# 11-2665-cv

(Docket Number in District Court: 1:09-cv-01989-PAC)

IN THE

## United States Court of Appeals for the Second Circuit

MARSHALL FREIDUS, on behalf of himself and all others similarly situated, STEWART THOMPSON and SHARON THOMPSON, Trustees for the S.O. Thompson Rev. Trust and the S.G. Thompson Rev. Trust, DORA L. MAHBOUBI,

*Lead Plaintiffs-Appellants,*

(*caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE DEFENDANTS-APPELLEES SEEKING AFFIRMANCE**

Robin S. Conrad
Rachel L. Brand
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Richard D. Bernstein
*Counsel of Record*
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

Mei Lin Kwan-Gett
Zheyao Li
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019
(212) 728-8000

*Counsel for Amicus Curiae*
*The Chamber of Commerce of the United States of America*

LARRY MORRISON, Individually and on behalf of all others similarly situated, JEFFREY LEFCOURT, on behalf of himself and all others similarly situated, BEVERLY PELLEGRINI, on behalf of herself and all others similarly situated, ALFRED FAIT, on behalf of himself and all others similarly situated,

*Consolidated Plaintiffs,*

—v.—

BARCLAYS BANK PLC, BARCLAYS PLC, MATTHEW WILLIAM BARRETT, JOHN SILVERSTER VARLEY, NAGUIB KHERAJ, ROBERT EDWARD DIAMOND, JR., SIR RICHARD BROADBENT, RICHARD LEIGH CLIFFORD, DAME SANDRA J.N DAWSON, SIR ANDREW LIKIERMAN, SIR NIGEL RUDD, STEPHEN GEORGE RUSSELL, JOHN MICHAEL SUNDERLAND, BARCLAYS CAPITAL SECURITIES LIMITED, CITIGROUP GLOBAL MARKETS INC., MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, WACHOVIA CAPITAL MARKETS, LLC, MORGAN STANLEY & CO. INCORPORATED, UBS SECURITIES LLC, A.G. EDWARDS & SONS, INC., BNP PARIBAS SECURITIES CORP., GOLDMAN, SACHS & CO., KEYBANC CAPITAL MARKETS INC, RBC DAIN RAUSCHER INC., SUNTRUST CAPITAL MARKETS, INC., WELLS FARGO SECURITIES, LLC, MARCUS AGIUS, DR. CHRISTOPHER LUCAS, GARY A. HOFFMAN, FREDERIK SEEGERS, DAVID G. BOOTH, FULVIO CONTI, DANIEL CRONJE, BANC OF AMERICA SECURITIES LLC,

*Defendants-Appellees.*

## RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is not a publicly traded corporation. It has no parent corporation and no publicly traded corporation owns more than 10% of its stock.

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The Chamber of Commerce of the United States of America ("Chamber") submits this *amicus* brief in support of the Defendants-Appellees.[1] The Chamber files this brief to address one particular argument raised by Plaintiffs-Appellants ("Plaintiffs") that is unprecedented and has potential implications far beyond this case – namely, their argument that statements made by Barclays Bank PLC ("Barclays") that are immaterial or at most statements of opinion gave rise to a duty to disclose all underlying facts that might lead someone to a different opinion or view. This argument would routinely impact numerous businesses of many kinds that participate in the United States securities markets. This *amicus* brief is submitted pursuant to the motion by the Chamber filed contemporaneously pursuant to Fed. R. App. P. 29. This *amicus* brief does not address the other routine issues underlying this Rule 12(b)(6) dismissal.

## INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the Nation's largest federation of business companies and associations. It directly represents 300,000 members and indirectly represents the interests of over 3

[1] Pursuant to Fed. R. App. P. 29(c)(5) and Second Circuit Local Rule 29.1, the Chamber certifies that (A) no party's counsel authored the brief in whole or in part; (B) no party and no party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) no person – other than the *amicus curiae*, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.

million business, trade, and professional organizations of every size, in every sector, and from every region of the country. Over 96% of the Chamber's members are small businesses with 100 or fewer employees. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of general concern to the nation's business community, such as those involving the federal securities laws, including *Pacific Investment Management Co. LLC v. Mayer Brown LLP*, 603 F.3d 144 (2d Cir. 2010), *Gearren v. The McGraw-Hill Companies, Inc.*, 660 F.3d 605 (2d Cir. 2011), *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011), and *Stoneridge Investment Partners, LLC v. Scientific Atlanta, Inc.*, 552 U.S. 148 (2008).

