COMMENT

THE TANGLED WEB OF ISSUER LIABILITY FOR ANALYST STATEMENTS: *IN RE CIRRUS LOGIC SECURITIES LITIGATION*

TABLE OF CONTENTS

I. INTRODUCTION

In recent years, claims of issuer liability for information contained in investment analysts' reports have become an increasingly visible part of securities fraud litigation. These claims are especially strong where the companies themselves are alleged to have been directly involved in the preparation, provision, or distribution of that information and usually fail absent direct involvement.[1] Partly as a result of their unpleasant experiences with such securities litigation, some issuers have reassessed their policies regarding corporate communications with analysts.[2]

A number of recent securities cases in the Ninth Circuit have followed important precedent generated by the Second Circuit.[3] One of the most recent decisions, *In re Cirrus Logic Securities Litigation*,[4] highlights the pertinent avenues of inquiry involved in determining this type of securities law liability.[5]

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[1]*See, e.g.*, Elkind v. Liggett & Myers, Inc., 635 F.2d 156 (2d Cir. 1980) (holding that a company was not liable for analyst forecasts because it demonstrated it had a "no comment" policy regarding projections and forecasts, even though it met repeatedly with analyst, and corrected and reviewed analyst reports prior to their publication); Stack v. Lobo, 903 F. Supp. 1361 (N.D. Cal. 1995) (denying in part a motion to dismiss, finding plaintiffs pled sufficient facts with regard to the inclusion of analyst reports in an investor relations package to state a claim of entanglement with those reports); *In re* Cypress Semiconductor Sec. Litig., 891 F. Supp. 1369 (N.D. Cal. 1995) (holding company not liable when officer provided analyst reports to two shareholders because there was no evidence presented that company's adoption of the analyst reports due to such distribution reached the market); *In re* RasterOps Corp. Sec. Litig., No. C-93-20349 RPA (EAI), 1994 U.S. Dist. LEXIS 18245 (N.D. Cal. Oct. 31, 1994) (holding that allegations of actual distribution of analyst reports by company were sufficient to state a claim); *In re* Syntex Corp. Sec. Litig., 855 F. Supp. 1086 (N.D. Cal. 1994), *aff'd*, 95 F.3d 922 (9th Cir. 1996) (dismissing allegations of issuer liability for analyst's forecasts because there were no allegations of entanglement with or adoption of those forecasts); *In re* Caere Corporate Sec. Litig., 837 F. Supp. 1054 (N.D. Cal. 1993) (applying strict pleading standard for entanglement and holding that officer's statement to analysts regarding slower first quarter sales and difficulty of prediction was not sufficient to state a claim of liability for analysts' statements); Colby v. Hologic, Inc., 817 F. Supp. 204 (D. Mass. 1993) (holding that plaintiff failed to adequately plead "entanglement" or misstatements of facts to analysts); Hershfang v. Citicorp, 767 F. Supp. 1251, 1257 (S.D.N.Y. 1991) (holding that optimistic statements of opinion to securities analysts by insider not actionable because of absence of "an inference of guilty knowledge").

[2]Dale E. Barnes, Jr. & Constance E. Bagley, *Great Expectations: Risk Management Through Risk Disclosure*, 1 STAN. J.L. BUS. & FIN. 155, 182 (1994) (citing to various articles indicating that companies such as Exabyte Corporation, Software Toolworks, and Oracle Systems Corporation now have stringent guidelines on the content and manner of such communications as a result of securities litigation involving those companies).

[3]*See supra* note 1.

[4]946 F. Supp. 1446 (N.D. Cal. 1996).

[5]Hereinafter, for convenience, all types of issuer liability for analyst statements will be

This comment begins by explaining the legal principles underlying issuer-analyst liability. Part III offers a discussion of the decision in *In re Cirrus*, and a review of certain fundamental attributes and benefits of the issuer-analyst relationship. Finally, Part IV proposes a safe harbor that will, in certain limited circumstances, protect securities analysts and issuers from securities law liability.

II. BACKGROUND

A. *Rule 10b-5 Liability*

An issuer's securities liability for third party statements is initially derived in part from section 10b of the Securities Exchange Act of 1934[6] and Rule 10b-5 promulgated thereunder.[7] Rule 10b-5 forbids fraudulent conduct in connection with the purchase or sale of securities, including security price manipulation, the making of materially misleading statements, and the failure to disclose certain kinds of material information.[8] Specifically, Rule 10b-5 makes it unlawful to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."[9] Federal securities laws also prohibit misleading statements in certain securities transactions and documents including, among others, sections 12(2)[10] and

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referred to collectively as "issuer-analyst" liability.

[6]15 U.S.C. § 78j (1994). Section 10b makes it unlawful for any person, directly or indirectly, in interstate commerce, through the mails, or through a national securities exchange, to use or employ, in connection with the purchase or sale of any security "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." *Id.*

[7]17 C.F.R. § 240.10b-5 (1997). Rule 10b-5 also makes it

> unlawful for any person, directly or indirectly . . . [in interstate commerce or the mails or any national exchange] . . . [t]o employ any device, scheme, or artifice to defraud . . . or . . . [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Id.

[8]*See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 474-76 (1977) (indicating types of conduct for which Rule 10b-5 was intended to create liability).

[9]17 C.F.R. § 240.10b-5(b) (1997).

[10]15 U.S.C. § 77(*l*) (Supp. 1995). Generally, § 12(2) imposes liability on any person who offers or sells a security in interstate commerce "by means of a prospectus or oral communication, which includes an untrue statement of a material fact . . . necessary . . . to make the statements, in the light of the circumstances . . . not misleading" if the purchaser did

17(a)[11] of the Securities Act of 1933 and section 18(a) of the Securities Exchange Act of 1934.[12] To prevail on a claim under section 10b, a plaintiff must establish that, in connection with the purchase or sale of a security, he relied upon a misstatement or omission of a material fact made with scienter[13] that proximately caused his injury.[14]

B. *Materiality of Information*

Only misstatements or omissions of *material* fact are unlawful under the federal securities laws.[15] A fact is material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[16] With regard to potential

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not know of the untruth or omission, and which person does not prove that he (the seller or offeror) did not know, and "in the exercise of reasonable care could not have known, of such untruth or omission." *Id.* Loss causation emanating from such untruth or omission must be found in order for the purchaser to recover damages. *Id.*

[11]15 U.S.C. § 77q(a) (1994). Generally, § 17(a)(2) provides that it is unlawful for any person offering or selling securities in interstate commerce to "obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." *Id.*

[12]15 U.S.C. § 78r(a) (1994). Generally, § 18(a) provides that:

> [a]ny person who [in a document filed with the SEC] shall make . . . any statement [which] . . . was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance . . . shall have purchased or sold a security at a price . . . affected by such statement, . . . unless [that] . . . person . . . shall prove that he acted in good faith and [without] . . . knowledge that such statement was false or misleading.

Id.

[13]Scienter is "a mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n.12 (1976). Scienter may be provable by evidence that a defendant's actions presented "'a danger of misleading buyers or sellers that [was] either known to the defendant or [was] so obvious that the [defendant] must have been aware of it.'" *In re* Software Toolworks Inc. Sec. Litig., 50 F.3d 615, 626 (9th Cir. 1994) (quoting Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1569 (9th Cir. 1990) (en banc)).

[14]Stransky v. Cummins Engine Co., 51 F.3d 1329, 1331 (7th Cir. 1995); Huddleston v. Herman & MacLean, 640 F.2d 534, 543 (5th Cir. 1981), *rev'd on other grounds*, 459 U.S. 375 (1983).

[15]*See generally supra* notes 7, 10-12 (setting forth statutory provisions that mandate that such misstatements or omissions be of material fact).

[16]Basic, Inc. v. Levinson, 485 U.S. 224, 231-32 (1988) (citing TSC Indus. Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)). The Supreme Court in *TSC Industries* was analyzing materiality in the context of a proxy statement. It has been noted that this formulation "has become the preferred judicial standard for determining whether misstated or

future events, a balance must be struck between "the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity."[17] Issuers are not required to disclose information merely because an investor would like to know it.[18] In certain situations, companies may not be required to disclose material information at all[19] or to issue updates.[20] However, an issuer must supply certain specific historic financial information to the market[21] and periodically disclose "where a trend, demand, commitment, event or uncertainty is both presently known to management and reasonably likely to have material effects on the registrant's financial condition or results of operation."[22] For instance, if the ownership control of a company should change, such an issuer is required to file a Form 8-K reporting such an event.[23]

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omitted facts are material." HAROLD S. BLOOMENTHAL & HOLME ROBERTS & OWEN, SECURITIES LAW HANDBOOK § 16.01, at 795 (1996). The Supreme Court, in *Basic*, analyzed materiality in the context of merger negotiations and the Court made pains to indicate that it was not addressing "other kinds of contingent or speculative information." *Basic*, 485 U.S. at 232 n.9.

[17]*Basic*, 485 U.S. at 238 (quoting SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968) (en banc)). The Court in *Basic* found it necessary to add this test because the "total mix" test could not be applied in a "straightforward" manner in the merger context. *See* BLOOMENTHAL & HOLME ROBERTS & OWEN, *supra* note 16, § 16.06, at 805.

[18]*In re* Time Warner Inc. Sec. Litig., 9 F.3d 259, 267 (2d Cir. 1993) (finding that an investor's preference for certain types of information does not mean that information must be disclosed by an issuer).

[19]*See* Glazer v. Formica Corp., 964 F.2d 149, 157 (2d Cir. 1992) (noting a difference between concept of materiality and the duty to disclose such information in the course of exploration of merger or leveraged buyout (LBO) possibilities).

[20]*See In re* Convergent Techs. Sec. Litig., 948 F.2d 507, 516 (9th Cir. 1991) (holding that issuer's previous risk disclosures regarding ability to manufacture a new product were sufficient to release company from duty to update public on progress of factory's retooling); *In re* Abbott Lab. Sec. Litig., 813 F. Supp. 1315, 1319 (N.D. Ill. 1992) (holding no duty to update statements that are not forward-looking).

[21]*See* 17 C.F.R. § 249.310 (1997). *See also Form 10-K, Annual Report Pursuant to § 13 or 15(d) of the Securities Exchange Act of 1934*, 5 Fed. Sec. L. Rep. (CCH) ¶ 31,102 (Sept. 17, 1997) (requiring disclosure of information about the issuer's financial condition).

[22]*Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosure*, 7 Fed. Sec. L. Rep. (CCH) ¶ 73,193, at 62,842 (June 7, 1989).

[23]*See* 17 C.F.R. § 249.308 (1997). *See also Form 8-K Current Report Pursuant to § 13 or 15(d) of the Securities Exchange Act of 1934*, 5 Fed. Sec. L. Rep. (CCH) ¶ 31,002 (Apr. 9, 1997).

C. *Affirmative Duties to Disclose*

Affirmative duties to disclose may arise in a number of different circumstances. These include reporting and registration disclosures required for certain publicly-held companies under securities laws including quarterly, annual, and current reports on Forms 10-Q, 10-K, and 8-K, respectively, and the various forms for registration statements.[24]

Additionally, courts have prescribed certain affirmative duties to disclose material inside information if insider trading has occurred or is contemplated.[25] Insiders in possession of material nonpublic information have a duty to disclose such information before trading or refrain from trading while such information remains undisclosed.[26] Such a duty to

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[24]Securities Act of 1933, 15 U.S.C. §§ 77a-77mm (Supp. 1995); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (Supp. 1995). The U.S. securities regulatory regime is premised on mandated disclosure, both in initial securities registration statements and continuing reporting documents filed with the SEC, of information relating to the company and the securities issued. This information includes facts about the company, its officers and directors, and certain types of risk and accounting disclosure. For a good overview of the types of information required, see BLOOMENTHAL & HOLME ROBERTS & OWEN, *supra* note 16, §§ 12.01-.05, at 529-56.

[25]*See, e.g.*, SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968) (holding that insiders who are in possession of nonpublic material information must either disclose the information or refrain from trading in the company's stock).

