if a plaintiff pleads facts that an authorized agent made a fraudulent statement with the requisite intent or knowledge.⁴⁶ Where circuits diverge is on the issue of whether a corporation can be held liable when the person connected to the misstatement did not know the truth but others did, or where no single employee knows the truth but the collective knowledge of several would expose the truth.⁴⁷ Scholars have divided courts into three factions with respect to collective scienter: those that completely reject it, those that apply strong collective scienter, and others that apply weak or hybrid versions of the doctrine.⁴⁸

⁴⁴ Abril & Olazábal, *supra* note 7, at 107; *see also* Lipton, *supra* note 31, at 1269–70 (highlighting how vicarious liability becomes difficult in the context of large corporations); Ethan D. Wohl, *When Does a Company Intend to Lie?*, 21 ANDREWS DEL. CORP. LITIG. REP. 3, 4 (2007) (illustrating the problems of corporate attribution even in the face of clear fraud).

⁴⁵ *See Omnicare II*, 769 F.3d at 473 (highlighting the disagreement among circuit courts and scholars regarding imputing corporate scienter); Maslo, *supra* note 32, at 95 (explaining how the complexities of pleading against a corporation have led to different theories of corporate scienter); O’Riordan, *supra* note 7, at 1598–99 (explaining how a corporation’s unique legal status complicates corporate liability and causes disagreement among courts).

⁴⁶ *See, e.g., Omnicare II*, 769 F.3d at 476 (concluding that the state of mind of the individual who uttered or issued the misrepresentation is relevant for purposes of imputing scienter); Glazer Capital Mgmt., LP v. Magistri, 549 F.3d 736, 745 (9th Cir. 2008) (requiring a party to plead in detail with respect to the individuals who actually made the false statements); *Teamsters*, 531 F.3d at 195 (“[T]he most straightforward way to raise such an inference for a corporate defendant will be to plead it for an individual defendant.”).

⁴⁷ *See Bondi*, *supra* note 6, at 3 (explaining the foundations of collective and corporate scienter); O’Riordan, *supra* note 7, at 1605 (describing corporate scienter). *Compare Southland*, 365 F.3d at 365 (quoting *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, No. 4:00-CV-355-Y, 2002 WL 32453742, at *6 (N.D. Tex. Mar. 31, 2002), *aff’d in part, rev’d in part*, *Southland*, 365 F.3d 353) (requiring plaintiffs “to enlighten each defendant as to his or her particular part in the alleged fraud”), *with City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 688 (6th Cir. 2005) (holding that the knowledge of corporate officers or agents who are acting with authority can be attributed to the corporation).

⁴⁸ Bondi, *supra* note 6, at 7 (explaining the varying approaches courts take regarding collective scienter); *see also* Jeffries, *supra* note 21, at 524–25 (introducing the various lines of cases regarding collective scienter); Maslo, *supra* note 32, at 95–96 (describing theories of corporate scienter). Some circuits have not fully committed to one of these categories, which may be in part due to the inherent shortcomings of each approach. *See Glazer*, 549 F.3d at 744–45 (holding that plaintiffs must plead scienter for each individual, but in certain circumstances some form of collective scienter might be appropriate); *Makor Issues & Rights, Ltd. v. Tellabs, Inc. (Tellabs II)*, 513 F.3d 702, 708, 710 (7th Cir. 2008) (observing that Rule 10b-5 requires courts to consider the scienter of individuals who make false statements, but noting that a strong inference of scienter

1. Traditional Scierter: Rejecting the Collective Approach

Circuits rejecting the theory of collective scierter follow a traditional approach that requires proof that the individual responsible for the misstatement had the requisite intent or knowledge in order to impute scierter to the corporation.⁴⁹ This theory stems from the common law agency principle of respondeat superior.⁵⁰ Respondeat superior creates employer liability for the actions of employees acting within the scope of their employment.⁵¹ This liability, however, is limited to and cannot exceed that of the culpable employee or agent.⁵²

Because a corporation acts only through its agents, supporters of this traditional theory require that scierter be pleaded to at least one authorized agent involved in the fraudulent conduct.⁵³ The necessary scierter required to form fraudulent intent cannot be imputed to a corporation based on disconnected facts known by various agents.⁵⁴ The most common policy justifications for traditional scierter is that it best serves the PSLRA's goals of curbing harmful, meritless litigation and encouraging corporate disclosure.⁵⁵

may exist without naming the specific individuals who engaged in the fraud); *Teamsters*, 531 F.3d at 195 (arguably adopting a broader approach to pleading scierter but maintaining a traditional individual approach in proving liability).

⁴⁹ Bondi, *supra* note 6, at 8; see *Phillips*, 374 F.3d at 1017–18 (holding that scierter must be found with respect to each defendant and each violation of the statute); *Southland*, 365 F.3d at 366 (noting that Rule 10b-5 requires courts to consider the state of mind of the individual who makes a false statement, rather than consider the collective knowledge of all of the corporation's officers and employees).

⁵⁰ Bondi, *supra* note 6, at 5; see also *Abril & Olazábal*, *supra* note 7, at 97 n.54 (describing a spectrum of approaches to scierter, with pleading collective knowledge on one end and the use of respondeat superior on the other); Lipton, *supra* note 31, at 1264 (noting that mens rea has been traditionally imputed to corporations via respondeat superior). Agency is the fiduciary relationship that is created when the employer and employee (the agent) mutually agree that the employee will act on behalf of the employer, subject to the employer's control. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006).

⁵¹ RESTATEMENT (THIRD) OF AGENCY § 2.04 (“[A]n employer is subject to liability for torts committed by employees while acting within the scope of their employment.”).

⁵² Crow, *supra* note 7, at 323; see also RESTATEMENT (THIRD) OF AGENCY § 5.03 cmt. d(2) (“[A] principal may not be subject to liability for fraud if one agent makes a statement, believing it to be true, while another agent knows facts that falsify the other agent's statement.”).

⁵³ See *Teachers' Ret. Sys. of La. v. Hunter*, 477 F.3d 162, 184 (4th Cir. 2007) (reasoning that a plaintiff must allege facts supporting a strong inference of scierter regarding at least one agent because a corporation's liability comes from its agents); *Southland*, 365 F.3d at 365 (requiring that plaintiffs enlighten each defendant as to his or her role in the fraud).

⁵⁴ *Gutter v. E.I. du Pont de Nemours*, 124 F. Supp. 2d 1291, 1311 (S.D. Fla. 2000) (rejecting the notion that scierter can be imputed from different agents within the corporation); see also O'Riordan, *supra* note 7, at 1619 (summarizing the *Gutter* holding).

⁵⁵ See Jeffries, *supra* note 21, at 525–26 (discussing the position of circuits that have rejected collective scierter); Randall W. Bodner et al., *Corporate Scierter After Janus*, 44 SEC. REG. & L. REP. (BNA) No. 36, at 1639 (Sept. 3, 2012) (arguing for the prudence and balance of a traditional

Scholars criticize the respondeat superior approach to scienter for a number of reasons.⁵⁶ They argue that, even for valid claims, it is incredibly difficult to find both action and scienter for a single agent in the vast, complex structures of large publicly-traded corporations.⁵⁷ Moreover, the limited scope of respondeat superior could allow a defendant corporation whose corporate policies foster a culture of illegal behavior to escape liability if there is no identifiable single actor.⁵⁸ Taken to its logical extreme, corporations could theoretically avoid imputation by intentionally limiting the knowledge of different departments while ensuring that those making public statements are completely ignorant as to the validity of such statements.⁵⁹ Such “see no evil, hear no evil” policies make it difficult for plaintiffs to trace the requisite intent to the single agent responsible for the misrepresentation.⁶⁰

respondeat superior approach to scienter); O’Riordan, *supra* note 7, at 1613–14 (illustrating how a lack of specificity in applying collective scienter runs counter to the PSLRA’s goals).

⁵⁶ Abril & Olazábal, *supra* note 7, at 112 (explaining how respondeat superior is both under-inclusive and over-inclusive); *see also* Maslo, *supra* note 32, at 97 (arguing that respondeat superior allows corporations to easily evade liability).

⁵⁷ *See* Abril & Olazábal, *supra* note 7, at 107 (highlighting the challenges of pleading against a large corporation); *supra* notes 32–34 and accompanying text (noting the legal and practical issues of pleading securities fraud against a corporation).

⁵⁸ *See* Abril & Olazábal, *supra* note 7, at 113–14 (identifying a situation where corporate culture results in illegal behavior but there is no single identifiable actor with the necessary mental state); Lipton, *supra* note 31, at 1264 (noting a disaggregation between the employee who actually made the misrepresentation and the employee with the requisite scienter).

⁵⁹ *See* Craig L. Griffin, Note, *Corporate Scienter Under the Securities Exchange Act of 1934*, 1989 BYU L. REV. 1227, 1244 (“A requirement that corporate knowledge exists in a single individual would allow a corporation to engage freely in *conscious ignorance* by keeping lines of communication between departments closed.” (emphasis added)); Maslo, *supra* note 32, at 97 (arguing that under the respondeat superior approach to scienter, companies could intentionally mislead investors and shield culpable actors).

⁶⁰ Lipton, *supra* note 31, at 1291 (arguing that corporate misconduct is often a result of tacit incentives to lower-level employees to shield higher management from liability); Wohl, *supra* note 44, at 3 (explaining that scienter is easily concealed in a company that limits oversight and compartmentalizes information with “a policy of see no evil, hear no evil”). Nevertheless, proponents of traditional scienter have theorized that both judges and juries carry certain biases and inferences regarding corporations, and are quick to assume willful blindness or corporate malfeasance when it may not necessarily be the case. Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 158 n.199 (1997) (theorizing that hindsight bias of judges and juries could lead to excessive enforcement against corporate defendants).

2. Strong Collective Scienter

Strong collective scienter allows plaintiffs to aggregate the overall collective knowledge of all employees in the corporation.⁶¹ Although no courts have expressly adopted complete collective scienter, a few have opened the door for its use.⁶² Some courts have held that certain circumstances make it reasonable to suggest that management possessed knowledge of a matter regardless of pleading individual scienter.⁶³ In such situations, the corporation itself is viewed as possessing scienter separate from its employees, without analyzing the mental state of individual agents.⁶⁴ Some courts have allowed an inference that high-ranking corporate officers have knowledge of the “critical core operations” of the company, which can be used in part to establish scienter.⁶⁵ These practices illustrate a shift away from the traditional agency-based scienter approach to a more flexible standard.⁶⁶

⁶¹ See *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1063 (9th Cir. 2014) (identifying the general principle of collective scienter); see also *Abril & Olazábal*, *supra* note 7, at 86 (introducing collective scienter); *Bondi*, *supra* note 6, at 7 (defining collective scienter).

⁶² See *Teamsters*, 531 F.3d at 195 (noting the possibility of pleading requisite corporate scienter without regard to a specific defendant); *Tellabs II*, 513 F.3d at 710 (“[I]t is possible to draw a strong inference without being able to name the individuals who concocted and disseminated the fraud.”).

⁶³ *S. Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 786 (9th Cir. 2008) (“[S]uch allegations may conceivably satisfy the PSLRA standard in a more bare form, without accompanying particularized allegations, in rare circumstances where the nature of the relevant fact is of such prominence that it would be ‘absurd’ to suggest that management was without knowledge of the matter.”); *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 989 (9th Cir. 2008) (concluding that management had knowledge of certain facts due to the importance of the facts).

⁶⁴ See *Teamsters*, 531 F.3d at 195 (concluding that it is possible to plead scienter against a corporation without pleading facts to a specific individual defendant); *Tellabs II*, 513 F.3d at 710 (stating that it is possible to draw a strong inference of corporate scienter without being able to name individuals directly involved in the fraud); see also *O’Riordan*, *supra* note 7, at 1603 (differentiating between a nominalist school, which views a corporation as a group of people with a common goal, from the realist school, which posits that a corporation has a culture separate from its individual employees).

