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The SEC's Final Whistleblower Rules:

The Floodgates Open on a New Wave of Whistleblower Claims, as the SEC Authorizes Massive Bounties to Anonymous Tipsters

Are There Lessons to Be Learned From Private Securities Class Actions' Use of "Confidential Sources"?

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Despite anguished pleas from public companies that great mischief is about to be unleashed on Corporate America by anonymous tipsters who may report false allegations of securities fraud to the government, on May 25 the Securities and Exchange Commission turned a deaf ear to these concerns and issued its final "whistleblower" rules under the Dodd-Frank Wall Street Reform and Consumer Protection Act. Many commentators have viewed these new whistleblower rules as perhaps the most anticorporate element of the Dodd-Frank legislation.[1] Under these new rules, whistleblowers whose tips lead to successful SEC enforcement actions yielding awards of more than $1 million are entitled to a substantial portion of the recovery. These bounties are orders of magnitude greater than tipsters could recover under former SEC rules, and create an almost irresistible incentive for disgruntled employees to report suspicions of wrongdoing to the government, with the knowledge that they will not be "outed" by the SEC to their employers. What is the likely result? As this article discusses, we already can predict what is likely to happen under these rules based on our experience with so-called "confidential witnesses" in private securities class actions over the last two decades. It's not a pretty picture.

As corporate defendants know all too well in the private securities litigation context—where allegations of securities fraud grounded on information purportedly obtained from "confidential witnesses" have become ubiquitous—allegations derived from unnamed sources often lead to costly litigation based on inaccurate or misleading information. Indeed, the experience in a number of reported cases shows that once unnamed witnesses are unmasked during the course of private litigation—a tool *not* available to corporate defendants in SEC enforcement actions under the new whistleblower rules—these witnesses often are found to be unreliable, lack basic knowledge of any actual misconduct, and, in some cases, recant altogether allegations attributed to them.

By encouraging corporate employees to report to the SEC exactly the kind of groundless information that plagues corporate defendants in the private securities litigation context, the new SEC whistleblower rules present substantial risks to corporations whose employees may be tempted to report to the SEC rumors, innuendo, gossip, or baseless suspicions of fraud, with the promise of a windfall for the tipster if the lead bears fruit.

The New SEC Whistleblower Rules

On July 21, 2010, Congress passed the Dodd-Frank legislation,[2] which called on the SEC to adopt rules to implement a new whistleblower program with financial incentives "to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated the securities laws… ."[3]

Less than a year later and after extensive comment letters from the issuer community criticizing the proposed rules, the SEC issued its final whistleblower rules under the new § 21F of the Securities and Exchange Act of 1934, with little substantive changes from its proposed rules.[4] Under these now-final rules, a person who provides the SEC with "original information" relating to a "possible violation of the federal securities laws… that has occurred, is ongoing, or is about to occur,"[5] and which results in a successful SEC enforcement action yielding a recovery of more than $1 million, is entitled to a 10% to 30% share of the recovery.[6]

Under the final rules, any person (with certain exceptions, such as internal compliance personnel) who believes that he or she has information concerning possible securities law violations by their employer—whether based on information obtained during the course of their work duties or simply overheard in the lunch room—has a tantalizing financial incentive to report that information to the SEC in the hope that it results in a successful enforcement action.[7]

The new rules also require "that the Commission not disclose information that could reasonably be expected to reveal the identity of a whistleblower."[8] As the SEC explained in its proposed rule, this prohibition on disclosing the name of the whistleblower is consistent with the Commission's policy and practice of keeping all information obtained during its investigations confidential.[9] As a result, companies that are the subject of SEC enforcement actions will have no way of learning *who* originally accused them of securities fraud, and obviously no right to confront their accusers. Corporate defendants, in other words, will have no opportunity to demonstrate to the SEC that: 1) the whistleblower was not in a position to know the information that purportedly amounts to a securities fraud violation; 2) given the whistleblower's function, the information reported by the whistleblower is not reliable or credible; 3) the whistleblower's recollection of events is impeached from his or her own documents, or other contemporaneous documents or information; 4) the event in question was followed by later events in which the whistleblower was not involved that contradict any inference of wrongdoing or intentional acts; or 5) the whistleblower may have had past employment-related issues that cast doubt on his or her credibility.

