[J-9-2023]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, JJ.

MIMI INVESTORS, LLC,	:	No. 57 MAP 2022
	:	
Appellee	:	Appeal from the Order of Superior Court at No. 1168 EDA 2020 dated November 5, 2021 Affirming the Order of the Bucks County Court of Common Pleas, Civil Division, at No. 2016-00834 dated January 8, 2020
v.	:	
PAUL K. TUFANO, DAVID CROCKER, DENNIS CRONIN, AND NEIL MATHESON,	:	ARGUED: March 8, 2023
	:	
Appellants	:	

OPINION

JUSTICE DONOHUE **DECIDED: July 19, 2023**

In this matter of first impression, we address whether a plaintiff must plead and prove scienter[1] as an element of 70 P.S. § 1-401(b),[2] a provision of the Pennsylvania

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[1] As this Court has recently observed, scienter is a "degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission[.]" *Commonwealth v. Butler*, 226 A.3d 972, 980 n.1 (Pa. 2020) (quoting *Scienter*, BLACK'S LAW DICTIONARY (11th ed. 2019)). Black's Law Dictionary also provides a more specific, secondary definition used "in the context of securities fraud[,]" where scienter is a "mental state consisting in an intent to deceive, manipulate, or defraud." *Scienter*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[2] Section 1-401(b) makes it unlawful, "in connection with the offer, sale or purchase of any security in this State, directly or indirectly[,]" 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 are made, not misleading[.]" 70 P.S. § 1-401(b).

Securities Act of 1972 ("PSA").[3] After careful review, we hold that under the plain language of its text, Section 1-401(b) of the PSA does not contain a scienter element. However, the PSA provides a defense to civil liability under Section 1-401(b) if the defendant can show they "did not know and in the exercise of reasonable care could not have known of the untruth or omission[.]" 70 P.S. § 1-501(a). Thus, we affirm.

I. Background

Mimi Investors, LLC ("Mimi Investors") sued Paul Tufano, David Crocker, Dennis Cronin, and Neil Matheson ("ORCA Officers"), the directors and officers of ORCA Steel, LLC ("ORCA Steel"), a now-defunct data storage company, alleging that ORCA Officers made material misrepresentations of fact in violation of the common law and Section 1-401(b) of the PSA. In their amended complaint, Mimi Investors described a meeting held in February of 2014 during which ORCA Officers allegedly represented to Mimi Investors that they had received 400 orders for computer data storage space ("CDS Orders") for ORCA Steel's new data storage facility. Amended Complaint, 9/17/2019, ¶ 21. To secure financing for the purpose of servicing the CDS Orders, ORCA Officers sought promissory notes to increase capital. *Id.* ¶ 22. As a result of that meeting, Mimi Investors loaned ORCA Steel $500,000. *Id.* ¶¶ 10, 23.[4] Beginning in October of 2014, ORCA Steel ceased making interest payments on the loan. *Id.* ¶ 15. ORCA Steel did

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[3] Act of December 5, 1972, P.L. 1280, *as amended*, 70 P.S. §§ 1-101—1-703.1.

[4] The promissory note provided that Mimi Investors would be furnished with Class A security shares in 865 Ridge Road ORCA, LLC ("Ridge Road ORCA"), an entity affiliated with ORCA Steel, in exchange for the assignment of the promissory note to Ridge Road ORCA. *Id.* ¶ 12.

not respond to Mimi Investors' demand letter, sent in August of 2015, which sought to cure the default. *Id.* ¶¶ 16-17.

Mimi Investors asserted that neither "construction financing nor the fulfillment of the new orders materialized." *Id.* ¶ 24. It also averred that, on October 21, 2014, ORCA Officers told Mimi Investors that they "had known for months that the loan to fund new construction was not viable" because the CDS Orders were "not investment grade." *Id.* ¶ 25. Mimi Investors claimed that "these misrepresentations regarding available construction financing and committed orders, as well as other statements by" ORCA Officers, "were material and untrue within the meaning of the" PSA, and that Mimi Investors "relied on these misrepresentations in deciding to make the [l]oan[.]" *Id.* ¶¶ 26-27. Mimi Investors sought to recover their $500,000 and all unpaid, accrued interest, minus any disbursements made by ORCA Steel prior to the default in October of 2014. *Id.* ¶ 30. Based on the same allegations, and seeking the same relief, Mimi Investors also claimed common law material misrepresentation. *Id.* ¶¶ 31-36.[5]

ORCA Officers filed preliminary objections to the amended complaint, arguing that all subsections of Section 1-401 require proof of scienter. Preliminary Objections, 10/8/2019, ¶¶ 17, 22. They also argued that Mimi Investors failed to plead scienter. *Id.* ¶ 16. ORCA Officers maintained that Section 1-401 does not encompass claims of negligent or scienter-less securities fraud and, therefore, argued for dismissal of Mimi Investors' amended complaint "as a matter of law." *Id.* ¶ 27.[6]

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[5] Mimi Investors' common law claims are not at issue in this appeal.

[6] As discussed in more detail below, ORCA Officers' cited before the trial court numerous federal cases interpreting Section 1-401 of the PSA as being analogous to, if (continued…)

On January 13, 2020, the trial court overruled the preliminary objections and directed ORCA Officers to file an answer. ORCA Officers ultimately filed a petition for review with the Superior Court on April 13, 2020, which was granted on June 8, 2020.

In its Pa.R.A.P. 1925(a) opinion, the trial court recognized the scarcity of Pennsylvania case law interpreting Section 1-401 of the PSA, and that the parties' citation of federal case law provided only non-binding authority regarding whether claims under Section 1-401 require proof of scienter and, therefore, that the court was "not bound by those decisions[.]" Trial Court Opinion, 11/10/2020, at 6. Nevertheless, assuming that Section 1-401 includes an element of scienter, the court found that Mimi Investors had "sufficiently" and "succinctly" pled scienter in the amended complaint. *Id.* As such, the trial court overruled the preliminary objections because it found that "it is not free and clear from doubt that the law would not permit recovery" under Section 1-401 "[b]ased on [Mimi Investors'] amended complaint and the lack of Pennsylvania state court case law interpreting" that provision of the PSA. *Id.* at 7.

