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# MOOT COURT BOARD

Orison S. Marden Moot Court Competition  
Preliminary Round Problem, Fall 2024

Allison Chung et al.,  
Appellant,

-against-

Veridium Corporation,  
Appellee.

Memorandum of Law

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## **QUESTION PRESENTED**

In a securities fraud complaint, may a court discount the allegations of a confidential witness in making an inference of scienter?

## **STATEMENT OF FACTS**

At the time of this suit, Veridium Corporation (“Veridium”) is one of the largest pharmaceutical companies in the country. Veridium started trading on the New York Stock Exchange in February 2002. On Monday, April 6th, 2020, at Veridium’s annual shareholders’ meeting, the company announced that it was on the brink of obtaining regulatory approval for a groundbreaking new cancer treatment drug, Oncorinex. On April 7th, 2020, soon after learning about Oncorinex’s impending clinical approval, Plaintiff Allison Chung, and many others, bought shares in Veridium. The propitious news sent Veridium’s shares soaring 14% by the end of the week.

Two months later, the news was not so favorable. In June 2020, the U.S. Food and Drug Administration (“FDA”) issued Veridium a refuse-to-file letter, the contents of which the FDA did not publicly release. The FDA issues a refuse-to-file letter when it concludes a drug application is deficient to proceed to full review. The letter explains the FDA’s reasoning.

In the same month, ABC News broadcasted a report on concerns regarding Oncorinex’s safety. The report alleged that Oncorinex’s clinical trials showed a link between patients’ use of Oncorinex and liver failure. ABC claimed to have received the information in the report from a corporate insider. Veridium’s shares subsequently fell by 20%.

Soon after, Allison Chung and other Veridium shareholders, who had also purchased Veridium shares between April and June 2020, sued Veridium in the District Court of New York for violating section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. § 78j(b), and Securities and Exchange Commission (“SEC”) Rule 10b-5, 17 C.F.R. § 240.10b-5, which prohibit material misrepresentations and misleading omissions in connection with the sale or purchase of a security. Plaintiffs allege that Veridium made false and misleading statements to investors about the likelihood that regulators would approve Oncorinex. Plaintiffs argue that Veridium’s conduct constituted a fraudulent scheme to deceive investors and to artificially inflate the company’s stock prices.

In their complaint, Chung and the class members rely on the testimony of a confidential witness, identified as “CW-1,” who claimed to be a former high-ranking lab technician at Veridium. CW-1 claimed that Veridium’s senior management knew that Oncorinex was unsafe and provided an alleged copy of the results of Oncorinex’s

animal studies, which suggest that mice reacted poorly when exposed to Oncorinex and that Oncorinex may have a similar effect on humans. The document was dated to 2011 when Oncorinex development was in its earliest phase.

In the complaint, Plaintiffs cite CW-1's allegation that the test results were submitted to Veridium's executives for review, but there is no way to verify that claim based on the complaint and single exhibit. Plaintiffs' complaint also includes a description of CW-1's responsibilities when they were employed at Veridium. The complaint asserts that CW-1 left the company within the last five years.

### **PROCEDURAL HISTORY**

Veridium moved to dismiss Plaintiffs' complaint under Rule 12(b)(6). Fed. R. Civ. P. 12(b)(6). In a Rule 10b-5 lawsuit, a plaintiff must establish, *prima facie*, the defendant's scienter, which means their intent to deceive. *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976) (concluding that, "in the absence of any allegation of 'scienter' intent to deceive manipulate, or defraud," a private plaintiff fails to establish a cause of action under Rule 10b-5).

Veridium, in its motion to dismiss, argued that Plaintiffs' complaint failed to meet the requirements of section 21D of the Private Securities Litigation Reform Act ("PSLRA"), which establishes heightened pleading requirements for plaintiffs in securities lawsuits. Specifically, section 21D requires that plaintiffs, "with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2)(A). Veridium claimed that because CW-1's testimony was unreliable, the complaint failed to establish the scienter necessary to state a claim under section 10(b) of the Exchange Act.

