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IMPORTANT WARNING OR DANGEROUS MISDIRECTION: RETHINKING CAUTIONS ACCOMPANYING INVESTMENT PREDICTIONS

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We are constantly bombarded with cautions warning us of dangers to our health or wellbeing. Sometimes, however, cautions increase the danger. This Article addresses one example: cautions warning investors of the risks that predictions regarding corporate performance will not pan out.

Here, the danger is investors falling prey to trumped up predictions of corporate performance, the result of which is to misallocate resources, increase the cost of capital for honest businesses, and create a drag on the overall economy. This Article shows how the typical cautions accompanying predictions of corporate performance facilitate rather than avoid this danger by misdirecting both investors and courts from looking at what they should: the credibility of the speaker in giving the prediction.

To solve this problem, this Article introduces a radically different approach to determining the legal impact of cautions accompanying predictions of corporate performance. This is to distinguish between cautions alerting investors to problems with the speaker's credibility in giving the prediction ("credibility cautions") versus those that simply list various risks that might lead the prediction to not pan out ("contingency cautions"). Only the former should provide a defense to claims of securities fraud based upon a failed prediction.

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INTRODUCTION

Because investors are essentially purchasing future flows of income, predictions of business income and performance are at the heart of every investment decision, whether it is to fund a startup venture or purchase shares on the stock exchange.[1] Yet, whether they involve politics, sports, war, or business, predictions commonly do not pan out. The predictable result is a continuous flow of litigation alleging securities fraud due to failed predictions regarding investments.[2]

This, in turn, creates a policy tension. If failed predictions regarding investments lead to liability, corporate managers and entrepreneurs will be deterred from making predictions.[3] This deprives investors of critical information in making investments. If, however, the law immunizes all failed predictions from producing liability, then the unscrupulous have free rein to spin out of thin air predictions that the person giving the prediction does not even believe. This can make predictions a tool for producing the negative consequences to the economy that the securities laws exist to prevent.[4]

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1. *E.g.*, Wielgos v. Commonwealth Edison Co., 892 F.2d 509, 514 (7th Cir. 1989) ("Investors value securities because of beliefs about how firms will do tomorrow, not because of how they did yesterday."); Homer Kripke, *The SEC, the Accountants, Some Myths and Some Realities*, 45 N.Y.U. L. REV. 1151, 1197, 1201 (1970).

2. *E.g.*, CORNERSTONE RSCH., SECURITIES CLASS ACTION FILINGS: 2021 YEAR IN REVIEW 13 (2022), https://www.cornerstone.com/wp-content/uploads/2022/02/Securities-Class-Action-Filings-2021-Year-in-Review.pdf (stating that claims based upon failed predictions made up over forty percent of securities class action filings).

3. *E.g.*, H.R. REP. NO. 104-369, at 43 (1995) (Conf. Rep.) [hereinafter Conf. Comm. Rep.] (asserting that the fear that inaccurate projections will trigger securities class action lawsuits has "muzzled corporate management").

4. *See infra* text accompanying notes 10–13.

Federal securities laws have sought to resolve this tension by attributing magical powers to cautions warning investors of risks that might prevent the prediction panning out. Specifically, the judicially created "bespeaks caution doctrine"[5] and a highly controversial provision in the Private Securities Litigation Reform Act of 1995 ("PSLRA")[6] enable speakers to avoid liability for failed predictions through cautions accompanying the predictions.

Unfortunately, courts applying this doctrine and statute have been looking at the wrong type of caution. These are lists of present facts or future events that might prevent the prediction from panning out.[7] Such cautions can facilitate fraud by misdirecting both the investors' and the courts' attention away from what they should focus on to avoid the danger. The focus should be on facts undermining the credibility of the speaker in giving the prediction and only cautions which warn investors of reasons to distrust the sincerity or basis of the prediction should serve as a defense to claims of fraud.[8]

The roadmap for developing this thesis and its implementation is as follows: Part I of this article lays the groundwork by describing the development of the law governing securities fraud, predictions, and cautions. Part II applies the concept of misdirection to cautions and fraudulent predictions by asking what cautions are helpful in detecting fraudulent predictions and what cautions are misdirection. It then compares the cautions typically accompanying corporate predictions—including in a hand-collected comprehensive set of court opinions with sufficiently detailed descriptions of the cautions given to allow comparison—and explains why cautions constituting misdirection rather than those helpful in detecting fraud are prevalent. Part III shows how the Supreme Court's decision in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*[9]—without courts or anyone else realizing it so far—provides authority for courts to adopt the approach suggested in this article.

5. *E.g.*, Saltzberg v. TM Sterling/Austin Assocs., 45 F.3d 399, 400 (11th Cir. 1995); Rubinstein v. Collins, 20 F.3d 160, 167 (5th Cir. 1994); *In re* Donald J. Trump Casino Sec. Litig.—Taj Mahal Litig., 7 F.3d 357, 371 (3d Cir. 1993).

6. 15 U.S.C. §§ 77z-2, 78u-5. This and two other provisions triggered President Clinton's veto of the PSLRA, which Congress overrode. *E.g.*, John W. Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 BUS. LAW. 335, 352–53 (1996) (explaining that President Clinton's veto message criticized the forward-looking statement safe harbor, the heightened standard for pleading state of mind, and the disparate treatment when imposing Rule 11 sanctions upon plaintiffs and defendants under the bill).

7. *See infra* text accompanying notes 114–116 and 146–161.

8. *See infra* text accompanying notes 114–124.

9. 575 U.S. 175 (2015).

I. THE LAW GOVERNING SECURITIES FRAUD, PREDICTIONS, AND CAUTIONS

Before getting into a discussion of what cautions protect against fraudulent predictions and what constitute misdirection, it is first necessary to understand the law in this area. This, in turn, calls for a brief tour of the purpose behind the prohibition of fraud in securities transactions, the tension presented by securities fraud claims based upon failed predictions, and the ambiguities created by courts and Congress viewing cautions as a magic bullet to resolve this tension.

A. The Objective

1. Lemons Markets and Securities Laws

The flow of information to investors and investment decisions based upon this information constitute the central nervous system of a capitalist economy.[10] Accurate information encourages capital going into producing things for which there is a demand and to those who are good at producing such things.[11]

Unfortunately, those who produce things for which there is not enough demand, or who are not very good at producing things for which there is, have an incentive to tell investors that there is a demand for the things they produce and that they are good at producing these things. Worse, it is commonly difficult for investors to distinguish between those providing accurate information about consumer demand and producer capabilities—often summarized in the form of predictions regarding future income and prospects for the business—and those who are not. This creates a "lemons" market in which many investments will turn out to be bad (lemons) because investors received inaccurate information, including worthless predictions.[12] This, in turn, misallocates resources, raises the cost of capital for everyone, and thereby serves as a drag on the economy.[13] Hence, the need for securities laws.

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10. *See, e.g.*, JOHN C. COFFEE ET AL., SECURITIES REGULATION CASES AND MATERIALS 8 (13th ed. 2015).

11. *E.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 673 (1984) ("Accurate information is necessary to ensure that money moves to those who can use it most effectively . . . .").

12. *See, e.g.*, *id.* at 674.

13. *Id.* at 673 ("A world with fraud, or without adequate truthful information, is a world with too little investment, and in the wrong things to boot.").

2. *Antifraud Rules Versus Other Approaches*

Broadly speaking, securities laws take three approaches to addressing this lemons market problem, which correspond to three different levels of government intervention.[14] The minimum approach is to prohibit false or misleading statements to prospective investors about businesses and investments (in other words, prohibit fraud in connection with selling securities).[15] This is common in securities laws[16] and an obvious response to the lemons market problem.

While the prohibition of fraud is common in securities laws, a more controversial component of the antifraud rules in the United States is the availability of express or implied private rights of action under which defrauded parties can pursue a class action against those committing the fraud.[17] This adds to deterrence by increasing the number of enforcement actions brought against those committing fraud.[18] It also leads to complaints about meritless actions brought against companies making innocent mistakes in their communications with investors, including predictions that turn out wrong.[19]

The most intrusive government intervention to address the lemons market problem is to require the government to approve the merits of any stock or other investments in a business (securities) before the stock or other securities can be sold to the public. This is found in some state securities (blue-sky) laws.[20]

In between the minimum of the antifraud rules and the maximum of government merit approval of securities are laws like provisions in the 1933

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14. *E.g.*, FRANKLIN A. GEVURTZ, CORPORATION LAW 539 (3d ed. 2021).

15. *See, e.g.*, 15 U.S.C. § 77q (prohibiting false or misleading statements in offering or selling securities).

16. *E.g.*, Easterbrook & Fischel, *supra* note 11, at 679 (before the prohibitions of fraud in the federal securities laws, every state had a rule against fraud in selling securities); MARC I. STEINBERG ET AL., GLOBAL ISSUES IN SECURITIES LAW 129 (2013) ("To be sure, most foreign countries proscribe securities fraud." (quoting Brief for the Republic of France as Amicus Curiae Supporting Respondents at 20, Morrison v. Austl. Nat'l Bank, 561 U.S. 247 (2010))).

17. *See infra* notes 41–45 and accompanying text.

18. *E.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (arguing that a private cause of action for false or misleading proxy solicitations supplements the limited resources of the SEC in detecting violations of the antifraud provision); Daniel J. Morrissey, *Shareholder Litigation After the Meltdown*, 114 W. VA. L. REV. 531, 546 (2012). The ability of investors to diversify and the circularity problem of investors suing the company they own and thereby funding their own recovery make the goal of compensating investors problematic. *E.g.*, Martin Gelter, *Global Securities Litigation and Enforcement*, *in* GLOBAL SECURITIES LITIGATION AND ENFORCEMENT 46–51 (Pierre-Henri Conac & Martin Gelter eds., 2019).

19. *See infra* note 71 and accompanying text.

20. *See, e.g.*, CAL. CORP. CODE § 25140 (1968) (preventing the sale of securities in California if the Corporations Commissioner does not find the investment to be "fair, just, and equitable").

Securities Act[21] and the 1934 Securities Exchange Act,[22] which impose disclosure obligations upon those selling securities and upon publicly traded corporations. The idea is to avoid the paternalism of requiring government approval of the merits of securities and let investors make their own decisions, but, at the same time, try to ensure that investors are fully informed in making such decisions.[23]

For our purposes what is critical is to understand where cautions fit into this. Some cautions given to investors exist in response to the mandatory disclosure regime created by the Securities and the Securities Exchange Acts. For example, Securities and Exchange Commission ("SEC") guidelines for a prospectus used to sell securities under the Securities Act,[24] as well as for annual filings under the Securities Exchange Act,[25] call for the document to contain a discussion of risk factors facing those purchasing the securities offered under the prospectus or issued by the company filing the annual disclosure. The concern of this Article, however, is not with what sort of cautions provide generally useful information aiding investors to make more intelligent decisions and so might be part of mandatory disclosure.

Instead, this Article is concerned with what cautions should provide a defense under the antifraud rules. Specifically, the bespeaks caution doctrine[26] and the meaningful cautions safe harbor under the PLSRA[27] are concerned with litigation arising under provisions of the Securities and the Securities Exchange Acts that establish express or implied private causes of action against persons making false or misleading statements.

It is important to keep this context in mind when discussing what sort of cautions should provide a defense under the bespeaks caution doctrine and the PSLRA safe harbor. Specifically, much of the muddled thinking on this

21. 15 U.S.C. § 77e (prohibiting the offer or sale of a security without registration and disclosure).

22. *Id.* § 78*l*(a), (g) (imposing registration and disclosure requirements on companies with shares listed on a stock exchange or held by over a certain number of shareholders).

23. *See, e.g.*, COFFEE, *supra* note 10, at 76 ("'[M]erit regulation' . . . contrasted sharply with the disclosure philosophy of the federal securities laws, which expects investors to protect their own interests once full disclosure is made.").

24. U.S. SEC. & EXCH. COMM'N, OMB 3235-0065, FORM S-1: REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933, at 4 (Jan. 2022), https://www.sec.gov/files/forms-1.pdf.

25. U.S. SEC. & EXCH. COMM'N, OMB 3235-0063, FORM 10-K: ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934, at 1 (Jan. 2023), https://www.sec.gov/about/forms/form10-k.pdf.

26. *E.g.*, *In re* Donald J. Trump Casino Sec. Litig.—Taj Mahal Litig., 7 F.3d 357, 371 (3d Cir. 1993) (bespeaks caution doctrine allows dismissal of securities fraud claims).

27. The PSLRA safe harbor, when its terms are met, insulates a party making a forward-looking statement (prediction) from liability "in any private action arising under this subchapter that is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading . . . ." 15 U.S.C. §§ 77z-2(c)(1), 78u-5(c)(1).

topic[28] results from confusing the broader approach of the mandatory disclosure regime, which seeks to provide investors the full panoply of material information to enable them to make intelligent decisions, and the narrower but critical approach of the antifraud rules, which seek to block misinformation that makes investment decisions worse than if investors had not received that information at all. As we shall discuss later,[29] the cautions that the mandatory disclosure rules might reasonably call for are different from the cautions relevant to the antifraud rules.

B. The Failed Prediction Problem and the Search for a Solution

1. The SEC's 180 Regarding Predictions

One approach to deal with the failure of predictions involving business income and performance to pan out is to bar giving predictions to investors. In fact, the SEC until the 1970s forbade the inclusion of predictions in disclosure documents required under the securities laws.[30] The SEC's view was that predictions were inherently misleading as suggesting to investors an expertise to forecast the future of a business that does not exist.[31]

After considerable debate and studies, the SEC's attitude changed in the 1970s.[32] Indeed, it ultimately flipped 180 degrees from banning predictions to encouraging[33] and then even to some extent mandating predictions in the Management Discussion and Analysis portions of disclosure documents.[34]

This left the problem, however, of what to do if a prediction failed to pan out and investors sue. It is difficult to encourage, much less mandate, predictions if they turn into an insurance policy for investors to get their

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28. *See, e.g.*, Susanna Kim Ripken, *Predictions, Projections and Precautions: Conveying Cautionary Warnings in Corporate Forward-Looking Statements*, 2005 U. ILL. L. REV. 929, 980 (explaining that incomplete cautions "miss the point of securities regulation in general, i.e., to provide investors with material information from which they can make reasonably informed choices").

29. *See infra* text accompanying notes 119–120.

30. *E.g.*, Safe Harbor for Forward-Looking Statements, Securities Act Release No. 33-7101, Exchange Act Release No. 34-34381, Investment Company Act Release No. 20619, 59 Fed. Reg. 52723, 52723–24 (proposed Oct. 19, 1994) (codified at 17 C.F.R. pt. 240).

31. *E.g.*, Harry Heller, *Disclosure Requirements Under Federal Securities Regulation*, 16 BUS. LAW. 300, 307 (1961).

32. *E.g.*, Statement by the Commission on the Disclosure of Projections of Future Economic Performance, Securities Act Release No. 5362, Exchange Act Release No. 9984, 1 SEC Docket 1, 4 (Feb. 2, 1973).

33. Guides for Disclosure of Projections for Future Economic Performance, Securities Act Release No. 33-5992 (Nov. 7, 1978).

34. FORM 10-K, *supra* note 25, at 9; SEC Reg. S-K, Item 303(a)(3)(ii), 17 C.F.R. § 229.303(a)(3)(ii) (2022). The regulation does not require predictions, however, but rather a discussion of present facts and trends expected to impact future results. SEC Reg. S-K, Item 303(a)(3)(ii), 17 C.F.R. § 229.303(a)(3)(ii) (2022).

money back in the event the prediction proves inaccurate. The SEC responded by developing a so-called safe harbor within which failed predictions would not violate the antifraud provisions of the securities laws.[35]

The development of the SEC safe harbor impacted the law on failed predictions and securities fraud in two ways. The first was to begin the law's focus on cautions listing contingencies that might prevent the prediction panning out. Specifically, early proposals for the safe harbor required accompanying the prediction with a caution that warned investors of the potential for the future to deviate from the prediction.[36]

Ultimately, the SEC backed off from an effort to include such an express condition. Under the SEC safe harbor as adopted, predictions in disclosure documents filed with the SEC do not to violate the antifraud rules if the predictions were made in good faith and had a reasonable basis.[37] In its release explaining its safe harbor, however, the SEC left the door open to a further possibility of liability by stating that disclosure of the key assumptions underlying the prediction may be necessary to meet the good faith and reasonable basis standard.[38] This suggested that plaintiffs might be able to sue based upon the failure to warn of important contingencies (things that the prediction assumes are not going to go wrong) that could prevent the prediction from panning out, thereby furthering the impetus for this sort of caution.

The other impact from the SEC's development of its safe harbor is that the good faith and reasonable basis test promulgated in the safe harbor ended up being significant in the efforts of federal courts to figure out when a failed prediction equals fraud.[39]

2. *Federal Court Efforts to Figure Out When a Failed Prediction Equals a False or Misleading Statement of Fact*

The failure of predictions given to investors to pan out has long provoked lawsuits under several provisions of the federal securities laws.[40]

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35. 17 C.F.R. §§ 230.175, 240.3b-6 (2004).

36. Notice of Proposed Rule 132, Securities Act Release No. 5581, Exchange Act Release No. 11,374, 6 SEC Docket 746, 748 (Apr. 28, 1975) (proposing safe harbor that would require that the projection "be accompanied by a statement which (1) discloses the material assumptions underlying the projection, (2) cautions that there can be no assurance that the projection will be achieved since its ultimate achievement is dependent upon the occurrence of the specified assumptions").

37. *See supra* note 35.

38. Safe Harbor Rule for Projections; Final Rule, Securities Act Release No. 6084, Exchange Act Release No. 15,994, 44 Fed. Reg. 38810 (July 2, 1979) (to be codified at 17 C.F.R. pts. 230, 240, 250, 260).

39. *See infra* notes 51–53 and accompanying text.

40. *E.g.*, Freed v. Szabo Food Serv., Inc., [1961–1964 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,317 (N.D. Ill. 1964).

The primary one is Rule 10b-5,[41] which the SEC promulgated pursuant to its authority under Section 10(b) of the Securities Exchange Act.[42] This rule prohibits false or misleading statements of material fact, as well as other forms of fraud, in connection with the purchase or sale of a security.[43] Federal courts have held that there is an implied cause of action for those injured by a violation of the rule to sue those violating the rule.[44] Section 11 of the Securities Act[45] expressly creates a cause of action for parties purchasing securities sold under a registration statement containing a false or misleading statement of material fact to sue a variety of persons including the issuer of the securities. Because Section 11, unlike Rule 10b-5,[46] does not require proof that the defendants intended to deceive,[47] it can be more attractive to plaintiffs when it applies than Rule 10b-5.