In a non-precedential decision penned by President Judge Panella, the Superior Court panel unanimously affirmed the ruling of the trial court. *Mimi Investors, LLC v. Tufano*, 1168 EDA 2020, 2021 WL 5150053 at *2 (Pa. Super. Nov. 5, 2021) (non-precedential decision). ORCA Officers argued before the panel that the trial court had erred in overruling their preliminary objections because Mimi Investors had ostensibly

(…continued)
not derived from, Rule 10b-5 of the federal Securities and Exchange Commission ("SEC"), a rule promulgated pursuant to the Securities Exchange Act of 1934 ("Act of 1934"), codified as 15 U.S.C. § 78j(b). At least since 1976, SEC Rule 10b-5 has been interpreted as requiring proof of scienter. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212 (1976) (stating "when the Commission adopted the Rule it was intended to apply only to activities that involved scienter").

failed to sufficiently plead that ORCA Officers had “acted with intent to defraud” in alleging a Section 1-401 violation. *Id.* (citing Pa.R.A.P. 1925(b) Statement, 6/24/2020, at 1).

The Superior Court first observed that it reviews a trial court’s order denying preliminary objections for an error of law or an abuse of discretion and that, in the trial court, “preliminary objections which result in the dismissal of a claim may be sustained only in cases that are clear and free from doubt.” *Mimi Investors*, 2021 WL 5150053, at *3. “To be clear and free from doubt that dismissal is appropriate, it must appear with certainty that the law would not permit recovery by the plaintiff upon the facts averred.” *Id.* (quoting *Burgoyne v. Pinecrest Cmty. Ass’n*, 924 A.2d 675, 679 (Pa. Super. 2007)).

Considering the elements of Section 1-401 claims, the Superior Court agreed with the trial court that no binding precedent interpreting Section 1-401 of the PSA appeared in Pennsylvania case law, and that our courts were not bound to follow the federal courts’ interpretation of that statute. *Id.* at *4. Consequently, the Superior Court agreed with the trial court that the law did not state with certainty that Mimi Investors could not recover under Section 1-401. *Id*. The Superior Court also agreed with the trial court that scienter had been sufficiency pled in Mimi Investors’ amended complaint. *Id.* Having determined that there was at least some doubt as to whether Section 1-401 of the PSA permitted recovery without a pleading of scienter—and that Mimi Investors had sufficiently pled scienter in its amended complaint anyhow—the Superior Court concluded that the trial court neither committed an error of law nor abused its discretion by overruling ORCA Officers’ preliminary objections. *Id.*

ORCA Officers timely filed a petition for allowance of appeal, which this Court granted in part and denied in part.[7] We rephrased the sole issue granted for review as follows:

> Whether the Pennsylvania Securities Act of 1972 requires a plaintiff to plead and prove scienter by clear and convincing evidence in connection with an alleged violation of 70 P.[S]. § 1-401 regulating the purchase and sale of securities in the Commonwealth, and if so, did plaintiff-appellee sufficiently plead its fraud-based claims in its first amended complaint[?]

Mimi Investors, LLC v. Tufano, 277 A.3d 551 (2022) (per curiam).

II. Parties' Arguments

ORCA Officers:

ORCA Officers acknowledge that, despite the PSA's "enactment 50 years ago, no Pennsylvania appellate court has ruled on whether scienter is required to establish a Section [1-]401 claim" under the PSA. ORCA Officers' Brief at 20. Nevertheless, they argue Section 1-401 is essentially "identical" to Section 101 of the 1956 version of the Uniform Securities Act.[8] *Id.* at 22. ORCA Officers note that the official comment to Section 101 of the Uniform Securities Act indicates that the model rule is "substantially" the same as SEC Rule 10b-5. *Id.* (quoting Unif. Sec. Act, § 101, cmt.).

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[7] We declined to grant review of questions regarding Mimi Investors' common law misrepresentation claims.

[8] The Uniform Securities Act is model legislation promulgated by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). "The NCCUSL has turned to the topic of state securities laws three times in its 113[-]year history, most successfully in 1956 with a Uniform Securities Act that was substantially enacted in thirty-seven states." UNIFORM SECURITIES ACT, *About the Uniform Securities Act*, https://uniformsecuritiesact.org/about/ (last visited 6/13/2023). Unless otherwise noted, all subsequent references to the Uniform Securities Act pertain to the 1956 version from which the PSA was fashioned.

SEC Rule 10b-5, ORCA Officers maintain, is also a "nearly verbatim" twin of Section 1-401 of the PSA.[9] Furthermore, the Supreme Court of the United States "has determined that in order to impose liability under [SEC] Rule 10b-5, a plaintiff must establish that a defendant acted with scienter." ORCA Officers' Brief at 23 (citing *Hochfelder*, 425 U.S. at 212). Next, ORCA Officers identify "an unbroken, forty-year line of cases" in which "federal courts applying the PSA have uniformly predicted that this Court would require a plaintiff to plead and prove scienter" for Section 1-401 claims, most often by tracing the common language and origins of that provision, SEC Rule 10b-5, and Section 101 of the Uniform Securities Act.[10] *Id.* at 24-25. For these reasons, ORCA Officers aver that, "[t]o date, the practitioner's expectation has been that a plaintiff must plead and prove scienter by clear and convincing evidence to sustain any claim arising out of the sale/purchase of a security under Pennsylvania law[.]" *Id.* at 25.

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[9] ORCA Officers admit that SEC Rule 10b-5 "employs an Oxford Comma and an immaterial change in the tense of one word[,]" but contend those differences are not substantive. ORCA Officers' Brief at 23 n.6.

[10] For example, in *Michael S. Rulle Family Dynasty Trust v. AGL Life Assurance Company*, 459 F. App'x 79 (3d Cir. 2011), the Third Circuit cited *Hochfelder*'s rule that, under SEC Rule 10b-5, "a private plaintiff must prove that the defendant acted with scienter[.]" *Id.* at 81. The *Rulle Trust* Court thus found that the plaintiff had not raised a "plausible claim" under SEC Rule 10b-5 because it failed to "specifically and plausibly allege recklessness" in its amended complaint. *Id.* at 82. Addressing similar state claims, including those raised under the PSA, the Third Circuit held that, because the PSA has "been interpreted to include similar scienter requirements as the Federal Securities Laws, Rulle Trust's state securities claims fail for the same reason." *Id.* Similarly, in *Leder v. Shinfeld*, 609 F.Supp. 2d 386 (E.D. Pa. 2009), the district court observed that the "absence of guiding precedent from Pennsylvania courts notwithstanding, it has long been the practice in this Circuit to treat [S]ection 1–401 claims as requiring the same elements of proof as required under [SEC] Rule 10b–5." *Id.* at 395.

