No. 13-435

IN THE

Supreme Court of the United States

OMNICARE, INC. *et al.*,

Petitioner,

—v.—

THE LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND and THE CEMENT MASONS LOCAL 526 COMBINED FUNDS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 11 of the Securities Act of 1933, 15 U.S.C. §77k, provides an express remedy for purchasers of a registered security if the security's registration statement "contained an untrue statement of material fact or omitted to state a material fact required to be stated therein or necessary to make the statement therein not misleading."

Omnicare, Inc. issued securities pursuant to a registration statement asserting that the provider of pharmaceuticals to elderly residents of long-term care facilities believed that it operated within the law – when in truth Omnicare operated by paying and receiving illegal kickbacks, illegally promoting products such as Johnson & Johnson's Risperdal for dangerous off-label uses, and submitting false claims to Medicaid and Medicare. To settle governmental claims against it, Omnicare eventually paid roughly $150-million (plus interest), agreeing to enter a five-year corporate-integrity rehabilitation program.

Asserting that the legality of Omnicare's conduct – including kickbacks, fraudulent billing, and promotion of pharmaceuticals for unauthorized off-label use – amounts merely to a matter of "opinion," Petitioners ask this Court to decide:

"For purposes of a Section 11 claim, may a plaintiff plead that a statement of opinion was 'untrue' merely by alleging that the opinion itself was objectively wrong, as the Sixth Circuit has concluded, or must the plaintiff also allege that the statement was subjectively false – requiring allegations that the speaker's actual opinion was different from the one expressed – as the Second, Third, and Ninth Circuits have held?"

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Omnicare, Inc. ("Omnicare"), Joel F. Gemunder, David W. Froesel, Jr., Cheryl D. Hodges, the estate of the late Edward L. Hutton, and Sandra E. Laney.

Respondents are the Laborers District Council Construction Industry Pension Fund and the Cement Masons Local 526 Combined Funds.

In addition to the above-listed parties, Indiana State District Council of Laborers and Hod Carriers Pension Fund was originally a named plaintiff in the district court.

Pursuant to Supreme Court Rule 29.6, Respondents disclose that neither the Laborers District Council Construction Industry Pension Fund nor the Cement Masons Local 526 Combined Funds has a parent corporation, issues stock, or is owned or controlled by a publicly traded corporation.

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STATEMENT OF THE CASE

I. Nature of the Case

This case concerns Petitioners' liability under §11 of the Securities Act of 1933 ("Securities Act" or "1933 Act"), for issuing Omnicare, Inc. securities in a December 2005 public offering pursuant to a Registration Statement that described Omnicare as a company that operates within the law to provide pharmaceutical products and services that are carefully tailored to elderly patients' needs.

The truth was otherwise. The nation's largest provider of pharmaceutical-care services for elderly residents of long-term care facilities was in fact paying and receiving illegal kickbacks, systematically switching patients from suitable medications to more expensive (and thus more lucrative) pharmaceutical products, illegally promoting unapproved off-label uses of dangerous psychoactive drugs, and submitting false claims for reimbursement to Medicaid and Medicare. Omnicare engaged with Johnson & Johnson, in particular, in an unlawful program of bribes and kickbacks, while illegally promoting Johnson & Johnson's Risperdal for inappropriate and unapproved off-label uses, despite the grave risks posed to elderly patients' health. *See infra* at 5-12.

Caught red-handed in systematic misconduct, Omnicare eventually entered settlements with federal and state authorities. One made Omnicare "pay $98 million plus interest . . . to the federal government and the participating states and the District of Columbia," and required Omnicare to enter a rehabilitative five-year "Amended and Restated Corporate Integrity Agreement (CIA) with the

Department of Health and Human Services," which entailed "training and oversight to demonstrate Omnicare's commitment to comply with the applicable laws and regulations governing pharmacies." R138-6(Omnicare press release). A Department of Justice ("DOJ") press release explained that the settlement "provide[s] for procedures and reviews to be put in place to avoid and promptly detect conduct similar to that which gave rise to these matters." R134-5(TAC Ex.5, DOJ Press Release).

Omnicare has acknowledged that another settlement resolved "billing issues under the Michigan Medicaid program" by requiring Omnicare to "pay approximately $49.0 million to the State of Michigan." R59-17(Omnicare press release).

More recently, the DOJ announced that Johnson & Johnson too has entered settlements – paying $2.2 billion to resolve both criminal and civil claims against it for, among other things, promoting Risperdal for impermissible off-label uses, and for paying kickbacks inducing Omnicare to submit false claims to federal healthcare programs. *See infra* 10-12.

Investors who acquired Omnicare's registered securities issued pursuant to the December 2005 Registration Statement, with its misleading description of Omnicare's operation, sought relief under §11(a)'s provision that anyone acquiring a registered security may sue if "any part of the registration statement . . . contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or

necessary to make the statements therein not misleading." 15 U.S.C. §77k(a).

This Court holds that §11 imposes strict liability on the security's issuer, if its registration statement is in any material respect incomplete or misleading: "Liability against the issuer of a security is virtually absolute, even for innocent misstatements." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983); *see Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208 (1976) ("the issuer of the securities is held absolutely liable").

Other defendants against whom §11 authorizes suit include every person who signed the registration statement or was a director of the issuer, 15 U.S.C. §77k(a)(1), (2), as well as "every underwriter with respect to such security," 15 U.S.C. §77k(a)(5), and every "accountant, engineer, or appraiser," or other professional who provides an expert opinion and with its consent was "named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement." 15 U.S.C. §77k(a)(4).

Defendants other than the issuer – which remains strictly liable – may avoid liability by pleading and proving an affirmative defense of "due diligence," requiring each to demonstrate that it "had, after reasonable investigation, reasonable ground to believe and did believe" that what the registration statement said was "true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. §77k(b)(3); *see Huddleston*, 459 U.S. at 382; *Hochfelder*, 425 U.S. at

208; *see Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 369 (5th Cir. 2001) ("this is an affirmative defense that must be pleaded and proved").

This Court's precedents interpreting §11 thus clearly hold that the issuer is strictly liable if a registration statement contains materially misleading statements, while other defendants bear the burden of proving as an affirmative defense that each both believed the statements made and after diligent investigation actually had a reasonable basis for that belief. *See Huddleston*, 459 U.S. at 382; *Hochfelder*, 425 U.S. at 208.

Though their principal brief below did not even cite it, Petitioners now contend that this Court's decision in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), holding that corporate directors' subjectively false statements of opinion or belief must be objectively misleading to be actionable under §14(a) of the Securities Exchange Act of 1934 ("Securities Exchange Act" or "1934 Act"), somehow should have compelled the Sixth Circuit to hold that plaintiffs seeking to state a 1933 Act §11 claim must plead and prove defendants' *subjective disbelief* in a registration statement's objectively misleading statements of opinion.