The question of when a failed prediction equals a false or misleading statement of fact for purposes of these provisions is not straightforward. A simple-minded answer would be that a prediction is false if it turns out to be wrong. As suggested above, this can turn predictions into insurance policies for investors. Hence, not surprisingly, federal courts uniformly hold that the mere failure of a prediction to pan out does not make it a false or misleading statement of fact.[48]

Beyond that, things became less clear. One early leading case stated that an earnings forecast was false or misleading if not based on facts from which a reasonably prudent investor would conclude that it was highly probable that the forecast would be realized or if any assumptions underlying the forecast were not disclosed and their validity was sufficiently in doubt to deter a reasonable investor from accepting the forecast.[49] A later decision invoked a multifactor test to determine whether a failed prediction was false.[50]

Most federal courts, however, ended up looking directly or indirectly to the good faith and reasonable basis formulation in the SEC's safe harbor. This formulation became more than just a safe harbor applicable to

41. 17 C.F.R. § 240.10b-5 (2004).

42. 15 U.S.C. § 78j(b).

43. 17 C.F.R. § 240.10b-5 (2004).

44. *E.g.*, Basic Inc. v. Levinson , 485 U.S. 224, 230–31 (1988).

45. 15 U.S.C. § 77k.

46. *E.g.*, Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

47. *E.g.*, Herman & MacLean v. Huddleston, 459 U.S. 375, 381, 388–89 (1983).

48. *E.g.*, Isquith v. Middle S. Utils., Inc., 847 F.2d 186, 203–04 (5th Cir. 1988); Polin v. Conductron Corp., 552 F.2d 797, 805 (8th Cir. 1977); Marx v. Comput. Scis. Corp., 507 F.2d 485, 490 (9th Cir. 1974).

49. Beecher v. Able, 374 F. Supp. 341, 348 (S.D.N.Y. 1974).

50. *Isquith*, 847 F.2d at 204 (considering "whether the prediction suggested reliability, bespoke caution, was made in good faith, or had a sound factual or historical basis").

predictions in documents filed with the SEC. It[51] and its variations[52] became the dominant definition of when a failed prediction is false or misleading.[53] This meant that predictions were false or misleading if they were not made in good faith (in other words, believed by the speaker) and with a reasonable basis—to which some courts added the need to disclose facts that seriously undermine the prediction.[54]

3. The Bespeaks Caution Doctrine

In addition to the question of when a failed prediction constitutes a false or misleading statement of fact, federal courts faced the question of what, if any, impact do cautions that accompanied a failed prediction have on potential liability under federal securities law. From a couple of federal court of appeals decisions which referenced cautionary language found in the defendants' disclosure documents as "bespeaking caution"[55] grew broad acceptance among federal courts of the notion that cautions accompanying predictions can preclude liability when the predictions turn out to be wrong—the bespeaks caution doctrine.[56] A less noticed flipside in some of the decisions addressing the impact of cautions are statements that failing to provide adequate cautions could render the prediction misleading.[57]

The rationale behind the bespeaks caution doctrine has been something of a mystery.[58] Some court opinions viewed cautions under the bespeaks

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51. *E.g.*, Schwartz v. System Software Assocs., Inc., 32 F.3d 284, 289–90 (7th Cir. 1994) (describing the jury instruction, which embodied SEC safe harbor test).

52. *E.g.*, *In re* Time Warner Inc. Sec. Litig., 9 F.3d 259, 266 (2d Cir. 1993) (explaining that predictions are fraudulent if "the defendants either did not have these favorable opinions on future prospects when they made the statements or . . . the favorable opinions were without a basis in fact").

53. *E.g.*, Hugh C. Beck, *The Substantive Limits of Liability for Inaccurate Predictions*, 44 AM. BUS. L.J. 161, 173 n.37 (2007) ("[D]uring the 1980s and 1990s, the Second, Third, Fifth, Sixth, Seventh, D.C., and Eighth Circuits all applied variations of the Rule 175 test [the SEC safe harbor] to evaluate the falsity of projections not included in Commission filings [and hence not covered by the safe harbor].").

54. *E.g.*, *In re* Apple Comput. Sec. Litig., 886 F.2d 1109, 1113 (9th Cir. 1989) ("A projection or statement of belief contains at least three implicit factual assertions: (1) that the statement is genuinely believed, (2) that there is a reasonable basis for that belief, and (3) that the speaker is not aware of any undisclosed facts tending to seriously undermine the accuracy of the statement. A projection or statement of belief may be actionable to the extent that one of these implied factual assertions is inaccurate.").

55. Luce v. Edelstein, 802 F.2d 49, 56 (2d Cir. 1986); Polin v. Conductron Corp., 552 F.2d 797, 805, 806 n.28 (8th Cir. 1977).

56. *See supra* note 5.

57. *See, e.g.*, Goldman v. Belden, 754 F.2d 1059, 1068 (2d Cir. 1985) ("[T]he claim here is that there was no note of caution in the defendants' statements and that defendants knew caution was warranted.").

58. *E.g.*, Jennifer O'Hare, *Good Faith and the Bespeaks Caution Doctrine: It's Not Just a State of Mind*, 58 U. PITT. L. REV. 619, 630 (1997).

caution doctrine as rendering a failed prediction not false or misleading.[59] A few suggested that cautions under the bespeaks caution doctrine might prevent the plaintiff from showing reliance on the false or misleading prediction.[60] Other courts explained that cautions under the bespeaks caution doctrine can render a false or misleading prediction immaterial.[61] Ultimately, the U.S. Court of Appeals for the Third Circuit's influential decision in *In re Donald J. Trump Casino Securities Litigation—Taj Mahal Litigation*,[62] led to the materiality rationale becoming the predominant view.[63]

Trump was an action brought by investors who purchased bonds issued to fund the construction of Trump's Taj Mahal hotel and casino in Atlantic City. They sued after the Trump-controlled issuer went bankrupt and defaulted on the bonds.[64] They alleged that the statement in the offering prospectus that the issuer "believes that funds generated from the operation of the Taj Mahal will be sufficient to cover all of its debt service" was misleading because the defendants lacked a genuine or reasonable belief in its truth.[65]

In affirming the dismissal of the plaintiffs' complaint, the Third Circuit explicitly adopted the view that cautions can deprive a misleading prediction of materiality.[66] To have this impact, the court explained, the cautions must ordinarily be more than mere boilerplate recitals that the prediction might not pan out. Instead, the cautions must be tailored to the specific risks of this investment.[67] Quoting the various cautions outlining the risks facing new casino construction in Atlantic City, especially for a project of the size of the proposed Taj Mahal casino, the court found that the cautions given by the Trump-controlled borrower were sufficiently specific and tailored to the risk of this investment.[68]

Interestingly, however, the court never really explained how these cautions deprived the prediction of materiality. True, these cautions pointed out in some detail that there was a risk that the casino would not produce the income to pay the bonds. Is this supposed to mean that the reasonable investor would not have found the prediction of repayment (which the defendants

59. *E.g.*, Sinay v. Lamson & Sessions Co., 948 F.2d 1037, 1040–41 (6th Cir. 1991).

60. *In re* Splash Tech. Holdings, Inc., Sec. Litig., No. C99-00109 SBA, 2000 WL 1727377, at *9 (N.D. Cal. Sept. 29, 2000); *In re* Towers Fin. Corp. Noteholders Litig., No. 93 CIV.0810 (WK)(AJP), 1996 WL 393579, at *15–17 (S.D.N.Y. July 15, 1996).

61. *E.g.*, *In re* Worlds of Wonder Sec. Litig., 35 F.3d 1407, 1416 (9th Cir. 1994).

62. 7 F.3d 357 (3d Cir. 1993).

63. *E.g.*, Beck, *supra* note 53, at 195.

64. *Trump*, 7 F.3d at 365.

65. *Id.*

66. *Id.* at 371.

67. *Id.* at 371–72.

68. *Id.* at 370–72.

allegedly did not genuinely or reasonably believe) to be important in deciding whether to buy the bonds? To answer this question, one must ask another: Would the reasonable investor still have purchased the bonds if the defendants had said that they did not expect the casino's income to be sufficient to service the debt? If not, how can the court say that the cautions deprived the prediction regarding repayment of materiality?

Following *Trump* as a model, cases applying the bespeaks caution doctrine typically focus on whether the cautions are boilerplate or tailored to the risks of the specific investment.[69] Yet, left without a cogent explanation is how cautions, even when geared to the specific risks of the investment at issue, deprive a false or misleading prediction of materiality.

4. *The PSLRA Safe Harbor for Forward-Looking Statements*

While the PSLRA addresses much more than securities fraud litigation triggered by failed predictions,[70] such claims were a major source of concern in Congress's enactment of the statute. A narrative behind the statute was that some lawyers were bringing meritless securities fraud lawsuits when corporate predictions regarding future earnings or the like failed to pan out with the plan of negotiating a settlement based upon the nuisance value of the lawsuit that resulted from burdensome discovery.[71] Not only did this impose costs on corporations, but it deterred companies from making predictions and thereby deprived investors of this important information.[72]

To address this narrative, the PSLRA created a safe harbor for "forward-looking statements" (predictions).[73] Congress excluded from the safe harbor certain transactions (such as initial public offerings, tender offers, and blank-check and penny stock offerings) and parties (such as non-corporate entities, investment companies, and so-called bad actors),[74] where Congress felt that the danger of fraudulent predictions outweighed the danger of meritless lawsuits. Where it applies, the safe harbor can insulate companies issuing securities registered under the Securities Exchange Act from liability in a

69. *E.g.*, Paradise Wire & Cable Defined Benefit Pension Plan v. Weil, 918 F.3d 312, 319–20 (4th Cir. 2019) (holding that extensive specifically tailored cautionary language precluded a finding of materiality); Warshaw v. Xoma Corp., 74 F.3d 955, 959 (9th Cir.1996) (question of fact as to whether cautionary language was sufficiently specific); Semerenko v. Cendant Corp., 223 F.3d 165, 183 (3d Cir. 2000) (cautionary language was not sufficiently specific). *But see* Schwartz v. Michaels, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,920 (S.D.N.Y. July 22, 1992) (treating boilerplate cautions as sufficient).

70. *E.g.*, Avery, *supra* note 6, at 357–77 (discussing various provisions in the PSLRA).

71. *E.g.*, Conf. Comm. Rep., *supra* note 3, at 31–32 (describing the abuses of securities fraud actions that motivated the PSLRA).

72. *See* Conf. Comm. Rep., *supra* note 3.

73. 15 U.S.C. §§ 77z-2, 78u-5. Not all predictions, however, come within the definition of a forward-looking statement.

74. 15 U.S.C. §§ 77z-2(b), 78u-5(b).

private action claiming that a forward-looking statement made by the issuer constitutes an untrue statement of fact or omits to state material facts which makes it misleading.[75]

To gain this protection, the forward-looking statement must fall within any one of several prongs: (1) The forward-looking statement is labeled as such and accompanied by meaningful cautionary statements; (2) the forward-looking statement is immaterial; or (3) the plaintiff fails to prove that the individual who made the forward-looking statement (or the company official who made or approved the statement in the case of statements issued in the name of the company) knew that the statement is false or misleading.[76] The first prong is the focus of our attention.

Several issues can arise under the first prong. This includes what constitutes a forward-looking statement,[77] when is it properly identified as such,[78] and when do cautionary statements accompany the forward-looking statement.[79] This Article's concern is which cautions are "meaningful."

A noted judicial discourse on what are meaningful cautions occurs in Judge Easterbrook's opinion in *Asher v. Baxter International Inc*.[80] Judge Easterbrook began by observing that the phrase "'meaningful cautionary statements' is not itself meaningful."[81] He dismissed as too little defining a meaningful cautionary statement as simply pointing out that there are risks the prediction will not pan out.[82] He rejected as too much defining meaningful cautionary statements to require disclosure of all important factors that could cause the prediction to fail.[83] This, he argued, would mean that there is no misleading omission and thus no function for the safe harbor.[84]

Having dismissed these two polar interpretations of meaningful, Judge Easterbrook meandered through an extended discussion of what sort of information would be most useful to investors: "What investors would like to have is a full disclosure of the assumptions and calculations *behind* the projections; then they could apply their own discount factors."[85] Counseling against this interpretation of meaningful cautionary statements, however,

75. 15 U.S.C. §§ 77z-2(c)(1), 78u-5(c)(1).
76. *Id.* §§ 77z-2(c)(1), 78u-5(c)(1).
77. *E.g.*, Berson v. Applied Signal Tech., Inc., 527 F.3d 982, 990 (9th Cir. 2008).
78. *E.g.*, Helwig v. Vencor, Inc., 251 F.3d 540, 558–62 (6th Cir. 2001).
79. *E.g.*, Miller v. Champion Enters., Inc., 346 F.3d 660, 677–78 (6th Cir. 2003).
80. 377 F.3d 727 (7th Cir. 2004).
81. *Id.* at 729.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 733.

Judge Easterbrook argued is the need for companies to keep secrets from their competitors.[86]

In the end, Judge Easterbrook punted on trying to define meaningful cautions. Instead, he resolved the case by pointing out that it was unclear at the pleading stage whether the cautions included the "principal or important" or "major" risks that might lead the company's predictions to fail.[87] Particularly troublesome was the fact that the company's cautionary statements remained unchanged even though the situation facing the company did change.[88]

Judge Easterbrook's discourse illustrates the confused thinking discussed earlier in this Article between the role of cautions in mandatory disclosure versus antifraud rules. Judge Easterbrook is not writing as a member of the SEC balancing the utility of information to investors against business reasons for keeping secrets to decide what information the SEC should require companies to disclose. The issue before the court was what cautions should preclude liability for making a false or misleading prediction.[89]

Presumably, this requires asking how cautions protect investors from a false or misleading prediction. The plaintiffs alleged that Baxter's predictions were false or misleading because Baxter failed to disclose various facts suggesting that the predictions might not pan out.[90] If this made predictions false or misleading, then how was disclosure of a different set of risks supposed to cure that?

In *Harris v. Ivax Corp.*,[91] the court presented a theory to answer this question. *Harris* held that if cautions described a factor, which could have caused the prediction not to pan out and was similar in significance to the event that ultimately caused the prediction to fail, then the defendant provided meaningful cautionary statements.[92]

At first glance this seems sensible. If investors know about risks of a certain significance that the prediction will not pan out, then what difference does it make that they were not warned about other risks of the same or less significance? A minimal understanding of statistics, however, exposes a flaw in this reasoning: Risks can be cumulative. As a simple and admittedly extreme example, assume a corporation issues a prediction in a situation in which there are only three possible outcomes, each with an equal chance of

86. *Id.*
87. *Id.* at 734.
88. *Id.*
89. *Id.* at 728.
90. *Id.* at 728–29.
91. 182 F.3d 799 (11th Cir. 1999).
92. *Id.* at 807.

occurring: (1) prediction pans out; (2) prediction fails because of event ‘A’; (3) prediction fails because of event ‘B.’ Under *Harris*, giving the prediction with a caution explaining that it will not pan out if event ‘A’ occurs, but without mentioning event ‘B,’ would be sufficient. Yet, the additional undisclosed risk of event ‘B’ creates a dramatically greater likelihood of the prediction not panning out than if the only risk was event ‘A.’[93]

Asher and *Harris* are emblematic of the difficulty courts have had in figuring out the meaning of meaningful cautionary statements.[94] Further evidencing this difficulty, other decisions have disagreed on what, if any, cautions can be meaningful when addressing a knowingly false prediction[95] and the sufficiency of relatively similar warnings.[96]

All told, the court opinions applying the bespeaks caution doctrine or addressing meaningful cautionary statements under the PSLRA show the need to go back to square one and ask which cautions can, and which cautions cannot, defuse the danger posed by fraudulent predictions. We next turn to this inquiry.

II. FRAUDULENT PREDICTIONS, CAUTIONS, AND MISDIRECTION

Having set up the problem, we can now discuss what sort of caution can defuse the danger posed by a fraudulent prediction and what sort of caution cannot. Then, we can compare the sort of caution issuers normally provide and that courts address and explore the reason for the disconnect between cautions useful in avoiding fraudulent predictions and the cautions commonly used and discussed in the cases.

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93. This hypothetical measures “significance” in terms of probability of occurring. The same problem exists if one measures significance in terms of the magnitude of the consequences. So, for example, if a prediction of future earnings mentions one event that would cause the company to lose $100 million, but not a second distinct event that did cause the company to lose $100 million, the ex-ante risk created by the two potential events is $200 million not $100 million.

94. *See, e.g.*, Slayton v. Am. Express Co., 604 F.3d 758, 771 (2d Cir. 2010) (“We find Congress’s directions [regarding what are meaningful cautionary statements] difficult to apply in this case.”).

95. *Compare Harris*, 182 F.3d at 807 n.10 (finding knowledge of falsity is only relevant if cautions inadequate), *with* ABF Cap. Mgmt. v. Askin Cap. Mgmt., 957 F. Supp. 1308, 1325 (S.D.N.Y. 1997) (“No cautionary statements can immunize the defendants if they knew or recklessly disregarded that these representations were false at the time they were made.”).

96. *Compare In re* PLC Sys., Inc. Sec. Litig., 41 F. Supp. 2d 106, 118 (D. Mass. 1999) (holding that warning of possible delay in getting FDA approval was adequate), *with In re* Amylin Pharms., Inc. Sec. Litig., No. 01CV1455BTM, 2002 WL 31520051, at *9–10 (S.D. Cal. Oct. 10, 2002) (holding that warning of possible need for additional testing to get FDA approval was insufficient).

A. *What Cautions Are Helpful in Detecting Fraudulent Predictions and What Cautions Are Misdirection?*

1. *Watching Out for Misdirection*

One approach to the topic of predictions and cautions seeks to apply the insights of psychology and consumer warnings to come up with recommendations designed to present cautions in a manner more impactful on investors.[97] I prefer to start with the insight of magicians.

Misdirection is critical to most magic tricks.[98] The magician must direct the audience's attention away from the sleight of hand or mechanical gimmick effectuating the trick. Conventionally, this is done by directing the audience's attention to disproving a series of possibilities (e.g., wires, false bottoms) that the audience suspects might be the key to the trick. This misdirection provides entertainment value but also keeps the audience from looking at what is really going on.