[26]*Id.* (holding that insider-tipper was liable for profits made by others who were not insiders but made profits on insider's tips). Those latter parties are known as "tippees." The general rule stated above in the text is the touchstone of the legal duty of insiders regarding the sales or purchases of their company stock. In the SEC administrative action, *In re* Cady, Roberts & Co., 40 S.E.C. 907 (1961), the underlying rationale for the disclose or abstain rule was explained as follows:

> [T]he obligation rests on two principal elements; first, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing.

Id. at 912.

This theory has evolved and mutated in various ways through the years. *See, e.g.*, United States v. O'Hagan, 117 S. Ct. 2199 (1997) (holding that a lawyer who learned of his client's plans to launch a tender offer and profited on the purchase of the target's stock was liable under a misappropriation theory of liability which states that Rule 10(b)-5 liability is triggered by an individual's trading on information misappropriated from a source in breach of a duty owed to that source); Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299 (1985) (holding the defense of *in pari delicto* is not normally available to tipper sued by tippee who traded on false information and lost money); Dirks v. SEC, 463 U.S. 646 (1983) (stating that insider trading liability should be found when a corporate insider discloses material nonpublic information with a desire for direct or indirect personal benefit). *See also* RICHARD W. JENNINGS ET AL., SECURITIES REGULATION — CASES AND MATERIALS 1002-09 (7th ed.

disclose arises due to the "relationship of trust and confidence between the shareholders of the corporation and those insiders who have obtained confidential information by reason of their position with that corporation."[27] "This relationship gives rise to a duty to disclose because of the 'necessity of preventing a corporate insider from . . . tak[ing] unfair advantage of the uninformed minority stockholders.'"[28] The absence or presence of allegations of insider trading is directly related to the strength of a plaintiff's claims of securities fraud, especially with regard to scienter or intent to defraud.[29] Also, certain duties to disclose may be prescribed by rules promulgated by self-regulatory securities organizations.[30]

D. *Primary Securities Law Liability Under 10b(5)*

If an issuer intentionally or recklessly misleads securities analysts, then the analyst reports are relevant to determine securities fraud liability.[31] Adoption or entanglement[32] is not required in such

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1992) (detailing various parties who have a duty of disclosure before trading, including insiders, nontrading tippers, trading tippees, and outsiders).

[27]Chiarella v. United States, 445 U.S. 222, 228 (1980) (holding that an employee of a printer, who was not employed by the issuer, and who discerned the identity of a tender offer and traded on that information prior to its actual publication, was not liable for securities law violations because "no duty could arise from petitioner's relationship with the sellers of the target company's securities, for . . . [he] . . . had no prior dealings with them. He was not their agent, he was not a fiduciary, he was not a person in whom the sellers had placed their trust and confidence." *Id.* at 232.

[28]*Id.* at 228-29 (alteration in original) (quoting Speed v. Transamerica Corp., 99 F. Supp. 808, 829 (D. Del. 1951)).

[29]*See In re* Apple Computer Sec. Litig., 886 F.2d 1109, 1117 (9th Cir. 1989) (finding that "[i]nsider trading in suspicious amounts or at suspicious times is probative of bad faith and scienter"); *In re* United Telecomms., Inc. Sec. Litig., 781 F. Supp. 696, 703 (D. Kan. 1991) (stating that allegations that defendants made contradicting opinions in private to those made in public failed due to lack of allegations of insider trading).

[30]For instance, there is a general duty to promptly disclose material information pursuant to NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL § 202.05 (Supp. #11, 1996), and the NASD MANUAL § 4310, at 5273 (July 1996). Although these duties are, from a legal standpoint, arguably directory rather than mandatory, an issuer would ostensibly have a desire to avoid the ire of a self-regulatory organization or exchange upon which it is listed and maintain the enhanced credibility and access to investors such an affiliation provides to an issuer's securities.

[31]This may seem obvious in light of the court's ensuing compelling analysis, but even otherwise sophisticated defense counsel were apparently not fully aware of this. *In re* Cirrus Logic Sec. Litig., 946 F. Supp. 1446, 1467 (N.D. Cal. 1996) (citing to defense confusion as to the law regarding direct liability for misrepresentations made by an issuer through an analyst).

[32]Entanglement and adoption are theories of liability for third party statements based

circumstances and an issuer cannot avoid liability just because the fraud is perpetrated through third parties.[33] Section 10(b) of the Exchange Act prohibits the use of "any manipulative or deceptive device or contrivance," whether practiced "directly or indirectly."[34] Section 20(b) specifies that it is unlawful for a person "to do any act or thing which it would be unlawful for such person to do . . . through or by means of any other person."[35] Manipulation of the prices of securities by the dissemination of false and misleading information through analysts is exactly the type of conduct section 10(b) prohibits.[36] When an issuer communicates such misleading information to investment analysts there is an expectation that the false information will reach the marketplace and influence prices.[37]

Analyst and other third party statements are essential parts of both the fraud-on-the-market theory of reliance and the truth-on-the-market defense. The fraud-on-the-market theory recognizes the efficient market

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upon the actions of an issuer vis-á-vis such statements, as more fully described *infra* Part III.G.

[33]*In re Cirrus*, 946 F. Supp. at 1467 (citing to Warshaw v. Xoma, 74 F.3d 955, 959 (9th Cir. 1996)). The court then cited to various circuit and district court precedent supporting direct liability for misleading statements made through analysts. *Id.*

[34]15 U.S.C. § 78j (1994).

[35]15 U.S.C. § 78t(b) (Supp. 1995). Section 20(b) defines the type of conduct that would constitute a violation of rules promulgated pursuant to § 10(b) and, therefore, of 10(b) itself. *See* Dirks v. SEC, 463 U.S. 646, 659 (1983). Under § 21(d), the SEC is authorized to seek injunctions prohibiting acts or practices violating the Securities and Exchange Acts and provide evidence to the Attorney General who may, at his discretion, institute criminal proceedings. 15 U.S.C. § 78u(d) (Supp. 1995).

[36]*See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 477 (1977) (stating that Congress intended to prohibit all "ingenious devices that might be used to manipulate securities prices").

[37]*See* Basic, Inc. v. Levinson, 485 U.S. 224, 246-47 n.24 (1988). *See also Warshaw*, 74 F.3d at 959 (noting the possibility that an issuer might intentionally use third parties to disseminate false information to the public); Kirby v. Cullinet Software, Inc., 116 F.R.D. 303, 307 (D. Mass. 1987) (citations omitted) (stating that reliance on the market also includes reliance on third party statements that just relayed the misstated information from issuers). For an interesting twist on this point and how it may also go to scienter, see *Hershfang*, in which *The Wall Street Journal* reported Citicorp officers' optimistic statements to securities analysts who then reported favorably on the bank's prospects and quoted the officers at length. Hershfang v. Citicorp, 767 F. Supp. 1251, 1253-54 (S.D.N.Y. 1991). Subsequently, after dividends declined precipitously, the chairman admitted that "[w]e were warned about real estate two years ago, we were warned again a year ago, and we pooh-poohed it. . . . Now I'm damn embarrassed . . . ." *Id.* at 1254 (citations omitted). These meetings and subsequent admissions were not sufficient to allege scienter. *Id.* at 1259. The court dismissed the claims and stated that "[t]he complaint must rise or fall on allegations about defendants' conduct and not on wide-eyed citation to the gratuitous commentary of outsiders." *Id.* at 1255. The court went on to say that "[t]he complaint as a whole alleges simply that defendants' optimism about Citicorp's prospects turned out wrong. Missing are any facts or identified circumstances that would generate an inference of guilty knowledge." *Id.* at 1257.

concept which basically posits that stock prices in efficient markets reflect all information available to the market.[38] The truth-on-the-market defense is "an essential corollary" of the fraud-on-the-market theory.[39] The presumption of reliance under the fraud-on-the-market theory may be rebutted by "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price."[40] If market participants had knowledge of the truth, then misrepresentations would not have had an impact on the market price, thus severing the link.[41] If successfully shown, truth-on-the-market rebuts the presumption of reliance prescribed by the fraud-on-the-market theory.[42]

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[38]*See Basic*, 485 U.S. at 247. *See also infra* note 213. The theory was recognized by the Supreme Court in *Basic*, based in part on the Third Circuit's prior decision in Peil v. Speiser, 806 F.2d 1154, 1160-67 (3d Cir. 1986), which affirmed the district court's directed verdict on a claim of individual misstatements or omissions and the entering of a judgment on a jury verdict for defendants on claims of a scheme to defraud. *See Basic*, 485 U.S. at 241-42 (quoting *Peil*, 806 F.2d at 1160-61). The fraud-on-the-market theory has created a three part presumption of reliance: "First, the court presumes that the misrepresentation affected the market price. Second, it presumes that a purchaser . . . rel[ied] on the price . . . as an indication of its value and thereby relied on the misrepresentation in the purchase. Third, it presumes the reasonableness of that reliance." *In re* Phillips Petroleum Sec. Litig., 738 F. Supp. 825, 835 (D. Del. 1990) (citing Zlotnick v. TIE Communications, 836 F.2d 818, 822 (3d Cir. 1988)). A defendant may rebut the fraud-on-the-market presumption of reliance "by showing that the market did not respond to the misrepresentation." *Id.* at 836.

[39]*In re* Bell Atl. Corp. Sec. Litig., Civ. Nos. 91-0514, 91-0518, 91-0531, 91-0673, 91-0737, 91-0748, 93-999, 1997 U.S. Dist. LEXIS 4938, at *95 (E.D. Pa. 1997) (citing Wielgos v. Commonwealth Edison Co., 892 F.2d 509 (7th Cir. 1989)). *See also* Associated Randall Bank v. Griffin, Kubik, Stephens & Thompson, Inc., 3 F.3d 208, 214 (7th Cir. 1993) (finding that "fraud-on-the-market theory . . . has a truth-on-the-market corollary"); Rand v. Cullinet Software, Inc., 847 F. Supp. 200, 207 (D. Mass. 1994) (stating that if dissemination of information by third parties can be a source of liability, then such statements can also be assessed to determine materiality, ostensibly to the defendant's benefit).

[40]*Basic*, 485 U.S. at 248.

[41]*Id.*

[42]If a sufficient amount of truthful information has entered the market, then the presumption of reliance generated by the fraud-on-the-market theory may be rebutted. *See In re* Apple Computer Sec. Litig., 886 F.2d 1109, 1116 (9th Cir. 1989) (noting that material information must be disclosed in a manner calculated to directly counter-act the misleading information). "[A] defendant's failure to disclose material information may be excused where that information has been made credibly available to the market by other sources." *Id.* at 1115. Brief mention in a "few poorly-circulated or lightly-regarded publications" is not sufficient. *Id.* at 1116. Some courts have "emphasized the strict evidentiary standards a defendant must meet to rebut the reliance presumption in this manner." *In re* Taxable Municipal Bonds Litig., [1994-1995 Transfer Binder] Fed. Sec. L. Rep. (CCH), ¶ 98,405, at 90,779, 1994 WL 532079, at *3 (E.D. La. Sept. 26, 1994). Because "[t]he determination is fact intensive[ ] . . ., the defendants have an onerous burden on summary judgment." *Id.* The court stated that it is rare that a "defendant can carry its 'staggering burden' under the truth on

E. *Duties to Correct and Update*

1. Issuer Statements

If a statement made by an issuer is correct when made but becomes materially misleading due to subsequent events, then the issuer may be obligated to correct the prior statement.[43] These prior statements could include opinions and projections,[44] including forward-looking statements upon which a reader might rely.[45] Some courts have stated that the duty to update or correct is triggered when the new information "can be calculated with substantial certainty."[46] Statements of general optimism, known as "puffing," are usually not actionable and ostensibly would not normally have to be corrected or updated.[47] However, the Ninth Circuit has held that "general expressions of optimism may still be actionable" if the implied representations of genuine belief — reasonable basis and lack of awareness of undermining undisclosed facts — are inaccurate.[48]

2. Third Party Statements

Ordinarily, an issuer would not have a duty to correct or update misleading third party statements made about it that could not be attributed to that issuer in some way.[49] Certain courts have, however,

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the market defense, particularly at the summary judgment stage." *Id.* at 90,780 (footnote omitted). One court suggested that when "such evidence is not so persuasive, as here, a defendant must attempt a more convincing demonstration that the misstatements or omissions alleged did not bias the market. Such demonstration may take the form of a time event or comparable index study . . . ." *In re* Seagate Tech. II Sec. Litig., 802 F. Supp. 271, 277 (N.D. Cal. 1992).