II. Statement of Facts[1]

Defendant Omnicare, whose stock trades publicly on the New York Stock Exchange under the symbol OCR, is the country's largest provider of pharmaceutical-care services to elderly patients of long-term care facilities ("LTCFs"), servicing more than 1.4 million LTCF patients nationwide. R134(TAC¶¶2-3, 16). But Omnicare's mode of conducting business, when the Registration Statement for its December 2005 registered offering became effective, was seriously at odds with the picture painted by the Registration Statement. The Registration Statement falsely told prospective investors that the company soliciting their money operated within the law, serving the needs of elderly patients in LTCFs. In truth, Omnicare generated its revenues by systematically switching patients to more-expensive pharmaceutical products whether or not in the patients' interest, by illegally promoting pharmaceuticals' dangerous off-label uses, by taking unlawful kickbacks for promoting pharmaceuticals – in direct violation of the Federal Anti-Kickback statute – and by submitting false claims to Medicare and Medicaid. R134(TAC¶¶4-11).

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1 This Statement of Facts is based on the operative complaint's allegations which, on a motion to dismiss, must be taken as true, along with materials that are properly subject to judicial notice. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007). Though the pleading was styled as the "Second Amended Complaint," *see* R134("Second Amended Complaint"), the district court subsequently dubbed it a "Third Amended Complaint" or "TAC." Pet. App. at 31a n.2. This brief employs the district court's preferred terminology.

The Registration Statement falsely represented that Omnicare operated by ethically and lawfully pursuing elderly patients' best interests.[2] In truth, Omnicare's so-called "therapeutic initiatives" were designed not to benefit LTCF patients, but rather to switch them from effective but inexpensive low-profit pharmaceuticals to far more-expensive high-profit drugs – overriding the patients' real interests in order to inflate Omnicare's reimbursements from payors such as Medicare and Medicaid. R134(TAC¶¶29-45). David Kammerer, who was Omnicare's Director of Medicaid Reimbursements until 2002, has reported that his duties included generating profit forecasts based on "how much Omnicare market share could be moved from one drug (or drug form) to another drug (or drug form)." R134(TAC¶31). A former executive assistant in Omnicare's Midwest Regional Headquarters between 1998 and 2005 has reported that Omnicare's CFO directed the creation of bogus "clinical case studies" to justify switching patients to

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[2] For example, Omnicare told investors that through its Pharmacy Services division, "in accordance with our pharmaceutical care guidelines, we also provide for patient-specific therapeutic interchange of more efficacious and/or safer drugs for those presently being prescribed," and that Omnicare's consultant pharmacists offered "monthly drug regimen reviews for each resident in the facility to assess the appropriateness and efficacy of drug therapies." R134(TAC¶¶10, 27). Omnicare said its consultant physicians offered "monthly drug regimen reviews for each resident in the facility to assess the appropriateness and efficacy of drug therapies, including a review of the resident's current medication usage, monitoring drug reactions to other drugs or food, monitoring lab results and recommending alternate therapies, dosing adjustments or discontinuing unnecessary drugs." R134(TAC¶27).

the more-expensive drugs. R134(TAC¶34). According to Kammerer, moreover, Omnicare falsely instructed its pharmacists and physicians that the more-profitable drugs had equal or superior efficacy, and offered cost savings for the ultimate payors.[3]

The Registration Statement prominently featured Omnicare's misleading assertions that "[w]e believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements," and that "our contract arrangements with other healthcare providers . . . are in compliance

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[3] R134(TAC¶37). Omnicare's "Ranitidine Initiative," for example, was designed to needlessly switch patients to a more-expensive form of the drug Ranitidine, the second-most-prescribed drug to LTCF patients. R134(TAC¶¶40-45). Kammerer developed spreadsheets showing that Omnicare's profitability could be increased by switching patients' prescriptions from inexpensive tablets to much more-expensive capsules, in order to evade the price limit imposed on tablets by the federal Health Care Financing Administration, now known as the Center for Medicare and Medicaid Services. R134(TAC¶¶40-41). Though the tablets' price was regulated, the capsules' price was not, as capsules were rarely prescribed, generally being needed only for patients who are intubated. R134(TAC¶41). Bernard Lisitza, a licensed pharmacist and supervisor at Omnicare's Jacobs Healthcare between 1992 and 2001, reports that Omnicare instructed clerical personnel to alter prescriptions and to enter the altered orders on patients' Physician Order Sheets, which their doctors would sign off on without noticing the change. R134(TAC¶¶42-43). Lisitza has estimated that switching patients to the more-expensive capsules produced two to four times the revenue that Omnicare should have received from Ranitidine sales. R134(TAC¶¶38, 41).

with applicable federal and state laws." R134(TAC¶46). The TAC details how those contracts in fact violated the federal Anti-Kickback Statute, 42 U.S.C. §1320a-7b(b), which prohibits payments to induce the purchase – or even the recommendation – of pharmaceuticals to be paid for by a federally funded health-care program. R134(TAC¶¶47-90). The TAC sets out particularized allegations, identifying specific companies involved, and the products for which Omnicare arranged to receive illegal kickbacks. *E.g.*, R134(TAC¶¶77-90).

Violations of the Anti-Kickback Statute can have serious consequences, including legal liability. Violators also are potentially subject to exclusion from participation in federal healthcare programs, such as Medicaid and Medicare. R134(TAC¶50). State laws, moreover, condition Medicaid reimbursements on certifications of legal compliance. R134(TAC¶50).

The Registration Statement affirmatively (but falsely) advised investors that Omnicare conducted its business in a lawful and ethical manner, asserting that its consultant pharmacist services "help clients comply with the federal and state regulations applicable to nursing homes," rendering particular "assistance to the nursing facility in complying with state and federal regulations as they pertain to drug use." R134(TAC¶91). Yet, Omnicare was in truth violating the Federal Anti-Kickback Statute, working with pharmaceutical manufacturers to promote drugs for off-label use in violation of the Food, Drug and Cosmetic Act, working with pharmaceutical manufacturers to evade "Best Price" detection in violation of the Medicaid Drug Rebate Statute, and violating the federal False Claims Act with

fraudulently inflated billings to Medicare and Medicaid. R134(TAC¶¶92-98).

Omnicare arranged with Johnson & Johnson, in particular, to promote Risperdal – a powerful and dangerous atypical antipsychotic drug – for off-label use that the FDA had specifically rejected. R134(TAC¶¶6-8, 67-71). Because only 1% of the elderly population suffers *from schizophrenia*, for the treatment of which Risperdal had FDA approval, Omnicare and Johnson & Johnson together implemented an initiative promoting the dangerous antipsychotic for far more extensive unapproved off-label use by patients suffering *from dementia* – thereby violating FDA regulations and endangering LTCF patients. R134(TAC¶¶7, 69). Omnicare's off-label promotion of Risperdal was linked to increased incidence of cerebrovascular adverse events among those patients, including stroke and death. R134(TAC¶7).

Omnicare's misconduct with Johnson & Johnson resulted in *qui tam* complaints on behalf of the United States against Omnicare, R134(TAC¶5), and against Johnson & Johnson. R134(TAC¶¶6-7).