ORCA Officers discount Mimi Investors' argument before the Superior Court that a distinction can be drawn between Section 1-401 and Rule 10b-5 based on their dissimilar headings,[11] because the Statutory Construction Act provides that headings are not dispositive of a statute's meaning.[12] *Id.* at 27. Regardless, ORCA Officers contend that since Subpart IV of the PSA, which contains Section 1-401, is titled "Fraudulent and Prohibited Practices," it suggests scienter requirements throughout. *Id.* According to ORCA Officers, "Fraudulent" implies intentional misconduct.[13] *Id.* at 28.

ORCA Officers also maintain that one purpose of the PSA was to harmonize Pennsylvania securities law with federal securities laws and other states that implemented the Uniform Securities Act. *Id.* at 29. Section 1-703(a) of the PSA provides that the Act "shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact the 'Uniform Securities Act' and to coordinate the interpretation and administration of this act with related Federal

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[11] Section 1-401 is titled, "Fraudulent and Prohibited Practices," whereas SEC Rule 10b-5 is titled "Employment of manipulative and deceptive devices."

[12] "The headings prefixed to titles, parts, articles, chapters, sections and other divisions of a statute **shall not be considered to control** but may be used to aid in the construction thereof." 1 Pa.C.S. § 1924 (emphasis added).

[13] At the time the PSA was enacted, Black's Law Dictionary defined "fraudulent" as follows: "Based on fraud; proceeding from or characterized by fraud; tainted by fraud; done, made, or **effected with a purpose or design** to carry out a fraud." *Fraudulent*, BLACK'S LAW DICTIONARY (4th Rev. ed. 1968) (emphasis added). Indeed, there is no doubt that this Court typically treats the concept of fraud as being intrinsically intertwined with an intent to deceive. *See Frowen v. Blank*, 425 A.2d 412, 415 (Pa. 1981) ("A fraud consists in anything calculated to deceive, whether by single act or combination, or by suppression of truth, or a suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture."). However, it is not entirely foreign to the law to have the scienter element of fraud presumed by a "statutorily created inference." *Fraud in law*, BLACK'S LAW DICTIONARY (11th ed. 2019).

regulation." 70 P.S. § 1-703(a). Consequently, to the extent that Section 1-703(a) guides our analysis, ORCA Officers argue that this Court should harmonize Section 1-401 with its federal counterpart in SEC Rule 10b-5, which requires scienter. ORCA Officers' Brief at 31. ORCA Officers point out that "there is no uniformity among the states that have enacted the purported 'Uniform Securities Act'" regarding whether scienter applies to sister state analogues to Section 1-401.[14] *Id.* at 29. Because of this

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[14] While it is true that there is not complete uniformity, only a few of our sister states that have adopted Section 101 of the Uniform Securities Act have interpreted their version of the misrepresentation provision, i.e., the equivalent of Section 1-401(b) of the PSA, to require proof of scienter, whereas most states that have addressed the question have determined that scienter is not an element of that provision. *Compare Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1102 (Colo. 1995) (stating that to prove Colorado's misrepresentation provision, a plaintiff must allege that "the defendant acted with the requisite scienter"); *Hubbard v. Hibbard Brown & Co.*, 633 A.2d 345, 349 (Del. 1993) (interpretating Delaware's misrepresentation provision to require scienter following *Hochfelder*'s interpretation of SEC Rule 10b-5); *and State ex rel. Oregon State Treasurer v. Marsh & McLennan Companies, Inc.*, 346 P.3d 504, 513 (Or. Ct. App. 2015) (stating the legislative history of the Oregon Securities Law "confirms our understanding that" all three provisions "were understood to include an element of scienter"), *appeal denied*, 357 Or. 299 (2015), *with Harrington v. Off. of Mississippi Sec'y of State*, 129 So. 3d 153, 163-64 (Miss. 2013) (rejecting a claim for "a uniform culpability requirement for the three subparagraphs" because "the language of the section is simply not amenable to such an interpretation," and concluding that scienter "is not a required element" under the misrepresentation subparagraph); *Trivectra v. Ushijima*, 144 P.3d 1, 15 (Haw. 2006) (following the "almost unanimous interpretation of [S]ection 101" by sister states that the misrepresentation provision does not require proof of scienter); *Tanner v. State Corp. Comm'n*, 574 S.E.2d 525, 530 (holding "that scienter is not required to prove" a misrepresentation claim under the Virginia Securities Act), *on reh'g in part on separate grounds*, 580 S.E.2d 850 (Va. 2003); *State v. Shama Res. Ltd. P'ship*, 899 P.2d 977, 982 (Idaho 1995) (holding "intent is not an element of securities fraud under" Idaho's misrepresentation provision); *State v. Gunnison*, 618 P.2d 604, 607 (Ariz. 1980) (holding "that, as to civil cases, scienter is not an element of a [misrepresentation] violation"); *Kittilson v. Ford*, 608 P.2d 264, 265 (Wash. 1980) (distinguishing *Hochfelder* in holding that Washington's misrepresentation provision does not require proof of scienter); *Piazza v. Kirkbride*, 785 S.E.2d 695, 709 (N.C. Ct. App. 2016) (stating claims under misrepresentation provision "may proceed forward without proof of fraud"), *aff'd as modified*, 827 S.E.2d 479 (N.C. 2019); *and Manns v. Skolnik*, 666 N.E.2d 1236, 1248 (Ind. Ct. App. 1996) (holding "the plain (continued…)

lack of uniformity, ORCA Officers contend that "harmonizing" an "interpretation of PSA Section 1-401 with all of those states that have purportedly adopted the Uniform [Securities] Act is impossible." *Id.* at 31.

Finally, ORCA Officers argue that Mimi Investors failed to adequately plead scienter in the amended complaint, contrary to the findings of the lower courts. To the extent that scienter was inferred by the pleadings in the amended complaint, ORCA Investors contend any such pleading fell short of the requirements of Pa.R.C.P. 1019(b) and *Bata v. Central-Penn National Bank of Philadelphia,* 224 A.2d 174, 179 (Pa. 1966).[15] That is, ORCA Officers assert that scienter was not pled with enough specificity to "permit [ORCA Investors] to prepare a defense and" to "convince the court that the averments are not merely subterfuge." ORCA Officers' Brief at 32 (quoting *Bata*, 224 A.2d at 179). ORCA Officers contend that Mimi Investors' allegation that ORCA Officers had known for months that the CDS orders were not viable did not meet this standard. ORCA Investors conclude by arguing that Mimi Investors' failure to

(…continued)
language of the statute leads us to conclude that a violation occurs irrespective of the individual's intent to defraud").