Here, Plaintiffs argue that Barclays – which made subjective statements about the value of its mortgage-related holdings and its risk management practices – was also obligated to break out in line-item fashion various subcategories of its mortgage-related holdings. (Appellants' Br. at 50-53.) Many of the Chamber's members are companies subject to the U.S. securities laws who would be directly and adversely affected if the Court were to hold that a statement that is immaterial or at most a statement of opinion gives rise to a duty to disclose all underlying facts that might cause a different person to reach a different opinion or view.

While this particular case involves mortgage-related assets, the limitless argument advocated by Plaintiffs would have broad ramifications for every company subject to the Securities Act of 1933 or the Securities Exchange Act of 1934. Plaintiffs propose that general, subjective statements characterizing an issuer's business that are immaterial or at most opinions create a duty to disclose the size and financial results of particular business lines encompassed within the statements. Such a duty would be unprecedented and, if adopted, would vastly increase the litigation risk faced by numerous issuers in the U.S. securities markets, harming our competitiveness in an already volatile economic climate.

## ARGUMENT

### PLAINTIFFS' THEORY THAT IMMATERIAL STATEMENTS OR STATEMENTS OF OPINION TRIGGER AN AFFIRMATIVE DUTY TO DISCLOSE UNDERLYING FACTS IS UNPRECEDENTED AND WRONG.

Whether a duty to disclose exists is a legal issue and thus regularly decided on a Rule 12(b)(6) motion. *See, e.g.*, *In re Morgan Stanley Information Fund Sec. Litig.*, 592 F.3d 347, 360-66 (2d Cir. 2010) (affirming dismissal). The existence of a duty to disclose is a separate question from materiality. *See id.* at 360-61, 366. Indeed, it is well established that "[a] corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact." *Id.* at 366 (citation omitted).

From an immaterial statement or at most a statement of opinion, Plaintiffs seek to extrapolate a legal duty to disclose all facts that *might* lead an investor to draw a different opinion or view. Specifically, Plaintiffs argue that Barclays' statements that it "actively managed" risk and had a "broadly stable risk profile" created a duty to disclose and itemize various subcategories of mortgage-related assets in addition to disclosing Barclays' overall holdings of those assets. (Appellants' Br. at 50-53.)

As a threshold matter, as Barclays has demonstrated in its brief on appeal, these statements are precisely the sort of generalized, subjective statements that this Court and courts within this Circuit have repeatedly held are immaterial as a matter of law. (*See* Barclays Defs.' Br. at 39-42.) *See also SRM Global Fund Ltd. P'ship v. Countrywide Fin. Corp.*, No. 10-2919-CV, 2011 WL 5867052, at *1-2 (2d Cir. Nov. 23, 2011) (summary order) (statement that company had "stabilized its liquidity" was inactionable); *ECA & Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 205-06 (2d Cir. 2009) (statements that company had "risk management processes that are highly disciplined" and that company would "continue to reposition and strengthen its franchises with a focus on financial discipline" were "no more than puffery") (alterations and internal quotation marks omitted); *In re Sec. Capital Assurance, Ltd. Sec. Litig.*, 729 F. Supp. 2d 569, 597 (S.D.N.Y. 2010) (statements about company's "underwriting

approach as . . . 'conservative' . . . [were] classic examples of puffery"). Plaintiffs' attempt to extrapolate a further disclosure duty based on immaterial statements has no basis in this Court's precedent and should be rejected for this reason alone.

Assuming for the sake of argument that such statements might somehow be material, they are, at most, statements of opinion. *See Stern v. Satra Corp.*, 539 F.2d 1305, 1308 (2d Cir. 1976) ("Statements that things are 'good,' 'valuable,' 'large,' or 'strong,' necessarily involve an exercise of individual judgment."); *see also Freidus v. ING Groep N.V.*, 09 Civ. 1049, 2011 WL 4056743, at *2 (S.D.N.Y. Mar. 29, 2011) (issuer's statement that it "considered its subprime [and] Alt-A . . . exposure to be of limited size and of relatively high quality" was statement of opinion); *In re DRDGOLD Ltd. Sec. Litig.*, 472 F. Supp. 2d 562, 568 (S.D.N.Y. 2007) (statement regarding "strong balance sheet" was inactionable opinion). Plaintiffs do not dispute this. Instead, Plaintiffs appear to argue that statements of opinion give rise to a duty to disclose factual details, such as itemizing business lines, because otherwise opinions send a "false message" even if they were "truthful." (Appellants' Br. at 53.) This bootstrap argument cannot be squared with settled legal principles.