The TAC details how Omnicare eventually entered a settlement with the DOJ to resolve extensive allegations of wrongdoing, by attaching (and thus incorporating by reference) the DOJ's press release describing how Omnicare had systematically "solicited or paid a variety of kickbacks." R134-5(TAC Ex.5, DOJ Press Release). The DOJ explained that Omnicare had, for example, "allegedly solicited and received kickbacks from a pharmaceutical manufacturer, Johnson & Johnson (J&J), in exchange for agreeing to recommend that physicians prescribe Risperdal, a J&J antipsychotic drug, to nursing home

patients." R134-5(TAC Ex.5). "J&J's kickbacks to Omnicare took multiple forms, including rebates that were conditioned on Omnicare engaging in an 'Active Intervention Program' for Risperdal and payments dispensed as data purchase fees, educational grants, and fees to attend Omnicare meetings." *Id.*

Omnicare's illegal conduct had by no means ended there. "The government further alleged that Omnicare regularly paid kickbacks to nursing homes," and also "that Omnicare solicited, and IVAX paid, $8 million in kickbacks in exchange for Omnicare's agreement to purchase $50 million in drugs from IVAX." *Id.*

"'The defendants broke the law to take advantage of our nation's most vulnerable citizens – the elderly and the poor,'" explained the Assistant Attorney General for the DOJ's Civil Division. *Id.* And taxpayers had to foot the bill, through programs such as Medicare and Medicaid.

Although it is not part of the record below, this Court may judicially notice the fact that Johnson & Johnson on November 4, 2013, entered settlements totaling $2.2 billion that covers its misconduct with respect to Risperdal and payment of illegal kickbacks to Omnicare.[4]

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[4] The DOJ's November 4, 2013, press release and the terms of the settlements it describes are a matter of public record and are available online. *See* http://www.justice.gov/opa/pr/2013/November/13-ag-1170.html (DOJ press release) (last visited Jan. 6, 2014); http://www.justice.gov/opa/jj-pc-docs.html (links to court filings) (last visited Jan. 6, 2014). That courts may judicially notice public documents and court records is well established. *See United States v. Pink*, 315 U.S. 203, 216 (1942) (noticing record

The DOJ announced on November 4, 2013, that "healthcare giant Johnson & Johnson (J&J) and its subsidiaries will pay more than $2.2 billion to resolve criminal and civil liability," for promoting Risperdal (and two other drugs) "for uses not approved as safe and effective by the Food and Drug Administration (FDA)," and also for "payment of kickbacks to physicians and to the nation's largest long-term care pharmacy provider" – that is, to Omnicare.[5] "The civil settlement also resolves allegations that, in furtherance of their efforts to target elderly dementia patients in nursing homes, J&J and Janssen paid kickbacks to Omnicare, Inc., the nation's largest pharmacy specializing in dispensing drugs to nursing home patients."[6] The DOJ explained that J&J and its Janssen subsidiary "have agreed to pay $149 million to resolve the government's contention that these kickbacks caused Omnicare to submit false claims to federal health care programs," noting that "[i]n 2009, Omnicare paid $98 million to resolve its civil liability for claims that it accepted kickbacks from J&J and Janssen, along with certain other conduct."[7]

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in another proceeding); *see also United States v. Louisiana*, 363 U.S. 1, 12-13 (1960) (noticing "a massive array of historical documents"). Courts may take judicial notice in connection with a Rule 12(b)(6) motion. *Tellabs*, 551 U.S. at 322-23.

5 United States DOJ press release, *Johnson & Johnson to Pay More than $2.2 Billion to Resolve Criminal and Civil Investigations*, Nov. 4, 2013, available online at http://www.justice.gov/opa/pr/2013/November/13-ag-1170.html (last visited Jan. 6, 2014).

6 *Id.*

7 *Id.*

Petitioners nonetheless insist that the December 2005 Registration Statement's assurances concerning the character and legality of Omnicare's operation were merely a matter of "opinion," and that what the Registration Statement said cannot be deemed materially misleading under §11 absent allegations demonstrating each defendant's personal subjective knowledge of falsity.

III. The Proceedings Below

A. From Filing Through Initial Appeal

This litigation began in 2006, with the filing of class-action complaints alleging scienter-based securities-fraud claims under 1934 Act §10(b), 15 U.S.C. §78j(b), and was styled as "a securities fraud class action on behalf of all purchasers of the publicly traded securities of Omnicare, Inc. . . . between August 3, 2005 and January 27, 2006." R1(Complaint ¶1).

Consolidating two related cases, the district court appointed Laborers District Council to serve as Lead Plaintiff, under the procedures implemented by the Private Securities Litigation Reform Act of 1995 ("PSLRA") as codified in 1934 Act §21D(a)(3)(A), 15 U.S.C. §78u-4(a)(3)(A), and in 1933 Act §27(a)(3)(A), 15 U.S.C. §77z-1(a)(3)(A). R22(Order). The Lead Plaintiff then filed a Consolidated Amended Complaint ("CAC"), on July 20, 2006, still asserting claims only "for violations of §§10(b) and 20(a) of the Securities Exchange Act of 1934." R27(CAC ¶1).

The district court granted leave on January 26, 2007, R51(Order), to file what was captioned as the "First Amended Consolidated Complaint" ("FACC"),

that added the Cement Masons Local 526 Combined Funds as an additional named plaintiff, and that asserted a further claim under the strict-liability provision of 1933 Act §11, 15 U.S.C. §77k, on behalf of those putative class members who had acquired shares issued pursuant to Omnicare's December 2005 registered offering. R52(FACC¶¶1, 33, 249-256).

On defendants' motion, the district court dismissed that complaint with prejudice. R93(Order) at 29, *reported as Ind. State Dist. Council of Laborers v. Omnicare, Inc.*, 527 F. Supp. 2d 698, 712 (E.D. Ky. 2007). After setting forth the special statutory pleading requirements for 1934 Act §10(b) claims, the district court proceeded to dismiss *both* fraud-based 1934 Act claims *and* strict-liability 1933 Act claims on the ground that plaintiffs had not pleaded the elements of *prima facie* liability under 1934 Act §10(b). R93(Order) at 9-26 & n.8.

Although neither scienter nor loss causation is an element of *prima facie* liability for the §11 claims, the district court in a footnote dismissed them on the basis that Respondents had not pleaded the loss-causation element necessary to state a *prima facie* claim for intentional securities fraud under §10(b). R93(Order) at 17 n.8.

The district court also dismissed 1934 Act §10(b) claims based on statements concerning Omnicare's legal-compliance policies which had appeared outside Omnicare's 1933 Act Registration Statement, in a news article and press release, and which therefore were not asserted as 1933 Act claims. R93(Order) at 21-26. The district court dismissed those §10(b) securities-fraud claims because "plaintiffs do not plead facts which support an inference that defendants knew these two statements to be false at

the time they were made," R93(Order) at 23-24, and entered judgment. R94(Judgment).

