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The Safe Harbor for Forward-Looking Statements after Twenty Years

Twenty years of case law on the PSLRA's Safe Harbor for forward-looking statements provides defendants and their counsel with a road map for effective strategies to invoke its protection. While the law is not completely settled, the cases reveal both challenges that defendants should proactively confront, as well as some potential missed opportunities in arguing that the Safe Harbor applies.

By Richard A. Rosen and Jessica S. Carey

It has now been more than 20 years since Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), which includes a "Safe Harbor" for forward-looking statements. The case law on the Safe Harbor has developed significantly since then, revealing both opportunities and challenges for defendants and their counsel in seeking the Safe Harbor's protection from meritless securities claims. Below, we analyze the current state of the law on several key issues that frequently arise in litigation over the Safe Harbor's scope, in addition to suggesting strategies for defense counsel to successfully invoke its protection. Among other things, we discuss: (1) how to establish that language is forward-looking, even where plaintiffs contend that it contains embedded assertions of historical fact; (2) how to show that "cautionary language" is meaningful; (3) the appropriateness of seeking dismissal at the pleadings stage based on cautionary language; (4) the importance of asserting a defendant's lack of actual knowledge of falsity as an independent basis for Safe Harbor protection; (5) the underutilized "immateriality" prong of the Safe Harbor; and (6) the effect of a prior guilty plea or SEC settlement on the availability of the Safe Harbor.

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The PSLRA's Safe Harbor

As background, the Safe Harbor provides that in any private action under the Securities Act of 1933 or the Securities Exchange Act of 1934 "based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading," a person covered by the Safe Harbor—which includes issuers and those acting on their behalf, subject to certain exclusions—shall not be liable for any forward-looking statement if:

(A) the forward-looking statement is—

(i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or

(ii) immaterial; or

(B) the plaintiff fails to prove that the forward-looking statement—

(i) if made by a natural person, was made with actual knowledge by that person that the statement was false or misleading; or

(ii) if made by a business entity, was—

(I) made by or with the approval of an executive officer of that entity; and

(II) made or approved by such officer with actual knowledge by that officer that the statement was false or misleading.

Is the Statement Forward-Looking?

Establishing that a Statement Is Forward-Looking

The PSLRA contains a lengthy definition of "forward-looking statement," which includes projections of future performance, plans and objectives for future operations, and assumptions underlying these statements. As courts have recognized, this is a "broad statutory definition."[1] Nevertheless, the threshold question of whether a statement is better characterized as a protected "forward-looking" statement or as an unprotected assertion of present or historical fact is still litigated frequently.

This question inevitably depends on the specific language and circumstances: as one court put it, "context is everything."[2] However, the case law indicates that defendants seeking to establish that a statement is forward-looking should emphasize the ways in which the accuracy of the statement depends on later events, because that is the ultimate test for a forward-looking statement. As the Eighth Circuit explained recently, "the determinative factor is not the tense of the statement; instead, the key is whether its truth or falsity is discernible only after it is made."[3]

Under this test, defendants can show that a statement is forward-looking even if it is ostensibly worded in the present tense. For example, in *In re Aetna, Inc. Securities Litigation*, the Third Circuit held that defendants' statements that its pricing policy was "disciplined" were forward-looking because "[t]he term 'disciplined' pricing describes a policy of setting prices in relation to future medical costs," and when the statements were made, "the medical costs had not yet been incurred and could not be ascertained until later."[4] Similarly, in *Harris v. Ivax Corporation*, the Eleventh Circuit held that a statement that "the challenges unique to this period in our history are now behind us" was forward-looking, because "whether the worst of [the company's] challenges were behind it was a matter verifiable only after" the statement was made.[5]

Although language that speaks specifically to future expectations is not required for a statement to be forward-looking, such language is worth emphasizing where possible. Courts are often persuaded by such language in holding that a statement is forward-looking—no doubt because a statement that is expressed as speaking to the future will almost inevitably depend on future events.[6] As the SEC and Second Circuit have explained,

> [t]he use of linguistic cues like "we expect" or "we believe," when combined with an explanatory description of the company's intention to thereby designate a statement as forward-looking, generally should be sufficient to put the reader on notice that the company is making a forward-looking statement.[7]

In *Slayton v. American Express Co.*, the Second Circuit held that a statement was forward-looking and adequately identified as such when it stated that certain investment losses were "expected to be substantially lower" for the rest of the year, and the

same document elsewhere contained the "common sense proposition" that "[t]he words 'believe', 'expect', 'anticipate', 'optimistic', 'intend', 'aim', 'will', 'should' and similar expressions are intended to identify such forward-looking statements."[8]

Addressing Purportedly "Mixed" Statements

Plaintiffs often contend that certain elements or aspects of an otherwise forward-looking statement relate to present or historical facts.[9] When courts find that a statement is "mixed" in this way, they often hold that "the part of the statement that refers to the present," if any, is not entitled to Safe Harbor protection.[10]

An oft-cited example is *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, where the Seventh Circuit held that defendant's statement that sales were "still going strong" contained an embedded assertion that sales were *presently* strong, which was unprotected by the Safe Harbor.[11] Recently, a federal district court interpreted *Makor* to mean that "statements of past or present facts are not covered by the Safe Harbor provision—even when they are inextricably tied with forward-looking statements."[12] That court held that the following statements contained unprotected representations of present or historical fact: (1) that the company "had 'begun' " to address issues raised in an FDA warning letter; (2) that tasks to address those issues were "well under way;" and (3) that the company was "on track" to resolve the warning letter.[13] Similarly, another district court recently held that statements that "sales trends continue to be strong" and that there was "no reason to believe that we couldn't see a continued decrease in markdowns" included unprotected references to *current* sales and markdowns.[14]

The Fifth Circuit recently took this even further, holding that the term "estimated recoverable reserves" could be parsed into a forward-looking "estimate[ ]" and a "backward-looking" assertion about "reserves."[15] In *Spitzberg v. Houston American Energy Corp.*, the plaintiffs alleged that the defendant had stated falsely that certain land had "estimated recoverable reserves of 1 to 4 billion barrels" of oil.[16] The plaintiffs argued that the term "reserves" had a defined meaning in the oil industry and under SEC regulations, which required that the " 'commercial productibility' of the reservoir [be] 'supported by actual production or formation tests.' "[17] The Fifth Circuit reasoned that the plaintiffs' claim was not that defendants' estimate about "commercial productibility" was wrong; rather, the "allegations of fraud focus[ed] on that component of the term, 'reserves,' communicating information about the geological testing that had already occurred."[18] This component of the statement, according to the court, was not entitled to Safe Harbor protection. Given the importance placed by the court on the fact that "reserves" was a term of art subject to a special SEC definition, which was inherently backward-looking, the case is best understood as largely confined to its facts.

Where a forward-looking statement does appear to contain references to past or present facts, the best response for defendants may be that language must be interpreted in context, and that when considered against the backdrop of a discussion that is forward-looking in nature, such references cannot be fairly read as making affirmative factual representations. To develop such an argument, it will often be effective for defendants to look beyond the specific words cited by plaintiffs to the surrounding language to show why the entire discussion should be regarded as forward-looking. Viewed in this context, any alleged representations may be assumptions underlying the forward-looking discussion, which are specifically protected by the Safe Harbor, as opposed to affirmative representations of present or historical fact.

This approach draws its most support from the Ninth Circuit's recent decision in *Police Retirement System of St. Louis v. Intuitive Surgical, Inc.*[19] There, the court held that

> [w]e need not resolve whether the safe harbor covers non-forward-looking portions of forward-looking statements because, examined as a whole, the challenged statements related to future expectations and performance.[20]

The plaintiffs argued that defendant made a statement containing unprotected assertions of fact in response to a question about "lower capital expenditures" by potential clients. The defendant's response was that: "At the present time, we don't have any indicators that tell us that's the case. But we're early into this."[21] The court held that rather than amounting to a representation of present fact, this statement was "an assumption 'underlying or related to' projections,"[22] tracking the language of one of the statutory definitions of "forward-looking statement." The other statement at issue was made in response to a question about whether "anything in the 'external environment' made the [defendant's executives] nervous about [product] purchases."[23] The defendant responded,

> [T]here's always a decision within a [client] of how do they prioritize their capital investment .... I think we come up typically fairly high on that priority list .... We aren't hear[ing] anything that causes us any significant concern ... no change from last quarter, I guess ... .[24]

The court held that, "[i]n context, this statement is properly understood as regarding [defendant]'s expectations of the future impact of the external economic environment on [the company]."[25]

Defendants also should remember that even where representations of past or present fact are contained within a forward-looking discussion, there are still many reasons why plaintiffs may have failed to state a claim based on those representations. For example, under the general requirements of the PSLRA, plaintiffs must allege with specificity the reason(s) why a statement is alleged to be misleading and facts giving rise to a strong inference that the statement was made with scienter. Defendants should consider whether plaintiffs have pleaded all of these requirements with respect to any statement of present or past fact alleged to be embedded within a forward-looking discussion. In many cases, even where it is possible to identify a statement of present fact in a forward-looking discussion, a close reading of the complaint as a whole may reveal that the plaintiffs have failed to allege that such a statement was false. Or defendants may be able to argue that plaintiffs' challenge to the statement of present fact is irreconcilable with plaintiffs' general theory of the case or the other allegations in the complaint.

A close reading of the complaint as a whole may reveal that the plaintiffs have failed to allege that such a statement was false.

