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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.

Record

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QUESTION PRESENTED

Whether courts may discount the allegations of confidential witnesses in determining an inference of scienter in securities fraud complaints.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW ORK

Allison Chung, et al.,

Plaintiff,

-against-

Veridium Corporation

Defendant.

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Docket No. 650328/2020

OPINION AND ORDER ON
MOTION TO DISMISS

Lebovitz, J.:

INTRODUCTION

The question presented to this Court addresses whether confidential sources should be steeply discounted in a complaint alleging a violation of section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), and of Rule 10b-5, 17 C.F.R. § 240.10b-5. Plaintiffs contend that allegations by confidential witnesses are entitled to the same treatment as those by their non-confidential counterparts. Defendant argues, however, that this Court should heavily discount confidential witnesses' allegations. We consider this question on Defendant's motion to dismiss.

FACTUAL BACKGROUND

Veridium Corporation ("Veridium") was incorporated in 1990 with the stated purpose to "improve global health outcomes by researching, developing, manufacturing, and distributing innovative and effective medications." Since its inception, Veridium has introduced many medical products to the market. In 2010, Veridium mentioned in its Form 10-K to the U.S. Securities and Exchange Commission ("SEC") that it had taken tentative steps to enter a clinical trial for a new drug intended to prevent colon cancer cells from proliferating by disrupting the DNA replication process. In 2015, Veridium formally named the product "Oncorinex" in another Form 10-K submission to the SEC.

On April 6th, 2020, Veridium held its annual shareholder meeting and announced that Oncorinex's trials on a thousand people were "going as planned." A Veridium representative also announced that the population study constituted the last phase of the experimental drug's clinical trial and that the company was waiting to receive "good news" from the U.S. Food and Drug Administration ("FDA"). After the news circulated, Veridium's share price rose 14%, from \$27 to \$30, that week.

Two months later, in June 2020, the FDA notified Veridium and published notice on its website that it had issued a refuse-to-file letter to Veridium regarding the company's marketing application for Oncorinex. Although federal law mandates that the content of such letters be kept confidential from the public, a refuse-to-file letter serves to notify a drug developer that its application is incomplete due to a deficiency or deficiencies and that the drug will not proceed to a full review.

Shortly after, in late June, ABC News allotted one of its breaking news segments to report on an alleged high correlation between the consistent usage of Oncorinex and hepatitis, a type of liver inflammation. ABC News' source claimed to be from inside the company and gave an interview detailing the chemical makeup of Oncorinex and how it likely leads to irreversible liver failure. Immediately after, Veridium's share price fell 20%, to \$24.

During the two-month-long "Class Period" between early April 2020, when Veridium declared that Oncorinex's approval was on the horizon, and late June 2020, when ABC News broadcast aired, Plaintiffs purchased stock in Veridium. Their complaint asserts claims against Veridium for violations of Rule 10b-5 and of § 10(b) of the Securities Exchange Act of 1934. Plaintiffs contend that Veridium "materially misled the investing public" by making "rosy statements regarding a new anticancer drug" that induced them into buying shares at an artificially inflated price.

The complaint introduces CW-1, a self-proclaimed former senior laboratory clinician at Veridium. CW-1's responsibilities at the company included clinical trial design, patient recruitment, study implementation and monitoring, data collection and analysis, adverse event reporting, regulatory compliance, and supervision of subordinates. The list does not make explicit whether CW-1 had a close working relationship with Veridium's executives or whether CW-1 ever exchanged words with them. CW-1 reportedly left Veridium no sooner than five years before the filing of this suit in late 2020.

CW-1's allegations in the complaint put forward that the Veridium executives who made the misstatement at the shareholder meeting knew that Oncorinex was not safe for human consumption. Plaintiffs argue this establishes that Veridium was in the state of mind to defraud investors. To strengthen this claim, CW-1 pre-sented a copy of a report on Oncorinex's performance in animal studies, which are required during the Investigational New Drug Process (the earliest phase of any experimental new drug's clinical research to obtain FDA approval). The report, dated back to September 2011, shows that the use of Oncorinex resulted in organ failure in a large sample of mice. The report also extrapolates the biological similarities of mice and humans and predicts the same potential safety concerns in humans. Plaintiffs' complaint stated that the report was presented to Defendant's senior management as part of a routine check, but the version submitted along with the complaint is a copy without any signature.