The Sixth Circuit affirmed the district court's dismissal of 1934 Act §10(b) claims for which investors must plead facts showing both scienter and loss causation. Pet. App. at 42a-67a. But it reversed the district court's dismissal of 1933 Act claims, because loss causation is not an element of *prima facie* liability for a 1933 Act claim, but rather a potential affirmative defense. Pet. App. at 66a-67a. Holding that Rule 9(b) applies to any allegations of fraud that may underlie §11 claims, the Sixth Circuit remanded, leaving "the application of Rule 9(b) standards to the district court." Pet. App. at 67a.

B. On Remand: Dismissal of Strict-Liability §11 Claims for Failure to Plead Particularized Facts Demonstrating Each Defendant's Knowledge of Falsity

On remand, the district court granted Respondents leave to file a further amended complaint that dropped fraud-based 1934 Act allegations and focused exclusively on stating strict-liability 1933 Act claims for the December 2005 Registration Statement's false and misleading statements and omissions. *See* R133:9(Order). The TAC drew on government investigations, other court proceedings, settlements of governmental claims, and confidential witnesses. R134(TAC¶¶4-11, 26-167).

The district court dismissed plaintiffs' §11 claims with prejudice, however, on the ground that plaintiffs failed to particularize facts demonstrating each

defendant's knowledge of falsity. Pet. App. at 28a-41a.

Although a defendant's state of mind is not an element of §11 liability, *see Huddleston*, 459 U.S. at 382, and although Rule 9(b) expressly permits state of mind to be "alleged generally," the district court held that when misleading statements of opinion are at issue, §11 plaintiffs must plead particularized facts demonstrating each defendant's subjective disbelief of the statements made. *See* Pet. App. at 34a-35a.

It then dismissed Respondents' strict-liability 1933 Act §11 claims on the ground that the TAC did not particularize facts demonstrating each defendant's fraudulent intent. Pet. App. at 35a-37a (dismissing allegations of accounting violations); Pet. App. at 38a-40a (dismissing allegations relating to legal compliance).

Asserting that "statements regarding a company's belief as to its legal compliance are considered 'soft' information and are generally not actionable," Pet. App. at 38a, the district court held that absent allegations demonstrating each defendant's personal knowledge of falsity, 1933 Act §11 liability cannot attach to the Registration Statement's misleading statements and omissions relating to the conduct, character, and legality of Omnicare's business operations. Pet. App. at 38a-40a. Saying it found no basis for "inferring that the company's officers knew they were violating the law," the district court dismissed the strict-liability claims with prejudice. Pet. App. at 39a.

C. The Sixth Circuit Sustains Respondents' §11 Claims Because Knowledge of Falsity is Not an Element of *Prima Facie* Liability

The Sixth Circuit reversed in substantial part the district court's dismissal of Respondents' strict-liability §11 claims, observing that the district court had erroneously "held that Plaintiffs were required to plead that Defendants knew that the statements of legal compliance were false at the time they were made." Pet. App. at 11a. "Because the court found that Plaintiffs failed to plead knowledge of falsity, it dismissed the complaint for failure to state a claim." Pet. App. at 11a.

Following this Court's decision in *Huddleston*, 459 U.S. at 381-82, the Sixth Circuit reversed because "Section 11 provides for strict liability, and does not require a plaintiff to plead a defendant's state of mind." Pet. App. at 12a.

"Section 10(b) and Rule10b-5 require a plaintiff to prove scienter," the Sixth Circuit observed, while "§11 is a strict liability statute." Pet. App. at 15a. Thus, if a registration statement "includes a material misstatement," or is otherwise materially misleading, "that is sufficient" to state a *prima facie* claim, "and a complaint may survive a motion to dismiss without pleading knowledge of falsity." Pet. App. at 16a.

The Sixth Circuit noted that citing this Court's *Virginia Bankshares* decision on liability under 1934 Act §14(a), the Second Circuit in *Fait v. Regions Financial Corp.*, 655 F.3d 105 (2d Cir. 2011), had

> held "when a plaintiff asserts a claim under section 11 . . . based upon a belief

> or opinion alleged to have been communicated by a defendant, liability lies only to the extent that the statement was both objectively false and disbelieved by the defendant at the time it was expressed." *Id.* at 110 (citing *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1095-96 (1991)).

Pet. App. at 16a (quoting *Fait*, 655 F.3d at 111).

The Sixth Circuit concluded that to the extent that the Second Circuit's decision in *Fait*, and Ninth Circuit's in *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009), might be read to require plaintiffs to allege each defendant's subjective knowledge of falsity or disbelief in order to state a §11 claim, they "have read more into *Virginia Bankshares* than the language of the opinion allows and have stretched to extend this §14(a) case into a §11 context." Pet. App. at 17a.

The Sixth Circuit explained: "Reserving the question of whether scienter is necessary to make out a §14(a) claim, the Supreme Court held in *Virginia Bankshares* that a plaintiff may bring a claim under §14(a) of the Securities Exchange Act of 1934 for a material misstatement or omission even if the statement is vague and conclusory." Pet. App. at 17a. "The Court furthermore held that a defendant's disbelief in his own statement is not enough, on its own, for a plaintiff to make out a claim for a material misstatement under §14(a)." Pet. App. at 17a. A §14(a) claimant must "plead objective falsity in order to state a claim; pleading belief of falsity alone is not enough." Pet. App. at 17a.

"In the instant case, the Plaintiffs have pleaded objective falsity," the Sixth Circuit observed. Pet. App. at 17a. "The *Virginia Bankshares* Court was not faced with and did not address whether a plaintiff must additionally plead knowledge of falsity in order to state a claim" under §14(a), let alone under 1933 Act §11, which expressly imposes liability whenever a registration statement contains a false or misleading statement. Pet. App. at 17a.

REASONS FOR DENYING THE WRIT

Petitioners ask this Court to decide whether a §11 plaintiff may "plead that a statement of opinion was 'untrue' merely by alleging that the opinion itself was objectively wrong, as the Sixth Circuit has concluded, or must the plaintiff also allege that the statement was subjectively false – requiring allegations that the speaker's actual opinion was different from the one expressed" – that is to say, that the defendants actually disbelieved the opinion expressed. But this Court's review is unwarranted.

Petitioners suggest the decision below conflicts with this Court's holding in *Virginia Bankshares*, a decision that their merits brief below did not even cite, and which does not address 1933 Act liability, but merely holds that false expressions of opinion must be objectively misleading in order to be actionable under 1934 Act §14(a). In *Virginia Bankshares*, this Court *assumed* that the 1934 Act defendants subjectively disbelieved their own representations that a proposed merger was "fair," and the value obtained "high." This Court then held that statements must be *objectively misleading* – not merely subjectively disbelieved – to impose liability under §14(a). But if statements are objectively

misleading, §11's statutory standard of liability is satisfied – whether or not any particular defendant personally disbelieved them. 15 U.S.C. §77k(a); *Huddleston*, 459 U.S. at 382. *Virginia Bankshares* never suggests, let alone holds, that an objectively misleading statement of opinion cannot be actionable under §11 unless each defendant's subjective disbelief in the statement is also alleged. *Infra* at 20-26.

