No. 13-435

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

REPLY TO BRIEF IN OPPOSITION

HARVEY KURZWEIL
RICHARD W. REINTHALER
JAMES P. SMITH III
JOHN E. SCHREIBER
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166
(212) 294-6700

LINDA T. COBERLY
Counsel of Record
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-8768
lcoberly@winston.com

STEFFEN N. JOHNSON
ELIZABETH P. PAPEZ
ANDREW C. NICHOLS
Winston & Strawn LLP
1700 K Street N.W.
Washington, DC 20006
(202) 282-5000

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

OTHER AUTHORITIES

INTRODUCTION

Respondents do not dispute that the question presented is important and recurring, with broad implications for federal securities law and U.S. capital markets. Nor do they dispute that, if the circuits *are* divided, such a conflict warrants review. And they concede that circuit-level law on the issue is at least "confusing." Opp. 32. This all supports granting the petition, and it may explain why Respondents initially decided not to file an opposition.

The gist of Respondents' position is that they are so confident in their view of the merits that "the likelihood of serious conflict developing seems remote." *Id*. at 19; see *id*. at 20–26, 32–35 (discussing merits). *But a serious conflict has already developed.* The Sixth Circuit expressly "decline[d] to follow the Second and Ninth Circuits." Pet. App. 17a. Now, in the Sixth Circuit, a plaintiff may base a Section 11 claim on a statement of opinion without alleging "subjective falsity"—that is, without alleging that that the speaker did not, in fact, hold the opinion he was expressing. The law in the Second, Third, and Ninth Circuits is the opposite. These conflicting decisions reflect differing understandings of this Court's decision in *Virginia Bankshares*. Pet. 8-13; *infra* 4-9. Respondents explain at length that they agree with the Sixth Circuit's interpretation (Opp. 20–26), but every other circuit to consider this issue has interpreted *Virginia Bankshares* differently. In short, Respondents may prefer one side of the conflict, but they cannot reasonably deny that the conflict exists.

Respondents' efforts to dismiss these other authorities do not withstand scrutiny. Most remarka-

bly, Respondents insist that the Second Circuit's decision in *Fait* has not had "much impact" and "[r]elatively few decisions have even cited" it. Opp. 29. In fact, *Fait* has been cited *dozens* of times—so often that the Second Circuit describes *Fait*'s holding as "frequently" stated. See *infra* 4–5. Outside of court, Respondents' own counsel has touted the "express[]" split the decision below creates with the Second Circuit: "'The court's opinion expressly rejects the Second Circuit's requirement, adopted in a 2011 decision, that statements of opinion cannot be deemed actionably misleading unless 'both objectively false and disbelieved by the defendant.'"[1] Although Respondents now prefer to characterize the Second Circuit's 2011 decision in *Fait* as "singularly garbled" (Opp. 19)—and the Ninth Circuit's as lacking a "rationale" (*id*. at 26, 27)—even a cursory review of those decisions shows otherwise.

This case is an ideal vehicle for resolving the conflict. Respondents cannot now claim that their allegations are sufficient "even under a subjective-disbelief standard" (Opp. 35), when the district court rejected that argument (Pet. App. 38a–40a), and that ruling was not disturbed on appeal. Moreover, the complaint affirmatively *disclaims* any allegation that Omnicare's officers subjectively disbelieved what they were saying. See Pet. App. 10a. The issue in this case could not be presented more cleanly.

---

[1] Robbins Geller Rudman & Dowd LLP, *Sixth Circuit Holds That Statements of Opinion Need Not Be Knowingly False to Be Actionably Misleading* (available at http://www.rgrdlaw.com/ news-item-168.html (last visited January 27, 2014)).

Respondents' inflammatory account of the facts (Opp. 1–2, 5–11) does nothing to undermine the need for this Court's review. *Every* case under the federal securities laws involves allegations of misconduct. And Respondents' presentation of those allegations as fact is not only irrelevant but misleading. No court has ever found Omnicare guilty of doing what Respondents allege, nor has Omnicare ever admitted to such wrongdoing, either in a settlement or otherwise.

In short, the question in this case remains important, recurring, squarely presented, and the subject of an acknowledged intra-circuit conflict. The writ should be granted.

ARGUMENT

I. Respondents cannot hide from the acknowledged conflict below, and they offer no reason to believe it will resolve itself.