The district court granted Veridium's motion. Plaintiffs appealed the ruling to the Fourteenth Circuit, which reversed.

Veridium petitioned the Fourteenth Circuit for a rehearing en banc. That petition was granted. Now, before the Court en banc is the question of whether, in a securities lawsuit, a court may discount the allegations of a confidential witness in making an inference of scienter.

### **SUMMARY**

A circuit split exists regarding whether, when evaluating a securities fraud complaint, a court may discount the testimony of a confidential witness when evaluating the defendant's scienter. The majority of circuits hold that the statements and observations of confidential witnesses cannot be wholly disregarded. A minority of circuits automatically discount the information provided by confidential witnesses.

If the Fourteenth Circuit adopts the majority approach, it will inquire into the “foundation or basis of the confidential witness’s knowledge, including the position(s) held, the proximity to the offending conduct, and the relevant time frame.” *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1240 (11th Cir. 2008). From there, the Court may still dismiss the case if it determines that CW-1’s statements do not satisfy the PSLRA requirement that plaintiffs plead scienter with particularity. If the Fourteenth Circuit adopts the minority approach, it will disregard CW-1’s allegations by default and grant Veridium’s motion to dismiss.

Veridium will urge the court to adopt the minority approach and disregard CW-1’s statements entirely. It will likely contend that anonymity compromises credibility and thus automatically precludes making an inference that its executives had the requisite intent to defraud. Veridium can also argue in the alternative that, should the court adopt the majority approach, the limited information available about CW-1 is insufficient to support an inference of scienter.

Plaintiffs will argue that the court should follow the majority circuit approach and give weight to CW-1’s testimony. Plaintiffs will likely claim that detailed allegations mitigate concerns about anonymous witness’ credibility, especially when paired with by other evidence. They can also argue that the level of detail conveyed in the complaint, along with corroborating evidence, should determine whether scienter has been pled with sufficient particularity.

## **DISCUSSION**

### **I. The Dispute Focuses on Whether the Court Should Find Confidential Witness’s Allegations Sufficient to Establish a Claim for Securities Fraud.**

Section 10(b) of the Exchange Act and Rule 10b-5 prohibit material misrepresentations and misleading omissions in connection to a sale or purchase of securities. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. To establish liability, private plaintiffs must show that a defendant acted with “scienter intent to deceive, manipulate, or defraud.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976) (internal quotation marks omitted).

Section 21D of the PSLRA (designed to limit frivolous suits by raising the pleading standard for securities complaints) also requires that plaintiffs plead with sufficient particularity “facts giving rise to a strong inference that the defendant acted with the required state of mind” to survive a motion to dismiss. 15 U.S.C. § 78u-4(b)(2)(A). A “strong inference” must be demonstrated by “knowledge of the statement’s falsity or reckless disregard of a substantial risk that the statement is false.” *Higginbotham v. Baxter Int’l, Inc.*, 495 F.3d 753, 756–57 (7th Cir. 2008). An inference of scienter in a securities fraud complaint must be more than merely “reasonable” or “permissible” to satisfy the PSLRA. It must be (1) “cogent and

compelling . . . in light of other explanations” and (2) “cogent and at least as compelling [to a reasonable person] as any opposing inference one could draw from the facts alleged.” *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 324 (2007). In applying this standard, “the court must take into account plausible opposing inferences.” *Id.* at 323.

One of the several common pleading tactics plaintiffs rely on is the use of confidential witnesses. *See, e.g., id.* at 316 (explaining that shareholder plaintiffs “amended their complaint, adding references to 27 confidential sources”). However, the anonymity of confidential witnesses raises questions as to whether courts can rely on their testimony to infer a defendant’s scienter, as required by the PSLRA. *Higginbotham*, 495 F.3d at 756–57.