Misdirection, of course, is used in more serious contexts. In war, it leads the enemy to believe that the Allied invasion will occur in Calais when it really occurs in Normandy.[99] In politics, it distracts voters' attention from issues politicians do not wish to discuss.[100] In fraud, it steers the "mark" away from what the "mark" should focus on to realize there is fraud.[101] So, what should the investor and, in turn, the courts, focus on when it comes to fraudulent predictions and what is misdirection?

2. *What Makes a Prediction Important to the Investor?*

To understand what investors and courts should focus on to protect against trickery in predictions, we need to begin by discussing in more depth what gives the prediction its importance to the investor.

The importance of a prediction from corporate managers, entrepreneurs, and the like to the investor does not come simply from the fact that investments are all about future flows of income. After all, the investor could make the investor's own prediction based upon raw data from the company,

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97. Ripkin, *supra* note 28, at 982–85.

98. *E.g.*, T.A. WATERS, THE ENCYCLOPEDIA OF MAGIC AND MAGICIANS 232 (1988).

99. *E.g.*, ANTONY BEEVOR, D-DAY: THE BATTLE FOR NORMANDY 3 (2009).

100. *E.g.*, Richard Denniss, *Politicians Are Like Magicians, Tricking Us into Looking at the Wrong Things*, GUARDIAN (Apr. 16, 2019), https://www.theguardian.com/commentisfree/2019/apr/17/politicians-are-like-magicians-tricking-us-into-looking-at-the-wrong-things.

101. *E.g.*, Bob Sullivan, *The Real Hustle Meets the Perfect Scam: My Conversation with TV Con Man Alexis Conran*, BOBSULLIVAN.NET (May 2, 2022), https://bobsullivan.net/cybercrime/the-real-hustle-meets-the-perfect-scam-my-conversation-with-tv-con-man-alexis-conran.

the entrepreneur, or other sources. So, why listen to someone else's prediction?

The answer is the same as the reason people listen to any opinion: Opinions provide a bottom-line judgment from a person with some expertise on the matter. Hence, the patient listens to the doctor because the doctor is the expert, and the patient is not. Similarly, the corporate manager's or entrepreneur's greater familiarity with the business gives utility to the manager's or entrepreneur's judgment as to the business' future income and prospects.[102]

The common law dealing with fraud from opinions encapsulates this understanding of an opinion's utility. While common law cases dealing with misrepresentation claims based upon opinions are often confusing, one strand in these cases is to allow claims against speakers with specialized expertise or knowledge but not against those with equal expertise or knowledge to the listener.[103]

The evolution discussed above in the approach of securities law toward predictions also reflects this view of a prediction's utility. Given that investors are purchasing future flows of income, the SEC's historic "just the facts" attitude[104] necessarily embodied the idea that investors are to use their own judgment as to what the future holds based upon raw data (such as reported earnings) rather than obtain any guidance from the judgment of corporate managers or entrepreneurs. The SEC's reversal to not just allowing soft information but even encouraging and then requiring it in the "Management Discussion and Analysis" portions of mandatory disclosure documents is based upon the view that the expert judgment of corporate managers has value beyond the raw data. As the SEC explained, "management's assessment of a company's future performance is information of significant importance to the investor."[105]

The PSLRA's safe harbor for forward-looking statements is based upon this same view. Motivating the safe harbor was a concern about muzzling

102. *E.g.*, Easterbrook & Fischel, *supra* note 11 at 673. Some studies complicate but do not change this. For example, there is evidence that the act of managers being confident enough to venture a favorable prediction may be more significant to investors than the precise contents of the prediction. *See, e.g.*, James D. Cox, *Insider Trading Regulation and the Production of Information: Theory and Evidence*, 64 WASH. U. L.Q. 475, 493–95 (1986). Even so, the investor's positive inference from the manager's willingness to issue the forecast reflects the assumption that the manager has expertise worth considering.

103. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 542(a) cmts. d, f (AM. L. INST. 1977).

104. *See supra* notes 31–32 and accompanying text.

105. Securities Act Release No. 33,5362, *supra* note 32, at 4; *see also* Merritt Fox et al., *Law, Share Price Accuracy, and Economic Performance: The New Evidence*, 102 MICH. L. REV. 331, 380–81 (2003) (finding that the SEC's mandate to include some forward-looking information in the Management Discussion and Analysis portion of periodic disclosure documents improved the accuracy of stock prices in U.S. markets).

management through fear of liability.[106] This, in turn, reflects a view that the corporate manager's expert opinion is valuable to investors. As the Conference Committee report on the PSLRA states: "Understanding a company's own assessment of its future potential would be among the most valuable information shareholders and potential investors could have about a firm."[107]

3. *Expert Judgment and Fraudulent Predictions*

Now that we understand what gives a prediction its utility, we can form a clearer notion of what constitutes the "trick" with a fraudulent prediction. What deprives a prediction of its essential value and makes it false or misleading is when it is not what it purports to be: a bottom-line judgment of someone applying their expertise. In other words, the trick with a fraudulent prediction is that investors thought they were getting an expert judgment but were getting something else entirely.

This is simplest with a prediction that the speaker does not in fact believe. Doctrinally, courts applying the common law reasoned that a statement as to what the speaker thinks is a statement of fact—that the speaker in fact thinks what the speaker expressly or implicitly says the speaker is thinking.[108] This means that a statement of opinion (including a prediction) is false if the speaker does not believe the opinion the speaker expresses.[109]

There is more going on here, however, than just doctrinal logic. The whole utility of an opinion (including a prediction) lies in the value that the listener places on the bottom-line judgment of the speaker. Hence, a speaker's stating one opinion but holding another deceives the listener on the very essence of what the listener values in considering an opinion. When the listener is justified in relying on the speaker's opinion due to the speaker's specialized expertise, then the law will protect the listener from such deceit even when the speaker has an adverse economic interest to the listener.[110]

Things become much more complex when we shift from predictions or other opinions the speaker does not believe to situations in which there is no direct evidence of such disbelief, but the speaker's belief seems to owe more to faith than facts. For example, the speaker might not have checked into the facts much before expressing the prediction or other opinion. Alternately, the

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106. *See supra* text accompanying notes 71–72.

107. Conf. Comm. Rep., *supra* note 3, at 43 (quoting testimony of former SEC Chairman Richard Breeden).

108. *E.g.*, Vulcan Metals Co. v. Simmons Mfg. Co., 248 F. 853, 856 (2d Cir. 1918).

109. *E.g.*, *id.* ("An opinion is a fact . . . ; the expression of an opinion is the assertion of a belief . . . .").

110. *E.g.*, *id.*; RESTATEMENT (SECOND) OF TORTS § 542(a) cmts. d, f (AM. L. INST. 1977).

speaker might be aware of facts suggesting that the prediction or other opinion is likely to turn out to be wrong. For example, assume that a doctor gives a patient a diagnosis without running tests necessary to establish the diagnosis or that is inconsistent with the patient's symptoms.

There are several implications of this situation. At one end, the issues with the factual basis for the doctor's diagnosis, or for a prediction given to investors, increases the risk that the diagnosis or investment prediction is wrong. Yet, medical diagnoses or investment predictions are often wrong. We need to find something different in kind, not just degree, to say that the diagnosis or investment prediction is no longer what it purports to be and has lost its essential value as a bottom-line judgment by a person with expertise—put differently, is false or misleading.

At the other end, the problems with the factual basis for the doctor's diagnosis, or for a prediction given to investors, might lead the cynic to question whether the doctor really believed the diagnosis, or the corporate manager really believed the prediction for investors. In this case, we are back to predictions or other opinions that the speaker does not in fact believe—but the lack of belief is inferred rather than established with direct evidence as to the speaker's thoughts.

Between these polar ends, one might say that the doctor or corporate manager is negligent. Indeed, the doctor's diagnosis in my example would likely lead to a malpractice suit. But our concern is with securities fraud—false or misleading statements—not with negligence. From a policy standpoint, penalizing negligent predictions based upon a jury or judge's assessment that, with the benefit 20-20 hindsight, the prediction lacked a reasonable basis risks discouraging useful predictions. In fact, doctors complain all the time that the threat of malpractice suits makes them reluctant to make a diagnosis without running unnecessary tests.[111]

Yet, a different implication is that the reasonable patient or investor, who had learned of the problems with the factual predicate before acting, would have disregarded the diagnosis or the prediction. This is not simply because of the increased risk that it is wrong, but because the reasonable patient or investor would have lost confidence in the doctor or corporate manager as a person whose expertise gives value to that person's bottom-line judgment, at least in this instance. In other words, implicit in an opinion from a doctor, corporate manager, or other expert is that the opinion represents the application of this person's expertise in the manner the reasonable patient, investor, or other listener expects when taking the opinion into account.[112] If

111. *See, e.g.*, Margot Sanger-Katz, *A Fear of Lawsuits Really Does Seem to Result in Extra Medical Tests*, N.Y. TIMES (July 23, 2018), https://www.nytimes.com/2018/07/23/upshot/malpractice-lawsuits-medical-costs.html.

112. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 539 cmt. b (AM. L. INST. 1977).

so, then the presentation of the diagnosis or a prediction without disclosing the questionable factual predicate misleads the reasonable patient or investor as to whether the diagnosis or prediction is what it purports to be—an expert judgment as opposed to a judgment by someone who happens to be an expert but is not acting like it.

Notice two overlapping and admittedly subtle differences between this final implication and asking whether the diagnosis or investment prediction was negligent because it lacked a reasonable basis. First, the focus is on what is hidden and what is disclosed to the patient or investor rather than on the basis, in and of itself, for a diagnosis or prediction. The practical significance of this is to empower the speaker to avoid judges and juries second guessing the basis for the prediction by disclosing problems with the basis. In addition, the test is the expectations of the reasonable listener rather than standards judges or juries might wish to impose upon speakers.[113] Both differences stem from the fact that our concern is whether the prediction or opinion is either false or misleading, insofar as it is not the judgment of someone applying their expertise that the reasonable listener thought it was.

4. *The Corollary Regarding Cautions*

The upshot of this discussion is that to avoid the "trick" with fraudulent predictions, the investor needs to keep the focus on the trustworthiness of the speaker in making the prediction. This means that useful cautions are any suggesting that the corporate manager or entrepreneur does not really believe the prediction or that such belief is inconsistent with the application of the expertise that leads the investor to value the prediction as a bottom-line judgment. These are what I have labeled "credibility cautions" because they undermine the speaker's credibility in providing an expert prediction. As suggested by the discussion above, cautions regarding the limited investigation undertaken by the speaker before making the prediction, or the extreme degree to which the speaker is disregarding facts undercutting the prediction, perform this function.

By contrast, another type of caution ("contingency cautions") lists various present facts or future events that exist or might happen to cause the prediction not to pan out. For example, cautions might warn investors that the company operates in a highly competitive industry and accordingly that

113. Admittedly, the invocation of the expectations of the reasonable investor gives room for judges and juries to impose their own standards. Nevertheless, there is a difference between asking whether a reasonable speaker would have made the prediction if presented with the factual basis possessed by the defendant and asking whether the reasonable listener would have been surprised to have heard the prediction if the listener knew what the basis for the prediction was. The former is speaker-focused while the latter is listener-focused. The interactions between speakers and listeners in which listeners form expectations based upon what they normally hear limits, but does not eliminate, the difference in these two views.

the actions of competitors could cause earnings not to match the prediction.[114] Cautions might warn that the company operates in the middle of complex supply chains and that soured relationships with vendors and distributors, or global disruptions from pandemic, war, or tariffs, could interfere with the company's operations and its ability to achieve predicted earnings.[115] Cautions might also state that the company operates in a field subject to extensive government regulation, which might interfere with the ability of the company to sell its products or might increase its costs.[116]

Such contingency cautions can be given—as indeed they are—by speakers providing sincerely believed and factually based predictions[117] and by speakers providing predictions without belief or factual basis.[118] As such, these cautions do not distinguish fraudulent from non-fraudulent predictions and so leave the lemons market in full operation. Indeed, insofar as contingency cautions tell the investor that numerous things might occur which could cause a prediction not to pan out, this tells the investor little that the investor should not already know. The more the speaker details these various possibilities seemingly to comply with the demands of the bespeaks caution doctrine and the PSLRA,[119] the more the unscrupulous speaker giving a prediction, without believing in or having any basis for it, misdirects the investor from looking at the critical question as to whether the prediction represents a judgment worth considering at all.[120]

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114. *E.g.*, *In re* Worlds of Wonder Sec. Litig., 814 F. Supp. 850, 860 (N.D. Cal. 1993). There, the company's caution stated:

> The toy industry is highly competitive . . . . The relatively low barriers to entry into the toy industry also permit new competitors to easily enter the industry. The Company believes it has enjoyed limited competition to its Teddy Ruxpin product line. Due to the success of Teddy Ruxpin, however, the Company anticipates other companies will introduce talking toy products that will compete with Teddy Ruxpin and other new products announced by the Company. Such entrants might force price reductions or cause the Company to lose market share, which events may adversely affect the Company."

Id.

115. *See, e.g.*, *In re* Stac Elecs. Sec. Litig., 89 F.3d 1399, 1402 (9th Cir. 1996) ("In connection with the IPO, Stac issued a Registration Statement and Prospectus . . . which included a four-page section on risk factors warning investors, *inter alia*, of Stac's competition, its dependence on Stacker, its reliance on distributors, its limited source of supply . . . .").

116. *See supra* note 96 (giving examples of cautions mentioning the need for FDA approval of the company's drug).

117. *See infra* notes 137–145 and accompanying text (discussing widespread use of contingency cautions).

118. *See infra* notes 155–161 and accompanying text (discussing cases in which parties who did not believe their predictions gave contingency cautions).

119. *See* Beck, *supra* note 53, at 198 ("[I]t often appears that managers believe that the longer their list of risks, the greater the likelihood that a court will find something in the list 'meaningful.'").

120. *See, e.g.*, Donald C. Langevoort, *Disclosures that "Bespeak Caution"*, 49 BUS. LAW. 481, 497 (1994) ("[I]nsofar as plaintiffs plausibly complain that they were led to believe the optimism was at least genuine, based on the insiders' superior access to information and the plaintiffs'

This is not to say that contingency cautions lack any utility to investors. Information about various contingencies that could prevent a prediction from panning out might aid the investor in deciding if the investment involves too much risk, as well in establishing the appropriate rate of return the investor should receive for an investment with this level of risk.[121] This, however, is true when dealing with a non-fraudulent prediction, but as just stated, is misdirection when dealing with a fraudulent one. Hence, while the SEC may appropriately mandate, as it does, contingency cautions, they do not protect against fraudulent predictions.[122]

To illustrate the point, consider a doctor's opinion. To facilitate patient autonomy and comply with the demands of tort law,[123] the doctor typically accompanies recommendations with warnings regarding various possible negative consequences to the patient from the recommended treatment or prescription. The patient might ignore or carefully consider these warnings. At the end of the day, however, the patient's decision to follow the doctor's recommendation is normally based in substantial measure on deference to the doctor's opinion.

Suppose, however, the doctor does not really believe that the recommended action is warranted for the patient. Say, for example, the doctor receives kickbacks from a pharmaceutical company for writing prescriptions for the company's drugs. The fact that the patient received warnings from the doctor about possible side effects or that the prescription might not help the patient hardly protects the patient from the doctor's fraud.

Incidentally, for the sake of clarity this discussion has treated credibility and contingency cautions as always two distinct things and given examples in which this is the case. This oversimplifies. Viewed as a Venn diagram, the sets of credibility and contingency cautions overlap to some extent. This occurs when the present facts or possible future events suggesting the prediction might turn out to be wrong become so overwhelming that the reasonable investor loses confidence that the speaker is applying the expertise that causes the investor to listen to the prediction.[124]

We can see this by returning to the example of a doctor's diagnosis. It is common for a diagnosis not to line up exactly with the patient's

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independent assessments of credibility, the standard disclaimers are meaningless. . . . In fact, in terms of persuasion theory, the presence of cautionary language actually may make the projections more influential.").

121. *See infra* note 252.

122. In an ideal world, one would ban contingency cautions with fraudulent predictions where they constitute misdirection and require them with non-fraudulent predictions where they are potentially useful; but this is obviously impractical.

123. *E.g.*, DANIEL B. DOBBS, THE LAW OF TORTS § 251 (2000).

124. Because the set of contingency cautions is so much larger than the set of credibility cautions, most of the overlap occurs in credibility cautions which are also contingency cautions.

symptoms.[125] Hence, a doctor's warning that the diagnosis does not match some of the patient's symptoms says no more than the diagnosis could be wrong and constitutes only a contingency caution. On the other hand, if the doctor were to tell the patient that the diagnosis does not explain any of the patient's symptoms, the patient would probably start looking for another doctor. In this situation, we have crossed the line to the point at which a contingency caution is also a credibility caution.

5. *The "Sure Thing" Caveat*

There is a caveat regarding which type of caution protects against fraudulent predictions. This involves claims by the speaker about the certainty of the prediction's panning out and specifically the speaker's assurance that the prediction is a "sure thing" (certain to be correct).

It seems difficult to believe that investors do not realize that business predictions commonly do not pan out or trust claims that a prediction regarding an investment is a sure thing. Yet, investors have believed the assurances of those operating Ponzi schemes that some magic formula guarantees their returns.[126] In turn, the SEC's fear of investors failing to realize the uncertainty in predictions led to its early opposition to predictions and its subsequent efforts to craft a safe harbor for predictions when accompanied by cautions stating that the predictions are not guaranteed to pan out.[127] This is where much of the legal misdirection focusing on contingency rather than credibility cautions got its start.

In any event, the efficacy of contingency cautions against a speaker claiming that the prediction is a "sure thing" is based upon the simple notion that such cautions make the point that this is not so, and thereby neutralize the false assurance.

It is important, however, not to let the tail wag the dog when discussing the "sure thing" caveat. To begin with, we are not dealing with the prediction itself in this context. Instead, we are dealing with an ancillary opinion or prediction regarding the likelihood of the underlying prediction panning out. Hence, if the underlying prediction is made by a speaker without belief in or basis for it, the fact that contingency cautions neutralized an ancillary assertion that the prediction is a "sure thing" does not protect the investor from relying on a fraudulent prediction. After all, investors look to

125. *See, e.g.*, DONALD A. SCHÖN, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION 16 (1983) (noting that a large percentage of patients have symptoms that do not fall into familiar categories of diagnosis and treatment).