Though the Sixth Circuit's decision in this case says it departs from decisions of the Second and Ninth Circuits, the possibility of nascent conflict does not warrant this Court's premature intervention. The entire conflict comes down to a single sentence unaccompanied by real analysis in the Ninth Circuit's decision in *Rubke*, and the Second Circuit's singularly garbled opinion in *Fait*. Other Second Circuit decisions clearly hold that statements of opinion may be materially misleading, and thus actionable under the 1933 Act, "no matter how honestly but mistakenly held." *Franklin Sav. Bank v. Levy*, 551 F.2d 521, 527 (2d Cir. 1977). While the Second Circuit may need to resolve confusion about what contradictory statements in *Fait* really mean, this Court's immediate attention would be premature. *Infra* at 26-32.

In the meantime, the lower courts can be expected to continue to apply §11's text as written, and to follow this Court's decisions in *Huddleston* and *Hochfelder*, just as the Sixth Circuit has done. Given the clarity of §11's text, and of this Court's opinions concerning its meaning, the likelihood of serious conflict developing seems remote. *Infra* at 32-35.

This case is, moreover, a poor vehicle for resolving whatever problems *Fait* might conceivably pose. For

one thing, Respondents allege sufficient facts to infer the subjective disbelief of at least three defendants: Omnicare, its CEO Joel F. Gemunder, and its CFO David W. Froesel. *Infra* at 35-36. Perhaps more important, this case presents little opportunity for reviewing and correcting *Fait*'s suggestion that an issuer may be insulated from liability for its false and misleading financial statements absent allegations showing its subjective disbelief in the accuracy of financial results it reports. Accounting rules often require the exercise of judgment, and audited financial results are accompanied by an "audit opinion." But in this case no auditor is named as a defendant, and the Sixth Circuit has *affirmed* dismissal of Respondents' claims of accounting violations. Alleged "accounting-based misstatements" thus are, Petitioners themselves concede, "not pertinent to this petition." Pet. at 4 n.1. This case thus presents a remarkably poor vehicle for addressing whatever problems the Second Circuit's opinion in *Fait* might hypothetically engender. *Infra* at 35-37.

I. The Petition is Grounded in a Misreading of *Virginia Bankshares*

The Petition is grounded in a misreading of *Virginia Bankshares*, a decision that Petitioners did not even cite in their principal brief below, and which holds that in the context of formal securities filings, statements of opinion "are reasonably understood to rest on a factual basis that justifies them as accurate, *the absence of which renders them misleading.*" *Virginia Bankshares*, 501 U.S. at 1093 (emphasis added).

Petitioners attribute to *Virginia Bankshares* an entirely different holding, asserting:

> The Court concluded that such a statement is actionable only as "a misstatement of the psychological fact of the speaker's belief in what he says." 501 U.S. at 1095. To establish that such a statement was a material misstatement, therefore, the plaintiff must show that the speaker in fact "did not hold the beliefs or opinions expressed." *Id.* at 1090.

Pet. at 1. But that clearly is *not* what *Virginia Bankshares* held. As a matter of fact, this Court *expressly disclaimed* any ruling that subjective knowledge of falsity is required to support a §14(a) claim, *Virginia Bankshares*, 501 U.S. at 1091 n.5, and its opinion emphasizes that a specific statement may be either "knowingly false *or* misleadingly incomplete, even when stated in conclusory terms." *Id.* at 1095 (emphasis added).

Virginia Bankshares involved claims under 1934 Act §14(a), and the defendants' subjective disbelief in the opinions they had expressed was assumed because it had been proved below to a jury's satisfaction. This Court explained that a jury had found "that the directors' statements of belief and opinion were made with knowledge that the directors did not hold the beliefs or opinions expressed, and we confine our discussion to statements so made." *Virginia Bankshares*, 501 U.S. at 1090. This Court confined itself to those facts – expressly reserving "the question [of] whether scienter was necessary" to

state a §14(a) claim. *Id.* at 1091 n.5. The question to be decided was whether the statements might be actionable under §14(a) even if they were not *objectively* misleading.

With subjective falsity or scienter assumed, this Court held that where a statement of belief or opinion is at issue, a defendant's mere subjective "disbelief or undisclosed motivation, standing alone, [is] insufficient" for §14(a) liability. *Virginia Bankshares*, 501 U.S. at 1096. Statements of opinion must be *objectively misleading* to be actionable. *See id.* This Court clearly did not hold that an objectively misleading statement of opinion cannot be actionable under §14(a), let alone that it cannot be actionable under §11's strict-liability standard, absent a showing of subjective falsity or scienter.

Virginia Bankshares never suggests that if statements are in fact objectively misleading, investors must *also* allege defendants' subjective disbelief to state a strict-liability 1933 Act claim. The decision very clearly states that in the context of formal securities-law filings, statements of opinion "are reasonably understood to rest on a factual basis, that justifies them as accurate, the absence of which renders them misleading." *Virginia Bankshares*, 501 U.S. at 1093. And §11 very clearly imposes liability if a registration statement "contained an untrue statement" or omitted any material fact "necessary to make the statements therein not misleading." 15 U.S.C. §77k(a).

Virginia Bankshares does not purport to insert a new state-of-mind requirement in §11's text, which by its express terms requires anyone invoking its due-diligence defense to "sustain the burden of proof" that

each "had, after reasonable investigation, reasonable ground to believe and did believe," when the registration statement became effective, "that the statements therein were true and there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading."[8] Neither does *Virginia Bankshares* purport to reverse the burden of pleading and proving this affirmative defense, which the statute squarely places on the shoulders of any defendant who chooses to invoke it.[9]

Virginia Bankshares does not purport to overrule 1933 Act precedents, such as *Hochfelder* and *Huddleston*, which hold that §11 imposes strict liability on a security's issuer, while placing on other defendants the burden of pleading and proving that each both actually believed what the registration statement said *and* had reasonable grounds for so believing. *Huddleston*, 459 U.S. at 382; *Hochfelder*, 425 U.S. at 208.

Nor does *Virginia Bankshares* disparage the numerous precedents, arising from many contexts, confirming that opinions can be objectively misleading, and thus potentially actionable, absent

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[8] 15 U.S.C. §77k(b)(3)(A) (emphasis added). *See generally* 2 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* §7.4[2], at 239-41 (6th ed. 2009).