Respondents' central argument is that the petition "is grounded in a misreading of *Virginia Bankshares*." Opp. 20–26. This misses the point. What Respondents describe as a "misreading of *Virginia Bankshares*" is, in fact, binding precedent in at least three circuits. The petition thus presents far more than "the possibility of a nascent conflict." *Id*. at 19. As the Sixth Circuit announced, a conflict has already arisen. Pet. App. 17a.[2]

---

[2] Respondents are also wrong to suggest that Petitioners never brought *Virginia Bankshares* to the Sixth Circuit's attention. Opp. 4, 18, 20. Petitioners presented a variety of authorities on subjective falsity—including *Fait*, which discussed *Virginia Bankshares* at length. The Sixth Cir-

This conflict is well established, and it is not going away. Despite Respondents' arguments to the contrary, the decisions that conflict with the Sixth Circuit's are neither "muddled" nor lacking in "rationale." Opp. 26, 27.

1. Take, for example, the Second Circuit's decision in *Fait*—which Respondents describe as "singularly garbled." Opp. 19. According to Respondents, *Fait* is so "conceptually incoherent" that it has not "had much impact" and "may be little more than a 'one-off' decision." *Id*. at 27–29. They contend that review would be "premature" because the "lower courts" may not follow *Fait* (*id.* at 19) and "[r]elatively few decisions have even cited it" (*id*. at 29).

Not so. At least *67* decisions have cited *Fait*, including 24 decisions citing it for the specific subjective falsity proposition at issue here.[3] Respondents protest that two of these decisions were summary orders (Opp. 29), but that merely confirms that *Fait* is so well settled that the Second Circuit routinely relies

---

cuit took the point: "Defendants [Petitioners] argue that in *Fait* the Second Circuit correctly interpreted and applied the Supreme Court opinion [in] *Virginia Bankshares*." Pet. App. 16a. Accordingly, there was no waiver, and Respondents do not seriously argue otherwise.

[3] See, *e.g.*, *City of Westland Police & Fire Ret. Sys*. v. *MetLife, Inc.*, 928 F. Supp. 2d 705, 716 (S.D.N.Y. 2013) (Section 11); *Abu Dhabi Commercial Bank* v. *Morgan Stanley & Co. Inc.*, 888 F. Supp. 2d 431, 454 (S.D.N.Y. 2012) (same); *MHC Mut. Conversion Fund, L.P.* v. *United W. Bancorp, Inc.*, 913 F. Supp. 2d 1026, 1036 (D. Colo. 2012) (same).

on it without publication. In fact, in one of those orders, the Second Circuit notes that it cites the rule in *Fait* "frequently." *Freeman Grp.* v. *Royal Bank of Scotland Grp. PLC*, 2013 WL 5340476, at *2 (2d Cir. Sept. 25, 2013). A published decision that stands for a proposition cited "frequently" can be called only one thing: *settled law*.

It is no answer to say that "[o]ther Second Circuit decisions clearly hold that statements of opinion may be materially misleading * * * 'no matter how honestly but mistakenly held.'" Opp. 19. This argument refers to *Franklin Savings Bank of New York* v. *Levy*, 551 F.2d 521, 527 (2d Cir. 1977), which was decided 34 years before *Fait* and 14 years before *Virginia Bankshares*. It is superseded.[4]

Nor is *Fait* "muddled" merely because it holds that Section 11 claims, which do not require scienter, may nonetheless require subjective falsity. Opp. 27. As Respondent's counsel has observed elsewhere, "[n]othing in the law requires such mutual exclusivity among the pieces of evidence used to establish elements of a cause of action. For example, in the securities-fraud context, falsity and scienter are often inferred from the same facts." Eric A. Isaacson, *et al.*, *What's Brewing in* Dura v. Broudo: *A Review of the Supreme Court's Opinion & Its Import for Securities-Fraud Litigation*, 37 Loy. U. Chi. L.J. 1, 36 (2005). And the fact that the same facts *can* do double duty does not mean they are *always* doing double duty.

---

[4] Respondents cite *Litwin* v. *Blackstone Group, L.P.*, 634 F.3d 706 (2d Cir. 2011), for a somewhat different proposition (Opp. 29); but it too was decided before *Fait*.

Fait explains that allegations about the speaker's subjective belief in an expressed opinion are necessary, not for scienter, but for material falsity. 655 F.3d at 112 n.5. The Second Circuit's reasoning flows from its understanding of *Virginia Bankshares*, which observes that a statement of opinion is actionable only as a representation about "the psychological fact of the speaker's belief in what he says." 501 U.S. at 1095. Pleading that such a statement is "false" necessarily requires allegations about falsity in the "psychological fact"—that is, allegations that the speaker did *not* believe what he was saying.

Respondents' critique of *Fait* is thus not really about whether it is clear enough to create a conflict. Instead, they simply think the Second Circuit was wrong. This underscores the need for this Court's review.