Defendants also have successfully argued that statements of present fact alleged to be embedded within forward-looking discussions are so vague or generic that they are not actionable. For example, in *Institutional Investors Group v. Avaya, Inc.*, the Third Circuit held that two statements alleged to contain factual representations—"[o]ur first quarter results position us to meet our goals for the year" and "we are on track to meet our goals for the year"—could not "meaningfully be distinguished from the future projection of which they are a part."[26] The court explained,

> These statements do not justify the financial projections in terms of any particular aspect of the company's current situation; they say only that, whatever that situation is, it makes the future projection attainable. Such an assertion is necessarily implicit in every future projection.[27]

On that basis, the court held that such "assertions of current fact are too vague to be actionable."[28] The court also noted that, unlike in *Tellabs*, there was no "specific assertion about the current state of sales that could be distinguished from the future projections."[29]

In *Gissin v. Endres*, the Southern District of New York applied *Avaya* to hold that there was no

actionable assertion of present fact in a statement that "based on our current expectation of cash flows . . . , we feel we will be in a position to fund those capital investments for the year."[30] The court rejected an argument that this statement amounted to an assurance that "the Company's liquidity was strong."[31] Indeed, the court observed, the plaintiffs did not contend that the SEC filings that defendants were referencing "were in any way incorrect or that they did not show a successful quarter."[32]

Finally, where plaintiff's claim is that a discussion containing forward-looking statements is misleading because it omits material facts, there is strong support for treating the entire discussion as forward-looking—even if part of it refers to past or present facts. In *Harris v. Ivax Corp.*, the Eleventh Circuit considered an allegation that an omission from a list of factors expected to influence future results rendered an entire statement misleading.[33] The court observed that "[t]he list is a mixed bag, with some sentences that are forward-looking and some that are not."[34] However, it reasoned that "it makes no sense to slice the list into separate sentences" because the question was whether "the character of the list as a whole" was forward-looking and whether "the whole list is misleading."[35] As support, the court noted that while "the statute does not tell us exactly what to do with a mixed statement," "extrinsic sources of congressional intent point strongly toward treating the entire list as forward-looking."[36] Accordingly, the court held that

> when the factors underlying a projection or economic forecast include both assumptions and statements of known fact, and a plaintiff alleges that a material factor is missing, the entire list of factors is treated as a forward-looking statement.[37]

Finally, it is worth noting that the cases addressing so-called "mixed" statements are sometimes categorized as either applying "parsing" or "holistic" approaches. To be sure, cases such as *Tellabs* and *Spitzberg* have parsed statements into their forward-looking and present components and held the present components to be actionable, while others like *Intuitive*, *Avaya*, and *Harris*, and *Gissin* concluded that the statements had to be addressed holistically and that individual phrases cited by plaintiffs were not independently actionable when made in the context of a forward-looking discussion. Yet it would be a mistake to interpret the outcomes in those cases as representing a split in authority on the legal question of how statements are to be analyzed generally. In reality, the courts largely agreed on the basic legal principles, and instead, the specific language at issue in those cases drove the analysis of whether the language was parsed into actionable representations or addressed holistically.[38] Courts only determined that parsing was appropriate where plaintiffs adequately alleged actionable statements of present or past fact, *i.e.*, statements that are separately identifiable from the surrounding forward-looking discussion, false or misleading, made with scienter, and material. As discussed above, defendants will often have strong grounds on which to challenge all of these requirements.

Establishing Meaningful Cautionary Language

Once a statement has been identified as forward-looking, one basis for immunity under the Safe Harbor is if the statement is "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." Thus, there are two requirements for a forward-looking statement to enjoy immunity on the basis of "cautionary language": (1) the cautionary language must be "meaningful"; and (2) the cautionary language must "accompan[y]" the forward-looking statement.

Showing that Cautionary Language Is Meaningful

The question of whether cautionary language is sufficiently meaningful is one of the most frequently

litigated issues concerning the Safe Harbor. To frame the issue for the court, the most persuasive approach for defendants is often to emphasize at the outset, generally in the statement of facts of a brief, that they made numerous different disclosures warning recipients that the business involved significant risks. Plaintiffs generally will complain that some sort of specific risk was never disclosed, but that risk will often be a narrow one—and frequently, not an important one. By emphasizing the number and scope of risks that were disclosed, particularly where they are of a similar nature to the risk that plaintiffs allege was omitted, defendants can often illustrate that plaintiffs knew of the types of risks alleged to be omitted, and demonstrate the insignificance of the specific risk that plaintiffs claim was not disclosed. After all, cautionary language does not have to disclose *every* potential risk in order to be meaningful; as the cases make clear, that is simply not realistic. The alternative approach—of turning immediately to the specific risk identified by plaintiff and attempting to show that this was disclosed—cedes control of the narrative to plaintiffs and places an unwarranted focus on the specific risk alleged to be omitted.

Cautionary language does not have to disclose every *potential risk in order to be meaningful.*

After setting the scene, however, defendants should certainly focus on cautionary language that is specifically directed at the forward-looking statement at issue. The case law indicates that the greater the specificity with which language describes the particular risks associated with a given forward-looking statement, the more likely it is that the language will be meaningful—even if it does not describe the specific risk that ultimately occurred and undermined the statement. Further, in showing that language is meaningful, defendants should emphasize language that has changed over time; courts have emphasized that language that remains static is more likely to be boilerplate.

The D.C. Circuit's recent decision in *In re Harman International Industries, Inc. Securities Litigation*[39] contains one of the most extensive discussions of these issues. *Harman* explained that "meaningful" language must contain "substantive company-specific warnings based on a realistic description of the risks applicable to the particular circumstances."[40] Specifically, the language must be "substantive and tailored to the specific future projections, estimates or opinions in the [statements] which the plaintiffs challenge."[41] At the same time, "the cautionary language need not necessarily 'mention *the* factor that ultimately belies a forward-looking statement' … or warn of 'all' important factors, so long as 'an investor has been warned of risks of a significance similar to that actually realized ….'"[42]

> Perfect clairvoyance may be impossible because of events beyond a company's control of which it was unaware …. [A] company must warn of factors that "have much import or significance" and "carry with them great or serious consequences," and which are "likely to have a profound effect on success."[43]

Conversely, *Harman* made clear that "mere boilerplate"[44] language, such as "generalized warnings that forward-looking statements are 'not guarantees of future performance,' "[45] will not suffice. The court noted that the repeated use of identical cautionary statements over time may tend to show that they are boilerplate.[46]

Courts' assessments of the meaningfulness of specific cautionary language are inherently fact-sensitive, but do provide good illustrations of the application of these principles. For example, in *Julianello v. K-V Pharmaceutical Co.*, the defendant described on an investor call its plans for pricing a drug and its confidence that the FDA would enforce its exclusive right to sell the drug.[47] During the call, the company referenced risk factors set forth in its form 10-K, which included "the possibility that any

period of exclusivity may not be realized, including with respect to [the drug]."[48] After a negative public reaction to the company's pricing structure, the FDA declined to enforce the company's exclusive rights.[49] The court held that the company's statements were protected by the Safe Harbor because the "cautionary language was specific and related directly to the circumstances of [the drug]'s planned launch," and therefore "warned [investors] of precisely the risks about which they now complain."[50]

In another example, a court in the Central District of California held cautionary language to be meaningful even though it did not mention the product initiative that formed the entire basis of the plaintiff's complaint.[51] There, the plaintiffs alleged that Hewlett-Packard had made misstatements about its "failed strategy" to develop an operating system known as "webOS" for its mobile devices.[52] The defendants' cautionary statement did not refer to webOS either by name or by description. Rather, defendants generally warned of " 'quality and other defects [that] may not be supported adequately by application software,' and referred to the possibility of 'defects in … engineering, design and manufacturing.' "[53] The court concluded that "the cautionary language concerning software quality and engineering defects was sufficient to satisfy the safe harbor's threshold requirements."[54]

A court in the District of New Jersey also recently found cautionary language meaningful even though plaintiffs alleged that it was generic. Plaintiffs claimed that a car rental company's reaffirmation of its earnings guidance was misleading in light of losses that the company was sustaining from divesting a fleet of cars that had been overvalued.[55] Plaintiffs argued that the company's cautionary statements about its earnings guidance failed to "specifically address the valuation issues" relating to the cars.[56] The company had warned that "future financial results could be affected by 'the operational and profitability impact of the … [D]ivestiture" and "provided a general warning that financial results could be impacted by 'the effect of tangible and intangible asset impairment charges.' "[57] The court held that "taken together, this language provides sufficient warning."[58] In other words, the cautionary statements were sufficient because they flagged the divestiture as a possible source of loss, even though they did not discuss the valuation issues that plaintiffs claimed were important to understanding the risk.

Language warning that something may *present a risk when that risk has already materialized renders the warning inadequate.*

Although some plaintiffs might cite the Second Circuit's decision in *Slayton v. American Express Co.* as having imposed a fairly stringent requirement for meaningful cautionary language, that decision appears to have been based on its own specific facts.[59] The *Slayton* court rejected defendants' argument that they had warned of the "exact risk that materialized."[60] Defendants had warned generally of "potential deterioration in the high-yield sector, which could result in further losses in [the company]'s investment portfolio," but "the risk that materialized was that rising defaults on the bonds underlying [the company]'s own investment-grade CDOs would cause deterioration in [it]s portfolio."[61] On one view, this decision requires cautionary language to be fairly specific in order to be meaningful, given that defendant's language was found to be insufficient even though it warned of a risk that, in a broad sense, had resulted in the company's losses. However, the language in *Slayton* omitted a certain risk—that presented by rising bond defaults—that appears to have been particularly important.[62] The court emphasized that defendants allegedly "knew of the major and specific risk that rising defaults on the bonds underlying [the company's] investment-grade CDOs would cause deterioration in [its] portfolio at the time of the … statement, and yet did not warn of it."[63] Accordingly, *Slayton* is best understood as a

case in which cautionary language was found not to be meaningful because, although it warned of potential losses at a high degree of generality, it omitted a "major and specific risk" making those losses likely. We are aware of no subsequent cases that have interpreted *Slayton*'s holding on the meaningfulness of cautionary language any more broadly.

One point on which there appears to be general agreement is that language warning that something *may* present a risk when that risk has already materialized renders the warning inadequate. As *Harman* explained, "cautionary language cannot be 'meaningful' if it is 'misleading in light of historical fact[s]' 'that were established at the time the statement was made' "—as, for example, "[i]f a company were to warn of the potential deterioration of one line of its business, when in fact it was established that that line of business had already deteriorated."[64] *Harman* adopted the well-worn analogy that "the safe harbor would not protect from liability a person 'who warns his hiking companion to walk slowly because there might be a ditch ahead when he knows with near certainty that the Grand Canyon lies one foot away.' "[65] Accordingly, the best cautionary language to invoke in defense of a forward-looking statement will not only be as specific as possible to the statement, but will discuss future risks and contingencies that had not already occurred when the statement was made. Language discussing risks that had already transpired is likely to be more harmful than helpful.[66]

Harman itself concluded that the cautionary language at issue in that case was not meaningful because all of the non-boilerplate language was "misleading in light of historical fact."[67] The plaintiffs alleged that Harman had recently re-designed the personal navigation devices (PNDs) it sold, leaving it with a large inventory of obsolete PNDs that it could not sell or would be forced to sell at a substantial loss.[68] In two calls with analysts, Harman's CEO acknowledged that inventories had "grown substantially," but stated that a "plan [was] proceeding" to reduce inventory to "normal levels at year-end" and that the company was forecasting a "very strong first quarter" in 2008, in part due to "the PND business, where we continue the growth and expansion."[69] The defendants argued that they had warned of the obsolescence issue with language stating that "sales could suffer if the Company failed to 'develop, introduce and achieve market acceptance of new and enhanced products,' " that the company "could 'experience difficulties that delay or prevent the development, introduction or market acceptance of new or enhanced products,' " and that "PND 'inventories … had grown substantially.' "[70] The court observed, however, that the general "[r]eferences to amassed inventory did not convey that [this] inventory was obsolete."[71] Further, "[e]ven if viewed as implicitly raising the specter of obsolescence, … they did not warn of actual obsolescence that had already manifested itself."[72] The language was therefore held to be misleading.[73]