⁶⁵ See *Reese v. Malone*, 747 F.3d 557, 569 (9th Cir. 2014) (“It may also be reasonable to conclude that high-ranking corporate officers have knowledge of the critical core operations of their companies.”); *S. Ferry*, 542 F.3d at 784 (“Allegations that rely on the core-operations inference are among the allegations that may be considered in the complete PSLRA analysis.”). Similar allegations under the core-operations inference can satisfy the PSLRA if the allegations are particular and indicate that the “defendants had actual access to the disputed information.” *S. Ferry*, 542 F.3d at 786.

⁶⁶ See *Glazer*, 549 F.3d at 744–45 (backtracking on the Ninth Circuit’s position by noting that the court had not altogether rejected collective scienter); *Teamsters*, 531 F.3d at 195 (explaining that “it is possible to raise the required inference with regard to a corporate defendant without doing so with regard to a specific individual defendant”).

Opponents to the strong collective scienter theory maintain three central objections.⁶⁷ First, collective scienter is argued to be a slippery slope that dangerously overextends corporate liability.⁶⁸ Hypothetically, if the scienter of any agent can be collectively imputed to the corporation, then a company could be liable for any statements regarding its business as long as a low-level employee anywhere in the world knew something to the contrary.⁶⁹

Second, opponents assert that strong collective scienter goes against congressional intent in drafting the PSLRA because it imposes a negligence standard on corporate defendants.⁷⁰ Requiring corporations to be responsible for the collective knowledge of every employee imposes a duty of inquiry that would not satisfy Rule 10b-5 claims.⁷¹ At the very minimum,

⁶⁷ See Crow, *supra* note 7, at 327–28 (explaining scholars’ reasoning for rejecting collective scienter); O’Riordan, *supra* note 7, at 1614 (arguing that collective scienter opens the door to frivolous suits and goes against Congress’s intentions in enacting the PSLRA).

⁶⁸ Brief for Sec. Indus. and Fin. Mkts. Ass’n et al. as Amici Curiae Supporting Defendants-Appellants at 3, *Teamsters*, 531 F.3d 190 (No. 06-2902-CV) [hereinafter *Teamsters Amici Curiae*]; see also *Ernst & Ernst*, 425 U.S. at 199 (holding that the PSLRA does not allow broader standards such as negligence); Bondi, *supra* note 6, at 20 (arguing that collective scienter imposes a negligence standard inconsistent with Supreme Court precedent).

⁶⁹ *Omnicare II*, 769 F.3d at 475–76; see O’Riordan, *supra* note 7, at 1614 (arguing that collective scienter would promote “bad news lawsuits”); see also Crow, *supra* note 7, at 314 (suggesting that, under a pure collective scienter standard, a statement made in New York could impose liability on a corporation even if one low-level associate in India was aware of its falsity).

⁷⁰ See H.R. REP. NO. 104-369, at 41 (requiring that a plaintiff plead with particularity to give rise to a strong inference of fraudulent intent); O’Riordan, *supra* note 7, at 1613. Pleading to the general knowledge of all employees, despite lacking specific facts, does enable one to draw a reasonable inference that an agent was negligent in managing financial aspects of the corporation. O’Riordan, *supra* note 7, at 1613. A reasonable inference, however, fails to meet the strong inference standard attached to the PSLRA. See *id.*; see also *Ernst & Ernst*, 425 U.S. at 199 (“[T]he use of the words ‘manipulative,’ ‘device,’ and ‘contrivance’ [are] terms that make unmistakable a congressional intent to proscribe a type of conduct quite different from negligence.”). Moreover, some courts have argued that the language of the PSLRA does not permit collective scienter due to its reference to only a single “defendant.” See *Phillips*, 374 F.3d at 1018 (noting that “[a]lthough the plain language is less compelling with respect to alleging the scienter of each defendant, the statute does use the singular term ‘the defendant,’” thus holding that “the most plausible reason in light of congressional intent is that a plaintiff . . . must allege facts sufficiently demonstrating each defendant’s state of mind”); see also 15 U.S.C. § 78u-4(b)(2)(A) (“[T]he complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”). Absent any clear congressional guidance, this argument will remain a point of contention among the circuits. See *Ottmann v. Hanger Orthopedic Group, Inc.*, 353 F.3d 338, 345 (4th Cir. 2003) (“[A] flexible, case-specific analysis is appropriate in examining scienter pleadings. Both the absence of any statutory language addressing particular methods of pleading and the inconclusive legislative history . . . indicate that Congress ultimately chose not to specify particular types of facts that would or would not show a strong inference of scienter.”).

⁷¹ See *Teamsters Amici Curiae*, *supra* note 68, at 3 (arguing that collective scienter does not fit within the language of the Exchange Act); Langevoort, *supra* note 60, at 128 (positing that an aggregation of knowledge rule would effectively create a negligence standard); Maslo, *supra* note

plaintiffs must plead recklessness for scienter in section 10(b) violations.⁷² The PSLRA is designed to prevent a “mud against the wall” approach and to provide distinct claims against the defendant.⁷³

Third, some assert that strong collective scienter generates more litigation, which could have a chilling effect on a company’s willingness to disclose information to the public.⁷⁴ This runs contrary to the philosophy of full disclosure embedded in the Exchange Act and ultimately has adverse effects on stockholders.⁷⁵

3. Hybrid Collective Scienter

Hybrid collective scienter narrows the permissive scope of employee knowledge to management and the speaker of the alleged misstatement.⁷⁶ This version of collective scienter holds that corporate scienter can exist if the plaintiff pleads that a member of management knew the statements were false.⁷⁷ This applies even if the particular member of management was not responsible for the alleged misstatement.⁷⁸ Therefore, a plaintiff can com-

32, at 98 (stating that collective scienter is akin to a negligence standard which is at odds with the PSLRA).

⁷² See *Cent. Bank of Denver*, 511 U.S. at 174 (affirming that negligence is insufficient to establish a valid section 10(b) violation); *Ernst & Ernst*, 425 U.S. at 193 n.12 (asserting that recklessness is sufficient in some circumstances to plead scienter).

⁷³ See S. REP. NO. 104-98, at 8 (suggesting that a complaint alleging a violation of securities laws can be created with little prior due diligence); see also *Southland*, 365 F.3d at 365 (noting that the PSLRA requires a plaintiff to distinguish individual defendants and provide particularized facts regarding their part in the fraud).

⁷⁴ See S. REP. NO. 104-98, at 5 (“According to the SEC: ‘the threat of mass shareholder litigation, whether real or perceived,’ has had adverse effects, especially in ‘chilling . . . disclosure of forward-looking information.’” (quoting Safe Harbor for Forward-Looking Statements, Exchange Act Release No. 33-7107, 57 S.E.C. Docket 1999 (Oct. 13, 1994))); Bondi, *supra* note 6, at 22–23 (discussing how frivolous litigation chills corporate disclosure); Crow, *supra* note 7, at 327 (stating that scholars who argue against collective scienter argue that the theory slows or chills corporate communication).

⁷⁵ See *Capital Gains Research Bureau*, 375 U.S. at 186 (explaining the fundamental purpose of full disclosure in federal securities laws); see also H.R. REP. NO. 104-369, at 42–43 (“Shareholders are also damaged due to the chilling effect of the current system on the robustness and candor of disclosure . . .”).

⁷⁶ See Bondi, *supra* note 6, at 12–13 (describing hybrid collective scienter); O’Riordan, *supra* note 7, at 1597 (introducing the hybrid or “weak” theory of collective scienter and its implications for management).

⁷⁷ See Bondi, *supra* note 6, at 13 (explaining different approaches to corporate scienter); Jeffries, *supra* note 21, at 524–25 (discussing the “watered down” version of collective scienter); see also *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 501 F. Supp. 2d 452, 481 (S.D.N.Y. 2006) (imputing scienter of various management-level employees to the corporation); *infra* note 82 and accompanying text (discussing the *Marsh & McLennan* holding).

⁷⁸ See Bondi, *supra* note 6, at 13 (stating that if a member of management knew a statement was false, that knowledge can be combined with any statement made by any agent of the company); Jonathan W. Miller & Lyle Roberts, *Outside Counsel: ‘Collective Scienter’ in Securities Fraud Cases*, N.Y. L.J., Feb. 8, 2008, at 5 (referring to a “narrow version” of collective scienter

bine the knowledge of a member of management with an alleged false statement made by an agent of the company in order to impute scienter to the corporation.⁷⁹ This approach attempts to redress the narrow nature of respondeat superior, while avoiding some of the negative effects of pure collective scienter.⁸⁰

Though seemingly practical, the hybrid approach nevertheless has its shortcomings.⁸¹ Although it expands the scope beyond one corporate agent, it fails to establish how senior a non-speaking officer must be to have his or her scienter imputable to the corporation.⁸² Despite the willingness of some courts to adopt a flexible hybrid imputation approach, no clear standard has been widely adopted regarding which specific employees should be included.⁸³

II. INCONSISTENCIES IN THE CIRCUITS ON COLLECTIVE SCIENTER

This Part analyzes the different approaches circuits have taken to collective scienter.⁸⁴ Section A discusses circuits that have wholly rejected col-

that allows scienter to be pled for a corporate defendant even if the officer is not a defendant and the false statement is made by an individual without scienter).

⁷⁹ Bondi, *supra* note 6, at 14; *see also* *City of Monroe*, 399 F.3d at 688–90 (attributing awareness of an officer without facts that linked the officer directly to the misrepresentation).

⁸⁰ *See Omnicare II*, 769 F.3d at 475–77 (describing how the middle ground approach addresses the issues of each end of the collective scienter spectrum); *supra* notes 56–60 and accompanying text (analyzing arguments against the respondeat superior approach); *supra* notes 67–75 and accompanying text (discussing objections to collective scienter).

⁸¹ *See* Bondi, *supra* note 6, at 13–14 (introducing the hybrid classification of collective scienter and issues that follow from it); O’Riordan, *supra* note 7, at 1619 (arguing that there are shortfalls of a “weak” or hybrid approach to collective scienter).

⁸² *See S. Ferry*, 542 F.3d at 784–85 (noting the possibility of pleading scienter based on management’s specific knowledge of core operations and an alleged fraud); *Marsh & McLennan*, 501 F. Supp. 2d at 481 (concluding that a hybrid approach is favorable to the narrow approach but also recognizing that no line exists for how senior an employee must be to be considered “management”). In 2006, in *In re Marsh & McLennan Cos., Inc. Securities Litigation*, the U.S. District Court for the Southern District of New York allowed the knowledge of a division head and senior vice president to be imputed to the corporation. *See* 501 F. Supp. 2d at 482; *see also In re BISYS Sec. Litig.*, 397 F. Supp. 2d 430, 443 (S.D.N.Y. 2005) (imputing scienter of regional vice president and vice president of corporate finance). The court raised the issue of drawing the line for imputing management, however, the court did not settle the issue. *See Marsh & McLennan*, 501 F. Supp. 2d at 481 (noting that there is no set standard for how senior an employee must be in order to have his or her scienter imputed to the corporation); *see also Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1106 (10th Cir. 2003) (asserting that the scienter of a senior controlling officer can be attributed to a corporation).

⁸³ *See Omnicare II*, 769 F.3d at 473 (noting the wide divergence among circuits and scholars regarding corporate scienter); Bondi, *supra* note 6, at 14; O’Riordan, *supra* note 7, at 1622 (raising the question of where to draw the line with hybrid collective scienter).