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Under the new rules, moreover, information is not deemed "original"—meaning its source is ineligible for a bounty—if it is already known to the SEC from any other source, including another whistleblower.[10] The rules thus create the perverse incentive for a whistleblower to engage in the proverbial "race to the courthouse," only in this case a race to the SEC, to report information before anyone else does. By adopting this "to the first go the spoils" rule, the SEC inevitably will cause whistleblowers to bypass their companies' internal corporate compliance systems, since any delay in reporting to the SEC may allow another whistleblower to claim the position of first-to-report, and with it, the potential bounty. (During the comment period on the proposed whistleblower rules, the SEC rejected calls from commentators to implement rules requiring whistleblowers to first report possible securities law violations to internal corporate compliance functions before reporting to the SEC. Instead, the final whistleblower rules create a 120-day "look-back" period in which a whistleblower may report to the SEC after first reporting internally and still be treated as if he or she had reported to the SEC at the earlier reporting date.[11] This look-back period, however, does nothing to require or even incentivize employees to report potential misconduct up the chain before reporting to the SEC. And while the new SEC rules also provide that a whistleblower's voluntary participation in an internal compliance and reporting system is a factor that the SEC will consider in determining whether to increase the amount of an eventual reward,[12] it is doubtful whether this potential financial reward will compel corporate tipsters to report potential fraud internally before reporting to the SEC, since bounty rewards already are at the discretion of the SEC.)

Thus, the whistleblower rules will likely usher in a new wave of tips from employees of every kind and nature, at the first inkling of a suspicion or raised eyebrow, and these employees now can take comfort that they will not be identified to their employers as a whistleblower.

Confidential Witnesses in Private Securities Litigation

The Use of Confidential Witnesses as Sources for Pleading a Strong Inference of Scienter In Securities Class Actions

As a preview of things to come for corporate issuers now facing the prospect of whistleblowers whose identities are kept hidden from the accused, let us summarize briefly the sordid history of "confidential witnesses" in private securities class actions under the federal securities laws over the last two decades.

The use of "confidential witness" allegations in private securities litigation began in earnest after Congress passed the Private Securities Litigation Reform Act of 1995 (PSLRA). The PSLRA was "[d]esigned to curb perceived abuses of the § 10(b) private action—nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests and manipulation by class action lawyers,"[13] by raising the standard by which plaintiffs had to plead securities fraud. Among other things, the PSLRA mandates that plaintiffs asserting claims for money damages under § 10(b) of the Securities Exchange Act of 1934 plead, with particularity, facts giving rise to a strong inference that defendants had fraudulent intent with respect to each alleged misstatement or omission made in connection with the purchase or sale of a security.[14] By raising the § 10(b) pleading standard, Congress sought to deter meritless securities class actions before discovery, which can "impose costs so burdensome that it is often economical for the victimized party to settle," even if the claims asserted are groundless.[15]

In an effort to meet their burden of pleading a strong inference of scienter, securities plaintiffs' lawyers increasingly have relied on allegations derived not from documentary evidence, or other verifiable sources, but from *anonymous* sources—typically, current or former lower-level employees of a corporate defendant—who are alleged to have provided inside information to plaintiffs' lawyers about the corporate defendant's alleged fraudulent conduct. Unlike other areas of the law, such as the criminal laws, where defendants are always entitled to confront their accusers,[16] "confidential witnesses" in securities class actions seem to be a protected species of sorts, and courts generally permit plaintiffs to rely on these anonymous sources to satisfy the strong inference of scienter pleading requirement. The rationale for this protective attitude towards confidential witnesses in securities cases is explained, in part, by the fact that the PSLRA imposes a stay of discovery during the pendency of a motion to dismiss, meaning that securities plaintiffs are restricted during this period from obtaining from defendants more traditional forms of evidence on which to ground a complaint. Thus, many courts have found that "there is no requirement that [the sources] be named, provided they are described in the complaint with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged."[17] This level of specificity is required as a preliminary test of the reliability of allegations attributed to anonymous sources. Many courts thus have found that such allegations are a permissible method of pleading a strong inference of scienter under the PSLRA, so long as these sources are described in the complaint as being in a position to actually know about the defendants' knowledge and fraudulent intent.[18] Nevertheless, a number of courts have expressed understandable concerns with this judicial deference to anonymous sources. As Frank H. Easterbrook, Chief Justice of Seventh Circuit Court, and one of the most esteemed federal judges in the United States colorfully summed up the problem of "confidential witnesses," "*[p]erhaps these confidential sources have axes to grind. Perhaps they are lying. Perhaps they don't even exist.*"[19]