[15] Rule 1019(b) provides that "[a]verments of fraud or mistake shall be averred with particularity. Malice, intent, knowledge, and other conditions of mind may be averred generally." Pa.R.C.P. 1019(b). Elaborating on Rule 1019(b), this Court stated in *Bata* that "[a]verments of fraud are meaningless epithets unless sufficient facts are set forth which will permit an inference that the claim is not without foundation nor offered simply to harass the opposing party and to delay the pleader's own obligations." *Bata*, 224 A.2d at 179. To avoid this potential for harassment and delay, *Bata* required two conditions be met: "The pleadings must adequately explain the nature of the claim to the opposing party so as to permit him to prepare a defense and they must be sufficient to convince the court that the averments are not merely subterfuge." *Id.*

specifically aver scienter revealed a "glaring hole in its theory of liability" despite ample time for discovery. *Id.* at 37.

<u>Mimi Investors</u>

Mimi Investors contend that Section 1-401 contains no scienter element on its face, and it emphasizes that federal decisions interpreting Section 1-401 to the contrary are not binding on this Court. Mimi Investors' Brief at 9-10. Mimi Investors criticizes ORCA Officers' attempt to "undermine" federalism by "substituting the plain language of Section 1-401 of the PSA with an interpretation derived" from Rule 10b-5. *Id.* Mimi Investors notes that SEC Rule 10b-5 is an SEC regulation that "coexists with" 15 U.S.C. § 78j. Section 78j states,

> **§ 78j. Manipulative and deceptive devices**
>
> 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—
>
> * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement **any manipulative or deceptive device or contrivance** in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b) (emphasis added).

Mimi Investors maintains that in interpreting SEC Rule 10b-5, the *Hochfelder* Court held that neither the statute nor the rule could be violated by negligent conduct because the statute used the terms "any manipulative or deceptive device or

contrivance," 15 U.S.C. § 78j(b), such that it was "unmistakable" that Congress intended "to proscribe a type of conduct quite different from negligence." *Hochfelder*, 425 U.S. at 199.[16] By contrast, Section 1-401 of the PSA "is entirely devoid of reference to the terms 'manipulative' and 'deceptive.'" Mimi Investors' Brief at 12. Furthermore, those exact terms are utilized elsewhere in Sections 1-403, 1-408, and 1-409 of the PSA.[17] Hence, Mimi Investors argues that the

> inclusion of "manipulative" and "deceptive" in multiple sections of the PSA immediately following [S]ection 1-401 clearly evidences that the Pennsylvania General Assembly (i) knew how to employ such language when it wanted to, and (ii) was aware of its application in the securities context. By the same token, the legislature's omission of "manipulative" and "deceptive" in PSA § 1-401 signals the legislative body's deliberate intent for such terms not to be read into the provision.

Mimi Investors' Brief at 13.

Mimi Investors believes that principles of statutory construction dictate that this Court should not consider anything beyond the text of the PSA to read into the statute a scienter element where the plain text shows that none is present. In this regard, Mimi Investors invoke the "canon of surplusage" pursuant to Section 1921 of the Statutory Construction Act, which provides that "[e]very statute shall be construed, if possible, to give effect to all its provisions." 1 Pa.C.S. § 1921(a). Mimi Investors contends that interpreting Section 1-401 with an inferred scienter element would effectively render

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[16] The *Hochfelder* Court later stated that the SEC's authority to enact SEC Rule 10b-5 was granted by the statute, and so the agency had no power to expand the reach of Section 78j(b) by lowering the scienter requirement to mere negligence in SEC Rule 10b-5. *Hochfelder*, 425 U.S. at 214 (stating SEC Rule 10b-5's "scope cannot exceed the power granted [to] the [SEC] by Congress" under Section 78j(b)).

[17] *See* discussion *infra* p. 24.

superfluous the General Assembly's use of the terms "manipulative" and "deceptive" elsewhere in the PSA, such as in Sections 1-403, 1-408, and 1-409. Thus, Mimi Investors contend that the "statute is unambiguous on its face" in its lack of a scienter element, commensurate with the General Assembly's intent. Mimi Investors Brief at 15.

As to Section 1-703's command that the PSA be construed to dovetail with federal regulations and laws from others states that have enacted the Uniform Securities Act, Mimi Investors posits that Section 1-703 cannot add a scienter element into Section 1-104 in defiance of that provision's plain text. *Id.* In any event, Pennsylvania would not be alone in interpreting identical provisions without a scienter element, even where other states' securities regulations also have an analogue to Section 1-703. *Id.* at 16. For instance, Mimi Investors cites to Chapter 21.20 of the Securities Act of Washington (State), which is virtually identical to Section 1-401 of the PSA. *Id.* (citing RCW § 21.20.010). Washington also has a provision identical to Section 1-703 of the PSA. *Id.* (citing RCW § 21.20.900). The Supreme Court of Washington concluded that its statute does not contain a scienter element. *Kittilson v. Ford*, 608 P.2d 264, 265 (Wash. 1980). The *Kittilson* court distinguished *Hochfelder* on the premise that Washington's statute, like Pennsylvania's, does not contain the manipulative/deceptive language of the enacting statute that governs SEC Rule 10b-5. *Id.*

Finally, even if this Court interprets Section 1-401 to include a scienter element, Mimi Investors claims that it adequately pled that element in its amended complaint. Mimi Investors' Brief at 18. Mimi Investors contends that its "pleading adequately explained the nature of the claim so as to permit [ORCA Officers] to prepare a

defense[.]" *Id.* at 19-20 (citing Amended Complaint, 9/17/2019, ¶¶ 10-15, & 26-29). Mimi Investors argues that these averments, collectively, provided the "who, what, when, and how" to support an inference of "why" ORCA Officers violated Section 1-401. *Id.* at 20.

Amicus Curiae

The Pennsylvania Department of Banking & Securities ("PDBS") filed an amicus curiae brief. PDBS is an "administrative agency authorized and empowered to administer and enforce numerous statutes, one of which is the [PSA], and the regulations promulgated thereunder." Amicus Brief at 1. "Accordingly, the [PDBS] has an interest in ensuring that the 1972 Act is interpreted in a manner consistent with its intended purpose of investor protection and capital formation." *Id.* PDBS offers its interpretation of Section 1-401 to this Court but takes no position on whether Mimi Investors' pleadings were sufficient.

