No.

In the Supreme Court of the United States

OMNICARE, INC., *ET AL.*,
PETITIONERS

v.

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

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

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 a private remedy for a purchaser of securities issued under a registration statement filed with the Securities and Exchange Commission if the 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." Against that statutory backdrop, this case presents the following question:

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 a named plaintiff in the district court but not in the court of appeals.

Pursuant to Supreme Court Rule 29.6, Petitioner Omnicare, Inc. discloses that it does not have a parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Petitioners seek this Court's review to resolve a sharp conflict among the circuits over a critical and recurring issue of pleading under the federal securities laws: the standard for pleading falsity in a statement of opinion or belief. This conflict flows from a fundamental disagreement among the circuits about the meaning of this Court's decision in *Virginia Bankshares* v. *Sandberg*, 501 U.S. 1083 (1991).

In *Virginia Bankshares*, this Court considered whether a statement of belief or opinion can be a material misstatement for purposes of a claim under Section 14(a) of the Securities Exchange Act of 1934, or, rather, whether such a statement is *per se* immaterial. 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. This requirement is commonly known as "subjective falsity."

The question in the instant case is whether this aspect of *Virginia Bankshares* applies to claims under Section 11 of the Securities Act of 1933. The Second, Third, and Ninth Circuits have all held that it does. In these circuits, no matter which provision of the federal securities laws is at issue, pleading that a statement of opinion was materially untrue requires allegations of both objective *and subjective* falsity. In other words, the plaintiff must allege that the opinion expressed was both wrong *and* inconsistent with the opinion actually held by the speaker.

The Sixth Circuit has taken a contrary position, explicitly rejecting the view of its sister circuits. According to the Sixth Circuit, "[t]he Second and Ninth Circuits have read more into *Virginia Bankshares* than the language of the opinion allows." Pet. App. 18a. Because Section 11 is a strict liability statute and does not require scienter, the Sixth Circuit concluded that the element of falsity for a Section 11 claim must be evaluated without reference to the speaker's subjective mindset, even if the statement was self-evidently a statement of the speaker's own opinion or belief. Thus, in the Sixth Circuit, a plaintiff may state a claim under Section 11 based on an honestly expressed opinion, merely by alleging that the opinion turned out to be wrong.

The Sixth Circuit's approach on this issue threatens dangerous and far-reaching consequences. Among other things, it portends a shift away from the clear limitations this Court and Congress have placed on claims under the federal securities laws. It would expose corporations, auditors, underwriters, and other professionals to a sharp increase in the cost of litigation, as certain types of federal securities claims—particularly those under Section 11—would become far more difficult to resolve at the pleading stage. And it would serve as a powerful disincentive for corporations and their executives to disclose their honestly held opinions on subjects that investors may find important and useful.

This Court's intervention is required to resolve the conflict of authority and ensure fidelity to the limitations this Court recognized more than twenty years ago in *Virginia Bankshares*.

OPINIONS BELOW

The opinion below (Pet. App. 3a–27a) is reported at 719 F.3d 498. The opinion of the district court granting Petitioners' motion to dismiss (Pet. App. 28a–41a) is unreported. An earlier Sixth Circuit opinion in this case (Pet. App. 42a–67a) is reported at 583 F.3d 935.

JURISDICTION

The court of appeals entered judgment on May 23, 2013, and denied a timely petition for rehearing en banc on July 23, 2013. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 11 of the Securities Act of 1933, 15 U.S.C. §77k, is set out in the appendix to this petition (Pet. App. 68a–76a).

STATEMENT OF THE CASE

Petitioner Omnicare is the nation's largest provider of pharmaceutical care services for the elderly and other residents of long-term facilities in the United States and Canada. Petitioners Joel Gemunder, David Froesel, Cheryl Hodges, Edward Hutton, and Sandra Laney were officers and directors of Omnicare at the relevant time. Omnicare is a publicly traded company and is subject to a variety of state and federal regulations. Pet. App. 6a.

In December 2005, Omnicare offered 12.8 million shares of common stock for sale pursuant to a registration statement filed with the Securities and Exchange Commission. *Id.* at 6a. Respondents Laborers District Council Construction Industry Pension Fund

and Cement Masons Local 526 Combined Funds allege that they were among the investors in these securities. They purport to represent a class consisting of all investors who purchased securities pursuant to the December 15, 2005 registration statement.

The sole claim at issue in this petition arises under Section 11 of the Securities Act of 1933, which requires a plaintiff to plead and prove that it acquired registered securities issued under a registration statement that "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 statement therein not misleading." 15 U.S.C. §77k(a), *infra* at Pet. App. 68a. Respondents allege that certain statements in the registration statement were false and misleading—specifically, statements advancing the opinion that Omnicare was in material compliance with applicable laws. Pet. App. 6a–7a.[1] The operative complaint is devoid of any allegations that Omnicare and its officers and directors actually held a different opinion than the one they expressed; indeed, Respondents explicitly disclaimed any such allegations. Pet. App. 10a, 34a n.3.

Petitioners moved to dismiss this claim at the pleading stage. Among other things, Petitioners argued that Respondents had failed to plead that Omnicare's December 2005 registration statement contained any material misstatement or omission. The

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[1] The operative complaint also alleged that the registration statement contained certain other, accounting-based misstatements. The dismissal of that claim was affirmed by the court of appeals (Pet. App. 22a–25a) and is not pertinent to this petition.

district court granted that motion, relying in significant part on a Sixth Circuit decision relating to an earlier version of the complaint in this case. Pet App. 67a ("*Omnicare I*").

In *Omnicare I*, the Sixth Circuit had rejected Respondents' attempt to plead a claim under Section 10(b) of the Securities Exchange Act of 1934 based on statements about Omnicare's legal compliance. The court held that such statements were not actionable without allegations "that defendants actually knew that the 'legal compliance' statements were false when made." *Omnicare I*, 583 F.3d at 945–47, Pet. App. 60a-65a. The reason for this approach, the Sixth Circuit explained, is that statements concerning the "legality" of a company's conduct are considered to be "matters of opinion" and thus constitute "soft" information, which is generally considered immaterial. *Id.* at 947, Pet. App. 60a (citations omitted). For that reason, such statements cannot be deemed material misstatements unless the plaintiff alleges that the speaker was aware at the time that the company was not, in fact, in compliance with the law. *Ibid.* In reaching this decision, the court focused entirely on falsity and materiality and did not consider the separate element of scienter.

On remand, and following a further amendment of the complaint, the district court correctly concluded that Respondents' attempt to plead a Section 11 claim based on substantially identical "legal compliance" statements failed for the same reason. Once again, the operative complaint failed to plead that the "defendants knew the statements were untrue at the time they were made." Pet. App. 38a. According to the district court, allegations about Petitioners' sub-

jective mindset were necessary to show that these statements of opinion were actionable as misstatements of material fact. *Ibid.* Because there were no such allegations, the claim failed as a matter of law.

The Sixth Circuit reversed and remanded this aspect of the district court's decision. Pet. App. 24a–25a. It held that the standard it had articulated in *Omnicare I* with respect to pleading material falsity is limited to claims under Section 10(b) and has no application to claims under Section 11. *Id.* at 15a. Section 11, the court explained, does not require scienter but rather "provide[s] for strict liability." *Ibid.* According to the Sixth Circuit, "a defendant's knowledge is not relevant to a strict liability claim," and thus the element of falsity for purposes of Section 11 must be assessed without any reference to the speaker's subjective mindset. *Id.* at 16a. In other words, once the plaintiff pleads that the opinion itself was objectively wrong, "that is sufficient and a complaint may survive a motion to dismiss without pleading knowledge of falsity." *Ibid.*

The Sixth Circuit expressly acknowledged that its holding in this regard conflicts with the Second Circuit's decision in *Fait* v. *Regions Financial Corp.*, 655 F.3d 105 (2d Cir. 2011), and the Ninth Circuit's decision in *Rubke* v. *Capital Bancorp Ltd.*, 551 F.3d 1156 (9th Cir. 2009). Both of those decisions hold that for a statement of belief or opinion, liability under Section 11 lies "only to the extent that the statement was both objectively false and disbelieved by the defendant at the time it was expressed." *Fait*, 655 F.3d at 110, cited in Pet. App. 16a; accord *Rubke*, 551 F.3d at 1162, cited in Pet. App. 16a. According to the Sixth Circuit, both *Fait* and *Rubke* "read more into *Virginia*

Bankshares than the language of the opinion allows and have stretched to extend this Section 14(a) case into a Section 11 context." Pet. App. 18a. And to the extent that the language of *Virginia Bankshares* (both majority and concurring opinions) actually supports a subjective falsity requirement, the Sixth Circuit proclaimed that these "musings regarding mens rea are dicta." *Id.* at 19a.

Petitioners sought rehearing en banc, explaining that the court's decision departs from settled authority in other circuits and makes the Sixth Circuit the most lenient jurisdiction in the Nation in terms of pleading Section 11 claims. The full Sixth Circuit declined review.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case reflects a stark conflict among the federal courts of appeals in the standards for pleading "falsity" under the federal securities laws. In the Sixth Circuit, a plaintiff in a Section 11 case may now plead that a statement of opinion was "false" merely by showing that the opinion was objectively wrong, even if the defendant honestly held the expressed opinion at the time. According to that court, even if the statement was self-evidently a statement of opinion, "subjective falsity" is not required.

The Sixth Circuit openly acknowledged that this conclusion places it in conflict with other federal courts of appeals that have addressed this precise issue. Each of these courts has specifically held that a claim under Section 11 requires allegations of both objective *and subjective* falsity. This conflict, standing alone, presents an important question warranting

this Court's attention. And the nature of the issue makes this Court's intervention even more important, as the disagreement among the circuits flows from a basic difference of opinion about the meaning of this Court's decision in *Virginia Bankshares*.

There is no doubt that this case squarely presents the issue and provides an ideal vehicle for resolving it. The Sixth Circuit held that Respondents "pleaded objective falsity." Pet. App. 17a. But Respondents have not pleaded *subjective* falsity; indeed, they have specifically disclaimed any such allegations. See *id.* at 10a. Thus, the resolution of the question presented in this Petition will undeniably control whether this dispute can move past the pleading stage.

For all these reasons—and given the importance of the issue to a variety of participants in the U.S. capital markets—Petitioners urge this Court to grant review.

I. The decision below creates a conflict among the circuits over the standards for pleading falsity in statements of opinion or belief.

As the Sixth Circuit acknowledged, its decision in this case conflicts with decisions of both the Second and Ninth Circuits. Pet. App. 16a–17a (citing and disagreeing with the Second Circuit's decision in *Fait*, 655 F.3d at 110, and the Ninth Circuit's decision in *Rubke*, 551 F.3d at 1162). Indeed, the conflict runs even deeper than that, as the Third Circuit too has reached a result squarely contrary to the decision below. See *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 368–69 (3d Cir. 1993). These three circuits have all explicitly held that a claim under Section 11 premised on a statement of opinion or belief requires

allegations of subjective falsity; the Sixth Circuit has held that it does not.

Underlying this conflict is a dispute about the meaning and scope of this Court's decision in *Virginia Bankshares*. The Court there considered the requirements for establishing liability for fraud in a proxy statement. That kind of claim arises under Section 14(a) of the Exchange Act—which, like Section 11 of the Securities Act, requires the plaintiff to plead and prove an "untrue statement of a material fact." 15 U.S.C. § 78n(e). The question before the Court was whether a statement of belief or opinion could *ever* constitute an untrue statement of material fact.

The Court concluded that such a statement may be both material and factual as a representation about "the psychological fact of the speaker's belief in what he says." 501 U.S. at 1095. But "[b]ecause such a statement by definition purports to express what is consciously on the speaker's mind," it cannot constitute a material *mis*statement unless the speaker "did not hold the beliefs or opinions expressed." *Id.* at 1090. Accordingly, under *Virginia Bankshares*, establishing a material misstatement of opinion requires both objective *and subjective* falsity.

The Second, Third, and Ninth Circuits have all applied this analysis in the context of claims under Section 11, which provides a private right of action for material misstatements and omissions in publicly filed registration statements. According to the Second Circuit, for example, requiring allegations of subjective falsity for statements of opinion "makes logical sense" because it "ensures that their allegations concern the factual components of those statements"—

namely, the factual assertion that the speaker holds the opinion expressed. *Fait*, 655 F.3d at 110–12.

Similarly, the Ninth Circuit has held that statements of opinion "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 and misleading." *Rubke*, 551 F.3d at 1162. And the Third Circuit has held that "statements of 'soft' information may be actionable misrepresentations [under Section 11] [only] if the speaker does not genuinely and reasonably believe them." *Trump*, 7 F.3d at 368–69.