This Court has held that a securities plaintiff may attack opinions in a 1933 Act case as false statements only if it alleges the opinions were "*not honestly believed* when they were made." *Fait v. Regions Financial Corp.*, 655 F.3d 105,

113 (2d Cir. 2011) (emphasis added) (citing *Virginia Bankshares v. Sandberg*, 501 U.S. 1083, 1095 (1991) ("A statement of belief may be open to objection . . . solely as a misstatement of the psychological fact of the speaker's belief in what he says.")). This holding means that the only factual message of an opinion is that the issuer believes it.

The mere existence of factual details that might lead a different person to a different opinion fails to suggest that an issuer did not believe its stated opinion. *See Fait*, 655 F.3d at 112 (not sufficient to allege that because of "adverse market conditions . . . defendants should have reached different conclusions"); *accord Tsereteli v. Residential Asset Securitization Trust 2006-A8*, 692 F. Supp. 2d 387, 393 (S.D.N.Y. 2010) (allegations that opinions "'contained weaknesses,' 'often [were] questionable' and were 'not in compliance with [professional standards]' . . . are insufficient to state a claim") (first alteration in original); *In re Salomon Analyst Level 3 Litig.*, 373 F. Supp. 2d 248, 252 (S.D.N.Y. 2005) (opinion "does not omit a material fact by failing to note that others may have different opinions or analytic approaches"); *Podany v. Robertson Stephens, Inc.*, 318 F. Supp. 2d 146, 154 (S.D.N.Y. 2004) (alleging that factors undermine an opinion is insufficient to allege that "the speaker [was] knowingly misstating his truly held opinion"). Logically, this means that the failure to disclose factual details is not evidence that an issuer disbelieved its opinion and thus communicated a false message.

Indeed, here Plaintiffs' operative complaint precluded them from alleging that the failure to disclose facts showed that the issuer's opinion communicated a false message of belief. Plaintiffs' operative complaint "expressly *exclude[s] and disclaim[s] any* allegation that could be construed as alleging fraud or intentional *or reckless misconduct*," and specifically sounds in "strict liability and negligence." (JA 457, 506, 524, 536, 549-55 (emphasis added).) This disclaimer is fatal to any claim that an opinion was disbelieved when made. *See Fait*, 655 F.3d at 109 (complaint's failure to "allege that defendants did not believe the statements" when made was fatal to its 1933 Act claims). Plaintiffs disclaimed the essential element – subjective disbelief – for any claim that an opinion conveyed a false message.

The pertinent portion of *Freidus v. ING*, 2011 WL 4056743, persuasively explained why similar 1933 Act claims should be dismissed. That issuer had stated that it "considered its subprime [and] Alt-A . . . exposure to be of limited size and of relatively high quality." *Id* at *2 (alterations in original). Those plaintiffs likewise contended that there was a material omission because "added disclosure was necessary to make that which was said not misleading." *Id*. The Court rejected this bootstrap argument: "This statement was one of opinion or of the company's state of mind. Such a statement can be false if, and only if, the company in fact did not so consider the exposure. The CAC is devoid of any

allegation that ING did not hold the view set forth in the offering materials at the time those materials were published." *Id*. at *3 (footnotes omitted).

Plaintiffs' unprecedented argument would have profound negative effects on American businesses. There is no principled basis to limit Plaintiffs' proposed bootstrap argument to cases involving subprime and other mortgage-related assets. If Plaintiffs' position were accepted, then any company's statement of opinion about its business could be a basis for suit for failing to itemize business lines or other factual details that might lead to a different opinion or view. For instance, suppose a company stated its opinion that its European, or Latin American, or Asian "business is stable." It could later be sued with 20-20 hindsight for failure to disclose details about the size or financial results of every business line in every country in that region. A furniture company stating its opinion that its "business is stable" would be subject to suit for failure to disclose details of its sales of tables, chairs, beds, and every other component of its business. And so on for countless other industries. Creative plaintiffs' lawyers can always think of more underlying factual details that could have been disclosed.