2. The conflict with the Ninth Circuit is similarly stark. Respondents contend that the Ninth Circuit's decision in *Rubke* offers "no reasoned analysis or rationale." Opp. 26. But *Rubke*'s rationale is evident from its reliance on both *Virginia Bankshares* and another decision from within the Ninth Circuit that carefully analyzes the requirement of falsity in this context. *Rubke*, 551 F.3d at 1162 (citing *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1265 (N.D. Cal. 2000)). The rule in *Rubke* is thus both clear and precedential.

Later district court decisions recognize this, treating *Rubke* as exactly what it is: the established law of the Ninth Circuit. As one court put it, "[u]nder recent Ninth Circuit law, statements of opinion are actionable under Section 11 'only if the complaint alleges with particularity that the statements were both

objectively and subjectively false or misleading.'" *In re Wash. Mut., Inc. Sec., Derivative & ERISA Litig.*, 259 F.R.D. 490, 506 (W.D. Wash. 2009) (quoting *Rubke*). District courts outside the Ninth Circuit agree. *E.g.*, *Belmont Holdings Corp.* v. *SunTrust Banks, Inc.*, 896 F. Supp. 2d 1210, 1229-1230 (N.D. Ga. 2012) (Section 11, citing *Rubke*). Courts bound by Ninth Circuit precedent are not free to disregard *Rubke* as stating its rule "rather casually," as Respondents do (Opp. 26)—as if a holding could be turned into dictum by the court's perceived tone of voice.

In an effort to blunt *Rubke*'s impact, Respondents cite other Ninth Circuit decisions under Section 11, but none involves a statement of opinion.[5] The point of *Rubke* (and *Fait*) is that statements of opinion require different allegations of falsity than pure statements of fact. Allegations about state of mind are required for opinion statements *because a statement of opinion is about the speaker's state of mind.* 551 F.3d at 1162 (case involved "misleading opinions, not statements of fact"). Thus, the Ninth Circuit's decision squarely conflicts with the decision in this case.

3. Although the Sixth Circuit did not say so, it also broke cleanly with the Third Circuit, which has "squarely held that opinions, predictions and other forward-looking statements * * * may be actionable

---

[5] See *Hildes* v. *Arthur Andersen LLP*, 734 F.3d 854, 858 (9th Cir. 2013) ("[plaintiff] alleges that [defendant] overstated its revenue") and *Hemmer Grp.* v. *Sw. Water Co.*, 527 Fed. Appx. 623, 625-626 (9th Cir. 2013) ("The financial statements * * * were * * * incorrect."), both cited in Opp. 27 n.14.

misrepresentations if the speaker does not genuinely and reasonably believe them." *In re Donald J. Trump Casino Sec. Litig.—Taj Mahal Litig.*, 7 F.3d 357, 368 (3d Cir. 1993) (Becker, J.).

Respondents do not suggest that this holding was dictum—nor could they. The *Trump Casino* court would never have had to decide whether the representation was "*material*" if the complaint had not also "allege[d] that the defendants made a misrepresentation with their statement that they *believed* they would be able to repay the principal and interest on the bonds." *Id.* at 369 (emphases in original).

Nor can Respondents avoid the conflict by observing that the Third Circuit referred to whether the speaker "genuinely *and reasonably*" believed the opinion expressed. Opp. 31 (emphasis in original). The Sixth Circuit's opinion conflicts with that conclusion, as it jettisons any requirement of genuine belief.

What is more, the Third Circuit aligned its requirement of "genuine[]" belief with *Virginia Bankshares*, which "held that a speaker's subjective disbelief or motivation, *standing alone*, would be inadequate to state a claim under § 14(a)." *Trump Casino*, 7 F.3d at 372 (emphasis added). In other words, subjective disbelief or motivation is necessary for liability, but it is not sufficient. Otherwise, a speaker could be held liable for the "impurities" of his proverbial "unclean heart." *Virginia Bankshares*, 501 U.S. at 1096. That would "threaten just the sort of strike suits and attrition by discovery that *Blue Chip Stamps* [v. *Manor Drug Stores*, 421 U.S. 723 (1975)] sought to discourage." 501 U.S. at 1096. Plainly, for statements of opinion to be actionable, *Trump Casino* requires subjective falsity.

In sum, there is no doubt about what *Trump Casino* means. That decision—like *Fait* and *Rubke*—holds that a Section 11 claim based on a statement of opinion requires subjective falsity. These published decisions constitute binding precedent in their respective circuits, and they squarely conflict with the decision below.[6]

II. This case is an excellent vehicle for resolving the conflict.

Respondents close their opposition by claiming that this case is a "poor test case" for resolving the question presented. Opp. 35. They argue that their allegations as to Omnicare and two of its former officers are sufficient to permit this case to "survive even under a subjective-disbelief standard." *Ibid.* But the district court specifically rejected this argument, and the court below did not disturb that ruling. This is not surprising, as Respondents' complaint "expressly exclude[d] and disclaim[ed] any [such] allegations." Pet. App. 10a.