These courts reached this result notwithstanding that a claim under Section 11—unlike certain other federal securities law claims—does not otherwise require scienter. See *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 381–82 (1983) (Section 11 provides for strict liability and does not require allegations or proof about the defendant's state of mind). As the Second Circuit explained, requiring subjective falsity with respect to statements of opinion or belief "does not amount to a requirement of scienter," but rather is simply a function of the nature of the particular misstatement that the plaintiff chose to allege. *Fait*, 655 F.3d at 112 n.5. As the Second Circuit recognized, this conclusion flows from this Court's recognition in *Virginia Bankshares* that "a statement [of opinion or belief] by definition purports to express what is consciously on the speaker's mind." 501 U.S. at 1090, cited in 655 F.3d at 111–12. Without allegations about what belief the speaker actually held, the court cannot determine whether, as a matter of simple logic, the alleged misstatement was false in any material respect.

The Sixth Circuit disagrees, concluding that these other circuits have "read more into *Virginia Bankshares* than the language of the opinion allows and have stretched to extend this Section 14(a) case into a Section 11 context." Pet. App. 18a. The court's reasoning starts with the premise that a claim under Section 14(a)—unlike a claim under Section 11—requires allegations of scienter. *Id.* at 18a, n.3 (citing *Adams* v. *Standard Knitting Mills, Inc.*, 623 F.2d 422, 430 (6th Cir. 1980)).[2] The court views *Virginia Bankshares* through that lens, concluding that this Court's discussion of "knowledge of falsity" for the Section 14(a) claim must have been an extension of the scienter requirement. Pet. App. 17a–19a.

As the Sixth Circuit explains, the Court in *Virginia Bankshares* had specifically "reserv[ed] the

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[2] Although *Adams* appears to represent the position of the Sixth Circuit on this issue, the weight of authority is to the contrary. See, *e.g.*, *Beck* v. *Dobrowski*, 559 F.3d 680, 681 (7th Cir. 2009) ("There is no required state of mind for a violation of section 14(a)"); *In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 196 (3d Cir. 2007) ("Violations of Section 14(a) * * * may be committed without scienter; in other words, no culpable intent is required."); *Knollenberg* v. *Harmonic, Inc.*, No. 03-16238, 2005 WL 2980628, at *6 (9th Cir. Nov. 8, 2005) ("[U]nlike Section 10(b), Section 14(a) lacks any reference to a manipulative device or contrivance to indicate a requirement of scienter."). This Court need not reach that issue, however, to resolve the question presented here. The question here has to do with pleading falsity—an "untrue statement of material fact"—which is independent of the element of scienter and is required for *all* misstatement claims under the federal securities laws.

question whether scienter was necessary for liability generally under § 14(a)." *Id.* at 18a (citing 501 U.S. at 1090 n.5). Under the Sixth Circuit's reading, *Virginia Bankshares* "tied the knowledge of falsity requirement to scienter but explicitly declined to address the issue further. Instead, it assumed the jury in the case had already found knowledge of falsity—whether necessary or not—and proceeded from there." *Ibid.* On that basis, the Sixth Circuit concluded that *Virginia Bankshares* is of "very limited application to Section 11," for which scienter is not required. *Ibid.*

The Sixth Circuit specifically addressed Justice Scalia's concurring opinion in *Virginia Bankshares*, which the Second Circuit had considered in requiring subjective falsity even for a claim under Section 11. Justice Scalia wrote:

> As I understand the Court's opinion, the statement "In the opinion of the Directors, this is a high value for the shares" would produce liability if in fact it was not a high value and the directors knew that. It would not produce liability if in fact it was not a high value but the directors honestly believed otherwise. * * * I agree with all of this.

501 U.S. at 1108–09. As the Second Circuit has recognized, this discussion underscores the conclusion that a statement of opinion *cannot constitute a material misstatement* unless the speaker's actual opinion was different from the one expressed. See *Fait*, 655 F.3d at 111.

The Sixth Circuit rejected that reading. Because the majority in *Virginia Bankshares* chose not to re-

solve the question whether Section 14(a) requires scienter, the Sixth Circuit declined to credit any "musings" about "knowledge of falsity" by either the majority or the concurrence. *Ibid.* The court continued:

> While there are contexts in which dicta provides valuable insight into the Court's outlook, we must be careful in how it is extended and applied. This is a context in which extension of dicta is most dangerous. Even Justice Scalia's seemingly direct statement must be read in the context of § 14(a)—a non-strict liability statute. In writing the opinion, the Court could not have intended that musings regarding the requirement would later be applied to an unrelated statute. We therefore refuse to extend *Virginia Bankshares* to impose a knowledge of falsity requirement upon Section 11 claims.

Ibid.

Given how explicitly the Sixth Circuit rejected its sister circuits' conclusions—both about the subjective falsity requirement and about *Virginia Bankshares* itself—there is no realistic possibility that the split of authority will be resolved on its own. The Sixth Circuit reached its decision fully aware that its position was inconsistent with that of the other circuits to address the issue. It has since declined the opportunity to hear the issue en banc. The passage of time will simply amplify the existing conflict and cause further confusion in the federal courts on this important issue. Petitioners urge this Court to grant review and resolve this issue now.

II. The Sixth Circuit's approach could have grave and far-reaching implications.

The Sixth Circuit's decision has already been the subject of significant controversy. Dozens of articles, blog posts, and commentaries have discussed its implications. See, *e.g.*, Alison Frankel, "The 6th Circuit splits with 2nd and 9th, lowers bar for securities claims" (May 24, 2013), retrieved Sept. 27, 2013 from http://blogs.reuters.com/us/; Rodney F. Tonkovic, "Knowledge of Wrongdoing Not Required for Section 11 Claims," SEC. REG. DAILY (May 28, 2013), retrieved Sept. 27, 2013 from www.dailyreportingsuite.com; Stewart Bishop, "6th Circuit Takes Wide View of Liability In Stock Inflation Suits," LAW360 (May 23, 2013), retrieved Sept. 27, 2013 from http://www.law360.com/articles/; Phyllis Skupien, "6th Circuit ruling in Omnicare shareholder suit creates circuit split," THE KNOWLEDGE EFFECT (June 20, 2013), retrieved Sept. 27, 2013 from http://blog.thomsonreuters.com/.[3]

The controversy is no surprise, given the importance of the federal pleading standards to all of the professionals and corporations that play a role in

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[3] See also, *e.g.*, Claire Loebs Davis, "6th Circuit Took A Wrong Turn In Omnicare Case," LAW360 (Aug. 21, 2013), retrieved Sept. 27, 2013 from http://www.law360.com/articles/; Paul Dutka, "Defending 1933 Act Claims: Rewriting The Playbook After *Fait v. Regions Fin. Corp.*," BLOOMBERG LAW NEWS (Aug. 27, 2013), retrieved Sept. 27, 2013 from http://about.bloomberglaw.com/; Harvard Law School Forum on Corp. Gov. & Fin. Reg., "The Circuits Split on Securities Act Pleading Standards" (May 31, 2013), *available at* http://blogs.law.harvard.edu/.

securities offerings. A claim under Section 11 imposes strict liability and thus carries unique risks and costs. Under the Sixth Circuit's approach, many potential speakers—including issuers, officers, directors, auditors, lawyers, and underwriters—may find themselves vulnerable to claims based on hindsight, as potential plaintiffs and class counsel focus their efforts on statements of opinion that, over time, turn out to be wrong.

While Section 11 does permit a "due diligence" or "good faith" defense, such a defense is available only to certain kinds of speakers for certain kinds of statements and is generally difficult to invoke at the pleading stage. See 15 U.S.C. § 77k(b)(3). Without any requirement that the plaintiff allege subjective falsity with respect to statements of opinion or belief, defendants may find it impossible to resolve those claims through a motion to dismiss—and, indeed, may ultimately bear strict liability—even if the opinion or belief they expressed actually reflected their honestly held views at the time.

The mere filing of such cases imposes significant costs on all these market participants and, in turn, on the U.S. capital markets as a whole. As this Court has observed, "the mere existence of an unresolved lawsuit" in this kind of class action litigation "has settlement value to the plaintiff not only because of the possibility that he may prevail on the merits, an entirely legitimate component of settlement value, but because of the threat of extensive discovery and disruption of normal business activities which may accompany a lawsuit which is groundless in any event, but cannot be proved so before trial." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723,

742–43 (1975). "Because class actions are such a powerful tool, they can give a class attorney unbounded leverage, particularly in jurisdictions that are considered plaintiff-friendly. Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits." S. Rep. No. 109-14, at 20–21 (2005), reprinted in 2005 USCCAN 3, 21.

Further, the Sixth Circuit's approach will serve as a powerful disincentive for issuers and others associated with registration statements to share their opinions on a variety of topics that may be important to investors—opinions that may well turn out to be both valuable and well-founded. Cf. *Hubbard* v. *United States*, 514 U.S. 695, 701 (1995) (Scalia, J., concurring in part and concurring in the judgment) (warning that applying 18 U.S.C. § 1001 to allegedly false statements made in federal court could have a chilling effect on legitimate trial advocacy).

Here, for example, the opinions at issue concern compliance with certain legal requirements. Respondents did not allege (and have never shown) that either Omnicare or its officers or directors held a different belief at the time of the registration statement than the one they actually expressed; indeed, Respondents expressly disclaimed any such allegations. Pet. App. 10a. Any reader of the registration statement would have understood that these legal compliance statements represented the viewpoint of the speaker and were not a guarantee of compliance. The Sixth Circuit's approach, however, transforms these statements of opinion into just such a guarantee. The existence of this precedent—whether followed in only one federal circuit or more—will undoubtedly have a

negative impact on the willingness of issuers and others to disclose their opinions on any topic where such disclosure is not specifically required.

Indeed, a relaxed standard for pleading falsity could have implications for all sorts of federal securities claims, whether under provisions like Section 11 (which provides for strict liability) or under Section 10(b) (which does not). Most claims for liability under the federal securities laws require either a material omission or an "untrue statement of a material fact."[4] Until now, courts have interpreted the analysis in *Virginia Bankshares* to apply to the element of falsity regardless of what sort of claim is at issue. See, *e.g.*, *Fait*, 655 F.3d at 111 (claims under Sections 11 and 12); *In re Credit Suisse First Boston Corp.*, 431 F.3d 36, 47 (1st Cir. 2005) (in a Section 10(b) case, citing *Virginia Bankshares* and requiring "subjective falsity", independent of any scienter requirement); *Nolte* v. *Capital One Fin. Corp.*, 390 F.3d 311, 315 (4th Cir. 2004) (in the context of a Section 10(b) case, holding that "[i]n order to plead that an opinion is a false factual statement under *Virginia Bankshares*, the complaint must allege that the opinion expressed was dif-

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[4] Rule 10b-5, 17 C.F.R. 240.10b-5 (liability for "any untrue statement of a material fact"); 15 U.S.C. § 77k(a) (Section 11 of the Securities Act: liability for registration statements containing "an untrue statement of a material fact"); 15 U.S.C. § 77l(a)(2) (Section 12(a)(2) of the Securities Act: liability for prospectus containing "an untrue statement of a material fact"); 15 U.S.C. § 78n(e) (Section 14(a) of the Exchange Act: liability for proxy statements containing "an untrue statement of a material fact"); accord 15 U.S.C. § 77r (Section 18 of Exchange Act: liability where statement was "false or misleading with respect to any material fact").

ferent from the opinion actually held by the speaker."). If allowed to stand, the Sixth Circuit's suggestion that the element of falsity may differ from claim to claim—depending on what other elements are required—could throw this entire area of law into disarray. For this reason too, this Court's intervention is required.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2013

APPENDIX A

No: 12-5287

United States Court of Appeals for the Sixth Circuit

FILED
Jul 23, 2013
DEBORAH S. HUNT, Clerk

INDIANA STATE DISTRICT COUNCIL OF LABORERS AND HOD CARRIERS PENSION AND WELFARE FUND, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

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

Plaintiffs-Appellants,

v. ORDER

OMNICARE, INC.; JOEL F. GEMUNDER; DAVID W. FROESEL, JR.; CHERYL D. HODGES; EDWARD L. HUTTON; SANDRA E. LANEY,

Defendants-Appellees.

BEFORE: COLE and GRIFFIN, Circuit Judges; and GWIN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

* Hon. James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

APPENDIX B

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 13a0145p.06

United States Court of Appeals for the Sixth Circuit

INDIANA STATE DISTRICT COUNCIL OF LABORERS AND HOD CARRIERS PENSION AND WELFARE FUND, on behalf of itself and all others similarly situated, No. 12-5287

Plaintiff;

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

Plaintiffs-Appellants,

v.

