The Epistemology of Collective Scienter
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Abstract

There is a circuit split over the standard to plead scienter in 10b-5 securities fraud litigation against corporations. NARROW PLEADING dismisses complaints for failure to plead scienter, unless the complaint names a natural person at the corporation who has scienter. But BROAD PLEADING allows a complaint to survive dismissal, even without naming any natural person who has scienter.

An analogous discussion occurs in the philosophical literature on the nature of group belief. SUMMATIVISM says that groups cannot hold beliefs not held by any of the group members. NONSUMMATIVISM says that groups can. MIDSUMMATIVISM says that groups can, in very limited circumstances.

My thesis is that judges can adopt BROAD PLEADING, regardless of their epistemological commitments — SUMMATIVISM does not preclude BROAD PLEADING.

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I. INTRODUCTION

A. The PSLRA

SEC Rule 10b-5 prohibits securities fraud. In addition to SEC enforcement, private actors may sue corporations in federal court on 10b-5 grounds.

Between 2015 and 2020, parties filed an average of fifteen securities class actions alleging violations of Rule 10b-5 in federal court each month. Those cases comprised roughly half of all securities lawsuits filed at the federal level.

Given the significant economic consequences of securities litigation, particularly from meritless cases that should be screened at the pleadings stage, Congress enacted the Private Securities Litigation Reform Act ("PSLRA") in 1995 to create heightened pleading standards in private claims against corporate actors for fraud. The heightened standard was intended to curb frivolous litigation.

The PSLRA’s heightened standard requires plaintiffs seeking to “recover money damages only on proof that the defendant acted with a particular state of mind” to “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” A frequently litigated element of the securities fraud claim is the ‘required state of mind,’ or scienter, which the Supreme Court defines as “a mental state embracing intent to deceive, manipulate, or defraud.”

B. Refining the PSLRA in Tellabs

The PSLRA’s heightened pleading standard requires that a complaint contain “particularly stated facts that would give a ‘strong inference’ both that a fraud took place...”

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1 17 C.F.R. § 240.10b-5. The rule states: “It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) 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, or (c) To 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.”


4 Id.


6 Tellabs, 551 U.S. at 309.


and that the defendant intended to defraud; a legal status referred to as scienter." But it is not immediately obvious what makes for a strong inference.

In *Tellabs*, the Court set out to “prescribe a workable construction of the "strong inference" standard, a reading geared to the PSLRA’s twin goals: to curb frivolous, lawyer-driven litigation, while preserving investors’ ability to recover on meritorious claims.”

The facts of *Tellabs* are as follows. The defendant, Tellabs, Inc., was a company that manufactured equipment for use in fiber-optic networks. Tellabs’s CEO, another named defendant, was Richard Notebaert. Between December 2000 to June 2001, Tellabs and Notebaert gave “increasingly optimistic projections about Tellabs’ potential for growth as well as its current financial condition.” Some such statements, such as those purporting to report earnings, were outright false. Others were misleading enough to induce the plaintiffs to buy Tellabs stock and thereby become shareholders.

In December 2002, the shareholders filed a class action suit against Tellabs and Notebaert in the Northern District of Illinois under Rule 10b-5. Tellabs filed a motion to dismiss, arguing that the shareholders had not met the pleading standards articulated in the PSLRA. The district court agreed and dismissed with prejudice. The shareholders appealed, and the Seventh Circuit reversed. Tellabs and Notebaert appealed to the Supreme Court.

The Court held that “courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when deciding Rule 12(b)(6) motions.” Deciding this requires asking “whether all the facts alleged, taken collectively, give rise to a strong inference of scienter — not whether any individual allegation, scrutinized in isolation, meets that standard.” Further, “the court must consider plausible opposing inferences.”

Further, “Congress did not merely require plaintiffs to allege facts from which an inference of scienter rationally could be drawn. Instead, Congress required plaintiffs to plead with particularity facts that give rise to a ‘strong’ — i.e., a powerful or cogent — inference. To determine whether the plaintiff has alleged facts giving rise to the requisite ‘strong inference,’ a court must consider plausible nonculpable

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10 *Tellabs*, 551 U.S. at 315.
11 Id.
12 Id.
13 Id.
14 Id.
15 Id.
16 Id.
17 Id.
18 Id.
19 Id.
20 Id.
21 Id.
22 Id.
23 Id.
explanations for the defendant’s conduct, as well as inferences favoring the plaintiff. The inference that the defendant acted with scienter need not be irrefutable, but it must be more than merely ‘reasonable’ or ‘permissible’ — it must be cogent and compelling, thus strong in light of other explanations.”

In sum: “a complaint will survive only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any plausible opposing inference one could draw from the facts alleged.”

A circuit split has developed over one candidate answer: a theory dubbed “collective scienter.” On this theory, plaintiff may satisfy the PSLRA’s pleading standard by alleging that a corporation-defendant has scienter not held by any of its members.

Several circuits have adopted a common law approach, rejecting the doctrine. **Narrow Pleading** dismises complaints for failure to plead scienter, unless the complaint names a natural person at the corporation who has scienter. But **Broad Pleading** allows a complaint to survive dismissal, even without naming any natural person with any scienter.

An analogous discussion occurs in the philosophical literature on the nature of group belief. **Summativism** says that groups cannot hold beliefs not held by any of the group members. **Nonsummativism** says that groups can. **Midsummativism** says that groups can, in very limited circumstances. Importantly, I limit my discussion to collective scienter theories of pleading rather than liability.