[43]*See In re* Time Warner Inc. Sec. Litig., 9 F.3d 259, 267 (2d Cir. 1993).

[44]*Id.*

[45]Backman v. Polaroid Corp., 910 F.2d 10, 17 (1st Cir. 1990) (holding that a statement must be forward-looking before the issuer is obliged to update it).

[46]Good v. Zenith Elecs. Corp., 751 F. Supp. 1320, 1322 (N.D. Ill. 1990) (quoting James v. Gerber Prods. Co., 587 F.2d 324, 327 (6th Cir. 1978)).

[47]Raab v. General Physics Corp., 4 F.3d 286, 289 (4th Cir. 1993) (holding that statements by company were "puffing" and therefore not actionable).

[48]*In re* Apple Computer Sec. Litig., 886 F.2d 1109, 1113 (9th Cir. 1989).

[49]See Osofsky v. J. Ray McDermott & Co., 725 F.2d 1057, 1059 (2d Cir. 1984) (citing Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 949 (2d Cir. 1969)), for the proposition that a tender offeror "was not obligated to correct the statement on the Dow Jones tape that [he] 'effectively increased' the offer . . . since the statement was not attributable to [him]." *Cf.* Etshokin v. Texasgulf, Inc., 612 F. Supp. 1212, 1216 (N.D. Ill. 1984) (stating that a company does not have a duty to correct rumors in the marketplace not attributable to it).

asserted a duty to correct information provided by the issuer that is contained in third party statements.[50] If an issuer has an adequate system in place to ensure proper dissemination of issuer information to the market, then public statements by its employees might not be held attributable to the issuer.[51] Failure to correct third party statements that the issuer knows are incorrect but did not itself make is, analytically speaking, a more problematic area. "Silence, absent a duty to disclose, is not misleading . . . ."[52]

The courts appear to be divided as to whether a duty to correct third party statements even exists.[53] Some have "refused to impose an affirmative duty on a corporation to correct misstatements about it by third parties."[54] Other courts have implied that the content of third party articles might be attributed to corporations if corporate reports or employees are quoted in such a way that the statements could represent materially misleading statements of fact.[55] However, as the court in *Elkind* pointed out, a corporate duty may exist to correct erroneous factual information in certain situations where the issuer neither provided the information nor confirmed its accuracy.[56]

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[50]*See, e.g.*, Panzirer v. Wolf, 663 F.2d 365, 367 (2d Cir. 1981) (stating that there was a duty to correct misleading newspaper report that was based on misleading statements in annual report), *vacated*, Price Waterhouse v. Panzirer, 459 U.S. 1027 (1982); Alfus v. Pyramid Tech. Corp., 764 F. Supp. 598, 603 (N.D. Cal. 1991) (stating that "where a company undertakes to pass on earnings forecasts through analysts' reports, it must correct figures that are incorrect") (citations omitted).

[51]Although § 20(a) of the Securities and Exchange Act of 1934 has been held to attribute employee acts to employers for purposes of the imposition of federal securities law liability, an employer can show a defense of good faith. 15 U.S.C. § 78t(a) (Supp. 1995). The lack of an issuer system to ensure proper dissemination of material information aides a plaintiff in pursuit of claims of attribution, at least according to one district court in the Southern District of New York. *In re* Warner Communications Sec. Litig., 618 F. Supp. 735, 752 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

[52]Basic, Inc. v. Levinson, 485 U.S. 224, 239 n.17 (1988).

[53]*See* Colby v. Hologic, Inc., 817 F. Supp. 204, 214 (D. Mass. 1993) (finding that review of jurisprudence indicates that courts are divided as to the determination of when issuer liability for statements by analysts or journalists accrues).

[54]*Id.* (quoting *In re* Commonwealth Oil/Tesoro Petroleum Corp. Sec. Litig., 467 F. Supp. 227, 240 (W.D. Tex. 1979)). *Accord Electronic Specialty*, 409 F.2d at 949 (finding no duty to correct a misstatement not attributed to the corporation).

[55]Milberg v. Western Pac. R.R., 51 F.R.D. 280, 282 (S.D.N.Y. 1970) (declining to impose liability on a company for inaccuracies in a third party publication without indication that the publication was quoting company officials). *Accord* Hershfang v. Citicorp, 767 F. Supp. 1251, 1255 (S.D.N.Y. 1991). *See supra* note 1.

[56]Elkind v. Liggett & Myers, Inc., 635 F.2d 156, 163 n.11 (2d Cir. 1980) (citing 5A ARNOLD S. JACOBS, THE IMPACT OF RULE 10b-5, at 88.04(b) (1st ed. 1974-1980); Rodney S. Dayan, *Correcting Errors in the Press*, 5 REV. SEC. REG. 941, 941-45 (1972); Joseph Shade,

F. *Protection for Forward-Looking Statements*

The SEC has recently encouraged the release of "soft information" such as forecasts and projections, and ostensibly protects such statements from securities law liability if they are made in good faith and with a reasonable basis.[57] Congress has now created a safe harbor for forward-looking statements made by certain issuers.[58] Additionally, a substantial body of case law has developed regarding "comfort statements."[59] Comfort statements are those statements sometimes made by issuers that they are "comfortable" with analysts' estimates.[60] Many such decisions forego the adoption analysis entirely, relying instead on policy considerations affording protection to forward-looking statements.[61]

Duties of Publicly Held Corporations Under the Federal Securities Laws, 26 BUS. LAW. 497, 504 (1970)). *But see Electronic Specialty*, 409 F.2d at 949 (company under no duty to correct a misstatement by the press).

[57]17 C.F.R. § 230.175 (1997).

[58]Section 27A of the Securities Act of 1933 was added by the Private Securities Litigation Reform Act of 1995 and provides a safe harbor for forward-looking statements made by specified persons. 15 U.S.C. § 77z-2 (Supp. 1995). A written or oral forward-looking statement may be protected by identifying it as forward-looking and accompanying it with "meaningful cautionary statements identifying important factors that could cause actual results to differ." *Id.* § 77z-2(c)(1).

[59]Malone v. Microdyne Corp., 26 F.3d 471, 473 (4th Cir. 1994).

[60]*Id.*

[61]A recent Eastern District of Pennsylvania decision analyzed when securities law liability will accrue to a defendant from analyst estimates allegedly adopted by the use of the word "expects" by defendants. *In re* Tseng Labs, Inc. Sec. Litig., 954 F. Supp. 1024, 1031 (E.D. Pa. 1996), *aff'd*, 107 F.3d 8 (3d Cir. 1997) (considering establishment of securities law liability in the context of a defense motion for summary judgment regarding forward-looking statements). The *Tseng* court found that the plaintiff failed to show that the defendant officer lacked a reasonable basis for his statement. *Id.* "An inability to foresee the future does not constitute fraud." *Id.* (quoting Eckstein v. Balcor Film Investors, 8 F.3d 1121, 1132 (7th Cir. 1993)). Also, the court stated that "[o]n its face, the word 'expects' limits [a] statement's potential to mislead." *Id.* (alterations in original)(quoting Pache v. Wallace, No. 93-5164, 1995 U.S. Dist. LEXIS 3511, at *14 (E.D. Pa. Mar. 20, 1995), *aff'd*, 72 F.3d 123 (3d Cir. 1995)). The plaintiffs in a Ninth Circuit case challenged, *inter alia*, an officer's statement in a Barron's newspaper article that the company was "comfortable" with analysts' predictions for the company's 1991 and 1992 earnings. Eisenstadt v. Allen, No. 95-16255, 1997 U.S. App. LEXIS 9587, at *11 (9th Cir. Apr. 28, 1997) (affirming lower court decision granting defense summary judgment motion and holding that none of the allegedly omitted adverse facts related to causes of failure of prediction to come true and therefore did not seriously undermine accuracy of projections). In a Fourth Circuit case, the chairman of a company, who was also the president and majority shareholder, had stated, in response to a phone call from a reporter, that he was comfortable with a particular analyst's estimate. *Malone*, 26 F.3d at 473. Although the court reversed a lower court's decision granting a motion for judgment as a matter of law, denying relief and remanding for a new trial, the court still held that a statement expressing "comfort" with an analyst's prediction of future earnings was not actionable. *Id.*

However, it also must be understood that an issuer does not always have a duty to disclose all internal forecasts, even when they have differed from those publicly disclosed by the issuer or project earnings below an amount predicted by an analyst.[62]

G. *Entanglement and Adoption*

1. *Elkind*

An issuer may incur securities fraud liability by "entangling" itself with analysts' statements to such an extent that those statements become "attributable to it."[63] Entanglement is caused when the issuer "place[s] its imprimatur, expressly or impliedly, on the analysts' projections."[64] As a result, a duty is created that requires the issuer "to correct material errors in those projections."[65] An issuer's actions could "implied[ly] represent[ ] that the information [contained in those reports] is true or at least in accordance with the company's views."[66]

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at 479. The court cited to *Raab v. General Physics Corp.*, 4 F.3d 286, 289-90 (4th Cir. 1993) in distinguishing between a company's strict duty to accurately report past results and its freedom to make predictions. *Id.* at 479. In a Northern District of California decision, a vice-president stated that he "preferred" certain analysts' "consensus estimate." *In re* Adobe Sys., Inc. Sec. Litig., 767 F. Supp. 1023, 1027 (N.D. Cal. 1991), *aff'd*, Cloutier v. Adobe Sys., Inc., 5 F.3d 535 (9th Cir. 1993). The *Adobe* court denied defendants' motion to dismiss the complaint. *Id.* at 1030. Although the defendants claimed that there was no "adoption," the court did not analyze the law behind "adoption" but instead analyzed the competing policy concerns of encouraging companies to make projections versus "Rule 10b-5's goal of preventing false and misleading statements." *Id.* at 1028. The court felt that the vice-president's intended or understood message to the market was unclear from his statement alone and stated that given the evidentiary record before the court, it was "still entirely possible that plaintiffs could prove a set of facts entitling them to relief." *Id.*

[62]*See In re* VeriFone Sec. Litig., 784 F. Supp. 1471, 1481-83 (N.D. Cal. 1992), *aff'd*, 11 F.3d 865 (9th Cir. 1993) (holding no duty to disclose internal forecasts even if they were more detailed than those already disclosed or projected earnings below that of analyst). *Cf. In re* Convergent Techs. Sec. Litig., 948 F.2d 507, 516 (9th Cir. 1991) (holding no duty to disclose negative internal projections, at least absent evidence they were calculated with reasonable certainty).

[63]*Elkind*, 635 F.2d at 163 (internal quotation marks omitted).

[64]*Id.*

[65]*Id.* At issue in *Elkind* was "whether Liggett sufficiently entangled itself with the analysts' forecasts to render those predictions 'attributable to it,' thus removing it from the conduct held protected in *Electronic Specialty*." *Id.* *See* Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 949 (2d Cir. 1969) (finding that a defendant knew in advance that an analysts' column had incorrect information in it, but since it was not the source of such information it had no duty to correct the analyst).

[66]*Elkind*, 635 F.2d at 163. In *Elkind*, the company had a general policy of not commenting on analyst reports, but in this case had, in fact, actually examined and commented

2. The Dismissal Pleading Standard

One court recently underscored a fundamental evidentiary problem in the application of entanglement theory by setting forth the minimum pleading requirements necessary to survive a Rule 9(b) motion to dismiss for lack of specificity.[67] The opinion also raised the real question of whether the court was merging the two theories of adoption and entanglement.[68] According to the *Stack* court, in order to adequately plead "adoption," the "plaintiff must: 1) identify specific analysts' forecasts and name the insider who adopted them; 2) point to specific interactions between the insider and the analyst which gave rise to entanglement, and; 3) state when these interactions occurred."[69] The court also found that "entanglement" requires the plaintiff to allege that the information flowed both ways between the issuer and the analyst,[70] stating that "[t]he plaintiff must allege that the insider provided misleading information to an analyst, that the analyst relied on this

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on certain reports. *Id.* at 164 n.13. However, the company had a specific policy of not commenting on earnings forecasts. *Id.* at 163. The court found that the analysts knew they were not getting secret information. *Id.* The court felt that "the record d[id] not compel the conclusion that" the company review implied that the analysts' projections matched the company's. *Id.* Liggett's suggestions as to factual and descriptive matters in the reports were found not to have been conduct sufficient to imply that the analysts' projections were consistent with the company's internal estimates. *Id.* Plaintiff also did not show that Liggett failed to correct any factual statements which it thought were wrong. *Id.* Therefore, the company was held not to have assumed a duty to disclose its internal forecasts or to warn the analysts and public as to the more pessimistic view of the company. *Id.*

[67]FED. R. CIV. P. 9(b).