At best, Plaintiffs' proposed rule would "bring an overabundance of information within its reach, and lead management 'simply to bury the shareholders in an avalanche of trivial information – a result that is hardly conducive to informed decisionmaking.'" *Basic Inc. v. Levinson*, 485 U.S. 224,

231 (1988) (citing *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 448-49 (1976)). Worse, to avoid the heightened litigation risk, issuers may well avoid raising capital in U.S. markets altogether. That would hurt our economy's growth and ability to compete against foreign capital markets. *See Stoneridge*, 552 U.S. at 163-64 (expansion of securities litigation risk would "rais[e] the costs of doing business" for American companies, deter overseas firms from doing business in the U.S., and "shift securities offerings away from domestic capital markets").

Plaintiffs cite no case using a statement of opinion – much less a statement that is immaterial as a matter of law – as a springboard for a duty to disclose additional facts underlying that statement. Such a drastic change in the securities laws must come from Congress if at all. *Cf. Morgan Stanley*, 592 F.3d at 366 (rejecting attempt to expand "past their logical breaking point" the generalized duties not to mislead by omission). Congress has on two occasions in the recent past made significant changes to the securities laws, in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and the Sarbanes-Oxley Act of 2002. On neither occasion did Congress choose to enact a rule that an opinion creates a duty to disclose all underlying facts that might lead someone to a different opinion or view. The Court should not adopt Plaintiffs' invitation to be the first court, after 78 years, to read such a duty retroactively into the 1933 Act.

## CONCLUSION

The Court should affirm the decision below.

Dated: December 23, 2011

Respectfully submitted,

/s/ Richard D. Bernstein

Richard D. Bernstein
*Counsel of Record*
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

Mei Lin Kwan-Gett
Zheyao Li
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019
(212) 728-8000

*Counsel for Amicus Curiae*
*The Chamber of Commerce*
*of the United States of America*

Robin S. Conrad
Rachel L. Brand
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

7155757

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the length limitations set forth in Fed. R. App. P. 29(d) because it is no more than one-half the maximum length authorized by the Federal Rules of Appellate Procedure for a party's principal brief.

I further certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 2,273 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

Dated: December 23, 2011

/s/ Richard D. Bernstein
Richard D. Bernstein

*Counsel for Amicus Curiae*
*The Chamber of Commerce of the*
*United States of America*

**CERTIFICATE OF SERVICE & CM/ECF FILING**

11-2665-cv Freidus v. Barclays Bank PLC

I hereby certify that I caused the foregoing Brief of *Amicus Curiae* The Chamber of Commerce of the United States of America in Support of Defendants-Appellees Seeking Affirmance to be served on counsel for Lead Plaintiffs-Appellants and Defendants-Appellees via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Rule 25.1:

David H. Braff
Michael T. Tomaino, Jr.
Adam T. Kirgis
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004

Jay B. Kasner
Scott Musoff
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
4 Times Square
New York, New York 10036

*Attorneys for Defendants-Appellees*

Mark Solomon
Andrew J. Brown
Joseph D. Daley
ROBBINS GELLER RUDMAN & DOWD LLP
655 West Broadway, Suite 1900
San Diego, California 92101

Samuel H. Rudman
David A. Rosenfeld
Mario Alba, Jr.
ROBBINS GELLER RUDMAN & DOWD LLP
58 South Service Road, Suite 200
Melville, New York 11747

Ramzi Abadou
Eli R. Greenstein
Stacey M. Kaplan
Erik D. Peterson
KESSLER TOPAZ MELTZER & CHECK, LLP
580 California Street, Suite 1750
San Francisco, California 94104

*Attorneys for Lead Plaintiffs-Appellants*

I further certify that an electronic copy was uploaded to the Court's electronic filing system.

Dated: December 23, 2011

Notary Public:

**Sworn to me this**

December 23, 2011

John Hagel
Notary Public, State of New York
No. 01HA6251181
Qualified in New York County
Commission Expires November 14, 2015

JOHN WAGNER HAGEL
Notary Public, State of New York
No. 01HA6251181
Qualified in New York County
Commission Expires Nov. 14, 2015

Zheyao Li

*Counsel for Amicus Curiae*
*The Chamber of Commerce of the*
*United States of America*