126. *See, e.g.*, SEC v. SG Ltd., 265 F.3d 42, 44 (1st Cir. 2001) (describing the company's solicitation, which invited participation in virtual investments that promised gain "without any risk").

127. *See supra* notes 30–38 and accompanying text.

predictions all the time even when speakers do not claim that the prediction is a "sure thing." This makes it likely that some investors will ignore the "sure thing" boast when contradicted by contingency cautions and still go ahead and make the investment based on the underlying fraudulent prediction.

Moreover, if the speaker gives assurances regarding the prediction's likelihood of panning out which are less than absolute, then contingency cautions do not nullify the assurances. Listing various contingencies that can prevent a prediction from panning out does not say that a speaker is wrong in claiming something less than 100% likelihood for the speaker's prediction to occur. Hence, contingency cautions do not protect against speakers who assert, without believing in or having any basis for it, that their prediction has some great likelihood of panning out. Instead, just as with any fraudulent prediction or other opinion, only credibility cautions protect investors from such an assertion.

Finally, the danger of the tail wagging the dog with the "sure thing" caveat becomes particularly acute when courts use it to create a straw man argument. Specifically, some courts applying the bespeaks caution doctrine seem to act as if the plaintiff is claiming that the defendants stated that the prediction was a sure thing, when this is not what the plaintiff claims. Having set up the straw man, these courts then point to contingency cautions to knock it down.

This might be what is going on in *Trump*. In summarizing its application of the bespeaks caution doctrine to the prediction of repayment, the court says: "The prospectus clearly and precisely cautioned that the bonds represented an exceptionally risky, perhaps even speculative, venture and that the Partnership's ability to repay the bonds was uncertain."[128] This implies that the plaintiffs are complaining about being told that repayment was assured—in which case the warnings clearly canceled that.

This, however, is not what the prospectus said, or the plaintiffs are complaining about. The prospectus said that the borrower "believes" that the cash flow would be sufficient.[129] Indeed, as the Supreme Court pointed out in *Omnicare*, the word "believes" communicates uncertainty.[130] The plaintiffs in *Trump* never allege that this said repayment was a sure thing. Rather, their complaint is that the borrower told them that it believed there would be enough cash flow when allegedly the borrower did not actually or reasonably believe this.[131] Put more colorfully, the complaint is not that the investors thought there was no risk, but rather among the facts before them

128. *In re* Donald J. Trump Casino Sec. Litig.—Taj Mahal Litig., 7 F.3d 357, 373 (3d Cir. 1993).
129. *Id.* at 365.
130. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175, 187 (2015).
131. *Trump*, 7 F.3d at 365.

in weighing the risks was the statement that "genius" real estate tycoon Donald Trump said he believed they would be repaid when, in fact, he did not actually or reasonably believe this.

6. Is Failing to Disclose Contingencies Misleading?

Before dismissing contingency cautions as largely irrelevant to fraudulent predictions, it is useful to ask whether the failure to provide such cautions could itself render a prediction misleading. Indeed, some court opinions mentioned earlier support this proposition.[132]

It is human nature to complain about being "misled" after a prediction or other opinion turns out to be wrong and the listener discovers that the speaker was aware of but did not disclose reasons why this might happen. Nevertheless, we should think twice before labeling such an omission as rendering the prediction or other opinion misleading under the securities laws. This follows from the distinction discussed earlier between antifraud and mandatory disclosure rules.

The existence of provisions in the Securities Act mandating disclosure upon a company's sale of its securities to the public[133] strongly suggests that Congress did not view a company's mere failure to accompany statements of favorable facts with unfavorable ones to be misleading in violation of the Act's antifraud section. After all, there would be little need for mandatory disclosure if such selective disclosure, by virtue of the inherently overly positive impression it gives of the quality of the offered security, violates the antifraud rule.[134]

Hence, to understand what is meant by a misleading omission in violation of the antifraud rules, we must distinguish two situations. In the first, there is a failure to disclose facts that a reasonable investor would find important because they give the investor a more complete and thereby accurate picture. In the second, the omission causes a reasonable investor to draw a false meaning from a specific, literally true statement—what are referred to as half-truths.[135] The existence of mandatory disclosure rules

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132. *See supra* notes 54–57 and accompanying text. This is also supported by the SEC release explaining its safe harbor for projections. *See supra* note 38 and accompanying text.

133. *See supra* note 21 and accompanying text.

134. The periodic disclosure requirements of the Securities Exchange Act might be justified by the need to avoid companies remaining completely silent—something that is not realistic for a company trying to sell its securities.

135. *Basic Inc. v. Levinson*, 485 U.S. 224, 227 n.4 (1988), provides an example of such a half-truth. The defendant denied it was aware of corporate developments that would account for heavy trading and price increases in its stock at the same time it was involved in negotiating a favorable merger. The defendant essentially argued that its statements were true insofar as the defendant did not know that the merger discussions (which were supposed to be secret), as opposed to other publicly known and market factors, accounted for the stock's activity. Levinson v. Basic Inc., 786

suggests that only the latter and not the former constitutes a misleading omission in violation of the antifraud rules.

In which category is a prediction that omits why it might be wrong? If a prediction is sincerely believed and represents the application of the speaker's expertise to the facts in the manner the listener expects, then the prediction is the expert judgment that the listener thought it was. This does not change simply because the speaker fails to warn the listener of reasons why the prediction might be wrong. Of course, the investor would be better served by full disclosure of why the prediction might turn out wrong—but that is what mandatory disclosure is for. This suggests that only omission of facts going to credibility of the speaker in giving the prediction (credibility cautions) makes a prediction misleading.

A rebuttal is to argue that the omission of contingency cautions can make a prediction misleading by causing the investor to attribute greater certainty to the prediction than justified.[136] This is a more subtle variation of the "sure thing" caveat insofar as it focuses on misapprehension of the likelihood of the prediction occurring.

This argument assumes that investors fail to adequately discount corporate predictions to offset the inherent uncertainty of predictions and the obvious bias of the source but will somehow translate contingency cautions into an accurate estimate of how unlikely a prediction is to pan out. In other words, it assumes a striking degree of investor unsophistication and sophistication at the same time. More fundamentally, it is difficult to distinguish this argument from an argument that any failure to accompany favorable facts with unfavorable ones about a security is misleading since it causes the investor to form an inaccurate impression of the overall quality of the security.

In any event, we have wandered off the question of what sort of cautions can protect against predictions that lack sincerity or basis. Even if contingency cautions might be justified as avoiding a misleading omission in their absence, this does not mean they do much to warn investors about the lack of sincerity or basis for a prediction. For that purpose, they remain misdirection.

F.2d 741, 747 (6th Cir. 1986), *vacated*, 485 U.S. 227 (1988). Even if literally true, this would be misleading since the typical listener would assume that the defendant was saying that nothing important was going on; not that something significant was happening but the management was not sure that this is what was causing the stock's activity. In other words, the omission caused the listener to misinterpret the meaning of what were arguably literally true statements.

136. *See, e.g.*, Beck, *supra* note 53, at 172 (discussing the SEC's view that the failure to disclose important assumptions, or reasons why a prediction might be less likely to pan out than normally expected, would be misleading).

B. Comparing the Cautions Given

Now that we know what cautions should contain to mitigate the risk of fraud, let us compare what they do contain.

1. Cautions in Disclosure Documents Generally

I suspect that readers of this Article who have been involved with drafting, litigating, or teaching about corporate disclosure documents will agree with my unscientific observation that such documents accompany predictions with contingency cautions. Moreover, rarely if ever do the contingency cautions reach such an overwhelming magnitude as to also constitute credibility cautions, nor are credibility cautions otherwise present.[137] Consistent with this observation, examples of effective cautions provided by sources to which lawyers would look for guidance consist solely of contingency cautions.[138]

There are studies of cautions in corporate disclosure documents. A survey by SEC staff shortly after the enactment of the PSLRA concluded that only ten percent of the 150 filings examined presented risks specifically enough to comply with the letter and the spirit of the safe harbor for forward-looking statements accompanied by meaningful cautionary statements.[139] This seems to have formed the basis for complaints by SEC officials about the quality of such cautions in the aftermath of the PSLRA.[140]

A study by Professors Karen Nelson and Adam Pritchard looked at cautions in corporate disclosure documents filed between 1996 and 2003 by over 300 firms, divided between those at greater and lesser risk of being

137. *Id.* at 198 ("[I]ssuers tend to include long lists of unenlightening cautionary statements and risk factors in Commission filings and press releases containing predictive information.").

138. The New York City Bar Committee on Securities Regulation gives the following (from an airline) as an example of an effective cautionary statement:

> Certain statements contained in this document contain "forward-looking statements" within the meaning of the Private Securities Litigation Reform Act of 1995. Such forward-looking statements involve known and unknown risks and uncertainties. The Company's actual actions or results may differ materially from those discussed in the forward-looking statements. Specific factors that might cause such a difference include, but are not limited to, availability of adequate working capital, competitive reaction to the Company's expansion plans, rise in fuel costs, regulatory actions by the Department of Transportation of the Federal Aviation Administration, future incidents similar to the Gulf War, future airline accidents (particularly if involving a low cost carrier), and general economic conditions in the United States. See additional discussion under "Risk Factors."

Comm. on Sec. Reg., *A Study of Current Practices: Forward-Looking Statements and Cautionary Language After the 1995 Private Securities Litigation Reform Act*, 53 REC. N.Y.C. BAR ASS'N 723, 743 (1998) (capitalization altered from source text for readability).

139. Andrew W. Fine, *A Cautionary Look at a Cautionary Doctrine*, 10 BROOK. J. CORP. FIN. & COM. L. 521, 533 (2016).

140. *Id.* at 528.

defendants in securities fraud litigation.[141] They found a general increase over this timespan in the number and length of cautions, with better quality cautions (measured by number and length, revisions from year-to-year, and better readability) in the filings by firms at greater litigation risk.[142]

Unfortunately, neither of these studies looks specifically at whether the disclosures they examined contained contingency versus credibility cautions. Indeed, one senses that the authors of these studies were utterly oblivious to the distinction. Nevertheless, like Sherlock Holmes's observation about the dog that did not bark, this omission is telling. One would think that if the SEC staff or the scholars undertaking these studies had confronted cautions that alerted them to problems with the prediction's sincerity or basis, this would have rated some mention.

Moreover, the specific findings of these studies are consistent with contingency rather than credibility cautions. For example, it is difficult to see how anyone would characterize a credibility caution as not sufficiently specific to meet the letter and the spirit of the PSLRA safe harbor. Hence, the ninety percent of the filings so characterized by the SEC were clearly contingency, not credibility, cautions. Moreover, Professors Nelson's and Pritchard's description of the cautions in their study indicate contingency cautions. Specifically, the illustrative disclosures they include in the appendix to the study consist entirely of contingency cautions.[143] The categories of cautions they observed and list in the appendix[144] also constitute the sort of thing found in contingency cautions.

In addition, these studies are telling us something about the utility of contingency cautions in addressing the lemons market effect created by fraudulent predictions. This again is a story of the dog that did not bark. Nothing in the studies suggests a pattern among the contingency cautions that would show they serve to flag potential fraudulent predictions.

For example, one might assume that non-specific boilerplate cautions are more likely from parties providing fraudulent predictions. Unless one thinks that most predictions are fraudulent, this assumption is inconsistent with the SEC study finding ninety percent of the cautions were not sufficiently specific to meet the letter and spirit of the PSLRA safe harbor (in other words boilerplate).

As mentioned above, Professors Nelson and Pritchard found that companies facing higher litigation risk provided better quality cautions.

141. Karen Nelson & Adam Pritchard, Litigation Risk and Voluntary Disclosure: The Use of Meaningful Cautionary Language (Aug. 2007) (unpublished manuscript presented at 2d Ann. Conf. on Empirical Legal Stud.), https://ssrn.com/abstract=998590.

142. *Id.* at 2–3.

143. *Id.* at 30–32.

144. *Id.* at 33–35.

Unfortunately, their measures for firms with higher litigation risk are based upon factors such as company industry rather than proclivity toward fraudulent predictions.[145] Hence, this does not show us that better quality contingency cautions correlate with less, or counterintuitively more, likelihood of fraudulent predictions.

In any event, overall corporate filings are probably not the data set we should be examining to find credibility cautions. The only filings that should have credibility cautions are those in which there is some problem with credibility to disclose. If we assume that the bulk of predictions are made by those who investigated the matter prior to making the prediction and did not ignore overwhelming facts undercutting the prediction, then there will be nothing to disclose by way of credibility cautions for the bulk of predictions.

Instead of looking at overall corporate filings we need to look at corporate statements when there is more likely to be a need for credibility cautions. This would seemingly be the cautions discussed in the court opinions dealing with the bespeaks caution doctrine and the PSLRA safe harbor for forward-looking statements.

2. *Cautions Invoked in Court Opinions*

An examination of the cautions found in court opinions applying the bespeaks caution doctrine or the PSLRA safe harbor for forward-looking statements confirms the suspicion that they consist of contingency rather than credibility cautions.

As an illustration, we can look at *Trump* in which the court quotes at length from the more specific cautions. These cautions set out the risks, such as market saturation and the like, facing a huge new casino in Atlantic City.[146] There is nothing in these cautions, however, to suggest that the defendants did not investigate the matter prior to predicting adequate cash flow to service the debt.[147] Nor do the facts and risks enumerated by the cautions appear to be so overwhelming as to suggest that the prediction of adequate cash flow was completely out of whack with the overall balance of information available to the defendants.[148] In other words, there is nothing in the cautions to suggest that the defendants neither believed the prediction nor lacked the basis for that belief that the investors would have expected. Hence, these are contingency not credibility cautions.

It would unduly extend the length of this article to engage in a similar discussion of other cases. The appendix to this Article contains a hand

145. *Id.* at 13–15.

146. *In re* Donald J. Trump Casino Sec. Litig.—Taj Mahal Litig., 7 F.3d 357, 370 (3d Cir. 1993).

147. *Id.*

148. *Id.*

collected comprehensive list of court opinions, which quote from or otherwise describe the cautions given to investors in sufficient detail to assess whether they contained credibility or just contingency cautions. A review of them shows contingency not credibility cautions.

While the absence of credibility cautions in these court opinions tells us more than the similar phenomenon in corporate filings overall, we must be careful in drawing the conclusion that in all or even most of these cases the defendants should have given credibility cautions. The problem is that in many cases the plaintiffs' allegations are insufficient to provide the counterfactual of what credibility cautions the defendants should have provided. There are a couple of common reasons for this.

Trump illustrates one reason. The plaintiffs alleged that the defendants made the prediction without a genuine or reasonable belief in it but did not allege any details in support of this broad allegation.[149] Without knowing the specific facts, if any, by which the plaintiffs expected to establish that the defendants either did not believe the prediction or lacked a reasonable basis for it, we do not know what, if any, credibility cautions the defendants should have given.[150]

Harris illustrates a second reason for plaintiffs failing to allege facts that would form the basis for credibility cautions. The plaintiffs complained of the failure of the defendants to warn of the very risk (the necessity of writing down goodwill) that proved fatal to the prediction.[151] This is an extreme example of a tendency illustrated in *Asher*[152] and other cases[153] for plaintiffs to accept the focus on contingency cautions and complain about contingencies overlooked or under-disclosed—as, for example, through

149. *In re* Donald J. Trump Casino Sec. Litig., 793 F. Supp. 543, 557 (D.N.J. 1992) ("Plaintiffs' allegation of 'no reasonable basis' is a naked assertion unsupported by any factual allegations in the complaint. Plaintiffs provide no foundation for their assertion that defendants either had no reasonable basis for its belief, or that defendants did not in fact hold that belief.").

150. The plaintiffs alleged that the defendants' prospectus failed to disclose risks such as the high daily casino take that would be necessary to fund the debt. *Trump*, 7 F.3d at 374. It is unexplained, however, whether such omitted facts were sufficient to suggest that the defendants did not believe the prediction or were utterly ignoring the facts to do so—in other words would have formed the basis for a credibility caution.

151. Harris v. Ivex Corp., 182 F.3d 799, 802 (11th Cir. 1999); *see also In re* Unicapital Corp. Sec. Litig., 149 F. Supp. 2d 1353, 1375 (S.D. Fla. 2001) (plaintiffs pointed to the failure of the cautions to mention the particular problem—statutorily-created obsolescence of the aircraft owned by the businesses the defendant purchased—that doomed the venture).

152. Asher v. Baxter Int'l Inc., 377 F.3d 727, 728–29 (7th Cir. 2004).

153. *See, e.g.*, Marrari v. Med. Staffing Network Holdings, Inc., 395 F. Supp. 2d 1169, 1179 (S.D. Fla. 2005) (plaintiff complained about the adequacy of a caution which warned that revenues would be adversely affected if the company's ability to open new offices is impaired); *In re* Marion Merrell Dow, Inc., No. 92-0609-CV-W-6, 1993 WL 393810, at *8 (W.D. Mo. Oct. 4, 1993) (plaintiffs successfully argued that cautions warning that there was no assurance that the FDA would approve OTC status were inadequate to apprise investors of the specific risks regarding approval for this drug).

language speaking of future possibilities to address problems already occurring.[154]

Perhaps we could work through all the cases in which plaintiffs accepted the focus on contingency cautions to reconstruct whether the plaintiffs in any of them alleged specific facts that would have formed the basis for credibility rather than just contingency cautions. I suspect that such an exercise would try the reader's patience for results that, in the end, would just come down to the subjective reactions of the author and reader.

Fortunately, there is a quicker and more objective approach to show that cases exist—even if it does not pick up all such cases—in which defendants should have, but did not, provide credibility cautions. This is to look at cases in which courts found that the plaintiffs alleged sufficient facts under the PSLRA's demanding standard that the defendants knew the predictions were false. In these cases, not only do we have more facts that go explicitly to the credibility of the speaker in giving the prediction, but we also have judges who doubted the sincerity of the prediction based upon these facts.