⁸⁴ *See infra* notes 87–123 and accompanying text.

lective scierter.⁸⁵ Section B discusses the circuits that have not taken a definitive stance on the collective scierter issue.⁸⁶

A. Setting a Bright Line: Circuits' Rejection of Collective Scierter

In order to maintain a narrow, bright-line standard, the U.S. Courts of Appeals for the Fifth and Eleventh Circuits have adopted the common law principle of respondeat superior for pleading scierter.⁸⁷ In 2004, in *Southland Securities Corp. v. INSpire Insurance Solutions, Inc.*, the U.S. Court of Appeals for the Fifth Circuit affirmed that section 10(b) pleadings must give notice to each defendant as to his or her particular role in the alleged fraud.⁸⁸ The court concluded that when analyzing a statement made by a corporation to find scierter, it must examine only the state of mind of the corporate official who made the statement, or those who ordered or contributed to the statement.⁸⁹ The court concluded that collective scierter would establish a negligence standard, which would directly conflict with the heightened pleading requirements of the PSLRA.⁹⁰

In another 2004 decision, in *Phillips v. Scientific-Atlanta, Inc.*, the U.S. Court of Appeals for the Eleventh Circuit also favored a narrow approach to collective scierter.⁹¹ The Eleventh Circuit relied on congressional intent in

⁸⁵ See *infra* notes 87–93 and accompanying text.

⁸⁶ See *infra* notes 94–123 and accompanying text.

⁸⁷ See *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 366 (5th Cir. 2004) (fully rejecting the notion of collective scierter); see also *Phillips v. Sci.-Atl., Inc.*, 374 F.3d 1015, 1018–19 (11th Cir. 2004) (concluding that the most effective approach to pleading scierter requires each plaintiff to plead facts regarding the state of mind of every defendant).

⁸⁸ *Southland*, 365 F.3d at 365 (concluding that the PSLRA requires plaintiffs to plead facts regarding each individual defendant's role in the alleged fraud). In *Southland*, the plaintiffs contended that the defendant insurance company and its officers engaged in a fraudulent scheme to deceive investors about the company's performance in order to inflate its stock prices. *Id.* at 360.

⁸⁹ *Id.* at 366 (stating that in order to find scierter, courts should “look to the state of mind of the individual corporate official or officials who make or issue the statement . . . rather than generally to the collective knowledge of all the corporation's officers and employees”). *Southland* remains the seminal case in the Fifth Circuit regarding collective scierter. See *Lee v. Active Power, Inc.*, 29 F. Supp. 3d 876, 881 (W.D. Tex. 2014) (“[T]he Court concludes *Southland* still is controlling law on the issue of imputation”); *Stone v. Life Partners Holdings, Inc.*, 26 F. Supp. 3d 575, 611–12 (W.D. Tex. 2014) (concluding that the plaintiff adequately pled scierter as required under *Southland*).

⁹⁰ See *Southland*, 365 F.3d at 365 (“[E]ven if a corporate officer's position supports a reasonable inference that he likely would be negligent in not being involved in the preparation of a document or aware of its contents, the PSLRA state of mind requirement is severe recklessness or actual knowledge.”).

⁹¹ See *Phillips*, 374 F.3d at 1018–19 (noting that it was not necessary to address the group pleading doctrine because the defendants satisfied the Fifth Circuit approach); see also *In re Omnicare, Inc. Sec. Litig. (Omnicare II)*, 769 F.3d 455, 473–74 (6th Cir. 2014) (stating that the Eleventh Circuit implicitly followed the Fifth Circuit respondeat superior approach). In *Phillips*, the plaintiffs alleged that the defendant corporation fraudulently misrepresented its financial perfor-

adopting the Fifth Circuit's scienter approach.⁹² The court did not view this standard as too stringent because all of the relevant facts and inferences from plaintiffs' pleadings were not analyzed in isolation and could be aggregated to achieve PSLRA standards.⁹³

B. Not Entirely Sure: Circuits That Have Not Committed

Several circuits have yet to fully weigh in on either side of the collective scienter debate.⁹⁴ This section analyzes the scienter case law in these undecided circuits.⁹⁵ Subsection 1 analyzes the Seventh, Second, and Fourth Circuits' collective scienter jurisprudence.⁹⁶ Next, subsection 2 reviews the Ninth Circuit's movement from pure rejection to the undecided middle camp of corporate scienter.⁹⁷

1. Seventh, Second, and Fourth Circuits Open to the Possibility

In 2008, after the U.S. Supreme Court remanded the case, the U.S. Court of Appeals for the Seventh Circuit applied the respondeat superior approach to scienter in *Makors Issues & Rights, Ltd. v. Tellabs, Inc.* ("*Tellabs II*"), but left open the possibility of a broader view of corporate scienter.⁹⁸ The court quoted the Fifth Circuit and held that establishing corporate

mance and consumer demand for its products. See Complaint for Violation of the Securities Exchange Act of 1934 at 10–15, *Phillips*, 374 F.3d 1015 (No. 03-13008).

⁹² *Phillips*, 374 F.3d at 1018. The court stated,

Although the plain language is less compelling with respect to alleging the scienter of each defendant, the [PSLRA] does use the singular term 'the defendant,' and we believe that the most plausible reading in light of congressional intent is that a plaintiff . . . must allege facts sufficiently demonstrating each defendant's state of mind.

Id. Congressional intent behind the PSLRA was to heighten the pleading standard for private securities fraud cases in order to combat frivolous litigation. See H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.), as reprinted in 1995 U.S.C.C.A.N. 730, 731 ("This legislation implements needed procedural protections to discourage frivolous litigation."); *supra* notes 38–44 and accompanying text (discussing legislative intent behind the PSLRA).

⁹³ *Phillips*, 374 F.3d at 1018 n.6 (explaining the court's treatment of all facts and inferences in the plaintiffs' pleadings).

⁹⁴ See *Glazer v. Capital Mgmt., LP v. Magistri*, 549 F.3d 736, 744–45 (9th Cir. 2008) (reasoning that previous Ninth Circuit precedent has not completely ruled out collective scienter); *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital, Inc.*, 531 F.3d 190, 195–96 (2d Cir. 2008) (drawing guidance from the Seventh Circuit); *Makor Issues & Rights, Ltd. v. Tellabs, Inc. (Tellabs II)*, 513 F.3d 702, 710 (7th Cir. 2008) (concluding that it is possible to raise an inference of scienter without regard to individual defendants).

⁹⁵ See *infra* notes 98–123 and accompanying text.

⁹⁶ See *infra* notes 98–114 and accompanying text.

⁹⁷ See *infra* notes 115–123 and accompanying text.

⁹⁸ See *Tellabs II*, 513 F.3d at 704, 708, 710; see also *supra* notes 45–48 and accompanying text (discussing the U.S. Supreme Court ruling that defined a strong inference of scienter). In *Makor Issues & Rights, Ltd. v. Tellabs, Inc. ("Tellabs II")*, plaintiffs alleged that the defendants

liability requires looking into the minds of the corporate officials involved in the issued misstatement, not the collective knowledge of the corporation.⁹⁹ In dicta, however, the court suggested that certain dramatic situations could provide corporate scienter without the necessity of providing facts of individual states of mind.¹⁰⁰ The court offered the following hypothetical to illustrate its point:

Suppose General Motors announced it had sold one million SUVs in 2006, and the actual number was zero. There would be a strong inference of corporate scienter, since so dramatic an announcement would have been approved by corporate officials sufficiently knowledgeable about the company to know that the announcement was false.¹⁰¹

Thus, the opinion conceivably reserves pleading corporate scienter without facts regarding individuals for dramatic announcements approved by management or executives.¹⁰² But, the court determined that no doctrinal expansion was necessary in the case before it because the plaintiffs had sufficiently pleaded that the CEO had the requisite scienter to defraud.¹⁰³

In 2008, in *Teamsters Local 445 Freight Division Pension Fund v. Dynex Capital, Inc.*, the U.S. Court of Appeals for the Second Circuit addressed, albeit incompletely, the issue of imputing corporate scienter.¹⁰⁴ The court ruled that in order to impose liability against a corporation, a plaintiff must prove that an agent of the corporation committed a culpable act with

violated section 10(b) and Rule 10b-5 through a series of public announcements that fabricated demand for the corporation's products. See 513 F.3d at 706.

⁹⁹ See *Tellabs II*, 513 F.3d at 708 (citing *Southland*, 365 F.3d at 366).

¹⁰⁰ *Id.* at 710 (hinting that it is still possible to draw a strong inference of corporate scienter without specifically naming the individuals who conducted the fraudulent activities).

¹⁰¹ *Id.*

¹⁰² See *id.*; Warren R. Stern & Joshua A. Naftalis, *Corporate Scienter Revisited*, SEC. LITIG. REP., Sept. 2008, at 1 (analyzing the implications of the *Tellabs II* opinion).

¹⁰³ See *Tellabs II*, 513 F.3d at 711. In a different case a few months after *Tellabs II*, the Seventh Circuit rejected plaintiffs' attempt to impute the scienter of what they contended was a senior-level employee. See *Pugh v. Tribune Co.*, 521 F.3d 686, 697–98 (7th Cir. 2008). The court rejected the argument that the employee was a senior-level officer because the employee was not listed as an executive officer in the company's SEC filings. *Id.* at 698. Following *Tellabs II*, the court also stated, in dicta, that it was possible to draw a strong inference of corporate scienter without naming the particular individuals who perpetuated the fraud. See *Tribune*, 521 F.3d at 697 n.5. Based on these two holdings, it appears that the Seventh Circuit may be willing to impute the knowledge of an executive officer under the inference that the officer approved a particular corporate statement. See Stern & Naftalis, *supra* note 102 (analyzing the Seventh Circuit's rulings).

¹⁰⁴ See *Teamsters*, 531 F.3d at 195. In *Teamsters*, the plaintiffs alleged that the financial services defendant Dynex concealed its faulty underwriting practices and misrepresented the cause behind its financial losses. See *id.* at 193. The complaint alleged that Dynex had purchased loans made to "uncreditworthy borrowers" in an effort to enter the manufactured homes market, and those borrowers ultimately defaulted. *Id.*

the necessary scienter.¹⁰⁵ In *pleading* scienter, however, the court held that a plaintiff need only create a strong inference that someone whose intent could be imputed to the corporation acted with the requisite scienter in order to survive a motion to dismiss.¹⁰⁶ Citing the *Tellabs II* decision, the court noted that it is possible to raise an inference of scienter without regard to a specific defendant.¹⁰⁷ Similar to *Tellabs II* and the Seventh Circuit, the Second Circuit rejected the notion of collective scienter as a means to impose liability, but did not completely foreclose its use for pleading purposes.¹⁰⁸

Finally, the Fourth Circuit has also kept the possibility open for a pleading standard that is closer to collective scienter.¹⁰⁹ In 2007, in *Teachers' Retirement System of Louisiana v. Hunter*, the U.S. Court of Appeals for the Fourth Circuit held that plaintiffs must allege facts in regard to "at least one authorized agent" of a defendant corporation in order to plead requisite scienter.¹¹⁰ The court initially cited the Fifth Circuit with approval regarding the scienter allegations.¹¹¹ The court also implied, however, that collective scienter could be applicable in certain instances.¹¹² In 2009, in *Matrix*

¹⁰⁵ See *id.* at 195 (differentiating between pleading standards and more stringent liability standards).

¹⁰⁶ See *id.* The court did note that the most direct way to raise an inference of scienter is to plead it for an individual defendant. *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See *id.* at 196 ("Congress has imposed strict requirements on securities fraud pleading, but we do not believe they have imposed [a] rule . . . that in no case can corporate scienter be pleaded in the absence of successfully pleading scienter as to an expressly named officer."); *Tellabs II*, 513 F.3d at 710. Despite the court's view, it held that the plaintiffs did not adequately plead scienter and remanded the case, allowing the plaintiffs to replead with specific facts. See *Teamsters*, 531 F.3d at 196–97.

