No. 13-435

In the Supreme Court of the United States

OMNICARE, INC., *et al.*,
Petitioners,
v.

LABORERS DISTRICT COUNCIL
CONSTRUCTION INDUSTRY PENSION FUND, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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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 a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." The question presented is as follows:

For purposes of a Section 11 claim, whether a plaintiff may plead that a statement of opinion was "untrue" merely by alleging that the opinion itself was objectively wrong, or whether the plaintiff must also allege that the statement was subjectively false—requiring allegations that the speaker's actual opinion was different from the one expressed.

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with supporters in all fifty states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has appeared before this and other federal courts in numerous cases related to the proper scope of the federal securities laws. *See, e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317 (U.S. argued Mar. 5, 2014); *Amgen, Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184 (2013); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005).

WLF agrees with Petitioners that plaintiffs may only allege that an opinion is "false" under § 11 of the Securities Act of 1933 by pleading that the opinion was not genuinely believed by the speaker, and that the Sixth Circuit's holding to the contrary conflicts with

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby state that no counsel for Petitioners or Respondents authored any part of this brief, and no person other than *amicus curiae* or its counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a) of Rules of this Court, letters of consent from all parties to the filing of the brief are on file or have been submitted to the Clerk of the Court.

Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991). WLF writes separately to emphasize the importance of clarifying the standard for challenging "false" statements of opinion under all the federal securities laws. Such a clarification is needed to protect the expression of honest opinions by corporations and their officers and directors, as well as to guard the real interests of shareholders, who would be disadvantaged by a rule that deterred companies from openly sharing their opinions.

The holding in this case is important to all publicly held companies and their shareholders, because all companies disclose crucial information by means of opinions—such as subjective judgments regarding a company's business and financial condition, risks and opportunities, and policies and priorities. But WLF is particularly concerned about the impact of this decision on technology and other growth companies, whose volatile stock prices make them especially vulnerable to abusive securities class actions. For example, life sciences companies with products under development operate in an uncertain atmosphere that renders many of their core disclosures inherently subjective. They must speculate on the risks and benefits of developing products, distill voluminous and complex clinical trial results that are readily subject to alternative interpretations, and characterize the ups and downs of their rollercoaster ride toward potential approval by the Food and Drug Administration. *See* Stuart R. Cohn & Erin M. Swick, *The Sitting Ducks of Securities Class Action Litigation: Bio-Pharmas and the Need for*

Improved Evaluation of Scientific Data, 35 Del. J. Corp. L. 911, 923-25, 928 (2010).[2] By exposing corporate actors to liability whenever their subjective judgments are later determined to be "wrong," the Sixth Circuit's decision endangers the prosperity of these companies and their shareholders.

SUMMARY OF ARGUMENT

Opinions are ubiquitous in corporate communications. Corporations and their officers routinely share subjective judgments on issues as diverse as asset valuations, strength of current performance, risk assessments, product quality, loss reserves, and progress toward corporate goals. Many of these opinions are crucial to investors, providing them with unique information and insight. If corporate actors fear liability for sharing their genuinely held beliefs, they will be reluctant to voice their opinions, and shareholders would be deprived of this vital information.

The standard that the federal securities laws use to determine whether an opinion is "false" is therefore of widespread importance. Although this case only involves § 11 of the Securities Act of 1933, it poses a

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[2] Not surprisingly, securities litigation against such companies is on the rise, and is increasingly directed at such subjective statements. *See Dechert Survey of Securities Fraud Class Actions Brought Against U.S. Life Sciences Companies* 2-3 (2013), http://www.dechert.com/files/Publication/9a791e10-3b4c-4418-a424-55bff34354bf/Presentation/PublicationAttachment/81f9beb0-b2d4-45a2-b142-0174fd11d9c2/Dechert_Life_Sciences_Survey_03-13.pdf.

fundamental question: What causes an opinion or belief to be a "false statement of material fact"? The Court's answer will affect the standards of pleading and proof for statements of opinion under other liability provisions of the federal securities laws, which likewise prohibit "untrue" or "false" statements of "material fact." Despite the complexity the courts have injected into this issue, the answer is not complicated; it is a straightforward application of common sense. An opinion or belief is not "false" if it turns out to be wrong, if some (or even many) people disagree with it, or if a judge later decides it was unreasonable. Rather, a statement of opinion is only "false" if the opinion is not genuinely held; a statement of belief is only "untrue" if the belief is not actually believed.

This Court articulated the correct standard for judging the falsity of opinions in *Virginia Bankshares*, in which it held that an opinion may be actionable as a false statement of "fact," to the extent to which it is a "misstatement of the psychological fact of the speaker's belief in what he says." 501 U.S. at 1095. This holding is correct as a matter of logic and statutory interpretation, and has been applied by several circuit courts, including the First, Second, Fourth, Fifth, and Ninth Circuits, to require plaintiffs to allege the subjective falsity of opinions.