[68]Stack v. Lobo, 903 F. Supp. 1361, 1372 (N.D. Cal. 1995) (citing *In re* Syntex Corp. Sec. Litig., 855 F. Supp. 1086, 1097 (N.D. Cal. 1994), *aff'd*, 95 F.3d 922 (9th Cir. 1996). In *In re Syntex*, the court's language evidenced a mixing of the entanglement and adoption theories of liability. *In re Syntex*, 855 F. Supp. at 1096-97. *Syntex* held that entanglement also requires two-way flow of information evidencing adoptive behavior. *Id.*

[69]*Stack*, 903 F. Supp. at 1372 (citing *In re Syntex*, 855 F. Supp. at 1097; *In re* Caere Corporate Sec. Litig., 837 F. Supp. 1054, 1059 (N.D. Cal. 1993). It thus appears that pleading convincing admissible evidence that misrepresentations to an analyst took place, which were later contained in that analyst's report, is a substantial obstacle to surviving a motion to dismiss if the court does not analyze it on a primary liability basis but instead applies an entanglement and adoption analysis. *But see In re* Columbia Sec. Litig., 155 F.R.D. 466 (S.D.N.Y. 1994) (denying defendants' motion for summary judgment and finding newspaper article and news release admissible under FED. R. EVID. 803(24) due to, in part, availability of author's testimony).

[70]*See Stack*, 903 F. Supp. at 1372. The court in *Stack* found that the plaintiffs sufficiently pled particularity by naming the insiders who reviewed identified analyst statement prior to their publication. *Id.* at 1374. The court also found that allegations regarding distribution of analysts' statements in an "investor relations package" were sufficiently pled with particularity. *Id.*

information in preparing a report, and that the insider somehow endorsed or approved the report prior to or after its publication."[71]

3. Distinguishing Adoption from Entanglement

Certain courts have distinguished entanglement behavior from adoption and held that liability under adoption does not hinge on whether the actual statements come from the issuer.[72] Instead, by its own conduct, an issuer may adopt analyst reports as its own by implicitly representing that the information contained therein was accurate or reflected the views of the company.[73] Prepublication entanglement theory appears to require instead that the information in the analyst reports is in some way attributable to the issuer due to the prior provision of information and involvement in the actual drafting of the statement.[74] At least one court has used language implying that some type of "entanglement" occurs due to the issuer distribution of analyst reports, which seems to combine

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[71] *Id.* at 1372. In *Colby*, two independent analysts' forecasts of the company's earnings were allegedly adopted by the company and claimed as a basis for Rule 10b-5 liability. Colby v. Hologic, Inc., 817 F. Supp. 204, 213 (D. Mass. 1993). No officers of the company were quoted or paraphrased in either report. *Id.* The statements were presented as independent opinions and no role in their preparation was attributed to the company by the analysts. *Id.* at 213-14. The court found that the mere meeting or speaking with such analysts on a regular basis, especially in the absence of such quotation or provision of information, and even where the analysts made available to the company such analysts reports for review and comment, was not sufficient to indicate that the company adopted such reports and violated a resulting duty to correct their mistaken projections. *Id.* at 214-15. No company reports or officials were quoted in the two analyst statements and no misstatements of fact were described. Only vague claims of misleading company "guidance" were set forth which did not detail the "time, place, or content" of the acts that allegedly led the analysts astray. *Id.* at 215.

[72] *In re* RasterOps Corp. Sec. Litig., No. C-93-20349 RPA (EAI) 1994 U.S. Dist. LEXIS 18245, at *9 (N.D. Cal. Oct. 31, 1994). In *In re RasterOps*, the company actually distributed analyst reports, which were obtained and reviewed by the company prior to their dissemination. *Id.* at *10. The court strongly felt that such behavior implied company agreement with the accuracy of those reports. *Id.* at *10. The court held that such a claim pled facts sufficient to survive a motion to dismiss. *Id.* at *11. In *In re Cypress*, the company, in response to a request for information, sent analysts' reports to shareholders. *In re* Cypress Semiconductor Sec. Litig., 891 F. Supp. 1369, 1378 (N.D. Cal. 1995). The court concluded that "[b]y sending the reports, Cypress may have impliedly endorsed the projections contained in them." *Id.* However, the plaintiffs were relying on the fraud-on-the-market theory to establish reliance, which meant that the misleading statement had to become public and affect the stock price. *Id.* Since there was no evidence that the company's adoption was made public, such defect was fatal and the court granted summary judgment in favor of the defendants. *Id.*

[73] *In re RasterOps*, 1994 U.S. Dist. LEXIS 18245, at *10.

[74] *See generally In re Cypress*, 891 F. Supp. at 1377 (discussing the difference between pre- and post-publication adoption and ratification).

prepublication entanglement and post-publication ratification semantics.[75] In attempting to make this distinction, the waters are thus muddied further.

H. *Selective Disclosure*

In *Dirks v. SEC*,[76] the Supreme Court stated that tipper/tippee[77] liability was initially based on the disclosure by a corporate insider of material, nonpublic information to an outside third party who subsequently traded in the issuer's stock.[78] The primary focus of the courts in selective disclosure claims was on the motivations of the disclosing insider,[79] with liability only being imposed when the corporate insider disclosed the information with a desire for direct or indirect personal profit.[80] *Dirks* has been interpreted to give some basis for an argument in favor of a less aggressive interpretive approach to the imposition of liability in claims involving issuer disclosures to analysts.[81]

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[75]*In re Cypress*, 891 F. Supp. at 1377. This may be due, in part, to the *Syntex* court's statement that entanglement can occur "prior to or after" publication of the reports at issue. *Id.* (quoting *In re* Syntex Corp. Sec. Litig., 855 F. Supp. 1086, 1096 (N.D. Cal. 1994), *aff'd*, 95 F.3d 922 (9th Cir. 1996)). Perhaps, to give the court the benefit of the doubt, it intended to highlight the distinction between prepublication "*entanglement*" (not "*adoption*") and post-publication *adoption* (*or* ratification). What is left, however, is an analytical terrain littered with the use of the word "*adoption*" as both an alternative element of entanglement and a separate grounds for liability, the latter not requiring statements from the issuer to make it into the analyst reports, but merely that there be a "ratification" to the market of the accuracy of those reports, by post-publication distribution for instance. This "ratification" view of adoption has apparently been utilized in the Third Circuit in *In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429 (3d Cir. 1997) (holding that use of the word "comfortable" by corporate officer in regards to his views of certain analysts' estimates clearly evidenced adoption). This approach is problematic at least with regard to the enhanced protection that is supposed to be afforded forward-looking statements. *See supra* notes 58-61. Misrepresentations as to historical fact are arguably more logically covered by an adoption theory that omits the additional two-way flow of information evident in certain other decisions. Additionally, direct primary securities law liability would normally accrue, in any case, to material misrepresentations of such backward-looking information. Utilizing this type of plain vanilla adoption also does not appear to adhere to subsequent interpretations of the requirements of *Elkind*. *See* Elkind v. Liggett & Myers, Inc., 635 F.2d 156, 163 (2d Cir. 1980).

[76]463 U.S. 646 (1983).

[77]*See supra* note 26.

[78]*See Dirks*, 463 U.S. at 651-61.

[79]*Id.* at 662.

[80]*Id.* at 663. *See also* Paul P. Brountas, Jr., Note, *Rule 10b-5 and Voluntary Corporate Disclosures to Securities Analysts*, 92 COLUM. L. REV. 1517, 1529 (1992) (indicating that insiders took comfort in this standard since they felt, rightly or wrongly, that liability would only result if a financial reward was involved).

[81]*See* Brountas, *supra* note 80, at 1529.

This argument finds support in the Court's favorable discussion of the analysts' role in the "preservation of healthy market."[82]

In contrast to the position taken by the Court in *Dirks*, the Securities and Exchange Commission in *SEC v. Stevens*,[83] broadly construed the *Dirks* standard of personal benefit. The *Dirks* court had stated that "personal benefit" also included "reputational benefit that will translate into future earnings."[84] The SEC applied a broad reading of that section to a fact pattern where an insider, who had subsequently retired, made a series of unsolicited phone calls to securities analysts to disclose that earnings would be much lower than anticipated.[85] The SEC claimed that he made these calls to "protect and enhance his reputation,"[86] and expanded *Dirks*' "reputational benefit" to include such common fact patterns, especially where some selling by analysts' clients had resulted.[87] It is not clear that the SEC could presently sustain such a position in court, especially in light of the Supreme Court's recent decision in *United States v. O'Hagan*.[88] Nonetheless, Mr. Stevens agreed to settle with the SEC and paid a disgorgement to the SEC of the analyst's profits.[89]

III. ANALYSIS

A. *Introduction*

In a class action, shareholders of Cirrus Logic, Inc., a designer, developer, and manufacturer of computer chips, sued the company and certain of its officers and directors for securities fraud.[90] The

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[82]*Dirks*, 463 U.S. at 658.

[83]No. 91 Civ. 1869, 1991 SEC LEXIS 451 (S.D.N.Y. Mar. 19, 1991) (SEC administrative action).

[84]*Dirks*, 463 U.S. at 663. *See also* Brountas, *supra* note 80, at 1530 (comparing *Stevens* with *Dirks*).

[85]*Stevens*, No. 91 Civ. 1869, 1991 SEC LEXIS at *2-3.

[86]*Id.* at *2.

[87]*See* John C. Coffee, Jr., *The SEC and the Securities Analyst*, N.Y.L.J., May 30, 1991, at 5 (explaining *Stevens* and the significant aggressive enforcement posture of SEC in light of the *Stevens* settlement).

[88]United States v. O'Hagan, 117 S. Ct. 2199 (1997); *see* John C. Coffee, *Is Selective Disclosure Now Lawful?*, N.Y.L.J., July 31, 1997, at 5 (stating that *O'Hagan* decision makes clear that when corporation effectively authorizes selective disclosure that insider trading does not occur, and detailing alleged problems in permitting selective disclosure, such as hidden compensation, vote-buying, and market inefficiency).

[89]Dean Foust, *The Do's and Don'ts of Feeding Wall Street Analysts*, BUS. WK., Apr. 8, 1991, at 27 (analyzing importance of SEC v. Stevens and setting forth an example of effective handling of negative disclosure to all of the general market at one predetermined time).

[90]*See In re* Cirrus Logic Sec. Litig., 946 F. Supp. 1446, 1451 (N.D. Cal. 1996).

shareholders alleged violations of sections 10(b) and 20(a) of the Securities Exchange Act of 1934.[91] The three summary judgment motions before the court were concerned with showing that Cirrus made certain allegedly fraudulent statements and no section 20(a) claims were argued in the motions.[92]

On November 1, 1996, Judge William H. Orrick, of the Northern District of California, handed down the court's decision.[93] The second motion dealt with the company's alleged liability for analysts' opinions and the company's "private statements" to one particular analyst.[94] The theories of liability regarding this second motion are the subject of this comment.

B. *The Facts*

Plaintiffs alleged that by the end of the summer of 1992, the company was aware that the demand for the products of one of its divisions was in an accelerating state of decline and would worsen.[95] The complaint also alleged that the defendants, in October of 1992, publicly stated that the division's business was strong despite their awareness that "demand . . . was evaporating."[96] In addition, a number of corporate insiders had sold stock in late October and November of 1992.[97]

The thrust of the complaint revolved around the company's announcement in December of its acquisition of Pacific Communication Science, Inc.[98] During this announcement, the company "allegedly represent[ed] that the acquisition would have no impact on the third quarter results, and only a $.10 to $.15 impact on the company's earnings

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[91] *Id.*

[92] *See id.* at 1451-52. The class period was from October 22, 1992 through April 26, 1993. *Id.* at 1451.