¹⁰⁹ See *Yates v. Mun. Mortg. & Equity, LLC*, 744 F.3d 874, 890 (4th Cir. 2014) (rejecting the "core operations" theory); *Matrix Capital Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 189–90 (4th Cir. 2009) (holding that a complaint can give rise to a strong inference of scienter without identifying an individual corporate agent); *Teachers' Ret. Sys. of La. v. Hunter*, 477 F.3d 162, 184 (4th Cir. 2007) (holding that if a defendant is a corporation, the plaintiff must allege facts that support scienter for at least one authorized agent).

¹¹⁰ See *Teachers' Ret.*, 477 F.3d at 168 ("[I]f the defendant is a corporation, the plaintiff must allege facts that support a strong inference of scienter with respect to at least one authorized agent of the corporation, since corporate liability derives from the actions of its agents.").

¹¹¹ See *id.* at 184 ("Thus, to allege a securities fraud claim against individual defendants, a plaintiff must allege facts that support a 'strong inference' that each defendant acted with at least recklessness in making the false statement."). In this case, the plaintiffs alleged that defendant Cree, Inc. and six corporate officers and directors misrepresented a series of transactions with other companies to artificially inflate the company's stock. See First Amended Consolidated Class Action Complaint at 2–3, *In re Cree, Inc.*, Sec. Litig., 333 F. Supp. 2d 461 (M.D.N.C. 2004) (No. 1:03CV549).

¹¹² See Bondi, *supra* note 6, at 13 n.48 (examining how the Fourth Circuit took an ambiguous position on collective scienter). The language "at least one authorized agent," as opposed to speaker or spokesperson, suggests that the Fourth Circuit would possibly allow a broader form of collective scienter pleading than the Fifth Circuit. See *id.* (suggesting that the *Teachers' Retirement*

Capital Management Fund, LP v. BearingPoint, Inc., the U.S. Court of Appeals for the Fourth Circuit further qualified its *Teachers' Retirement* holding.¹¹³ Although the court conceded that most often a plaintiff's complaint identifies a particular corporate agent, it noted that this practice is not an absolute requirement.¹¹⁴

2. The Ninth Circuit's Movement to the Middle

The U.S. Court of Appeals for the Ninth Circuit likely has seen the greatest change in its position on collective scier since the enactment of the PSLRA.¹¹⁵ In 1995, in *Nordstrom, Inc. v. Chubb & Son, Inc.*, the Ninth Circuit heard its first post-PSLRA section 10(b) pleading case and completely rejected the theory of collective scier.¹¹⁶ The defendant insurer argued that the plaintiff corporation could be directly liable for the fraudulent acts of the directors and officers because it is possible that the corporation would have the necessary intent to establish liability under the theory of collective scier.¹¹⁷ The court squarely rejected this argument, stating that no case law exists to support a collective scier theory.¹¹⁸ Then, in

ment holding could allow a more plaintiff-friendly pleading standard). *Compare Teachers' Ret.*, 477 F.3d at 184 (requiring particularized facts of at least one authorized agent), *with Southland*, 365 F.3d at 366 (requiring that a plaintiff plead facts regarding the scier of corporate officials who made or issued the alleged fraudulent statement).

¹¹³ See *Matrix Capital*, 576 F.3d at 182 (referring to the *Teachers' Retirement* holding and noting "this court has not yet discussed the extent to which a plaintiff must identify that agent"). In dicta, the court applied the hypothetical used in *Tellabs II* in light of the circuit's previous ruling. See *id.* at 190.

¹¹⁴ See *id.* at 189. The court did, however, agree that when plaintiffs name individual defendants, they must allege facts supporting a strong inference of scier as to each individual defendant. *Id.* at 190; cf. *Yates*, 744 F.3d at 890 (holding that attempting to plead the core operations theory in alleging scier without "establishing the defendant's actual exposure to the . . . problem . . . falls short of the PSLRA's particularity requirement").

¹¹⁵ *Compare Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1435 (9th Cir. 1995) (establishing complete rejection of collective scier), *with Glazer*, 549 F.3d at 744 (holding that there could be some circumstances in which pleading collective scier may be appropriate).

¹¹⁶ See *Nordstrom*, 54 F.3d at 1435. This case involved a dispute over the defendant insurers obligations, as Nordstrom's insurance providers, to cover a settlement amount resulting from a class action securities fraud lawsuit against Nordstrom. See *id.* at 1427. One of the defendant insurers only agreed to pay half of the settlement because both the corporation (the uninsured entity) and the directors and officers (insured entities) were named as defendants in the underlying suit. *Id.* at 1433.

¹¹⁷ *Id.* at 1433.

¹¹⁸ *Id.* at 1435 ("[T]here is no case law supporting an independent 'collective scier' theory."). The court also held that there was no evidence in this case to support collective scier without finding that one of the individual director or officer defendants also had the requisite intent. *Id.* The Fifth Circuit cited the *Nordstrom* holding in establishing its support of a respondeat superior stance in 2004. See *Southland*, 365 F.3d at 366.

2005, in *In re Apple Computer, Inc.*, the Ninth Circuit maintained its firm stance against collective scienter.¹¹⁹

In 2008, in *Glazer Capital Management LP v. Magistri*, the U.S. Court of Appeals for the Ninth Circuit significantly retreated from its previous position on collective scienter and instead joined the middle camp of the split.¹²⁰ The court stated that the *In re Apple Computer* opinion overstated its position in *Nordstrom* and at that time the circuit had not categorically rejected collective scienter.¹²¹ Citing the Seventh Circuit's *Tellabs II* decision, the court observed that certain circumstances may render collective scienter appropriate.¹²² Despite this openness to broader forms of pleading scienter, the court still required the plaintiffs to plead scienter with respect to the individuals who made the false statements.¹²³

III. OMNICARE TRIES A DIFFERENT APPROACH

This Part examines the U.S. Court of Appeals for the Sixth Circuit's approach to collective scienter both before and after its 2014 decision in *In re Omnicare, Inc. Securities Litigation* ("*Omnicare II*"), and compares its scienter test to other circuits.¹²⁴ Section A provides an overview of the Sixth Circuit's previous corporate scienter approach and the procedural history leading up to *Omnicare II*.¹²⁵ Section B details the *Omnicare II* holding and

¹¹⁹ See *In re Apple Computer, Inc.*, 127 F. App'x 296, 303 (9th Cir. 2005) ("A corporation is deemed to have the requisite scienter for fraud *only* if the individual corporate officer making the statement has the requisite level of scienter at the time that he or she makes the statement." (emphasis added)).

¹²⁰ See *Glazer*, 549 F.3d at 744 (allowing the possibility that certain circumstances could be appropriate in applying collective scienter). The plaintiffs in *Glazer Capital* alleged that the defendant made misrepresentations in a merger agreement by not disclosing what were later revealed to be potential regulatory violations. See *id.* at 739.

¹²¹ See *id.* at 744 (concluding that the Ninth Circuit has not categorically rejected collective scienter).

¹²² *Id.* (reasoning that *Nordstrom* does not foreclose the possibility of collective scienter under certain circumstances); see *Tellabs II*, 513 F.3d at 710; see also *S. Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 786 (9th Cir. 2008) (holding that there are rare circumstances where the underlying facts surrounding the fraud are so blatant it would be "absurd" to suggest that management did not know about it).

¹²³ See *Glazer*, 549 F.3d at 745 ("We need not decide whether we agree with [*Tellabs II*] because the facts of this case are different from the hypothetical in [*Tellabs II*] . . . we are thus not faced with whether, in some circumstances, it might be possible to plead scienter under a collective theory."). More recently, the U.S. District Court for the Southern District of California ruled that plaintiffs did not present facts establishing a circumstance where collective scienter would be applicable as described in *Glazer Capital*. See *In re Maxwell Techs., Inc. Sec. Litig.*, 18 F. Supp. 3d 1023, 1032 (S.D. Cal. 2014) ("Plaintiff's claims are based upon statements by the individual defendants and in official filings signed by the individual defendants. It is thus necessary to require scienter as to the individuals who were responsible for the statements.").

¹²⁴ See *infra* notes 128–175 and accompanying text.

¹²⁵ See *infra* notes 128–146 and accompanying text.

new corporate scierter test.¹²⁶ Lastly, section C draws parallels between parts of the *Omnicare* test and approaches adopted in other courts.¹²⁷

A. Sixth Circuit Pre-Omnicare

In 2005, the U.S. Court of Appeals for the Sixth Circuit addressed the collective scierter issue in *City of Monroe Employees Retirement System v. Bridgestone Corp.*¹²⁸ The plaintiffs named the corporation and its subsidiary along with two corporate executives as defendants.¹²⁹ One of the executives was Masatoshi Ono, the Executive Vice President of Bridgestone and CEO of its subsidiary, Firestone.¹³⁰ Unsurprisingly, the plaintiffs' biggest challenge was pleading scierter because Ono was not involved in the alleged misstatements.¹³¹

Taking a different approach, the Sixth Circuit allowed Ono's knowledge of false reports to be imputed to the corporation despite the plaintiffs' failure to link him to the issuance of the statements.¹³² The court inferred that Ono had acquired knowledge of the corporation's alleged tire defects from certain company meetings where complaints, governmental investigations, and settlements were discussed.¹³³ Therefore, because Ono had knowledge and was acting within his capacity as an employee in these meetings, his mental state was directly attributable to Bridgestone.¹³⁴

In reaching its decision, the Sixth Circuit took guidance from a 2003 case from the U.S. Court of Appeals for the Tenth Circuit, *Adams v. Kinder-*

¹²⁶ See *infra* notes 147–162 and accompanying text.

¹²⁷ See *infra* notes 163–175 and accompanying text.

¹²⁸ See *City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 688–89 (6th Cir. 2005) (addressing the issue of corporate scierter and whether an officer's awareness can be imputed to the corporation regardless of whether he or she issued the misleading statements). The defendant Bridgestone and its subsidiary Firestone were accused of providing false and misleading information regarding product quality in annual reports from 1997–2000. See Complaint for Violation of the Sec. Exch. Act of 1934 at 1–2, *City of Monroe*, 399 F.3d 651 (No. 03-5505) [hereinafter *City of Monroe* Complaint]. These misrepresentations not only hurt the value of the corporation's stock, but also led to numerous car accidents. See *id.* at 1, 8.

¹²⁹ *City of Monroe* Complaint, *supra* note 128, at 9–10.

¹³⁰ *Id.* at 10.

¹³¹ See *City of Monroe*, 399 F.3d at 668, 690 (discussing the district court's rejection of the plaintiffs' attempts to plead scierter); see also Crow, *supra* note 7, at 331 (describing the plaintiffs' challenge of meeting PSLRA standards). Although the plaintiffs could not link Ono directly to the fraudulent statements, they maintained that he had actual knowledge that the statements were false and misleading. See *City of Monroe*, 399 F.3d at 688–89.

¹³² See *City of Monroe*, 399 F.3d at 688, 690.

¹³³ See *id.*

¹³⁴ See *id.* (“Ono’s awareness of the claims as gleaned from these meetings is directly attributable to Bridgestone because ‘knowledge of a corporate officer or agent acting within the scope of [his] authority is attributable to the corporation.’” (quoting HAZEN, *supra* note 39, § 12.8[4])).