As this issue of *Securities Litigation Report* was going to press, another federal district court issued a decision imposing Rule 11 sanctions on a plaintiffs' firm for including false allegations in a complaint attributed to a confidential witness. Specifically, in *In re BankAtlantic Bancorp., Inc. Sec. Litig.* [Case No. 0:07-cv-61542-UU (Order dated Aug. 3, 2011)], discovery revealed that five of six confidential witnesses had "disavowed" allegations attributed to them, "denied providing information to Class Counsel," or testified that "they [did] not believe the substance of the statements attributed to them to be true, regardless of who made the statements." In addition, contrary to the allegations in the complaint, a key confidential witness did not even work in the department where improper conduct was alleged to have occurred, demonstrating that the "factual contentions" attributed to this witness "lacked adequate evidentiary support, and a reasonable inquiry by counsel would have revealed as much."

In short, the use of anonymous sources in order to survive dismissal of the case at the pleading stage is both deeply entrenched in the plaintiffs' bar and, with limited exceptions, judicially sanctioned. As the next section reflects, however, the story of these confidential witnesses becomes decidedly ugly once a defendant is able to probe what these confidential witnesses *actually* know or *actually* said.

The (Un)Reliability of Confidential Sources

Despite the clear endorsement by courts of the use of confidential witnesses as an appropriate source of pleading securities fraud, several recent decisions have demonstrated that this pleading practice has serious limitations as a tool for identifying actual fraudulent conduct. Indeed, when defendants in private securities litigation have the opportunity to confront the confidential witnesses whose statements form the basis for a securities fraud complaint, these witnesses often prove to be unreliable sources of fraud, with some witnesses going so far as to retract or contradict key allegations of fraud purportedly derived from their statements.

In *City of Livonia Employees' Retirement System v. The Boeing Company*,[20] a recent case in the Northern District of Illinois, for example, when a confidential witness who allegedly provided key information supporting a plaintiff's securities fraud complaint was interviewed by counsel for defendant, the witness flatly rejected the allegations attributed to him in the complaint. In *Boeing*, a shareholder plaintiff asserted that Boeing had made misrepresentations about the testing and delivery schedule for the 787 Dreamliner commercial aircraft.[21] The complaint was based in large part on allegations purportedly provided by a confidential witness identified as a Boeing employee with first-hand knowledge that adverse test results were circulated to senior Boeing executives.[22] The district court denied defendants' motion to dismiss, noting later that the "confidential source allegations… were critical to the survival of the second amended complaint."[23]

After the dismissal, counsel for defendants identified and interviewed the confidential witness.[24] Defendants discovered not only that the witness *had never worked for Boeing,* but that he *had no personal knowledge of test results, had never met plaintiffs' counsel prior to being deposed, and had never seen the allegations attributed to him in the complaint*.[25] On defendants' motion for reconsideration of the court's order denying defendants' motion to dismiss, the court found that plaintiffs had made "flawed representations directly to the court about the confidential source's position and firsthand knowledge of Boeing's internal testing and documents"—factual representations that the court called "at best unreliable and at worst fraudulent."[26] The court granted the motion for reconsideration, concluding that, if it had known at the time of deciding the motions to dismiss that plaintiffs had "misrepresented" these "material facts," the court would have granted the motions to dismiss.[27]

The *Boeing* case, while a stark example of improper confidential witness allegations, is hardly the only case where a corporate defendant, upon learning the identity of the unnamed source that purportedly provided evidence of fraud, demonstrated that the allegations derived from these witnesses were flawed. In *Campo v. Sears Holdings Corp.*,[28] plaintiffs alleged that corporate defendants knowingly made false statements that substantially undervalued real estate assets in order to artificially depress the company's stock price in advance of its reorganization.[29] The plaintiffs claimed, on the basis of allegations attributed to three confidential witnesses, that the individual defendants either knew or must have known the true value of the real estate assets because these defendants had access to reports containing this information.[30] On defendants' original motion to dismiss, the district court denied the motion without prejudice, but ordered that depositions be taken of the three confidential witnesses to determine whether they supported the allegations in the complaint.[31] After these depositions, the district court dismissed the complaint, determining that the confidential witnesses testimony did not adequately allege the falsity of any statement or give rise to a strong inference of scienter.[32]