## **II. Appellee’s Likely Arguments**

Appellee will argue that the court should reject CW-1’s allegations categorically at the motion to dismiss stage because a confidential witness’s anonymity “obstruct[s]” a court’s ability to “take account of plausible opposing inferences” and to determine whether the information provided “could be deemed ‘compelling.’” *Higginbotham v. Baxter Int’l., Inc.*, 495 F.3d 753, 756–57 (7th Cir. 2008).

### **A. Appellee Will Urge the Fourteenth Circuit to Adopt the Minority Approach and Categorically Reject the Confidential Witness’s Allegations.**

In *Higginbotham*, the Seventh Circuit imposed the strictest dismissal of confidential sources to date. Writing for the majority, Judge Easterbrook cast doubt on the motives of the confidential sources cited by the plaintiffs: “Perhaps these confidential sources have axes to grind. Perhaps they are lying. Perhaps they don’t even exist.” *Id.* at 757. For similar reasons, district courts in the Second Circuit also increasingly disfavor confidential witnesses. In *Plumbers and Pipefitters Local Union No. 630 Pension-Annuity Trust Fund v. Arbitron Inc.*, the court granted the defendant’s motion to compel disclosure of confidential witnesses’ identities to relieve concerns that plaintiff was “utiliz[ing] the [confidential witnesses] offensively” and that the defendant would endure “undue hardship” to take “dozens of additional depositions of former employees.” No. 08 Civ. 4063(PAE), 2011 WL 5519840, at \*341–42 (S.D.N.Y. Nov. 14, 2011) [hereinafter *Arbitron*]. Later, the court in *In re Bear Stearns Companies, Inc. Securities, Derivative, and ERISA Litig.*, citing *Arbitron*, noted that “where a party has attempted to satisfy the pleading requirements of the [PSLRA] by showcasing statements from a limited number of confidential witnesses, the plaintiff may not thereafter refuse to disclose the identity of those witnesses on the grounds of work product.” No. 08 MDL 1963(RWS), 2012 WL 259326, at \*2–3 (S.D.N.Y. Jan. 27, 2012).

In this case, Appellee will likely emphasize that, given the lack of detail in the record describing the confidential witness, the court and Appellee would struggle to make educated guesses as to CW-1's identity. This uncertainty undermines the assertion that CW-1 is telling the truth either about their background as a former executive at Appellee's corporation or about their knowledge of Appellee's internal operations. In a pharmaceutical corporation as large as Veridium, a description of CW-1's identity as vague as a former "high-ranking clinician" who left the company in the last five years is unspecific.

Appellee will argue that without knowing who CW-1 is, it is impossible to evaluate whether they may have personal reasons or financial incentives for providing false information. Appellee will also raise concerns about the timing of CW-1's decision to come forward: the confidential witness only emerged after the news about the side effects of Appellee's drug broke on national television. Appellee may suggest that CW-1 may have fabricated allegations to capitalize on Appellee's plight. Thus, it is impossible to know which opposing inferences are more plausible.

Since *Tellabs, Inc. v. Makor Issues & Rts., Ltd.* requires that the plaintiff to identify particular facts that point to a strong inference of the defendant's scienter, 551 U.S. 308, 323 (2007), the questionable veracity of CW-1's testimony culminates in a failure to meet the standard mandated by the Supreme Court.

**B. Appellee Will Address Instances in Which the Seventh Circuit Stopped Short of a Categorical Dismissal of Confidential Sources.**

Despite *Higginbotham*'s "steep" discount of confidential sources, the majority conceded that there are situations "in which statements by anonymous sources may corroborate or disambiguate evidence from disclosed sources." 495 F.3d at 757. "Because it is impossible to anticipate all combinations of information that may be presented in the future, and because *Tellabs* instructs courts to evaluate the allegations in their entirety, . . . 'confidential witnesses' must be 'discounted' rather than ignored." *Id.* Similarly, in a subsequent decision, the Seventh Circuit held that the statements of twenty-six confidential sources cited in a complaint satisfied the *Tellabs* standard and established the defendant's scienter. Judge Posner, writing for the majority, wrote that the "absence of proper names does not invalidate the drawing of a strong inference from informants' assertions." *Makor Issues & Rts., Ltd. v. Tellabs Inc.*, 513 F.3d 702, 711–12 (7th Cir. 2008) [hereinafter *Tellabs II*].