One of the easiest of these cases is *Freeland v. Iridium World Communications, Ltd.*,[155] in which the court found that "[t]he statement that the company believed it would meet subscriber and revenue goals, for instance, was contradicted by internal memoranda indicating the goals were outrageous and unattainable."[156] A more involved counterfactual occurs in *In re Nash Finch Co. Securities Litigation*.[157] There, the plaintiffs alleged statements from fourteen former employees regarding numerous meetings and reports alerting senior corporate executives to problems with earnings and with integrating acquired operations at the same time such executives were giving optimistic predictions regarding earnings and the integration of these operations.[158]

The defendants in both cases provided cautionary statements setting out various contingencies that might impact the predicted earnings and performance.[159] In neither did the cautions disclose the internal information later allegedly provided by former employees, which indicated that senior

154. *E.g.*, Voit v. Wonderware Corp., 977 F. Supp. 363, 370 (E.D. Pa. 1997) (plaintiff argued that the cautions themselves were misleading by omitting to disclose that the risks warned about were already occurring).

155. 545 F. Supp. 2d 59 (D.D.C. 2008).

156. *Id.* at 72.

157. 502 F. Supp. 2d 861 (D. Minn. 2007).

158. *Id.* at 875–77.

159. *Iridium*, 545 F. Supp. 2d at 65 ("[M]any of the statements carried cautionary language indicating that these were based on certain assumptions."); *Nash Finch Co.*, 502 F. Supp. 2d at 864–66.

management did not believe the predictions or were willfully blind in doing so.[160] Other cases are similar.[161]

C. Predictions, Cautions, and the Private Securities Litigation Context

The misalignment between cautions useful in addressing fraudulent predictions and the cautions invoked in the cases raises the question of why this mismatch exists. To explain this, we need to understand the incentives involved for the various participants in private securities fraud litigation.

1. The Securities Fraud Litigation Lemons Market

Litigation, including securities fraud claims, in many ways involves a lemons market every bit as much as markets for securities or used cars (where the term originated[162]). Plaintiffs are seeking awards usually of money based upon allegations regarding facts. Just as it is often difficult for the buyer of a used car to know whether the car is a lemon before buying and driving it for a while, or for an investor to know whether an investment is a lemon before investing, it is often difficult for the court to know whether a plaintiff's allegations as to the facts are true before the parties spend considerable money litigating the case through trial—and even then the assessment of truth is fallible and can produce its own lemons.

Moreover, litigation is a multi-sided lemons market. The flip side of the fact that some plaintiffs' claims are meritorious, and some are not, is that some defendants are innocent of wrongdoing and some defendants are not.

160. While these opinions did not provide a detailed description of the cautions given and hence are not listed in the appendix to this article, one can be confident that had the cautions disclosed the existence of internal memoranda, meetings, and reports contradicting the predictions, the courts would have mentioned this.

161. *E.g.*, *In re* Harman Int'l Indus., Inc. Sec. Litig., 791 F.3d 90, 94–96, 103–07 (D.C. Cir. 2015) (contrasting cautions generally warning of risks of product obsolescence with the fact that management knew that changes in the company's own product had already obsoleted the company's large inventory of existing products—the discounted sale of which meant missing projections); Lormand v. U.S. Unwired, Inc., 565 F.3d 228, 240–47 (5th Cir. 2009) (contrasting internal knowledge of the dire situation facing the company due to its contract with Sprint and the cautions given along with optimistic predictions); Rosenbaum Cap., LLC v. McNulty, 549 F. Supp. 2d 1185, 1190–91 (N.D. Cal. 2008) (cautions inadequate to warn that statements regarding integration of acquired firm's operations, which formed part of the basis for the defendant's earning projections, were, as disclosed by former employees, knowingly false); *In re* SeeBeyond Tech. Corp. Sec. Litig., 266 F. Supp. 2d 1150, 1160–61 (C.D. Cal. 2003) (discussing allegations that management's prediction regarding earnings in the just completed quarter were, according to a statement from a former employee, based upon delivering software that management knew did not work and booking as accounts receivable the amounts the customers refused to pay, none of which the cautions disclosed); *In re* Prudential Sec. Inc. Litig., 930 F. Supp. 68, 73–74 (S.D.N.Y. 1996) (contrasting extremely negative evaluation of leased aircraft residual values in appraisals commissioned by defendant with general warning that value of leased aircraft could decline).

162. George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489 (1970).

In other words, there are lemons on both sides. Moreover, the decision maker who would be working with limited information to figure out who is the lemon prior to parties incurring significant litigation costs is the court.

This multi-sided lemons market gives parties an incentive to settle not only due to the uncertainties of the outcome but also to avoid the expense of litigating the matter through trial in order to establish who is the lemon. The result is that, just as some buyers of used cars or securities purchase a lemon, innocent defendants pay to be rid of meritless claims (in other words they buy lemons) while, just as with sellers of good used cars or securities, plaintiffs with meritorious claims get less than their claims would be worth absent litigation costs.

Whether plaintiffs with meritless claims collecting through settlements occurs more frequently in securities fraud litigation than in other sorts of litigation is disputed.[163] What is important for present purposes, however, is the impact of the securities fraud litigation lemons market on the various participants when it comes to cautions about predictions.

2. The Securities Fraud Litigation Lemons Market and Misdirection Regarding Cautions

Like any participant in a lemons market,[164] defendants in securities fraud litigation will try to engage in signaling that they are not the lemon, in this instance because the plaintiffs' claim is. Unfortunately, credibility cautions do not work as such a signal in the securities fraud litigation lemons market. The problem is that the defendant, who sincerely believed and had ample basis for a prediction, had no reason to give such a caution. At the same time, the absence of such a caution is also expected from the unscrupulous party giving a prediction without such belief or basis. Hence pointing to credibility cautions or their absence normally does little to separate the lemons from the non-lemons in the securities fraud litigation lemons market.

On the other hand, there is no reason for the speaker providing a prediction the speaker believes in and has a basis for not to provide contingency cautions. Working with what one has, defendants point to their contingency cautions as a signal of their virtue visible without expensive

163. *Compare, e.g.*, Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991) (study suggesting that meritless claims predominate in securities fraud litigation), *with* Franklin A. Gevurtz, *The Protection of Minority Investors and Compensation of their Losses*, 62 AM. J. COMP. L. 303, 304 n.5 (2014) (discussing problems with studies trying to determine if securities fraud litigation produces settlements more indicative of meritless claims brought for nuisance value than true in other types of litigation).

164. *See, e.g.*, Akerlof, *supra* note 162, at 499 (sellers of high-quality used cars give a warranty to signal that their cars are not lemons).

discovery and trial.[165] The problem, as stated earlier,[166] is that the speaker giving a prediction without believing in or having a basis for it can also provide contingency cautions. This makes them serve for such a party as misdirection aimed at shifting the attention of both investors and courts from what they should be looking at to see if there is fraud in the prediction. Put differently, such cautions do not serve to separate the lemons from the non-lemons in either the securities or the litigation lemons markets.

Plaintiffs, however, have an incentive to show that two can play this game. Unless the defendants are prescient—and the fact their predictions failed suggests they are not—they may not have anticipated the precise fact or event that caused their prediction to go awry. Accordingly, the contingency cautions defendants give are often going to have omitted the fatal fact or prospective event, or, at the very least, not have given the fatal fact or prospective event the prominence and detail that it deserved in retrospect.

Now, the plaintiff can point to this omission as a fact visible before discovery and trial to signal that the plaintiff's claim is not the lemon.[167] This, however, is misdirection by the plaintiff. It allows the plaintiff lacking any evidence that the defendant did not sincerely believe the prediction or lacked a basis for it—in other words the plaintiff whose claim is a lemon—to focus the court's attention on something else.

Courts have their own incentives when faced with the securities fraud litigation lemons market. This can lead them to grasp for any sort of signal, which is easily visible before docket clogging discovery and trial, regarding whose claim is a lemon and whose is not. The presence of contingency cautions appears to be such an easily visible signal. The result is the bespeaks caution doctrine.[168]

Congress, under pressure from companies threatened by securities fraud litigation (many of which have been high-technology firms fueling a booming economy), was also looking for a fix to the securities fraud litigation lemons market.[169] Among the options is to look to cautions as an easily

165. *See, e.g.*, *In re* Donald J. Trump Casino Sec. Litig.—Taj Mahal Litig., 7 F.3d 357, 367 (3d Cir. 1993) (in support of their motion to dismiss for failure to state a cause of action, the defendants argued that their "abundant warnings and cautionary statements" precluded liability "as a matter of law").

166. *See supra* note 118 and accompanying text.

167. *See, e.g.*, Harris v. Ivax Corp., 182 F.3d 799, 802 (11th Cir. 1999) (alleging that the failure to warn of the prospect for the write down of goodwill that occurred rendered the prediction misleading).

168. *See, e.g.*, Langevoort, *supra* note 120, at 498 (explaining judicial motives for a strong bespeaks caution doctrine).

169. *See, e.g.*, Conf. Comm. Rep., *supra* note 3, at 43 ("Technology companies—because of the volatility of their stock prices—are particularly vulnerable to securities fraud lawsuits when projections do not materialize.").

visible fact ostensibly to separate the lemons and non-lemons. The result is the PSLRA safe harbor for forward-looking statements accompanied by meaningful cautionary statements.

IV. *OMNICARE* AS THE PRESCRIPTION

While one would like to think that the logic of the argument set forth above would be enough to convince courts to abandon their misguided focus on contingency cautions, it obviously helps to point to a Supreme Court decision as authority in support of this result. Even though neither courts nor commentators have yet realized it, the Supreme Court's *Omnicare* decision provides exactly this. To see why, it is necessary to discuss the key insights in the Court's opinion and explain how these insights relate to cautions as a defense to fraud claims based upon failed predictions.

A. The Accidental Brilliance of Omnicare

1. Clarifying When an Opinion Is False or Misleading

The reason no one has yet recognized the implication of *Omnicare* on cautions and failed predictions is because the Court addresses a seemingly different topic: When is an opinion a false or misleading statement of fact?

Omnicare was an action brought under Section 11 of the Securities Act.[170] Omnicare's registration statement to sell stock contained the assertion that the company believed it was complying with the law, whereas apparently the company was receiving illegal kickbacks from drug companies.[171] The plaintiffs argued that the divergence was sufficient to trigger Section 11's strict liability of issuers for false statements in a registration statement.[172] The Supreme Court, pointing out that the expression of belief rendered Omnicare's assertion an opinion, found it necessary, however, to ask when is an opinion false or misleading.[173]

In answering the question of when an opinion constitutes a false or misleading statement, the Court in *Omnicare* walked away from two prior views, which had done much to confuse things.

The first was the hash that the Supreme Court had made in addressing the issue in *Virginia Bankshares, Inc. v. Sandberg*.[174] *Virginia Bankshares* involved a claim that the corporation's directors had violated the SEC

170. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175, 180 (2015).
171. *Id.* at 179–80.
172. *Id.* at 182.
173. *Id.* at 183.
174. 501 U.S. 1083 (1991).

regulation against false or misleading statements in soliciting proxies[175] when expressing their opinion about the fairness of the price the shareholders would receive in the proposed merger. Instead of being content to stop with the jury verdict finding that the directors did not believe the opinion they expressed,[176] the Court in *Virginia Bankshares* fixated on whether the directors' opinion about the fairness of the price was supported by objective facts.[177]

The Court in *Omnicare* explains this away (twice[178]) as addressing a rare hypothetical situation in which the speaker's opinion turns out to be correct even though the speaker did not actually believe the expressed opinion. In doing so, the Court in *Omnicare* deliberately undercut the reading of *Virginia Bankshares* as an instruction for courts not to focus on the sincerity of the speaker when determining whether an opinion is fraud.[179]

In addition, without explicitly acknowledging what it was doing, the Court in *Omnicare* shifted in a subtle but highly significant manner away from the formulations discussed earlier,[180] which the SEC and lower federal courts used to determine when predictions as well as other opinions were false or misleading.

The Court in *Omnicare* started at essentially the same place—although it avoided the nebulous term "good faith" found in the SEC safe harbor and some lower federal court opinions.[181] The Court in *Omnicare* explained that an expression of opinion is false if the speaker did not in fact hold the opinion the speaker expressed.[182] In this instance, the misstated fact is what the speaker believes.

This corresponds to the earlier discussion of why opinions are significant: The listener values the bottom-line judgment of the speaker because of the speaker's greater expertise. Indeed, the Court invokes the common law allowing claims for false opinions from a speaker with special expertise by noting the corporation's (actually, its management's) special knowledge of its business—which, of course, tracks the SEC's and Congress' recognition of such expertise discussed earlier.[183] Hence, misstating what the corporate manager believes is both false and normally material.

175. *Id.* at 1087; 17 C.F.R. § 240.14a-9 (2009).

176. *Virginia Bankshares*, 501 U.S. at 1090.

177. *Id.* at 1093–95.

178. *Omnicare*, 575 U.S. at 185 n.2, 189 n.7.

179. *See, e.g.*, *In re* Donald J. Trump Casino Sec. Litig–-Taj Mahal Litig., 7 F.3d 357, 372 (3d Cir. 1993) (reading *Virginia Bankshares* as refusing to make liability turn on whether the speaker believed the opinion).

180. *See supra* notes 51–54 and accompanying text.

181. *See supra* notes 35, 50–51 and accompanying text.

182. *Omnicare*, 575 U.S. at 184.

183. *See supra* notes 105–107 and accompanying text.

Of more direct relevance to cautions, the Court in *Omnicare* moved away from the various formulations stating that opinions might constitute fraud if they lacked a reasonable basis. This reasonable basis formulation seemingly raised the prospect that predictions or other opinions might produce liability if, with the benefit of 20-20 hindsight, a finder of fact concluded that the speaker was negligent in coming to this prediction or opinion.[184]

Instead of asking whether the speaker had a reasonable basis for the opinion, the Court in *Omnicare* stated that liability could still arise in cases in which the speaker held the opinion expressed but omitted to state facts which rendered the opinion misleading.[185] While these facts relate to the basis for the opinion, the question under the Court's formulation is not whether these facts show the lack of a reasonable basis as judges or juries might later define it. Rather, the question is whether the basis for the opinion deviated from the expectations of the reasonable investor.[186] Moreover, there is nothing wrong with giving an opinion whose basis deviates from the expectations of the reasonable investor; it is simply a matter of whether the speaker discloses this deviation.[187]

As explained later in this Article, the practical impact of *Omnicare*'s subtle departure from the reasonable basis formulation is to preclude plaintiffs getting past the pleading stage with broad allegations that the defendant lacked a reasonable basis for a prediction or other opinion.[188] It also empowers speakers through disclosure to preempt judges or juries second-guessing the reasonableness of the basis for a prediction or other opinion.[189]

2. *Focusing on Credibility*

Far more significant to this article, the Court in *Omnicare* gives two examples of omitted facts that render opinions misleading. The first is the failure to have investigated the matter prior to giving the opinion in the manner that the reasonable investor would have expected the matter to have

184. *See supra* note 111 and accompanying text.

185. *Omnicare*, 575 U.S. at 188.

186. *Id.* at 186–87.

187. The Court discusses one other possibility for fraud in opinions. *Id.* at 185–86. This is when the statement contains embedded within it an assertion of fact that is false or misleading. The Court gives an example in which a CEO states the opinion that the company's product is the best on the market but goes on to say that this is because the company uses a patented technology to which competitors lack access. *Id.* There would be a false statement of fact if the company does not use such a patented technology.

188. *See infra* notes 203–204 and accompanying text.

189. *See infra* text between notes 285–286.

been investigated.[190] The second is the speaker's knowledge of facts indicating the opinion is wrong.[191]

What these two examples have in common is that both go to the credibility of the speaker in providing the opinion—in other words, they involve the failure to provide the sort of facts that I have labeled credibility cautions. This is obvious in the first example. While more subtle, this is also true of the Court's second example. Critically, there is more going on in this second example than simply an omission of facts undercutting the opinion. As the Court puts it, "a statement of opinion is not misleading just because external facts show the opinion to be incorrect."[192]

To understand what makes the omission of facts undercutting the opinion misleading under *Omnicare*, it is useful to start by noticing that the Court talks about the omission of facts known to the speaker.[193] One might assume this is because a speaker cannot disclose facts that the speaker does not know. Yet, *Omnicare* involved a strict liability claim under Section 11. If the omission of a fact undercutting Omnicare's opinion rendered it misleading, then Omnicare's lack of knowledge of this fact is irrelevant under Section 11. This makes the Court's reference to facts known to the speaker profound: The facts are not important because they might render the opinion wrong. Rather they are important because the speaker's giving the opinion while knowing these facts potentially says something about whether the investor can trust the speaker in giving this opinion.

Reinforcing this view is something the Court says in remanding the case. Referring to the plaintiff's allegation that an attorney for the company had warned Omnicare that its contracts might violate anti-kickback laws, the Court instructed the lower court to "determine whether [this] fact would have been material to a reasonable investor."[194]

Critically, however, the Court did not stop there. Instead, if the lower court found that the attorney's warning to Omnicare was material, the lower court must then "ask whether the alleged omission [to disclose the warning] rendered Omnicare's [statements regarding legal compliance] misleading in the way described earlier—i.e., because the excluded fact shows that Omnicare lacked the basis for making those statements that a reasonable investor would expect."[195] In other words, the materiality of the contrary fact to the reasonable investor is not enough to make its omission misleading. Instead, what makes the omission misleading rests on what it tells the investor about

190. *Omnicare*, 575 U.S. at 188.
191. *Id.* at 188–89.
192. *Id.* at 188.
193. *Id.* at 189.
194. *Id.* at 196.
195. *Id.*

how much the investor can trust the speaker's opinion. Specifically, the investor might not trust the speaker in giving the opinion if the investor knew that the speaker was disregarding contrary facts to a significantly greater extent than the investor would expect.

This makes perfect sense when one recalls the reason that statements of opinion, including predictions, have utility: They represent the bottom-line judgment of a person with expertise on the topic. Indeed, such a bottom-line judgment is particularly useful in a situation involving the balancing of competing facts. As the Court states in *Omnicare*: "Reasonable investors understand that opinions sometimes rest on a weighing of competing facts."[196]

The problem arises when the balance between facts supporting the opinion and facts cutting the other way is so out of whack with the opinion that the investor feels misled by reading the opinion without a suitable warning of the disparity. As the Court puts it: "[The investor] expects not just that the issuer believes the opinion (however irrationally), but that it fairly aligns with the information in the issuer's possession at the time."[197] Such a misalignment not only raises the prospect that the opinion is wrong, but it also causes the reasonable investor to question whether the speaker is applying the expertise that leads the investor to consider the opinion.

Beyond its two examples, there is another indication of the Court's focus on credibility, not contingencies. This comes from the Court's approach to the cautions (or "caveats" as the Court describes them) that Omnicare gave.