Satisfying the Accompaniment Requirement

In most cases—at least those involving sophisticated issuers with established practices—demonstrating that the cautionary language "accompanies" a forward-looking statement will not be a significant hurdle. Courts generally have taken a permissive approach to the accompaniment requirement. The PSLRA expressly provides that *oral* forward-looking statements may incorporate by reference cautionary language contained in a "readily available" written document,[74] and numerous courts have similarly allowed *written* forward-looking statements to incorporate cautionary language by reference,[75] particularly when the reference is to SEC filings.[76] Indeed, the Seventh Circuit and a court in the Southern District of New York have pushed this permissive trend even further, holding that any of defendants' cautionary statements reasonably available to investors will be deemed to satisfy the accompaniment requirement, at least where plaintiffs' claims are premised on a fraud-on-the-market theory.[77]

In the typical example of a conference call with investors and analysts, courts generally consider forward-looking statements to be adequately "accompanied" where a company representative announces at the beginning of the call that speakers will be

" 'making forward-looking statements during the presentation,' and direct[s] the call participants to the cautionary language in [a public document] for a discussion of the relevant risks, uncertainties, and assumptions."[78] Ideally, announcements of forward-looking statements also will specifically invoke the Safe Harbor, identify the kind of language the company will use when making forward-looking statements, and include a general cautionary statement to the effect that "[f]orward-looking statements involve risk and uncertainties and undue reliance should not be placed on such statements."[79]

Raising Cautionary Language at the Pleading Stage

Where available, the Safe Harbor defense of meaningful cautionary language can and should be raised in a motion to dismiss. The PSLRA and its legislative history are clear that it is appropriate for courts to determine the applicability of the Safe Harbor—including deciding whether cautionary statements are "meaningful"—at this stage.[80] Myriad cases have done so, and many have held expressly that courts have this authority.[81] Likewise, the Conference Committee Report states that the requirement for cautionary language to identify "important" risk factors was not intended "to provide an opportunity for plaintiff counsel to conduct discovery on what factors were known to the issuer."[82] Of course, all of this is consistent with a central purpose of the PSLRA generally—for meritless securities suits to be dismissed at the outset.[83]

Nevertheless, defendants should be aware that a small minority of cases have held on their facts that the meaningfulness of cautionary language could not be assessed until summary judgment or even trial. The most prominent case is the Seventh Circuit's 2004 decision in *Asher v. Baxter International Inc.*[84] There, the defendant made fairly detailed risk disclosures specific to its business but had not disclosed the particular risks alleged to have materialized.[85] Although Judge Easterbrook's opinion began by reciting the principle that "[t]he PSLRA creates rules that judges must enforce at the outset of the litigation,"[86] it concluded that discovery was necessary to determine whether "the items mentioned in [the defendant]'s cautionary language were those that at the time were the (or any of the) 'important' sources of variance."[87]

As one of us previously wrote, *Asher*'s immediate effect in the Seventh Circuit was to raise the bar for defendants seeking dismissal at the pleadings stage.[88] But after more than a decade has passed, *Asher*'s impact in the Seventh Circuit seems to have lessened. As a court in the Eastern District of Wisconsin explained:

> [T]he *Asher* Court did not state or imply that a safe harbor defense could never be resolved on a motion to dismiss; the decision to remand was based on the nature of the record in the case .... [T]he statute expressly authorizes courts to resolve a safe harbor issue on a motion to dismiss.[89]

Other post-*Asher* district-court decisions in the Seventh Circuit have likewise held cautionary statements to be meaningful on motions to dismiss.[90]

Courts elsewhere have occasionally cited *Asher* when concluding that dismissal at the pleading stage is premature under the circumstances. The only circuit court decision to do so is *Lormand v. US Unwired, Inc.*, in which the Fifth Circuit actually decided that the cautionary statements at issue were inadequate but briefly concluded with the suggestion that the defendants might still have hope on summary judgment.[91] There, after an extensive analysis, the court held that defendants' argument that they made meaningful cautionary statements was "without merit," in part because defendants "glossed over as a future risk ... certain dangers that had already begun to materialize."[92] But the court then also abruptly observed,

> Because reasonable minds could disagree as to whether the mix of information in the allegedly actionable document is misleading, the statutory safe harbor provision cannot provide the basis for dismissal as matter of law.[93]

In a footnote, the court added, "This does not foreclose the safe harbor's possible applicability in latter stages of these proceedings," citing *Asher*.[94]

The few district court cases outside the Seventh Circuit to follow *Asher* generally have done so in light of their particular facts rather than as a general rule,[95] or as a brief aside when dismissing claims on other grounds.[96] In two very unusual cases, however, district courts even denied defendants *summary judgment*, holding that the adequacy of the defendants' cautionary statements was a question of fact for a jury to decide.[97] Those cases are among the minority to have held a defendant's state of mind to be relevant to the determination of whether cautionary statements are meaningful.[98] That topic is discussed in further detail below.

Defendants can minimize the effects of *Asher* by pointing out that it is best understood as an outlier confined to its own facts. Consistent with the legislative history and purpose of the PSLRA, the overwhelming majority of cases continue to determine the adequacy of cautionary statements at the pleadings stage.

Further, the rationale of *Asher*—that it was not possible to determine from the pleadings whether the factors identified in the cautionary language were "important" to how actual results could differ from those predicted—is unlikely to apply in most securities cases. Plaintiffs' complaint will often make reference to a myriad of securities filings, call transcripts, press releases, and other public statements—documents that are likely to include detailed discussions of the defendant's business.[99] The cited documents typically will include not only those that plaintiffs allege contain misstatements, but also those that plaintiffs allege revealed "the truth"—*i.e.*, that explain why defendants' results were actually lower than expected. Defendants can refer to any discussion in any of these documents in a motion to dismiss,[100] and in most cases, it will provide an ample record to explain how the cautionary language was important. And, although this is not required for cautionary language to be considered meaningful, where the language does disclose the specific risk that is later alleged to have materialized and undermined a forward-looking statement, then it will almost automatically be considered meaningful—nothing could show more clearly that a risk was important than the fact that it actually transpired.

However, given the existence of outlier decisions declining to consider cautionary language at the motion to dismiss stage, defendants would be well advised to couple arguments that cautionary language immunizes a forward-looking statement with other alternative bases for dismissal, such as a failure to plead that the statement was made with actual knowledge of falsity or that it was material. Indeed, many of these arguments complement each other. For example, the fact that an issuer has disseminated detailed cautionary language discussing why a prediction might not come true may also undercut a claim that the defendant intended to mislead with the prediction.[101]

Immunity Based on Lack of Actual Knowledge of Falsity

The Importance of Disputing Actual Knowledge

Defendants also can invoke the Safe Harbor where "the plaintiff fails to prove that the forward-looking statement … was made with actual knowledge by that person that the statement was false or misleading." As the statute is written, this is an alternative basis for immunity to the "cautionary language" and "immaterial[ity]" prongs. As the Second Circuit explained in *Slayton* v. *American Express Co.*,

> [t]he safe harbor is written in the disjunctive; that is, a defendant is not liable if the forward-looking statement is identified and accompanied by meaningful cautionary language *or* is immaterial *or* the plaintiff fails to prove that it was made with actual knowledge that it was false or misleading.[102]

The Second, Sixth, Ninth, and Eleventh Circuits have all so held,[103] and the First and Third Circuits have suggested they would as well.[104]

Accordingly, under the plain language of the statute, defendants should be entitled to invoke the Safe Harbor where they lacked actual knowledge of falsity, even if they cannot show meaningful cautionary language or immateriality. Conversely, defendants also should be entitled to invoke the Safe Harbor based on cautionary language or immateriality even if they actually had knowledge of a statement's falsity.

As a practical matter, though, if defendants can argue that they lacked actual knowledge of falsity, then they will almost always be better off doing so in addition to raising any other bases for application of the Safe Harbor. This is, among other reasons, because of the way in which some courts have interpreted the Safe Harbor's actual knowledge prong. In particular, even though the statute makes clear that absence of actual knowledge of falsity is an alternative basis for immunity under the Safe Harbor—rather than a pre-condition to it applying at all—courts have expressed concerns about conferring immunity on a defendant alleged to have known a statement was false. The Fifth Circuit and some district courts have even suggested that defendants are not entitled to the Safe Harbor at all—even if there was meaningful cautionary language—if they knew of a statement's falsity.

When the Fifth Circuit first considered the question in *Southland Securities Corp. v. INSpire Insurance Solutions, Inc.*[105] in 2004, the court got it right. The court explained, "To avoid the safe harbor, plaintiffs must plead facts demonstrating that the statement was made with actual knowledge of its falsity. The safe harbor has two independent prongs: one focusing on the defendant's cautionary statements and the other on the defendant's state of mind."[106] But in 2009, the court turned the standard on its head in *Lormand v. US Unwired, Inc.*[107] There, the court misinterpreted the Safe Harbor statute by stating that it was available "only if" the lack-of-knowledge prong was established,[108] transforming this from a sufficient to a necessary condition for immunity. Despite having cited its own decision in *Southland*, the court erroneously stated that the plaintiff's allegation of defendant's knowledge precluded the application of the Safe Harbor.[109] As one would expect, the conflict between *Southland* and *Lormand* has created confusion in the district courts in the Fifth Circuit.[110] Some district courts noting the conflict have followed the correct holding in *Southland* on the grounds that, in the Fifth Circuit, the earlier opinion controls unless it is overruled *en banc*.[111]

A small number of courts outside the Fifth Circuit also have adopted the *Lormand* view.[112] For instance, a court in the Southern District of New York recently misquoted the Second Circuit's *Slayton* decision as purportedly stating that "the safe harbor does not cover claims that were 'made or approved by an executive officer with actual knowledge by that officer that the statement was false or misleading.' "[113] But that is not what the Second Circuit said. The quoted language was only a fragment of a sentence which, when read in its entirety, correctly states the statutory rule:

> The safe harbor provision *also requires dismissal* if the plaintiffs do not "prove that the forward-looking statement was made or approved by an executive officer with actual knowledge by that officer that the statement was false or misleading."[114]

Numerous other district-court cases in the Second Circuit have correctly cited *Slayton*'s disjunctive reading.[115]

None of these minority decisions attempts to explain how their approach can be reconciled with the plain language of the statute, which as discussed above, is clearly worded in the disjunctive. Further, by treating an absence of knowledge as a necessary condition for Safe Harbor protection, the minority approach does violence to the structure of the statute by rendering the other two prongs redundant. Under the minority approach, these prongs would only be available if a plaintiff fails to prove actual knowledge, but in that event, they would be irrelevant because the statute already makes clear that a plaintiff's failure to allege defendant's knowledge is, on its own, sufficient to trigger Safe Harbor immunity.[116]

Even some courts to have correctly held that lack of knowledge is not necessary for a defendant to invoke the immateriality and meaningful cautionary language prongs of the Safe Harbor have nevertheless gone on to suggest that a defendant's knowledge might still be relevant to those issues. Most courts, including the Sixth, Ninth, and Eleventh Circuits,[117] have concluded that a defendant's state of mind is irrelevant to the meaningful cautionary language prong. That is consistent with the express instructions of the Conference Committee Report: "The first prong of the safe harbor requires courts to examine only the cautionary statement accompanying the forward-looking statement.