*Morgan, Inc.*¹³⁵ The Tenth Circuit in *Kinder-Morgan* had held that the scienter of the senior controlling officers of a corporation may be imputed when the officers are acting within the scope of their apparent authority.¹³⁶ Expanding on *Kinder-Morgan*, the Sixth Circuit in *City of Monroe* permitted the knowledge of any corporate officer or agent to be attributed to a corporation.¹³⁷ By extending imputation to any agent acting within the scope of employment, the Sixth Circuit adopted a much broader view of corporate scienter that could have cast an overly vast net of corporate liability.¹³⁸

In 2013, in *In re Omnicare, Inc. Securities Litigation* (“*Omnicare I*”), a group of shareholders brought an action in the U.S. District Court for the Eastern District of Kentucky against pharmaceutical provider Omnicare and several of its senior management.¹³⁹ The plaintiffs accused Omnicare of misleading stockholders regarding the company’s compliance with Medicare and Medicaid billing regulations.¹⁴⁰ The plaintiffs alleged that Omnicare made material misrepresentations in compliance reports and in statements made by executives, while simultaneously concealing its fraudulent activities.¹⁴¹ Eventually, Omnicare’s compliance violations were revealed in

¹³⁵ See *id.*; *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1106 (10th Cir. 2003).

¹³⁶ See *Kinder-Morgan*, 340 F.3d at 1106 (“The scienter of the senior controlling officers of a corporation may be attributed to the corporation itself to establish liability as a primary violator of § 10(b) and Rule 10b-5 when those senior officials were acting within the scope of their apparent authority.”). This was the quotation cited in the *City of Monroe* opinion, and which played a role in imputing Ono’s knowledge to the corporation. See *City of Monroe*, 399 F.3d at 688.

¹³⁷ See *McCaughy & Demers*, *supra* note 11, at 858 (stating that *City of Monroe* was a tacit endorsement of broad collective scienter). Compare *Kinder-Morgan*, 340 F.3d at 1106 (limiting imputation of scienter to senior controlling officers acting within the scope of employment), with *City of Monroe*, 399 F.3d at 688 (attributing scienter of any corporate officer or agent acting within the scope of employment).

¹³⁸ See *In re Omnicare, Inc. Sec. Litig. (Omnicare II)*, 769 F.3d 455, 475–76 (6th Cir. 2014) (acknowledging that the *City of Monroe* holding could excessively expand corporate liability); see also *Crow*, *supra* note 7, at 314 (identifying a scenario that highlights the potential consequences of collective scienter). Furthermore, *City of Monroe* allowed Ono’s scienter to be imputed despite a lack of facts illustrating his involvement in the misrepresentations. See *City of Monroe*, 399 F.3d at 690 (plaintiffs did not allege direct responsibility or even facts that Ono was involved in disseminating Firestone’s false data). In contrast, the plaintiffs in *Kinder-Morgan* adequately established the scienter of two executive officers directly involved in the fraudulent activity. See *Kinder-Morgan*, 340 F.3d at 1106. The court held that the plaintiffs’ complaint established scienter to defraud through financial statements signed by both defendants. See *id.* at 1105–06.

¹³⁹ See *In re Omnicare, Inc. Sec. Litig. (Omnicare I)*, No. 11-cv-173-DLB-CJS, 2013 WL 1248243, at *1 (E.D. Ky. Mar. 27, 2013), *aff’d*, *Omnicare II*, 769 F.3d 455; Consolidated Amended Complaint at 4, 14, *Omnicare II*, 769 F.3d 455 (No. 2:11-CV-00173-DLB-CJS) [hereinafter *Omnicare Complaint*].

¹⁴⁰ *Omnicare Complaint*, *supra* note 139, at 4, 14. Omnicare concealed from investors a widespread scheme to defraud Medicare and Medicaid by seeking and obtaining reimbursement for medical claims that did not comply with the regulations of either program. *Id.* at 2.

¹⁴¹ See *Omnicare I*, 2013 WL 1248243, at *3–4.

a federal qui tam action, which exposed shareholders to hundreds of millions of dollars in damages.¹⁴²

The district court dismissed the complaint with prejudice, holding that the plaintiffs failed to plead an actionable misrepresentation or omission.¹⁴³ The court also addressed the plaintiffs' new position, presented during oral arguments, which relied on *City of Monroe* to impute the collective scienter of non-party employees to Omnicare.¹⁴⁴ The court stated that the plaintiffs failed to support their assertion that the knowledge of non-defendant employees who were not involved in the alleged misstatements should be imputed to the defendant corporation.¹⁴⁵ On appeal to the Sixth Circuit, the plaintiffs continued to rely on *City of Monroe* in arguing that the mental state of corporate insiders can be imputed to the corporation even if those individuals are not personally liable under section 10(b).¹⁴⁶

B. Omnicare's Proposed Hybrid Scienter Standard

In 2014, in *In re Omnicare, Inc. Securities Litigation* ("Omnicare II"), the U.S. Court of Appeals for the Sixth Circuit attempted to establish a pragmatic standard for imputing corporate scienter.¹⁴⁷ Finding that none of the approaches adopted by other circuits, including previous Sixth Circuit decisions, struck the appropriate balance, the court set forth a middle ground, or hybrid scienter standard.¹⁴⁸

¹⁴² *Omnicare* Complaint, *supra* note 139, at 2. A qui tam action is an action in which a private party (called a relator) brings an action on the government's behalf. See *Qui Tam Action*, BLACK'S LAW DICTIONARY 1368 (9th ed. 2009).

¹⁴³ *Omnicare I*, 2013 WL 1248243, at *5.

¹⁴⁴ See *id.* at *4, *11; Lead Plaintiff's Post-Hearing Memorandum in Further Opposition to Defendant's Motion to Dismiss at 2–3, *Omnicare I*, No. 2:11-cv-173-DLB-CJS (E.D. Ky. Feb. 21, 2013), 2013 WL 7117710. Citing *City of Monroe* as authority, the plaintiff attempted to argue that the knowledge of senior-level employees, including non-defendants, could be imputed to Omnicare. See *Omnicare I*, 2013 WL 1248243, at *11.

¹⁴⁵ See *Omnicare I*, 2013 WL 1248243, at *11 ("[P]laintiff fails to cite primary authority where the knowledge of a nondefendant employee, who did not make the compliance statement, was imputed to the company for purposes of finding that a corporation had actual knowledge . . ."). This is distinguished from *City of Monroe* because that case imputed the knowledge of an employee-defendant named in the case. See *City of Monroe*, 399 F.3d at 688. The court further concluded that even if the court were to impute the knowledge of non-defendant employees to the corporation, the plaintiff failed to provide sufficient facts to support actual knowledge of the falsity of the statements. See *Omnicare I*, 2013 WL 1248243, at *11.

¹⁴⁶ See Plaintiff-Appellant's Opening Brief at 37–38, *Omnicare II*, 769 F.3d 455 (No. 13-5597) (stating that "[*City of Monroe*] held that a corporation's mental state could be established through the imputed knowledge of a corporate official who was not personally liable under Section 10(b)"). The plaintiffs cited case law attributing knowledge from an *agent* of the defendant corporation and not just senior officers. See *id.*

¹⁴⁷ See *Omnicare II*, 769 F.3d at 475–76.

¹⁴⁸ *Id.* ("Given that neither approach is ideal, a middle ground is necessary.")

In order to create a more functional standard, the court held that for purposes of determining the scienter of a corporation under section 10(b), a plaintiff may plead facts regarding the state of mind of any of three specific categories of agents.¹⁴⁹ The first category is the individual corporate agent who actually uttered or issued the misrepresentation.¹⁵⁰ The second category is any individual agent who authorized, requested, aided, or approved a misrepresentation prior to its utterance.¹⁵¹

The final category of agent is any “high managerial agent or member of the board of directors” who approved or recklessly disregarded or tolerated a misrepresentation after it is stated.¹⁵² The Sixth Circuit derived this part of its rule from section 2.07 of the Model Penal Code (“MPC”).¹⁵³ The MPC defines a high managerial agent as: “an officer of a corporation . . . or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.”¹⁵⁴ Despite the court’s new interpretation of corporate scienter, it held that the plaintiffs failed to plead sufficient facts to meet the heightened standard under the PSLRA.¹⁵⁵

In adopting this new standard, the court sought to widen the permissible realm of imputable agents beyond strict respondeat superior.¹⁵⁶ The

¹⁴⁹ See *id.* at 476.

¹⁵⁰ See *id.*

¹⁵¹ See *id.* The first two prongs of the scienter standard are analogous to the Fifth Circuit’s more traditional respondeat superior approach to corporate scienter. See *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 366 (5th Cir. 2004) (limiting the inquiry to corporate officials who actually made or contributed to the statement); *infra* notes 166–169 (describing the influence the Fifth Circuit had in the *Omnicare II* holding).

¹⁵² *Omnicare II*, 769 F.3d at 476.

¹⁵³ MODEL PENAL CODE § 2.07(1)(c) (AM. LAW INST. 1962) (“A corporation may be convicted of the commission of an offense if . . . the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.”); *cf.* *Omnicare II*, 769 F.3d at 476 (“The state(s) of mind of any of the following are probative for the purposes of determining . . . requisite scienter Any high managerial agent or member of the board of directors who ratified, recklessly disregarded, or tolerated the misrepresentation after its utterance or issuance” (quoting *Abril & Olazábal*, *supra* note 7, at 135)).

¹⁵⁴ MODEL PENAL CODE § 2.07(4)(c); see also *Abril & Olazábal*, *supra* note 7, at 146 n.210 (defining high managerial agent as part of the authors’ proposed scienter rule, which was partially adopted by the *Omnicare II* court); Christopher R. Green, *Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages and Criminal Liability and Criminal Law*, 87 NEB. L. REV. 197, 204–05 (2008) (discussing the Model Penal Code’s rules for corporate crime).

¹⁵⁵ *Omnicare II*, 769 F.3d at 483. Although the court agreed that the vice president of internal audit’s knowledge was imputable to the corporation, the plaintiffs ultimately failed to allege enough facts to overcome the PSLRA’s pleading burden. See *id.*

¹⁵⁶ See *id.* at 475, 477 (discussing how its rule prevents corporate policies of willful blindness and information shielding from helping corporations evade liability); see also McCaughey & Demers, *supra* note 11, at 858 (stating that the *Omnicare II* holding expanded Rule 10b-5 liability).

court also aimed to prevent corporations from evading liability through “tacit encouragement and willful ignorance.”¹⁵⁷ As a result, corporate defendants that permit or endorse low-level employees to knowingly shield information from management will still be found liable.¹⁵⁸ This, the court reasoned, fostered the accountability principles embedded in the Exchange Act’s original purpose.¹⁵⁹

Aside from the third category of the *Omnicare* test, the court limited the scierter analysis to agents who participated in the alleged misstatement in order to prevent an overbroad application of a pure collective scierter approach.¹⁶⁰ Therefore, the only low-level employees whose scierter can be imputed to the corporation are those connected to the fraudulent statements.¹⁶¹ The court indicated that the narrower focus of its test would protect corporations from strike suits, thus balancing the polarizing aims of the PSLRA with the Exchange Act.¹⁶²

C. *Omnicare*: Similarities with Other Circuits

The *Omnicare* test is essentially a combination of different holdings adopted throughout the federal circuits.¹⁶³ This middle ground standard ef-

¹⁵⁷ *Omnicare II*, 769 F.3d at 477; see also William Foley et al., *Circuits Split on When to Impute Employee’s Knowledge to Corporations for Section 10(b) Claims*, ORRICK SEC. LITIG., INVESTIGATIONS & ENFORCEMENT BLOG (Oct. 21, 2014), <http://blogs.orrick.com/securities-litigation/2014/10/21/circuits-split-on-when-to-impute-employees-knowledge-to-corporation-for-section-10b-claims/> [<http://perma.cc/WSJ9-X8U5>] (discussing the Sixth Circuit’s stance regarding the flaws of other approaches).

¹⁵⁸ *Omnicare II*, 769 F.3d at 477; see also Maslo, *supra* note 32, at 97 (discussing the tactics companies can employ to avoid liability under a respondeat superior approach).