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The Second Circuit affirmed the district court's decision, concluding that the complaint did not adequately allege scienter, and noting that one of the confidential witnesses had "expressly disclaimed" allegations attributed to him in the complaint and that none of the confidential witness testimony supported the complaint's allegations that the reports in question contained information about the value of the real estate assets.[33] The Court also rejected plaintiff's challenge to the district court's consideration of deposition testimony from the confidential witnesses, concluding that the district court appropriately considered the deposition testimony "for the limited purpose of determining whether the confidential witnesses acknowledged the statements attributed to them in the complaint."[34]

Even in cases where courts have denied motions to dismiss or Rule 11 motions for sanctions brought on the basis of unreliable confidential witness allegations, courts have recognized that once defendants are able to identify and interview or depose the unnamed sources, these witnesses often prove to lack specific knowledge of any improper conduct by defendants. For example, in *Waldrep v. ValueClick, Inc.*,[35] a California district court denied the Rule 11 motion for sanctions despite finding that, "At some point after the Complaint was filed, Defendants independently identified, tracked down, and interviewed the confidential witnesses. Defendants then obtained six declarations by the (formerly) confidential witnesses, which directly contradict their allegations as represented in the Complaint, and which also state that the witnesses have no personal knowledge on which to base the allegations attributed to them in the Complaint." Also, in *The Wu Group v. Synopsys, Inc.*,[36] another California district court denied the Rule 11 motion for sanctions, but noting that declarations from confidential witnesses identified by defendants "raise serious questions about the accuracy of the statements and opinions Plaintiffs attribute to Supervisor, SA1 and SA2 in their Complaint." And in *In re ProQuest Sec. Litig.*,[37] a Michigan district court denied a motion to dismiss despite declaration from confidential witness that recanted allegations attributed to witness in complaint; and in *In re Cabletron Systems, Inc. Sec. Litigation*,[38] a New Hampshire district court approved settlement and noted, after reviewing affidavits from plaintiffs' anonymous sources, "[t]o say the least, the information provided in the affidavits was far less incriminating than this Court had been led to believe.").

In a recent decision in *In re Dynex Capital, Inc. Sec. Litig.*,[39] the Manhattan district court adopted a magistrate judge's report and recommendation denying defendants' motion to dismiss based on fraud on the Court, despite the fact that five of plaintiff's confidential witnesses provided declarations that they did not make the statements attributed to them in the securities complaint, with another witness indicating that he had no recollection of making the statements attributed to him.[40] Four of these six witnesses, moreover, stated that they did not believe the substance of their purported statements to be true, regardless of who made the statements.[41]

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The object lesson from these cases is clear. As found in a series of examples from around the country, in randomly dispersed cases from different courts involving many different kinds of issuers, confidential witnesses not only have proven themselves to be generally poor sources of reliable information, but they also have shown themselves to be far too easily coaxed by plaintiffs' counsel or their private investigators to misrepresent, exaggerate, or misstate the facts. Moreover, it is clear that at least some of these confidential witnesses have their own personal oxes to gore. Finally, these cases demonstrate that in the private securities litigation context, once defendants gain access to these unnamed sources of fraud and have the opportunity to confront their accusers, the true facts can lead to rapid dismissal of the otherwise baseless claims of securities fraud. Unfortunately, the new SEC whistleblower rules, which keep a lid on tipsters' identity, will not provide the same opportunities for corporate issuers to defend themselves.

Conclusion

The significant financial stakes for whistleblowers under the recently enacted SEC rules will likely compound intractable problems of confidential witness reliability. With its limited resources, the SEC will be forced to sift through what is expected to be an influx of whistleblower tips, many of which undoubtedly will be based on inaccurate information. We fear that, when in doubt, the Enforcement Division will credit the allegations of these anonymous tipsters, at least to the point of forcing the company to respond to broad information requests from the SEC Staff, and consume valuable time and resources better spent on operating the business. Unfortunately for these issuers, they will be forced to respond to these information requests—or worse, formal subpoenas and testimony—with one arm tied behind their back, prevented from knowing their accusers or effectively challenging and contextualizing the information provided by these sources.

Since the new rules permit, but do not require, employees to rely on internal compliance functions, companies often will be powerless to assess and investigate whistleblower allegations before they are reported to the SEC. To minimize the risk of false reporting by whistleblowers, companies are well advised to create a culture of compliance at all levels of the company and ensure that their employees have access to easy-to-use, widely available, and highly responsive compliance functions. Only if employees are confident that their concerns will be dealt with seriously, expeditiously, and on a confidential basis may companies effectively dissuade their employees from bypassing internal compliance functions and reporting directly to the SEC every tip, rumor, or piece of gossip that, when analyzed and placed in the appropriate context, simply does not amount to fraud.