No articles have yet brought the philosophy to bear on the circuit split over collective scienter. But, as this article attempts to show, there are several benefits to introducing philosophy to the legal conversation.

I argue that **Narrow Pleading** rests on a philosophical confusion about the logical relationship between ascription and inference. Judges who adopt **Narrow Pleading** assume that **Summativism** precludes any “strong inference” of belief attributable to the corporation unless the complaint names a natural person with the belief. I argue this is false. Consequently, **Narrow Pleading** “improperly conflate[s] pleading rules and liability rules.”

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24 Id. at 310.
25 Id.
28 See Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc., 531 F.3d 190, 195 (2d Cir. 2008) (noting that just because allegations of collective scienter can survive dismissal, collective scienter may not suffice to impose liability onto a corporation).
30 See generally Southland Sec. Corp. v. INSpire Ins. Sols., Inc., 365 F.3d 353 (5th Cir. 2004); Mizzaro v. Home Depot, Inc., 544 F.3d 1230 (11th Cir. 2008).
31 Teamsters, 531 F.3d at 195.
My thesis is that judges can adopt **Broad Pleading**, regardless of their preferred liability rule. In Section II, I outline the parallels between each judicial stance in the circuit split (**Narrow Pleading**, **Broad Pleading**, and **Middle Pleading**) and each philosophical stance on group belief (**Summativism**, **Nonsummativism**, and **Midsummativism**). In Section III, I argue, *contra Narrow Pleading*, that **Summativism** does not preclude any “strong inference” of belief when there is no named individual with the belief.32

In the Conclusion, I reflect on how societal circumstances have substantially changed since the advent of *respondeat superior*, which is the framework that originally motivated **Narrow Pleading**. I conclude that **Summativism** is no excuse to permit corporations to escape liability before trial.

II. Circuit Split and Philosophical Analogues

A. Narrow Pleading and Summativism

1. Narrow Pleading

Under **Narrow Pleading**, which the Fifth and Eleventh Circuits adopt, a plaintiff must specify an individual who is both responsible for the allegedly fraudulent statement and in possession of the requisite scienter.

Specifically, under the Fifth Circuit’s holding in *Southland*, scienter may be imputed to a corporation by looking at “the state of mind of the individual corporate official or officials who make or issue the statement (or order or approve it or its making or issuance, or who furnish information or language for inclusion therein, or the like) rather than generally to the collective knowledge of all the corporation’s officers and employees acquired in the course of their employment.”34 A satisfactory pleading requires alleging that at least one named individual acting on behalf of the corporation made a false statement with the requisite state of mind.35

The Fifth Circuit reasoned in *Southland* that its holding “is consistent with the general common law rule that where, as in fraud, an essentially subjective state of mind is an element of a cause of action also involving some sort of conduct, such as a misrepresentation, the required state of mind must actually exist in the individual making (or being a cause of the making of) the misrepresentation, and may not simply be imputed to that individual on general principles of agency.”36 And since collectives have no subjective states of mind at all, it must be impossible to plausibly allege that collectives have scienter.37 Indeed, “[a] plaintiff must allege a connection

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33 See generally *Southland*, 365 F.3d at 353; *Mizzaro*, 544 F.3d at 1230.
34 *Southland*, 365 F.3d at 366.
35 *Id.*
36 *Id.* at 365.
37 See also Restatement, Agency 2d, § 275, comment b; *Gutter v. E.I. DuPont de Nemours*, 124 F. Supp. 2d 1291, 1311 (S.D. Fla. 2000) (“The knowledge necessary to form the requisite fraudulent intent must be possessed by at least one agent and cannot be inferred and imputed to a corporation based on disconnected facts known by different agents,” citing, *inter alia*,}
between a defendant’s scienter and the allegedly false statements.”  

In sum, the Fifth Circuit looked to the nature of the substantive crime in order to determine a theory of adequate pleading.

Similarly, the Eleventh Circuit, in Mizzaro, “held that a corporation’s state of mind is determined by looking ‘to the state of mind of the individual corporate official or officials who make or issue the statement’ rather than generally to the collective knowledge of all the corporation’s officers and employees acquired in the course of their employment.” Accordingly, “[t]he plaintiff must allege facts that create a strong inference of scienter for each defendant.” The relevant scienter is either an “intent to deceive, manipulate, or defraud,” or ‘severe recklessness.”

The Eleventh Circuit defines “severe recklessness” in the following manner:

“Severe recklessness is limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it.”

The crucial detail here is that, like the Fifth Circuit, even the lowest 10b-5 scienter of severe recklessness can only be pled with respect to an individual (named or otherwise) rather than a general collective. The court stressed that a satisfactory

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38 Alaska Elec. Pension Fund v. Asarco, 768 F. App’x 175 (5th Cir. 2019) (citing Southland, 365 F.3d at 364 (“[S]cience [must] be pleaded with regard to ‘each act or omission’ sufficient to give ‘rise to a strong inference that the defendant acted with the required state of mind.’”)) (quoting 15 U.S.C. § 78u-4(b))); cf. id. at 365 (“[W]e do not construe allegations contained in the Complaint against the ‘defendants’ as a group as properly imputable to any particular individual defendant unless the connection between the individual defendant and the allegedly fraudulent statement is specifically pleaded.”).