[93] *Id.* at 1446.

[94] *In re Cirrus*, 946 F. Supp. at 1452. The first summary judgment motion alleged that *Cirrus*' preparation and issue of its third quarter financials, especially with regard to its calculations for inventory reserves, constituted accounting fraud. *Id.* at 1457. "The third motion discusse[d] Cirrus's alleged liability for its own public statements in conference calls, press releases, and filings with the [SEC] during the third and fourth quarters of fiscal 1993." *Id.* at 1452.

[95] *Id.* at 1452. The "[p]laintiffs allege[d] that *Cirrus* 'cooked the books' . . . to avoid revealing the fact and extent of the purportedly declining demand for its products." *Id.*

[96] *Id.* The plaintiffs argued that certain "allegedly improper accounting manipulations permitted *Cirrus* fraudulently to report increased revenues and earnings for the third quarter, thus keeping stock prices artificially high." *Id.*

[97] *See id.* Four insiders sold a total of 161,000 shares in late October and early November of 1992. *Id.*

[98] *In re Cirrus*, 946 F. Supp. at 1452.

per share for the fourth quarter."[99] However, in April of 1993, the company corrected its previous projections, announcing that earnings for the fourth quarter would be lower than had been anticipated. Accordingly, third quarter results were revised downward from $.46 to $.28 per share.[100] Immediately following the April announcement, the company's share price dropped from $20.50 to $14.50 per share.[101]

C. *Generally Applicable Principles of Law*

The court first set forth the relevant standards for deciding a summary judgment motion.[102] It then noted the requirements for a successful Rule 10b-5 claim — "(1) a misrepresentation or omission of material fact, (2) reliance, (3) scienter, and (4) resulting damages."[103] After stating that misrepresentations of material facts under Rule 10b-5 include projections and opinions,[104] the court detailed the three principal defenses under which forward-looking statements could be shielded from liability under 10b-5.[105] These were: (1) the shield of genuine belief, reasonable basis, and a lack of awareness of undisclosed undermining facts,[106] (2) the contextual shield of evaluating statements "in light of all the information then available"[107] as enhanced by the "bespeaks caution"

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[99] *Id.*

[100] *Id.*

[101] *Id.* The price decline occurred the day after the end of the class period. *Id.*

[102] *In re Cirrus*, 946 F. Supp. at 1452-53. First, "a party seeking summary judgment [must] show the absence of a genuine issue of material fact." *Id.* at 1453 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)). If absence of a genuine issue of material fact is shown by the moving party, the burden shifts to the nonmoving party, which must "designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting *Celotex*, 477 U.S. at 324 (quoting FED. R. CIV. P. 56(c)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* (quoting *Matsushita*, 475 U.S. at 586). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* (quoting *Liberty Lobby*, 477 U.S. at 249-50 (citations omitted)). "[I]nferences . . . drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Id.* (quoting *Matsushita*, 475 U.S. at 587 (citations omitted)).

[103] *Id.* at 1453 (quoting Paracor Fin., Inc. v. General Elec. Capital Corp., 96 F.3d 1151, 1157 (9th Cir. 1996)).

[104] *Id.* (citations omitted).

[105] *Id.* at 1453-54.

[106] *In re Cirrus*, 946 F. Supp. at 1453. *See also supra* note 37 (discussing optimistic statements made in *Hershfang*).

[107] *In re Cirrus*, 946 F. Supp. at 1453 (quoting *In re* Convergent Techs. Sec. Litig., 948 F.2d 507, 512 (9th Cir. 1991)). The court stated that such available information was inclusive of information available to the market. *Id.* This could possibly imply that there may be other

doctrine,[108] and (3) vagueness.[109] The court also believed that it was important to "keep in mind that '[p]rofessional investors, and most amateur investors as well, know how to devalue the optimism of corporate executives, who have a personal stake in the future success of the company.'"[110]

In support of the vagueness liability shield, the court alluded to the *In re Caere* case in a footnote.[111] The court noted that *In re Caere* had held that language used by the company, including statements that they were "'well-positioned' for growth," that it "had been an 'exciting year,'" that the company had "expanded beyond [its] traditional markets," and that the company had "continuing strong sales," were not actionable because, among other reasons, they were vague.[112]

Continuing, the *Cirrus* court stated that only omissions of material facts are actionable.[113] In a fraud-on-the-market case,[114] "the defendant's failure to disclose material information may be excused where that information has been made credibly available to the market by other sources . . . with a degree of intensity and credibility sufficient to

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additional information available to a particular investor than the market in general. It is unclear whether the court intended to leave open this possible implication.

[108]*Id.* at 1453-54. The court then noted that "enough cautionary language or risk disclosure" could support the granting of a summary judgment motion for defendants on a claim of liability for forward-looking statements. *Id.* at 1453 (quoting *In re* Worlds of Wonder Sec. Litig., 35 F.3d 1407, 1413 (9th Cir. 1994)). The court also quoted *In re Worlds of Wonder* for the requirement that the cautionary language be "precise," and that risk disclosure conspicuously, specifically, and adequately disclose the assumptions behind the projections. *Id.* at 1454 (quoting *In re* Worlds of Wonder Sec. Litig., 814 F. Supp. 850, 858 (N.D. Cal. 1993), *aff'd in part, rev'd in part*, 35 F.3d 1407 (9th Cir. 1994) (citation omitted)). In a footnote, the court noted that, pursuant to the bespeaks caution doctrine, both the optimistic and the cautionary statements must be within the "four corners of [the same] document." *Id.* at 1454 n.3 (alterations in original) (quoting Pozzi v. Smith, [1995-1996 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,967, at 93,669 (E.D. Pa. Dec. 1, 1995) (citation omitted)).

[109]*Id.* at 1454 (citing *In re* Caere Corporate Sec. Litig., 837 F. Supp. 1054, 1057 (N.D. Cal. 1993)).

[110]*Id.* (quoting *In re* Caere Corporate Sec. Litig., 837 F. Supp. 1054, 1058 (N.D. Cal. 1993) (quoting *In re* VeriFone Sec. Litig., 784 F. Supp. 1471, 1481 (N.D. Cal. 1992), *aff'd*, 11 F.3d 865 (9th Cir. 1993) (citation omitted))). This assertion, that the market devalues insiders' statements, stands in stark contrast to the "one-sided representations" *In re Apple* characterization of insider statements, *In re* Apple Computer Sec. Litig., 886 F.2d 1109, 1116 (9th Cir. 1989), thus leaving it difficult to ascertain where the balance is to be struck between market knowledge, real or imputed, and issuer intent, real or implied.

[111]*In re Cirrus*, 946 F. Supp. at 1454 n.4.

[112]*Id.* (quoting *In re Caere*, 837 F. Supp. at 1057) (alteration in original).

[113]*Id.* at 1454. The court referred to *In re VeriFone Sec. Litig.*, 11 F.3d 865, 869 (9th Cir. 1993), to illustrate that mere failure to forecast future events does not lead to a duty to disclose nor render disclosed statements misleading. *In re Cirrus*, 946 F. Supp. at 1454 n.5.

[114]See *supra* note 38 for an explanation of fraud-on-the-market.

effectively counterbalance any misleading impression created by the insiders' one-sided representations."[115] The fraud-on-the-market theory gives the plaintiffs the benefit of a presumption of indirect reliance, a necessary element of a section 10b-5 cause of action, by positing that the stock price at which they purchased reflects the integration of such information into the market.[116] Also, the court noted that "[a]s a general rule, companies are not required to disclose internal forecasts,"[117] and may reveal only one of a number of projections provided that the one released to the public has a "reasonable basis."[118] The failure to disclose internal forecasts does not necessarily render statements misleading.[119] However, "companies [do] have a duty to disclose internal forecasts 'made with . . . reasonable certainty.'"[120] This duty extends to "'financial data and other material information upon which an internal forecast is based.'"[121]

The court briefly summarized the law regarding the materiality of omitted facts.[122] It emphasized the strict standard for summary

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[115]*In re Cirrus*, 946 F. Supp. at 1454-55 (quoting *In re Apple*, 886 F.2d at 1115-16). See *supra* notes 39-42 and accompanying text for an explanation of truth-on-the-market.

[116]*See id.* at 1455 n.6 (quoting *In re Apple*, 886 F.2d at 1113-14)).

[117]*Id.* at 1455. The court gave the following examples: *In re VeriFone*, 11 F.3d at 869 (holding that forecasts are not required to be disclosed because there were no allegations that the company did not disclose facts or financial data underlying those forecasts); *In re* Lyondell Petrochemical Co. Sec. Litig., 984 F.2d 1050, 1052-53 (9th Cir. 1993) (holding that projections indicating lower results were not required to be disclosed because businesses are "called upon to make confidential projections for a variety of sound purposes where public disclosure would be harmful"); *In re* Convergent Techs. Sec. Litig., 948 F.2d 507, 516 (9th Cir. 1991) (holding that disclosure of internal forecasts was not required); and Marx v. Computer Sciences Corp., 507 F.2d 485, 491 (9th Cir. 1974) (stating that "a company . . . need not detail every corporate event, current or prospective").

[118]*In re Cirrus*, 946 F. Supp. at 1455 (citing *In re* Stac Elecs. Sec. Litig., 89 F.3d 1399, 1411 (9th Cir. 1996), *cert. denied*, Anderson v. Clow, 117 S. Ct. 1105 (1997) (quoting Wielgos v. Commonwealth Edison Co., 892 F.2d 509, 516 (7th Cir. 1989))).

[119]*Id.* (citing *In re VeriFone*, 11 F.3d at 869 (holding that existence of undisclosed forecasts did not make disclosed statements misleading)).

[120]*Id.* (quoting *In re Convergent*, 948 F.2d at 516 (citation omitted)).

[121]*In re Cirrus*, 946 F. Supp. at 1455 (quoting Provenz v. Miller, 95 F.3d 1376, 1386 (9th Cir. 1996) (case withdrawn from bound volume) (citation omitted) (reversing grant of summary judgment where company executive predicted earnings of approximately $624,000 for the quarter, while disregarding a reliable internal spreadsheet predicting a quarterly loss of $4 million)).

[122]*See id.* at 1455-56. The court cited to *TSC Industries* for the proposition that an assessment of materiality is a mixed question of law and fact. *Id.* at 1455 (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 450 (1976)). The court also noted that determination of materiality "'requires delicate assessments of the inferences a "reasonable shareholder" would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact.'" *Id.* at 1456 (quoting *TSC Indus.*, 426 U.S. at 450) (footnote omitted)).

judgment[123] because questions of materiality are normally reserved for the trier of fact.[124]

Elaborating on the applicable legal principles, the court discussed scienter and the manner in which it may be established, pointing out that "[r]ecklessness may also satisfy the scienter element."[125] A plaintiff may establish scienter by either direct or circumstantial evidence,[126] including evidence of "motive and opportunity" or "reckless or deliberate behavior."[127] Parenthetically, the court noted that "circumstantial evidence [is] sufficient to prove scienter because of the difficulty inherent in proving state of mind."[128] The court then closed its discussion on this point by citing a case in which plaintiffs presented no evidence of the defendant's actual knowledge or fraudulent intent but survived summary judgment because sufficient evidence was presented allowing "a reasonable inference that 'the [defendants] had access to all information that was available and deliberately chose to conceal the truth.'"[129]

Finally, plaintiffs bear a higher burden in a Rule 10b-5 claim because they must prove each of the elements, while defendants can defeat summary judgment by showing that they are entitled to summary judgment with respect to only one of the elements.[130]

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[123] *In re Cirrus*, 946 F. Supp. at 1456. The court referred to Fecht v. Price Co., 70 F.3d 1078, 1081 (9th Cir. 1995), *cert. denied* 116 S. Ct. 1422 (1996) (quoting Durning v. First Boston Corp., 815 F.2d 1265, 1268 (9th Cir. 1987), for support of the proposition that materiality issues are only appropriately resolved as a matter of law if the adequacy of the disclosure or the materiality of the statement "is so obvious that reasonable minds [could] not differ." *In re Cirrus*, 946 F. Supp. at 1456 (alteration in original).