OMNICARE, INC.; JOEL F. GEMUNDER; DAVID W. FROESEL, JR.; CHERYL D. HODGES; EDWARD L. HUTTON; SANDRA E. LANEY,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Kentucky at Covington.
No. 2:06-cv-26—William O. Bertelsman, District Judge

Argued: January 15, 2013

Decided and Filed: May 23, 2013

Before: COLE and GRIFFIN, Circuit Judges; GWTN, District Judge.*

COUNSEL

ARGUED: Eric Alan Isaacson, ROBBINS GELLER RUDMAN & DOWD LLP, San Diego, California, for Appellants. Harvey Kurzweil, WINSTON & STRAWN LLP, New York, New York, for Appellees. ON BRIEF: Eric Alan Isaacson, Henry Rosen, Jennifer L. Gmitro, Amanda M. Frame, ROBBINS GELLERRUDMAN & DOWD LLP, San Diego, California, for Appellants. Harvey Kurzweil, Richard W. Reinthaler, John E. Schreiber, WINSTON & STRAWN LLP, New York, New York, Wm. T. Robinson III, Michael E. Nitardy, FROST BROWN TODD LLC, Florence, Kentucky, for Appellees.

COLE, J., delivered the opinion of the court in which GRIFFIN, J., and GWIN, D. J., joined. GWIN, J. (pp. 18-19), delivered a separate concurring opinion.

OPINION

COLE, Circuit Judge. Plaintiffs, all Omnicare investors, appeal the dismissal of their securities suit

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* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

under § 11 of the Securities Act of 1933, 15 U.S.C. § 77k (2010), against Defendants Ornnicare, Inc., its officers, and directors. Plaintiffs allege that Defendants made material misstatements and/or omissions in a Registration Statement filed with the Securities and Exchange Commission in connection with a December 2005 public stock offering. The district court held that Plaintiffs had not adequately pleaded knowledge of wrongdoing on the part of Defendants and dismissed the complaint for failure to state a claim upon which relief can be granted. Plaintiffs seek reversal of the district court's dismissal order on the grounds that § 11 is a strict liability provision. For the following reasons, we REVERSE and REMAND in part and AFFIRM in part.

I.

Defendant Omnicare is the nation's largest provider of pharmaceutical care services for the elderly and other residents of long-term care facilities in the *United States and Canada. Ind. State Dist. Council v. Omnicare Inc.*, 583 F.3d 935, 938 (6th Cir. 2009) (hereinafter "*Omnicare I*"); *Ind. State Dist. Council v. Omnicare Inc.*, 527 F. Supp. 2d 698, 700-01 E.D.(E.D.Ky. 2007). During the relevant time period, Defendant Joel Gemunder was Omnicare's Chief Executive Officer; Defendant David Froesel was Omnicare's Chief Financial Officer and a Senior Vice President; Defendant Cheryl Hodges was Omnicare's Secretary and a Senior Vice President; Defendant Edward Hutton was Chairman of the Board of Directors;[1] and Defendant Sandra Laney was a Director.

[1] According to Defendants, Mr. Hutton is deceased.

Plaintiffs are investors who purchased Omnicare securities in a December 15, 2005, public offering. In conjunction with the public offering, Omnicare offered 12.8 million shares of common stock and made related filings with the Securities and Exchange Commission. These filings were incorporated into a Registration Statement which is central to the current litigation. Plaintiffs did not hold the stock long. They sold all of these securities by January 31, 2006.

Plaintiffs seek relief under § 11 of the Securities Act of 1933, 15 U.S.C. § 77k. Section 11 provides a remedy for investors who have acquired securities under a registration statement that was materially misleading or omitted material information. It imposes liability on issuers and signers of registration statements containing untrue statements or omissions of material fact. 15 U.S.C. § 77k(a). Section 11 also imposes liability on the directors of the issuer. *Id*. at § 77k(a)(2).

According to the Third Amended Complaint[2], Omnicare was engaged in a variety of illegal activities including kickback arrangements with pharmaceutical manufacturers and submission of false claims to Medicare and Medicaid. Plaintiffs allege that representations in the Registration Statement were material, untrue and misleading because they effectively concealed Omnicare's illegal activities from its investors. According to the Plaintiffs, the Registration Statement stated "that [Omnicare's]

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[2] Although the Third Amended Complaint is titled "Second Amended Consolidated Complaint," it is the third amendment to the original complaint in this litigation. The parties and the district court have consistently referred to it as the "Third Amended Complaint."

therapeutic interchanges were meant to provide [patients with] . . . more efficacious and/or safer drugs than those presently being prescribed" and that its contracts with drug companies were "*legally and economically valid* arrangements that bring value to the healthcare system and patients that we serve." Plaintiffs claim that given Omnicare's alleged illegal activities, these and other statements indicating compliance with the law were misleading. Specifically, Plaintiffs allege that these statements of "legal compliance" made in the Registration Statement were material, false and misleading, and therefore in violation of § 11.

Furthermore, Plaintiffs allege that Omnicare failed to comply with Generally Accepted Accounting Principles ("GAAP"), such that the financial statements filed in connection with the December 2005 public offering substantially overstated the company's revenue. Therefore, according to Plaintiffs, the financial statements contained material misstatements and omissions in violation of § 11.

Plaintiffs filed this case in the United States District Court for the Eastern District of Kentucky in February 2006 as a putative securities class action, alleging claims for violations of § 10(b), Rule 10b-5 and § 20(a) of the Securities and Exchange Act of 1934. *Omnicare I*, 583 F.3d at 939. A class was never certified. Plaintiffs later amended the complaint, adding a claim under § 11 for material misstatements and omissions in the Registration Statement. That § 11 claim is the basis of the instant appeal.

Defendants moved to dismiss the complaint on a variety of grounds. On October 12, 2007, the district court granted Defendants' motion and dismissed the

complaint in its entirety. *Omnicare*, 527 F. Supp. 2d at 712. With respect to the § 10(b), Rule 10b-5 and § 11 claims, the district court determined that Plaintiffs had failed to plead loss causation—the causal connection between a defendant's misconduct and the plaintiffs loss. *Id.* at 704-05. The claim made under § 20(a) was dismissed as well. *Id.* at 711. Plaintiffs appealed.

On October 21, 2009, this Court affirmed the judgment of the district court with respect to all claims except the § 11 claim. We held that "loss causation" is not an element of a § 11 claim but is instead an affirmative defense. *Omnicare I*, 583 F.3d at 947. Accordingly, we determined that the district court had erred by requiring Plaintiffs to plead loss causation in order to state their § 11 claim. We remanded the case to district court for further analysis. *Id.* at 948.

Plaintiffs pursued a writ for certiorari, which they later dismissed, and then moved for leave to amend the complaint in order to re-plead the § 11 claim. The motion was granted. The Third Amended Complaint encompasses two types of § 11 allegations: (1) material misstatements and omissions made with reference to the statements or legal compliance"; and (2) material misstatements and omissions in reference to GAAP. Defendants filed a motion to dismiss the Third Amended Complaint.

On February 13, 2012, the district court granted Defendants' motion, concluding that because the Plaintiffs' § 11 claim "sounds in fraud," it was subject to but failed to meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b). The court furthermore held that, for both claims asserted under

§ 11, Plaintiffs were required, but failed to plead, knowledge of falsity on the part of the Defendants. Because the court found that the complaint failed to satisfy the pleading standards of Rule 9(b), and because Plaintiffs had not sufficiently pleaded Defendants' knowledge of falsity, the complaint was dismissed. Plaintiffs again appealed.

II.

Whether the district court properly dismissed a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) is a question of law subject to de novo review. *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006). The court must construe the complaint in a light most favorable to the plaintiff and accept all factual allegations as true. *Id.* at 688. The factual allegations must "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Stated otherwise, the Rule 12(b)(6) standard requires that the plaintiff provide "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. A complaint must "contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005).

While notice pleading requirements are based on Rule 8, *see Twombly*, 550 U.S. at 555, claims for fraud are held to the heightened pleading standard of Rule 9(b). We held in *Omnicare I* that, although § 11 claims do not require pleading of scienter, Rule 9(b) pleading standards still apply to § 11 claims that sound in fraud. *Omnicare I,* 583 F.3d at 948. We furthermore held that the § 11 claims pleaded by Plaintiffs in the instant case met this requirement. *Id.*

Plaintiffs argue that, since this Court's decision in *Omnicare I*, they have amended their complaint to abandon all claims "that could be construed as alleging fraud or intentional or reckless misconduct" and that, as a result, Rule 9(b) no longer applies. They base this argument primarily on a disclaimer that has been added to the complaint stating: "Plaintiffs expressly exclude and disclaim any allegation that could be construed as alleging fraud or intentional or reckless misconduct, as this claim is based solely on the theories of strict liability and negligence under the Securities Act." This one-sentence disclaimer, however, does not achieve Plaintiffs' desired result. *See Cal. Pub. Emps. Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 160 (3rd Cir. 2004) ("[A]n examination of the factual allegations that support Plaintiffs' section 11 claims establishes that the claims are indisputably immersed in . .. fraud. The one-sentence disavowment of fraud contained [in] . . . the . . . [c]omplaint does not require us to infer" otherwise) (footnote omitted). The basis of Plaintiffs' allegations has not changed since *Omnicare I*, and therefore the heightened pleading standard of Rule 9(b) still applies to the § 11 claims.

Complaints subject to Rule 9(b) must plead "with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). In order to meet the "particularity" requirement of Rule 9(b), "a plaintiff [must] allege the time, place, and content of the alleged misrepresentations on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006) (internal quotation marks and citation omitted); see also *Omnicare I*, 583 F.3d at 942-

43. "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b).

Plaintiffs have brought two separate § 11 claims in their Third Amended Complaint: one for material misstatements and/or omissions of legal compliance and one for Defendants' alleged failure to comply with GAAP such that the Registration Statement contained material misstatements and/or omissions. We address each of these claims in turn.

A.

1.

Plaintiffs allege that Omnicare's statements of legal compliance led investors to believe that Omnicare—which was allegedly engaged in illegal activities—was in compliance with the law. Plaintiffs assert that these statements of legal compliance made in the Registration Statement were therefore material, untrue, and misleading, in violation of § 11.

The district court held that Plaintiffs were required to plead that Defendants knew that the statements of legal compliance were false at the time they were made. Because the court found that Plaintiffs failed to plead knowledge of falsity, it dismissed the complaint for failure to state a claim. On appeal, Plaintiffs argue that § 11 provides for strict liability and it was therefore inappropriate for the district court to require them to plead knowledge in connection with their § 11 claim. We agree.

Section 11 provides for the imposition of liability if a registration statement, as of its effective date, "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). It provides a remedy for investors who have acquired securities pursuant to a registration statement that was materially misleading or omitted material information. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1983). Section 11 provides for strict liability, and does not require a plaintiff to plead a defendant's state of mind. *See id.* at 382. Plaintiffs contend that the argument should end here and that the district court erred by requiring them to plead state of mind.

Defendants respond, however, that the issue is not so simple. Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, have elements parallel to § 11, prohibiting "fraudulent, material misstatements or omissions in connection with the sale or purchase of a security." *Miller v. Champion Enters. Inc.*, 346 F.3d 660, 671 (6th Cir. 2003) (internal quotation marks and citation omitted). This Court held in *Omnicare I*—for purposes of § 10(b) and Rule 10b-5—that legal compliance statements are "soft information." *See Omnicare I*, 583 F.3d at 945 (citation omitted). Soft information includes matters of opinion and predictions. There is no duty to disclose soft information unless it is "virtually as certain as hard facts." *In re Sofamor Danek Grp. Inc.*, 123 F.3d 394, 401-02 (6th Cir. 1997) (internal quotation marks and citations omitted). Because there is generally no duty to disclose soft information for purposes of § 10(b) and Rule 10b-5, a defendant corporation that chooses to keep completely silent regarding soft information cannot be held liable for a material omission under those provisions. *See id.*

A thornier issue arises when a defendant chooses to disclose some soft information, as occurred in the instant case. Defendants were not completely silent, but instead spoke on issues of legal compliance. With regard to § 10(b) and Rule 10b-5, this Court has reasoned:

> [T]he protections for soft information end where speech begins . . . .: [H]ow can a rule of non-disclosure apply to a company's disclosure? If—as defendants contend—the protection for soft information remains intact even after a company speaks on an emerging issue, the speaker could choose which contingencies to expose and which to conceal. On any subject falling short of reasonable certainty, then, a company could offer a patchwork of honesty and omission. This proposition is untenable . . . .

Helwig v. Vencor, Inc., 251 F.3d 540, 560 (6th Cir. 2001) (en banc), *abrogated on other grounds by Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007).

In *Omnicare I*, this Court addressed Plaintiffs' § 10(b) and Rule 10b-5 claims regarding statements of legal compliance. The Court reasoned, citing *Kushner v. Beverly Enterprises, Inc.*, 317 F.3d 820, 831 (8th Cir. 2003), and *Helwig*, that Plaintiffs could not stop at pleading that Defendants' disclosures were untruthful. *See Omnicare I*, 583 F.3d at 945. We held that in order for § 10(b) and Rule l0b-5 liability to attach to Omnicare's general assertions of legal compliance, the complaint must "adequately plead[] that the defendants knew the statements were untruthful" at

the time they were made. *Id*. at 945 (internal quotation marks and citation omitted). The *Omnicare I* panel found that Plaintiffs had not adequately pleaded any allegation that Defendants knew that the legal compliance statements were false when made and accordingly held that Plaintiffs had failed to state a claim. *Id*. at 946-47.