Appellee will address and explain the caveats the Seventh Circuit attached to the *Higginbotham* rule. Appellee will recommend that the Court understand *Tellabs II* as an exception to the principle laid out in *Higginbotham*. In other words, Appellee will attempt to convince the court that *Higginbotham*'s *per se* rejection of confidential witnesses controls unless the confidential witnesses are "numerous and consist of persons who . . . were in a position to know at first hand the facts to which they are

prepared to testify.” *Tellabs II*, 513 F.3d at 712.

Appellee will bring up three crucial points to show the *Higginbotham* rule, and not the *Tellabs II* exception, controls. First, given that Appellee is only relying on CW-1’s allegations, the numerosity specification in *Tellabs II* is not met and thus Appellee still has not sufficiently drawn a compelling inference of scienter. Second, given the abundance of information that the informants provide in *Tellabs II*, the absence of their names may not have hindered their credibility. To be clear, *Higginbotham* only discounts the sort of anonymity that “conceals information that is essential to the . . . comparative evaluation required by *Tellabs*.” *Higginbotham*, 495 F.3d at 757. Put differently, despite their unknown names, the informants in *Tellabs II* can hardly be considered “confidential.” The plaintiffs in *Tellabs II* claimed that the defendant had knowingly misrepresented the sales of its most important fiber optic products. As proof of scienter, they offered the testimonies of twenty-six employees who claimed to personally know the data on the products in question, that their sales were “dropping off a cliff,” and that the one of the products was failing its performance tests. *Tellabs II*, 513 F.3d 702 at 711–12. Compared to CW-1’s allegations, those of the confidential witnesses in *Tellabs II* provide markedly more detailed and relevant proof of the defendant’s scienter. Last, *Higginbotham* is still binding in the Seventh Circuit, and its language does not limit the discounting of allegations by confidential witnesses to the specific facts of that case.

**C. In the Alternative, Appellee Can Argue That, Even if Confidential Sources Are Considered, Not Enough Information About the Confidential Witness Is Available to Satisfy the Statutory Pleading Requirements.**

Appellee will argue that even if Appellant’s approach prevails, there is not enough evidence to corroborate CW-1’s allegations. While there is no singular standard to disprove a witness’s credibility, Appellee can highlight similarities to other cases.

CW-1’s claim to be a former lab clinician at Appellee’s corporation does not establish that they were in a position to know everything going on in the heads of other employees, as CW-1 never claimed to have encountered anyone with decision-making powers. Consider *Mizzaro v. Home Depot*, in which the Eleventh Circuit credited the statements of six confidential witnesses. 544 F.3d 1230, 1241–42 (11th Cir. 2008). Other than the first confidential witness (a regional manager), each held a store-level position and stated that widespread, company-wide fraud had occurred. *Id.* at 1242–43, 1247. That notwithstanding, the Eleventh Circuit held that the plaintiff did not meet the PSLRA requirement because the six witnesses did not seem to have sufficient contact with the defendants. *Id.* at 1247–48 (finding that none “of the confidential witnesses say that any one of the individual defendants ever discussed the alleged fraud or even knew about it,” and that “none of the confidential witnesses even claims to know or have so much as ever met any of the six individual

defendants.”).

Similarly, the fact that Appellant’s complaint only offers evidence from one confidential witness to show an element as crucial as scienter likely fails to establish that Appellant’s complaint allows a fact finder to infer the requisite mental state to survive the motion to dismiss.

