



---

**Portfolio Media, Inc.** | 648 Broadway, Suite 200 | New York, NY 10012 | [www.law360.com](http://www.law360.com)  
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | [customerservice@portfoliomedia.com](mailto:customerservice@portfoliomedia.com)

---

## 'Plausible' Inference Of Fraud Fails Tellabs Test

*Portfolio Media, New York (June 10, 2008)*

In a recent securities fraud class action decision, *Skubella v. CheckFree Corp.*, Civil Action No. 1:07-CV-796-TWT, 2008 WL 1902118 (N.D. Ga. Apr. 25, 2008), the U.S. District Court for the Northern District of Georgia granted the defendants' motion to dismiss for failure to state a claim under the pleading requirements of the Private Securities Litigation Reform Act (the "Reform Act").

The plaintiff had alleged that defendants engaged in accounting fraud in order to mask the fact that the company's sales volume was declining. *Id.* at \*1. Plaintiff, however, could not allege particularized facts of any improper accounting, nor could it allege that the individual defendants knew of any improper activity whatsoever.

For these reasons, the court dismissed the complaint. *Id.* at \*9.

In reaching this decision, the court relied on the "competing inference" standard set out by the U.S. Supreme Court in *Tellabs Inc. v. Makor Issues & Rights Ltd.*, 127 S. Ct. 2499, 2504 (2007).

As the *Skubella* court observed, *Tellabs* clarified that, in order to plead a "strong inference" of scienter under the Reform Act, that inference "must be more than merely plausible or reasonable – it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Id.* at \*8 (internal citations and quotations omitted).

The *Skubella* court then applied this standard and found that, in explaining the reasoning behind the method of accounting chosen for certain transactions, the defendants had put forth a specific and straightforward rebuttal to the claim that they had falsified accounting reports. *Id.* at \*9.

On the other hand, the plaintiff had "not come forward with any facts to contradict" this explanation. The inference of fraudulent intent, therefore, was "not cogent and not as compelling as the opposing inference of nonfraudulent intent." *Id.*

Thus, the complaint could not meet the *Tellabs* standard and failed to plead the essential element of scienter. *Id.*

The case is also significant because of its holding regarding the safe harbor afforded forward-looking statements under the Reform Act.

The plaintiff had argued that, if forward-looking statements referred to past reported revenue, those statements were transformed from forward-looking into actionable statements of fact. *Id.* at \*8.

The Skubella court observed that the Eleventh Circuit had already foreclosed that argument in *Harris v. Ivax*, 182 F.3d 799, 806 (11th Cir. 1999). *Id.*

The court also explained that the cautionary language accompanying and protecting forward-looking statements “did not require a Nostradamus-like warning of the exact event that occurred.” *Id.* Instead, a cautionary statement protects a forward-looking statement from a claim of securities fraud if it puts “a reasonable investor on notice of the type of harm the investor suffered.” *Id.*

– By John A. Jordak Jr. and Robert R. Long, **Alston & Bird** LLP

*John A. Jordak Jr. is a partner and and Robert R. Long is an associate in Alston's Atlanta office. Alston & Bird LLP was counsel of record for the defendants.*

---

All Content Copyright 2007, Portfolio Media, Inc.