The *Omnicare I* panel relied heavily on *Kushner*, which had in turn relied heavily on our *Helwig and Sofamor* opinions. *See Omnicare I*, 583 F.3d at 945 (citing *Kushner*, 317 F.3d at 831.). *Kushner* frames the knowledge of falsity pleading requirement as one of disclosure. *Kushner* does not appear to have distinguished between material misstatements and omissions under § 10b and Rule 10b-5. Although the primary issue in *Kushner* was whether defendants were liable for a material misstatement, the court began by commenting: "Before liability for non-disclosure can attach, the defendant must have violated an affirmative duty of disclosure." *Kushner*, 317 F.3d at 831 (internal quotation marks and citation omitted). Citing Sofamor, the court noted that there is generally no duty to disclose soft information. When knowledge of falsity is shown, however, "[o]pinions cease to be soft information" and become hard facts. *Id*. At that point, the duty to disclose and liability for disclosure of false information under § 10b and Rule I Ob-5 attach. See id. Although the court agreed that "even absent a duty to speak, a party who voluntarily discloses material facts in connection with securities transactions assumes a duty to speak fully and truthfully," it held that "[a]bsent a clear allegation that the defendants knew of the scheme and its illegal nature at the time they stated the belief that the company was in compliance with the law, there [was] nothing further to

disclose." *Id*. (internal quotation marks and citation omitted). According to Kushner, under § 10b and Rule l0b-5 a defendant may only be liable for a material misstatement if she knew the statements were false and therefore knew there was something further to disclose.

Language in *Helwig* supports the view taken by the Eighth Circuit in Kushner for purposes of § 10b and Rule 10b-5. In *Helwig*, this Court stated: "With regard to future events, uncertain figures, and other so-called soft information, a company may choose silence or speech elaborated by the factual basis *as then known* . . ." 251 F.3d at 561 (emphasis added). In other words, a company that chooses to disclose soft information assumes the duty to do so fully and truthfully, but only to the extent that facts are known at the time the statements are made. *Helwig, Kushner and Omnicare I*, therefore appear to indicate that, in § 10(b) and Rule 10b-5 cases, a plaintiff must plead knowledge of falsity because there can be no liability for a material misstatement if a defendant was not aware there was anything further to disclose in order to correct the misstatement.

Defendants now argue that the same reasoning should apply under § 11 to the case at hand. We do not agree. Section 10(b) and Rule 10b-5 require a plaintiff to prove scienter, § 11 is a strict liability statute. It makes sense that a defendant cannot be liable for a fraudulent misstatement or omission under § 10(b) and Rule l0b-5 if he did not know a statement was false at the time it was made. The statement cannot be fraudulent if the defendant did not know it was false. Section § 11, however, provides for strict liability when a registration statement "contain [s] an untrue statement of a material fact." 15 U.S.C.

77k(a); *see Huddleston*, 459 U.S. at 382. No matter the framing, once a false statement has been made, a defendant's knowledge is not relevant to a strict liability claim.

It is immaterial that this issue has been framed as a disclosure requirement. Disclosed information can nevertheless be indisputably wrong. Under the language of § 10(b) and Rule 10b-5, a defendant may take shelter in the fact that she did not know there was anything further to disclose; it was not, audulent for the defendant to fail to disclose anything further. A plaintiff therefore fails to state a claim if she has not pleaded knowledge of falsity. Under § 11, however, if the defendant discloses information that includes a material misstatement, that is sufficient and a complaint may survive a motion to dismiss without pleading knowledge of falsity.

Finally, Defendants urge us to follow *Fait v. Regions Financial Corp.*, 655 F.3d 105 (2d Cir. 2011). In Fait, a case similar to the instant one, the Second Circuit 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)). Defendants argue that in Fait the Second Circuit correctly interpreted and applied the Supreme Court opinion Virginia Bankshares, 501 U.S. 1083 (1991), and this Court is bound to follow suit. *See also Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009) (citing to *Virginia Bankshares* and holding that 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").

While Defendants are correct that we are bound by Supreme Court precedent, we see nothing in *Virginia Bankshares* that alters the outcome in the instant case, and we decline to follow the Second and Ninth Circuits as a result. 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 § I 4(a) of the Securities and Exchange Act of 1934 for a material misstatement or omission even if the statement is vague and conclusory. *Virginia Bankshares*, 501 U.S. at 1093 ("[S]uch conclusory terms in a commercial context are reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading"); 15 U.S.0 § 78n(a). 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). *Id*. at 1090, 1095-96. In other words, under § 14(a) a plaintiff is required to plead objective falsity in order to state a claim; pleading belief of falsity alone is not enough. *Id*. at 1095-96 ("proof of mere disbelief or belief undisclosed [standing alone] should not suffice for liability under § 14(a)"). In the instant case, the Plaintiffs have pleaded objective falsity. 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. *Id*. It therefore does not impact our decision today.

The Court, *at the same point* that it declined to discuss scienter, also explicitly limited its discussion to statements of opinion and belief that it presumed

were made with knowledge of falsity: "[W]e interpret the jury verdict as finding 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." *Id*. at 1090. A footnote to this sentence reserves "the question whether scienter [is] necessary for liability . . . under § 14(a)." *Id.* at 1090 n.5. The connection of these two statements indicates that the *Virginia Bankshares* Court itself tied the knowledge of falsity requirement to scienter but explicitly declined to address the issue further. Instead, it assumed the jury in the case had already found knowledge of falsity—whether necessary or not—and proceeded from there. *See id*. at 1090.

The Second and Ninth Circuits 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. Since the Supreme Court assumed knowledge of falsity for the purposes of the discussion in *Virginia Bankshares,* § 14(a) was effectively treated as a statute that required scienter.[3] The Virginia Bankshares discussion, therefore, has very limited application to § 11; a provision which the Court has already held to create strict liability. *See Huddleston*, 459 U.S. at 381-82.

The Second Circuit reads Justice Scalia's concurring opinion as support for their interpretation of *Virginia Bankshares*. *See Fait*, 655 F.3d at 111 (citing *Virginia Bankshares*, 501 U.S. at 1108-1109). Justice

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[3] In this Circuit § 14(a) does in fact require proof of scienter to state a claim. *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 430 (6th Cir. 1980).

Scalia wrote: "As I understand the Court's opinion, the statement 'In the opinion of the Directors, this is a high value for the shares' would produce liability if in fact it was not a high value and the directors knew that. It 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 1108-09. We do not think it is necessary to ignore Justice Scalia's interpretation of the majority *Virginia Bankshares* opinion; we only believe it is unreasonable to extend it to this case and §11. Because the Court chose to limit its discussion to "statements of belief and opinion . . . made with knowledge that" the statements were false, id. at 1090, any musings regarding mens rea are dicta. The Supreme Court was not faced with the question of knowledge of falsity requirements. Justice Souter carefully declined to discuss strict liability in his introduction to the majority opinion, and it would be unwise for this Court to add an element to § 11 claims based on little more than a tea-leaf reading in a § 14(a) case. While there are contexts in which dicta provides valuable insight into the Court's outlook, we must be careful in how it is extended and applied. This is a context in which extension of dicta is most dangerous. Even Justice Scalia's seemingly direct statement must be read in the context of § 14(a)—a non-strict liability statute. In writing the opinion, the Court could not have intended that musings regarding the requirement would later be applied to an unrelated statute. We therefore refuse to extend *Virginia Bankshares* to impose a knowledge of falsity requirement upon § 11 claims.

2.

We construe facts alleged in the complaint in the light most favorable to the Plaintiffs and accept all

factual allegations as true. *Kottmyer*, 436 F.3d at 688; *see Tellabs, Inc., v. Makor Issues & Right, Ltd*, 551 U.S. 308, 322 (2007). But complaints subject to Rule 9(b) must plead "with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Defendants argue that Plaintiffs have not met their burden under Rule 9(b) due to their reliance on qui tarn complaints and confidential sources. We disagree.

Defendants first argue that Plaintiffs' citations to qui tarn complaints are insufficient to sustain their claim. In order to support this argument, Defendants first contend that Plaintiffs have failed to conduct a "reasonable investigation" as required under Rule 11. *See Alrbright v. Upjohn Co.*, 788 F.2d 1217, 1220 (6th Cir. 1986); *see also* Fed. R. Civ. P. 11. This argument, however, was also raised in district court, and the court, at its discretion, did not issue sanctions or strike the relevant portions of the Third Amended Complaint. See Mich. Div.-Monument Builders of N. Am. v. Mich. Cemetery Ass 'n, 524 F.3d 726, 739 (6th Cir. 2008) ("We review a district court's decision to grant or deny sanctions . . . arising from . . . Rule 11, under the abuse-of-discretion standard"). Rule 11 sanctions are a question of "whether the . . . attorney's conduct was reasonable under the circumstances." *Id.* (internal quotation marks and citations omitted). We see no reason to conclude that the district court abused its discretion for purposes of Rule 11.

Defendants next argue that allegations based on *qui tam* complaints nevertheless cannot withstand a motion to dismiss under Rule 9(b). Defendants cite to several cases in which courts, after noting reliance on third-party actions, have dismissed complaints under Rule 9(b). We do not believe this case necessitates

such action. The only Sixth Circuit opinion cited by Defendants, *Konkol v. Diebold, Inc.*, 590 F.3d 390 (6th Cir. 2009), *abrogated on other grounds by Frank v. Dana Corp.*, 646 F.3d 954 (6th Cir. 2011), is inapposite. In *Konkol*, this Court began by determining that the complaint, in a § 10b and Rule 10b-5 case, was insufficient to state a claim—on grounds that had nothing to do with third-party complaints.[4] *Id.* at 397-400. We then proceeded to address the plaintiffs' list of defenses to that holding, finding each of them insufficient. *Id.* at 400-04. One of these defenses was the existence of government investigations into the defendants' actions. Id. at 401-02. We stated that "(a]lthough a government investigation is not altogether irrelevant to the . . . analysis . . . [g]overnment investigations can result from any number of causes, and the investors have not pointed to any facts suggesting that the SEC investigation" supports their claim. *Id.* at 402.

The same is not true in the instant case. Plaintiffs do not simply cite to the existence of government investigations, they allege numerous reasons why the facts of those investigations support their claim. In *Konkol*, the plaintiffs relied on the fact that government agencies had dedicated resources to investigating defendants, and they therefore concluded, "as a matter of common sense," that something must be amiss. *Id.* at 401-02. The Plaintiffs here jump to no such conclusions. Instead of relying on the mere ex-

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[4] We also note that plaintiffs in *Konkol* were not only subject to Rule 9(b) but also to the higher more exacting pleading standards of the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b), which are inapplicable in this case. *Konkol*, 590 F.3d at 396.

istence of *qui tam* complaints or investigations, they comprehensively discuss how the details are relevant to their own complaint, and give extensive rationale for that support. We find the other cases cited by Defendants similarly inapplicable.

Defendants' second argument is that the confidential witness statements in the complaint should be "steeply discounted." See *Omnicare I*, 583 F.3d at 946 (discounting the weight of the confidential witness statements). Even giving the confidential witness statements minimal weight, however, we do not doubt that sufficient facts have been presented to "raise a reasonable expectation that discovery will reveal evidence." *Twombly*, 550 U.S. at 556. We therefore conclude that Plaintiffs have adequately met the particularity requirement of Rule 9(b).

B.

Plaintiffs also appeal the dismissal of their § 11 claim for GAAP-based misstatements and omissions. The district court held that Plaintiffs failed to plead knowledge of falsity and therefore failed to state a claim. Defendants argue that we should affirm because the GAAP allegations are based on "soft information." *Cf. In re Almost Family, Inc. Sec. Litig.*, No. 3:10-CV-00520-H, 2012 WL 443461, at *4 (W.D. Ky. Feb. 10, 2012) (holding that some GAAP allegations were soft information because the allegations in plaintiff's complaint focused on defendants' beliefs about accounting numbers, not on the actual data they reported). We disagree that Plaintiffs' GAAP allegations qualify as soft information. Plaintiffs' allegation is that Defendants' hard numbers were incorrect. These are allegations of hard facts and do not require pleading knowledge of falsity under any

standard. Even if we were to hold that the GAAP allegations are soft information, however, plaintiffs are not required to plead knowledge of falsity under § 11 to make out a claim for a material misstatement. Therefore, the district court erred in requiring Plaintiffs to plead knowledge of falsity with regard to the GAAP violations.

However, Plaintiffs still have to meet the particularity requirements of Rule 9(b) in pleading that GAAP violations occurred. As this Court noted in *Omnicare I*, Plaintiffs' GAAP allegations appear to contain some factual holes. In assessing Plaintiffs' 10(b) and 10b-5 claims, the *Omnicare I* Court stated:

> Although Plaintiffs list numerous alleged violations of GAAP rules, the complaint nowhere suggests how or when any of these alleged accounting improprieties were disclosed. Rather, Plaintiffs argue that they were implicitly disclosed because Omnicare's allegedly illegal conduct (drug recycling, etc.) translated into accounting violations. Thus, when news of the government raids appeared, the accounting statements were thrown into question by extension. This causation theory, however, rests entirely on speculation and is substantially undercut both by the lack of any financial restatements on Omnicare's part and by the willingness of third-party auditors to continue to certify Omnicare's GAAP compliance.