Appellee will introduce other reasons against giving weight to CW-1’s testimony. For instance, the fact that CW-1 ceased to be Appellee’s employee in the last five years indicates that they may have out-of-date information about Veridium. Appellee will likely contend that because CW-1 never claimed to have had direct contact with Appellee’s senior management, the court should discount CW-1’s allegations just as other courts have discounted other confidential witnesses’ claims. In *Mizzaro*, for example, the Eleventh Circuit found that even though the six confidential witnesses’ claims of widespread fraud were credible, plaintiffs had failed to create a strong inference of scienter because none of the witnesses testified to having met the individual defendants, let alone knowing what the individual defendants were thinking. *See* 544 F.3d at 1247–48. Similarly, in *Zucco Partners, LLC v. Digimarc Corp.*, the Ninth Circuit held that the plaintiffs had failed to “provide the requisite particularity” necessary to rely on the confidential witnesses’ statements because “[s]ome of the confidential witnesses were simply not positioned to know the information alleged, many report[ed] only unreliable hearsay, and others allege[d] conclusory assertions of scienter.” 552 F.3d 981, 996 (9th Cir. 2009). Furthermore, Appellee may note that Appellant’s complaint did not attach “any affidavits or declarations [from CW-1] that would provide more detail or context to [CW-1’s] proffered testimony.” *See, e.g., Teamsters Loc. 237 Welfare Fund v. ServiceMaster Glob. Holdings, Inc.*, 83 F.4th 514, 527 (6th Cir. 2023) [hereinafter *Teamsters*] (holding that the confidential sources, without affidavits or declarations from the witnesses, whose job description was sparsely provided in the complaint, did not produce a strong enough inference of scienter). Appellee may argue that confidentiality compromises these witnesses’ potential to help Appellant’s case, which is the reason that the court should automatically disregard information provided by confidential witnesses.

#### **D. Appellee Will Raise Policy Arguments.**

Policy arguments may also support Appellee’s position, namely, that discounting confidential witnesses preserves judicial economy. The outright rejection of confidential sources at the pleading stage can save courts from administering lawsuits later revealed to be frivolous. That was the case in *City of Livonia Emps.’ Ret. Sys. v. Boeing Co.*, where an investigation by the defendant company revealed that the confidential witness “had never been employed by the company” but worked for its contractor. 711 F.3d 754, 759–60 (7th Cir. 2013). The misuse of confidential witnesses is not uncommon, suggesting that sapping judicial resources is a weighty concern. For example, in *In re Millennial Media, Inc. Sec. Litig.*, the court found that



four of nine confidential witnesses later repudiated “as inaccurate, misleading, or lacking a foundation in personal knowledge” statements attributed to them in the plaintiff’s complaint. No. 14 Civ. 7923(PAE), 2015 WL 3443918, at \*6 (S.D.N.Y. May 29, 2015).

Acknowledging the potential for wasting judicial resources, the District Court for the Southern District of New York has also repeatedly held for defendants on the grounds that any minimal work product protection associated with confidential witnesses’ identities may be outweighed by the defendants’ need for information and the substantial burden they would bear if forced to identify the confidential witnesses through other means. *See, e.g., Arbitron*, 2011 WL 5519840, at \*342 (holding that “the cost of preparing for and taking dozens of additional depositions of former employees would impose a substantial expense on the company”); *In re Am. Int’l Grp., Inc. 2008 Sec. Litig.*, No. 08 Civ. 4772 (LTS) (DF), 2012 WL 1134142, at \*4 (S.D.N.Y. Mar. 6, 2012) [hereinafter *In re AIG*] (holding that “the difficulty Defendants would face in trying to ascertain the identity of these witnesses from otherwise available information is a burden that overcomes Plaintiffs’ need for protection”).