Veridium has moved to dismiss for failure to state a claim, arguing that Plaintiffs have failed to meet the pleading requirements for scienter set out by section 21D(b)(2) of the Private Securities Litigation Reform Act (“PSLRA”). Veridium also contends that Plaintiffs’ failure to provide more particular information about CW-1 renders the complaint unable to survive the motion to dismiss.

DISCUSSION

Pursuant to its authority under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), the SEC promulgated Rule 10b-5, which reads as follows:

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.

17 C.F.R. § 240.10b-5.

To plausibly allege a Rule 10b-5 violation, one of the elements that Plaintiffs must establish *prima facie* is Defendant’s scienter, namely, that it had the intention to deceive when carrying out the alleged fraudulent action. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 186 (1976). To clarify the pleading standard, Congress added section 21D to the PSLRA, Subsection (b)(2) of which specifically provides that:

. . . [I]n any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, 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).

The landmark Supreme Court holding, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, presents two guideposts to determine whether the alleged facts give rise to a “strong inference” of scienter: (1) a reasonable person must view Plaintiff’s contention as at least equally cogent and compelling when compared with reasonable alternative contentions; (2) courts must consider plausible opposing inferences when applying this standard. 551 U.S. 308, 309–10 (2007).

Plaintiffs’ showing of scienter cannot be said to have risen to the level of particularity required by the PSLRA and *Tellabs* because allegations from confidential witnesses are subject to an automatic discount. *Higginbotham v. Baxter Intl. Inc.*, 495 F.3d 753, 757 (7th Cir. 2008).

I. Confidential Sources Raise Questions of Credibility.

This Court is unable to set aside CW-1’s anonymity in assessing whether the provided information is “compelling” in the presence of opposing inferences. Confidential witnesses may have personal interests, grievances, or incentives that influence their willingness to come forward and the nature of the information they provide. *Id.* Without knowing more about who the witness is, this Court has no grounds to quiet doubts that CW-1 may be, for example, seeking financial rewards or retaliation against Veridium. The anonymity afforded to CW-1 may embolden them to make unfounded allegations or distort facts without fear of repercussions. Regardless of how potentially valuable their statements may be, the secrecy surrounding CW-1’s identity and motivations casts doubt on their reliability and trustworthiness.

This Court is not alone in its skepticism. The Second Circuit has compelled depositions and identifications of anonymous sources to supplement their reliability. *See, e.g., Campo v. Sears Holdings Corp.*, 371 Fed.App’x. 212, 216 n.4 (2d Cir. 2010) (upholding an order compelling depositions “for the limited purpose of determining whether the confidential witnesses acknowledged the statements attributed to them in the complaint”); *In re Bear Stearns Co., Inc. Sec., Derivative, and ERISA Litig.*, 08 MDL No. 1963, 2012 WL 259326, at *2 (S.D.N.Y. Jan. 27, 2012) (holding that disclosing the identities of confidential witnesses will not reveal any more of the work product of plaintiffs’ attorneys than already disclosed in the complaint).

Plaintiffs noted that confidential witnesses do not stay confidential forever, arguing that because their identities are revealed at the discovery stage Fed.R.Civ.P. 26(a)(1)(A)(i) (requiring that plaintiffs furnish defendants with contact information for all persons “likely to have discoverable information . . . the disclosing party may use to support its claims or defense”), their incentive to make unfounded allegations is less strong than this Court suggests. However, incidents where confidential witnesses turned out to have misrepresented the truth in their allegations are unfortunately all too common. In *City of Livonia Empl. Ret. Sys. v. Boeing Co.*, after the judge applied a heavy discount to the confidential witnesses in

the plaintiffs' first complaint, it was later discovered that one of those witnesses had never been employed at the defendant's company and was unlikely to have been in contact with its executives. 711 F.3d 754, 759–60 (7th Cir. 2013). In *In re Millennial Media, Inc. Sec. Litig.*—where four confidential witnesses eventually repudiated their statements—one confessed that he exaggerated what he said, another admitted to having only second-hand knowledge of the information he provided, and still another failed to recall details of his conversation with the investigator. 14 Civ. No. 7923 (PAE), 2015 WL 3443918, at *6–10 (S.D.N.Y. May 29, 2015). These episodes are representative of many more that district courts all over the nation have had to manage.