PDBS "submits that the Court should examine the framework established under the Securities Act of 1933 ("1933 Act")" as "the 1933 Act provides clear guidance for determining when scienter is and is not required." *Id.* at 3. PDBS argues that the federal analogue to Section 1-401 of the PSA is not Section 10(b) of the 1934 Securities Exchange Act (from which SEC Rule 10b-5 is derived) ("1934 Act"), but instead Section 17(a) of the 1933 Act. *Id.* at 3-8. PDBS believes this is because the Uniform Securities Act, promulgated by the Uniform Law Commission ("ULC"), is the model from which Pennsylvania derived the PSA, and the ULC used the 1933 Act, not the 1934 Act, as a model to draft the Uniform Securities Act. *Id.* at 4-5. PDBS maintains that the language from the Uniform Securities Act has remained virtually unchanged despite two revisions

in 1985 and 2002, and is identical to Section 1-401 of the PSA. *Id.* at 6. However, PDBS notes that Section 10(b) of the 1934 Act departs from the Uniform Securities Act's uniform language taken from the 1933 Act by adding the terms "manipulative" and "deceptive." *Id.* at 6-7.

PDBS therefore maintains that:

> The ULC did not adopt the additional language in Section 10(b) and [SEC] Rule 10b-5. The ULC's decision to not adopt this language is significant as they would often mirror changes implemented by individual states, which suggests that the additional language in [SEC] Rule 10b-5 did not serve the intended purpose. Furthermore, neither the Pennsylvania General Assembly nor any other jurisdictions that adopted the 1956 Act adopted the additional language in Section 10(b) and Rule 10b-5. Therefore, it is indisputable that the federal equivalent to Section [1-]401 is its identical counterpart, Section 17(a) of the 1933 Act.

Amicus Brief at 7. PDBS further notes that, if this Court decides that Section 1-401's federal equivalent is Section 17(a) of the 1933 Act, and not Section 10(b) of the 1934 Act, it will align Pennsylvania law with numerous other jurisdictions, including Arizona, Hawaii, Idaho, Indiana, Kansas, Minnesota, Nevada, New Mexico, Utah, Virginia, Washington, and Wisconsin. *Id.* at 8 n.13 (compiling cases).

Using Section 17(a) of the 1933 Act as the model, and giving deference to federal interpretations of that provision, PDBS contends that the subsections of Section 1-401 contain different scienter requirements. In *Aaron v. SEC*, 446 U.S. 680 (1980), the High Court contrasted the requirements of Section 17(a) of the 1933 Act and Section 10(b) of the 1934 Act. *Aaron* followed *Hochfelder*'s interpretation of Section 10(b) of the 1934 Act and its offspring, Rule 10b-5. *Aaron*, 446 U.S. at 691. However, the Court recognized "less precedential authority" regarding its interpretation of Section

17(a) of the 1933 Act. *Id.* at 695. The language of Section 17(a) of 1933 Act, the *Aaron* Court found, " strongly suggests that Congress contemplated a scienter requirement under § 17(a)(1), but not under § 17(a)(2) or § 17(a)(3)." *Id.* at 695-96. Thus, PDBS advises that:

> In explicitly identifying the different requirements, the *Aaron* Court further explained that the language of Section 17(a)(3) "quite plainly focuses upon the effect of particular conduct on members of the investing public, rather than upon the **culpability of the person responsible**." *Id.* at 696-[]97 (emphasis added). "Congress thus opted for liability without willfulness, intent to defraud, or the like, in enacting § 17(a) [of the Securities Act of 1933]." *SEC v. Coven*, 581 F.2d 1020, 1027 (2nd Cir. 1978). "Indeed, since Congress drafted § 17(a) in such a manner as to compel the conclusion that scienter is required under one subparagraph but not under the other two, it would take a very clear expression in the legislative history of congressional intent to the contrary to justify the conclusion that the statute does not mean what it so plainly seems to say." *Aaron*[], 446 U.S. at 697.

Amicus Brief at 11. Transposing this analysis onto Section 1-401, PDBS argues that, "because Section [1-]401 is substantively identical to Section 17(a) [of the 1933 Act], the same analysis should apply, with only Section [1-]401(a) requiring scienter, but not Sections [1-]401(b) and (c)." *Id.* at 12.

PDBS contends that this interpretation solves any purported problems stemming from Section 1-703's mandate, because this Court's interpretation of Section 1-401 would directly align with the United States Supreme Court's interpretation of Section 17(a) of the 1933 Act. *See id.* at 13. PDBS contends that the federal interpretation in *Aaron* "is not only persuasive but also exactly what the General Assembly intended." *Id.* (footnote omitted).

PDBS also contends that this interpretation is supported by the unambiguous text at issue:

> The General Assembly was clear and direct in expressing how [it] wanted the 1972 Act interpreted – in conformity with other states **and** federal law. 70 P.S. § 1-703. Pennsylvania courts have recognized that the primary purpose of the 1972 Act is "to protect the investing public." *Commonwealth v. Mason*, …112 A.2d 174, 176 ([Pa.] 1955); *Lenau v. Co-Exprise, Inc.*, …102 A.3d 423, 436 [(Pa. Super. 2014)]… . To fulfill the stated intent and purpose of the 1972 Act, it is incumbent upon the Court to apply the *Aaron* analysis of Section 17(a) to Section 401, holding that Section [1-]401(a) requires scienter, but Sections [1-]401(b) and (c) do not.

Id. at 15 (emphasis in original, internal footnotes omitted).

PDBS further argues that requiring proof of scienter for Sections 1-401(b) and (c) would undermine the presumption under Pennsylvania Law that "the General Assembly intends to favor the public interest as against any private interest." *Id.* at 16 (quoting 1 Pa.C.S. § 1922(5)). Moreover, PDBS contends that an alternative interpretation would hamper the exercise of its regulatory authority, because it "regularly and frequently brings enforcement actions against individuals and entities that never question the misinformation or lack of information they distribute to investors[,]" and those "entities and individuals also never conduct independent investigations about the validity of the investment. They simply sell investments resulting in millions of dollars in commissions and profits from sales to Pennsylvania investors." *Id.* However, because PDBS has followed *Aaron* in construing Section 1-401(a) as requiring proof of scienter, PDBS "rarely, if ever, brings an enforcement action alleging a Section [1-]401(a) violation as it is nearly impossible to prove malicious intent." *Id.* at 16-17.