[9] *See* 15 U.S.C. §77k(b)(3). This Court's precedents preclude shifting to plaintiffs the burden of pleading facts in avoidance of such a defense. *See, e.g.*, *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Vance v. Terrazas*, 444 U.S. 252, 269 n.11 (1980).

allegations of scienter. Accountants may be liable for negligent audit opinions.[10] Appraisers may be liable for negligent opinions as to value.[11] Lawyers, too, may be liable for professional negligence if they offer a false opinion on a point of law.[12]

The Restatement (Second) of Torts confirms that opinions may be negligently misleading. Section 552, for example, provides that one with a pecuniary interest who "supplies false information for the guidance of others in their business transactions" may be liable "if he fails to exercise reasonable care or competence in obtaining or communicating the information." Restatement (Second) of Torts §552(1)

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10 *See, e.g., Travelers Cas. & Sur. Co. of Am. v. Ernst & Young LLP*, 542 F.3d 475, 481-84 (5th Cir. 2008) (Mississippi common law); *Rhode Island Hosp. Trust Nat'l Bank v. Swartz, Bresenoff, Yavner & Jacobs*, 455 F.2d 847, 848-53 (4th Cir. 1972) (Rhode Island law); *Fullmer v. Wohlfeiler & Beck*, 905 F.2d 1394, 1395-96 (10th Cir. 1990) (Utah law); *Touche Ross & Co. v. Comm. Union Ins. Co.*, 514 So. 2d 315, 322 (Miss. 1987); *Shatterproof Glass Corp. v. James*, 466 S.W. 2d 873, 874-80 (Tex. Civ. App. 1971).

11 *See, e.g., Private Mortgage Inv. Servs. v. Hotel & Club Assocs.*, 296 F.3d 308, 315 (4th Cir. 2002) (South Carolina common law); *FSLIC v. Texas Real Estate Counsellors*, 955 F.2d 261, 265 & n.6 (5th Cir. 1992) (Texas law); *Levine v. Wiss & Co.*, 478 A.2d 397, 247-48 (N.J. 1984); *Costa v. Neimon*, 366 N.W. 2d 896, 898 (Wis. Ct. App. 1985).

12 *See, e.g., Wafra Leasing Corp. 1999-A-1 v. Prime Capital Corp.*, 192 F. Supp. 2d 852, 873-74 (N.D. Ill. 2002); *Crossland Sav. FSB v. Rockwood Ins. Co.*, 700 F. Supp. 1274, 1284 (S.D.N.Y. 1988).

(1977). This "applies not only to information given as to the existence of facts *but also to an opinion given upon facts* equally well known to both the supplier and the recipient."[13]

A statement of opinion clearly may be misleading, and thus actionable under §11, even if it was not subjectively disbelieved by the persons that the statute makes accountable for a registration statement's misleading statements and omissions.

Justice Scalia's *Virginia Bankshares* concurrence by no means suggests a different conclusion. Justice Scalia wrote that the directors' statement of opinion that a proposed merger provided "high value" was one that, under 1934 Act §14(a), "would not produce liability if in fact it was not a high value but the directors honestly believed otherwise." *Virginia Bankshares*, 501 U.S. at 1109. The Sixth Ciruit recognized it would be unreasonable to employ this concurring dictum on 1934 Act §14(a) liability, *from a case assuming that §14(a) may require scienter, see*

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[13] *Id.*, §552, cmt. b (emphasis added); *see, e.g., Private Mortgage*, 296 F.3d at 314; *Lawyers Title Ins. Corp. v. Baik*, 55 P.3d 619, 624 (Wash. 2002); *Milwaukee Partners v. Collins Eng.*, 485 N.W. 2d 274, 277 (Wis. Ct. App. 1992). Liability for negligent misrepresentation exists even "[w]hen there is no intent to deceive but only good faith coupled with negligence," as those who offer opinions to guide others are bound to exercise both honesty *and* due care. Rest. (Second) Torts § 552, cmts. a and i; *see, e.g., Gilchrist Timber Co. v. ITT Rayonier*, 696 So. 2d 334, 337 (Fla. 1997); *State ex rel. Nichols v. Safeco Ins. Co.*, 671 P.2d 1151, 1154 n.1 (N.M. App. 1983); *Merrill v. William E. Ward Ins.*, 622 N.E. 2d 743 (Ohio App. 1993); *Haberman v. WPPSS*, 744 P.2d 1032, 1067 (Wash. 1987).

supra at 21-22, to rewrite 1933 Act §11. Nothing in Justice Scalia's concurrence concerning the scope of implied liability under §14(a) suggests that the Court should disregard §11's clear text, which creates an express right of action and places on specific defendants the burden of demonstrating that they not only "did believe" the statements made, but also that they had a reasonable basis for that belief. 15 U.S.C. §77k(b)(3).

II. Ambiguity In Other Circuits' Decisions Raises No Clear Conflict Warranting this Court's Review

Petitioners emphasize that the Sixth Circuit's opinion below says it rejects decisions of the Second and Ninth Circuits that can be read to say statements of opinion are not actionable under §11 unless plaintiffs allege facts showing that the defendants subjectively disbelieved them. *See* Pet. App. at 16a. But the intercircuit conflict is neither so extensive, nor so clear, as Petitioners contend.

The Ninth Circuit's decision in *Rubke* surely affords no basis for this Court's immediate intervention, when it rather casually states that allegedly misleading opinions "can give rise to a claim under section 11 only if the complaint alleges with particularity that the statements were both objectively and subjectively false or misleading." *Rubke*, 551 F.3d at 1162. The Ninth Circuit offers no reasoned analysis or rationale for this conclusory statement of an idea entirely at odds both with statutory text and with this Court's settled precedents.

Subsequent Ninth Circuit decisions adhere to this Court's holdings in *Huddleston* and *Hochfelder*, that 1933 Act claims do not require plaintiffs to allege defendants' subjective state of mind.[14] Resolving any resulting tensions in the Ninth Circuit's case law should be left to that court, given the paucity of analysis in *Rubke* and its lack of significant impact on subsequent decisions.

The Second Circuit's decision in *Fait*, concerning §11 claims based on allegedly misleading statements about an issuer's goodwill and loan-loss reserves, is altogether too muddled to produce a clear conflict requiring this Court's immediate attention. Acknowledging that under this Court's settled precedents "claims under sections 11 and 12 do not require allegations of scienter," the Second Circuit's opinion in *Fait* nonetheless asserts that statements concerning valuation of goodwill and the adequacy of required accounting reserves involve opinion, and thus can be actionable under §11 only if "both objectively false *and disbelieved* by the defendant at the time it was expressed." 655 F.3d at 109-10 (emphasis added).

The Second Circuit's analysis concerning valuation of goodwill is conceptually incoherent, asserting that a §11 claimant must "plausibly allege that defendants did not believe the statements regarding goodwill at the time they made them," while simultaneously

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[14] *See, e.g.*, *Hildes v. Arthur Anderson LLP*, 734 F.3d 854, 860 (9th Cir. 2013) ("Section 11 lacks a scienter requirement"); *Hemmer Grp. v. Sw. Water Co.*, No. 11-56154, 2013 U.S. App. LEXIS 11517, at *3-*4 (9th Cir. June 7, 2013) ("Section 11 is a strict liability statute and does not require fraudulent intent.").

insisting that this "does not amount to a requirement of scienter." *Id.* at 112 & n.5. This is puzzling, to say the least. For a defendant's subjective disbelief in its own statements amounts to knowing falsity. And the Second Circuit has long held that "'[t]he scienter needed in connection with securities fraud is intent to deceive, manipulate or defraud, *or knowing misconduct.*'" *Press v. Quick & Reilly Inc.*, 218 F.3d 121, 130 (2d Cir. 2000) (quoting *Press v. Chemical Inv. Servs. Corp.*, 166 F.3d 529, 538 (2d Cir. 1999)) (emphasis added).