Moreover, the aforementioned examples justify a steep discount of confidential sources to discourage plaintiffs from building entire cases on such questionable foundations and misusing judicial resources. Assessing the credibility of confidential witnesses is more challenging than evaluating that of named witnesses. Factfinders may need to rely on circumstantial evidence, corroboration, or other indicia, which can complicate and prolong proceedings. See *Plumbers and Pipefitters Loc. Union No. 630 Pension-Annuity Trust Fund v. Arbitron, Inc.*, 278 F.R.D. 335, 340 (S.D.N.Y. Nov. 14, 2011) (compelling the plaintiff to identify their confidential witnesses to “expedite the discovery process . . . rather than having to engage in a costly process of elimination in which it would take numerous depositions simply to smoke out [the confidential witnesses from the disclosed names]”). In the worst-case scenario, if the allegations from confidential witnesses are inherently defective, the court and the defendants will have shouldered frivolous litigation costs without good cause, since these witnesses' identities will be revealed in discovery. *Higinbotham*, 495 F.3d at 757 (“Concealing names at the complaint stage thus does not protect informers from disclosure (and the risk of retaliation); it does nothing but obstruct the judiciary's ability to implement the PSLRA.”). For these reasons, this Court finds that the cost of waiting until discovery to assess CW-1's credibility outweighs the value of their allegations—if CW-1's information holds water, there ought to be other ways of establishing it without compromising judicial efficiency.

II. There Is Not Enough Background Information About CW-1 to Pass Muster.

Even if this Court agreed with Plaintiffs that the allegations of confidential witnesses should not always be discounted, there is still insufficient corroborating information about CW-1 to hold that their allegations produce a strong inference of scienter, as required by the PSLRA. Nothing in the complaint suggests that CW-1 was in a position to have first-hand knowledge of the Veridium executives' states of mind. See, e.g., *Mizzaro v. Home Depot*, 544 F.3d 1230, 1248 (11th Cir. 2008) (holding that the confidential sources failed to give rise to a strong inference of scienter because none claimed to “know or have so much as ever met any of the six individual defendants”).

The contextual details Plaintiff offered about CW-1 are incredibly vague. Neither CW-1's job title nor their job description mentions serving as a liaison with executives or other departments. A nominal status of "senior lab clinician" does not meaningfully narrow the scope of CW-1's identity since Defendant is one of the largest pharmaceutical companies in the country and employs tens of thousands clinicians of various seniority. The Ninth Circuit in *Contra Zucco Partners, LLC v. Digimarc Corp.* approved specific descriptions of confidential witnesses' employment information, including job titles as clear as "Director of the IT Department of Digimarc's ID Systems . . . who reported directly to [the defendant]," or "anonymous IT employee who worked extensively on [the defendant company's] implementation of the . . . accounting system and had direct knowledge of how [the defendant company] accounted for its inventory during the [relevant time period]," or "Human Resources manager until 2002 who reported to [a former company President]," but ultimately held that the plaintiff had not satisfied the PSLRA's pleading requirement for scienter because even such specificity failed to suggest that these witnesses knew the defendants' states of mind. 552 F.3d 981, 996 (9th Cir. 2009). Moreover, CW-1's five-year-wide departure window does not mitigate this Court's skepticism because it is unduly broad, especially given the thousands of other employees who likely departed a corporation of Veridium's size during that time. *Id.* at 997 (expressing discomfort with a confidential witness' failure to specify dates).

Given that the opacity surrounding CW-1 frustrates the judicial process, the task of jumping through hoops to determine their identity tips the balance of equities toward Defendant. *See, e.g., In re Am. Int'l Grp., Inc. 2008 Securities Litigation*, 08 Civ. No. 4772 (LTS) (DF), 2012 U.S. Dist. LEXIS 54099, at *17 (S.D.N.Y., Mar. 6, 2012) [hereinafter *In re AIG*] ("[T]he 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.").