The Second Circuit has similarly remarked that the use of confidential witnesses prevents courts from accurately weighing competing inferences drawn from a complaint, which *Tellabs* requires. 551 U.S. at 324. In *Campo v. Sears Holdings Corp.*, for example, the Second Circuit permitted the district court to order depositions of confidential witnesses to dispel the concerns about credibility. 371 Fed. App’x. 212, 216 n.4 (2d Cir. 2010) (finding that the district court made no error when it “relied upon the deposition testimony for the limited purpose of determining whether the confidential witnesses acknowledged the statements attributed to them in the complaint”). Later, in *In re AIG*, the court remarked that “the difficulty Defendants would face in trying to ascertain the identity of these witnesses from otherwise available information is a burden that overcomes Plaintiffs’ need for protection.” 2012 WL 1134142, at \*4. Given the substantial probability that confidential witnesses eventually turn out to be unreliable, and given the volume of cases straining judicial resources, Appellee will ask that the court not create a precedent that further burdens the Fourteenth Circuit.

### **III. Appellant’s Likely Arguments**

Appellant will argue that (1) confidential sources, as a matter of law, may be considered by courts, and (2) the facts here are sufficient to make out a claim for securities fraud.

#### **A. Appellant Will Argue for the Majority Approach and Give Weight to Allegations by Confidential Witnesses.**

The Eleventh Circuit has held that while the confidential status of a witness may impact the weight afforded their allegations, that status “should not eviscerate

the weight given if the complaint otherwise fully describes the foundation or basis of the confidential witness's knowledge, including the position(s) held, the proximity to the offending conduct, and the relevant time frame." *Mizzaro v. Home Depot*, 544 F.3d 1230, 1240 (11th Cir. 2008).

Appellant will contend that the *Mizzaro* decision is especially crucial because it draws from pre-*Tellabs* case law that affords confidential sources some leeway if there is enough information about their probability of possessing the information, highlighting the long-standing judicial convention backing up the majority approach. See, e.g., *Novak v. Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000) (holding that confidential sources may stay confidential "as long as they supply sufficient specific facts to support their allegations"); *Cal. Pub. Empes.' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 147–48 (3d Cir. 2004) (finding that facts supporting confidential sources' allegations must be "described . . . with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged" (quoting *Novak*, 216 F.3d at 313–14)). Indeed, several circuits follow a similar reasoning to that of the Second Circuit in *Novak*. See, e.g., *N.J. Carpenters Pension & Annuity Funds v. Biogen IDEC Inc.*, 537 F.3d 35, 51 (1st Cir. 2008) (indirectly quoting *Novak* that "[w]here plaintiffs rely on confidential sources but also on other facts, they need not name their sources as long as the latter facts provide an adequate basis for believing that the defendants' statements were false" (quoting *In re Cabletron Sys., Inc.*, 311 F.3d 11, 29 (1st Cir. 2002) (quoting *Novak*, 216 F.3d at 314))).

Appellant will argue that because the Fifth and Sixth Circuits switched to adopt the majority approach in recent years, the Fourteenth Circuit should do the same. Following *Higginbotham*, these two circuits were among the first to adopt the automatic steep discount approach. See, e.g., *Ind. Elec. Workers' Pension Tr. Fund IBEW v. Shaw Grp., Inc.*, 537 F.3d 527, 535 (5th Cir. 2008) (holding that "courts must discount allegations from confidential sources" because "anonymity frustrates the process" of "weigh[ing] the strength of plaintiffs' favored inference in comparison to other possible inferences" that "*Tellabs* requires" (quoting *Higginbotham*, 495 F.3d at 757)); *Ley v. Visteon Corp.*, 543 F.3d 801, 811 (6th Cir. 2008) ("[A]llegations of confidential witnesses must be discounted and '[u]sually that discount will be steep'" (quoting *Higginbotham*, 495 F.3d at 757) (alterations in original)), *abrogated on other grounds* by *Doshi v. Gen. Cable Corp.*, 823 F.3d 1032, 1039 (6th Cir. 2016).