39 Mizzaro, 544 F.3d at 1255.

40 Id. at 1238.


42 Mizzaro, 544 F.3d at 1238 (quoting Bryant, 187 F.3d at 1282 n.18).
pleading of corporate scienter must impute scienter to the corporation from a natural person, although the person might not be named:

“Corporations, of course, have no state of mind of their own. Instead, the scienter of their agents must be imputed to them.

Here, however, [plaintiff] does not argue that any Home Depot officials were responsible for the company’s financial statements other than the named individual defendants. In other words, [plaintiff] does not argue that, even if the amended complaint fails to raise a strong inference of scienter as to any of the individually named defendants, it does raise a strong inference that somebody responsible for the allegedly misleading statements must have known about the fraud. For that reason alone we need not pursue this issue further.”

The implicit reasoning here seems very similar to the Fifth Circuit’s approach. The Eleventh Circuit seemingly assumes it is impossible to ascribe mental states to collectives (“Corporations, of course, have no state of mind of their own”), so it must therefore be impossible to plausibly plead such a mental state.

2. Summativism

The Fifth and Eleventh Circuits appear committed to a philosophical stance called “SUMMATIVISM,” a characteristic definition of which is as follows:

SUMMATIVISM: A group has a belief only if at least one individual a member of the group has the belief.

For example, under SUMMATIVISM, to say that the union believes management is being unreasonable is to require that at least one member of the union believe this. The appeal of SUMMATIVISM is primarily its simplicity. Individual attitudes are familiar and measurable. Attributing mental states to non-physical entities as a group is mysterious, so explaining such attributions purely in terms of individuals satisfies the theoretical virtue of parsimony.

Some have argued that SUMMATIVISM is subject to counterexamples, in which individual belief seems neither necessary nor sufficient for ascribing a group belief. Consider:

MARRIAGE CASE: “Suppose the Catholic Church forms a committee to deliberate on gay marriage. After hours of discussion, all of the members...”

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43 Id. at 1254.
44 Domingos Faria, Group Belief: Defending a Minimal Version of Summativism, 58 EPISTEMOLOGY & PHIL. OF SCI. 82, 84 (2021).
45 Id.
jointly agree that gay marriage should not be permitted. So the committee, as a group in a very conservative church, has this belief. However, it turns out that not a single member of the church committee actually believes this; instead, each one privately has a liberal perspective and supports gay marriage. But this is not the belief of the church committee, since its members felt that their decision should represent the Catholic Church and its traditional perspective.  

In MARRIAGE CASE, we have a belief held by the group (the Catholic Church) yet not held by any of its members (those people on the committee). But it seems unnatural to say that the Catholic Church does not really believe the proposition that the committee declares — ascertaining this belief is the whole point of the committee in the first place.

Summativists may respond to the necessity-sufficiency concerns by distinguishing between group belief and group acceptance, and arguing that MARRIAGE CASE is an instance of the latter, rather than the former. Belief seems inexorably connected to truth: you believe a proposition only if the proposition seems true to you (even if the proposition might be false). In contrast, you can accept a proposition by acting as though you believe it, even if the proposition does not seem true to you (perhaps the acceptance stems from factors disconnected from truth, such as political allegiance). Indeed, because none of the committee members believe that gay marriage is impermissible, that proposition does not seem true to any of them. When the members make a decree on behalf of the Catholic Church, they accept that proposition without believing it.

But I do not think this reply succeeds. When the liberals serve on the church committee, they take on a role beyond themselves. As the summativist points out, they do not ask, “What seems true to me about the permissibility of gay marriage?” But it does seem they ask, “From the perspective of the Catholic Church, what seems true about the permissibility of gay marriage?” In other words, just because you accept a proposition you do not believe, that does not mean that factors other than what seems true motivate you. You are just changing the subject to whom the proposition seems true (per your role). So, MARRIAGE CASE remains an example of group belief without individual belief.

In this section, I intended to briefly consider the merits and drawbacks of the SUMMATIVISM that the Fifth and Eleventh Circuits appear committed to. I think they seem committed to SUMMATIVISM because, in claiming the impossibility of

47 Faria, supra note 47.
48 See id.
49 See id.
group belief, they effectively assign an *a priori* probability of 0 to collective scienter. But successfully pleading scienter requires demonstrating a non-zero probability of scienter. Thus, on this view, collective scienter can never be successfully pled.

**B. Broad Pleading and Nonsummativism**

1. Broad Pleading

Under **BROAD PLEADING**, a plaintiff need not identify, at the pleadings stage, an individual who both made the allegedly fraudulent statement and possessed the requisite scienter.

The Seventh Circuit has endorsed this approach. Judge Posner argues that “knowledge is inferable from gravity.” In other words, if a defendant creates a danger is sufficiently obvious (or ‘gravitational’), then we may infer from the obviousness that the defendant must have been aware of it. Posner goes on to say: “All this is not to say that the plaintiffs could name “management” as a defendant or, less absurdly, name each corporate officer. That would be an example of “the group pleading doctrine[, which] is a judicial presumption that statements in group-published documents including annual reports and press releases are attributable to officers and directors who have day-to-day control or involvement in regular company operations.” But, says Judge Posner, the group pleading doctrine is inconsistent with the “strong inference” requirement.” The reason lies in the language of the statute. The text of § 78u-4(b)(2) requires a satisfactory complaint to “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” And “PSLRA references to ‘the defendant’ may only reasonably be understood to mean ‘each defendant’ in multiple defendant cases, as it is inconceivable that Congress intended liability of any defendants to depend on whether they were all sued in a single action or were each sued alone in several separate actions.”