NOTES

1. *See, e.g.*, Letter dated May 23, 2011, from The U.S. Chamber of Commerce Center for Capital Markets Competitiveness and The U.S. Chamber of Commerce Institute for Legal Reform to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, available at www.sec.gov/comments/s7-33-10/s73310.shtml; letter dated January 4, 2011, from Jeffrey W. Rubin, Chair of the Committee on Federal Regulation of Securities, ABA Business Law Section, to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, also available at www.sec.gov/comments/s7-33-10/s73310.shtml.
2. Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. 11-203, July 21, 2010, 111th Congress, 2009-2010.
3. S. Rep. No. 111-176 at 110 (2010).
4. File No. S7-33-10, "Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934."
5. 17 CFR §§ 240.21F-3(a), 240.21F-5(b).For a more complete discussion of the new SEC whistleblower rules, *see* www.gibsondunn.com/Publications/Pages/SECAdoptsFinalRulesImplementingDodd-FrankWhistleblowerProvisions.aspx.
6. These rules are a radical departure from the old SEC whistleblower bounty program, which covered tips relating only to insider trading violations; capped payments to whistleblowers at 10% of the overall recovery; and which, between 1989 and 2009, paid out a total of seven bounties amounting to less than $160,000. 15 U.S.C.A. § 78u-1(e); U.S. Securities and Exchange Commission, Office of Inspector General, Office of Audits, Assessment of the SEC's Bounty Program, March 29, 2010, Report No. 474, available at www.sec-oig.gov/reports/auditsinspections/2010/474.pdf.
7. Under the rules, tipsters are prohibited from "knowingly and willfully" making false statements to the SEC. *See* Form TCR, Release No. 34-64545; File No. S7-33-10, "Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934," at 280. This, of course, does not prevent tipsters from supplying information based on mere hunches or suspicions of fraud that turn out to be baseless. Moreover, tipsters may report information to the SEC anonymously through their attorney, who is subject to obligations akin to those arising under Rule 11 of the Federal Rules of Civil Procedure—to refrain from knowingly making false, incorrect, or incomplete representations to the SEC. *See* Form TCR, Release No. 34-64545. As demonstrated below, given that plaintiffs lawyers in the private securities context have not been constrained by ethical obligations from misusing confidential sources, it is highly doubtful

that the attorney affirmation process will serve as an appropriate check on the submission of inappropriate whistleblower claims to the SEC.