A defendant's state of mind is irrelevant to the meaningful cautionary language prong.

Courts should not examine the state of mind of the person making the statement."[118] The Second Circuit, however, expressed reservations in *Slayton* about concluding that "an issuer [could] be protected by the meaningful cautionary language prong of the safe harbor even where his cautionary statement omitted a major risk that he knew about at the time he made the statement."[119] In dicta, *Slayton* explained why the court "f[ou]nd Congress's directions difficult to apply":

> In order to assess whether an issuer has identified the factors that realistically could cause results to differ, we must have some reference by which to judge what the realistic factors were at the time the statement was made. We think that the most sensible reference is the major factors that the defendants faced at the time the statement was made. But this requires an inquiry into what the defendants knew because in order to determine what risks the defendants faced, we must ask of what risks were they aware.[120]

In support, *Slayton* quoted the Seventh Circuit's opinion in *Asher v. Baxter International Inc.*, which referred to "the major risks [the issuer] objectively faced when it made its forecasts."[121] It is unclear why the *Slayton* panel thought that an inquiry into the risks an issuer "objectively" faced would entail a subjective inquiry into the issuer's state of mind. In any case, *Slayton* ultimately declined to decide this "thorny issue," instead affirming dismissal of the complaint on the basis of the lack-of-knowledge prong.[122]

Nevertheless, the discussion in *Slayton* suggests that the Second Circuit was concerned by the fact that defendants who knew of the falsity of a statement could be entitled to immunity—a concern that likely also underlies those decisions suggesting that absence of actual knowledge is a prerequisite for application of the Safe Harbor. As discussed above, although those decisions reflect a minority view that is difficult to defend as a matter of legal doctrine, wherever possible, the best path for defendants is likely to dispute vigorously the sufficiency of plaintiffs' allegations of actual knowledge and argue why defendants are entitled to Safe Harbor immunity on that alternative basis also. Those arguments are often likely to be successful given the significant pleading and proof burden imposed by the actual knowledge requirement, discussed below. Moreover, even where a court is not prepared to decide that plaintiffs failed to plead actual knowledge, defendants may create sufficient doubt to make a court more comfortable holding that defendants are entitled to immunity under the other prongs of the Safe Harbor, such as the meaningful cautionary language prong, and that a consideration of actual knowledge is unnecessary (as many courts have held).[123]

Plaintiffs' Burden to Plead and Prove Actual Knowledge

The Safe Harbor's "actual knowledge" standard requires plaintiffs to show "actual subjective knowledge" that a forward-looking statement is false or misleading.[124] This imposes a higher burden than the general scienter requirement that applies to securities fraud cases under the PSLRA.[125] Perhaps most

significantly, although recklessness—which suffices for purposes of the PSLRA's general requirement—is satisfied by "mere[ ] indifference to the danger that a statement is false," actual knowledge requires more.[126] These requirements are worth emphasizing when invoking the Safe Harbor, because they are more onerous than the standards that most courts are used to applying to securities fraud claims. Indeed, as discussed below, this distinction has been dispositive in several cases, which have held that plaintiffs failed to plead actual knowledge sufficiently even though they might have adequately alleged recklessness.

In addition, the PSLRA's heightened pleading standard applies, requiring plaintiffs to plead a "strong inference of scienter," meaning that the inference "must be cogent and at least as compelling as any opposing inference of nonfraudulent intent."[127]

The most detailed discussion of the actual knowledge requirement has been in the Second Circuit's decision in *Slayton*. The Securities and Exchange Commission (SEC) submitted an amicus brief in that case arguing that the "actual knowledge" standard required that the "speaker actually knows that one or more of [three] implicit factual representations is not true": "(i) that the statement is genuinely believed; (ii) that there is a reasonable basis for that belief; and (iii) that the speaker is not aware of any undisclosed facts tending to seriously undermine the accuracy of the statement."[128] The court applied this standard on the basis that the parties agreed with it, without expressly endorsing the standard itself.[129] Nonetheless, district court opinions have cited *Slayton* as precedent in applying this standard.[130]

Even though this test reads three implicit factual assertions into forward-looking statements and allows plaintiffs to assert a claim based on any of them, it is still not likely to be easily satisfied. As both the Second Circuit and the SEC emphasized, it is not enough for plaintiffs to show that one of the assertions is incorrect—they must show that the defendant actually knew it was false.[131] For example, as to the second assertion, plaintiffs would have to show that defendants "actually knew that they had no reasonable basis for making the statement."[132] As the SEC explained, this "actual subjective knowledge" requirement is stricter than recklessness, which is an "objective inquiry" that can be satisfied based on a danger that was "so obvious that the defendant must have been aware of it" or "facts known to a person [that] place[d] him on notice of a risk."[133] Similarly, as to the third assertion, plaintiffs must show that defendants actually knew of the fact(s) alleged to seriously undermine the accuracy of the projection. In addition to disputing knowledge of that fact(s), defendants also could argue that the fact does not "seriously undermine" the projection at all—even if it is inconsistent with it.[134]

In *Slayton* itself, based in large part on the rigors of the actual knowledge requirement and plaintiffs' failure to discharge their burden to plead a "strong inference of scienter," the court held that the plaintiffs had not adequately alleged actual knowledge.[135] On the one hand, some allegations supported an inference of scienter regarding defendants' statement that they expected their losses from high-yield debt investments to be "substantially lower" for the rest of the year.[136] For example, the defendants were allegedly aware of "the highly likely risk" that those investments would deteriorate, and "actually knew that they did not know the extent of the deterioration and therefore had no reasonable basis" for their prediction.[137] On the other hand, the court noted that there were "opposing nonfraudulent inference[s]" to be made based an executive's "stunned" response to the actual deterioration and the absence of allegations that defendants had reason to believe that their losses would be as large as the previous quarter.

The court also noted the absence of allegations above defendants' motive.[138] On that basis, the Second Circuit concluded that "the circumstantial evidence supporting an inference of non-fraudulent intent is more compelling."[139] As one commentator wrote, "*Slayton* provides what may be an archetypical case in which the higher scienter standard for statutorily protected forward-looking statements makes a difference" because "[m]aking a statement without knowing whether it is true or false—which is essentially what the plaintiffs alleged in *Slayton*—may

reach severe recklessness. But it does not amount to 'actual knowledge' that the statement is false or misleading."[140]

A recent case in the District of Louisiana also highlights the significance of the actual knowledge requirement. The court there held that the plaintiffs had not adequately alleged that defendants knew that their prediction that the company could "meet [its] obligations for the next twelve months" was false, even though the company was "extremely leveraged, and increasingly cash poor," and soon after the statement, its financial position became "untenable."[141] In so holding, that court also emphasized the importance of the actual knowledge requirement to its decision, noting that it "may well have reached a different result" under a recklessness standard.[142] It explained, "That defendants misjudged the gravity of [the company]'s peril does not mean that they actually knew that [it] would not survive or that they intended to defraud the public."[143]

Plaintiffs have had the most success alleging actual knowledge based on the "undisclosed facts" limb of the *Slayton* test, although only where they were able to assert credible allegations that defendants actually knew of the allegedly undisclosed fact. For example, in one district court case, plaintiffs were held to have adequately alleged actual knowledge when defendants' SEC disclosures demonstrated that they knew of a phenomenon known as "plant shrink" that diminished the amount of natural gas that the company could extract from its wells.[144] Defendants provided projections to the plaintiff that did not account for plant shrink, and defendants were alleged to have had a strong and specific motive for doing so.[145] In another case, plaintiffs alleged that defendants "assured investors that [the company] 'did not see conditions for the rest of the year where it would need to raise liquidity'," even though the day after that statement, the company announced a $1 billion public offering and, if that offering failed, the company would be forced into bankruptcy.[146] Based on these facts, the court held that plaintiffs sufficiently alleged "that the defendants were aware of undisclosed facts that would tend to seriously undermine the accuracy of … forward-looking statements."[147] Although these cases can be distinguished on their facts, they do illustrate the significance of *Slayton*'s "undisclosed facts" limb, on which plaintiffs will likely focus in other cases also—although plaintiffs will still have to show that the facts were actually known to the defendants, along with their importance to the forward-looking statement at issue.

Plaintiffs will still have to show that the facts were actually known to the defendants.

In many cases, plaintiffs will attempt to establish actual knowledge based on allegations that confidential witnesses told company executives that forward-looking statements would not be achieved or were lacking in basis. Defendants frequently have strong rejoinders to such allegations. For example, many cases have held confidential witness statements to be insufficient where they fail to allege adequately that the purported witnesses were actually in a position to have spoken with the relevant executives about the issue or to have had personal knowledge of the executives' mental state.[148] Of course, to support allegations of actual knowledge, confidential witnesses must have not only been in a position to have communicated their views, but have actually done so—claiming that a confidential witness *thought* that a forward-looking statement was unrealistic will not establish that anyone else necessarily thought that. In addition, courts have held that a witness's having informed an executive of a potential problem does not demonstrate that the executive shared that view: rather, it demonstrates only a difference of opinion about the future, which is clearly distinct from actual knowledge that a prediction was false, or even lacking in basis.[149]

Finally, it is also worth remembering that defendants whose lack-of-knowledge arguments do not persuade courts on a motion to dismiss may have a

second bite at the apple on a motion for summary judgment. The Safe Harbor provides immunity where "the plaintiff fails to *prove*" the defendant's actual knowledge of a forward-looking statement's falsity. Indeed, in at least two cases that previously survived motions to dismiss, district courts granted summary judgment to defendants on the basis that plaintiffs failed to adduce adequate evidence of the defendant's knowledge of falsity.[150]

Immunity Based on Immateriality

A third independent statutory basis for Safe Harbor immunity arises when a forward-looking statement is immaterial.[151] This prong of the Safe Harbor has not been the subject of extensive analysis in recent years, perhaps because even *non*-forward-looking statements are unactionable under the securities laws if they are immaterial.[152] This appears to be a missed opportunity for defendants. Because some decisions have held that a statement is not material unless it provides "a *guarantee* of some concrete fact or outcome,"[153] there is good reason to believe that forward-looking statements—which are often couched in aspirational or subjective language—may in fact be uniquely susceptible to attack based on a lack of materiality, even at the motion to dismiss stage.