Omnicare 1, 583 F.3d at 945.

While that analysis concerned whether Plaintiffs had adequately alleged "loss causation" with particularity, it is applicable to whether they have pleaded a GAAP violation at all. Plaintiffs' Third Amended Complaint alleges many GAAP-based violations, but as the Court noted in Omnicare I, the details of the accounting violations remain unclear. Although Plaintiffs' complaint has been amended since our previous opinion, Plaintiffs have not pointed to any updated information that would resolve these issues.

C.

Defendants urge us to affirm the district court on the alternative ground that the affirmative defense of loss causation is evident on the face of the complaint. "Loss causation" refers to the causal connection between the defendant's material misrepresentation or omission and the plaintiff's loss. *See Omnicare*, 527 F. Supp. 2d at 704-05. When an affirmative defense is evident on the face of a complaint, the complaint may be subject to dismissal under Rule 12(b)(6). *Jones v. Bock*, 549 U.S. 199, 215 (2007). Furthermore, this Court held in *Omnicare I* that the complaint did not adequately plead loss causation for the 10(b) and Rule 10b-5 claims. *Omnicare I*, 583 F.3d at 943-47.

Loss causation is an element of a § 10(b) and Rule 10b-5 claim but only an affirmative defense to a § 11 claim. The *Omnicare I* panel reversed the district court on the § 11 claim on exactly that basis. Had the Court determined that the affirmative defense of loss causation was evident from the face of the pleadings, it would have affirmed and dismissed the case. Instead, it chose to remand to the district court for further analysis. *Id.* at 948. The district court, having declined to reach this issue on remand, has not yet

addressed the merits of the argument. Although the complaint has been amended since Omnicare I was decided, the Defendants urge us to find loss causation on the basis of language in the outdated complaint. We therefore have no more information on this issue now than we had at the time of the *Omnicare 1* opinion.

"When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court." *Dandridge v. Williams*, 397 U.S. 471, 476 n.6 (1970); *see also Lewis v. Philip Morris Inc.*, 355 F.3d 515, 534 (6th Cir. 2004) (remanding due to the fact-intensive nature of the review required). The district court in this case has had many years to familiarize itself with the facts of this case and is in a stronger position than this Court to conduct the fact-intensive analysis this ruling requires.

IV.

For the foregoing reasons, we REVERSE the district court with regard to Plaintiffs' legal compliance claims and REMAND for further proceedings consistent with this opinion; and AFFIRM with respect to Plaintiffs' GAAP-based claims.

CONCURRENCE

GWIN, District Judge, concurring. I concur in the majority's thoughtful and comprehensive opinion. I write separately to make clear that the district court

retains the statutory and inherent discretion to resurrect previously dismissed claims and previously dismissed parties should later discovered evidence warrant it. *See Rodriguez v. Tenn. Laborers Health & Welfare Fund*, 89 F. App'x 949, 959 (6th Cir. 2004) ("District courts have authority both under common law and Rule 54(b) to reconsider interlocutory orders and to reopen any part of a case before entry of final judgment.").

Rule 54(b) of the Federal Rules of Civil Procedure provides the statutory vehicle for such revision. If a court decides fewer than all the claims presented, as is the case here, dismissed claims can be revived until the entry of final judgment. Fed. R. Civ. P. 54(b) ("[A]ny order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."). The district court's ability to reconsider past rulings must be tempered by "the sound public policy that litigation be decided and then put to an end." *Petition of U.S. Steel Corp.*, 479 F.2d 489, 494 (6th Cir. 1973).

In deciding whether to revisit previously dismissed claims or parties, a district court may consider "(1) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice." *Rodriguez*, 89 F. App'x at 959. (citing *Reich v. Hall Holding Co.*, 990 F. Supp. 955, 965 (N.D. Ohio 1998)). Simple reargument of evidence that had been available at the time of the earlier decision is usually not enough to warrant reconsideration. *Id.*

Rule 54(b) is particularly relevant in suits subject to the Private Securities Litigation Reform Act (PSLRA). The PSLRA, passed in 1995 after considerable lobbying by corporate and investment interests, mandates heightened pleading requirements to avoid dismissal. As one scholar notes, the PSLRA "created a super-heightened pleading standard for certain aspects of securities claims and deferred discovery until after resolution of an inevitably protracted motion to dismiss . . ." Arthur Miller, From Conley to Twombly to Iqbal: *A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 11 (2010). Such motions to dismiss, as is the case here, often include questions of "scienter, loss causation, reliance, and materiality—questions that formerly would have been considered trial worthy." *Id.* Remarkably, the PSLRA imposes what amounts to a probabilistic pleading standard for scienter. *See Tellabs v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007) (defining the "strong inference" of scienter under the PSLRA as "more than merely plausible or reasonable–it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent").

If newly-found evidence in a PSLRA case supports a previously dismissed claim's scienter (or materiality, or reliance, or loss causation) allegation, the district court could allow the claim to be revived. District courts are charged with enforcing rules "to secure the just, speedy, and inexpensive determination" of an action. Fed. R. Civ. P. 1. There's a reason that "just" precedes "speedy."

APPENDIX C

In the United States District Court for the Eastern District of Kentucky Northern Division at Covington

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NO. 2006-26 (WOB)

Indiana State District Council of Laborers And HOB Carriers Pension And Welfare Fund, et al.,

Plaintiffs,

v.

Omnicare, Inc., et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on defendants' motion to dismiss plaintiffs' Third Amended Complaint (Doc. 138).

Having previously heard oral argument on this motion, the Court now issues the following Memorandum Opinion and order.

BACKGROUND

The lengthy factual background to this case may be found in a prior opinion of the United States Court of Appeals for the Sixth Circuit, as well this Court's opinion from which that appeal arose. *Indiana State Dist. Council of Laborers and HOD Carriers Pension and Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935 (6th Cir. 2009); *Indiana State Dist. Council of Laborers and HOD Carriers Pension and Welfare Fund v. Omnicare, Inc.*, 527 F. Supp.2d 698 (E.D. Ky. 2007).

For present purposes, it suffices to repeat that Defendant Omnicare, Inc. is a provider of pharmaceutical care services to residents of long-term care facilities in the United States and Canada. Defendant Gemunder was Omnicare's CEO; defendant Froesel was its CFO and a Senior Vice-President; defendant Hodges was its Secretary and a Senior Vice-President; defendant Hutton was Chairman of the Omnicare Board of Directors;[1] and defendant Laney was a Director.

On December 15, 2005, Omnicare completed a public offering of 12.8 million shares of common stock, in conjunction with which the company made certain filings with the Securities and Exchange Commission in August and November 2005, which were incorporated into a Registration Statement and

[1] Defendants state that Mr. Hutton passed away while this case was on appeal to the Sixth Circuit.

Prospectus. (Third Amended Complaint ("TAC") ¶ 23).

Plaintiffs purchased stock through this public offering. (TAC ¶ 184). However, plaintiffs held that stock for only a short time, selling all of it by January 31, 2006. (Doc. 16-4 at 4; Doc. 52-2 at 3).

A. Procedural History of the Case

A review of the procedural history of the case is helpful to understand the issues now before the Court.

This case was filed on February 2, 2006, as a putative securities class action alleging claims for violations of § 10(b) and § 20(a) of the Securities Exchange Act of 1934. Plaintiffs alleged generally that defendants engaged in a fraudulent scheme that artificially inflated Omnicare's stock price by misrepresenting the company's financial results and business practices.

Following various preliminary matters, plaintiffs moved for leave to amend their complaint to add, as relevant here, an additional plaintiff (Cement Masons pension funds), asserting a claim for violation of § 11 of the Securities Act of 1933 based on allegedly false statements made in the Registration Statement issued in conjunction with the December 15, 2005,

public offering. The court granted plaintiffs' motion to amend their complaint.[2]

Defendants moved to dismiss the amended complaint on various grounds. In an Opinion and Order dated October 12, 2007, this Court granted defendants' motion to dismiss plaintiffs' complaint in its entirety. *Indiana State Dist. Council of Laborers and HOD Carriers Pension and Welfare Fund v. Omnicare, Inc.*, 527 F. Supp.2d 698 (E.D. Ky. 2007).

Plaintiffs appealed. (Doc. 95). On October 21, 2009, the Sixth Circuit issued an opinion affirming the dismissal of all claims, except the § 11 claim. *Indiana State Dist. Council of Laborers and HOD Carriers Pension and Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935 (6th Cir. 2009). The Sixth Circuit held that this Court had improperly dismissed the § 11 claim on the grounds that plaintiffs had not shown "loss causation" because such is not an element of a § 11 claim but rather is an affirmative defense thereto. *Id.* at 947.

Although the Sixth Circuit agreed with defendants that plaintiffs' § 11 claim sounds in fraud and is thus subject to Rule 9(b) 's heightened plead-

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[2] Because plaintiffs had previously filed an amended complaint styled as a Consolidated Amended Complaint (Doc. 27), what was labeled the "First Amended Complaint" was actually the second amendment to the pleadings. This accounts for the fact that plaintiffs continue to label the present incarnation of their complaint the "Second Amended Consolidated Complaint" when it is, in fact, a Third Amended Complaint, which label the Court uses herein.

ing requirements, the Court declined to reach defendants' alternative argument that the claim failed on that basis. *Id*. at 948. Instead, the Court stated that it would "leave the application of Rule 9(b)'s standards to the district court." *Id*.

After a stay during which plaintiffs pursued a petition for writ of certiorari, which they later dismissed, plaintiffs moved for leave to amend the complaint to replead the § 11 claim based on newly discovered information, and the Court granted this motion on July 14, 2011. (Doc. 133). Defendants responded with the motion to dismiss which is now ready for resolution.

B. Facts Alleged in Third Amended Complaint

As part of its Pharmacy Services Division, Omnicare provides consultant services in Long Term Care Facilities (LTCFs). (TAC ¶ 3). Plaintiffs allege that Omnicare utilized its pharmacy services to engage in extensive therapeutic interchange programs designed to market and sell high-profit drugs to LTCF patients. (TAC ¶ 4). Further, "Omnicare often implemented such initiatives in order to effect kickback arrangements with pharmaceutical manufacturers, whereby the Company received rebates in exchange for promoting the manufacturers' drugs." (*Id*.).

For the details of these alleged kickback schemes, plaintiffs cite to and incorporate allegations from whistleblower lawsuits filed against Omnicare, an investigation by the Department of Justice

("DOJ"), and a lawsuit against Johnson & Johnson filed by the DOJ and the United States Attorney's Office in Massachusetts. (TAC ¶ 6). Plaintiffs allege that these and other schemes were "approved and implemented at Omnicare's highest levels of management." (*Id.*) .

In particular, plaintiffs allege that Omnicare and Johnson & Johnson developed a scheme to market the drug Risperdal to nursing home patients with dementia, which was an illegal "off-label" use because the drug had been approved by the FDA only for the treatment of schizophrenia. (TAC ¶ 7).

Plaintiffs further allege that Omnicare "violated the Federal Anti-Kickback Statute by paying tens of millions of dollars to LTCFs in order to obtain or maintain pharmacy and services contracts with Omnicare." (TAC ¶ 8).

Plaintiffs allege that, at the time of the December 2005 public offering which is the basis of their § 11 claim, investors were unaware of these illegal activities because Omnicare concealed the kickback schemes and stated that the therapeutic interchanges were meant to "provide [patients with] . . . more efficacious and/or safer drugs than those presently being prescribed" and that its contracts with drug companies were "legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve." (TAC ¶ 10). Plaintiffs allege that these statements contained in the Registration Statement were materially false and misleading. (TAC ¶ 11).

Plaintiffs also allege that Omnicare failed to comply with Generally Accepted Accounting Principles ("GAAP") such that the financial statements filed in connection with the December 2005 public offering contained material misrepresentations and/or omissions.

ANALYSIS

A. Section 11 of the Securities Act of 1933

Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, imposes liability on persons who sign securities registration statements containing untrue statements of material fact or omissions of material fact. *J & R Marketing, SEP v. General Motors Corp.,* 549 F.3d 384, 390 (6th Cir. 2008).

Although § 11 plaintiffs are not required to plead or prove that the defendant acted with scienter, where the underlying allegations regarding the alleged misrepresentations or omissions sound in fraud, the requirements of Rule 9(b) apply. *Omnicare*, 583 F.3d at 948.[3]

Rule 9 (b) requires that a plaintiff "allege the time, place, and content of the alleged misrepresentations on which he or she relied; the fraudulent

[3] Because plaintiffs' allegations are clearly based on allegedly fraudulent and/or illegal activities, their attempted disavowal of any reliance on fraud in the TAC (TAC ¶ 178) is ineffective. *See In re Axis Holdings Ltd. Sec. Litig*., 456 F. Supp.2d 576, 597-98 (S.D.N.Y. 2006) (discussing numerous cases so holding) .

scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006) (citation omitted).