Omnicare's statement that it believed it was complying with the law was accompanied by several cautions. This included reference to state-initiated enforcement actions against drug companies for paying kickbacks to pharmacies (Omnicare provides pharmacy services to nursing homes[198]); noting an expression of concern from the federal government about rebates by drug companies to pharmacies; and the all-purpose warning that the laws relating to the drug companies' payments might "be interpreted in the future in a manner inconsistent with our interpretation and application."[199]

Instead of pointing to the cautions and throwing out the case, the Court in *Omnicare* instructed the lower court on remand to consider these cautions as part of the context in deciding whether Omnicare's failure to disclose the alleged warning from one of its lawyers was misleading.[200] It is difficult to

196. *Id.* at 189–90.
197. *Id.* at 188–89.
198. *Id.* at 179.
199. *Id.* at 180.
200. *Id.* at 196–97.

understand the Court's decision if the point of cautions is simply to warn that the opinion might be wrong.

On the other hand, if the concern is with the credibility of the opinion, then the Court's decision makes sense. It is one thing for a speaker to express an opinion on legality which is at odds with the position of state or federal officials. While this might cause the reasonable investor to question the trustworthiness of the proclamation of innocence, it is not necessarily enough to do so. If, however, the speaker's own lawyer is telling the speaker that there is a problem, then the investor may have much greater reason to think that the speaker is saying what the speaker would like to believe rather than what the speaker really believes or knows they have grounds to believe. In other words, the distinction regarding the source of the troubling facts in the possession of Omnicare potentially matters because the concern is with Omnicare's credibility in issuing its opinion.

3. *Addressing the Securities Fraud Ligation Lemons Market and Avoiding Misdirection by Plaintiffs*

Omnicare provides much for defendants in securities fraud litigation to cheer. Of relevance to our discussion, the decision screens against securities fraud claims that are lemons or based on misdirection.

To begin with, *Omnicare* significantly narrows which omissions might render an opinion (including a prediction) misleading. As just explained, it holds that an omission is not misleading simply because the omitted fact would be material to the reasonable investor. This blocks misdirection by plaintiffs when they argue that the failure to disclose facts creating a material risk that a prediction could turn out wrong—and especially the contingency that caused the prediction to fail—renders the prediction misleading.[201] As discussed earlier,[202] this is misdirection (whether intentional or not) because it confuses mandatory disclosure and antifraud rules.

Moreover, *Omnicare*'s clarification of what makes an opinion false or misleading, when combined with the PSLRA provision on pleading knowing falsity, should prevent a plaintiff from getting past the pleading stage without alleging specific facts undercutting the defendant's credibility in making the prediction.

Before *Omnicare*, alleging broadly that an opinion lacked a reasonable basis might have been adequate to state a claim that a failed opinion constituted fraud.[203] We just saw, however, that *Omnicare* replaces the notion

201. *See supra* notes 151–154 and accompanying text.

202. *See supra* notes 132–136 and accompanying text.

203. *See, e.g.*, *In re* Donald J. Trump Casino Sec. Litig—Taj Mahal Litig., 7 F.3d 357, 368–69 (3d Cir. 1993) (dismissing based on the lack of materiality rather than the lack of specifics in the allegation that the defendants did not genuinely or reasonably believe their prediction); Eric Talley,

that the lack of a reasonable basis could render an opinion false or misleading with the holding that an opinion is only false if the speaker does not believe the opinion and the opinion is only misleading if the speaker omits facts going to credibility.

It is difficult to plead such misleading omissions without alleging what the omitted facts were. As the Supreme Court in *Omnicare* explains:

> The investor must identify particular (and material) facts going to the basis for the issuer's opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context. That is no small task for an investor.[204]

Turning to false rather than misleading opinions, at first glance it appears that one might plead that an opinion is false under *Omnicare* by simply alleging that the speaker did not believe the opinion. On the other hand, a speaker knows what the speaker believes. Therefore, the elements of falsity and of knowing falsity are as a practical matter identical in dealing with opinions.[205] The significance of this lies in yet a different provision of the PSLRA.

The PSLRA imposes a heightened pleading requirement regarding knowing falsity. Specifically, the plaintiff must plead "with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[206] It is an interesting question as to whether *Omnicare*'s requirement that the speaker not believe the opinion for it to be false makes this a "required state of mind" for purposes of the PSLRA's pleading rule. Even if not, in any case in which knowing falsity would be required as its own element—actions under Rule 10b-5 and those subject to the PSLRA's requirement of knowing falsity for liability based upon forward-looking statements—the plaintiff is going to need to plead specific facts showing such knowledge.[207] Hence, a plaintiff alleging that the defendant did not believe the failed prediction must plead specific facts showing this—in other words, the stuff of credibility cautions.

The policy implications of this are significant. *Omnicare* answers the argument that the bespeaks caution doctrine and the PSLRA safe harbor for forward-looking statements accompanied by cautions are necessary to screen

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Disclosure Norms, 149 U. PA. L. REV. 1955, 1973 (2001) (pointing out that plaintiffs could often finesse the permissive "reasonability" standard in the SEC forward-looking statement safe harbor to get past defendants' motions for dismissal or for summary judgment).

204. *Omnicare*, 575 U.S. at 194 (citation omitted).

205. *E.g.*, SEC v. Goldstone, No. CIV. 12-0257 JB/GBW, 2015 WL 5138242, at *254 (D.N.M. Aug. 22, 2015).

206. 15 U.S.C. § 78u-4(b)(2)(A).

207. *See, e.g.*, Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007).

out early in litigation meritless claims based upon failed predictions.[208] Under *Omnicare*, plaintiffs bringing claims based upon failed predictions should not get past the pleading stage without alleging specific facts raising serious problems concerning the credibility of the defendant in giving the prediction—in other words, how the defendant derived the prediction, its significant misalignment with the facts in the defendant's possession, or some sort of admission by the defendant that the defendant did not believe the prediction.

This still leaves a place for cautions. Interpreting the bespeaks caution doctrine and the PSLRA safe harbor for forward-looking statements to call for cautions disclosing potential issues regarding the credibility of predictions creates a safe harbor under which speakers can disclose such facts when giving predictions and thereby preempt plaintiffs from basing claims on these facts in the event the prediction fails. The result, as explained later, is a safe harbor targeted to allowing speakers in the grey area to enable investors, rather than judges and juries, to decide whether predictions are made without belief or basis.

All told, *Omnicare* provides a sensible approach to weed out meritless claims and protect innocent defendants in the securities fraud litigation lemons market without all the misdirection involving contingency cautions.

4. Avoiding Misdirection by Defendants

The "accidental" brilliance of *Omnicare* lies in the flipside. Specifically, the Court's narrowing of the facts whose omission can make an opinion misleading argues for narrowing, in the same manner, the cautions that can avoid liability for false or misleading predictions. *Omnicare* thus provides authority, as detailed next, for demanding that cautions address credibility, not contingencies, if they are to immunize failed predictions. The happy result is that the Court's resolution of the issue before it addresses brilliantly an issue the Court never considered.

B. Applying Omnicare to Predictions and Cautions

Using *Omnicare* as authority regarding the cautions necessary to invoke the bespeaks caution doctrine or the PSLRA safe harbor requires applying a decision involving a seemingly different legal issue, for a different type of statement, and arising in the context of one particular provision of the Securities Act. Let us discuss these concerns in reverse order from the least to the most challenging.

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208. *E.g.*, Ann Morales Olazabal, *False Forward-Looking Statements and the PSLRA's Safe Harbor*, 86 IND. L.J. 595, 629 (2011).

1. Can Omnicare Apply Beyond Section 11?

Analytically, there is nothing about the core question presented to the Court in *Omnicare* (what makes an opinion false or misleading) that indicates the Court's overall approach to answering this question only applies to Section 11 and not to the far more numerous cases brought for violation of Rule 10b-5. Indeed, both Section 11 and Rule 10b-5 similarly speak of an untrue statement of material fact or an omission of material fact that makes a statement misleading.[209] Moreover, the sources used by the Court in *Omnicare* to address the issue of when an opinion is false or misleading include the Restatements of Torts and Contracts and a leading treatise on the law of torts,[210] which were discussing common law rules regarding fraud rather than anything specific to Section 11 or to federal securities laws more broadly.

True, the Court mentions the context of Section 11 in addressing when an omission is misleading to the reasonable investor. Specifically, in discussing when the omission of facts pertaining to the investigation of the matter prior to giving an opinion would be misleading to the reasonable investor, the Court mentions the greater care customary in preparing a registration statement, including investigating before giving opinions, than would be expected by the reasonable investor hearing the same opinion in a less formal venue.[211] This, however, is no more than the commonsense recognition that context always matters in communication and does not say that the Court's overall approach is inapplicable to other settings.

The Court also mentions the policy of Section 11 in deterring misleading omissions (half-truths) and not just false statements.[212] This same policy, however, exists for Rule 10b-5, which similarly prohibits misleading omissions.[213]

Accordingly, it is not surprising that lower federal courts have applied *Omnicare* to cases brought under Rule 10b-5.[214] Nevertheless, some judges[215]

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209. *E.g.*, City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc., 856 F.3d 605, 616 (9th Cir. 2017) (pointing out similarity).

210. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175, 188, 191–92 (2015).

211. *Id.* at 190.

212. *Id.* at 192–93.

213. *E.g.*, SEC v. Tex. Gulf Sulfur Co., 401 F.2d 833, 862–64 (2d Cir. 1968) (remanding for determination as to whether ambiguous press release was misleading).

214. *E.g.*, *Dearborn*, 856 F.3d at 616; Tongue v. Sanofi, 816 F.3d 199, 210–14 (2d Cir. 2016); *In re* Lehman Bros. Sec. & ERISA Litig., 131 F. Supp. 3d 241, 251 (S.D.N.Y. 2015).

215. *Dearborn*, 856 F.3d at 623–24 (Kleinfeld, J., concurring); Firefighters Pension & Relief Fund v. Bulmahn, 147 F. Supp. 3d 493, 528 n.148 (E.D. La. 2015).

and a commentator[216] have questioned this. They point to differences between Section 11 and Rule 10b-5 regarding issues such as the requirement to prove intent to deceive in an action under Rule 10b-5.

Courts should, of course, be cognizant of the difference between Section 11 and Rule 10b-5 regarding intent to deceive when applying *Omnicare*. *Omnicare*, however, has only indirect relevance to intent to deceive. *Omnicare*'s holding that an opinion is only false if the speaker does not believe the opinion effectively brings Section 11 when applied to opinions closer to Rule 10b-5.[217] Otherwise, *Omnicare* gets rid of the notion that an opinion might be false simply if it lacked a reasonable basis—which sounds a bit like negligence.

Instead, *Omnicare* talks about opinions being misleading if they omit facts that show the basis for the opinion deviates too much from what the reasonable investor expects. In terms of intent to deceive, the speaker knows the basis (or lack thereof) for the speaker's opinion and what the opinion did not disclose. Hence, the only intent to deceive issue would be whether the speaker knew what a reasonable investor expects. Presumably in a Section 11 case involving opinions falling outside the PSLRA safe harbor, the speaker's ignorance of the expectations of a reasonable investor would not matter;[218] whereas it would in a Rule 10b-5 action or a case involving predictions subject to the PSLRA safe harbor for forward-looking statements.

All told, the argument that *Omnicare* can have no relevance to Rule 10b-5 cases is poor, even though one must keep in mind the difference between Section 11 and Rule 10b-5 when addressing issues beyond the one addressed in *Omnicare*. In terms of the issue we are addressing, it is worth noting that neither courts nor Congress have had any problem with applying the bespeaks caution doctrine[219] and the PSLRA forward-looking statements safe harbor[220] to actions both under Rule 10b-5 and Section 11 despite differences in these provisions.

2. *Predictions as Opinions*

As the Court characterized it, *Omnicare* involved an opinion as to a present fact (that Omnicare was complying with the law) rather than a

216. Michael D. Moritz, *The Advent of Scienterless Fraud? Applying* Omnicare *to Section 10(B) and Rule 10B-5 Claims*, 13 N.Y.U. J.L. & BUS. 595 (2017).

217. *See supra* notes 50–51 and accompanying text.

218. Which the majority in *Omnicare* points out (575 U.S. at 192 n.11) in responding to Justice Scalia's argument that common law fraud required an intent to deceive.

219. *E.g.*, *In re* Worlds of Wonder Sec. Litig., 814 F. Supp. 850 (N.D. Cal. 1993) (applying bespeaks caution doctrine to both Rule 10b-5 and Section 11 claims).

220. 15 U.S.C. §§ 77z-2, 78u-5 (parallel safe harbor provision for claims under the Securities and Securities Exchange Acts).

prediction as to the future. This raises the question as to whether *Omnicare* can apply to predictions rather than just opinions as to present facts.

Interestingly, Omnicare's mistaken opinion on its legal compliance might, in effect, have been a prediction.[221] This is because the kickbacks did not involve secret under-the-table payments from drug companies. Instead, there appears to have been some uncertainty as to whether provisions in Omnicare's contracts with the drug companies violated the anti-kickback law.[222] This makes Omnicare's statement essentially a legal opinion regarding the application of a statute in the absence of a binding interpretation—the correctness of which ultimately hinges on what a court finally decides. This, in turn, means that one could characterize Omnicare's opinion that it believed its conduct was legal as essentially a prediction that a court resolving the issue will so rule.[223]

In any event, at least one lower federal court has already applied *Omnicare* to predictions.[224] Moreover, court decisions involving common law fraud have treated predictions as a species of opinion.[225] Given the Court in *Omnicare*'s reliance on sources discussing common law fraud in determining when an opinion is false or misleading, this common law view of predictions as opinions is relevant to whether *Omnicare* applies to predictions. Beyond this, the SEC's evolving view on predictions discussed earlier,[226] as well as cases applying the bespeaks caution doctrine,[227] lump predictions together with other opinions. Hence, ample authority exists for applying *Omnicare* to predictions. Nevertheless, it might also be useful to look at this in terms of policy.

There are primarily three types of statements in fraud cases that raise questions as to whether they constitute statements of fact: contestable propositions, facts expressed as opinions, and predictions. The truth or falsity

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221. Albeit perhaps not one falling within the narrower confines of forward-looking statements as defined by the PSLRA.

222. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175, 179–80 (2015).

223. *See, e.g.*, Julianello v. K-V Pharm. Co., 791 F.3d 915, 917 (8th Cir. 2015) (statement that laws and regulations were clear and that the company therefore expected the FDA would enforce company's exclusive right to sell the drug in question was a forward-looking statement because its veracity could only be determined after the statement was made).

224. Shreiber v. Synacor, Inc., 832 F. App'x 54, 56–57 (2d Cir. 2020).

225. *E.g.*, Presidio Enters., Inc. v. Warner Bros. Distrib. Corp., 784 F.2d 674, 680 (5th Cir. 1986) ("A prediction, or statement about the future, is essentially an expression of opinion.").

226. *See, e.g.*, Carl W. Schneider, *Nits, Grits, and Soft Information in SEC Filings*, 121 U. PA. L. REV. 254, 255 (1972) (identifying "categories" of information that can be characterized as "soft information" for purposes of the SEC ban).

227. *E.g.*, *In re* Donald J. Trump Casino Sec. Litig.—Taj Mahal Litig., 7 F.3d 357, 368 n.11 (3d Cir. 1993) ("The term soft information refers to statements of subjective analysis or extrapolation, such as opinions, motives, and intentions, or forward looking statements, such as projections . . . ." (quoting Craftmatic Sec. Litig. v. Kraftsow, 890 F.2d 628, 642 (3d Cir. 1989))).

of contestable propositions (such as "our company makes high quality widgets") is in the eye of the beholder, which, even if not articulated, helps to explain why courts commonly disregard such statements as mere puffery.[228] Predictions have a similar indeterminacy when given but then devolve into the opposite problem: It is too easy after the prediction fails to pan out to say that the prediction was false, thereby creating the problem of deterring any predictions regarding investments. *Omnicare* involved factual assertions expressed in the language of opinion. Specifically, a statement as to a present and presumably verifiable fact (the company is complying with the law[229]) was turned into an opinion by the addition of prefatory language "we believe."

Factual assertions expressed in the language of opinion raise the weakest policy for treating the statement as anything other than a statement of the underlying fact—especially when the result is to allow companies to avoid the strict liability that they would otherwise face for false statements of fact in a Securities Act registration statement.[230] The Court's policy rationale for differentiating such statements from an ordinary statement of fact lies in the uncertainty communicated to the investor by the expression of opinion ("we believe").[231] The investor's recognition of the uncertainty in the statement should exist to even a greater extent with predictions—where it is inherent in the fact that the future has yet to occur[232]—than it does with factual assertions expressed as opinions.

There is a more fundamental reason, however, for treating predictions as a species of opinion for purposes of *Omnicare*'s insights as to when an opinion constitutes a false or misleading statement. The utility of a prediction, as much or more than a factual statement expressed as an opinion, lies in deference to the bottom-line judgment of the speaker. After all, a prediction is simply the speaker's opinion on the topic of what the future will be and only is useful if there is some reason to respect the judgment of the speaker. Hence, *Omnicare*'s focus on both the actual belief of the speaker, as well as the omission of facts going to the speaker's credibility in giving the

228. *E.g.*, *In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1428 n.14 (3d Cir. 1997); Grossman v. Novell, Inc., 120 F.3d 1112, 1119 (10th Cir. 1997).

229. As mentioned above (see *supra* note 213 and accompanying text), this ignores the fact that this seems to have been a grey area of law in which views differed as to whether the company's conduct was illegal.

230. *See, e.g.*, Wendy Gerwick Couture, *Optimal Issuer Disclosure of Opinions*, 86 U. CIN. L. REV. 587, 593, 602–03 (2018).

231. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175, 187–88 (2015).

232. *See, e.g.*, Presidio Enters., Inc. v. Warner Bros. Distrib. Corp., 784 F.2d 674, 680 (5th Cir. 1986) ("A statement about the future can be verified only in the future . . . .").

opinion, should apply at least as much to predictions as to factual assertions expressed in the language of opinion.

3. *How Does Omnicare Relate to Cautions?*

The primary leap required to apply *Omnicare* to the problem at hand is that the Court in *Omnicare* is using facts going to the credibility of an opinion as examples of omissions that render an opinion misleading. By contrast, our concern is with cautions that cut off liability from opinions (including predictions) that turn out to be wrong. To make this leap we must ask why cautions cut off liability.