PDBS contends that applying a scienter element to every provision of Section 1-401

> is certainly not what the General Assembly intended, as it would erode the investing public's confidence in the regulator. Furthermore, as the 1972 Act establishes a civil right of action by investors under Section 501 of the 1972 Act, the investing public would also face the same insurmountable hurdles when bringing their own private action after losing substantial investments. Thus, requiring proof of scienter for Sections [1-]401(b) and [1-]401(c) would be contrary to public policy, severely undermine public trust, and, in most instances, eliminate both regulatory enforcement action and civil rights of action against unscrupulous and nefarious entities and individuals.

Id. at 17. Consequently, PDBS argues that applying scienter elements throughout Section 1-401 of the PSA would produce "absurd" results. *Id.* at 17 (quoting 1 Pa.C.S. § 1922(1)).

Finally, PDBS contends that applying *Aaron*'s rationale to Section 1-401 "gives effect to the unambiguous and plain meaning of the statute, which would not require further review" of the statute's meaning. *Id.* at 18-19. Furthermore, if this Court deems Section 1-401 as ambiguous as to scienter, PDBS urges this Court to grant its interpretation deference in line with *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In such case, "[c]onsidering the Department's Section [1-]401 interpretation is aligned with most states and its federal counterpart, Section 17(a), the interpretation offered by the [PDBS] is reasonable under *Chevron*, and thus is entitled to deference by the Court." *Id.* at 20.

<u>ORCA Officers' Reply</u>

In reply, ORCA Officers address PDBS's analysis. They acknowledge the historical record regarding the 1933 Act and the 1934 Act and their respective

purposes.[18] Reply Brief at 2-4. However, ORCA Officers emphasize that Section 101 of the Uniform Securities Act, from which Section 1-401 of PSA was derived, contained a comment linking it to SEC Rule 10b-5 despite any resemblance Section 1-401 might have to Section 17(a) of the 1933 Act. Reply Brief at 4. Thus, ORCA Officers maintain that Section 1-401 should be interpreted in the same way the *Hochfelder* Court interpreted SEC Rule 10b-5.

ORCA Officers further posit that the General Assembly's failure to amend Section 1-401—despite more than forty years of courts' interpreting Section 1-401 of the PSA as requiring an element of scienter—constitutes important evidence that those interpretations were consistent with the General Assembly's intent when it passed the PSA. Reply Brief at 5. ORCA Officers also contend that it "would violate every rule of construction and common sense to hold that the same language (Section [1-]401 and Rule 10b[-]5/Section 101 of the Uniform [Securities] Act) means two very different things." *Id.* at 5.

III. Analysis

Our standard of review in matters involving statutory interpretation is de novo, and our scope of review is plenary. *U.S. Venture, Inc. v. Commonwealth*, 255 A.3d 321, 334 (Pa. 2021). The principal objective of statutory interpretation is to give full effect to

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[18] ORCA Officers again cite *Hochfelder*, which noted that the 1933 Act "was designed to provide investors with full disclosure of material information concerning public offerings of securities in commerce, to protect investors against fraud and, through the imposition of specified civil liabilities, to promote ethical standards of honesty and fair dealing." *Hochfelder*, 425 U.S. at 195. By contrast, "[t]he 1934 Act was intended principally to protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets, and to impose regular reporting requirements on companies whose stock is listed on national securities exchanges." *Id.*

the General Assembly's intent. *Id.*; 1 Pa.C.S. § 1921(a) ("The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly."). The legislative will is revealed, first and foremost, by the explicit text of a statute. *Commonwealth v. Griffith*, 32 A.3d 1231, 1235 (Pa. 2011) (stating "the best indication of legislative intent is the plain text of the statute"). When a statute's text is "clear and free from all ambiguity," we will not disregard that text "under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b). When ascertaining the meaning of a statute's text, we construe the statue's terms, "if possible," in such a manner as "to give effect to all its provisions." *Id.* § 1921(a).

Even though the General Assembly passed the PSA more than fifty years ago, the question before this Court involves a matter of first impression. No prior precedential decisions by Pennsylvania courts regarding the scienter requirements of Section 1-401 of the PSA exist to frame our analysis. The one occasion when this Court meaningfully addressed Section 1-401 of the PSA involved a criminal prosecution of a Section 1-401(b) violation. *See Commonwealth v. Stockard*, 413 A.2d 1088 (Pa. 1980). However, the *Stockard* Court did not consider the scienter requirements of Section 1-401(b) at issue here, nor could it have done so. Criminal prosecutions under the PSA are governed by Section 1-511, which provides its own scienter requirements for criminal violations of the various prohibitions set forth in the PSA. To be subject to a criminal prosecution for a violation of Section 1-401, the accused must act willfully. *See* 70 P.S. § 1-511(a)-(c). Thus, *Stockard* provides no guidance here, as Section 1-511 simply does not apply to civil actions brought by private parties.

Similarly, in *Stas v. Pennsylvania Securities Commission*, 910 A.2d 125 (Pa. Commw. 2006), the Commonwealth Court reviewed the Commission's determination that the petitioner had willfully violated Sections 1-401(a)-(c), concluding that the Commission's determination had been supported by substantial evidence. *Stas*, 910 A.2d at 133. However, the *Stas* court specifically considered violations of Section 1-401 in relation to Section 1-513, which governs standards for the issuance of rescission orders. To issue a rescission order, the Commission must, inter alia, determine that "an issuer wilfully violated [S]ection [1-]201 or [1-]401[.]" 70 P.S. § 1-513. Thus, the *Stas* decision also involved scienter requirements imposed on Section 1-401 violations for specific circumstances not applicable in this case.

Upon this clean slate, the parties and Amicus have dedicated profuse analysis to the proposition that the history and circumstances of the General Assembly's enactment of the PSA and the decisions of foreign jurisdictions interpreting similar (and often identical) texts bear heavily upon its meaning, but those arguments place the proverbial cart before the horse. It is only upon a finding that a statute's terms are ambiguous that we turn away from the text to ascertain legislative intent by other means. *See Oliver v. City of Pittsburgh*, 11 A.3d 960, 965 (Pa. 2011) (stating "it is well established that resort to the rules of statutory construction is to be made only when there is an ambiguity in the provision").[19] Thus, statutory interpretation begins and most often ends with the plain meaning of a statute's text, as it does here.

Section 1-401 provides as follows:

§ 1-401. Sales and purchases

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[19] *See* 1 Pa.C.S. § 1921(c).

It is unlawful for any person, in connection with the offer, sale or purchase of any security in this State, directly or indirectly:

(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 are 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.