However, Judge Posner argues it is still “possible to draw a strong inference of corporate scienter without being able to name the individuals who concocted and disseminated the fraud.” Further, “Suppose General Motors announced that it had sold one million SUVs in 2006, and the actual number was zero. There would be a strong inference of corporate scienter, since so dramatic an announcement would

50 *Makor Issues & Rts., Ltd. v. Tellabs Inc.*, 513 F.3d 702, 704 (7th Cir. 2008).
51 *Winer Family Trust v. Queen*, 503 F.3d 319, 335 (3d Cir. 2007).
52 *Makor*, 513 F.3d at 710.
53 *Id.*
55 *Southland*, 365 F.3d at 365-66. See also *Phillips v. Scientific-Atlanta, Inc.*, 374 F.3d 1015, 1018 (11th Cir. 2004) (“We believe that the most plausible reading in light of congressional intent is that a plaintiff, to proceed beyond the pleading stage, must allege facts sufficiently demonstrating each defendant's state of mind regarding his or her alleged violations.”).
56 *Makor*, 513 F.3d at 710.
have been approved by corporate officials sufficiently knowledgeable about the
comppany to know that the announcement was false."\(^{57}\)

Citing Judge Posner’s hypothetical, the Second Circuit put the collective
scienter doctrine to work in Teamsters. The plaintiffs alleged that Dynex Capital
 misrepresented aspects of bonds it sold to investors, but the complaint did not name
any specific individual with scienter.\(^{58}\) Distinguishing between “pleading rules and
liability rules,” the Second Circuit explained that in pleading scienter “it is possible to
raise the required inference with regard to a corporate defendant without doing so
with regard to a specific individual defendant.”\(^{59}\)

Indeed, the Second Circuit reiterated the traditional approach that, in order to
establish liability (as opposed to merely pleading it), “a plaintiff must prove that an
agent of the corporation committed a culpable act with the requisite scienter, and
that the act (and accompanying mental state) are attributable to the corporation.”
(emphasis added).\(^{60}\) “Congress has imposed strict requirements on securities fraud
pleading, but we do not believe they have imposed the rule urged by defendants, that
in no case can corporate scienter be pleaded in the absence of successfully pleading
scienter as to an expressly named officer.”\(^{61}\)

Although the court concluded that the complaint should be dismissed, it is
essential to note that it reached this conclusion using the broad approach. Here, the
Second Circuit presents an argument that is incompatible with the reasoning from
the Fifth and Eleventh Circuits. It is incompatible because the Second Circuit grants
that one may think there is a probability of zero that we may ascribe scienter to
collectives (““a plaintiff must prove that an agent of the corporation committed a
culpable act with the requisite scienter, and that the act (and accompanying mental
state) are attributable to the corporation.””) (emphasis added).\(^{62}\) But that impossibility
does not preclude the inference of a mental state that is somehow attributable to the
corporation — perhaps because a satisfactory pleading establishes a sufficient
probability of finding a natural person with the scienter once the case reaches
discovery.

Interestingly, unlike the judges who adopt **Narrow Pleading**, the Second Circuit
appears to permit the possibility of the logical opposite of **Summativism**: a
position appropriately labeled **Nonsummativism**. I will outline this position in the
following subsection.

\(^{57}\) *Makor*, 513 F.3d at 710.
\(^{58}\) *Teamsters*, 531 F.3d at 190.
\(^{59}\) *Id.* at 195.
\(^{60}\) *Id.*
\(^{61}\) *Id.* at 196.
\(^{62}\) *Id.* at 195.
2. Nonsummativism

The philosophical analogue here is **Nonsummativism**. Perhaps the most widely accepted form of **Nonsummativism** is the *joint acceptance account* (JAA) from epistemologist Margaret Gilbert:

JAA: “A group \( G \) believes that \( p \) if and only if the members of \( G \) jointly accept that \( p \). The members of \( G \) jointly accept that \( p \) if and only if it is common knowledge in \( G \) that the members of \( G \) individually have intentionally and openly... expressed their willingness jointly to accept that \( p \) with the other members of \( G \).”

Crucially, JAA does not require belief on the part of a single member of the group in question:

“It should be understood that: (1) Joint acceptance of a proposition \( p \) by a group whose members are \( X, Y, \) and \( Z \), does not entail that there is some subset of the set comprising \( X, Y, \) and \( Z \) such that all the members of that subset individually believe that \( p \). (2) One who participates in joint acceptance of \( p \) thereby accepts an obligation to do what he can to bring it about that any joint endeavors ... among the members of \( G \) be conducted on the assumption that \( p \) is true. He is entitled to expect others’ support in bringing this about. (3) One does not have to accept an obligation to believe or to try to believe that \( p \). However, (4) if one does believe something that is inconsistent with \( p \), one is required at least not to express that belief baldly.”

Thus, according to Gilbert’s nonsummativist view, so long as a group jointly accepts that \( p \) in the way described above, such a group is said to believe that \( p \). On a nonsummativist account of a group’s believing that \( p \), then, it is neither necessary nor sufficient that some of its individual members believe that \( p \). It is not necessary because joint acceptance by the group members does not require individual belief on their part. And it is not sufficient because individual belief by the group members does not involve their joint acceptance of the proposition in question. Thus, **Nonsummativism** avoids the concerns associated with the MARRIAGE CASE discussed earlier.