The few courts to have analyzed materiality in the context of the Safe Harbor have generally focused on whether the forward-looking statement is mere "puffery"[154]—*i.e.*, "vague and non-specific expressions of corporate optimism on which reasonable investors would not have relied."[155] For example, in *In re Aetna, Inc. Securities Litigation*, the Third Circuit held that the defendant's statements about its "dedication to disciplined pricing" for its insurance policies were immaterial puffery.[156] The court explained that such statements represented only "oblique references to Aetna's pricing policy," which were "too vague to ascertain anything on which a reasonable investor might rely" and "could not have meaningfully altered the total mix of information available to the investing public."[157]

Yet as a recent Second Circuit decision highlights, materiality carries other requirements that may be especially difficult for many forward-looking statements to satisfy. In *City of Pontiac Policemen's & Firemen's Retirement System v. UBS AG*, the court held that a statement is material only where it is "sufficiently specific for an investor to reasonably rely on that statement as a *guarantee* of some concrete fact or outcome."[158] The Second Circuit held that even a statement that was "important" would not be material unless worded as a "guarantee": "while importance is undoubtedly a *necessary* element of materiality, importance and materiality are not synonymous."[159]

Importance and materiality are not synonymous.

Although *City of Pontiac* did not itself concern a forward-looking statement or address the Safe Harbor, its holding that statements must guarantee a specific outcome to be actionable seems to have particular significance for forward-looking statements.[160] Many such statements are cast in aspirational or subjective terms—for example, that a company hopes to, or believes that it will, achieve revenue in a certain amount—and under *City of Pontiac*, those statements are immaterial. The Second Circuit's decision suggests that only statements cast in categorical terms—for example, that a company *will* achieve certain revenue—would be actionable.[161]

Perhaps the most interesting aspect of this issue is that *City of Pontiac* is by no means unprecedented. Prior to the introduction of the PSLRA, numerous courts observed that "projections of future performance not worded as guarantees are generally not actionable under the federal securities laws."[162] For example, in one case, the Fourth Circuit held that statements setting forth "an expected annual growth rate of 10% to 30% over the next several years" were immaterial "because the market price of a share is not inflated by vague statements predicting growth,"

and "both the range of rates cited, as well as the time for their achievement, are anything but definite."[163] Yet, there are relatively few cases considering similar arguments after the introduction of the PSLRA.

Defendants therefore may have significant and potentially underutilized opportunities to move to dismiss forward-looking statements that are not worded as guarantees based on a lack of materiality. Although some courts historically have viewed materiality as a fact issue, whether or not a statement is worded as a guarantee turns only on the language of the statement and is therefore uniquely suited for determination at the pleadings stage—indeed, *City of Pontiac* itself was resolved on a motion to dismiss.

Effect of a Prior Guilty Plea or SEC Settlement

Finally, it is worth highlighting that the Safe Harbor contains a disqualification provision which states that the statute does not apply to statements that are "made with respect to the business or operations of [an] issuer" which, within three years of the statement, was (1) convicted for a securities violation or (2) the "subject of a judicial or administrative decree or order" that prohibits securities fraud violations or determines that such a violation has occurred. Notably, because the disqualification applies to all statements "made with respect to" such an issuer, it appears even to deprive an individual defendant who has never violated the securities laws of the benefit of the Safe Harbor if he or she is speaking about an issuer that falls within the disqualification. In these situations, defendants must rely on more general principles of law to defend claims based on forward-looking statements.

In apparently the only court case to analyze this disqualification, an opinion in the Eastern District of New York observed in dicta that where an issuer "voluntarily enters into a consent decree that is subsequently entered by the court as a final consent judgment," the issuer would be disqualified from the Safe Harbor.[164] The court rejected defendants' argument that the voluntary nature of the consent decree did not trigger the disqualification, describing this as a "distinction without a difference."[165]

Issuers may obtain waivers from the disqualification "by rule, regulation, or order of the Commission."[166] But in the years since the financial crisis, regulators have faced increased pressure not only to pursue aggressively violators of the securities laws, but also to seek admissions of liability in settlements with issuers. As a result, as one of us recently wrote, waivers from the disqualification are no longer routinely granted and are subject to heightened scrutiny from the SEC and members of Congress.[167] Issuers seeking such waivers now have a higher burden to show why the waiver is needed and that the conduct triggering the disqualification is not part of a pattern of misconduct.[168] On the other hand, though, the SEC now interprets the scope of the disqualification more narrowly, with disqualification arising only where an issuer itself is the subject of proceedings.[169] Previously, the SEC staff had taken the position that disqualification of a subsidiary also disqualifies a parent advisor.[170]

Obtaining a waiver from a Safe Harbor disqualification will likely be more burdensome and involve greater public scrutiny than in years past.

In this environment, defense counsel should carefully consider the collateral consequences of a guilty plea or a settlement with the SEC involving a consent decree. In the event of such a resolution, counsel should be aware that obtaining a waiver from a Safe Harbor disqualification will likely be more burdensome and involve greater public scrutiny than in years past. Ultimately, many issuers may end up

having little choice but to enter into a settlement with the SEC that will result in disqualification, but they should at least do so with an informed understanding of the consequences.

However, even where the disqualification applies, all is not lost. Prior to the introduction of the statutory Safe Harbor, courts had developed the "bespeaks caution" doctrine pursuant to which a forward-looking statement "accompanied by sufficient cautionary language is not actionable because no reasonable investor could have found the statement materially misleading."[171] The Safe Harbor was "based on aspects of … the judicial[ly] created 'bespeaks caution' doctrine," though it was not intended to replace that doctrine "or to foreclose further development of that doctrine by the courts."[172] Many courts still analogize to the bespeaks caution doctrine when applying the Safe Harbor,[173] apply both the doctrine and the Safe Harbor,[174] or find statements protected by the bespeaks-caution doctrine alone.[175] Although the doctrine therefore remains available for defendants in addition to the statutory Safe Harbor, it is especially valuable for those defendants that are disqualified from the Safe Harbor.[176] Indeed, defendants may also invoke the protection of the bespeaks-caution doctrine where other statutory exceptions to the Safe Harbor apply, such as the one for statements made in connection with an initial public offering.[177]

Further, whether or not the Safe Harbor applies, plaintiffs asserting claims based on forward-looking statements relating to disqualified issuers still will have to establish all of the normal requirements of those claims. Those requirements typically will include materiality which, as discussed above, may prove problematic for many claims based on forward-looking statements. They also will often include scienter, which, for a forward-looking statement, will require plaintiffs to plead that defendants did not genuinely believe that the statement was true, knew that there was not a reasonable basis for the belief, or knew of undisclosed facts that tended to seriously undermine the accuracy of the statement.[178] Although recklessness likely will suffice for that purpose, the PSLRA's general requirement that plaintiffs plead allegations of scienter with specificity, and the frequency with which courts dismiss securities fraud claims based on their failure to meet that burden, indicate that this will remain a significant burden for plaintiffs.

Notes

1. *In re Aetna, Inc. Sec. Litig.*, 617 F.3d 272, 279 (3d Cir. 2010).
2. *Gissin v. Endres*, 739 F. Supp. 2d 488, 506 (S.D.N.Y. 2010); *see* Iowa Pub. Emps.' Ret. Sys. v. MF Global, Ltd., 620 F.3d 137, 143 (2d Cir. 2010) ("The line can be hard to draw, and we do not now undertake to draw one.").
3. *Julianello v. K-V Pharm. Co.*, 791 F.3d 915, 921 (8th Cir. 2015) (internal quotation marks omitted); *see also W. Wash. Laborers-Emp'rs Pension Trust v. Panera Bread Co.*, 697 F. Supp. 2d 1081, 1094 (E.D. Mo. 2010); *see Lopez v. CTPartners Executive Search Inc.*, 2016 WL 1276457, at *19 (S.D.N.Y. Mar. 29, 2016) ("[S]tatements of projections as to corporate earnings [are forward-looking], without regard to whether the last day of the covered earnings period had passed.").
4. *In re Aetna,* 617 F.3d at 281.
5. *Harris v. Ivax Corp.*, 182 F.3d 799, 805 (11th Cir. 1999).
6. Of course, the use of the future tense will not make a statement forward-looking in the unusual case where the statement actually concerns past or present facts. *See, e.g.*, *In re Urban Outfitters, Inc. Sec. Litig.*, 103 F. Supp. 3d 635, 649-50 (E.D. Pa. 2015) ("Any 'characterizations of past events or current conditions,' or prefacing otherwise non-forward-looking statements with 'words of futurity or belief' does not bring the statements within the protection of the safe harbor.").
7. *Slayton v. Am. Express Co.*, 604 F.3d 758, 769 (2d Cir. 2010).
8. *Id.*; *see also Gissin v. Endres*, 739 F. Supp. 2d 488, 506 (S.D.N.Y. 2010) (holding that the words "expectation" and "we feel we will be" were the kind "linguistic clues" that "cast [defendants' statements] in predictive terms" such that they were "by definition forward-looking").
9. *See, e.g.*, *In re Stone & Webster, Inc., Sec. Litig.*, 414 F.3d 187, 213 (1st Cir. 2005) ("We believe that in order to determine whether a statement falls within the safe harbor, a court must examine which aspects of the statement

are alleged to be false."); *In re Aetna*, 617 F.3d at 281 ("Our examination begins with a determination of which aspect of the statements are false.").