"Loss causation," which refers to the causal connection between the material misrepresentation or omission and plaintiff's loss, is not an element of a claim under § 11 of the Securities Act. *See Indiana State Dist. Council of Laborers and HOD Carriers Pension and Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935, 947 (6th Cir. 2009) (citing 15 U.S.C. § 77l(b)). Rather, loss causation is an affirmative defense to a § 11 claim. *Id.*

Defendants have moved to dismiss the TAC on both Rule 9(b) and loss causation grounds.

B. GAAP-Based Statements/Omissions

Plaintiffs allege that, due to certain improper accounting practices, the 2005 Prospectus and related SEC filings substantially overstated the company's revenue, operating income, and goodwill. (TAC ¶¶ 118-139). Thus, they allege, the statement that the filings contained no untrue statement of material fact and fairly presented the financial condition of the company were false and materially misleading. (TAC ¶¶ 166-67).

As this Court previously noted, allegations of GAAP violations, standing alone, do not satisfy the particularity requirements of Rule 9(b). (Doc. 133 at 5 (citing *Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1269 (11th Cir. 2006)). "Omnicare's auditors certified

Omnicare's GAAP compliance with respect to the financial statements in issue, and Omnicare has never restated these financials." *Id.*

Plaintiffs' TAC details numerous accounting practices that they allege violated GAAP. (TAC ¶¶ 100-167). However, a close review of these densely-detailed paragraphs – many of which simply incorporate allegations from other legal actions against Omnicare -- shows that plaintiffs allege no particularized facts showing that defendants knew or were reckless in regard to the fact that financial statements in question were compiled in violation of GAAP.[4]

For example, plaintiffs allege that Gemunder and Froesel were personally involved in one of the underlying transactions which plaintiffs allege was unlawful (TAC ¶¶ 118-128), but they do not allege that these defendants had any involvement with how that transaction was booked or how it was treated for accounting purposes. The allegation that these defendants knew that the financial statements issued in connection with the December 2005 public offering were false or misleading thus requires an inference that lacks any alleged factual basis.

Plaintiffs also allege, based on information from a confidential informant ("CW2"), that Omnicare failed to adequately reserve for doubtful receivables and failed to write-off uncollectible receivables.

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[4] In fact, the TAC contains not a single factual allegation specific to defendants Hodges, Hutton, and Laney.

(TAC ¶¶ 145-146). Again, however, no allegations link these accounting deficiencies to knowledge on the part of the defendants as to the accuracy of the financial statements contained in the offering materials.[5] The allegations from confidential witnesses CW3, CW4, CW5 (TAC ¶¶ 147-151) suffer from the same flaws.

Similarly, CW6's allegation that Froesel and Gemunder wanted the company's financial reporting to "look good, not to make it accurate" lacks the specificity required by Rule 9(b) for a claim grounded in fraud.[6]

For these reasons, plaintiff's allegations of material misstatements or omissions in the 2005 offering documents based on GAAP violations do not satisfy the requirements of Rule 9 (b).

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[5] The closest allegation is: "It was CW2's experience that defendant Gemunder and other senior management . . . denied write-offs" that would have been called for under GAAP. (TAC ¶ 145). This is still vague, however, and it does not actually allege that Gemunder or anyone else knew such denials to be in violation of GAAP, much less that he knew that such denials resulted in false financial statements.

[6] The Court assumes for purposes of this discussion that these confidential witnesses are identified with sufficient detail. However, it notes that plaintiffs' statement that the Court previously found similarly-described confidential witnesses to be reliable (Doc. 139 at 31) is incorrect. In fact, the Court held the exact opposite. *See Indiana State Dist. Council of Laborers and HOD Carriers Pension and Welfare Fund v. Omnicare, Inc.*, 527 F. Supp.2d 698, 710-11 (E. D. Ky. 2007).

C. Statements Regarding Legal Compliance

Plaintiffs allege a second category of material misstatements/omissions in the December 2005 offering materials by way of statements that: Omnicare's therapeutic drug interchange programs were meant to provide patients with more efficacious or safer drugs; Omnicare's contracts with drug manufacturers were legally and economically valid and brought value to patients; and Omnicare believed that its contracts complied with federal and state laws. (TAC ¶¶ 10, 27, 46).

As both this Court and the Sixth circuit have noted, statements regarding a company's belief as to its legal compliance are considered "soft" information and are generally not actionable. *See Indiana State Dist. Council of Laborers and HOD Carriers Pension and Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935, 945 (6th Cir. 2009) (citing *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 401-02 (6th Cir. 1997)); *Omnicare*, 527 F. Supp.2d at 709-10.

Plaintiffs argue that this principle is inapplicable here because they allege that "defendants knew the statements were untrue at the time they were made." (Doc. 139 at 25) . In support of this assertion, plaintiffs again identify allegations concerning only two of the defendants: Froesel and Gemunder.

These allegations, taken as true, establish that these two defendants were involved in planning and implementing Omnicare's therapeutic drug interchange programs and did so with the goal of improv-

ing the company's profitability. This does not get plaintiffs very far. Presumably all publicly-traded companies conduct their activities in order to be profitable. That is a far cry, however, from inferring that the company's officers knew they were violating the law.

Plaintiffs further state in their brief that the TAC alleges that Froesel directed that "false clinical data" be created and provided to physicians. (Doc. 139 at 26). The paragraphs of the TAC cited, however, do not support that serious allegation. Although couched in ominous tones, these paragraphs actually allege (through a confidential witness, CW1) only that Froesel identified regions that needed a "revenue boost" and directed Regional CFOs to garner data to support initiatives which would lead to such increased revenues through the drug interchanges. (TAC ¶¶ 33-34). The ensuing paragraphs which allege that Omnicare employees then put a "clinical spin" on information communicated to physicians and LTCFs support no inference of illegality. The averment that letters sent by Omnicare to physicians "misrepresent[ed] the efficacy and/or cost benefits of the target drug" lacks any alleged nexus to Froesel. (TAC ¶ 38). Nor does the complaint allege that such misrepresentations were made at Froesel's direction or with his knowledge.

The allegations against Gemunder are similarly lacking. For example, the TAC -- as opposed to plaintiffs' brief -- alleges only that Gemunder approved drug-switching initiatives that would increase Omnicare's profitability. (TAC ¶ 31). The allegations

about the "Risperdal Initiative" specifically make no mention of Gemunder. (TAC ¶¶ 67-71).[7]

Further, contrary to plaintiffs' arguments, the Sixth Circuit has also rejected the argument that Omnicare had a "duty to disclose" its allegedly illegal activities. *Omnicare*, 583 F.3d at 946.

CONCLUSION

In sum, the TAC does not provide sufficient factual basis to support the § 11 claim asserted against defendants. The Court thus need not reach the arguments regarding loss causation.

Therefore, having reviewed this matter, and the Court being otherwise sufficiently advised,

IT IS ORDERED that defendants' motion to dismiss plaintiffs' Third Amended Complaint (Doc. 138) be, and is hereby, **GRANTED**. A separate Judgment shall enter concurrently herewith.

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[7] Plaintiffs cite in their brief a "corporate document" attached to the TAC as Exhibit 7 as evidence of their claim against Gemunder. This document - which is unexplained and unauthenticated (indeed, it is not clear who the author is), merely states: "Joel Gemunder, President of Omnicare contacted David Norton, Pres. of Janssen on Friday, Sept. 18 to say that Omnicare would continue to support Risperdal." The Court finds nothing in this document to support the inferences plaintiffs advocate.

This 13th day of February, 2012.

Signed By: William O. Bertelsman WOB
United States District Judge

APPENDIX D

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 09a0370p.06

United States Court of Appeals for the Sixth Circuit

No. 07-6379
INDIANA STATE DISTRICT COUNCIL OF LABORERS AND HOD CARRIERS PENSION AND WELFARE FUND, ON BEHALF OF ITSELF AND ALL Others Similarly Situated, et al.,
Plaintiffs-Appellants,

ALASKA ELECTRICAL PENSION FUND, ON Behalf of Itself and All Others Similarly Situated,
Intervenor-Appellant,

v.

OMNICARE, INC.; JOEL F. GEMUNDER; DAVID W. FROESEL, JR.; CHERYL D. HODGES; EDWARD L. HUTTON; SANDRA E. LANEY,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Kentucky at Covington.
No. 06-00026—William O. Bertelsman, District Judge.

Argued: September 18, 2008

Decided and Filed: October 21, 2009

Before: DAUGHTREY and GILMAN, Circuit Judges; MILLS, District Judge.*

COUNSEL

ARGUED: Eric Alan Isaacson, COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP, San Francisco, California, for Appellants. Harvey Kurzweil, DEWEY & LeBOEUF LLP, New York, New York, for Appellees. **ON BRIEF:** Eric Alan Isaacson, Henry Rosen, Jennifer L. Gmitro, Shirley H. Huang, COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP, San Francisco, California, Kevin L. Murphy, GRAYDON HEAD & RITCHEY, LLP, Fort Mitchell, Kentucky, for Appellants. Harvey Kurzweil, William T. Conway III, Richard W. Reinthaler, James P. Smith III, DEWEY & LeBOEUF LLP, New York, New York, John E. Schreiber, DEWEY & LeBOEUF LLP, Los Angeles, California, Douglas R. Dennis, Stephen M. Gracey, FROST BROWN TODD LLC, Cincinnati, Ohio, William T. Robinson III, FROST BROWN TODD LLC, Florence, Kentucky, for Appellees.

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* The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

OPINION

MILLS, District Judge. Seizing on a few vague statements from management, the plaintiffs try to turn bad corporate news into a securities class action.

Because the Private Securities Litigation Reform Act ("PSLRA") forbids such alchemy, we generally affirm the district court's dismissal, although we reverse its disposition regarding the claims brought under the Securities Act of 1933, 15 U.S.C. § 77k.

I. BACKGROUND

A. General Information

Defendant Omnicare, Inc. is the nation's largest provider of pharmaceutical care for the elderly, handling medication distribution for nearly 1.5 million patients across most states and in Canada. Reflecting the size of its operations, Omnicare's phar-

macy services generated $5.3 billion in net sales in 2005 alone.[1]

The plaintiff class (Plaintiffs) consists of Omnicare investors who purchased securities between August 3, 2005, and July 27, 2006. The Laborers Council was selected as lead plaintiff under the PSLRA. *See* § 21D(a)(3)(B), 15 U.S.C. § 78u-4(a)(3)(B). It purchased Omnicare securities throughout December 2005 and January 2006, and sold all of them at the end of January 2006.

Also implicated in this case are several individual defendants. Three of these defendants are officers of Omnicare: CEO, President, and Director Joel Gemunder, CFO and Senior Vice President David Froesel, and Secretary and Senior Vice President Cheryl Hodges. The remaining individual defendants are board members: Chairman Edward Hutton and Director Sandra Laney.

Plaintiffs allege that the defendants committed fraud in violation of § 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j, as well as Rule 10b-5, 17 C.F.R. 240.10b-5. Plaintiffs also allege liability for Gemunder, Froesel, and Hodges under § 20(a), 15 U.S.C. § 78t(a), and liability for all defendants under § 11 of the Securities Act of 1933 ("SA"), 15 U.S.C. § 77k.

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[1] Technically, Omnicare is comprised of two business segments: Pharmacy Services and Contract Research Organization Services. But this detail may largely be ignored since 97% of Omnicare's revenue comes from Pharmacy Services.

The parties pull four sets of § 10(b) fraud claims out of Plaintiffs' sprawling and repetitive First Amended Consolidated Complaint. Briefly, these claims concern misleading statements or omissions relating to: (1) Medicare Part D preparedness, (2) a contract dispute with United Health Group (UHG), (3) violations of Generally Accepted Accounting Principles (GAAP), and (4) the legality of Omnicare's alleged drug recycling program and drug substitution program. The claim under § 11 also relates to the alleged GAAP violations. We summarize each set of claims in turn.

B. Medicare Part D Preparedness

In 2003, the Medicare Prescription Drug, Improvement and Modernization Act created Medicare Part D, a voluntary prescription drug benefit program for seniors.

Under this program, private entities (typically insurance providers) contract with the Centers for Medicare and Medicaid Services ("CMS"), a division of the Department of Health, to offer approved prescription drug plans ("PDP"). Pharmacies such as Omnicare contract with the PDP providers to supply the enrollees with the required prescription drugs. The PDP providers are compensated through a combination of enrollee premiums and reimbursement for the drugs provided (at an 8% mark up) from the CMS.

In late 2005, Omnicare was preparing for the industry's transition to Medicare Part D on January 1, 2006. Plaintiffs aver that Omnicare, on two sepa-

rate dates, misled the public about its readiness for this transition on several occasions.