Nor is Plaintiffs' corroborating evidence adequate to raise a strong inference of scienter. Even if Veridium's directors knew of the animal study report that CW-1 volunteered, the fact that Oncorinex did not perform well on one of the first stages in a lengthy clinical trial process does not necessarily mean its defects went unmodified for nearly a decade after. It is more believable that the drug's shortcomings in 2011 are unrelated to those that were discussed on ABC News in 2020. *Cf. Higginbotham*, 495 F.3d at 758 (finding that the claim that an employee's fraud was reported to headquarters "sometime in the May time frame" did not compel the conclusion that anyone who signed the May 10th 10-Q report knew about it). Because Plaintiffs did not produce an inference at least as strong as an alternative theory, as required by *Tellabs*, this Court must grant Defendant's motion to dismiss.

CONCLUSION

Plaintiffs have failed to show a strong inference that Defendant, Veridium, had the requisite scienter to violate Rule 10b-5. Defendant's motion to dismiss is **GRANTED**.

SO ORDERED.

Jerome Lebovitz

Hon. Jerome Lebovitz
United States District Judge

Dated: August 23, 2021
New Ork, New Ork

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW ORK

Allison Chung, et al.,

Plaintiff,

-against-

Veridium Corporation

Defendant.

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NOTICE OF APPEAL

No. 650328/2020

NOTICE IS GIVEN that Plaintiffs' appeal to the United States Court of Appeals for the Fourteenth Circuit challenging the granting of Defendant's Motion to Dismiss by the District Court for the District of New Ork rendered on August 23, 2021, and entered on August 29, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy hereof upon counsel listed below, by email and by postage prepaid-first class U.S. mail, on November 2, 2021.

Caitlyn Anyon-Peter

Caitlyn Anyon-Peter
Attorney for the Defendant

United States Court of Appeals FOR THE FOURTEENTH CIRCUIT

OCTOBER TERM 2022

No. 650328/2020

ALLISON CHUNG, ET AL.,

Plaintiff-Appellant,

v.

VERIDIUM CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW ORK

ARGUED: OCTOBER 29, 2022

DECIDED: DECEMBER 10, 2022

Before: MIRANDA HOFFMAN, MARIO ESPITIA-WEILSON, AND ISABELLA POMBO, *Circuit Judges.*

INTRODUCTION

Plaintiff-Appellant Allison Chung represents a class of plaintiffs who owned and traded stock in Veridium, Defendant-Appellee, from April 6, 2020 to late June 2020. Appellant's complaint asserts claims against Appellee for violations of Rule 10b-5 and of section 10(b) of the Securities Exchange Act of 1934. Appellant draws on corroborating statements and evidence from a confidential witness to allege that Appellee knowingly misled the investing public. Appellee moved for dismissal for failure to state a claim, and the lower court granted the motion. Appellant timely appealed, arguing that the district court erred in discounting allegations made by its confidential source.

We find for Appellant, holding that courts, in considering the validity of securities fraud complaints, may not discount confidential witnesses on the basis of their confidentiality. Therefore, we hold that the district court erred in granting Appellee's motion to dismiss. The decision of the district court is reversed and vacated. The case is remanded for further proceedings consistent with this opinion.

REVERSED, VACATED, AND REMANDED.

MARIO ESPITIA-WEILSON, *Circuit Judge*:

Before this Court is a motion to dismiss. We review this motion de novo.

BACKGROUND

This case arises from Appellee’s announcement on April 6, 2020, that its anti-cancer treatment, Oncorinex, was close to receiving regulatory approval from the U.S. Food and Drug Administration (“FDA”). Following the encouraging news, Appellee’s share price rose by 14%. Two months later, the FDA published notice that it had issued a refuse-to-file letter to Appellee, barring its marketing application for Oncorinex. These letters typically indicate that there was a deficiency in the drug’s clinical results. Shortly after, ABC News reported that Oncorinex was found to have adverse effects on patients’ livers. As a result, Appellee’s share price fell by 20%.

Appellant, having bought or held shares issued by Appellee between early April and late June of 2020, sought damages from Appellee under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. Appellants’ complaint includes allegations from a confidential witness, CW-1, claiming that Appellee knowingly misrepresented Oncorinex’s likelihood of receiving FDA approval. The lower court dismissed the case, finding that claims by confidential witnesses fail to give rise to a strong inference of scienter as required by the Private Securities Litigation Reform Act (“PSLRA”). On review, we overturn that holding and find for Appellant.