10. *E.g.*, *Institutional Investors Grp. v. Avaya, Inc.*, 564 F.3d 242, 255 (3d Cir. 2009); *In re Stone & Webster*, 414 F.3d at 213; *Gissin*, 739 F. Supp. 2d at 505; *In re EveryWare Glob., Inc. Sec. Litig.*, 2016 WL 1242689, at *11 (S.D. Ohio Mar. 30, 2016).
11. 513 F.3d 702, 705 (7th Cir. 2008).
12. *Mulligan v. Impax Labs., Inc.*, 36 F. Supp. 3d 942, 965 (N.D. Cal. 2014) (emphasis omitted).
13. *Id.* at 964.
14. *In re Urban Outfitters, Inc. Sec. Litig.*, 103 F. Supp. 3d 635, 650(E.D. Pa. 2015).
15. *Spitzberg v. Hous. Am. Energy Corp.*, 758 F.3d 676, 692 (5th Cir. 2014).
16. *Id.* at 680.
17. *Id.* at 680-81.
18. *Id.* at 692.
19. 759 F.3d 1051 (9th Cir. 2014).
20. *Id.* at 1059.
21. *Id.*
22. *Id.*
23. 759 F. 3d at 1059.
24. *Id.*
25. *Id.*; *see also W. Wash. Laborers-Empl'rs Pension Trust v. Panera Bread Co.*, 697 F. Supp. 2d 1081, 1095 (E.D. Mo. 2010) ("Although standing alone the statement might appear to also contain a present representation, the context demonstrates that the entire discussion concerned future events. It is therefore protected by the safe harbor."); *In re Invensense, Inc. Sec. Litig.*, 2016 WL 1182063, at *7 (N.D. Cal. Mar. 28, 2016) (same, quoting *Intuitive*).
26. 564 F.3d 242, 254-55 (3d Cir. 2009).
27. *Id* at 255.
28. *Id.*
29. *Id.* at 255–56.
30. 739 F. Supp. 2d 488, 505–06 (S.D.N.Y. 2010) (emphasis omitted).
31. *Id.* at 506 (emphasis omitted).
32. *Id.*
33. 182 F.3d 799, 805-06 (11th Cir. 1999).
34. *Id.* at 806.
35. *Id.*
36. *Id.*
37. *Id.* at 807; *see also Lemmer v. Nu-Kote Holding, Inc.*, 2001 WL 1112577, at *5 (N.D. Tex. Sept. 6, 2001) (holding that "the alleged predictive statements and optimistic forecasts" were protected by the Safe Harbor where they allegedly "omitted certain information which made the achievement of the forecasts unlikely"), *aff'd*, 71 F. App'x 356 (5th Cir. 2003).
38. *Compare, e.g.*, *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 705 (7th Cir. 2008), *with Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.*, 759 F.3d 1051, 1059 (9th Cir. 2014).
39. 791 F.3d 90 (D.C. Cir. 2015).
40. *Id.* at 102 (quoting *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 372 (5th Cir. 2004)).
41. *Id.* (quoting *Institutional Investors Grp. v. Avaya, Inc.*, 564 F.3d 242, 256 (3d Cir. 2009)). *Avaya* also stated that cautionary language must be "extensive and specific" in order to be meaningful. 564 F.3d at 256.
42. *Harman*, 791 F.3d at 102 (quoting *Harris v. Ivax Corp.*, 182 F.3d 799, 807 (11th Cir. 1999)).
43. *Id.* (citations and brackets omitted); *see also Asher v. Baxter Intern. Inc.*, 377 F.3d 727, 730 (7th Cir. 2004) (holding that "[a]s long as the firm reveals the principal risks, the fact that some other event caused problems cannot be dispositive"; any other result would "demand prescience").
44. 791 F.3d at 102 (collecting cases).
45. *Id.* (quoting *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 244 (5th Cir. 2009)).
46. *Id.* at 106; *accord Slayton v. Am. Express Co.*, 604 F.3d 758, 772–73 (2d Cir. 2010). *But see* In re Invensense, Inc. Sec. Litig., 2016 WL 1182063, at *7 (N.D. Cal. Mar. 28, 2016) ("[P]laintiff cites no case holding that cautionary language becomes less effective with each repetition, and the Court is aware of no case so holding.").
47. 791 F.3d 915, 918-19 (8th Cir. 2015).
48. *Id.* at 918.
49. *Id.* at 919.
50. *Id.* at 922.
51. *Gammel v. Hewlett-Packard Co.*, 905 F. Supp. 2d 1052, 1060, 1067 (C.D. Cal. 2012).

52. *Id.* at 1060.
53. *Id.* at 1067.
54. *Id.*
55. *In re Hertz Global Holdings, Inc. Sec. Litig.*, 2015 WL 4469143, at *14 (D.N.J. July 22, 2015).
56. *Id.* at *3, *14.
57. *Id.* at *14.
58. *Id.*
59. 604 F.3d 758 (2d Cir. 2010).
60. *Id.* at 772.
61. *Id.* at 764, 772.
62. *Id.* at 763–64, 772.
63. *Id.* at 770. *Slayton* also emphasized that "defendants' cautionary language remained the same even while the problem changed," *id.* at 772-73, so it may be that if defendants had revised the language to address the deteriorating state of the market, the court would have found it to be meaningful. It is also possible that the court's analysis was colored by its view that the allegations raised a plausible inference of fraudulent intent. *Id.* at 777. The court ultimately held that the statement was still protected by the Safe Harbor because plaintiffs had not adequately alleged that it was made with actual knowledge that it was misleading. *See infra* text accompanying notes 128-140.
64. 791 F.3d 90, 102–03 (citing and quoting *Slayton*, 604 F.3d at 769–70 (citations omitted)); *see, e.g.*, *Howard v. Liquidity Servs., Inc.*, 2016 WL 1301044, at *12 (D.D.C. Mar. 31, 2016).
65. 791 F.3d at 103 (quoting *Rombach v. Chang*, 355 F.3d 164, 173 (2d Cir. 2004)). Judge Milton Pollack in the Southern District of New York first made this analogy in a case discussing the bespeaks-caution doctrine. *In re Prudential Sec. Inc. Ltd. Partnerships Litig.*, 930 F. Supp. 68, 72 (S.D.N.Y. 1996).
66. *See, e.g.*, *Rubinstein v. Collins*, 20 F.3d 160, 171 (5th Cir. 1994) ("To warn that the untoward may occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit.").
67. 791 F.3d at 104.
68. *Id.* at 97.
69. *Id.* at 96–98 (emphasis omitted).
70. *Id.* at 104.
71. *Id.*
72. *Id.*
73. *Id.*; *see also Rand-Heart of New York, Inc. v. Dolan*, 812 F.3d 1172, 1178-79 (8th Cir. 2016) (finding company's cautionary statement inadequate where the statement disclosed that "if" the company loses "large repeat customers" the company "may be adversely affected," while in fact the company's largest customer had already stopped sending it new business).
74. *Yellen v. Hake*, 437 F. Supp. 2d 941, 963 (S.D. Iowa 2006).
75. *E.g.*, *In re Merck & Co., Inc. Sec. Litig.*, 432 F.3d 261, 273 n.11 (3d Cir. 2005); *Elec. Workers Pension Trust Fund of IBEW Local Union No. 58 v. CommScope, Inc.*, 2013 WL 4014978, at *13 (W.D.N.C. Aug. 6, 2013); *W. Wash. Laborers-Empl'rs Pension Trust v. Panera Bread Co.*, 697 F. Supp. 2d 1081, 1090 (E.D. Mo. 2010).
76. *Julianello v. K-V Pharm. Co.*, 791 F.3d 915, 921 (8th Cir. 2015); *Golesorkhi v. Green Mountain Coffee Roasters, Inc.*, 973 F. Supp. 2d 541, 555 (D. Vt. 2013).
77. *Asher v. Baxter Intern. Inc.*, 377 F.3d 727, 732 (7th Cir. 2004); *Kuriakose v. Fed. Home Loan Mortg. Corp.*, 897 F. Supp. 2d 168, 179 (S.D.N.Y. 2012), *aff'd sub nom. Cent. States, Se. & Sw. Areas Pension Fund v. Fed. Home Loan Mortg. Corp.*, 543 F. App'x 72 (2d Cir. 2013).
78. *E.g.*, *City of Austin Police Ret. Sys. v. Kinross Gold Corp.*, 957 F. Supp. 2d 277, 303 (S.D.N.Y. 2013); *see also Slayton v. Am. Express Co.*, 604 F.3d 758, 769 (2d Cir. 2010); *In re Fusion-io, Inc. Sec. Litig.*, 2015 WL 661869, at *13 (N.D. Cal. Feb. 12, 2015).
79. *Fort Worth Emp'rs' Ret. Fund v. Biovail Corp.*, 615 F. Supp. 2d 218, 232 (S.D.N.Y. 2009) (emphasis omitted); *see, e.g.*, *Gammel v. Hewlett-Packard Co.*, 905 F. Supp. 2d 1052, 1066–67 (C.D. Cal. 2012); *Gissin v. Endres*, 739 F. Supp. 2d 488, 507 (S.D.N.Y. 2010).
80. *See* H.R. Rep. No. 104–369, at 44 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 743, 1995 WL 709276 ("The plaintiff must plead with particularity all facts giving rise to a strong inference of a material misstatement in the cautionary statement to survive a motion to dismiss.").
81. *E.g.*, *Helwig v. Vencor, Inc.*, 251 F.3d 540, 554 (6th Cir. 2001); *Halperin v. eBanker USA.com, Inc.*, 295 F.3d 352, 359 (2d Cir. 2002); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1278 (11th Cir. 1999); *Elec. Workers Pension Trust Fund of IBEW Local Union No. 58 v. CommScope, Inc.*,

2013 WL 4014978, at *12 (W.D.N.C. Aug. 6, 2013); *In re Humana, Inc. Sec. Litig.*, 2009 WL 1767193, at *12 (W.D. Ky. June 23, 2009); *In re Huffy Corp. Sec. Litig.*, 577 F. Supp. 2d 968, 1013 n.45 (S.D. Ohio 2008); *In re Tibco Software, Inc.*, 2006 WL 1469654, at *25–26 (N.D. Cal. May 25, 2006); *In re Ligand Pharm., Inc. Sec. Litig.*, 2005 WL 2461151, at *17 (S.D. Cal. Sept. 27, 2005); *Karacand v. Edwards*, 53 F. Supp. 2d 1236, 1243 (D. Utah 1999).

82. H.R. Rep. No. 104-369, at 44.
83. *See, e.g.*, *Bryant*, 187 F.3d at 1278.
84. 377 F.3d 727 (7th Cir. 2004).
85. *Id.* at 729-30.
86. *Id.* at 728.
87. *Id.* at 734.
88. *See* Richard A. Rosen, *The Statutory Safe Harbor for Forward-Looking Statements: A Scorecard in the Courts from November 2004 Through November 2006*, 39 Sec. Reg. & L. Rep. 54, 55 & n.14 (BNA 2007) (collecting cases).
89. *W. Pa. Elec. Emps. Pension Trust v. Plexus Corp.*, 2009 WL 604276, at *8 n.7 (E.D. Wis. Mar. 6, 2009).
90. *See St. Lucie Cnty. Fire Dist. Firefighters' Pension Trust Fund v. Motorola, Inc.*, 2011 WL 814932, at *10 (N.D. Ill. Feb. 28, 2011); *Panasuk v. Steel Dynamics, Inc.*, 2009 WL 5176193, at *9 (N.D. Ind. Dec. 21, 2009); *Silverman v. Motorola, Inc.*, 2008 WL 4360648, at *12 (N.D. Ill. Sept. 23, 2008); *cf. In re Harley-Davidson, Inc. Sec. Litig.*, 660 F. Supp. 2d 969, 993 (E.D. Wis. 2009) (declining to decide the adequacy of the cautionary language because the lack-of-knowledge prong was dispositive, but noting that "the statutory scheme anticipates" consideration of cautionary language on a motion to dismiss, and that "courts have roundly rejected claims that cautions are ineffective because they did not line up with the exact causes of inaccurate projections").
91. 565 F.3d 228, 247-48 & n.11 (5th Cir. 2009).
92. *Id.* at 247.
93. *Id.* at 248 (quotation marks and alterations in original omitted).
94. *Id.* at 248 n.11.
95. *E.g.*, *In re EVCI Colleges Holding Corp. Sec. Litig.*, 469 F. Supp. 2d 88, 103 (S.D.N.Y. 2006) ("Unfortunately for defendants, this is one of those (probably) rare cases where the Safe Harbor issue is not amenable to final resolution on the pleading, even accompanied by all the relevant press releases and SEC filings. It depends on facts that remain to be developed in discovery."); *Ryan v. Flowserve Corp.*, 444 F. Supp. 2d 718, 730 n.6 (N.D. Tex. 2006) (stating in dicta in a footnote that the Safe Harbor was inapplicable because "it is impossible without more information (via summary judgment) to tell whether the cautionary language describes the 'principal or important risks' facing Flowserve at the time they were made."). *But see* Lefkoe v. Jos. A. Bank Clothiers, 2007 WL 6890353, at *5 n. 10 (D. Md. Sept. 10, 2007) ("[T]he adequacy of cautionary language is a question of fact, and, typically, is not a question to be resolved on a motion to dismiss.").
96. *E.g.*, *In re Houston Am. Energy Corp. Sec. Litig.*, 970 F. Supp. 2d 613, 643 (S.D. Tex. 2013) (ultimately dismissing for lack of scienter but noting in dicta that "the adequacy of risk warnings is a factual issue not to be resolved on the pleadings"), *rev'd on other grounds sub nom. Spitzberg v. Houston Am. Energy Corp.*, 758 F.3d 676 (5th Cir. 2014); *In re Spectrum Brands, Inc. Sec. Litig.*, 461 F. Supp. 2d 1297, 1320 n.9 (N.D. Ga. 2006) (dismissing claims on other grounds but commenting that "[d]etermining whether a statement contains sufficiently 'meaningful' cautionary language and is thus entitled to a PSLRA safe harbor, for example, can be a fact-intensive question inappropriate for decision on the pleadings"); *The WU Grp. v. Synopsys, Inc.*, 2005 WL 1926626, at *11 (N.D. Cal. Aug. 10, 2005) (dismissing claims on other grounds but noting "in the context of a 12(b)(6) motion, it is too early in the litigation to reach a conclusion on whether the cautionary statements included in the earnings releases at issue are sufficiently meaningful to invoke the safe harbor provision").
97. *City of Ann Arbor Emps.' Ret. Sys. v. Sonoco Prods. Co.*, 827 F. Supp. 2d 559, 576 (D.S.C. 2011); *Freeland v. Iridium World Commc'ns, Ltd.*, 545 F. Supp. 2d 59, 74 (D.D.C. 2008).
98. *See Sonoco*, 827 F. Supp. 2d at 576; *Freeland*, 545 F. Supp. 2d at 74.
99. Indeed, a complaint that does not refer to such statements may be subject to dismissal for failure to plead securities fraud with the requisite specificity.
100. *See, e.g.*, *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007).