¹⁵⁹ *Omnicare II*, 769 F.3d at 477; see also SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963) (“A fundamental purpose, common to these statutes, was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry.”); Foley et al., *supra* note 157, at 1–2 (describing the balancing of interests in the *Omnicare II* decision).

¹⁶⁰ See *Omnicare II*, 769 F.3d at 476; see also William O. Fisher, *Caselaw Developments 2014*, 70 BUS. LAW. 903, 957 (2015) (describing the *Omnicare II* court’s rejection of the plaintiffs’ attempt to plead broad collective scierter).

¹⁶¹ See *Bondali v. Yum! Brands, Inc.*, 620 F. App’x 483, 493 (6th Cir. 2015) (concluding that although some employees were aware of the fraud, the plaintiffs did not allege facts that those employees were involved in preparing or making the false statements); *Omnicare II*, 769 F.3d at 476–77; see also Lyle Roberts, *Middle Ground*, 10B-5 DAILY (Oct. 24, 2014, 11:14 PM), <http://10b5daily.com/2014/10/24/middle-ground/> [<http://perma.cc/D3DA-2U44>] (discussing the *Omnicare II* holding).

¹⁶² See *Omnicare II*, 769 F.3d at 476–77; see also Joseph M. McLaughlin, *Pleading Corporate Scierter: Circuits Split on Standard*, N.Y. L.J., Dec. 11, 2014, at 5 (discussing the balance the *Omnicare II* holding attempts to strike).

¹⁶³ See, e.g., *Glazer Capital Mgmt., LP v. Magistri*, 549 F.3d 736, 744–45 (9th Cir. 2008) (requiring pleading facts regarding individuals who made or were involved in false statements but not foreclosing the notion of collective scierter); *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital, Inc.*, 531 F.3d 190, 195 (2d Cir. 2008) (concluding that a plaintiff need not al-

fectively addresses some of the holes in the scienter pleading standards adopted by other circuits.¹⁶⁴ Nevertheless, the *Omnicare II* ruling answered only part of the corporate scienter issue because it failed to define precisely what constitutes a “high managerial agent.”¹⁶⁵

First, the *Omnicare* test embraced the Fifth Circuit’s approach for pleading scienter as a means to support the PSLRA’s intended purpose.¹⁶⁶ By requiring specific scienter allegations of individuals involved in corporate misstatements, the Fifth Circuit’s approach promotes the PSLRA’s goal of preventing strike suits and encouraging disclosure.¹⁶⁷ Like the Fifth Circuit, however, the first two criteria of the *Omnicare II* standard leave the issues of compartmentalized knowledge and lack of accountability unresolved.¹⁶⁸ The final provision of the *Omnicare II* court’s standard addresses this imbalance by broadening its scope to be more akin to other circuits and prior Sixth Circuit decisions.¹⁶⁹

ways plead scienter to one individual agent); *Southland*, 365 F.3d at 366 (requiring scienter analysis of corporate official or officials who make or contribute to a misstatement); see also *infra* notes 166–175 and accompanying text (describing the similarities of the *Omnicare* test with other case law).

¹⁶⁴ See *Omnicare II*, 769 F.3d at 475–77; Lyle Roberts, *Being of One Mind: Corporate Scienter and Securities Fraud Liability*, in *SECURITIES LITIGATION 2015: FROM INVESTIGATION TO TRIAL* 207, 213 (2015) (stating that the first two categories of the *Omnicare* rule are in line with the Fifth Circuit).

¹⁶⁵ See *Omnicare II*, 769 F.3d at 476 (citing *Abril & Olazábal*, *supra* note 7, at 135) (adopting a corporate scienter rule that utilizes the MPC definition of “high managerial agent”); Lipton, *supra* note 31, at 1292 (stating that the high managerial agent standard under the MPC will overly extend the margins of corporate liability); *infra* notes 194–215 and accompanying text (addressing the lack of clarity with the term “high managerial agent”).

¹⁶⁶ Compare *Omnicare II*, 769 F.3d at 476 (“The [following] state(s) of mind . . . are probative for . . . determining . . . requisite scienter . . . a. The individual agent who uttered or issued the misrepresentation; b. Any individual agent who authorized, requested, commanded, furnished information for, prepared (including suggesting or contributing language . . .), reviewed or approved the statement . . .” (quoting *Abril & Olazábal*, *supra* note 7, at 135)), with *Southland*, 365 F.3d at 366 (“For purposes of determining . . . scienter we . . . look to the state of mind of the individual corporate official or officials who make or issue the statement (or order or approve it or its making or issuance, or who furnish information or language for inclusion therein, or the like) . . .”).

¹⁶⁷ See H.R. REP. NO. 104-369, at 42 (1995) (Conf. Rep.), as reprinted in 1995 U.S.C.C.A.N. 730, 741 (“Abusive litigation severely affects the willingness of corporate managers to disclose information to the marketplace.”); see also Bondi, *supra* note 6, at 22–23 (discussing the disclosure repercussions of imposing a negligence equivalent pleading standard that would follow from a collective scienter approach).

¹⁶⁸ See *United States v. Bank of New Eng., N.A.*, 821 F.2d 844, 856 (1st Cir. 1987) (noting that corporations compartmentalize knowledge); see also *Abril & Olazábal*, *supra* note 7, at 144 (discussing the difficulty of locating a single agent within an organization possessing both the requisite scienter and connection to a given misrepresentation); Wohl, *supra* note 44, at 3 (discussing how a single agent approach could lead to compartmentalizing knowledge, which would undermine effective corporate compliance programs).

¹⁶⁹ See *Omnicare II*, 769 F.3d at 477 (discussing how the court’s holding will prevent willful ignorance); see also *Makor Issues & Rights, Ltd. v. Tellabs, Inc. (Tellabs II)*, 513 F.3d 702, 710

Second, the final part of the *Omnicare* test, which considers the scierter of any high managerial agent or board member, was built from the expansiveness of the Sixth Circuit's earlier *City of Monroe* holding.¹⁷⁰ The *Omnicare II* court reasoned that the *City of Monroe* approach could expose corporations to too much liability.¹⁷¹ More specifically, the term "agent" could result in broad liability for corporations so long as any single employee (regardless of level) within the organization knew something culpable.¹⁷² The *Omnicare II* court qualified its prior ruling by limiting the inquiry of those not involved in the misstatement to high managerial agents and the board of directors.¹⁷³ This limitation was intended to prevent the extreme consequences of a pure collective scierter standard.¹⁷⁴ This departure from *City of Monroe*'s overly broad language brought the third part of the *Omnicare II* rule more in line with the Tenth Circuit precedent that originally influenced the Sixth Circuit to expand its scierter approach.¹⁷⁵

IV. A BETTER STANDARD, BUT ONE AMBIGUITY LEFT BEHIND

Although the U.S. Court of Appeals for the Sixth Circuit's 2014 decision in *In re Omnicare, Inc. Securities Litigation* ("*Omnicare II*") was a step in the right direction for securities fraud pleading, further revision is necessary.¹⁷⁶ This Part argues that the *Omnicare* test is the proper standard for corporate scierter, but that the issue of what constitutes a "high managerial agent" must be addressed and clarified.¹⁷⁷ Section A discusses how the *Omnicare* rule bridges the current scierter gap in undecided circuits.¹⁷⁸ Next, section B argues that term "high managerial agent" should be limited to of-

(7th Cir. 2008) (suggesting the possibility of establishing corporate scierter without pleading facts regarding specific individuals who publicized the fraud); *City of Monroe*, 399 F.3d at 688–89 (allowing the knowledge of a corporate officer who did not issue the misleading statement to be imputed to the corporation).

¹⁷⁰ See *Omnicare II*, 769 F.3d at 476 (looking to any high managerial agent or board member who ratified, recklessly disregarded, or tolerated a misrepresentation to impute scierter and stating that its rule is consistent with the Sixth Circuit's previous pronouncement in *City of Monroe*); see also *supra* notes 128–134 and accompanying text (discussing the *City of Monroe* holding).

¹⁷¹ See *Omnicare II*, 769 F.3d at 475 ("[R]eading our decision in *City of Monroe* too broadly could expose corporations to liability far beyond what Congress has authorized."); *City of Monroe*, 399 F.3d at 688.

¹⁷² See *Omnicare II*, 769 F.3d at 475–76; see also Foley et al., *supra* note 157, at 1 (discussing the *Omnicare II* court's criticism of *City of Monroe*); *supra* notes 67–75 and accompanying text (discussing criticism of collective scierter).

¹⁷³ *Omnicare II*, 769 F.3d at 476–77.

¹⁷⁴ See *id.* at 477.

¹⁷⁵ See *City of Monroe*, 399 F.3d at 688 (citing *Kinder-Morgan*, 340 F.3d at 1106); *supra* notes 135–138 (analyzing the Tenth Circuit's influence on the *City of Monroe* holding).

¹⁷⁶ See *infra* notes 194–215 and accompanying text.

¹⁷⁷ See *infra* notes 181–228 and accompanying text.

¹⁷⁸ See *infra* notes 181–193 and accompanying text.

ficers.¹⁷⁹ Finally, section C addresses potential policy objections to the refined *Omnicare* rule.¹⁸⁰

A. Why *Omnicare* Would Move Some Circuits Away from Uncertainty

The *Omnicare* test bridges the gap between both sides of the corporate scienter split, and thus is a feasible alternative to the ambivalence that permeates the circuit courts.¹⁸¹ Undecided circuits have accepted the minimum requirements of the Fifth Circuit Court of Appeals' approach from its 2004 decision in *Southland Securities Corp. v. INSpire Insurance Solutions, Inc.*, but have simultaneously left themselves open to a broader view of scienter that the Fifth Circuit expressly rejected.¹⁸² Pleadings that allege facts satisfying the narrow requirements of the Fifth Circuit's approach are accepted as valid in virtually all circuits.¹⁸³ Therefore, the first two parts of the *Omnicare* rule, which is a direct descendant of the Fifth Circuit's stance, would undoubtedly align with the undecided circuits.¹⁸⁴

Despite favoring the Fifth Circuit stance, uncertain circuits have left open the possibility that a special set of circumstances could make collective scienter appropriate.¹⁸⁵ The third part of the *Omnicare* rule analyzes the

¹⁷⁹ See *infra* notes 194–215 and accompanying text.

¹⁸⁰ See *infra* notes 216–228 and accompanying text.

¹⁸¹ See *In re Omnicare, Inc. Sec. Litig. (Omnicare II)*, 769 F.3d 455, 476–77 (6th Cir. 2014) (“Given that neither approach is ideal, a middle ground is necessary.”); see also *supra* notes 87–123 and accompanying text (introducing the split among circuits regarding corporate scienter).

¹⁸² See, e.g., *Matrix Capital Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 190 (4th Cir. 2009) (holding that plaintiffs must establish facts creating an inference of scienter for each named defendant); *Glazer Capital Mgmt., LP v. Magistri*, 549 F.3d 736, 745 (9th Cir. 2008) (requiring that the plaintiff plead scienter with respect to the individuals who made the misstatement); *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital, Inc.*, 531 F.3d 190, 195 (2d Cir. 2008) (reasoning that the most direct way to raise an inference of scienter is to plead it for an individual defendant); see also *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 366 (5th Cir. 2004) (adopting a standard for corporate scienter).

¹⁸³ See *Makor Issues & Rights, Ltd. v. Tellabs, Inc. (Tellabs II)*, 513 F.3d 702, 708 (7th Cir. 2008) (adopting the *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.* standard as a means to establish corporate liability); *Teachers' Ret. Sys. of La. v. Hunter*, 477 F.3d 162, 184 (4th Cir. 2007) (citing *Southland* with approval in establishing the requisite scienter pleading standards); see also *Glazer*, 549 F.3d at 745 (requiring the plaintiffs to plead scienter with respect to the individuals who made the false statements in the merger agreement).