To align terminology, I will refer to JAA as **Nonsummativism**. Although other versions of **Nonsummativism** exist in the philosophical literature, JAA is the

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64 Id.

Like any philosophical view, **NONSUMMATIVISM** is not entirely immune from criticism, as I will discuss in the following subsection.

C. Middle Pleading and Midsummativism

1. Middle Pleading

When considering both the broader and narrower approaches, the Sixth Circuit reasoned that neither was ideal in *Omnicare*, and therefore a middle ground was preferable. The Sixth Circuit landed on the following rule for evaluating claims of collective scienter:

> “The state(s) of mind of any of the following are probative for purposes of determining whether a misrepresentation made by a corporation was made by it with the requisite scienter under Section 10(b):
> a. The individual agent who uttered or issued the misrepresentation;
> b. Any individual agent who authorized, requested, commanded, furnished information for, prepared (including suggesting or contributing language for inclusion therein or omission therefrom), reviewed, or approved the statement in which the misrepresentation was made before its utterance or issuance;
> c. Any high managerial agent or member of the board of directors who ratified, recklessly disregarded, or tolerated the misrepresentation after its utterance or issuance.”

The Sixth Circuit reasoned that this rule remained consistent with its precedent and improved on the flaws of the two other approaches. When the Sixth Circuit previously considered collective scienter in *City of Monroe*, they suggested that the knowledge of any agent of the company could be imputed to the corporation. But that case turned only on the CEO’s knowledge, a person included in Part C of the *Omnicare* rule. The broader language was therefore declared dicta as it was not necessary to reach the case’s outcome. Accordingly, *City of Monroe* would not come out differently under new the *Omnicare* rule.

This formulation also essentially prevents corporations from evading liability through tacit encouragement and willful ignorance, as they potentially could under a stricter *respondeat superior* approach. Per *Omnicare*, “a corporation is not insulated if

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66 Jennifer Lackey, *The Epistemology of Groups* 24 (2021) (“[The] perhaps most widely accepted [account of nonsummativism] is what we may call the joint acceptance account … a prominent expression of which is offered by Margaret Gilbert”).
68 *Id.*
70 *Cf. United States v. Wells*, 473 F.3d 640, 647–48 n. 5 (6th Cir.2007) (rephrasing a prior panel’s statement when it used overly broad dicta to decide a narrower holding).
lower-level employees, contributing to the misstatement, knowingly provide false information to their superiors with the intent to defraud the public.”

Thus, “corporations that willfully permit or encourage the shielding of bad news from management will potentially be liable.”

On the other hand, Omnicare also shields corporations from liability when “one individual unknowingly makes a false statement that another individual, unrelated to the preparation or issuance of the statement, knew to be false or misleading.” Further, “[b]y allowing courts to examine only the states of mind of lower-level employees connected to the statements, [this] formulation prevents plaintiffs from abusing the broad dicta in City of Monroe and contravening the PSLRA.” Presumably, the broad holding from City of Monroe aligns with the broad approach taken by the Second and Seventh Circuits. Here, the Sixth Circuit implies that this abuse is permitted in those Circuits and attempts to avoid that result.

So, even though the Second Circuit stakes a middle ground between Narrow Pleading and Broad Pleading, it does so for reasons similar to the Fifth and Eleventh Circuits. That is because the Sixth Circuit remains worried about the possibility of eventually imposing liability with merely collective scienter. Since such liability “runs afoul of the PSLRA,” it must be impossible a priori to sufficiently plead such scienter.

2. Midsummativism

Similar to the Sixth Circuit, in a recently published book, epistemologist Jennifer Lackey adopts a middle ground between Summativism and Nonsummativism that she calls the “Group Agent Account.” She begins by considering the following hypothetical:

“TOBACCO COMPANY: Philip Morris, one of the largest tobacco companies in the world, is aware of the massive amounts of scientific evidence revealing not only the addictiveness of smoking, but also the links it has with lung cancer and heart disease. While the members of the board of directors of the company believe this conclusion, they all jointly agree that, because of what is at stake financially, the official position of Philip Morris is that smoking is neither highly addictive nor detrimental to one’s health, which is then published in all of their advertising materials.”

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71 Omnicare, 769 F.3d at 476–77.
72 Id.
73 See id. (“By allowing courts to examine only the states of mind of lower-level employees connected to the statements, our formulation prevents plaintiffs from abusing the broad dicta in City of Monroe and running afoul of the PSLRA.”).
74 LACKEY, supra note 67, at 30.
75 Id.
Lackey considers TOBACCO COMPANY to be a paradigmatic case of group lying.\(^{76}\) Several formal accounts of lying exist in the philosophical literature.\(^ {77}\) I will use Lackey’s:

“LIE: A lies to B if and only if (1) A states that \( p \) to B, (2) A believes that \( p \) is false, and (3) A intends to be deceptive to B with respect to whether \( p \) in stating that \( p \).”\(^ {78}\)

Thus, for a group, \( G \), to lie, all three conditions must hold. \( G \) must state that \( p \) where \( G \) believes that \( p \) is false, and \( G \) must have the deliberate intention to be deceptive.