101. In several cases in which defendants sought to rely on meaningful cautionary language, courts granted dismissal based on plaintiffs' failure to plead actual knowledge. *See, e.g.*, *Slayton v. Am. Express Co.*, 604 F.3d 758, 777 (2d Cir. 2010); *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 371–73 (5th Cir. 2004).
102. 604 F.3d at 766.
103. *Id.*; *Helwig v. Vencor, Inc.*, 251 F.3d 540, 554–55 & n.2 (6th Cir. 2001); *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1112–13 (9th Cir. 2010); *Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc.*, 594 F.3d 783, 795 (11th Cir. 2010); *see also In re Harman Int'l Indus., Inc. Sec. Litig.*, 27 F. Supp. 3d 26, 41 (D.D.C. 2014), *rev'd on other grounds*, 791 F.3d 90 (D.C. Cir. 2015).
104. *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 201 (1st Cir. 1999); *In re Stone & Webster, Inc., Sec. Litig.*, 414 F.3d 187, 212 (1st Cir. 2005); *Institutional Investors Grp. v. Avaya, Inc.*, 564 F.3d 242, 259 (3d Cir. 2009); *see also In re Hertz Global Holdings, Inc. Sec. Litig.*, 2015 WL 4469143,at *14 n.13 (D.N.J. July 22, 2015); *In re Gold Res. Corp. Sec. Litig.*, 957 F. Supp. 2d 1284, 1293 (D. Colo. 2013), *aff'd*, 776 F.3d 1103 (10th Cir. 2015); *Elec. Workers Pension Trust Fund of IBEW Local Union No. 58 v. CommScope, Inc.*, 2013 WL 4014978, at *9 (W.D.N.C. Aug. 6, 2013); *Plumbers & Pipefitters Local Union No. 630 Pension-Annuity Trust Fund v. Allscripts-Misys Healthcare Solutions, Inc.*, 778 F. Supp. 2d 858, 877 (N.D. Ill. 2011); *W. Wash. Laborers-Empl'rs Pension Trust v. Panera Bread Co.*, 697 F. Supp. 2d 1081, 1089 (E.D. Mo. 2010); H.R. Rep. No. 104–369, at 43–44 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 742–43, 1995 WL 709276 (describing a "a bifurcated safe harbor" in which the knowledge prong "provides an alternative analysis.").
105. 365 F.3d 353 (5th Cir. 2004).
106. *Id.* at 371 (citations omitted).
107. 565 F.3d 228 (5th Cir. 2009).
108. *Id.* at 244.
109. *Id.* ("Because the plaintiff adequately alleges that the defendants actually knew that their statements were misleading at the time they were made, the safe harbor provision is inapplicable to all alleged misrepresentations."). Not only did the court state that lack of knowledge was necessary for safe harbor immunity, it also stated that it was insufficient. *Id.* ("Even if the plaintiff had failed to plead actual knowledge, the safe harbor provision still would not apply here, because the alleged misrepresentations are not accompanied by 'meaningful cautionary language.'"). But in light of the court's conclusions that (i) plaintiffs had pleaded lack of knowledge and (ii) defendant's cautionary language was not meaningful, the court's statements about the logical relationship between the two are arguably dicta. *See In re Harman Int'l Indus., Inc. Sec. Litig.*, 27 F. Supp. 3d 26, 41 n.5 (D.D.C. 2014), *rev'd on other grounds*, 791 F.3d 90 (D.C. Cir. 2015).
110. *Compare Hopson v. MetroPCS Commc'ns, Inc.*, 2011 WL 1119727, at *18 n.19 (N.D. Tex. Mar. 25, 2011) (noting the conflict and concluding it is bound by *Southland* because "because it is [a] well-established rule in the Fifth Circuit that one 'panel does not have the authority to overrule a previous panel's decision'"), *with N. Port Firefighters' Pension—Local Option Plan v. Temple-Inland, Inc.*, 936 F. Supp. 2d 722, 758 (N.D. Tex. 2013) (noting the conflict but then mis-citing *Southland* for the proposition that "actual knowledge of the falsity of the statement will defeat the safe harbor defense").
111. *Hopson*, 2011 WL 1119727, at *18 n.19; *see Firefighters Pension & Relief Fund of New Orleans v. Bulmahn*, 2015 WL 7454598, at *10 n.60 (E.D. La. Nov. 23, 2015).
112. *See, e.g.*, *Winslow v. BancorpSouth, Inc.*, 2011 WL 7090820, at *18 (M.D. Tenn. Apr. 26, 2011), *report and recommendation approved*, 2012 WL 214635 (M.D. Tenn. Jan. 24, 2012); *Primavera Investors v. Liquidmetal Techs., Inc.*, 403 F. Supp. 2d 1151, 1159 (M.D. Fla. 2005).
113. *In re ITT Educ. Servs., Inc. Sec. Litig.*, 34 F. Supp. 3d 298, 306 (S.D.N.Y. 2014) (Oetken, J.) (quoting *Slayton v. Am. Express Co.*, 604 F.3d 758, 762 (2d Cir. 2010)).
114. *Slayton v. Am. Express Co.*, 604 F.3d 758, 762 (2d Cir. 2010) (emphasis added; alterations in original omitted).
115. *E.g.*, *In re Sanofi Sec. Litig.*, 87 F. Supp. 3d 510, 530 (S.D.N.Y. 2015) (Engelmayer, J.); *In re Fairway Grp. Holdings Corp. Sec. Litig.*, 2015 WL 4931357, at *12 (S.D.N.Y. Aug. 19, 2015) (Peck, Mag. J.), *report and recommendation adopted*, 2015 WL 5255469 (S.D.N.Y. Sept. 9, 2015) (Kaplan, J.); *In re Nevsun Res. Ltd.*, 2013

WL 6017402, at *7 (S.D.N.Y. Sept. 27, 2013) (Gardephe, J); *City of Providence v. Aeropostale, Inc.*, 2013 WL 1197755, at *9 (S.D.N.Y. Mar. 25, 2013) (McMahon, J.); *In re WEBMD Health Corp. Sec. Litig.*, 2013 WL 64511, at *4 (S.D.N.Y. Jan. 2, 2013) (Keenan, J.); *Golesorkhi v. Green Mountain Coffee Roasters, Inc.*, 973 F. Supp. 2d 541, 552 (D. Vt. 2013) (Sessions, J.), *aff'd*, 569 F. App'x 43 (2d Cir. 2014); *Hutchinson v. Perez*, 2012 WL 5451258, at *8 (S.D.N.Y. Nov. 8, 2012) (Baer, J.); *Gissin v. Endres*, 739 F. Supp. 2d 488, 511 n.144 (S.D.N.Y. 2010) (Scheindlin, J.). *But see* Freudenberg v. E*Trade Fin. Corp., 712 F. Supp. 2d 171, 193 (S.D.N.Y. 2010) (Sweet, J.) (pre-*Slayton* case: "Even where the safe harbor is triggered, it does not protect statements made with actual knowledge of falsity, as alleged here…. Defendants cannot be immunized for knowingly false statements even if they include some warnings….").