Fait's analysis concerning loan-loss reserves starts by indicating that the plaintiff failed to allege objective falsity: "Plaintiff does not point to an objective standard for setting loan loss reserves." 655 F.3d at 113. Yet the court then concludes: "Because the complaint does not plausibly allege subjective falsity, it fails to state a claim." *Id.* If the statements at issue were not objectively misleading, because no objective standards were violated, then there was no reason for the Second Circuit also to delve into whether they were subjectively misleading. And had there been sufficient facts to show objective falsity, the Second Circuit may well have found those facts sufficient for pleading subjective falsity, too.

As a consequence, *Fait* may be little more than a "one-off" decision. Other Second Circuit precedents clearly hold that statements of opinion may be actionably misleading under the 1933 Act, whether or not their makers genuinely believed them. In *Franklin Savings Bank*, 551 F.2d at 527, which involved claims under 1933 Act §12, 15 U.S.C. §77*l*, the Second Circuit held: "If Goldman, Sachs failed to exercise reasonable professional care in assembling and evaluating the financial data, particularly in view

of the worsening condition of Penn Central, then its representation that the paper was credit worthy and high quality was untrue in fact and misleading no matter how honestly but mistakenly held." And in *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 715-16 (2d Cir. 2011), the Second Circuit held that defendants' alleged negligence relating solely to matters of opinion about known trends' likely future impact sufficiently stated a §11 claim.

Nor can Petitioners say that *Fait* has had much impact. Relatively few decisions have even cited it. The Second Circuit did so in a couple of nonprecedential summary orders, both lacking serious analysis of what *Fait* means.[15] Two published opinions that cite *Fait* involve claims arising under 1934 Act §10(b), for which knowledge of falsity or scienter is an element of liability, and thus cast little light on how *Fait* will be applied to strict-liability 1933 Act claims.[16] A single published decision involving 1933 Act claims, *Freidus v. Barclays Bank PLC*, 734 F.3d 132 (2d Cir. 2013), allows the plaintiff leave to replead on remand in order to meet *Fait*'s requirement that a statement of opinion be both objectively false *and* disbelieved by the defendant. *Id.*

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15 *See, e.g., Freidus v. ING Groep, N.V.*, No. 12-4514-cv, 2013 U.S. App. LEXIS 23489, at *4 (2d Cir. Nov. 22, 2013) (nonprecedential summary order); *Freeman Group v. Royal Bank of Scotland Group PLC*, No. 12-3642-cv, 2013 U.S. App. LEXIS 19571, at *7 (2d Cir. Sept. 25, 2013) (nonprecedential summary order).

16 *Kleinman v. Elan Corp.*, 706 F.3d 145, 147, 153 (2d Cir. 2013); *City of Omaha Nebraska Civ. Empl. Ret. Sys. v. CBS Corp.*, 679 F.3d 64, 66-67 (2d Cir. 2012).

at 141. The decision notes *Fait*'s assertions "that allegations of disbelief of subjective opinions are not the same as allegations of fraud," *id.*, and that "the pleading required for beliefs and opinions 'does not amount to a requirement of scienter,'" *id.* (quoting *Fait*, 655 F.3d at 112 n.5).

But the Second Circuit has yet to explain how requiring a defendant's subjective disbelief in the truth of its own statements amounts to something other than requiring scienter. It should be permitted to do so before the issue demands this Court's attention.

Hoping to create the impression of a more extensive, and perhaps serious, precedential conflict, Petitioners say that in *In re Donald J. Trump Casino Secs., Litig.*, 7 F.3d 357 (3d Cir. 1993), the Third Circuit held that statements of opinion cannot be deemed misleading unless defendants subjectively disbelieved them. But this is what *Trump Casino* actually says:

> We have squarely held that opinions, predictions and other forward-looking statements are not *per se* inactionable under the securities laws. Rather, such statements of "soft information" may be actionable misrepresentations if the speaker does not genuinely *and reasonably* believe them.

Trump Casino, 7 F.3d at 368 (emphasis added).

The Third Circuit thus clearly contemplates liability may lie in §11 cases if statements were not

both "genuinely *and reasonably* believe[d]." *Id.* (emphasis added).

Reasonable belief clearly is a negligence standard, not a requirement that plaintiffs demonstrate each defendant's subjective disbelief concerning an offering document's representations. As this Court noted in *Hochfelder*, §11's "due diligence" affirmative defense implicates "a negligence standard," by requiring any defendant invoking it to show "that 'after reasonable investigation' he had 'reasonable ground[s] to believe' that the statements for which he was responsible were true and there was no omission of a material fact." *Hochfelder*, 425 U.S. at 208 (quoting 15 U.S.C. §77k(b)(3)). Again, the statute squarely places on defendants seeking to invoke this defense the burden of demonstrating that they both genuinely and reasonably believed what the Registration Statement said. *See id.*; 15 U.S.C. §77k(b)(3). It clearly does not make the defendants' subjective disbelief or knowledge of falsity an element of *prima facie* liability that plaintiffs must plead in order to state a claim.

Trump Casino notes that *Virginia Bankshares* "held that statements of opinion or belief may be actionable when they expressly or impliedly assert something false or misleading about their subject matter." *Trump Casino*, 7 F.3d at 372. Yet *Trump Casino* never interprets *Virginia Bankshares* to hold that when its requirement of objective falsity is satisfied, a plaintiff must *also* prove defendants' subjective disbelief to state a §11 claim. *Trump Casino* never suggests that defendants must subjectively disbelieve a registration statement's objectively misleading statements of opinion or belief

in order for those misleading statements to be actionable under §11.

In sum, although the Second Circuit's decision in *Fait* and the Ninth Circuit's decision in *Rubke* each unquestionably contains some confusing language, the job of clearing up what those decisions really mean is better left to the Second Circuit and Ninth Circuit – which should be afforded an opportunity to work through any dissonance that exists in their own decisions before this Court's intervention is required.

III. The Sixth Circuit's Opinion Comports with The 1933 Act's Statutory Text and With This Court's Decisions Interpreting that Text

Despite confusing statements in *Rubke* and *Fait*, other circuits can be expected to honor this Court's precedents, and to apply §11 as written – just as the Sixth Circuit has. The statutory text, and this Court's decisions concerning that text, are sufficiently clear that serious precedential conflict is unlikely to develop.