Lackey leverages the concept of group lying to propose the following desideratum for any plausible account of group belief: Group Lie Desideratum (GLD): “An adequate account of group belief should have the resources for distinguishing between, on the one hand, a group’s asserting its belief that \( p \) and, on the other hand, paradigmatic instances of a group’s lying regarding that \( p \).”\(^ {79}\)

Though the GLD seems intuitive enough, Lackey argues that NONSUMMATIVISM cannot satisfy it:

“[On NONSUMMATIVISM,] Philip Morris believes that smoking is neither highly addictive nor detrimental to one’s health in TOBACCO COMPANY. The operative members of the company—namely, the board of directors—not only jointly accept this proposition, but also do so through the exercise of their authority and with mutual belief. Moreover, given that the power possessed by the board of directors is part of the very structure of the company, the nonoperative members of the group tacitly accept this proposition and do so with awareness. Thus, conditions [(1) through (4)] are satisfied by Philip Morris, thereby resulting in the group believing that smoking is neither highly addictive nor detrimental to one’s health.”\(^ {80}\)

Thus, NONSUMMATIVISM fails to distinguish sincere group beliefs from group lies. But doing so is the whole point of the corporate scienter inquiry. NONSUMMATIVISM also fails to distinguish conceptually similar phenomena from group belief. For example, it seems groups can ‘bullshit’ just as individuals can. Consider:

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\(^{76}\) Id.


\(^{78}\) LACKEY, supra note 67, at 31.

\(^{79}\) Id.

\(^{80}\) Id. at 34.
“OIL COMPANY: After the oil spill in the Gulf of Mexico, BP began spraying dispersants in the cleanup process that have been widely criticized by environmental groups for their level of toxicity. In response to this outcry, the executive management team of BP convened and its members jointly accepted that the dispersants being used are safe and pose no threat to the environment, a view that was then made public through all of the major media outlets. It turns out that BP’s executive management team arrived at this view with an utter disregard for the truth—it simply served their purpose of financial and reputational preservation.”

Lackey considers OIL COMPANY to be an instance of group bullshit.81 Frankfurt describes the individual case as follows:

“It is impossible for someone to lie unless he thinks he knows the truth. Producing bullshit requires no such conviction. A person who lies is thereby responding to the truth, and he is to that extent respectful of it. When an honest man speaks, he says only what he believes to be true; and for the liar, it is correspondingly indispensable that he considers his statements to be false. For the bullshitter, however, all these bets are off: he is neither on the side of the true nor on the side of the false. His eye is not on the facts at all, as the eyes of the honest man and the liar are, except insofar as they may be pertinent to his interest in getting away with what he says. He does not care whether the things he says describe reality correctly. He just picks them out, or makes them up, to suit his purpose.”82

So, NONSUMMATIVISM delivers the verdict that there is the group belief that $\neg p$, both in paradigmatic cases where the group believes that $\neg p$ (lying) and in paradigmatic cases where the group simply fails to believe that $p$ (bullshitting). This motivates Lackey to demand a second desideratum for a satisfactory account of group belief:

Group Bullshit Desideratum (GBD): “An adequate account of group belief should have the resources for distinguishing between, on the one hand, a group’s asserting its belief that $p$ and, on the other hand, paradigmatic instances of a group’s bullshitting that $\neg p$.83

The GLD and GBD are especially relevant to securities law because they track the scienters of knowledge and recklessness, respectively. The MPC instructs that an agent “acts knowingly with respect to a material element of an offense when (i) if the element involves the nature of his conduct or the attendant circumstances, he is

81 Id.
82 HENRY FRANKFURT, ON BULLSHIT 55–56 (2005).
83 LACKEY, supra note 67, at 34.
aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.\textsuperscript{84} Awareness, or awareness of practical certainty that \( p \) is false but asserting it anyway straightforwardly satisfies Lackey’s theory of lying.

Similarly, the MPC says that an agent “acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.”\textsuperscript{85} One example of doing so is “not car[ing] whether they things he says describe reality correctly.”\textsuperscript{86}

And Lackey rejects NONSUMMATIVISM because it cannot satisfy either the GLD or GBD.\textsuperscript{87} After all, GLD and GBD hold only if a group belief in \( p \) entails that at least one member of the group believes \( p \). But NONSUMMATIVISM, by definition, permits group belief without this entailment.

However, Lackey also notes that “[w]hen individuals make up a group, relations arise among their beliefs that can only be properly assessed at a collective level. Whether these relations are together coherent or incoherent, for instance, is critical in assessing whether a belief state is appropriate for figuring in the group’s actions. And the nature of these relations at the collective level directly impact whether a group’s action is rational or justified considering its belief states.”\textsuperscript{88}

Lackey thus proposes the following account of group belief, which avoids all the problems afflicting rival views:

Group Agent Account (GAA): “A group, \( G \), believes that \( p \) if and only if: (1) there is a significant percentage of \( G \)’s operative members who believe that \( p \), and (2) are such that adding together the bases of their beliefs that \( p \) yields a belief set that is not substantively incoherent.”\textsuperscript{89}

Condition (1) prevents attributing fringe members’ beliefs to the group as a whole. Condition (2) allows GAA to satisfy both the GLD and GBD.\textsuperscript{90} Lies and bullshit yield substantively incoherent belief sets — an agent lies when believing that \( p \) and asserting that \( \neg p \), and an agent bullshits when believing that \( p \) and asserts a proposition incompatible with \( p \).\textsuperscript{91}