70 P.S. § 1-401.

Instantly, Mimi Investors sought relief by alleging ORCA Officers' violation of Section 1-401(b). A violation of that subsection occurs when there is a misrepresentation of a material fact in connection with a securities transaction. The misrepresentation may be overt, such as when a person makes an untrue statement about a material fact. The offense may also occur by act of omission. Omitting a material fact in a statement connected to a securities transaction constitutes a violation of Section 1-401(b) when the omission renders the statement misleading. Critically, **there are no terms in Section 1-401(b) related to scienter**, and there are no general provisions of the PSA that otherwise supply a scienter element.[20]

[20] By contrast, for example, Section 302(c) of the Crimes Code "provid[es] the default culpability for a material element of an offense when none is otherwise prescribed by law." *Commonwealth v. Gallagher*, 924 A.2d 636, 641 (Pa. 2007) (citing 18 Pa.C.S. § 302(c)). No similar provision applies to the PSA across the board. However, various sanctions under Part V (Enforcement) of the PSA provide scienter requirements specific to the sanction imposed.

ORCA Officers do not specifically claim that Section 1-401(b) is ambiguous; yet, they fail to conduct any textual analysis to identify what terms in Section 1-401(b) establish a scienter requirement. Rather, ORCA Officers assert that provisions of Section 1-401 have been deemed to require scienter by federal courts, and that its ostensible analogue in SEC Rule 10b-5, which contains nearly identical language, was deemed to require scienter in *Hochfelder*. However, both arguments skip a pure textual analysis and effectively ask this Court to read into Section 1-401(b) an implicit scienter element based on a variety of non-precedential sources and other devices of statutory construction that do not come into play absent a finding of ambiguity. We ascertain no basis to proceed to the secondary steps of our rules of statutory construction given the lack of ambiguity in the terms of Section 1-401 regarding scienter.

In promulgating the PSA, the General Assembly clearly understood how to provide a scienter requirement. For example, immediately preceding Section 1-401(b) is Section 1-401(a), which utilizes the phrase "scheme or artifice to defraud." 70 P.S. § 1-401(a). That phrasing directly implies intentional misconduct with common scienter terminology. Black's Law Dictionary defines "device" as "a scheme to trick or deceive; a stratagem or artifice, as in the law related to fraud." *Device*, BLACK'S LAW DICTIONARY (11th ed. 2019). Merriam-Webster defines "scheme" as "a **plan** for doing something." *Scheme*, WEBSTER'S II DICTIONARY (3d ed. 2005) (emphasis added). Similarly, "fraud," the root of "defraud," means a "**deliberate** deception perpetrated for unlawful or unfair gain." *Fraud*, WEBSTER'S II DICTIONARY (3d ed. 2005) (emphasis added). Moreover, to "defraud" is subsumed within the definition of "scienter." *See supra* note 1. Thus, individually and in combination, the Legislature's use of the terms "device," "scheme"

and “defraud” in Section 1-401(a) plainly define a scienter requirement of knowledge or specific intent to defraud. Conversely, language describing scienter is glaringly absent from Section 1-401(b). Additionally, the Legislature employed the language of scienter in several other material provisions of PSA, further reinforcing the notion that the absence of scienter language in Section 1-401(b) was intentional. *See* 70 P.S. § 1-403 (“No broker-dealer or agent shall effect any transaction in, or induce or attempt to induce the purchase or sale of, any security in this State by means of any manipulative, deceptive or other fraudulent scheme, device, or contrivance, fictitious quotation, or in violation of this act or any regulation or order hereunder.”); 70 P.S. § 1-408 (“It is unlawful for any person to purchase or sell or induce or attempt to induce the purchase or sale of any security in this Commonwealth by means of any manipulative, deceptive or other fraudulent scheme, device or contrivance… .”); 70 P.S. § 1-409 (“It shall be unlawful for any person to purchase or sell or induce or attempt to induce the purchase or sale of any security in this State by means of any manipulative, deceptive or other fraudulent scheme, device or contrivance… .”).

It is abundantly clear that when the General Assembly intended to include a scienter element in the material provisions of the PSA, it unambiguously utilized explicit language to that effect.[21] Furthermore, as was the case in both *Stockard* and *Stas*,

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[21] Thus, two legal maxims ostensibly apply in these circumstances. First, “[u]nder the doctrine of expressio unius est exclusio alterius, ‘the inclusion of a specific matter in a statute implies the exclusion of other matters.’” *Thompson v. Thompson*, 223 A.3d 1272, 1277 (Pa. 2020) (internal citations omitted). Second, while we primarily focus on what a statute says, it may at times be equally important to recognize what a statute does not say. *Id.* Here, the General Assembly’s refusal to utilize the diction of scienter in Section 1-401(b) is particularly notable precisely because the Legislature so readily used the omitted language elsewhere in the PSA.

certain enforcement provisions under Part V of the PSA provide additional scienter requirements specific to the nature of the sanction permitted under that section of the statute; e.g., both criminal penalties and/or rescission orders involving Section 1-401 violations require a showing of willfulness. *See* 70 P.S. § 1-511 (criminal penalties); 70 P.S. § 1-513 (recission). Again, when the General Assembly intended to provide a scienter requirement in the PSA, it did so expressly.

Finally, the absence of a scienter requirement in Section 1-401(b) is logically compatible with the provision's plain meaning. One can make an untrue statement about material facts, or omit a material fact so as to render the whole statement untrue or misleading, without the presence of any intent to deceive, manipulate, or defraud. The General Assembly was free to recognize that such misstatements might cause significant economic harms warranting redress, regardless of intentionality. Because the PSA contemplates a variety of sanctions that exist on a wide spectrum of relative severity from civil to criminal, it should come as no surprise in this statutory regime that some of the proscribed conduct in the PSA's material provisions do not require a showing of scienter. That is, there is nothing remotely absurd with the notion that the General Assembly intended that some provisions of the PSA, like Section 1-401(b), would not require pleading and proof of scienter to address and provide remedies for the wide variety of negative outcomes that might occasionally result from a problematic securities transaction.