First, in an August 3, 2005, press release, Gemunder stated:

> There are still many specifics yet to be determined through subregulatory guidance by CMS, as well as the approval of specific PDPs by CMS. . . . All things considered, we see nothing materially adverse about the regulations at this time and believe we are well-positioned to add value under the new Medicare Part D benefit. We will monitor developments and continue to ready our company as the year progresses.

During a conference call on the same day, Gemunder elaborated:

> We have been extremely busy in the last couple of months, working with potential PDP's to familiarize them about the specialized services required and the nuances of providing pharmacy services to long-term care residents and negotiating agreements for our participation in their pharmacy networks to serve the long-term care market. . . . [W]e're pretty confident that we're not going to be hurt by moving into the Part D structure, vis-a-vis where we are now.

Second, Plaintiffs allege that Gemunder made further misleading statements on November 2, 2005. In a press release, Gemunder stated:

> "We remain highly focused on the upcoming implementation of the Medicare Drug Benefit. While bringing about sweeping change in our industry, we believe we are well-positioned to add value under the new Medicare Part D benefit. . . . As the enrollment process begins, we are busy educating our long-term care facility clients and their residents on the availability and implementation of the new drug benefit . . . ."

Gemunder reiterated these points in a conference call that same day:

> "So we have been focused this quarter on training and on educating our employees, and seeing to the operational issues, related to the implementation of the new drug benefit. And with the enrollment period beginning November 15th, we have also been heavily been [sic] engaged in educating our long-term care facility clients and their residents, on the availability of the new benefit, as well as working with them on the implementation process . . . ."

Plaintiffs complain that these statements, and others, were misleading because Omnicare failed to sufficiently monitor developments (including perfor-

mance of a crosscheck of their databases against a national database) and neglected to properly educate the drug-plan suppliers on pharmacy care practices. The result was a rocky transition to Part D, costing approximately $9.8 million in overtime and related expenses.

C. UHG Contract Dispute

Next, Plaintiffs assert that Omnicare's positive earnings growth predictions were misleading in light of an undisclosed contract dispute with UHG, a major PDP sponsor. On February 23, 2006, Gemunder commented on the fourth-quarter 2005 results by stating that "as we enter our 25th year as a public company, Omnicare's revenue and earnings growth outlook remains positive given our strong underlying fundamentals and our proven growth strategy." In an April 27, 2006, statement regarding Omnicare's first quarter 2006 results, Gemunder repeated that "Omnicare's revenue and earnings growth outlook remains positive given our strong underlying fundamentals and our proven growth strategy."

Plaintiffs argue that these statements were false and misleading because Gemunder did not disclose a developing dispute with UHG. UHG, a drug-plan supplier responsible for about a third of Omnicare's Part D business, had recently completed a merger with PacifiCare Health Services, Inc. PacifiCare also had a contract with Omnicare, but it was less profitable. Some time in February 2006, UHG informed Omnicare that, as a result of the merger, it would be withdrawing from its original contract and switching to the less favorable PacifiCare agreement.

This change reduced Omnicare's profits for the second quarter of 2006.[2]

Plaintiffs claim that Gemunder's growth predictions were misleading absent a disclosure of this development. The contract dispute was not revealed until May 18, 2006, when Omnicare filed suit against UHG.[3] In response to the filing, Omnicare's stock dropped from $54.98 to $50.57.

D. GAAP Violations

From the second quarter of 2005, to the first quarter of 2006, Omnicare reported large, sometimes record, revenues. Commenting on the second quarter revenues, Gemunder stated that "[o]ur sales once again hit record highs, and our operating margins improved on a sequential basis, reflecting the growing benefits of our cost reduction and productivity enhancement initiatives." Hodges added that revenue per patient was up over prior years. Similar sentiments were expressed in relation to later quarters and filings certified by Gemunder and Froesel also reflected this revenue growth.

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[2] At one point, the complaint states that Omnicare's profits dropped 51%. However, the complaint also quotes a document putting Omnicare's *total* profit decline was at 51% for the quarter. This translated into $30.4 million or 25 cents per share. The complaint goes on to quote the document's conclusion that the loss attributable to UHG's contract switch was $18.3 million or 9 cents per share.

[3] A district court later granted UHG's summary judgment motion on these claims. *Omnicare, Inc. v. UnitedHealth Group, Inc.*, 594 F. Supp. 2d 945 (N.D. Ill. 2009).

Plaintiffs allege that these statements were misleading because Omnicare's revenue numbers for 2005 and early 2006 were inflated by non-compliance with GAAP. They allege: (1) improper revenue recognition, (2) overvaluation and improper recognition of receivables, (3) overvaluation of inventories, and (4) the failure to establish, in a timely manner, litigation settlement reserves with respect to several government investigations (discussed below).

E. False Assurances of Legal Compliance

Finally, Plaintiffs accuse Omnicare of falsely claiming that the company complied with the law when it was involved in two illegal practices: improper drug recycling and improper drug substitution. As to the former allegations, Plaintiffs say that Omnicare was repackaging and reshipping drugs with varying expiration dates, including some expired drugs. The latter allegation relates to a scheme to replace cheaper doses of certain medicines with more expensive doses (*e.g.*, capsules for tablets) in order to increase revenue.[4]

In light of these practices, Plaintiffs allege that Omnicare made materially misleading statements on a number of occasions when it assured the public that it was complying with the law. For example, a November 7, 2005, a press release explained that "Om-

[4] Passing references are also made to a scheme to replace generic drugs with brand-name ones. It is unclear where this alleged scheme fits into the Plaintiffs' claims.

nicare's policy is to comply with all applicable federal and state laws and regulations. To the best of our knowledge, our purchases of pharmaceuticals comply with all applicable laws and regulations and are consistent with Omnicare's goal of providing appropriate pharmaceutical care cost-effectively for the seniors we serve." Similar statements were allegedly made in January and February 2006.

In January 2006, several government raids were conducted on Omnicare facilities. By late 2006, two settlements had resulted. The first involved one of Omnicare's Michigan subsidiaries, Specialized Pharmacy, whose president was charged with fraud. This case was settled for $52.5 million. The second settlement was with the attorney generals of 43 states and involved Omnicare's alleged substitution of dosage forms on several generic drugs (*e.g.*, tablets with capsules). This settlement obligated Omnicare to pay $49.5 million.

F. District Court Ruling

Finding the FACC insufficient, the district court granted Defendants' motion to dismiss. The court began with the § 10(b) and Rule 10b-5 claims, dismissing the Part D statements and the GAAP violations for a failure to plead loss causation. Turning to the statements regarding legal compliance, the court noted that loss causation might also be lacking, but dismissed the action on other grounds. First, it held that any statements concerning legality of a company's actions were "soft" statements, for which disclosure was not required. Second, the court discounted the value of the confidential witness testi-

mony in the complaint and held that no strong inference of scienter existed.

With respect to the UHG contract dispute, the Court found that the Laborers Council, the lead plaintiff, had sold its securities before the relevant disclosure and therefore lacked standing. The district court also denied a motion to intervene by Alaska Electrical Pension Fund (a party ostensibly possessing standing), holding that a further amendment was barred by the PSLRA and, alternatively, concluding that any intervention was futile in light of the lack of scienter.

Next, the district court dismissed Plaintiff's § 11 action. In a footnote, the Court explained: "The Section 11 claim, which also sounds in fraud and is based on the alleged accounting violations, fails on the same grounds [i.e., failure to allege loss causation]."

Having dismissed all claims of primary securities violations, the court rejected application of control-person liability under § 20.

II. STANDARD OF REVIEW

A district court's grant of a Rule 12(b)(6) motion to dismiss is reviewed de novo. *Zaluski v. United Am. Healthcare Corp.*, 527 F.3d 564, 570 (6th Cir. 2008) (citing *Robert N. Clemens Trust v. Morgan Stanley DW, Inc.*, 485 F.3d 840, 845 (6th Cir. 2007)). All well-pleaded facts in the complaint are accepted as true. *Ley v. Visteon Corp.*, 543 F.3d 801, 805 (6th Cir. 2008). "In addition to the allegations in the com-

plaint, the court may also consider other materials that are integral to the complaint, are public records, or are otherwise appropriate for the taking of judicial notice." *Id.* (quoting *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 560 (6th Cir. 2008)). Further, we may affirm on any supportable ground, even if the district court invoked other grounds for its ruling. *Id.* at 805-06.

III. ANALYSIS

A. Securities and Exchange Act Claims: 10(b) and Rule 10b-5

'Section 10(b) of Securities and Exchange Act and Rule 10b-5 prohibit fraudulent, material misstatements in connection with the sale or purchase of a security.' *Zaluski*, 527 F.3d at 570 (quoting *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 680-81 (6th Cir. 2004)) (internal quotation marks omitted). A private right of action for violations exists where a plaintiff can demonstrate the following elements: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 128 S. Ct. 761, 768 (2008); *see also Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 917 (6th Cir. 2007).

Because § 10(b) claims sound in fraud, the pleading strictures of Federal Rule of Civil Procedure 9(b) apply. *Frank v. Dana*, 547 F.3d 564, 569-70 (6th

Cir. 2008). Thus, the complaint must "'(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.'" *Id.* at 570 (quoting *Gupta Terra Nitrogen Corp.*, 10 F. Supp. 2d 879, 883 (N.D. Ohio 1998)).

Bolstering this rule of specificity, the PSLRA imposes further pleading requirements. *Id.* (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504 (2007)). First, the complaint must "specify each statement alleged to have been misleading" along with "the reason or reasons why the statement is misleading." 15 U.S.C. § 74u-4(b)(1). Second, plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). *See Frank*, 547 F.3d at 570.

1. UHG Dispute

In order to recover under § 10(b) and Rule 10b-5, a plaintiff must show both an omission or misstatement and its materiality. *Zaluski*, 527 F.3d at 571. Materiality can be established by proof of a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.* (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988)). When a company chooses to speak, it must "provide complete and non-misleading information." *Rubin v. Schottenstein, Zox & Dunn*, 143 F.3d 263, 268 (6th Cir. 1998). However, liability does not attach to mere corporate puff-

ery or statements of corporate optimism. *In re Ford Motor Co. Sec. Litig.*, 381 F.3d 563, 570 (6th Cir. 2004). Further, a safe-harbor "excuses liability for defendants' projections, statements of plans and objectives, and estimates of future economic performance." *Helwig v. Vencor, Inc.*, 251 F.3d 540, 547-48 (6th Cir. 2001) (en banc) (citing 15 U.S.C. § 78u-5(i)(1)). This protection is overcome only "if the statement was material; if defendants had actual knowledge that it was false or misleading; and if the statement was not identified as 'forward-looking' or lacked meaningful cautionary statements." *Id.* At 548 (citing 15 U.S.C. § 78u-5(c)(1)).

With regard to the UHG dispute, Plaintiffs do not explain why, as a general matter, Omnicare had a duty to disclose its contractual dispute with UHG any earlier than it did. Rather, Plaintiffs focus on a statement made by Gemunder on two occasions: "Omnicare's revenue and earnings growth outlook remains positive given our strong underlying fundamentals and our proven growth strategy." According to Plaintiffs, this predictive statement was misleading absent disclosure of the contract dispute.

The problem with this argument, however, is that Gemunder's comments are forward-looking statements entitled to safe-harbor protection. Indeed, not only does the statement itself call attention to its predictive character ("growth outlook") but even the complaint identifies it as "a positive outlook on future revenue." Further, to the extent that the reference to the outlook "remaining" positive implies some present circumstances, that is not enough to take this statement out of the safe harbor. *See Miller v. Champion*

Enterprises Inc., 346 F.3d 660, 676-77 (6th Cir. 2003) (relying on 15 U.S.C. § 78u-5(i)(1)(D) and finding reference to use of term "continuation" in phrase "continuation of outstanding earnings growth" did not transform an otherwise forward-looking prediction into an unprotected mixed statement).

Even putting that exception aside, Gemunder's statements cannot be deemed material. Courts have consistently found immaterial "a certain kind of rosy affirmation commonly heard from corporate managers and numbingly familiar to the marketplace - loosely optimistic statements that are so vague, so lacking in specificity, or so clearly constituting the opinions of the speaker, that no reasonable investor could find them important. . . ." *In re Ford Motor Co. Sec. Litig., Class Action*, 381 F.3d 563, 570-71 (6th Cir. 2004) (*quoting Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1217 (1st Cir. 1996)). Gemunder's comments fall squarely within this realm of corporate puffery, as they do nothing more than vaguely predict positive future results, a claim so banal and ubiquitous that it cannot engender reliance by reasonable investors. *See San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 811 (2d Cir. 1996) (statements of optimism about earnings and claim predicting "income growth consistent with . . . historically superior performance" were "puffery").