A simple answer is that if the omission of a fact makes a statement misleading, then disclosing the fact means the statement is not misleading because of such an omission. So, if the omission of facts (lack of investigation, facts not aligning with the opinion) renders an opinion misleading under *Omnicare*, then cautions disclosing such facts (credibility cautions) means that the opinion is not misleading and accordingly there is no liability for a misleading opinion under *Omnicare*. Hence, *Omnicare* leads to a mirror image test for what cautions are necessary to avoid liability. Incidentally, this reasoning applies as well to what would be a false statement of opinion under *Omnicare*. Since the falsity lies in the express or implied assertion that the speaker believes the opinion, a disclosure that the speaker does not believe the opinion (either directly or through disclosure of facts that lead the reasonable investor to draw this conclusion) removes the falsity.

Indeed, this mirror image approach is the way the Court called for using the cautionary language discussed earlier,[233] which accompanied Omnicare's opinion about its legal compliance. Instead of discussing whether these cautions had some sort of independent significance, the Court in *Omnicare* stated, "the analysis of whether Omnicare's opinion is misleading must address the statement's context. That means the court must take account of . . . any other hedges, disclaimers, or qualifications [Omnicare] included in its registration statement."[234] The Court then listed the cautionary statements that accompanied Omnicare's opinion as the context to be considered on remand in deciding whether the alleged omission regarding a lawyer's warning to Omnicare was misleading.

In other words, the significance of a caution to the Court in *Omnicare* is either that there was not any potentially misleading omission at all, or that a caution has already sufficiently exposed the questionable basis for the speaker's opinion so that any further omission along the same lines does not

233. *See supra* notes 198–199 and accompanying text.
234. *Omnicare*, 575 U.S. at 196 (citations omitted).

render the opinion misleading.[235] In either case the nature of the relevant facts (those going to credibility) is the same for omissions and cautions.

The only way to avoid this mirror image logic is to suggest some other basis as to why a caution should preclude liability. There are two possibilities: One, which is the dominant rationale for the bespeaks caution doctrine, is that cautions can render a false or misleading prediction or other opinion not material. The second is that Congress said in the PSLRA that cautions can preclude liability for a false or misleading prediction (*ipse dixit*).

4. *Rethinking Bespeaks Caution after* Omnicare

Since the bespeaks caution doctrine is simply a creation of lower federal courts, it is entirely appropriate for lower federal courts to reconsider the doctrine in light of a Supreme Court decision—even if the Supreme Court did not seem to recognize the potential implication of its decision for the doctrine. Those inclined to thinking in silos might object, however, that the bespeaks caution doctrine goes to materiality, while *Omnicare* focuses on what is misleading—two different elements.

a. Misleading or Materiality

As discussed earlier,[236] court decisions dealing with the bespeaks caution doctrine are either not clear or in apparent conflict regarding where the doctrine fits in the elements for a securities fraud claim and specifically whether the impact of cautions goes to making a failed prediction or other opinion not false or misleading, not material, or even not relied upon. The Third Circuit's decision in *Trump* led to the materiality rationale becoming the dominant view.

In many ways, the uncertainty about where the bespeaks caution doctrine fits in a securities fraud claim reflects the Tweedledum and Tweedledee nature of the inquiry. For example, assume a corporate manager says, "I believe X based upon a vision I had while under the influence of hallucinogenic drugs." Assume further that the reasonable investor does not expect this to be the source for a business opinion and would disregard the opinion if it resulted from such a vision. One could say that the disclosure of the questionable basis for the opinion avoids a misleading omission—which is *Omnicare*'s approach. One could also say, however, that the statement as to the basis for the opinion renders the

235. So, for example, if a speaker were to disclose that a prediction of future earnings comes from the planned development of a product, the functioning of which would defy the laws of physics, the failure to also disclose that the prediction was based upon a vision occurring while under the influence of hallucinogenic drugs would probably not be misleading.

236. *See supra* notes 57–62 and accompanying text.

statement "I believe X" not material because a reasonable investor would not view an opinion based upon such a vision to be important.[237]

The Supreme Court's foundational decision defining materiality, *TSC Industries, Inc. v. Northway, Inc.*,[238] is itself something of an example of this. In *TSC*, the plaintiff claimed that the corporation's board of directors had violated the SEC rule against false or misleading statements in soliciting proxies by failing to mention some facts suggesting that the other party to the merger for which the board sought approval might control the board.[239] The problem with the plaintiffs' case was that the proxy statement disclosed the key facts suggesting control.[240] Under these circumstances, it would have been fair to characterize the issue as whether the proxy statement was misleading. The Supreme Court, however, resolved the matter by holding that the disclosed facts in the proxy statement created an issue of fact as to whether the omitted facts were material.[241] One suspects that the Court focused on materiality simply because it had granted certiorari to resolve a dispute regarding the standard for materiality[242] and it would have been awkward to resolve this dispute and then say the case really did not involve materiality.

b. How Credibility Cautions Address Materiality While Contingency Cautions Do Not

There are, of course, situations in which undeniably false or misleading predictions might not be material. For example, a prediction about sales from one vending machine in an employee lounge of a large company might not much matter to the reasonable investor buying stock in that company regardless of whether it is true or false. Those who fixate on the materiality rationale behind the bespeaks caution doctrine similarly argue that cautions can render a prediction not material even if the cautions did not prevent the prediction from being false or misleading.[243] What is lacking in this argument is a coherent explanation of how contingency rather than credibility cautions can render a false or misleading prediction immaterial.

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237. It would also make reliance unreasonable.

238. 426 U.S. 438 (1976).

239. *Id.* at 451.

240. The other party owned thirty-four percent of the corporation's outstanding shares and nominated five of the ten directors (including the president and vice president of the company). *Id.* at 452–53.

241. *Id.* at 453.

242. *Id.* at 443. The issue was whether the standard for materiality was "would" or "might" a reasonable investor find the fact important. *Id.* at 445.

243. *E.g.*, Richard F. Conklin, *Why "Or" Really Means "Or": In Defense of the Plain Meaning of the Private Securities Litigation Reform Act's Safe Harbor Provision*, 51 B.C. L. REV. 1209, 1236–41 (2010) (making this argument).

A statement, including a false or misleading prediction or other opinion, is material if there is a substantial likelihood that a reasonable investor would find it important in deciding whether to buy or sell a security—in other words, to view the statement as significantly altering the total mix of information available.[244] This means that a caution can render a false or misleading prediction or other opinion immaterial only if the caution means there is no longer a substantial likelihood that the reasonable investor would find the false or misleading prediction or other opinion important as part of the total mix of information. Put more simply, the caution must be likely to cause the reasonable investor to ignore the false or misleading prediction or other opinion.

This is precisely the test for materiality of an opinion put forth by the Supreme Court in *Virginia Bankshares*, which the *Trump* opinion discusses in adopting the materiality rationale for the bespeaks caution doctrine.[245] Specifically, the Court in *Virginia Bankshares* states: "Only when the inconsistency [between a misleading opinion and other information disclosed to the shareholders] would exhaust the misleading conclusion's capacity to influence the reasonable shareholder would a § 14(a) action fail on the element of materiality."[246] The problem is that *Trump* recites this test but fails to apply it.

As discussed earlier,[247] the cautions in *Trump* told the plaintiffs about various risks in constructing Trump's Taj Mahal casino in Atlantic City. So what? Lenders loan to businesses that involve risks all the time. What they do not normally do is lend to businesses whose owners do not expect to repay.[248] How then did the contingency cautions in *Trump* eliminate the materiality of the statement that the defendants expected to be able to service the debt when they allegedly did not really expect to do so?

Perhaps the rationale behind *Trump* and other cases following the materiality view of bespeaks caution is that investors, armed with cautions, can make their own determinations of the risks that a prediction will not pan out.[249] This rationale fails to apply the standard for materiality and is

244. *E.g.*, Basic, Inc. v. Levinson, 485 U.S. 224, 231–32 (1988) (adopting the test for materiality from *TSC Industries* for Rule 10b-5 cases).

245. *In re* Donald J. Trump Casino Sec. Litig.—Taj Mahal Litig., 7 F.3d 357, 372 (3d Cir. 1993) (citing Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991)).

246. *Virginia Bankshares*, 501 U.S. at 1097–98.

247. *See supra* note 141 and accompanying text.

248. Unless the lender is relying solely on collateral or the willingness to break bones and crush ribs.

249. *See, e.g.*, Harris v. Ivax Corp., 182 F.3d 799, 807 (11th Cir. 1999) (expressing this view in the context of the PSLRA safe harbor by stating that the defendant's cautions put an investor "sufficiently on notice of the danger of the investment to make an intelligent decision about it according to her own preferences for risk and reward").

completely at odds with the notion that predictions from experts have value. If the bond purchasers were supposed to ignore Trump's prediction of repayment and rely solely on their own calculations, then we are back to the SEC's "just the facts" hostility toward predictions and the SEC should return to its prohibition. The SEC's change in position regarding predictions, as well as the express purpose for the PSLRA safe harbor, stem from the view that the entrepreneur's or corporate insider's expert judgment has value. If so, it makes no sense to say that investors are supposed to ignore the prediction and look solely to their own assessment based upon contingency cautions.

This is even truer of cases other than *Trump*. The bonds in *Trump* were debt instruments in which the prediction only involved the likelihood of repayment.[250] In equity investments, however, the prediction of the business' future income not only determines the likelihood of payment, but more critically, how much investors will receive. If the prediction of future income comes from a speaker who does not believe it or lacks any basis for it, there is no way to offset this by discounting for the various risks that the prediction will not come to pass.[251]

The bottom line is that contingency cautions, unless they also constitute credibility cautions, do not render a prediction immaterial under *TSC* or *Virginia Bankshares*.[252] This is because contingency cautions add to the total mix of information along with the prediction. Remember, such cautions do not say the prediction is worthless; they say there are risks it might not pan out. As a result, contingency cautions might lead investors to demand a

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250. *Trump*, 7 F.3d at 364.

251. Valuation of an investment takes the expected future income and discounts it to present value by dividing by a number based upon the demanded rate of return. Expressed as an equation: $V = E/(1 + R)^n$ where V is the present value; E is the expected income; R is the demanded rate of return; and n is the number of years in the future the income will be made. R, in turn, is the sum of the risk-free rate of interest plus a premium for the greater risk presented by the investment. *See, e.g.*, JEFFERY J. HAAS, CORPORATE FINANCE 53 (2015); W. Bauman & J. Komarynsky, *Security Analysis* 16-29, 16-30, *in* HANDBOOK OF MODERN FINANCE (Dennis Logue ed., 1984). The appropriate expected earnings based upon a prediction without belief or basis is 0 and hence the present value of this predicted income is 0. Inserting the predicted earnings and dividing by a number reflecting a discount that the income will not materialize does not equal 0 unless the discount is infinite.

Incidentally, this equation explains why Judge Easterbrook in *Asher* is discussing discount factors. *See supra* text accompanying note 82. The misunderstanding in *Asher* comes from a pre-*Omnicare* view of what makes a prediction misleading. Judge Easterbrook assumes this includes omitting significant risks. *See supra* text accompanying note 81 (discussing Judge Easterbrook's statement that cautions which disclosed all material risks would avoid any misleading omission in giving a prediction, which implicitly assumes that the failure to disclose material risks can render the prediction misleading). Therefore, he focuses on the discount factor (the denominator in the equation). Under *Omnicare*, the misleading omission goes to the credibility of the earnings forecast (the numerator in the equation).

252. The one minor exception, discussed earlier (see *supra* text accompanying notes 120–121), is the ability of contingency cautions to contradict the claim that a prediction is a sure thing.

greater rate of return to offset the increased risk that the prediction will not pan out, as they did with the bonds issued in *Trump*. They might even rise to the point at which some investors, based upon their analysis of the total mix of information, disagree with prediction and do not make the investment. In neither case, however, is the result to deprive the false or misleading prediction of its materiality because in neither case did the prediction cease to be information that the reasonable investor would consider important as part of the total mix of information. Weighing a caution alongside a fraudulent prediction does not destroy the materiality of the prediction.

By contrast, the significant credibility caution leads the reasonable investor to no longer consider the prediction to be important in deciding upon an investment. This is because it suggests that the speaker is not applying the expertise that leads the reasonable investor to listen to the speaker. Indeed, reasoning backwards, this suggests a test to distinguish credibility from contingency cautions in grey areas: A contingency caution at most adds to the total mix of information considered important by the investor, while a significant credibility caution ultimately reduces the total mix of such information by removing the prediction from the reasonable investor's calculus.[253]

Notice, by the way, that the key to avoiding confusion here is to focus on the caution's impact on the materiality of the false or misleading prediction, rather than just the materiality of the facts in the caution.

5. *Reinterpreting the PSLRA's "Meaningful Cautionary Statements" Provision After Omnicare*

The most challenging problem is whether congressional intent blocks reinterpreting the PSLRA's "meaningful cautionary statements" safe harbor to require credibility cautions in line with *Omnicare*'s focus on what facts should be disclosed. At first glance, it seems easy to dismiss this concern. After all, it is not like the phrase "meaningful cautionary statements" has an obvious meaning. There are, however, four potential objections to this reinterpretation.

253. Admittedly, this discussion takes an all or nothing approach to the impact of a credibility caution. A credibility caution might lead the reasonable investor to question the sincerity or applied expertise of the speaker in making the prediction, but not to the point at which the investor is entirely convinced that the speaker did not believe or has no basis for the opinion. Under these circumstances, the reasonable investor might discount the valuation of the investment to account for the increased risk that the prediction is bogus, but not completely disregard the prediction. The problem is that materiality calls for an all or nothing determination—a reasonable investor either would or would not view a fact as important. This is, of course, not unique to materiality. Legal determinations essentially are binary in a world which is not. Hence, the need to turn credibility cautions somewhat artificially into an all or nothing impact is something that courts do every day with all sorts of issues.

a. The Surplusage Concern

The first objection is that interpreting meaningful cautionary statements as a mirror image of omissions that make opinions misleading under *Omnicare* seemingly renders the safe harbor based upon cautionary statements surplusage. After all, if the cautionary statement lists those facts whose omission would render the prediction misleading under *Omnicare*, then there is no liability for a misleading prediction anyway. This parallels why Judge Easterbrook in *Asher* rejects the notion of interpreting meaningful cautionary statements to call for sufficient disclosure to prevent the prediction from being misleading.[254]

The easiest response to this objection is that the language of the PSLRA completely undercuts it. Specifically, one prong of the statutory safe harbor states that there is no liability for a failed prediction which is immaterial. This is totally surplusage because liability for securities fraud requires materiality in any event.[255]

Beyond this, it is useful to keep in mind that the PSLRA came before *Omnicare*. As explained earlier,[256] at the time Congress passed the statute there was substantial authority suggesting that predictions without a reasonable basis constituted fraud. This creates the danger of liability for failed predictions due to finders of fact concluding with the benefit of 20-20 hindsight that the prediction lacked a reasonable basis. Under this state of the law, it makes sense to provide a safe harbor telling those making predictions that they can avoid such second guessing by disclosure to investors. Congress could not know that *Omnicare* would come along almost two decades later and replace the reasonable basis test with a focus on misleading omissions. This gets to the same place as the PSLRA by allowing those making predictions to avoid second guessing through disclosure to investors.

Put broadly, the PSLRA safe harbor, like all statutory or regulatory safe harbors, was written in response to the lack of certainty and potential overreach in the high seas of judicial authority at the time the safe harbor was drafted. If subsequent judicial development calms of the waters of uncertainty and overreach, one does not need to leave the jetty marking the

254. *See supra* note 87 and accompanying text. It is useful to note, however, that Judge Easterbrook in *Asher* seemingly takes a much broader view of what omissions render a prediction misleading than would be the case after *Omnicare*. Specifically, he seems to view the omission of any risks material to the reasonable investor as potentially misleading—a view that might explain his reluctance to adopt a mirror image test. *Omnicare* rejects such a broad test of what is misleading.

255. *E.g.*, Basic, Inc. v. Levinson, 485 U.S. 224, 238 (1988). The legislative history of the PSLRA indicates that this redundancy was deliberate. Conf. Comm. Rep., *supra* note 3, at 44 (explaining that the immateriality prong was added to clarify that courts could continue to find that forward-looking statements were not actionable under the antifraud provisions of the Securities or Securities Exchange Acts because the statements were not material).

256. *See* text accompanying *supra* notes 51–54.

boundary of the safe harbor in the middle of calm water simply for it to differ from the newly established judicial doctrine.

b. The Provision's Entire Language

The second objection is textual. While the expression "meaningful cautionary statements" is malleable in defining what makes a caution meaningful, the entire provision refers to meaningful cautionary statements "identifying important factors that could cause actual results to differ materially from those in the forward-looking statement."[257] This might seem to contemplate listing the various contingencies that could cause the prediction not to pan out—in other words, contingency cautions.

On the other hand, the fact that the speaker did not research the prediction in the manner investors would have expected or confronted overwhelming facts suggesting the prediction was wrong certainly seem to be important factors that could cause actual results to differ materially from those in the prediction. In other words, the phrase "factors that could cause" is capable of more than one meaning in this provision: It could refer to existing facts and prospective events that could cause the future to deviate from the prediction. Alternately, it could refer to the way in which the speaker came to the prediction that causes the prediction not to be any good. Hence, this language does not rule out requiring credibility cautions.

c. Legislative History

Dealing with the objection based upon the PSLRA's legislative history is more complex. Of course, legislative history is not the statute, and one does not need to be as extreme in downplaying the use of legislative history as was Justice Scalia[258] to recognize that courts do not owe every passage in a committee report the same fealty they owe to passages in statutory text.[259] This is particularly relevant in this instance because one cannot expect legislative history to address how to read the statute to account for a Supreme Court decision that occurs years later.

In any event, courts[260] and writers[261] looking to the legislative history for guidance on the meaning of "meaningful cautionary statements" typically focus on the Conference Committee report. Like the language in the statute,

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257. 15 U.S.C. 78u-5(c)(1)(A)(i).

258. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 390 (2000) (Scalia, J., concurring) (describing "all of the Court's invocations of legislative history" as "utterly irrelevant").

259. *See, e.g.*, WILLIAM N. ESKRIDGE JR. ET AL, CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 750–51 (6th ed. 2020) (discussing problems with relying on committee reports).