8. 17 CFR § 240.21F-7(a). In addition, under § 21F(h)(2) of the Exchange Act, all whistleblower-identifying information is exempt from the provisions of the Freedom of Information Act. *See* 17 CFR 240.21F(h)(2).
9. *See* Release No. 34-64545; File No. S7-33-10, "Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934," at 126.
10. 17 CFR § 240.21F-4(b).
11. 17 CFR § 240.21F-4(b)(7).
12. *See* 17 CFR § 240.21F-6(a)(4).
13. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 320, 127 S. Ct. 2499, 168 L. Ed. 2d 179, Fed. Sec. L. Rep. (CCH) P 94335 (2007).
14. 15 U.S.C.A. § 78u-4(b). The U.S. Supreme Court has held that, in order to plead a strong inference of scienter under the PSLRA, a complaint's allegations of scienter must be "cogent and as compelling as any opposing, non-fraudulent inference." *Tellabs*, 551 U.S. at 324.
15. *Novak v. Kasaks*, 216 F.3d 300, 306, Fed. Sec. L. Rep. (CCH) P 91030 (2d Cir. 2000) (citing legislative history); *see also Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 706, Fed. Sec. L. Rep. (CCH) P 94560 (7th Cir. 2008) ("Apparently, Congress does not believe that weak complaints should put a defendant to the expense of discovery in a securities-fraud case, which is likely to be complex.").
16. Indeed, the Supreme Court recently reaffirmed the broad constitutional right of criminal defendants to confront witnesses who provide incriminating evidence. In *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), the Court considered whether, under the Confrontation Clause of the Sixth Amendment, a prosecutor may introduce a forensic lab report containing a certification—in which the lab technician confirmed that the defendant had an elevated blood alcohol level—through the in-court testimony of someone other than the technician who signed the certification or performed the test. In reversing a New Mexico Supreme Court decision upholding the defendant's conviction, the Supreme Court held that the accused had the constitutional right "to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist."
17. *Novak*, 216 F.3d at 313-14. *See also In re Cabletron Systems, Inc.*, 311 F.3d 11, 29-30, Fed. Sec. L. Rep. (CCH) P 92202 (1st Cir. 2002) (following *Novak* and finding that, in evaluating confidential witness allegations, trial court should also take into account "the level of detail provided by the confidential sources, the corrobative nature of the other facts alleged (including from other sources), the coherence and plausibility of the allegations, the number of sources, the reliability of the sources, and other similar indicia."); *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1239-40, Fed. Sec. L. Rep. (CCH) P 94876 (11th Cir. 2008) (following *Novak* with respect to confidential witness allegations).
18. *See, e.g., Indiana Electrical Workers' Pension Trust Fund IBEW v. Shaw Group, Inc.*, 537 F.3d 527, 535, Fed. Sec. L. Rep. (CCH) P 94790 (5th Cir. 2008).
19. *Higginbotham v. Baxter Int'l Inc.*, 495 F.3d 753, 757, Fed. Sec. L. Rep. (CCH) P 94479 (7th Cir. 2007) (emphasis added). *See also Indiana State Dist. Council of Laborers and Hod Carriers Pension and Welfare Fund v. Omnicare, Inc.,* 583 F.3d 935, 946, Fed. Sec. L. Rep. (CCH) P 95384 (6th Cir. 2009), *cert. dismissed*, 178 L. Ed. 2d 411, 2010 WL 5638596 (U.S. 2010) (discounting allegations from confidential witness when complaint lacked adequate description of witness' basis of knowledge). Leading academics have voiced similar concerns about the misuse of confidential witness allegations in securities complaints. *See* "Securities Lawyers Spar Over Use of Confidential Witnesses," April 12, 2005, Law.com, available at www.law.com/jsp/law/LawArticleFriendly.jsp?id=1113222913666 (quoting Prof. Joseph Grundfest of Stanford Law School as saying that if allegations attributed to unnamed witnesses allow plaintiffs to overcome motions to dismiss and proceed "to discovery on a series of false premises, you're creating a clear engine for fraud that can never be tested").
20. *City of Livonia Employees' Retirement System v. The Boeing Co.,* Fed. Sec. L. Rep. (CCH) P 96235, 2011 WL 824604 (N.D. Ill. 2011).
21. *Boeing* at *4.
22. *Boeing* at *2.
23. *Boeing* at *4.
24. *Boeing* at *2.
25. *Boeing* at *2, *4.
26. *Boeing* at *4.
27. *Boeing* at *5.
28. *Campo v. Sears Holdings Corp.*, 635 F. Supp. 2d 323 (S.D.N.Y. 2009) (*Campo I*).

29. *Campo I,* 635 F. Supp. 2d at 327.
30. *Campo I*, 635 F. Supp. 2d at 329-30.
31. *Campo I*, 635 F. Supp. 2d at 330 n.54.
32. *Campo I*, 635 F. Supp. 2d at 336.
33. *Campo v. Sears Holding Corp.*, 371 Fed. Appx. 212, 214, 371 Fed. Appx. 212, Fed. Sec. L. Rep. (CCH) P 95664, 2010 WL 1292329, at *3 n.4 (2d Cir. 2010) (*Campo II)*.
34. *Campo II*.
35. *Waldrep v. ValueClick, Inc.*, Case No. 2:07-cv-05411-DDP-AJW (C.D. Cal.), Order dated Sept. 25, 2008.
36. *The Wu Group v. Synopsys, Inc.*, 2005 WL 1926626, at *13 (N.D. Cal. Aug. 10, 2005).
37. *In re ProQuest Sec. Litig.*, 527 F. Supp. 2d 728, 738-40, Fed. Sec. L. Rep. (CCH) P 94510 (E.D. Mich. 2007).
38. *In re Cabletron Systems, Inc. Sec. Litigation*, 239 F.R.D. 30, 34 (D.N.H. 2006).
39. *In re Dynex Capital, Inc. Sec. Litig.*, Case No. 1:05-cv-01897-HB (S.D.N.Y.).
40. *See* Report and Recommendation dated May 2, 2011, at 3; Order dated June 21, 2011.
41. Report and Recommendation at 3.