In the district court, Respondents pointed to the same statements of opinion (about Omnicare's legal

---

[6] It is irrelevant that some state authorities hold that a statement of opinion may be actionable without any allegation of subjective falsity. See Opp. 23–25 (citing cases). In some state jurisdictions, of course, a statement of opinion is not actionable at all. See, *e.g.*, *Barbara's Sales, Inc.* v. *Intel Corp.*, 227 Ill. 2d 45, 73 (2007); *Sandy Creek Condo. Ass'n* v. *Stolt & Egner, Inc.*, 267 Ill. App. 3d 291, 298 (2d Dist. 1994). If state courts disagree about that issue, that is a function of the diverse common law and is irrelevant to the conflict here under federal law.

compliance) and argued that the complaint's allegations were sufficient to show that officers Froesel and Gemunder knew at the time that those statements were false. But as the district court found, the facts alleged in the complaint established only that Froesel and Gemunder operated the relevant part of the business "with the goal of improving the company's profitability." Pet. App. 38a–39a. As the district court explained, "[p]resumably 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." *Id*. at 39a.

The district court also rejected Respondents' claim that Froesel directed regional employees to take steps "to switch patients' prescriptions from lower-priced to higher-priced drugs." Opp. 36. On that point too, the court found the complaint's allegations insufficient. Pet. App. 39a. And the court held that "[t]he allegations against Gemunder are similarly lacking." *Ibid*. For example, the paragraphs of the complaint discussing "a therapeutic initiative to steer patients towards Risperdal" (Opp. 36) "make no mention of Gemunder" (Pet. App. 40a).

The Sixth Circuit plainly agreed. If the complaint had alleged subjective falsity—a point Respondents argued in their opening brief below (No. 12-5287, Appellant's Br. 57–59)—the Sixth Circuit would never have had to decide whether a claim could be stated *without* subjective falsity. Again, Respondents' complaint affirmatively disclaims any allegation of knowing falsity: "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." Pet. App. 10a. Although the courts below held this statement inadequate to circumvent the heightened pleading standards of Rule 9, the contract's disclaimer means that the question here could not be presented more cleanly.

Finally, the fact that this case involves statements of opinion about legal compliance—rather than "misstated financial results" or an auditor's report (Opp. 36–37)—actually strengthens the case for review. The decision below presents the legal issue in the most straightforward way possible. The supposed misstatements here are undeniably statements of opinion. Indeed, some actually begin with the words "'[w]e believe.'" See *id.* at 7 (quoting Registration Statement). Yet even in this clear case, the circuits still disagree about the governing legal standard.

To the extent the Court wishes to examine the implications of its ruling in other contexts—which Respondents concede could raise "important questions" in the future (Opp. 37)—those implications will doubtless be addressed by both the parties and *amici* in their merits briefs. That is true in nearly every case before this Court. The question for today is whether the particular facts alleged here will allow the Court to answer the question presented and resolve the conflict among the circuits. The answer is yes. In fact, deciding the question in this clear-cut factual context will permit the Court to focus on the unsettled legal issue itself, without needing to address the finer questions about whether a particular kind of statement should be treated as a statement of opinion for these purposes. In short, the uncluttered

facts here are a reason to *grant* the petition, not to deny it.

CONCLUSION

Three circuits hold that statements of opinion in registration statements should not be judged solely in the sharp gaze of hindsight. In those circuits, a plaintiff seeking to base a Section 11 claim on a statement of opinion must allege that the speaker did not honestly hold the opinion expressed. The Sixth Circuit disagreed, based on a fundamentally different reading of this Court's decision in *Virginia Bankshares*. A conflict has arisen among the circuits, and this case presents a strong and timely vehicle for resolving it. The Court should grant review.

Respectfully submitted.

HARVEY KURZWEIL
RICHARD W. REINTHALER
JAMES P. SMITH III
JOHN E. SCHREIBER
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166
(212) 294-6700

LINDA T. COBERLY
Counsel of Record
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, Illinois 60601
(312) 558-8768
lcoberly@winston.com

STEFFEN N. JOHNSON
ELIZABETH P. PAPEZ
ANDREW C. NICHOLS
Winston & Strawn LLP
1700 K Street N.W.
Washington, DC 20006
(202) 282-5000

JANUARY 2014