Petitioners breeze past §11's text, which imposes strict liability on an issuer of securities without regard to its state of mind, and which squarely places on others involved in the offering process (including the issuer's directors and anyone who signed the registration statement) the burden of demonstrating that each reasonably believed the registration statement contained no false or misleading statements. *See* 15 U.S.C. §77k(a), §77k(b)(3).

In framing express remedies under the federal securities laws, Congress "clearly specified whether recovery was to be premised on knowing or intentional conduct, negligence, or entirely innocent mistake." *Hochfelder*, 425 U.S. at 207. "For example, §11 of the 1933 Act unambiguously creates a private action for damages when a registration statement includes untrue statements of material facts or fails to state material facts necessary to make the statements therein not misleading." *Id.* at 207-08. "Within the limits specified by §11(e), the issuer . . . is held absolutely liable for any damages resulting from such misstatement or omission." *Id.* at 208. Others "such as accountants who have prepared portions of the registration statement are accorded a 'due diligence' defense." *Id.* "In effect, this is a negligence standard." *Id.* "The express recognition of a cause of action premised on negligent behavior in §11 stands in sharp contrast to the language of §10(b)," (*id.*), which imposes liability only if a defendant acted with scienter, "a mental state embracing intent to deceive, manipulate, or defraud." *Id.* at 193 n.12; *see also Huddleston*, 459 U.S. at 381-82.

Though Petitioners say expressions of opinion cannot possibly be misleading unless their authors personally disbelieved them, the 1933 Act expressly requires defendants other than the issuer to show, as an affirmative defense, not only that they believed assertions in a registration statement – including any opinions and valuations – but also that they had a reasonable basis to so believe. A defendant other than the issuer must "sustain the burden of proof" that it had "after reasonable investigation, reasonable ground to believe and did believe . . . that the statements therein were true and that there was no

omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. §77k(b)(3)(A), (B). If the Registration Statement contains the "report or valuation of an expert" opining on the issuer's operations or assets, the affirmative defense requires defendants claiming to rely on the expert's opinion to demonstrate that each "had no reasonable ground to believe" that the statement of opinion was inaccurate or misleading. 15 U.S.C. §77k(b)(3)(C).

The statutory text makes no sense if, as Petitioners contend, such statements cannot be misleading in the first place absent a showing that specific defendants personally disbelieved them.

It is easy to imagine cases where an issuer's Chief Executive Officer or its Chief Financial Officer know that something a registration statement says is false, or misleadingly incomplete, and yet reasonably diligent underwriters and outside directors remain unaware of the falsity. In this case, for example, it might turn out at trial that Omnicare's CEO and CFO each knew that what the Registration Statement said about legal compliance was false. Yet, it is conceivable that an outside director still could carry the burden of demonstrating the affirmative defense – by showing that he or she remained innocently ignorant, and actually believed what the Registration Statement said.

According to Petitioners' views, then, it appears that one and the same statement would be both materially misleading, and *not* materially misleading, at the very same time, apparently depending on the subjective state of mind of each defendant. It is materially misleading to the extent that plaintiffs can

show the CEO or CFO disbelieved it. But it is *not* materially misleading because other defendants were unaware of the problem. This makes little sense. For as this Court has repeatedly stated, materiality must be judged "according to an objective standard," looking not to any defendant's state of mind, but focusing instead on "'the significance of an omitted or misrepresented fact to a reasonable investor.'" *Amgen Inc. v. Connecticut Retirement Plans & Tr. Funds*, 133 S. Ct. 1184, 1191, 1195-96 (2013) (quoting *TSC Indus., Inc. v. Northway Inc.*, 426 U.S. 438, 445 (1976)); *see Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1318 (2011).

All in all, it is quite unlikely that any serious precedential conflict will develop in the circuit courts.

IV. This Is A Poor Test Case as at Least Three Defendants' Subjective Disbelief is Manifest from the Facts Alleged, and as the Case Presently Involves No Accounting Issues of the Sort Implicated by *Fait*

Were it necessary to wade into the issues hypothetically created by an extravagant reading of *Fait*, this case would be a poor vehicle for doing so.

For one thing, this case should survive even under a subjective-disbelief standard. If knowing falsity were truly §11's standard, the facts pleaded raise at least a plausible inference that Omnicare and its two top officers knew of Omnicare's misconduct. CEO Gemunder and CFO Froesel not only knew of Omnicare's undisclosed practices, they were directly involved in coordinating and implementing them, overseeing and orchestrating the execution of

therapeutic initiatives and contracts entailing illegal rebates.

Gemunder personally approved therapeutic initiatives designed to push high-profit drugs on nursing home patients, R134(TAC¶31), and Froesel was responsible for directing Omnicare's Regional CFOs to initiate measures to switch patients' prescriptions from lower-priced to higher-priced drugs. R134(TAC¶¶34-38). Gemunder personally told a Johnson & Johnson executive that Omnicare would support a therapeutic initiative to steer patients towards Risperdal by promoting the drug for off-label uses.[17] Corporate documents also reveal that Gemunder negotiated contracts providing the "rebates" Omnicare received for promoting manufacturers' drugs – including those related to Omnicare's Risperdal Initiative. R134(TAC¶¶51, 87-90 & Ex. 21 at JNJ011362-64). Gemunder also misled Omnicare's attorneys in order to get their "approval," or simply ignored the attorneys' advice concerning the transactions. R134(TAC¶¶87-90, 122, 124). Accordingly, Froesel and Gemunder, at least, likely knew that Omnicare's statements affirming the legality of Omnicare's practices were false.

Perhaps more important, Petitioners themselves concede that this case presents no opportunity to evaluate *Fait's* potential impact on cases involving misstated financial results. *Fait*, which involved alleged accounting violations, might arguably have seriously deleterious consequences were it broadly applied whenever a company's reported financial

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[17] R134(TAC¶¶67-71). The individual responsible for preparing "clinical spin," Lisa Welford, reported directly to defendant Gemunder. R134(TAC¶36 & Ex. 17 at JNJ351935).

results are based on accounting judgments, or when an auditor's report is framed as an "audit opinion."

The valuation of goodwill and the taking of reserves for doubtful accounts can directly affect a company's reported assets and earnings. Does *Fait* thus mean that when a company reports that it earned fifty cents a share, this is nothing more than an expression of opinion? Does *Fait* mean that when auditors consent to inclusion of an "audit opinion" in an issuer's registration statement, they cannot be liable unless plaintiffs allege and prove the auditors' subjective disbelief –thereby inverting §11(b)(3)'s provision that an auditor must demonstrate that it "had, after reasonable investigation, reasonable ground to believe and did believe" that its audit opinion was "true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading"? 15 U.S.C. §77k(b)(3)(B)(i); *see Hochfelder*, 425 U.S. at 208.

Depending on how the case law develops, those might turn out to be important questions. But this is not a case that raises them. Petitioners concede that with the dismissal of the TAC's "accounting misstatements . . . affirmed by the circuit court," they are "not pertinent to this petition." Pet. at 4. This is not a proper case in which to consider *Fait's* potential impact.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
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