[124] *Id.* (citations omitted).

[125] *Id.* (citing Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9th Cir. 1990) (en banc), *cert. denied*, 499 U.S. 976 (1991)). *See also* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976) (stating that scienter is a "mental state embracing intent to deceive, manipulate, or defraud").

[126] *In re Cirrus*, 946 F. Supp. at 1456 (citations omitted).

[127] *Id.* (citing *In re* Wells Fargo Sec. Litig., 12 F.3d 922, 931 (9th Cir. 1993) (citations omitted)).

[128] *Id.* (citing Herman & MacLean v. Huddleston, 459 U.S. 375, 390 n.30 (1983). This is because direct proof of the state of mind of a particular defendant could come only from the testimony of the defendants themselves, who are unlikely to implicate themselves because of self-interest.

[129] *Id.* (alteration in original) (quoting *In re* Software Toolworks Inc. Sec. Litig., 50 F.3d 615, 627 (9th Cir. 1994)).

[130] *In re Cirrus*, 946 F. Supp. at 1456-57 (citing Paracor Fin., Inc. v. General Elec. Capital Corp., 96 F.3d 1151, 1157 (9th Cir. 1996)). *See also supra* notes 13-14 and accompanying text for the elements of a claim under § 10b.

D. *Principles of Law Applicable to Liability for Third Party Statements*

In its consideration of the summary judgment motion regarding the analyst statements, the court first addressed the legal standards applicable to the plaintiffs' two claims.[131] Analyzing third party statement liability for issuers, it cited *In re VeriFone* and *In re Syntex*, respectively, for the *Elkind* "imprimatur"[132] and entanglement standards[133] and the pleading hurdles imposed by the *In re Caere* pleading standards.[134] The court then indicated that the policy underlying the adoption or entanglement theory was to ensure that issuer liability is not triggered by statements of parties over whom they exercise no control.[135]

In a footnote, the court briefly addressed what was perceived to be the defendants' mistaken legal argument that entanglement is not a valid legal theory because "aiding and abetting" liability had been eliminated.[136] Entanglement could be premised either on a secondary liability theory such as aiding and abetting or on direct or primary liability agency theory.[137] The court indicated that the impossible result of not granting the validity of the agency theory argument under entanglement would be to permit issuers to use third party analysts to disseminate false statements to the market.[138] The issuer would not be liable even if it acted with scienter because it used a conduit that acted without scienter.[139]

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[131]*See In re Cirrus*, 946 F. Supp. at 1465.

[132]*Id.* (quoting *In re* Stac Elecs. Sec. Litig., 89 F.3d 1399, 1410 (9th Cir. 1996), *cert. denied*, Anderson v. Clow, 117 S. Ct. 1105 (1997) (quoting *In re* VeriFone Sec. Litig., 784 F. Supp. 1471, 1486 (N.D. Cal. 1992), *aff'd*, 11 F.3d 865 (9th Cir. 1993) (citation omitted)). See also *supra* Part II.G detailing the imprimatur standard.

[133]*In re Cirrus*, 946 F. Supp. at 1465 (quoting *In re* Syntex Corp. Sec. Litig., 855 F. Supp. 1086, 1097 (N.D. Cal. 1994), *aff'd*, 95 F.3d 922 (9th Cir. 1996) (citation omitted)). See also *supra* Part II.G explaining the entanglement theory of liability.

[134]*In re Cirrus*, 946 F. Supp. at 1465 (quoting *In re* Caere Corporate Sec. Litig., 837 F. Supp. 1054, 1059 (N.D. Cal. 1993)). See also *supra* Part II.G setting forth pleading standards for entanglement and adoption.

[135]*In re Cirrus*, 946 F. Supp. at 1465-66.

[136]*Id.* at 1466 n.11. Defendants relied on the Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 191 (1994), which held that there is no implied private right of action for damages against a party who aides and abets a violation of § 10b-5. *In re Cirrus*, 946 F. Supp. at 1466 n.11.

[137]*In re Cirrus*, 946 F. Supp. at 1466 n.11 (quoting *In re* ICN/Viratek Sec. Litig., [1996-1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,213, at 95,086 (S.D.N.Y. Apr. 4, 1996)).

[138]*See id.*

[139]*Id.* (adopting the reasoning of *In re ICN/Viratek*, [1996-1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 95,086).

This unacceptable inevitable result argument effectively underscored the necessity of the primary liability theory in assessing issuer-analyst liability.

E. *Findings Regarding Adoption and Entanglement*

The *Cirrus* court found no evidence of adoption on the record.[140] Of the six analysts whose reports were at issue, four testified that "Cirrus did not review or approve their reports before publication."[141] The company had an internal policy that only some of the individual defendants and one other person, not a defendant, were authorized to speak to analysts.[142] In fact, the defendants did recall speaking with analysts but stated in discovery responses that they never commented on the analysts' financial projections nor provided the analysts with internal earnings or revenue forecasts.[143]

There was similarly no evidence submitted to the court in support of post-publication adoption.[144] The mere tracking of analyst reports — which Cirrus admitted doing — did not constitute adoption of those reports.[145] The court closed its analysis by holding that the claims arising solely from the opinions of analysts fail without a showing of adoption or entanglement.[146]

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[140] *Id.* at 1466.

[141] *In re Cirrus*, 946 F. Supp. at 1466 (citations omitted). With respect to the other two analysts, one was not asked and did not testify as to whether he provided copies of his reports to the company prior to publication, and the other was not deposed. *Id.* (citation omitted). Moreover, each analyst testified that their reports were "based on numerous sources of information other than Cirrus personnel." *Id.* (citations omitted).

[142] *Id.* (citation omitted).

[143] *Id.* (citations omitted).

[144] *Id.*

[145] *In re Cirrus*, 946 F. Supp. at 1466 (citing *In re* Cypress Semiconductor Sec. Litig., 891 F. Supp. 1369, 1378 (N.D. Cal. 1995); *In re* Seagate Tech. II Sec. Litig., [1994-1995 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,530, at 91,583 (N.D. Cal. Feb. 8, 1995)).

[146] *Id.* Referring to *In re Cypress*, the court noted that even though the company regularly met with analysts, the plaintiffs in In re *Cypress* "failed to produce any evidence 'showing that Cypress even reviewed analysts' reports before they were published, let alone represented that the reports conformed to its internal projections.'" *Id.* (quoting *In re Cypress*, 891 F. Supp. at 1377).

F. *Direct Liability and the Nonexclusivity of Entanglement and Adoption*

1. The Law

In the next section of its opinion, the court analyzed the defendant's argument that no liability accrues to the company that makes allegedly misleading statements to analysts *unless* entanglement or adoption is proven.[147] The court observed that the law places liability on the maker of the misleading or untrue statement without providing exceptions for such statements to analysts.[148] The court then described what it essentially characterized as the nonexclusivity of entanglement and adoption for securities law liability involving the statements of third parties.[149]

The court's ability to cite to extensive authority supporting this proposition is clearly indicative of some confusion on the part of defendants' counsel.[150] The court cited to more than ample precedent indicating that companies would still be liable for that false information passed on through those analysts' reports.[151] When such statements are made through third parties, the company must still make "full and fair disclosure to ensure that its statements are not materially misleading."[152]

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[147] *Id.*

[148] *Id.* at 1466-67 (citation omitted).

[149] *See In re Cirrus*, 946 F. Supp. at 1467.

[150] *Id.*

[151] *Id.* The court stated that "[d]efendants 'cannot escape liability simply because [they] carried out [their] alleged fraud through the public statements of third parties.'" *Id.* (alterations in original) (quoting Warshaw v. Xoma Corp., 74 F.3d 955, 959 (9th Cir. 1996)). The court also cited to the following: McGann v. Ernst & Young, 95 F.3d 821, 829 (9th Cir. 1996) (holding an accountant liable where it provided a fraudulent audit report to a company knowing it would be distributed to investors); Elkind v. Liggett & Myers, Inc., 635 F.2d 156, 164 (2d Cir. 1980) (finding that liability can attach to management when management purposefully gives incorrect information concerning material facts to analysts); Colby v. Hologic, Inc., 817 F. Supp. 204, 215 (D. Mass. 1993) (stating that no claim exists as to analyst reports where plaintiffs do not plead entanglement or adoption, "nor are any misstatements of *fact* by any of the defendants to the analysts described"); and lastly, Alfus v. Pyramid Tech. Corp., 764 F. Supp. 598, 603 (N.D. Cal. 1991) (holding that a company has a duty to correct misleading statements it provided to the market through analysts). *In re Cirrus*, 946 F. Supp. at 1467.

[152] *In re Cirrus*, 946 F. Supp. at 1467 (citing First Va. Bankshares v. Benson, 559 F.2d 1307, 1313-14 (5th Cir. 1977); *In re* Apple Computer Sec. Litig., 672 F. Supp. 1552, 1560 (N.D. Cal. 1987), *aff'd in relevant part and rev'd in part*, 886 F.2d 1109 (9th Cir. 1989)). The *Cirrus* court stated that "[a] company may not lie to securities analysts and avoid liability for its misrepresentations by refusing to adopt the analyst reports incorporating the misrepresentations." *Id.*

Cases requiring a two-way information flow between the analyst and company to show entanglement are based on the provision by the company of truthful and accurate information to the analyst.[153] A company should not be liable for a third party's interpretations of accurate information provided by the company unless the company adopts those interpretations as its own.[154] In contrast, the court pointed out that the deliberate or reckless provision of misinformation to an analyst is actionable even without adoption,[155] and no two-way flow of information is required.[156] In a footnote, the court stated that, "[a]lternatively, one could characterize . . . intentional or reckless misrepresentations to analysts as a form of entanglement with statements in analysts' reports . . . that rely on the misrepresentations."[157] In light of clear precedent, a company could be liable for such types of misrepresentations, even where no adoption is shown.[158] Nonetheless, the plaintiffs "bear the *Basic*."[159]

The court thought it necessary to distinguish *In re Syntex*, or at least clarify that result in light of its holding in *In re Cirrus*.[160] It stated that the *Syntex* court appeared, at first, not to find liability absent entanglement in these circumstances.[161] The *Syntex* court upheld the dismissal of claims that the defendants were liable for third party analysts' statements because no entanglement or adoption was alleged.[162] Here, the court stated that the *Syntex* court did not address the issue of direct liability for misrepresentations to analysts; instead, it had focused on the possibility of defendant's liability for analysts' interpretations of company statements.[163]

A further defect in the plaintiffs' argument was found. The plaintiffs asserted that, in a "fraud on the market" case, the burden is on the defendants to prove the statements never reached the market.[164] Under *Basic*, the burden is on plaintiffs to prove that public

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[153] *Id.*

[154] *Id.*

[155] *See id.* (footnote omitted).

[156] *See In re Cirrus*, 946 F. Supp. at 1467. *But see* Stack v. Lobo, 903 F. Supp. 1361, 1372 (N.D. Cal. 1995)). See also *supra* notes 1, 68.

[157] *In re Cirrus*, 946 F. Supp. at 1467 n.12.

[158] *Id.* at 1467.

[159] *Id. See supra* notes 16-17 and accompanying text discussing the Basic court's materiality balancing test.

[160] *See In re Cirrus*, 946 F. Supp. at 1467 n.13.