¹⁸⁴ See *Teamsters*, 531 F.3d at 195 (declaring that when pleading scienter, “the most straightforward way to raise such an inference for a corporate defendant is to plead it for an individual defendant”); see also *Bondi*, *supra* note 6, at 6 (noting the long history of creating liability through respondent superior in securities law). Compare *Omnicare II*, 769 F.3d at 476 (declaring the scienter of the individual who uttered or participated in a misrepresentation as probative), with *Southland*, 365 F.3d at 366 (examining scienter only in individuals who either make, contribute to, order, or approve a statement).

¹⁸⁵ See *Matrix Capital*, 576 F.3d at 189 (concluding that a complaint can allege that at least one corporate agent acted with requisite scienter even if it does not specify that agent); *Teamsters*,

scierter of high managerial agents and directors and effectively codifies the dramatic false corporate announcement scenario the Seventh Circuit described in 2008, in *Makors Issues & Rights, Ltd. v. Tellabs, Inc.* (“*Tellabs II*”).¹⁸⁶ Both the third part of the *Omnicare* rule and the *Tellabs II* scenario have the same underlying rationale: both suppose that certain corporate officers or directors must either approve or be sufficiently knowledgeable about the company to know that a statement is false.¹⁸⁷

For instance, a court applying the third part of the *Omnicare* rule to the hypothetical in *Tellabs II* would likely utilize similar empirical evidence and reach the same result.¹⁸⁸ Returning to that hypothetical, if General Motors announced \$1 million in sales when the number is in fact zero, it is very likely that a plaintiff could plead facts that a high managerial agent or corporate director recklessly disregarded or tolerated such a misrepresentation.¹⁸⁹ Such high managerial agents or directors likely encompass the same parties that the *Tellabs II* court suggested are “sufficiently knowledgeable” to recognize that such a statement is false.¹⁹⁰

Moreover, under the heightened level of specificity under the PSLRA, plaintiffs would still need to provide particularized facts regarding any reckless toleration or ratification by specific high managerial agents or directors.¹⁹¹ This would compensate for the “blanket assertions” or “raw data” pleadings rejected by circuits, and allow them to move toward a more flexible pleading standard.¹⁹² The implementation of the *Omnicare* scierter

531 F.3d at 196 (concluding that Congress did not impose a rule that forbids establishing a strong inference of scierter without expressly naming an individual officer).

¹⁸⁶ See *Omnicare II*, 769 F.3d at 476 (establishing a new rule to balance the competing interests of the PSLRA); *Tellabs II*, 513 F.3d at 710; see also *supra* notes 98–103 (describing the hypothetical the court offered in *Tellabs II* as a situation where collective scierter could be applicable).

¹⁸⁷ See *Omnicare II*, 769 F.3d at 476 (extending the scierter analysis beyond those directly involved in the misrepresentation); *Tellabs II*, 513 F.3d at 710 (suggesting that in certain situations a broader form of scierter pleading could be appropriate).

¹⁸⁸ See *Omnicare II*, 769 F.3d at 476; *Tellabs II*, 513 F.3d at 710 (holding that a plaintiff cannot simply name management under the presumption that they approved a corporate statement).

¹⁸⁹ See *Omnicare II*, 769 F.3d at 476; *Tellabs II*, 513 F.3d at 710. With facts related to the above scenario, such a pleading would “support a strong inference of scierter *with respect to at least one authorized agent of the corporation*,” thus satisfying the Fourth Circuit’s standard. See *Matrix Capital*, 576 F.3d at 189 (emphasis added) (quoting *Teachers’ Ret.*, 477 F.3d at 184).

¹⁹⁰ See *Tellabs II*, 513 F.3d at 710 (posing a hypothetical that suggests a strong inference of scierter due to a corporate agent’s position).

¹⁹¹ See 15 U.S.C. § 78u-4(b)(2)(A) (2012) (requiring particularized facts giving rise to a strong inference of scierter); *Omnicare II*, 769 F.3d at 476 (declaring the scierter of *any* high managerial agent or member of the board of directors as probative for section 10(b) violations).

¹⁹² See *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 282 (3d Cir. 2006) (“[S]uch ‘catch-all’ or ‘blanket’ assertions do not satisfy the particularity requirements of Rule 9(b) and the PSLRA, and must be disregarded.”); see also *Teamsters*, 531 F.3d at 196 (“[Plaintiffs’] broad reference to raw data lacks even an allegation”); *Ottmann v. Hanger Orthopedic Grp., Inc.*,

pleading standard could potentially provide the desired pleading structure for circuits that have not foreclosed broader standards under the PSLRA.¹⁹³

B. High Managerial Agent

Although the *Omnicare* test is a marked improvement over previous approaches to collective scienter, courts must further refine the test by providing a clearer standard for determining which “high managerial agents” can have their knowledge imputed to the corporation.¹⁹⁴ By including “high managerial agent” among imputable employees to analyze when pleading scienter, the *Omnicare II* court left an ambiguity that could cause more disparity in judicial interpretation.¹⁹⁵

As previously mentioned, the third part of the *Omnicare* rule was adopted from section 2.07 of the MPC.¹⁹⁶ The MPC purportedly defines high managerial agent in relation to employees’ policymaking power; however, the language of this standard is problematically broad.¹⁹⁷ This definition raises the question of who is considered to represent corporate policy.¹⁹⁸ Moreover, the MPC fails to answer what policies of the corporation are relevant in analyzing managerial conduct.¹⁹⁹ Cases involving CEOs and other top executives presumably fall easily within the category of high

353 F.3d 338, 345 (4th Cir. 2003) (holding that a flexible analysis is appropriate in examining scienter pleadings).

¹⁹³ See *Glazer*, 549 F.3d at 745 (deciding not to address the applicability of *Tellabs II* or collective scienter due to the “limited nature” of the misstatements); see also *City of Roseville Emps. Ret. Sys. v. Horizon Lines, Inc.*, 442 F. App’x 672, 676–77 (3d Cir. 2011) (deciding that the facts of the case would not allow the court to decide whether it agreed with a broader scienter approach).

¹⁹⁴ See *infra* notes 196–215 and accompanying text (discussing the MPC definition for high managerial agent, which was adopted by the *Omnicare II* court).

¹⁹⁵ See *Omnicare II*, 769 F.3d at 476 (allowing plaintiffs to plead the scienter of any high managerial agent); RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. e (AM. LAW. INST. 2006) (“[T]here is no rigid test to determine whether an agent is a ‘managerial agent.’”).

¹⁹⁶ See MODEL PENAL CODE § 2.07(4)(c) (AM. LAW INST. 1962); *supra* notes 153–154 and accompanying text (discussing the third part of the *Omnicare* rule).

¹⁹⁷ MODEL PENAL CODE § 2.07(4)(c); Green, *supra* note 154, at 205 (concluding that the Model Penal Code (“MPC”) measures the term high managerial agent in terms of policymaking.); see Stern, *supra* note 33, at 136 (arguing that a high managerial agent standard does not provide any definitive manner to distinguish who actually takes part in policymaking).

¹⁹⁸ See Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1105 (1991) (offering a scenario in which a purchasing agent could be considered a high managerial agent, and thus attaching liability to a corporation); George R. Skupski, Note, *The Senior Management Mens Rea: Another Stab at a Workable Integration of Organizational Culpability into Corporate Criminal Liability*, 62 CASE W. L. REV. 263, 270 (2011) (describing flaws with the MPC corporate liability model).

¹⁹⁹ See Lipton, *supra* note 31, at 1291 (stating that the breadth of the high managerial agent standard often implicates any agent who holds a supervisory role); Stern, *supra* note 33, at 135–36 (discussing the ambiguities of the MPC’s high managerial agent definition).

managerial policymakers.²⁰⁰ But, this categorization becomes far less clear in a public corporation with many managerial agents who have a lesser ability to implement corporate policy.²⁰¹ This issue is only exacerbated in large corporations and could broaden the scope of corporate liability beyond *Omnicare II*'s intentions.²⁰² Without a definitive high managerial agent rule, an officer or director planning to make a public statement would theoretically have to survey all managerial agents believed to be imputable under *Omnicare II* to ensure the statement's validity.²⁰³ This would be unduly burdensome and prohibitively expensive.²⁰⁴

Therefore, a high managerial agent for determining corporate scierter should be explicitly limited to executive officers.²⁰⁵ The best definition of what constitutes an executive officer is found in section 16(a) of the Exchange Act.²⁰⁶ The SEC defines the term officer as referring to:

²⁰⁰ See *Omnicare II*, 769 F.3d at 476–77 (reasoning that a CEO's knowledge is imputed to the corporation under the formulation of the standard). It is doubtless that any C-level executive of a corporation would be considered an "officer" of the corporation with the ability to implement policy. See MODEL PENAL CODE § 2.07(4)(c) (defining high managerial agent); *supra* notes 153–154 and accompanying text (discussing the third part of the *Omnicare* rule).

²⁰¹ See Bondi, *supra* note 6, at 14 n.51 (stating that large corporations could have a large number of management-level employees, which would overly broaden corporate exposure). For example, federal district courts in the Second Circuit have already extended this label beyond executive officers with no means of differentiating an imputable managerial agent. See *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 501 F. Supp. 2d 452, 481–82 (S.D.N.Y. 2006) (imputing the knowledge of a senior vice president and a division head, but recognizing there is no simple formula for how senior an employee must be in order to be imputable); *In re BISYS Sec. Litig.*, 397 F. Supp. 2d 430, 443 (S.D.N.Y. 2005) (imputing scierter of regional vice president and vice president of corporate finance).

²⁰² See *Omnicare II*, 769 F.3d at 477 (discussing how the court's rule is designed to prevent strike suits by limiting the corporate agents that can be examined); see also Bondi, *supra* note 6, at 14 n.51 (discussing how a corporation's size can unintentionally broaden the scope of a purportedly limited version of collective scierter); O'Riordan, *supra* note 7, at 1621–22 (analyzing the issue of drawing the line with hybrid collective scierter). For example, *Omnicare* industry competitor CardinalHealth employs over 36,000 people worldwide with possibly thousands of managerial agents who implement various corporate policies. See *Our People*, CARDINALHEALTH, <http://www.cardinalhealth.com/en/about-us/our-people.html> [<http://perma.cc/8HB3-FWVQ>].

²⁰³ See Bondi, *supra* note 6, at 25 (discussing the practical shortcomings of strong and hybrid collective scierter); Jeffries, *supra* note 21, at 543 (discussing criticism over broad collective scierter and corporate compliance).

²⁰⁴ See Bondi, *supra* note 6, at 25 ("Identifying the person or persons with knowledge can be enormously costly and . . . may be akin to finding a needle in a haystack."); Maslo, *supra* note 32, at 98–99 (describing the undue amounts of human resources and money that would be required to check all communications with investors). The fact-checking with an ambiguous high managerial standard becomes even more of an issue with transnational corporations. See O'Riordan, *supra* note 7, at 1623 (noting how compliance issues amplify in the case of large international corporations).

²⁰⁵ See *infra* notes 206–215 and accompanying text (arguing how limiting the inquiry to executive officers under the Exchange Act's "officer" definition better serves the *Omnicare* test).