Recent cases evidence the Fifth and Sixth Circuit's receptiveness to investigate the particularity of the complaint to decide how much weight to give to confidential witnesses' allegations. See, e.g., *Okla. Firefighters Pension & Ret. Sys. v. Six Flags Ent. Corp.*, 58 F.4th 195, 208 (5th Cir. 2023) [hereinafter *Firefighters*] ("only minimally" discounting a confidential source "for his anonymity and lack of corroborating witnesses"); *Teamsters*, 83 F.4th at 527 (holding that the plaintiff's scienter allegations were ultimately not more plausible than "the more plausible, non-culpable inference," but first finding that those allegations, which relied on four confidential witnesses, were sufficiently plead to be at least plausible).

Appellant will use these precedents to highlight the similarity of the confidential source in *Firefighters*, whose job description was the defendant’s “Director of International Construction and Project Management,” along with their dates of employment and a list of responsibilities, to the complaint’s inclusion of CW-1’s background information. *Firefighters*, 58 F.4th at 208. (explaining that “[w]hen confidential sources ‘consist of persons who from the description of their jobs were in a position to know at first hand the facts,’ and there is ‘convincing detail’ to the information they provide, there is reason to credit the informants’ reliability” (quoting *Tellabs II*, 513 F.3d at 712)).

Finally, Appellant will also draw the court’s attention to the door that *Higginbotham* left ajar when it stated that “[i]t is possible to imagine situations in which statements by anonymous sources may corroborate or disambiguate evidence from disclosed sources.” 495 F.3d at 757. Likewise, *Tellabs II* explicitly allows witnesses to remain confidential if certain conditions are met. 513 F.3d at 711–12 (giving confidential allegations weight because “the confidential sources listed in the complaint . . . [were] numerous and consist[ed] of persons who from the description of their jobs were in a position to know at first hand the facts to which they [were] prepared to testify”). Appellant will then undermine Appellee’s case by contending that even the Seventh Circuit recognizes that confidential witnesses can be minimally discounted in some circumstances, such as when “[t]he information the confidential [witnesses] are reported to have obtained is set forth in convincing detail” and “some of the information [has been] corroborated by multiple sources.” *Id* at 712. Here, CW-1 was a lab technician with supervising duties, indicating a certain level of seniority. Their alleged position is supported by their possession of the results of the animal study. Common sense may suggest that only highly involved employees would be privileged with such crucial information, and that CW-1’s allegations are credible enough at this stage of the dispute.

**B. Appellant Will Argue That CW-1’s Allegations Are Sufficiently Particular to Satisfy the PSLRA’s Heightened Pleading Requirement.**

The Third Circuit instructs that it is “important to distinguish deficiencies relating to the content of allegations from those relating to their form.” *Institutional Invs. Grp. v. Avaya, Inc.*, 564 F.3d 242, 263 n.33 (3d Cir. 2009). The Ninth Circuit concurs and further explains that “[t]he problem for [plaintiff] is not that the confidential witnesses are inadequately identified—the problem is that these witnesses do not convey information sufficient to support the strong inference of scienter that the PSLRA requires.” *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1069 n.13 (9th Cir. 2008). After arguing that confidential sources should not be steeply discounted, Appellant will show that the complaint established a probability that CW-1 possesses the information claimed, satisfying the PSLRA and *Tellabs* requirement of scienter.

Appellant will first argue that having only one confidential witness is not detrimental to their case, by drawing comparisons to *Firefighters*. The court in *Firefighters* found the one confidential source credible because “the complaint’s details about the responsibilities of his position [were] directly relevant to the events at issue” and because the source’s account was corroborated by other evidence. 58 F.4th 195 at 208.

Appellant will counter Appellee’s position that proffering more witnesses is less costly. Courts have deemed this practice to be a burden on defendants. For example, in *In re Netbank, Inc. Sec. Litig.*, the court compared determining the identities of seven confidential witnesses to “a needle-in-haystack search,” describing the “burden” as “time-consuming, wasteful and expensive.” 259 F.R.D. 656, 677 (N.D. Ga. 2009) (citation omitted). Similarly, in *In re Aetna Inc. Sec. Litig.*, the court required the plaintiffs to disclose the names and addresses of all the individuals who claimed to have knowledge pertaining to their allegations, saving the defendant from going through 750 individual statements and preventing the case’s discovery process from being “subverted.” No. CIV. A. MDL 1219, 1999 WL 354527, at \*4 (E.D. Pa. May 26, 1999).