For the above reasons, it is patently clear that the Legislature did not intend to include a scienter requirement for causes of action premised upon a violation of Section

1-401(b) of the PSA.[22] Thus, the Superior Court correctly concluded that the trial court did not err when it overruled ORCA Officers' preliminary objections.[23] Consequently, we need not address the second aspect of the question before us—whether Mimi Investors adequately pled scienter in the amended complaint—because we conclude

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[22] ORCA Officers also posits that the General Assembly's failure to amend Section 1-401 despite a long history of federal district court decisions interpreting it to require scienter constitutes evidence, if not a presumption, that the legislature intended it require scienter. Reply Brief, at 5. They cite *Fonner*, wherein this Court stated that the "failure of the General Assembly to change the law which has been interpreted by the courts creates a presumption that the interpretation was in accordance with the legislative intent; otherwise the General Assembly would have changed the law in a subsequent amendment." *Fonner*, 724 A.2d at 906. This argument fails because "the courts" referred to in *Fonner* were exclusively Pennsylvania courts and, more specifically, the prior interpretations by this Court of the statutory language at issue in that case. Here, however, **every** case cited by ORCA Officers interpreting Section 1-401 to require scienter was issued by a court that offers no binding precedent with respect to the interpretation of a Pennsylvania statute. Indeed, *Fonner* cited directly, without qualification, to *Commonwealth v. Willson Products, Inc.*, 194 A.2d 162, 167 (Pa. 1963) for the presumption, where the rule was stated as such: "The failure of the Legislature subsequent to **our decision** in *Sablosky v. Messner*, [92 A.2d 411 (Pa. 1952)], to change the law **as therein interpreted by this Court** creates a presumption that such an interpretation was in accordance with the intent of the Legislature[.]" *Willson Prods., Inc.*, 194 A.2d at 167 (emphasis added). Indeed, the Rules of Construction make substantially the same point. *See* 1 Pa.C.S. § 1922(4) ("In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used: … That when a **court of last resort** has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language.") (emphasis added). The presumption invoked by ORCA Officers simply has no application here, where we address a matter of first impression before this Court.

[23] To the extent that our rationale deviates from that of the lower courts, it is of no moment. The lower courts resolved this matter by concluding that any legal ambiguity as to whether the provisions of Section 1-401 require proof of scienter resolves in favor of the non-moving party in the context of the standard governing preliminary objections. However, we conclude today that there is no ambiguity as to the absence of scienter requirement in Section 1-401(b); thus, Mimi Investors' alleged failure to plead and prove scienter was no barrier to its ability to obtain relief below.

that no such pleading was required under the unambiguous terms of Section 1-401(b), the sole provision of the PSA pursuant to which Mimi Investors sought relief.

Nevertheless, our holding today does not foreclose the potential role of scienter in this case. Section 1-501 defines private causes of action arising under the PSA, and provides even more evidence that the General Assembly's omission of scienter language from Section 1-401(b) was intentional. Section 1-501(a) provides:

> (a) Any person who: … (ii) offers or sells a security in violation of sections 401, 403, 404 or otherwise by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the purchaser not knowing of the untruth or omission, and **who does not sustain the burden of proof that he did not know and in the exercise of reasonable care could not have known of the untruth or omission**, shall be liable to the person purchasing the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at the legal rate from the date of payment, less the amount of any income or distributions, in cash or in kind, received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, plus interest at the legal rate from the date of disposition. Tender shall require only notice of willingness to exchange the security for the amount specified. Any notice may be given by service as in civil actions or by certified mail addressed to the last known address of the person liable.

70 P.S. § 1-501(a) (emphasis added).

Synthesizing Sections 1-401 and 1-501, we observe that Section 1-501(a) establishes private causes of actions arising from violations of Sections 1-401, 1-403, and 1-404. Pertinent here, Section 1-401(b) provides the elements of a misrepresentation claim that must be pled and proven by a plaintiff to entitle them to the

forms of relief described in the latter half of Section 1-501(a). As we hold in this case, those elements do not include scienter. However, Section 1-501(a) explicitly permits a defendant who has offered or sold the at-issue security to assert an affirmative defense "that that he did not know and in the exercise of reasonable care could not have known of the untruth or omission" that forms the basis of a Section 1-401(b) claim. Section 1-501(a) clearly places the burden of proof on the person who made the untrue statement (explicitly or by omission) to establish their lack of knowledge (or any inability to ascertain the truth by reasonable care) regarding the relevant material fact. As the General Assembly has dictated, "[e]very statute shall be construed, if possible, to give effect to all its provisions." 1 Pa.C.S. § 1921(a). The affirmative defense set forth in Section 1-501(a) would be rendered superfluous if a scienter element were implied into Section 1-401(b). Thus, the presence of an affirmative scienter defense in Section 1-501(a) reinforces our conclusion that a plaintiff has no obligation to plead and prove scienter to establish a violation of Section 1-401(b).

Finally, although we broadly granted allocatur to answer whether Section 1-401 of the PSA requires a plaintiff to plead and prove scienter, the question as stated is broader than necessary to resolve the discrete legal dispute between the parties in this case. Section 1-401 contains three distinct subsections, Sections 1-401(a), (b), and (c), defining three types of prohibited conduct. In their amended complaint, Mimi Investors sought relief under the PSA solely based on ORCA Officers' alleged violation of the

terms of Section 1-401(b). Amended Complaint, ¶ 28. Thus, our decision today resolves that issue alone.[24]

IV. Conclusion

Scienter is typically an indispensable element of fraud, a legal truism we can readily assume was known to the General Assembly when it enacted the PSA. But Part IV of the PSA governs "Fraudulent **and** Prohibited Practices," suggesting that the legislature did not necessarily intend to limit the scope of the PSA's proscriptions only to fraudulent conduct.[25] Moreover, the legislature was also free to assign the burden of proof as it saw fit to the extent that it intended scienter to play a role in specific claims raised under the auspices of the PSA. At least with respect to a misrepresentation claim under Section 1-401(b), the General Assembly decided, unambiguously, that a plaintiff is not required to demonstrate that the defendant acted with scienter in misrepresenting a material fact relating to a securities transaction. Instead, the Legislature assigned the burden to demonstrate the absence of scienter to the defendant. Thus, a plaintiff need not plead and prove scienter in its complaint when asserting a private cause of action pursuant to Section 1-401(b) of the PSA. Accordingly, because the Superior Court reached the correct result, we affirm.

Chief Justice Todd and Justices Dougherty, Wecht and Brobson join the opinion.

Justice Mundy files a concurring opinion.

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[24] In our analysis, we observed that Section 1-401(a) and other substantive provisions of the PSA include a scienter element in determining that Section 1-401(b), by comparison, does not. We leave for another day whether Section 1-401(c) requires scienter, as resolution of that question is simply not necessary to resolve the controversy that gave rise to the instant appeal.

[25] PSA, Part IV ("Fraudulent and Prohibited Practices") (emphasis added).