I will refer to the GAA as ‘MIDSUMMATIVISM’ to portray its parallel with the Sixth Circuit’s MIDDLE PLEADING. The GAA is “mid” in the following sense. The

\begin{footnotesize}
\textsuperscript{84} MODEL PENAL CODE \S 2.02(2) (AM. LAW. INST. 1962).
\textsuperscript{85} Id.
\textsuperscript{86} FRANKFURT, supra note 83.
\textsuperscript{87} LACKEY, supra note 67, at 34.
\textsuperscript{88} Id. at 48.
\textsuperscript{89} Id.
\textsuperscript{90} See id.
\textsuperscript{91} See id.
\end{footnotesize}
GAA is just summative enough to satisfy GLD and GBD, but nonsummative enough to not have group belief supervene on any individual of the group (instead, only “operative members”).

Just as Lackey’s account seeks to preserve accountability by merely qualifying SUMMATIVISM, rather than abandoning it, so too does the Sixth Circuit seek to preserve NARROW PLEADING by qualifying it. As discussed, satisfying the GLD and GBD precludes NONSUMMATIVISM, so Lackey includes Condition (1) in her account. Similarly, the Sixth Circuit requires a named person in order to maintain its summativist reading of the PSLRA.92

D. Ascription and Inference

Each of the described arguments for NARROW PLEADING, BROAD PLEADING, MIDDLE PLEADING relies on a tacit relationship between ascribing a belief and inferring a belief.

To ascribe a belief to an agent is simply to say that the agent has that belief.93 To infer that an agent has a belief is to say that the probability of the agent having the belief is greater than or equal to the probability of the agent not having the belief.94 The Circuits adopting NARROW PLEADING assume that ascribing collective scienter is impossible, so inferring scienter from a collective must be impossible too. The Sixth Circuit also tempered its pleading standard in accordance with this same worry. In the contrast, the Circuits adopting BROAD PLEADING have at least left open the possibility that collective scienter may suffice for liability but noted a distinction between this question and the question of pleading.

This distinction between inference and ascription also drives the following critique from Liam Kofi Bright on Lackey’s MIDSUMMATIVISM.

“Lackey’s normative case for the Group Lie Desideratum relies on us agreeing that our ability to ‘hold groups, such as corporations, businesses and governments, responsible both for their lies and for the consequences that follow from them’ requires satisfying the Group Lie Desideratum. I certainly grant that we do wish to hold groups such as corporations, businesses and governments accountable for their actions, and that the actions of such groups include epistemic actions like forming beliefs and making assertions.

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92 See Omnicare, 769 F.3d at 477 (“By allowing courts to examine only the states of mind of lower-level employees connected to the statements, our formulation prevents plaintiffs from abusing the broad dicta in City of Monroe and running afoul of the PSLRA.”).
94 See Tellabs, 551 U.S. at 310 (“The inference that the defendant acted with scienter need not be irrefutable, but it must be more than merely ‘reasonable’ or ‘permissible’—it must be cogent and compelling, thus strong in light of other explanations.”).
But I do not think the case has been made that achieving this requires clearly separating out group lies from sincere beliefs.

Instead, what seems to me to matter is rather that the procedure used for deciding upon which utterances shall be made is improper, and we normatively ought to intervene upon it. Whether a group utterance is a lie rather than a reflection of a sincere belief is orthogonal to whether the utterance is the sort of thing we should activate accountability mechanisms to deal with.\textsuperscript{95}

To support this criticism, Bright offers the following revision of TOBACCO COMPANY:

REVISED TOBACCO COMPANY: “Revise the case such that, instead, just as they are about to engage in the process that constitutes group belief formation, and quite outside of their control or even knowledge, Anansi casts a charm over the board members and they all come to sincerely affirm the claim they were about to affirm on spurious grounds. As such, without it in any way reflecting on their own epistemic efforts, the board members now sincerely believe the claim they induce the company to affirm. The group belief is now entirely reflective of the real belief of those so authorized to make epistemic decisions for the company.”\textsuperscript{96}

The point is that the group’s decision-making procedure is what determines whether a group is lying. Once Anansi pulls the strings, the tobacco company is no longer lying because Anansi has determined that the members genuinely believe the false claim (thus failing Condition (2) of Lackey’s definition of lying).

Thus, Bright shows that we don’t have to be summativists to distinguish beliefs from lies. So long as we normatively evaluate the procedure, rather than the outcome, we can distinguish between group beliefs and lies even if we are nonsummativists. The legal crux is this. Per the PSRLA, what we do at the pleadings stage in 10b-5 litigation is “strongly infer” a group lie (or group bullshit) from the complaint, assuming the allegations are true. Per \textit{Tellabs}, this means inferring the group lie (or group bullshit) is at least as compelling as inferring a genuine group belief. And, as Bright instructs, summativists and nonsummativists alike can distinguish group lies and bullshit from genuine group beliefs.

The reason is that accountability lies “with the procedure used for deciding upon which utterances shall be made is improper.”\textsuperscript{97} But if summativist judges who

\textsuperscript{95} Liam Kofi Bright, \textit{Group Lies and Reflections on the Purpose of Social Epistemology}, XCIV ARISTOTELIAN SOCY SUPPLEMENTARY VOL. 209, 213 (2020).

\textsuperscript{96} Id. at 214.