260. Slayton v. Am. Express Co., 604 F.3d 758, 771 (2d Cir. 2010).

261. *E.g.*, Olazabal, *supra* note 208 at 613–14; Conklin, *supra* note 243 at 1243–44.

much of the discussion of meaningful cautionary statements in this report is not particularly meaningful. Some of it essentially repeats the statutory language embellished with a bit of self-evident additional detail.

For example, the report states: "'Important' factors means the stated factors identified in the cautionary statement must be relevant to the projection and must be of a nature that the factor or factors could actually affect whether the forward-looking statement is realized."[262] This contains the same ambiguity as the statutory language insofar as "factors" that "could actually affect whether the forward-looking statement is realized" might include both contingencies that would prevent the statement from panning out but also the speaker's lack of belief in or basis for the statement.

The example given in the report of specific facts that might go into the cautionary statements is "information about the issuer's business."[263] While again suggestive of contingency cautions, information about the issuer's business could also include facts so misaligned with the prediction as to constitute credibility cautions. Picking up from the bespeaks caution doctrine, the report explains that "boilerplate warnings will not suffice."[264] Credibility cautions are anything but boilerplate.

Two more specific comments in the report are the troublesome ones. The report states:

> The Conference Committee expects that the cautionary statements identify important factors that could cause results to differ materially—but not all factors. Failure to include the particular factor that ultimately causes the forward-looking statement not to come true will not mean that the statement is not protected by the safe harbor.[265]

It is admittedly difficult to square this passage with an interpretation of "factors that could cause" a prediction not to pan out as referring to facts going to credibility, such as a lack of investigation before giving the prediction or the non-alignment of the prediction with the facts in the speaker's possession. Otherwise, the report would seem to be saying that cautions are okay even though they omitted the key fact (such as a lack of investigation) undermining the credibility of the speaker in giving the prediction.

On the other hand, this passage must be understood in the context of judicial authority at the time Congress enacted the PSLRA. At that time, no Supreme Court decision prevented plaintiffs from arguing that a prediction was misleading and cautions inadequate when the speaker did not warn of

262. Conf. Comm. Report, *supra* note 3, at 43–44.
263. *Id.* at 43.
264. *Id.*
265. *Id.* at 44.

the contingency that caused the prediction to fail. The Conference Committee report seeks to block such an argument. No one knew that years later the Supreme Court in *Omnicare* would accomplish this goal by narrowing what makes the expression of an opinion misleading to just facts going to credibility.

The other commentary in the report that presents a difficulty involves the speaker's knowledge and state of mind. Specifically, the report explains that the specification of important factors is "not to provide an opportunity for plaintiff counsel to conduct discovery on what factors were known to the issuer at the time the forward-looking statement was made."[266] Moreover, the report goes on to state that "[c]ourts should not examine the state of mind of the person making the statement"[267] when looking at cautionary statements. As pointed out before,[268] *Omnicare* looks only to disclosure of facts known to the speaker because this is what matters when focused on the speaker's credibility.

Reading more carefully, however, the report is not saying that the statute cannot require credibility cautions simply because such cautions involve facts known to the speaker. The first passage quoted above is focused on discovery. As explained earlier,[269] *Omnicare* demands that the plaintiff plead the specific facts going to credibility that the speaker knew and did not disclose. Hence, it does not allow plaintiffs to use discovery to go on a fishing expedition to find out what the defendant knew—which seems to be the underlying concern of the report. Moreover, demanding credibility cautions does not require courts to examine state of mind to evaluate the cautions. The question is whether the defendant disclosed those specific facts that raise issues about the sincerity of or basis for the forward-looking statement, not whether the defendant believed the prediction. Explaining this further brings us to the fourth objection to interpreting the PSLRA safe harbor to incorporate *Omnicare* and require credibility cautions.

d. *Keeping State of Mind Disjunctive*

i. *The Problem*

The PSLRA legislative history involving state of mind brings us to the "or" problem. A particularly controversial[270] aspect of the PSLRA forward-

266. *Id.*
267. *Id.*
268. *See supra* text accompanying note 193.
269. *See supra* text accompanying notes 203–208.
270. *See, e.g.*, 141 Cong. Rec. 35299 (1995) (statement of Sen. Biden) (calling the proposal to enact a safe harbor without an inquiry into intent "outrageous"); 141 Cong. Rec. 17427 (1995)

looking statements provision involves its disjunctive listing of two types of failed predictions that will not produce liability: predictions labeled as forward-looking statements and accompanied by meaningful cautionary statements; or predictions made without actual knowledge that they are false or misleading. The seeming implication of the "or" connector is that first part of the safe harbor allows persons knowingly making false or misleading predictions (and thus ineligible for the alternate protection) to avoid liability by accompanying the prediction with meaningful cautionary statements.

At first glance, this disjunctive formulation is not inconsistent with interpreting meaningful cautionary statements to require the sort of credibility cautions that would avoid the prediction being misleading under *Omnicare*. Indeed, one could argue that this resolves the "or" criticism of the PSLRA provision. After all, if the prediction is not misleading, then the statute is not letting people off who make knowingly misleading predictions.

A problem, however, arises with false, rather than misleading, predictions—in other words, a prediction that the speaker does not really believe. A simple-minded solution is to interpret meaningful cautionary statements in this instance to require a confession.[271] Indeed, this again avoids the criticism that the PSLRA allows those giving predictions that they do not believe to escape liability to fooled investors—since the confession tips off the investor to the fraud.

The district court's decision in *In re SeeBeyond Technologies Corp. Securities Litigation*[272] supports this approach. Specifically, the court explained that the disjunctive structure of the PSLRA precludes following the view expressed in some court opinions[273] that speakers making predictions they do not actually believe cannot rely on the safe harbor for predictions accompanied by meaningful cautions.[274] Nevertheless, the court continued:

> If the forward-looking statement is made with actual knowledge that it is false or misleading, the accompanying cautionary language can only be meaningful if it either states the belief of the speaker that it is false or misleading or, at the very least, clearly articulates the reasons why it is false or misleading. These are

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(statement of Sen. Cohen) (worrying that "a few carefully placed disclaimers could provide a legal protection for misleading statements that were made knowingly").

271. *See, e.g.*, FRANKLIN A. GEVURTZ, CORPORATION LAW 557–58 (1st ed. 2000) (suggesting this when discussing the bespeaks caution doctrine).

272. 266 F. Supp. 2d 1150 (C.D. Cal. 2003).

273. *E.g.*, No. 84 Emp.-Teamster Joint Council Pension Tr. Fund v. Am. W. Holding Corp., 320 F.3d 920, 936–37 (9th Cir. 2003).

274. *SeeBeyond*, 266 F. Supp. 2d at 1164.

> undeniably "important factors that could cause actual results to differ materially from those in the forward-looking statement."[275]

This solution, however, might be a little too facile. The PSLRA's legislative history discussed above suggests that the cautionary statement provision is designed to create a safe harbor enabling parties making predictions to avoid getting into disputes over whether there was knowing falsity by accompanying the predictions with cautionary statements. If the only disclosure or caution that would work is a confession to knowing falsity, then the speaker who really believes in the prediction seemingly can never use a caution to avoid the possibility of litigation over knowing falsity unless the speaker is willing to confess to something that is not so. This contravenes the legislative goal.

ii. Credibility Cautions as an Elegant Safe Harbor from Disputes over State of Mind

A more careful analysis, however, shows that interpreting the PSLRA's meaningful cautionary statements provision to call for credibility cautions provides an elegant way to meet the underlying goals of the statute while avoiding "or" criticism. To begin with, Congress's purpose for including the prong in the PSLRA safe harbor that protects failed predictions in the absence of knowing falsity is obviously not to insulate those making knowingly false predictions from liability. Rather, by requiring knowing falsity, this prong cuts off liability based upon recklessness under Rule 10b-5,[276] or strict liability under Section 11.[277]

Moreover, the purpose of the cautionary statements prong in the safe harbor, with its "or" connector to the knowing falsity prong, was not to let off those knowingly making false or misleading predictions—even though many worried this would be its effect.[278] Rather, it was to create a safe harbor allowing the innocent, by giving cautions, to avoid the burdens and uncertainty arising from disputes over whether there was knowing falsity.[279] Interpreting the PSLRA's meaningful cautionary statements provision to call for credibility cautions meets this goal

To understand why, we switch from the insights of magicians to those of trial lawyers. The defendant's state of mind is not a known fact in

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275. *Id.* at 1165; *see also* Rosenbaum Cap., LLC v. McNulty, 549 F. Supp. 2d 1185, 1191 (N.D. Cal. 2008) (following *SeeBeyond* on this point).

276. *See, e.g.*, 3 ALAN R. BROMBERG ET AL., BROMBERG & LOWENFELS ON SECURITIES FRAUD, § 6.36 (2d ed. 2023).

277. It also clarifies for predictions the question of who must know of the falsity when dealing with statements in the name of a corporation.

278. *See supra* note 270.

279. *See supra* text accompanying notes 266–267.

litigation. Moreover, the finder of fact in litigation cannot read minds. Hence, the plaintiff alleging that a speaker did not really believe the speaker's prediction will need to prove this based upon inferences the judge or jury is supposed to draw from some external facts.

One such fact is the investigation conducted by the speaker before giving the prediction. The lack of an investigation that the reasonable investor would expect is *Omnicare*'s first example of a fact whose omission could render an opinion misleading. In addition, a judge or jury might infer from such a lack of investigation that the speaker spun the prediction out of thin air and the speaker, knowing this, does not really believe the prediction. More frequently, plaintiffs point to facts in the speaker's possession that make the prediction unlikely to happen.[280] *Omnicare*'s second example of a fact whose omission could render an opinion misleading involves the situation in which this reaches the stage in which the speaker's opinion does not fairly align with the facts in the speaker's possession. Once again, a judge or jury might infer from the speaker's possession of non-aligning facts of such a magnitude that the speaker does not really believe the prediction.

This, in turn, means that disclosure regarding the speaker's limited investigation or possession of facts not fairly reflected by the prediction (credibility cautions) not only avoids misleading omissions under *Omnicare*, but also should cut off liability based upon allegations that the speaker did not really believe the prediction when the evidence in support of the allegation consists of the lack of investigation or the possession of these non-aligning facts. After all, if the plaintiff is asking the judge or jury to infer from the lack of investigation or possession of non-aligning facts that the speaker did not believe the prediction, then the reasonable investor should have made the same inference.

So far, this discussion focused on the common pattern in which the plaintiff asks the judge or jury to conclude that the speaker did not believe the prediction based upon the indirect inferences from a lack of investigation or the possession of non-aligning facts. What about the situation in which the plaintiff can produce direct evidence that the speaker did not believe the prediction? Former President Trump's taped interviews with Bob Woodward, in which Trump essentially admits to not believing the assurances he was giving the public during the early days of the Covid-19 epidemic in the United States,[281] provides an illustration. Yet, how often is such direct evidence going to exist when dealing with predictions involving

280. *See supra* notes 155–161 and accompanying text.

281. *E.g.*, Robert Costa & Phillip Rucker, *Woodward Book: Trump Says He Knew Coronavirus Was 'Deadly' and Worse than the Flu While Intentionally Misleading Americans*, WASH. POST (Sept. 9, 2020), https://www.washingtonpost.com/politics/bob-woodward-rage-book-trump/2020/09/09/0368fe3c-efd2-11ea-b4bc-3a2098fc73d4_story.html.

investments[282] and what would be the harm in saying that the only suitable caution is to disclose this evidence to investors?

While demanding cautions that provide the investor with evidence that the speaker does not believe the prediction handles the lemons market problem by flagging the lemons or imposing liability when that is not done, where is the safe harbor for the innocent? The answer is to recognize both the grey areas involved in this discussion and that the essence of a safe harbor in the law is to allow parties to trade off going beyond what the law might require in exchange for removing uncertainty in the application of the law to the situation.[283]

So, for example, while a judge or jury might infer from a lack of investigation or the possession of facts indicating that the prediction will not pan out that the speaker did not believe the prediction, this might not be the case. Experience shows that people can believe the strangest things in the face of overwhelming facts to the contrary.[284] Providing investors with credibility cautions disclosing the lack of investigation or the knowledge of facts indicating that the prediction will not pan out allows the honest—if perhaps delusional—speaker to avoid litigation over whether the speaker really believed the prediction based upon inferences that a plaintiff later wishes to draw from the disclosed facts.[285] In the rare case in which there is direct evidence that the speaker did not believe the prediction (those embarrassing tapes, texts, or email), disclosure to investors might allow the speaker to explain the apparent admission.

Moreover, credibility cautions perform the safe harbor function when it comes to potentially misleading omissions in giving predictions. The grey area here involves the question of what a reasonable investor would find misleading. Specifically, when does an investigation so depart from what a reasonable investor would expect that the reasonable investor would feel misled if the investor did not know the limits of the investigation? When do the facts in the speaker's possession so misalign with the prediction that their omission misleads the reasonable investor?

This grey area impacts not only whether the omission is misleading, but also whether the speaker knowingly made the misleading prediction. Of

282. *E.g.*, Jordan Eth & Michael Dicke, *Insider Stock Sales in Rule 10b-5 Corporate Disclosure Cases: Separating the Innocent from the Suspicious*, 1 STAN. J.L. BUS. & FIN. 97, 105 (1994) (noting that direct evidence of knowing falsity is rare).

283. *E.g.*, Ripken *supra* note 28 at 980.

284. To avoid giving offense, I will forgo examples.

285. As explained earlier (see *supra* notes 206–208 and accompanying text), the PSLRA's requirement to plead facts creating a strong inference regarding the required state of mind should force the plaintiff to disclose in the complaint that the plaintiff is relying on the facts that the defendant has disclosed to investors in credibility cautions whenever this is the case and hence cut off the litigation before expensive discovery.

course, the speaker knows the scope of the speaker's investigation before giving the prediction as well as facts in the speaker's possession that undermine the prediction. The speaker also knows if the speaker disclosed these facts when giving the prediction. Nevertheless, the speaker might deny knowledge that a reasonable investor would have expected a more extensive investigation or would have been so shocked by the misalignment of the prediction and the underlying facts as to feel misled.

A sensible safe harbor in this grey area tells the speaker who is in doubt about whether a particular fact would cause a reasonable investor to question your credibility in making the prediction, either disclose the fact or take your chances on an after-the-fact determination of what a reasonable investor would think and whether you knew that. Hence, interpreting the PSLRA's meaningful cautionary statements provision to call for credibility cautions as suggested by the insights of *Omnicare* is entirely consistent with the legislative purpose of allowing speakers to use cautions to avoid litigating over their knowledge.

CONCLUSION

All told, reinterpreting the bespeaks caution doctrine and the PSLRA's meaningful cautionary statements provision to call for credibility rather than contingency cautions replaces misdirection with useful warnings to flag trumped up predictions. Fortunately, the Supreme Court's *Omnicare* decision provides courts with authority—even if no one has noticed it so far—to adopt this approach. Under this approach, investors rather than judges or juries can decide whether predictions lack sincerity or basis. To do so, however, investors need to hear those facts that plaintiffs can later reasonably claim show a lack of sincerity or basis. This means that the speaker who is worried about being sued for a failed prediction should follow the advice that good trial attorneys give their witnesses and make sure the jury (or this instance the investors) hear any reasons for them to question your credibility from you first.[286]

286. *See, e.g.*, THOMAS A. MAUET, TRIAL TECHNIQUES AND TRIALS 187 (9th ed. 2013).

APPENDIX: DATA SET OF CASES DESCRIBING CAUTIONS IN SUFFICIENT DETAIL TO DETERMINE WHETHER THEY CONSTITUTE CREDIBILITY VS CONTINGENCY CAUTIONS

(Organized in descending order from the court opinion containing the most to the court opinion containing the least extensive description of the cautions provided by the defendant)

Cases Addressing Cautions in the Context of the PSLRA Safe Harbor

Kurtzman v. Compaq Comput. Corp., No. CIV.A.H-99-1011, 2000 WL 34292632, at *5 (S.D. Tex. Dec. 12, 2000).

Abuhamdan v. Blyth, Inc., 9 F. Supp. 3d 175, 196 (D. Conn. 2014).

In re NovaGold Res. Inc. Sec. Litig., 629 F. Supp. 2d 272, 280 (S.D.N.Y. 2009).

In re Mellanox Techs. Ltd. Sec. Litig., No. 13-cv-04909, 2014 WL 12650991, at *11 (N.D. Cal. Mar. 31, 2014).

Peregrine Options, Inc. v. Farley, Inc., No. 90 C 285, 1993 WL 489739, at *4 (N.D. Ill. Nov. 19, 1993).

Damian v. Montgomery Cnty. Bankshares, Inc., 255 F. Supp. 3d 1265, 1274 (N.D. Ga. 2015).

Yellen v. Hake, 437 F. Supp. 2d 941, 962 (S.D. Iowa 2006).

In re Harman Int'l Indus., Inc. Sec. Litig., 27 F. Supp. 3d 26, 46 (D.D.C. 2014), *rev'd and remanded*, 791 F.3d 90 (D.C. Cir. 2015).

In re Regeneron Pharms., Inc. Sec. Litig., No. 03 Civ.3111, 2005 WL 225288, at *4 (S.D.N.Y. Feb. 1, 2005).

In re Bemis Co. Sec. Litig., 512 F. Supp. 3d 518 (S.D.N.Y. 2021), *judgment entered*, No. 19 CIVIL 3356 (JPC), 2021 WL 5140777 518, 527 (S.D.N.Y. Nov. 4, 2021).

Stavros v. Exelon Corp., 266 F. Supp. 2d 833, 839 (N.D. Ill. 2003).

In re Ligand Pharms., Inc. Sec. Litig., No. 04CV1620DMS(LSP), 2005 WL 2461151, at *2 (S.D. Cal. Sept. 27, 2005).

In re Analogic Corp. S'holder Litig., No. 18-cv-11301, 2019 WL 4804800, at *4 (D. Mass. Sept. 30, 2019).

Payne v. DeLuca, 433 F. Supp. 2d 547, 584 (W.D. Pa. 2006).

Asher v. Baxter Int'l Inc., 377 F.3d 727, 729 (7th Cir. 2004).

In re XM Satellite Radio Holdings Sec. Litig., 479 F. Supp. 2d 165, 169 (D.D.C. 2007).

In re Sec. Litig. BMC Software, Inc., 183 F. Supp. 2d 860, 894 (S.D. Tex. 2001).

In re Gilat Satellite Networks, Ltd., No. CV-02-1510, 2005 WL 2277476, at *13–14 (E.D.N.Y. Sept. 19, 2005).

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