DISCUSSION

I. Confidentiality Is Not a Basis for Judicial Discounting.

Appellant challenges the district court’s decision to give no credence to CW-1’s allegations due to their confidentiality. We do not consider confidentiality a fatal defect if the complaint otherwise supports the information provided by the unnamed witness. We agree with the Eleventh Circuit that details such as “the position(s) held, the proximity to the offending conduct, and the relevant time frame” may neutralize any perceived weaknesses of confidentiality. *Mizzaro v. Home Depot*, 544 F.3d 1230, 1240 (11th Cir. 2008).

Appellee notes that Rule 10b-5 complaints must comply with the PSLRA’s heightened pleading requirement that the alleged facts “give[] rise to a strong inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2)(A). As for what constitutes a “strong inference” of scienter, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.* holds that the inference must be “cogent and at least as

compelling as any opposing inference one could draw from the facts alleged” from the viewpoint of a reasonable person. 551 U.S. 308, 324 (2007). The Supreme Court in *Tellabs* specifically prescribes that courts “consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions.” *Id.* at 310. This supports Appellant’s contention that other components included in the complaint factor into the judicial assessment of CW-1’s statements. The mystery surrounding CW-1’s identity alone is not dispositive.

It is worth noting that in *Higginbotham v. Baxter Intl. Inc.*, the case most relied on by Appellee and the lower court, the Seventh Circuit does not categorically invalidate a less rigid treatment of confidential sources. 495 F.3d 753, 757 (7th Cir. 2007) (“[I]t is possible to imagine situations in which statements by anonymous sources may corroborate or disambiguate evidence from disclosed sources”). This rationale aligns with our decision and with common sense, as “discount” does not equal “discard.” *Okla. Firefighters Pension & Ret. Sys. v. Six Flags Ent. Corp.*, 58 F.4th 195, 208 (5th Cir. 2023) (“Discount does not mean unfettered discretion to discard. The degree of discounting depends on the circumstances involved.”). Rather, the quotidian understanding of the word encourages an evaluation of confidential witnesses in light of background facts in the complaint. *Id.* The Fifth and Sixth Circuits subscribe to this line of reasoning and apply only a minimal discount on anonymous sources. *See, e.g., id.* (“When 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.”); *Teamsters Loc. 237 Welfare Fund v. ServiceMaster Glob. Holdings, Inc.*, 83 F.4th 514, 527 (6th Cir. 2023) (holding that plaintiff met the PLSRA pleading requirement with statements from four confidential witnesses alleging that the defendant, a pesticide service provider, knowingly concealed from the public its injurious exposure to a termite crisis).

While we are sympathetic to the lower court’s goal of judicial efficiency, we must balance that concern with the importance of protecting confidential witnesses. The lower court was correct in worrying about duplicity and a proliferation of frivolous lawsuits enabled by anonymity. However, it is equally probable that confidential witnesses would be deterred from giving truthful statements but for the shield of anonymity. Fear of retaliation, harassment, and intimidation is highly plausible, especially since most Rule 10b-5 defendants are large, resourceful corporations. To encourage whistleblowers to report wrongdoing and contribute to the enforcement of securities laws, we ought to foster a safe environment in which confidential witnesses can provide valuable testimony. *See Novak v. Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000) (“[Requiring plaintiffs to name their confidential sources] serves no legitimate pleading purpose while it could deter informants from providing critical information to investigators in meritorious cases or invite retaliation against them.”).

II. Appellants' Complaint is Sufficiently Particular.

When assessing the complaint, we treat the allegations as true and exercise judicial evaluation only to determine whether they are factual or conclusory. *See Okla. Firefighters*, 58 F.4th at 208 (distinguishing between factual assertions and “mere conclusory statements”). Considering all the details in the description of the confidential source, we hold that Appellants’ complaint, relying chiefly on CW-1’s allegations, sufficiently established the element of scienter required by the PSLRA.