\textsuperscript{97} Id. at 213.
adopt **Narrow Pleading** are dismissing complaints, corporations lack incentive to improve the communicative processes that “we normatively ought to intervene upon” in the case of reckless (i.e., bullshit) or knowledgeable (i.e., lie) collective misstatement.

This concern shows how the argument for **Narrow Pleading** equivocates “scienter.” To successfully plead scienter is to demonstrate a non-zero probability of scienter attributable to the corporation. **Summativism** assigns a probability of zero to any ascription of collective scienter. Thus, summativist judges contend that it is impossible to ever plead collective scienter successfully. But even if a summativist judge may never *ascribe* scienter to a collective, such a judge may still *infer* scienter attributable to a corporation from allegations of collective scienter. That is the legal import of Bright’s insight.

To see how Bright’s claim applies to securities pleading, consider two possible scienters that we may find later on in discovery. One is the scienter of the person making the misstatement or the person withholding information. Another is recklessness by the person who designed the communication protocols that allowed those people to go on without talking to each other. In either case, we ultimately end up with a natural person whose scienter we may impute to the corporate defendant. It is scienter like these that corporations ought to answer for.

It is also for this reason that **Broad Pleading** need not commit judges to accepting group pleading:

“Suppose a clerical worker in the company’s finance department accidentally overstated the company’s earnings . . . . Even if senior management had been careless in failing to detect the error, there would be no corporate scienter. Intent to deceive is not a corporate attribute—though not because “collective intent” or “shared purpose” is an oxymoron. It is not. A panel of judges does not have a single mind, but if all the judges agree on the decision of a case, the decision can properly be said to represent the collective intent of the panel, though the judges who join an opinion to make it unanimous may not agree with everything said in it. The problem with inferring a collective intent to deceive behind the act of a corporation is that the hierarchical and differentiated corporate structure makes it quite plausible that a fraud, though ordinarily a deliberate act, could be the result of a series of acts none of which was both done with scienter and imputable to the company by the doctrine of *respondeat superior*. Someone low in the corporate hierarchy might make a mistake that formed the premise of a statement made at the executive level by someone who was at worst careless in having failed to catch the mistake. A routine invocation of *respondeat superior* . . . . would, if applied to a

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98 *Id.*
99 *See Southland*, 365 F.3d at 353.
securities fraud that requires scienter, attribute to a corporation a state of
mind that none of its employees had. [100]

In essence: SUMMATIVISM is no excuse to permit corporations to escape
liability for genuinely fraudulent misstatements or omissions. Scholarship from
collective epistemology shows us that we may coherently adopt SUMMATIVISM and
BROAD PLEADING.

III. CONCLUSION

The doctrine of respondeat superior, according to which a principal may face
liability for the illegal conduct of its agents, undergirds NARROW PLEADING.

But this doctrine originated in Ancient Rome in the context of slave owners facing
liability for the conduct of their slaves. Extending the framework has proved
untenable in the context of modern-day corporations, which allow for
unprecedented distribution of information and, crucially, responsibility. The pleading
standards for the former have precluded meritorious investigations into claims of the
latter. It is time we update our pleading standards accordingly.

Some disagree. For example, Judge Gerard E. Lynch of the Southern District
of New York (now on the Second Circuit), held in a case where the plaintiffs sought
to maintain their claims against the corporation after having released all of its agents,
attempts to impose corporate liability without the strictures of the common law of
agency are: “nothing but a subtle attempt … to take the sweet without the bitter, to
import common-law principles like respondeat superior into the federal securities
context … while at the same time demanding that traditional limitations on those
doctrines be ignored. Such selective adoption of common law principles cannot be
justified.” [103]

But new contexts demand new analysis. Much of the premise of respondeat
superior is preserved in the context of large corporations – employees answer to
those above them, and executives are response for those below them. But
corporations distribute knowledge and information through extremely large, often
global, internal organization, delegating everyday operations into increasingly small
components. [104] Just because the parts are distributed does not mean that the parts do

[100] Makor, 513 F.3d at 707.
(“[A]gency and respondeat superior are common law doctrines used to establish vicarious
liability under both common law and statutory causes of action. As such, the common law
principles ... apply to the liability of a principal regardless of the underlying substantive basis
of legal liability of the agent.”) (citation omitted).
[102] See generally Rory Van Loo, The Revival of Respondeat Superior and Evolution of Gatekeeper Liability,
not nonetheless form a sum when added together. Roman judges did not dissect slaveowners’ brains. But because judges adopting **Narrow Pleading** effectively do dissect corporations into parts too small to face liability, corporations have incentive to forum shop into these jurisdictions to escape liability and often do.

What I hope to have shown in this paper is that **Summativism** is no excuse to permit corporations to escape liability. Scholarship from collective epistemology shows us that we may coherently adopt **Summativism** and **Broad Pleading**. This validation allows us to get corporate incentives right by avoiding the encouragement of willful ignorance (since willful ignorance serves to decrease the probability that someone at the corporation will both make an actionable misstatement and hold the requisite uncertain). This, in turn, alleviates concern about preserving scienter and avoiding the frivolous litigation that could occur under a strict liability regime. The resulting judicial methodology aligns with the refinement of PSLRA found in *Tellabs*, which requires courts to weigh competing inferences of culpability versus non-culpability when deciding motions to dismiss 10b-5 claims. Thus, judges would benefit from studying the philosophers.

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105 Id.
106 See id.