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *In re Cirrus*, 946 F. Supp. at 1467-68. *See also supra* note 38 (explaining fraud-on-the-market).

misrepresentations were made and only then may reliance be presumed.[165] The court believed that some statements, like those made to analysts in "official conference calls or press conferences," may be presumed to be made to the market for the purposes of this analysis.[166] However, a one-on-one provision of information to an analyst could not be presumed public without further proof.[167] The proof of the "public" aspect of the statement would not normally be difficult to provide if the analyst testified that such misinformation was included in his published reports.[168]

2. The Evidentiary Problem of Proving Direct Liability for Analyst Statements

It could be argued that one of the most problematic issues regarding allegations of entanglement is the proof of such behavior. Such difficulty of proof may undermine the prophylactic or deterrence value of having such a theory control issuer liability for third party statements. *In re Cirrus* dealt with allegations that individual defendants made fraudulent statements in private conversations with analysts.[169] However, in their responses to summary judgment motions, the plaintiffs had focused almost exclusively on two conversations with one analyst in which the defendants made alleged misrepresentations.[170]

The court spoke to this central difficulty in proving direct liability for misrepresentations to the market through an analyst.[171] The court analyzed the admissibility of evidence necessary to raise an issue of material fact to defeat a defendant's motion for summary judgment.[172] Although an analyst may be available to testify as to his memory of such communications, the court held that the analyst's notes of his conversations with insiders were inadmissible hearsay because the potential for inaccuracies in those statements may lead to unfair imposition of securities liability on company spokesmen.[173]

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[165] *In re Cirrus*, 946 F. Supp. at 1468 (citing Basic, Inc. v. Levinson, 485 U.S. 224, 248 n.27 (1988)). *See also supra* note 38 (explaining rebuttable presumption of reliance created by acceptance of the fraud-on-the-market theory).

[166] *In re Cirrus*, 946 F. Supp. at 1468 (citing *Basic*, 485 U.S. at 246 n.24).

[167] *Id.* (citing *Basic*, 485 U.S. at 246 n.27).

[168] *Id.*

[169] *Id.*

[170] *In re Cirrus*, 946 F. Supp. at 1468.

[171] *See id.* at 1468-70. Such analysis may indicate that problems of proof would also accompany allegations of entanglement.

[172] *Id.*

[173] *Id.* at 1469.

The statements were clearly offered for the truth of the matter asserted and therefore fell within the definition of hearsay.[174] The present sense impression exception to the hearsay rule was not satisfied because the analyst testified that the notes contained his "interpretations and analyses of conversations" with company officials.[175] Such an exception is only intended to include those "statements 'describing or explaining' an event or condition where 'substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation.'"[176] The court apparently believed that the analyst's testimony as to his interpreting of the information indicated a potential for precisely that kind of misrepresentation.[177]

Plaintiffs argued that such notes and records were business records, which would be admissible if "made by a person with knowledge at or near the time of the incident recorded, and the record is kept in the course of a regularly conducted business activity."[178] On the other hand, the notes would not be admissible "if the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness."[179] Because the analyst testified to the lack of accuracy, it would be impossible to distinguish whether the alleged misinformation in the analyst's opinions came from the analyst or the company.[180] The court noted that the lack of control that a company has in ensuring that company statements are transcribed accurately or include necessary material qualifiers was an important consideration, absent any proof of entanglement or adoption.[181] The court believed that it was "plainly unfair" to impose liability without independent corroboration of the accuracy of the analyst's notes.[182]

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[174]*In re Cirrus*, 946 F. Supp. at 1469-70 (citing FED. R. EVID. 801(c); *In re* Cypress Semiconductor Sec. Litig., 891 F. Supp. 1369, 1374 (N.D. Cal. 1995); Larez v. City of Los Angeles, 946 F.2d 630, 640-44 (9th Cir. 1991) (holding as inadmissible hearsay certain newspaper articles offered to prove that statements therein were made by him); *In re* Seagate Tech. II Sec. Litig., 802 F. Supp. 271 (N.D. Cal. 1992) (holding as inadmissible hearsay newswire of defendants' statement offered as proof of his making of the statement)).

[175]*Id.* at 1469 (citing FED. R. EVID. 803(1)).

[176]*Id.* (quoting FED. R. EVID. 803(1) and 1972 advisory committee notes).

[177]*See id.*

[178]*In re Cirrus*, 946 F. Supp. at 1469 (citation omitted).

[179]*Id.* (quoting Kennedy v. Los Angeles Police Dep't, 901 F.2d 702, 717 (9th Cir. 1989)).

[180]*See id.* The court stated that the analyst had "indicated the lack of accuracy of the proffered evidence with regard to the exact content of conversations with Cirrus executives." *Id.*

[181]*Id.*

[182]*In re Cirrus*, 946 F. Supp. at 1469.

Quoting *Raab v. General Physics Corp.*,[183] the court sympathized with a defendant whose statements may be "taken out of context, incorrectly quoted, or stripped of important qualifiers."[184] Therefore, it held that the analyst's notes were not admissible as business records.[185] Additionally, the analyst reports were not admissible as business records because the information therein was based on the analyst's notes.[186] Moreover, lack of reliability prevented the admission of the notes or report as admissions of a party opponent.[187]

The notes and analyst reports were also held to be inadmissible under the residual hearsay exception.[188] Once again, the lack of trustworthiness indicated in the preceding sections of the opinion precluded availability of this exception.[189] The court found that the analyst must testify as to "the entire conversation" with company officials.[190] However, the notes could be used to refresh the memory of the witness.[191] The court held open the possibility that if it could be proven, from evidence other than the notes and reports, that misrepresentations were made by the company to the analyst, then published reports would be admissible to show that the statements reached the market.[192]

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[183]Raab v. General Physics Corp., 4 F.3d 286 (4th Cir. 1993).

[184]*In re Cirrus*, 946 F. Supp. at 1469 (citing *Raab*, 4 F.3d at 288).

[185]*Id.*

[186]*Id.*

[187]*Id.* (referring to FED. R. EVID. 801(d)(2)).

[188]*In re Cirrus*, 946 F. Supp. at 1470. The residual hearsay exception provided in Rule 803(24) of the Federal Rules of Evidence requires "that the evidence be more probative on the point for which it is offered than any other evidence the proponent could produce through reasonable efforts." *See* FED. R. EVID. 803(24) & 1974 Advisory Committee Notes. "The court must balance the need for the evidence against its trustworthiness." *In re Cirrus*, 946 F. Supp. at 1470. The court felt that the company must show that the analyst is unavailable to testify about his notes and that there are "circumstantial guarantees of trustworthiness." *Id.* However, it should be noted that the court in *In re* Columbia Sec. Litig., 155 F.R.D. 466 (S.D.N.Y. 1994), assessed the admissibility of a reporter's notes regarding a published article under FED. R. EVID. 803(24) and found that the availability of the reporter to testify helped ameliorate one of the underlying concerns of hearsay rule — an inability to cross-examine an out-of-court declarant. The court admitted the notes. *In re Columbia*, 155 F.R.D. at 476-77.

[189]*In re Cirrus*, 946 F. Supp. at 1469.

[190]*Id.* at 1470.

[191]*Id.* at 1470 n.15.

[192]*Id.* at 1470.

G. *Disposition*

The court granted the defendants' motion for summary judgment on all of plaintiffs' claims for (1) accounting fraud, except those regarding certain inventory reserve calculations; (2) liability for adoption of allegedly misleading opinions by the securities analysts; (3) fraudulently misleading statements made by the company to the analyst who made the notes, but only to the extent plaintiffs relied on statements attributed to defendants that appear only in that analyst's notes and reports and that cannot be independently corroborated, or that did not reach the market; and (4) fraudulent public statements made by the company in certain press releases, conference calls, and the company's Form 10-Qs for the second and third quarters.[193] The court denied defendants' motion for summary judgment on plaintiffs' claims that the defendants made fraudulent public statements during a single conference call to analysts.[194] In December of 1996, the company tentatively agreed to settle the case, along with certain other ongoing securities litigation, for an undisclosed cash payment by the company and individual insurance policies.[195]

IV. EVALUATION

As *In re Cirrus* illustrates, an issuer may unwittingly cross the line into potential securities law liability for an analyst's statements about the company. There remains some confusion, though, as to where that line should be drawn.[196] The court in *In re Cirrus* did not say what remained of entanglement after reminding defense counsel of the direct securities law liability an issuer incurs when using the analyst as a conduit for false information.[197] It did not say how much practical application entanglement and adoption continue to have after highlighting the

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[193]*In re Cirrus*, 946 F. Supp. at 1479.

[194]*Id.* at 1479-80.

[195]*Cirrus Buries the Legal Hatchet*, ELEC. NEWS, Dec. 16, 1996, at 25.

[196]For instance, the SEC has taken the position in an interpretive release that a hyperlink to a research report from a preliminary prospectus posted on the World Wide Web is akin to delivering the report in the same envelope as the preliminary prospectus to an investor, which is not permitted during the waiting period. Use of Electronic Media for Delivery Purposes, 17 C.F.R. § 231.7233 (Oct. 27, 1995). If such reports are linked to from Web pages of issuers in general, it seems that a strong case could be made that the issuer has completely adopted such reports as its own, since it is ostensibly distributing such reports, at least in the eyes of the SEC, in a fashion similar to that of the issuer in *In re RasterOps*.

[197]*In re Cirrus*, 946 F. Supp. at 1467.

evidentiary problems in pursuing direct liability claims. Because an issuer's officers may review drafts and make suggested revisions verbally and extemporaneously, it is difficult to understand how an issuer would not be encouraged to try to avoid liability by having a written policy of no comment on forecasts, memorializing nothing in writing, or claiming convenient memory loss at depositions, thereby reducing the possibility of the existence of evidence that would corroborate the trustworthiness of an analyst's notes, especially where that analyst includes his own interpretive comments in those notes.[198]

Although the continuing growth in the jurisprudential consideration of the entanglement and adoption doctrines may clear up misunderstandings regarding these relatively recent theories of liability, the selective disclosure problem faced by issuers and analysts alike will probably remain.[199] An issuer desiring to maximize coverage by the analyst community faces, at least according to some courts and the SEC, a walk "on a tightrope"[200] between the equally perilous alternatives of securities law liability and market anonymity. Analyst coverage can be extremely valuable to a company because it can expand the pool of investors willing to consider purchasing that company's stock and may enhance subsequent issuer access to the equity markets for additional capital.[201]

Among the inherent attributes of maintaining such a relationship is the desire of an issuer to ensure that an analyst that covers the issuer

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[198]Circumstantial evidence of the trustworthiness of such evidence is one of the inquiries that may lead to admitting that evidence under FED. R. EVID. 803(24).

[199]*But see* Coffee, *supra* note 88. However, it seems problematic that the boards of public companies will now commence authorizing such selective disclosure, thereby ostensibly mitigating the fraud on the source standard promulgated in *O'Hagan*. Because liability for such disclosures has been measured by established case law, boards may be averse to risking such liability, especially given the SEC's enforcement posture. *See supra* Part II.H.

[200]SEC v. Bausch & Lomb, Inc., 565 F.2d 8, 9 (2d Cir. 1977). This decision affirmed a district court's refusal to grant the injunctive relief requested by SEC that would have enjoined appellees from future violations of the securities laws. *Id.* at 19. The court found that the chairman of the company violated "the concept of materiality" by communicating an internal earnings forecast to an analyst. *Id.* at 15. However, there was no reasonable likelihood that the chairman would violate the securities laws in the future. *Id.* at 19.

[201]*See* Barnes & Bagley, *supra* note 2, at 180-8. *See also* Donald C. Langevoort, *Investment Analysts and the Law of Insider Trading*, 76 VA. L. REV. 1023, 1024 (1990) (stating that some academic commentary supports the proposition that "[i]nvestment analysts are crucial players in the mechanisms of marketplace efficiency that lead to optimal allocations of capital resources"); Mark B. Leeds & Bruce W. Fraser, *Why Wall Street Matters; The Value of Investor Relations Program*, 82 MGMT. REV. 23 (Sept. 1993) (stating that consideration of issuers by purchasers and the market in general is dependent on research coverage by top analysts).

is not unduly surprised by changes in information previously supplied to him and to the market in general.[202] The desire to avoid upsetting the relationship through such surprises may lead an issuer to communicate with a single or small group of analysts in advance of the release of material adverse information, which raises a selective disclosure problem.[203] Therefore, there is a tension between the avoidance of what may be seen as unfair selective disclosure and encouragement of the asserted efficiency maximizing activity of analysts.[204] Adding to this tension is the fact that the courts' approach to these conflicting policy goals appears to have been considerably more charitable towards analysts and issuers than the approach of the Securities and Exchange Commission.[205]

It could be claimed that, as an analogy to the imprimatur theory,[206] it is the analyst who is actually placing his "imprimatur" of approval on the information by taking the company-supplied information and publishing it under his, and his firm's, name. Additionally, some commentators have posited that the informal contacts between an issuer and analysts play a beneficial role in ensuring accurate disclosure by mitigating a "moral hazard" inherent in the release of positive company news.[207] This hazard exists because the investing public may be suspicious of the source of such type of information, even if it comes from honest issuers, because other issuers may have lied or overstated their prospects in the past.[208] Such a moral hazard could be overcome by

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[202]Coffee, *supra* note 87, at 6 (stating that companies feel they should not let analysts be surprised by discovering important company news in the newspapers, as it could affect the analyst's credibility and affect their interest in the issuer).