²⁰⁶ See 15 U.S.C. § 78p(a)(1) (2012); 17 C.F.R. § 240.16a-1(f) (2015). Section 16(a) requires corporate insiders such as directors, officers, and ten percent security holders to file periodic re-

[A] president, principal financial officer, principal accounting officer (or, if there is no such accounting officer, the controller), any vice-president . . . in charge of a principal business unit, division or function (such as sales, administration or finance) . . . or any other person who performs similar policy-making functions for the issuer.²⁰⁷

This definition also applies to any officers of subsidiaries that perform similar policy-making functions for the company.²⁰⁸ Although this definition similarly refers to policymaking power, section 16(a) of the Exchange Act provides a further distinction that “policy-making function” is intended to apply to significant corporate policies.²⁰⁹

Courts should adopt the officer standard from section 16(a) of the Exchange Act because, instead of broadly looking to employees who can be “fairly assume[d] to represent the policy of the corporation,” this standard will look to employees that specifically have the power to implement and execute major corporate policy.²¹⁰ Establishing more definitive, yet still flexible, criteria will prevent courts from casting too wide a net over agents who can be found to represent corporate policy.²¹¹

Adopting this definition of high managerial agents will additionally provide clear compliance guidance for corporations, and incentivize executives to rectify any statements they know to be false or misleading.²¹² Having an executive status comes with the increased responsibility of safe-

ports regarding their beneficial stock ownership. See 15 U.S.C. § 78p(a)(1); see also Arnold S. Jacobs, *An Analysis of Section 16 of the Securities Exchange Act of 1934*, 32 N.Y.L. SCH. L. REV. 209, 210 (1987) (providing an overview of section 16(a) of the Exchange Act).

²⁰⁷ 17 C.F.R. § 240.16a-1(f). Although the SEC has regulations defining an “executive officer,” the officer definition is more detailed and provides essentially the same agents for consideration. See 17 C.F.R. § 240.3b-7 (“The term *executive officer* . . . means its president, any vice president of the registrant in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the registrant.”).

²⁰⁸ See 17 C.F.R. § 240.16a-1(f).

²⁰⁹ See *id.* (“Policy-making function” is not intended to include policy-making functions that are not significant.”).

²¹⁰ See 17 C.F.R. § 240.16a-1(f); MODEL PENAL CODE § 2.07(1)(c).

²¹¹ See Bucy, *supra* note 198, at 1105 (describing a case extending liability beyond an executive policymaker to a purchasing agent); Stern, *supra* note 33, at 135 (arguing that the MPC’s standard is too flexible in allowing courts to determine whose acts represent the corporation’s policies). As an added benefit, courts will be able to use corporate filings with the SEC as a tool because such filings require companies to adhere to the same executive officer criteria. See Pugh v. Tribune Co., 521 F.3d 686, 698 (7th Cir. 2008) (rejecting the plaintiffs’ argument that an individual was a senior-level officer because he was not included in the company’s SEC filing).

²¹² See *Omnicare II*, 769 F.3d at 477 (holding that the court’s rule is designed to prevent management from insulating themselves from false or misleading statements); Abril & Olazábal, *supra* note 7, at 142 (asserting that those who authorize, request, or command public statements should ultimately bear some responsibility for them).

guarding corporate compliance, and this formulation of the rule will reflect that burden.²¹³ Moreover, limiting high managerial agents to executive officers properly balances the fundamental purposes of the PSLRA.²¹⁴ It allows corporations to implement efficient compliance programs, and ensures candid disclosure by those most accountable for corporate operations.²¹⁵

C. Broader Standards Are Inadequate

Opponents to this altered *Omnicare* rule may argue that courts should adopt a broader standard because plaintiffs serve an important regulating function in keeping corporate disclosure honest.²¹⁶ This argument, however, is outweighed by the negative impact that meritless suits have on investor confidence.²¹⁷ In light of recent financial instability, plaintiffs are seeking out financially secure defendants in the hopes of a securing a generous settlement, regardless of how attenuated the defendants' role was in the alleged fraudulent actions.²¹⁸ This exacerbates financial hardships for shareholders and creates additional social costs.²¹⁹ Also, there are other mechanisms,

²¹³ See Frances Floriano Goins, *Defending Clients from Securities Fraud Claims*, in RECENT DEVELOPMENTS IN SECURITIES LAW 17, 17 (2013 ed.), 2013 WL 5290488 (discussing new "top-down" guidelines issued by legislators and prosecutors to increase oversight and responsibility of directors and senior corporate management); Lipton, *supra* note 31, at 1267 (asserting that without liability, top officers and corporate managers will be incentivized to tacitly encourage fraudulent behavior).

²¹⁴ See *Omnicare II*, 769 F.3d at 477 (applying its rule against the competing interests of the PSLRA); see also H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.), as reprinted in 1995 U.S.C.A.N. 730, 730 (stating that meritless strike suits undermine the fundamental purpose of securities laws); Jeffries, *supra* note 21, at 534 (discussing the need to balance the objectives of the PSLRA).

²¹⁵ See Bondi, *supra* note 6, at 28 (discussing how collective scierter would make corporate counseling and compliance unpredictable); Donald C. Langevoort, *On Leaving Corporate Executives "Naked, Homeless, and Without Wheels": Corporate Fraud, Equitable Remedies, and the Debate Over Entity Versus Individual Liability*, 42 WAKE FOREST L. REV. 627, 630 (2007) (arguing for equitable remedies against executives engaging in corporate fraud or misreporting).

²¹⁶ See H.R. REP. NO. 104-369, at 31 (noting the importance of private securities litigation to the integrity of the American market); Jeffries, *supra* note 21, at 533 (suggesting that the ability of the SEC and private plaintiffs to hold companies accountable is important in supporting market integrity and investor confidence).

²¹⁷ See H.R. REP. NO. 104-369, at 31–32 ("[T]he investing public and entire U.S. economy have been injured by the unwillingness of the best qualified person to serve on the boards of directors and of issuers to discuss publicly their future prospects, because of fear of baseless and extortionate securities lawsuits."); see also Lipton, *supra* note 31, at 1265 (highlighting the policy benefits that come with corporate disclosure).

²¹⁸ See Goins, *supra* note 213, at 32 ("Many of these deep-pocket defendants are only peripheral players, at best, in the activities giving rise to the fraud claims.")

²¹⁹ See MUKESH BAJAJ ET AL., U.S. CHAMBER INST. FOR LEGAL REFORM, ECONOMIC CONSEQUENCES: THE REAL COSTS OF U.S. SECURITIES CLASS ACTION LITIGATION 17 (Feb. 2014), http://www.instituteforlegalreform.com/uploads/sites/1/EconomicConsequences_Web.pdf [<http://perma.cc/V2NX-MW3C>] (citing studies reporting that shareholders lose \$39 billion annually when secu-

such as legislation, that can better serve the deterrence, restitution, and investor confidence goals of securities laws.²²⁰

The altered *Omnicare* rule does not foreclose the possibility of members of middle or lower management having knowledge imputed to plead scienter.²²¹ The first two parts of the rule, comparable to the Fifth Circuit's ruling in *Southland*, would impute scienter to any employee involved in any way with a misstatement.²²² In this way, the scope of the *Omnicare* test depends entirely on what facts the plaintiff can allege, making it a natural fit for the fact-based nature of securities fraud claims; if plaintiffs can allege facts indicating that middle or lower management were involved in the misstatement, the *Omnicare* test would allow such a claim to go forward.²²³

Conversely, proponents of a traditional agency law approach may argue that this rule will result in more litigation where plaintiffs allege that executives ratified fraudulent conduct *ex post facto*.²²⁴ Pleading under the PSLRA requires particularized facts to establish scienter.²²⁵ Many courts that have been open to broader forms of pleading have nonetheless dis-

curities lawsuits are announced); *see also* H.R. REP. NO. 104-369, at 31–32 (discussing the negative effects of meritless litigation).

²²⁰ *See* Jeffries, *supra* note 21, at 532–33 (stating that the ability of private litigants and the SEC to pursue securities violations serves to promote deterrence, compensation of victims, and investor confidence); Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 394 (2015) (discussing how the SEC's fair funds distributions are effectively compensating victims without securities class actions).

²²¹ *See Omnicare II*, 769 F.3d at 477 (“Under our formation of the rule, a corporation is not insulated if lower-level employees, contributing to the misstatement, knowingly provide false information . . . with the intent to defraud the public.”).

²²² *See id.* at 476 (presenting a three-part rule incorporating a *Southland*-like standard); *Southland*, 365 F.3d at 366 (holding that the scienter of the individuals that make and prepare the statements is analyzed for section 10(b) actions).

²²³ *See* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 324 (2007) (“A complaint will survive . . . only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.”); J. Michael Marcoux, *Canaries in the Coal Mine: Facts from Securities Fraud Private Civil Actions Can Identify Intent to Manipulate Energy Markets*, 29 ENERGY L.J. 141, 150–51 (2008) (illustrating how some facts can support scienter while other facts are insufficient).

²²⁴ *See Pugh*, 521 F.3d at 700–01 (holding it insufficient that plaintiffs allege that a defendant had knowledge simply because of his position in the company); *Suprema Specialties*, 438 F.3d at 281–82 (concluding that the bare inference of a defendant's position in a company is not enough to support scienter). It may also be argued that this formulation of scienter pleading will lead to excessive costs in director and officer insurance rates. *See Teamsters Amici Curiae, supra* note 68, at 28 (arguing that the cost of directors and officers liability insurance—D&O insurance—is six times higher in the United States than in Europe).

²²⁵ *See* 15 U.S.C. § 78u-4(b)(2)(A) (“[T]he complaint shall . . . state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”). In *Omnicare II*, despite alleging that certain employees who fit within the court's new test had the requisite scienter, the plaintiffs' complaint nevertheless failed because they did not allege particularized facts. *See Omnicare II*, 769 F.3d at 484; Foley et al., *supra* note 157, at 2 (summarizing how the plaintiffs were not able to meet the pleading requirements of the PSLRA).

missed cases based on the strength of the facts alleged.²²⁶ Courts open to a scenario where a plaintiff need not plead individual scierter have still required specificity as to the knowledge and intent of an individual agent during the time of the alleged fraud.²²⁷ If anything, this formulation of scierter pleading will prevent establishing a strong inference merely from an agent's position in the corporation.²²⁸

CONCLUSION

In 2014, in *In re Omnicare, Inc. Securities Litigation* (“*Omnicare II*”), the U.S. Court of Appeals for the Sixth Circuit established an effective standard to address the circuit split over collective scierter. The ruling adopted the narrow respondeat superior approach from the Fifth Circuit, combined with a narrowed version of what could be construed as a pure collective scierter approach. The flexibility in this bipartisan approach makes the *Omnicare II* ruling appealing for circuits that have not fully committed to an existing scierter approach. The rule, however, must provide an explicit definition of a “high managerial agent” to prevent judicial interpretation from extending the scope of the rule toward an overly broad pure collective scierter approach. A pleading standard broader than *Omnicare II* would only instigate meritless litigation every time stocks depreciate, and would create disincentives for corporations to disclose information. This would be contrary to the fundamental purposes of both the Exchange Act and the PSLRA. With a well-defined executive officer standard, the *Omnicare II* ruling will provide clear guidance for federal compliance. These clear standards, along with the narrowed *Omnicare II* rule, will encourage corporations to publicly disclose information to investors.

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²²⁶ See, e.g., *Omnicare II*, 769 F.3d at 484 (“Accordingly, each of these factors cuts against finding an inference of scierter—let alone, a strong one”); *Teamsters*, 531 F.3d at 196 (“[Plaintiff’s] broad reference to raw data lacks even an allegation Accordingly, they have not raised an inference of scierter”).

²²⁷ See *Matrix Capital*, 576 F.3d at 190 (“[T]o the extent a plaintiff alleges fraud claims against individual defendants, the plaintiff must allege facts supporting a strong inference of scierter as to each defendant.”); *S. Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 786 (9th Cir. 2008) (requiring additional facts on top of a “core operations” inference regarding the officer’s knowledge of fraud).

²²⁸ See *supra* notes 194–215 and accompanying text (discussing the benefits of heightened specificity requirements).