In this case, Appellant will argue that a lab clinician is more likely than not to have first-hand knowledge of Oncorinex’s development and of any according challenges. Because CW-1 claims to have held a high-ranking position with specific supervisory duties (mentioned in Appellant’s complaint) in a Veridium lab, it is plausible that CW-1 communicated with Veridium executives who had decision-making power and were aware of the drug’s defects. Moreover, Appellant will point to the presence of corroborating evidence, such as the results from Oncorinex’s 2011 animal study, to emphasize that CW-1’s position provided them access to confidential information, increasing the probability that they truthfully possess relevant information. *See, e.g., Firefighters*, 58 F.4th at 208 (giving weight to the confidential source due to the presence of corroborating evidence).

### **C. Appellant Will Raise Policy Arguments.**

Appellant will counter the concerns about confidential sources raised in *Higginbotham*—that confidential sources are categorically unreliable because they may have “axes to grind,” lie, or not “even exist.” 495 F.3d at 757. Appellant will argue that this concern is misplaced at the motion to dismiss stage. Appellant will note that, when ruling on a motion to dismiss, the court is obligated to assume that all facts alleged in the complaint are true. Therefore, whether CW-1 has an ulterior motive is irrelevant. The key factor is whether they have given enough facts of sufficient particularity. *See In re Thornburg Mortg., Inc. Sec. Litig.*, 695 F. Supp. 2d 1165, 1177 n. 11 (D.N.M. 2010) (writing that the court would “decide what weight to give such statements based upon the information the Plaintiffs give about the source and the detail of the information”).

Appellant will also attempt to mitigate the *Higginbotham* concern by citing other statutory measures that are already in place to address untruthful witnesses, such as Federal Rule of Civil Procedure 11. *See* Fed. R. Civ. P. 11(b)(3) (requiring that the “factual contentions” in court filings “have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery”); *see also In re MTI Tech. Corp. Sec. Litig. II*, No. SACV 00-0745 DOC, 2002 WL 32344347, at \*5 (C.D. Cal. June 13, 2002) (“The only proper challenge to the sufficiency of the underlying basis for Plaintiffs’ complaint allegations would be a motion brought pursuant to Federal Rule of Civil Procedure 11”). The rule authorizes district courts to sanction attorneys if the pleading is improper, thereby making them additional gatekeepers in charge of vetting the information provided by confidential witnesses. *See* Fed. R. Civ. P. 11(b), (c) (“If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction”). In addition, the particularity requirement of section 21D of the PSLRA also guides the court to distinguish between frivolous securities complaints and meritorious ones. In other words, if the Fourteenth Circuit is concerned about enabling future plaintiffs to file baseless complaints—backed up by confidential witnesses whose dishonesty will only be uncovered in discovery—the court should rest assured that there are other procedural rules mitigating the chance of fraud.

Appellant will also argue that the court should not categorically disregard confidential witnesses because they contribute to effective regulatory enforcement and monitoring against securities fraud by providing “critical information to investigators in meritorious cases or invit[ing] retaliation against them.” *Novak*, 216 F.3d at 314. If the court requires confidential witnesses to give up so much information that they become easily identifiable, the risk of retaliation from powerful securities defendants will deter future witnesses from coming forward.

## **CONCLUSION**

Appellant and Appellee will argue about the correct legal standard, and then discuss how the facts apply under that standard. They will first discuss which approach the court should adopt with regard to confidential witnesses in securities fraud complaints and then investigate the particularity of the information provided by the confidential witness in this case. While the majority of circuits favor Appellant, Appellee has the advantage when it comes to the more fact-intensive inquiry. Both have the opportunity to make persuasive policy arguments.