[203]Barnes & Bagley, *supra* note 2, at 184 (stating that selective disclosure is that disclosure of material nonpublic information to selected analysts that is "not made simultaneously to the financial community as a whole" and stating that this type of disclosure may make the issuer vulnerable "to allegations of 'tipping'" and "insider-trading violations under Rule 10b-5"). *See also* Brountas, *supra* note 80, at 1529-31 (explaining selective disclosure and indicating its potential adverse affect on beneficial analyst activity); *supra* Part II.H (generally explaining certain developments in selective disclosure liability).

[204]Brountas, *supra* note 80, at 1517.

[205]*See supra* notes 83-89 and accompanying text; Part II.H.

[206]See *supra* note 65-66 and accompanying text; Part II.G.

[207]Langevoort, *supra* note 201, at 1030. Such contacts may mitigate a possible perception in the market that insiders may have self-interest in making positive statements, especially if their compensation is tied to an increase, albeit temporary, in a company's stock price. Incentive stock options, a form of executive compensation, are tied to the performance of the company and, often, its stock price.

[208]*Id.* Such distrust is only to be expected, especially if the market has theretofore integrated the information fully into the stock price and a price decline occurs as a result of negative unexpected disclosure.

utilizing the analyst to "bond" the information, which serves a credibility enhancing role.[209] The analyst's role as an information gatekeeper and his continuing good reputation and value to his own clients depends on his ability to gauge the truthfulness and accuracy of the information he has gathered.[210] Taking this analysis to its logical conclusion, the analyst could be seen as taking upon himself a "professional" duty of correcting and validating such information to the best of his ability.[211] This professional duty serves to induce the analyst to be diligent in assessing the accuracy of the information, absent some other incentive to risk his professional reputation. Such an incentive, on the other side of the analytical coin, could include short-term gains on trading by clients or even by the analyst himself. Obviously, clients would pay good money to trade ahead of market disclosure, but it can be argued that such a profit, if sufficiently transparent to the general market, will eventually highlight the staleness of such an analyst's provision of information to the general market and decrease his credibility as an unbiased observer and analyst of company events. Nevertheless, it must not be forgotten that material nonpublic information is initially in the hands of an insider and that the insider continues to have a duty to correct or update any such statements contained in such reports that become misleading or incorrect in light of new information.[212]

It does not necessarily run counter to the policies underlying the securities laws that limited informational advantages be granted to parties who are thereby encouraged to enhance market efficiency[213] in

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[209]*Id.* An independent third party may logically be perceived by the market as having less self-interest in its provision of negative or positive information, especially if it has demonstrably been shown to be independent in the past.

[210]*Id.* at 1043. But Langevoort criticizes the validity of the bonding argument, especially because the company typically is not the same visible source of information which is normally present in other bonding situations such as underwriting. *Id.* at 1039. *See also* Brountas, *supra* note 80, at 1520 (stating that analysts verify forward-looking data from companies "to prevent fraud and to eliminate the effects of corporate biases").

[211]Such a hypothetical duty to correct is not to be construed as a legal duty, but one that is tied to the analyst's potential self-interest as being perceived by the market as a credible independent provider of information, with transparency as to their bias so as to enable uninformed investors to decode the information implicit in price movements due to trading by investors with temporary informational advantages. *See* Brountas, *supra* note 80, at 1538 (citations omitted).

[212]F. Philip Manns, Jr., Comment, *Duty to Correct: A Suggested Framework*, 46 MD. L. REV. 1250, 1254 (1987) (citations omitted).

[213]The efficient market theory states, in general, that public information that would affect the market price of a stock is rapidly reflected in the price in a well-developed market. Therefore, the average investor would not be expected to profit from the use of such information. *See, e.g.*, Lynn A. Stout, *Are Takeover Premiums Really Premiums? Market*

fundamental and long-lasting ways. While this could be construed as contrary to the apparent philosophy of the SEC in *Stevens*,[214] it is in accord with, and represents an extension of, the courts' apparent general hesitance to impose liability on issuers for analyst reports.[215] The public policies underlying the Securities and Exchange Acts — the protection of investors and the disclosure of material information[216] — might be better served by encouraging a growth in the coverage of smaller companies by analysts. Growth in the numbers of analysts should be fostered, especially in light of the vital role analysts play as information gatekeepers.

At the very least, a safe harbor from tipper/tippee and entanglement liability should be created for analysts and issuers that recognizes, among other things, this fundamental need of issuers to inform analysts of material nonpublic information prior to its public dissemination.[217] This

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Price, Fair Value, and Corporate Law, 99 YALE L.J. 1235, 1240-41 (1990). There are three views of efficiency: "weak" (prices only reflect historic price patterns); "semi-strong" (all public information is reflected in price); and "strong" (prices reflect all public and available information). *Id.* at 1241 n.32 (citations omitted). However, the efficient market theory has been criticized as counter-intuitive and not reflective of the behavior of actual market participants. *See id.* at 1243-44. This comment is not intended to explore the various arguments for and against the efficient market theory. It is sufficient for the purposes of this comment to illustrate the basic premise of the theory and to point out that there is some disagreement in the academic and business communities as to its continuing validity.

[214]*See supra* Part II.H.

[215]*See generally supra* note 1 (citing various cases that seemed to utilize entanglement and adoption theory of liability to generally find in favor of defendants).

[216]See *supra* note 24.

[217]A safe harbor relating to analyst activity has been proposed previously, apparently in recognition of its inherent value, albeit under different circumstances. The SEC, reacting to the *Dirks* and *Chiarella* decisions, sent legislation to Congress in 1987 seeking a codification of its "misappropriation theory," which very generally states that there is a duty to refrain from trading while a party is in possession of material nonpublic information if to so trade would violate a fiduciary duty or similar relationship of trust or confidence that party has to a third party who is not the issuer. United States v. Chestman, 947 F.2d 551, 566 (2d Cir. 1991) (en banc) (applying misappropriation theory to claim of violation of 10b-5 and holding that a family member was not situated in similar relationship of trust or confidence and was, therefore, not liable). The court in *Chestman* upheld the conviction of Mr. Chestman under § 14e-3(a), which is a stricter rule of liability for merely trading on the basis of undisclosed nonpublic information concerning a pendent tender offer, if such person knows or has reason to know that is was acquired directly or indirectly from an insider of the offeror or issuer, or someone working for them. *Id.* at 588. The proposed legislation by the SEC would have replaced the *Dirks* personal benefit standard with a prohibition on (1) misuse of material nonpublic information knowingly received by an insider and (2) communications by insiders of such information to someone else if that other person's resale was foreseeable. Langevoort, *supra* note 201, at 1035 (citing Text of Draft "Insider Trading Act of 1987" submitted by Securities and Exchange Commission), 19 Sec. Reg. & L. Rep. (BNA), 1284 (Aug. 14, 1987)).

"analyst's safe harbor" would permit them to engage in vigorous and insightful fact-gathering and analysis, while also imputing such a safe harbor to the issuers themselves.[218] Protection would be afforded to analysts who receive information from insider tippers who do not receive any direct or indirect personal pecuniary benefit, thus expanding *Dirks* by limiting liability to such cases and easing the risk that an issuer faces in an expansive rendering of reputational benefit such as that evidenced in *Stevens*.[219] There have been a number of safe harbors created in recent years protecting other types of securities-related activities and such an analysts' safe harbor is in accord with this general evolution in regulatory philosophy.[220]

Additionally, consideration should be given to permitting analysts to advise their own clients before the market is informed in general. Because of the information costs of gathering data, there may have to be some form of economic incentive for analysts to cover issuers.[221] If selective disclosure liability becomes so great a concern to issuers and analysts that such activity is discouraged, there might be little reason for analysts to then willingly incur the inevitable substantial information costs. There must be some incentive for analysts to bear the high costs associated with gathering, compiling, and analyzing information from nonissuer sources regarding diverse subjects such as interest rates,

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In a proposed safe harbor intended to protect investment analyst activity from the effects of this law, the SEC proposed a carve-out from liability for communications to analysts if such communications were made by investment analysts or by insiders who receive no personal benefit. It should be noted that the reconciliation draft of the legislation, however, contained no such safe harbor. *Id.* at 1036. The safe harbor proposed herein differs insofar that it intends to go one step further than *Dirks*, and ostensibly in the opposite direction of the SEC. It would restrict that case's personal benefit standard even further and potentially abolish the tippee anti-trading prohibition for analysts altogether. In light of the recent decision in *O'Hagan*, where the misappropriation theory was finally adopted as the law of the land by the United States Supreme Court, it appears that analysts may be in a more vulnerable position than ever, notwithstanding certain recent commentary. *See generally* United States v. O'Hagan, 117 S. Ct. 2199 (1997). See *supra* note 88.

[218]Arguably, a safe harbor for issuer statements to analysts would merely codify the result in *O'Hagan*, as Coffee articulates it. See *supra* note 88.

[219]*See supra* note 87.

[220]See *supra* notes 57-58; Part II.F.

[221]One commentator, although critical of the alleged extent of the efficiency maximizing activity of analysts, has stated that one argument in favor of informal contacts is that the analysis is an expensive and time-consuming process and if that information is given to other analysts, its "potential for exploitation [is] diminishe[d]." Langevoort, *supra* note 201, at 1031. A system that allows selective disclosure might be predicted to contribute to a greater degree of market efficiency. *Id.*

government actions and general social and economic trends.[222] Analysts must also attempt to then obtain earnings forecasts or projections from companies and verify them to minimize fraud and "eliminate the effects of corporate biases."[223]

Analyst reports, in general, should be required to contain specific and conspicuous warnings to investors who read them that (1) certain information contained therein may be derived from company sources, (2) the information may be inherently unreliable due to the economic interest of the issuer in maximizing positive coverage of its securities, and (3) certain of the analyst's clients may, in certain circumstances, have already received and traded on such information prior to its widespread public dissemination. As a result of the proposed safe harbor, issuer concern about relationship maintenance could be addressed and the courts' and SEC's concerns about insider trading would remain a consideration, especially where an insider may be contemporaneously selling stock for his or her own account.

Arguably, an efficient market would punish those analysts whose reports relied too heavily on erroneous, misleading, or biased company-supplied information.[224] This punishment would occur by the discounting by investors of a particular analyst's credibility after negative earnings surprises or other events that contradict the analyst's predictions and recommendations.[225] Analysts are in the business of recommending stocks in a highly competitive business and the provision of obviously biased advice could cause them to lose their jobs should such bias be discovered by the market.[226]

In any event, the present state of affairs may make it difficult for any issuer to understand what types of communications it may make to, or relationships it may sustain with, the analyst community without incurring securities law liability, including links to analyst reports from issuer web pages.[227] If issuers have a small safe harbor to make certain private statements to analysts, the self-correcting market mechanism that places a premium on a perception of credibility may adequately ensure investor protection, where the lack of information due to a dearth of

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[222]Brountas, *supra* note 80, at 1520 (citations omitted).

[223]*Id.*

[224]Langevoort, *supra* note 201, at 1043 (stating that an analyst must "balance the risk of overoptimism against the benefit ultimately accruing from the enhanced access to information").

[225]*Id.*

[226]*Id.*

[227]*See supra* note 196 (discussing a prospectus posted on the World Wide Web).

analyst coverage could be damaging to underlying securities law policy interests.[228]

V. CONCLUSION

Issuer liability for third party analyst statements is an area of law that is evolving and growing in importance to many issuers in this modern age of information. All issuers must become aware of the circumstances that can cause them to become liable for such third party statements if they are to conduct themselves in a manner that will minimize their litigation risk and maximize the amount of coverage their companies receive in the marketplace.

Robert Norman Sobol

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[228] *See supra* note 24 and Part II.H (regarding public policies of investor protection and disclosure of material information).