116. *See Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc.*, 594 F.3d 783, 795–96 (11th Cir. 2010).
117. *See Miller v. Champion Enters. Inc.*, 346 F.3d 660, 678 (6th Cir. 2003); *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1112 (9th Cir. 2010); *Harris v. Ivax Corp.*, 182 F.3d 799, 803 (11th Cir. 1999); *Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc.*, 594 F.3d 783, 795 (11th Cir. 2010); *see also In re Gold Res. Corp. Sec. Litig.*, 957 F. Supp. 2d 1284, 1294 (D. Colo. 2013), *aff'd*, 776 F.3d 1103 (10th Cir. 2015); *Gissin*, 739 F. Supp. 2d at 511 n.144; *Desai v. Gen. Growth Props., Inc.*, 654 F. Supp. 2d 836, 844 (N.D. Ill. 2009).
118. H.R. Rep. No. 104–369, at 44 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 743, 1995 WL 709276.
119. 604 F.3d at 772.
120. *Id.* at 771.
121. *Id.* at 771 n.8 (quoting *Asher v. Baxter Int'l Inc.*, 377 F.3d 727, 734 (7th Cir. 2004) (Easterbrook, J.)).
122. *Id.* at 772, 775.
123. *See supra* note 117.
124. *Slayton*, 604 F.3d at 776 n.9.
125. *Id.* at 773.
126. *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 705 (7th Cir. 2008); *Slayton*, 604 F.3d at 773; *Strougo v. Barclays PLC*, 105 F. Supp. 3d 330, 341–42 (S.D.N.Y. 2015).
127. *Slayton*, 604 F.3d at 773 (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007)); *see Lopez v. CTPartners Executive Search Inc.*, 2016 WL 1276457, at *7, 20 (S.D.N.Y. Mar. 29, 2016) ("The fact of a later correction, made a short time after an initial statement is made, does not connote that that the Company's earlier statement about its earnings expectations was false or misleading when made."); *Firefighters Pension & Relief Fund of New Orleans v. Bulmahn*, 2015 WL 7454598, at *10 (E.D. La. Nov. 23, 2015).
128. *Slayton*, 604 F.3d at 774.
129. *Id.*
130. *Marcus v. J.C. Penney Co., Inc.*, 2015 WL 5766870, at *5 (E.D. Tex. Sept. 29, 2015); *In re WEBMD*, 2013 WL 64511, at *7; *In re Symbol Technologies, Inc. Sec. Litig.*, 2013 WL 6330665, at *12 n.4 (E.D.N.Y. Dec. 5, 2013); *Patriot Exploration, LLC v. SandRidge Energy, Inc.*, 951 F. Supp. 2d 331, 352 (D. Conn. 2013); *In re Gen. Elec. Co. Sec. Litig.*, 857 F. Supp. 2d 367, 388 (S.D.N.Y. 2012), *partial reconsideration granted on other grounds*, 856 F. Supp. 2d 645 (S.D.N.Y. 2012); *see also Bulmahn*, 2015 WL 7454598, at *24 (citing Fifth Circuit precedent).
131. *Slayton*, 604 F.3d at 775; *see* Brief for SEC as *Amicus Curiae at 12–13*, Slayton*, 604 F.3d 758* (No. 08-5442) [hereinafter SEC Brief], available at *http://www.sec.gov/litigation/briefs/2010/slayton0110.pdf*; *see also Bulmahn*, 2015 WL 7454598, at *25 ("[F]or each predictive statement, plaintiffs must plead specific facts giving rise to a strong inference that the defendant responsible for the statement *actually knew* that at least one of the three implicit assertions contained in the prediction was false.").
132. *Slayton*, 604 F.3d at 775.
133. SEC Brief at 11 (quoting *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47 (2d Cir. 1978)); *id.* at 13 (citing *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1046 (7th Cir. 1977) and *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 704 (7th Cir. 2008)).
134. The scope of the actual-knowledge prong of the Safe Harbor should be unaffected by the Supreme Court's recent decision in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015). There, the Court held that to allege a misleading omission in an opinion, a plaintiff "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." *Id.* at 1327, 1332. The Court, however, was analyzing the issue for claims under Section 11 of the Securities Act of 1933, which ordinarily have no scienter requirement. The Safe Harbor, in contrast, statutorily elevates the scienter standard for forward-looking statements to its highest possible level: "actual knowledge" of falsity. To be sure, *Omnicare*'s standard for misleading omissions in statements of opinion shares some similarities with *Slayton*'s standard for "actual knowledge" of falsity of forward-looking statements, in that both hold the bases for the statement to be relevant. Nonetheless, as *Slayton* makes clear, the Safe Harbor standard requires that the speaker actually know that one of the bases was lacking, while the *Omnicare* test relies on the objective view of the "reasonable person reading the statement." *Omnicare* should therefore not affect the scienter requirement of the Safe Harbor. *See Bulmahn*, 2015 WL 7454598, at *25 ("[*Omnicare*] did not address or modify the PLSRA's safe harbor for forward-looking statements.").

135. 604 F.3d at 775-77.
136. *Id.* at 775.
137. *Id.*
138. *Id.* at 776-77.
139. *Id.*
140. William O. Fisher, American Bar Association, *Caselaw Developments 2010*, 66 Bus. Law. 785, 884 (2010).
141. *Firefighters Pension & Relief Fund of New Orleans v. Bulmahn*, 2015 WL 7454598, at *24, *25, *31 (E.D. La. Nov. 23, 2015).
142. *Id.* at *31.
143. *Id.*
144. *Patriot Exploration, LLC v. SandRidge Energy, Inc.*, 951 F. Supp. 2d 331, 352–53 (D. Conn. 2013).
145. *Id.*
146. *Marcus v. J.C. Penney Co., Inc.*, 2015 WL 5766870, at *5 (E.D. Tex. Sept. 29, 2015) (Mitchell, Mag. J.).
147. *Id.*
148. *See, e.g.*, *Fire & Police Pension Ass'n of Colorado v. Abiomed, Inc.*, 778 F.3d 228, 245 (1st Cir. 2015); *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 998 (9th Cir. 2009); *In re EveryWare Glob., Inc. Sec. Litig.*, 2016 WL 1242689, at *9 (S.D. Ohio Mar. 30, 2016); *In re A123 Sys., Inc. Sec. Litig.*, 930 F. Supp. 2d 278, 286 (D. Mass. 2013); *Campo v. Sears Holdings Corp.*, 635 F. Supp. 2d 323, 335 (S.D.N.Y. 2009), *aff'd*, 371 F. App'x 212 (2d Cir. 2010).
149. *See, e.g.*, *In re Salomon Analyst Level 3 Litig.*, 373 F. Supp. 2d 248, 252 (S.D.N.Y. 2005); *In re HomeBanc Corp. Sec. Litig.*, 706 F. Supp. 2d 1336, 1358 (N.D. Ga. 2010).
150. *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 735 F. Supp. 2d 856, 911 (N.D. Ill. 2010); *In re St. Jude Med., Inc., Sec. Litig.*, 629 F. Supp. 2d 915, 924 (D. Minn. 2009).
151. *See Slayton v. Am. Express Co.*, 604 F.3d 758, 766 (2d Cir. 2010); *In re Aetna, Inc. Sec. Litig.*, 617 F.3d 272, 278 (3d Cir. 2010); *Kuriakose v. Fed. Home Loan Mortg. Corp.*, 897 F. Supp. 2d 168, 179 (S.D.N.Y. 2012).
152. Indeed, where courts address both materiality and the Safe Harbor, they tend to treat them as separate analyses. *See, e.g.*, *Gammel v. Hewlett-Packard Co.*, 905 F. Supp. 2d 1052, 1065–71 (C.D. Cal. 2012); *Gissin v. Endres*, 739 F. Supp. 2d 488, 504–12 (S.D.N.Y. 2010); *Fort Worth Emp'rs' Ret. Fund v. Biovail Corp.*, 615 F. Supp. 2d 218, 229 (S.D.N.Y. 2009).
153. *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 185 (2d Cir. 2014) (emphasis added).
154. *E.g.*, *In re Aetna,* 617 F.3d at 283; *Kuriakose*, 897 F. Supp. 2d at 179.
155. *In re Aetna*, 617 F.3d at 284.
156. *Id.*
157. *Id.*
158. 752 F.3d 173, 185 (2d Cir. 2014) (emphasis added). The sentence in its entirety is as follows: "To be 'material' within the meaning of § 10(b), the alleged misstatement must be sufficiently specific for an investor to reasonably rely on that statement as a guarantee of some concrete fact or outcome which, when it proves false or does not occur, forms the basis for a § 10(b) fraud claim." *Id.*
159. *Id.*
160. The *City of Pontiac* plaintiffs asserted fraud claims based on "UBS's representations that it prioritized 'adequate diversification of risk' and 'avoidance of undue concentrations,'" arguing that the representations were misleading in light of UBS's accumulation of a $100 billion position in undisclosed mortgage assets. *Id.* at 186 (emphasis omitted). The court held that these representations were "too open-ended and subjective to constitute a guarantee that UBS

would not accumulate a $100 billion RMBS portfolio," and were thus immaterial. *Id.*

161. *See Vallabhaneni v. Endocyte, Inc.*, 2016 WL 51260, at *16 (S.D. Ind. Jan. 4, 2016) ("Because [forward-looking statements] are by definition only predictions, not guarantees, the standard is particularly stringent.").
162. *E.g.*, *Raab v. Gen. Physics Corp.*, 4 F.3d 286, 290 (4th Cir. 1993) (quoting *Krim v. BancTexas Grp., Inc.*, 989 F.2d 1435, 1446 (5th Cir. 1993)); *In re Fidelity/Apple Sec. Litig.*, 986 F. Supp. 42, 48 (D. Mass. 1997); *Robbins v. Moore Med. Corp.*, 894 F. Supp. 661, 673 (S.D.N.Y. 1995); *Lasker v. New York State Elec. & Gas Corp.*, 1995 WL 867881, at *6 (E.D.N.Y. Aug. 22, 1995), *aff'd*, 85 F.3d 55 (2d Cir. 1996).
163. *Raab*, 4 F.3d at 290.
164. *In re Symbol Techs., Inc. Sec. Litig.*, 2013 WL 6330665, at *15 (E.D.N.Y. Dec. 5, 2013).
165. *Id.*
166. *See generally* Richard A. Rosen & David S. Huntington, *Waivers from the Automatic Disqualification Provisions of the Federal Securities Laws*, INSIGHTS: CORP. & SEC. L. ADVISOR, Aug. 2015, at 2–16.
167. *Id.* at 2.
168. *See id.* at 3, 11.
169. *Id.* at 5.
170. *Id.*
171. *Iowa Pub. Emps.' Ret. Sys. v. MF Global, Ltd.*, 620 F.3d 137, 141 (2d Cir. 2010).
172. H.R. REP. NO. 104–369, at 43, 46 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 742, 745, 1995 WL 709276.
173. *In re Aetna, Inc. Sec. Litig.*, 617 F.3d 272, 282 (3d Cir. 2010).
174. *Kuriakose v. Fed. Home Loan Mortg. Corp.*, 897 F. Supp. 2d 168, 179 (S.D.N.Y. 2012); *see also Golesorkhi v. Green Mountain Coffee Roasters, Inc.*, 973 F. Supp. 2d 541, 553 (D. Vt. 2013).
175. *See, e.g., Ill. State Bd. of Inv. v. Authentidate Holding Corp.*, 369 F. App'x 260, 263–65 (2d Cir. 2010).
176. *In re Bausch & Lomb, Inc. Sec. Litig.*, 2003 WL 23101782, at *2 n.3 (W.D.N.Y. Mar. 28, 2003) ("Defendants may still avail themselves of the 'bespeaks caution' doctrine, however, since Congress indicated that the safe harbor provision was not intended to replace the 'bespeaks caution' doctrine…."); *Little Gem Life Scis. LLC v. Orphan Med., Inc.*, 2007 WL 541677, at *7 (D. Minn. Feb. 16, 2007) ("The PSLRA does not exclude application of the bespeaks caution doctrine in the instant case.").
177. *See, e.g.*, *Johnson v. Sequans Commc'ns S.A.*, 2013 WL 214297, at *10, *14–16 (S.D.N.Y. Jan. 17, 2013) (applying the bespeaks-caution doctrine after observing that "[t]he PSLRA safe-harbor does not apply…to statements made in connection with an initial public offering."); *Nat'l Junior Baseball League v. Pharmanet Dev. Grp. Inc.*, 720 F. Supp. 2d 517, 535 n.15 (D.N.J. 2010) (noting that "[t]he Third Circuit has also applied the 'bespeaks caution' doctrine to cases where the PSLRA does not apply").
178. *See supra* text accompanying notes 124-134.