Appellee argues that having only one confidential witness is not enough to move the needle. Appellee cites precedents that apply a minimal discount to confidential sources and points out that even in those cases, the numerosity of sources plays a factor. *Makor Issues & Rights Ltd. v. Tellabs, Inc.*, 513 F.3d 702, 712 (7th Cir. 2008) (acknowledging statements from confidential sources in part because they “are numerous”). Appellee likewise contends that Appellant has not sufficiently pled a strong inference of scienter because Appellant did not “explain ‘how or why’ their confidential source would have the knowledge alleged.” *Institutional Inv. Grp. v. Avaya, Inc.*, 564 F.3d 242, 266 (3d Cir. 2009) (quoting *Cal. Pub. Emples.’ Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 149 (3d Cir. 2004)) (holding that the plaintiff has “adequately alleged when their sources were employed by [the defendant], when they obtained the information they allegedly possess, and whether their supposed knowledge is first or second hand”).

We do not automatically overlook an allegation solely because of the absence of similar allegations from other sources. *Tellabs* instructs courts to assess each complaint holistically. 551 U.S. at 326. In this case, CW-1’s background information and the corroborating evidence sufficiently compel a strong inference in Appellant’s favor. *Cf. Okla. Firefighters*, 58 F.4th at 208 (declining to discount a confidential source because “the complaint’s details about the responsibilities of his position are directly relevant to the events at issue” and his testimony is “supported by at least some corroborating evidence”).

“Securities fraud plaintiffs may rely on confidential witnesses . . . ‘provided they are described . . . with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged.’” *Collier v. ModusLink Glob. Sol., Inc.*, 9 F.Supp.3d 61, 70 (D. Mass. 2023) (citing *In re Cabletron Sys., Inc.*, 311 F.3d 11, 29 (1st Cir. 2002)). CW-1 worked at Appellee’s laboratory. CW-1’s seniority is evidenced by their possession of a confidential report of Oncorinex’s test results from its early days (indicating CW-1’s illustrious career with Appellee as well as the prominent position they used to hold). CW-1’s seniority, in turn, puts them in a position to provide first-hand information, such as details about Oncorinex’s defects, not merely repeating statements they heard. *Contra Nat’l Junior Baseball League v. Pharmanet Dev. Grp. Inc.*, 720 F.Supp.2d 517, 540 (D. N.J. 2010) (discounting the credibility of confidential sources “because Plaintiff fails to allege... whether the information came from individual

Defendants at these meetings, or any other executives, that had first hand knowledge of this information”).

CW-1’s corroborating evidence further bolsters the contention that Appellee knew about Oncorinex’s shortcomings. The court is expected to take “*all* of the facts alleged” to determine whether they “give rise to a strong inference of scienter,” which “is necessarily a fact-specific inquiry.” *Collier*, 9 F.Supp.3d at 69. Taking Appellant’s allegations as true, the animal study report was likely reviewed by Appellee’s authorized entities. *See Weston v. DocuSign, Inc.*, 669 F.Supp.3d 849, 883 (N.D. Ca. 2023) (taking as true the plaintiff’s contention that the defendants “likely received internal reports reflecting alarming key performance metrics”). We therefore find it plausible that CW-1 actually possesses first-hand knowledge of Appellee’s scienter, as they claim to do.

CONCLUSION

For the foregoing reasons, the lower court’s decision in this case is **REVERSED**. The order of dismissal in favor of Appellee is vacated, and the case is remanded for further proceedings consistent with this opinion.

United States Court of Appeals
FOR THE FOURTEENTH CIRCUIT

JANUARY TERM 2024

No. 650328/2020

ALLISON CHUNG, ET AL.,

Plaintiff-Appellant,

v.

VERIDIUM CORPORATION,

Defendant-Appellee.

FILED ON: FEBRUARY 2023

Before: MIRANDA HOFFMAN, CHIEF JUDGE; MARIO ESPITIA-WEILSON, ISABELLA POMBO, JULIET OH, ELIZABETH STIFELMAN, STEPHANIE HERMAN, EVA MAZLOUM-HONG, AND WON-JUN KIM, *Circuit Judges*.

ORDER

Appellee's petition for rehearing en banc and the response thereto were circulated to the full court. Thereafter, a majority of the judges eligible to participate voted in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be granted and the Court's judgment filed January 2023 be vacated. This case will be reheard by the Court sitting en banc. It is

FURTHER ORDERED that the parties brief the following question:

- 1) May courts discount the allegations of confidential witnesses in determining an inference of scienter in securities fraud complaints?