Therefore, we find that the complaint fails to allege a material misstatement or omission.[5]

2. Part D Implementation

Plaintiffs allege that Gemunder's statements and predictions concerning Omnicare's transition to Part D were misleading in light of Omnicare's allegedly insufficient and untimely training as well as the difficulties encountered in implementation. The district court dismissed this claim, finding that loss causation had not been adequately pled. We agree with that assessment.

In a securities action, the plaintiff bears the burden of proving loss causation, 15 U.S.C. § 78u-4(b)(4), as well as pleading it. *See Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346-48 (2005). "Loss causation requires 'a causal connection between the material misrepresentation and the loss.'" *Brown*, 481 F.3d at 920 (quoting Dura, 544 U.S. at 342). Price inflation alone is insufficient; rather, a plaintiff must show that an economic loss occurred after the truth behind the misrepresentation or omission became known to the market. *See Dura*, 544 U.S. at 346-47.

Assuming that Gemunder's statements are otherwise actionable, loss causation is thoroughly lacking in this case. Although a number of allegations relate to Omnicare's alleged Part D shortcomings, none explain how the statements were revealed to be

[5] Since Alaska Electrical's claims would fail for the same reason, we also affirm the denial of the motion to intervene.

false and thereby caused a drop in the stock price. Indeed, the sole "loss causation" allegation identified by the Plaintiffs is a fragment of a sentence imbedded in the complaint's block quote of an article from *TheStreet.com*. The entire sentence reads: "The institutional pharmacy [Omnicare] has found itself caught up in two government probes *even as it struggles to overcome major glitches associated with the new Medicare Part D drug coverage program."* (emphasis added). Tellingly, this quote does not appear in the section of the complaint dealing with Part D, but rather in a discussion of loss causation relating to various government raids. Further, the complaint fails to explain why this minor problem, as opposed to the raids, caused the ensuing decline in stock value. *See Dura*, 544 U.S. at 343 ("To 'touch upon' a loss is not to *cause* a loss, and it is the latter that the law requires."); *Tricontinental Indus., Ltd. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824, 842 (7th Cir. 2007) ("To plead loss causation, the plaintiff must allege that it was the very facts about which the defendant lied which caused its injuries."). Quite to the contrary, the complaint expressly attributes the decline in share price to the confluence of governmental probes, not the news of Part D difficulties. As a result, we cannot conclude that loss causation has been adequately pled with respect to the implementation of Part D.

3. GAAP Violations

Plaintiffs have also failed to plead loss causation under § 10(b) regarding Omnicare's alleged misstatements premised on non-compliance with GAAP. Although Plaintiffs list numerous alleged violations

of GAAP rules, the complaint nowhere suggests how or when any of these alleged accounting improprieties were disclosed. Rather, Plaintiffs argue that they were implicitly disclosed because Omnicare's allegedly illegal conduct (drug recycling, etc.) translated into accounting violations. Thus, when news of the government raids appeared, the accounting statements were thrown into question by extension. This causation theory, however, rests entirely on speculation and is substantially undercut both by the lack of any financial restatements on Omnicare's part and by the willingness of third-party auditors to continue to certify Omnicare's GAAP compliance. In short, the complaint does not suggest that the alleged GAAP violations were ever recognized by or revealed to the market. Therefore, loss causation is again lacking.

4. Legal Compliance

Finally, Plaintiffs seek recovery based on Omnicare's claims of "legal compliance." Defendants argue that its statements regarding "legal compliance" are not actionable because companies have no duty to opine about the legality of their own actions. As a general matter, that is true. Such information is considered "soft" and, therefore, disclosure is not required. *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 401-02 (6th Cir. 1997).

But Plaintiffs object to application of this rule because Omnicare did not stay completely silent; instead, it made several general statements that it complied with state law and regulations and had a

policy of complying with the law.[6] Thus, Plaintiffs argue that liability can be imposed based on these statements and that Omnicare had a duty to disclose its involvement in "illegal" activities. We disagree.

In *Kushner v. Beverly Enterprises, Inc.*, the Eighth Circuit reviewed a case very similar to this: a company made a general assertion that it complied with Medicare regulations but was later embroiled in a large Medicare fraud investigation. 317 F.3d 820, 824-25, 830-31 (8th Cir. 2008). Relying on this Court's decisions in *Sofamor Danek and Helwig*, the Eighth Circuit assumed that liability could attach to a company's general assertion of legal compliance, but only where the complaint "adequately pleaded that the defendants knew the statements were untruthful." *Id.* at 831. Since no such allegations were made, the pleading was deemed inadequate. *Id.*

This case is no different. Although Plaintiffs claim that Omnicare's "legal compliance" claim was made with knowledge of its falsity, few factual allegations support this claim. Indeed, although three confidential witnesses reported various drug-handling practices that they considered illegal, only the allegations of CW6 suggest any knowledge on the part of any of the defendants. In particular, CW6 asserted that "Froesel would contact Regional CFOs twice each quarter to implement the therapeutic inter-

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[6] The bulk of these statements come from newspaper articles. We assume, without deciding, that these statements can be sufficiently attributed to Omnicare. *See Raab v. Gen. Physics Corp.*, 4 F.3d 286, 288-89 (4th Cir. 1993).

change program where the more expensive branded drugs were substituted for the cheaper and less profitable . . . ." But this does little to aid the Plaintiffs. First, no information is given regarding CW6 except the title of his position. As a result, any inferences drawn from his accusations must be steeply discounted. *Ley*, 543 F.3d at 811. Second, the allegations of illegality in this case relate to drug recycling and an alleged scheme to change forms of dosages (e.g., capsules for tablets), not branded drugs being substituted for generic drugs.[7] Hence, there is a disconnect between what Froesel allegedly knew (branded-for-generic drugs) and what was allegedly revealed to the market (dosage substitutions and recycling). Further, even if this statement did involve drug recycling or dosage substitution, it still fails to show falsity because no allegations establish when the defendants were aware of the wrongdoing or, for that matter, when the wrongdoing was occurring. Thus, as in Kushner, the complaint fails specifically to allege that defendants knew their statements of "legal compliance" were false when made.

Nor did Omnicare have a duty to disclose its "illegal" operations based on its "legal compliance" claim. In *Zaluski*, we dealt with a statement claiming not legal compliance, but rather that the company "complied with provisions" of a contract. *Zaluski*, 527 F.3d at 568. The defendant in that case (the parent

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[7] CW6 does state that "Omnicare made the switches [from tablets to capsules of Ranitidine] . . . simply to charge a higher price." Nothing, however, suggests who at Omnicare knew of this policy, when they knew, or even when it was in effect.

company of Omnicare) had a contract with the state of Tennesse, prohibiting payments to Tennessee officers or employees; violations could result in fines or the termination of the entire contract. Despite these potential consequences, the defendant made a large number of monthly payments to a Tennessee senator. When the scheme began to unravel, the defendants issued a press release claiming that the payments were made for out-of-state consulting. *Id*. at 567-70.

We found that the press release in *Zaluski* was "an affirmative misleading statement," but nevertheless held that Omnicare did not have to disclose that the payments constituted a breach of contract:

> The April 15 press release . . . is an affirmative misleading statement .... However, Plaintiffs do not allege simply that the payment was made, but that the making of the payment created a voidable contract or the possibility of fines and sanctions by the State of Tennessee. Thus, Plaintiff's allegation refers to the consequences of the payment, not the payment itself. . . . These consequences are the type of predictions and soft information that do not give rise to a duty of disclosure.

Id. at 575-76.

We also noted in *Zaluski* that the statements regarding the contract, though misleading, did not require further disclosures:

> In C*ity of Monroe*, once the company chose to speak regarding an objective fact, it was required to qualify that representation with known information undermining (or seemingly undermining) the claim. This objective fact did not turn on decisions made by external parties, such as whether to fine the company for violations of safety standards, but on a statement that was directly in conflict with data in the company's possession. In *City of Monroe*, the defendants issued a statement that 'the objective data clearly reinforces our belief that these are high quality, safe tires'; the defendants in fact had data that indicated the opposite. In contrast, the complained-of omission in this case is that payments made to [the Senator] could have resulted in Tennessee's decision to void the contract or fine the company. There is no evidence that [defendant] believed either of these actions to be forthcoming.

Id. at 576.

The *Zaluski* misrepresentation was that the payments to the Senator were for out-of-state work; in other words, the payments to the Senator complied with the contract. Here, Omnicare said even less, merely making a generic claim that they complied with the law without providing any specifics and generally refusing to discuss the case. As such, additional disclosures of potential legal findings and conse-

quences would be even less justified here than in Zaluski. Further, as in Zaluski, the materiality of the alleged omission derives solely from predictions regarding the actions of third parties, particularly whether fines or other sanctions would be brought based on findings of regulatory violations. This information is "soft," and no disclosure is required despite the generalized claim of "legal compliance."

In sum, the complaint does not sufficiently establish that defendants actually knew that the "legal compliance" statements were false when made. Nor did the generic claim of lawfulness, in the absence of any specifics, require the disclosure of the allegedly "illegal" activities. Therefore, we find that the district court properly dismissed this claim as well.

B. Securities and Exchange Act Claim: § 20

Plaintiffs also allege that the defendant officers (Gemunder, Froesel, and Hodges) are liable under § 20 of the Securities and Exchange Act , 15 U.S.C. § 78t(a). When a primary violation of securities law is shown, that provision imposes joint and several liability on "controlling persons." However, as discussed above, the district court properly dismissed the Plaintiffs' claims under § 10(b) and Rule 10b-5. Therefore, dismissal of control person liability under § 20 was also proper.[8]

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[8] As discussed below, Plaintiffs' claim under § 11 may survive. However, control person liability for violations of the Securities Act of 1933 is imposed under § 15 of that Act, not § 20 of the Securities and Exchange Act of 1934.

C. Securities Act Claim: § 11

The complaint also alleges a violation of § 11 of the Securities Act of 1933 based on Omnicare's alleged GAAP abuses. The district court dismissed this claim on the same grounds as the Securities and Exchange Act claims, namely a lack of loss causation. Loss causation, however, is not an element of a § 11 claim, but an affirmative defense to it. *See* 15 U.S.C. § 77l(b). Thus, the district court erred in dismissing this claim on that ground.

Recognizing this problem, Omnicare recharacterizes the lower court's opinion, suggesting that the district judge found the affirmative defense on the face of the complaint. Nothing in the opinion's brief footnote on § 11 supports this position.

Defendants also urge us to affirm on a different ground: that the § 11 claims fail to allege the underlying GAAP violations with the specificity required by Rule 9(b). We agree with Defendants that, since the GAAP violations sound in fraud, Rule 9(b) must apply. *See ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 68 (1st Cir. 2008) (noting the specificity requirement when the claim is grounded in fraud); *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1277 (11th Cir. 2006) (discussing the specificity requirement in cases which involve fraud); *Cal. Pub. Employees' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 160-63 (3d Cir. 2004) (same); *Rombach v. Chang*, 355 F.3d 164, 170-71 (2d Cir. 2004) (same); *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368-69 (5th Cir. 2001) (claims must sound in fraud in order to be subject to dismissal under Rule 9(b)); *In re*

Stac Electronics Sec. Litig., 89 F.3d 1399, 1404-05 (9th Cir. 1996) (Rule 9(b) requirements apply to claims brought under § 11 which are grounded in fraud); *Sears v. Likens*, 912 F.2d 889, 892-93 (7th Cir. 1990) (same). *But see In re NationsMart Corp. Sec. Litig.*, 130 F.3d 309, 315 (8th Cir. 1997) (holding that

"Rule 9(b) does not apply to claims under § 11of the Securities Act, because proof of fraud or mistake is not a prerequisite to establishing liability under § 11"). Nevertheless, we decline to affirm on this alternate ground and instead leave the application of Rule 9(b) standards to the district court.

IV. CONCLUSION

In sum, we **AFFIRM** the district court's dismissal of the § 10(b), § 20(a), and Rule 10b-5 claims, as well as the denial of Alaska Electrical's motion to intervene. However, we **REVERSE** the dismissal of the § 11 claim and **REMAND** the case to the district court for further proceedings.

APPENDIX E

Effective: November 3, 1998

United States Code Annotated Currentness
Title 15. Commerce and Trade
Chapter 2A. Securities and Trust Indentures (Refs & Annos)
Subchapter I. Domestic Securities (Refs & Annos)

→→ § 77k. Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, 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, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue--

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration

statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been 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, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not

knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Persons exempt from liability upon proof of issues

Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof--

> **(1)** that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or
>
> **(2)** that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration state-

ment had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, 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; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, 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 there-

in not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was

> an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) Standard of reasonableness

In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) Effective date of registration statement with regard to underwriters

If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the

security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided,* That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit,

including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) Joint and several liability; liability of outside director

(1) Except as provided in paragraph (2), all or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(2)(A) The liability of an outside director under subsection (e) of this section shall be determined in accordance with section 78u-4(f) of this title.

(B) For purposes of this paragraph, the term "outside director" shall have the meaning given such term by rule or regulation of the Commission.

(g) Offering price to public as maximum amount recoverable

In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.