Nevertheless, confusion has persisted within the courts, with some judges continuing to rely on outdated doctrines inconsistent with *Virginia Bankshares*. As a result, in some courts, opinions are deemed immaterial

as a matter of law, suggesting to investors that they have no recourse if companies falsely portray their beliefs. At the other end of the spectrum is the Sixth Circuit decision under review, which holds that a speaker may be liable even for the expression of an honest opinion, if someone determines in hindsight that the opinion was "wrong." Pet. App. 16a-17a.

These inconsistent legal standards fail to achieve the "balance" that Justice Powell cautioned was necessary to give effect to the language and purpose of the federal securities laws. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S 723, 760-61 (1975) (Powell, J., concurring). The Securities Act of 1933 and Securities Exchange Act of 1934 were designed to "'insure honest securities markets and thereby promote investor confidence.'" *Chadbourne & Parke LLP v. Troice*, 134 S.Ct. 1058, 1067 (2014) (quoting *United States v. O'Hagan*, 521 U.S. 642, 658 (1997)). The laws achieve these goals by protecting investors from fraud and manipulation, and promoting "ethical standards of honesty and fair dealing." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976) (citing H.R. Rep. No. 85, at 1-5 (1933)).

But, as Justice Powell observed, the goal of preventing corporate fraud must be balanced with the need to protect against "open-ended litigation [that] would itself be an invitation to fraud." *Blue Chip Stamps*, 421 U.S at 760 (Powell, J., concurring). This balance is especially important because it is the shareholders who "ultimately bear the burden" of

meritless litigation. *Id.* at 761 n.5. Preventing such harm was one of the primary motivations behind the Private Securities Litigation Reform Act of 1995 ("Reform Act"). Congress knew that abusive litigation not only threatened corporate interests and damaged the U.S. economy, but that it also had a "chilling effect" on the "robustness and candor of disclosure" that ultimately harmed investors. H.R. Rep. No. 104-369, at 42-43 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730.

With this case, the Court has an opportunity to correct errors that have distorted the balance on both sides of the scale. In addition to reaffirming *Virginia Bankshares*, and emphasizing that the falsity of an opinion must hinge upon whether it is genuinely held, the Court can correct misguided precedent that has distorted how other elements of a securities fraud claim are applied in opinion cases—including the standards for misleading statements, scienter, and materiality. By clarifying the independent work done by each element, the Court can improve the fairness of securities class-action litigation across a wide range of cases. Companies would be assured that they would not face liability for sharing their honest judgments; shareholders would be assured that companies could not lie with impunity by simply casting their statements as opinions; and both would benefit from the application of clear and consistent standards.

ARGUMENT

I. Statements of Opinion Are a Common and Crucial Form of Disclosure.

A. Corporate Opinions Take Several Forms.

Before exploring the proper method for analyzing the falsity of opinions, it is important to understand what qualifies as an "opinion" under the securities laws. Current law provides no clear standard for making this determination, leaving most courts to make judgments on an *ad hoc* basis—often employing an "I know it when I see it" test. *See* Wendy G. Couture, *Opinions Actionable as Securities Fraud*, 73 La. L. Rev. 381, 401-04 (2013) (discussing the absence of a disciplined approach to identifying corporate opinions). The lack of a consistent standard predictably leads to inconsistent results, such that similar statements may be classified as statements of opinion, or not, depending upon the court. *Compare Hill v. State St. Corp.*, No. 09CV12146-NG, 2011 WL 3420439, at *23 (D. Mass Aug. 3, 2011) (holding statement that assets are "high quality" is *not* an opinion) *with Freidus v. ING Groep, N.V.*, 543 F. App'x 93, 95 (2d Cir. 2013) (holding statement that assets are "relatively high quality" *is* an opinion). A review of the literature and case law, and a sampling of recent company disclosures, yields four categories of corporate statements that are properly classified as opinions.

The first category encompasses all corporate statements that reflect an inherently subjective characterization, analysis, or judgment, about which

reasonable minds could differ. *See Billhofer v. Flamel Techs., S.A.*, No. 07 CIV. 9920, 2012 WL 3079186, at *10 (S.D.N.Y. July 30, 2012) ("[T]he hallmark of an opinion is that it does not express 'matters of objective fact' which can be assessed against an 'objective standard' but instead conveys a belief or 'judgment' whose 'determination is inherently subjective.'") (quoting *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 110-13 (2d Cir. 2011)). Opinions in this category are not necessarily qualified by "I think" or "I believe," and often involve crucial information. Examples include: fairness opinions, *see, e.g.*, *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009); auditors' reports or statements of compliance with financial standards, *see, e.g.*, *Buttonwood Tree Value Partners, LP v. Sweeney*, No. SACV 10-00537-CJC(MLGx), 2012 WL 2086607, at *2 (C.D. Cal. June 7, 2012); evaluations of assets and the adequacy of loan loss reserves, *see, e.g.*, *Fait*, 655 F.3d at 110, 113; characterization of clinical trial results, *see, e.g.*, *Wolfe v. Aspenbio Pharma, Inc.*, No. 11-CV-00165-REB-KMT, 2012 WL 4040344, at *8 (D. Colo. Sept. 13, 2012); appraisal of the strength of new technology, *see, e.g.*, *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 502 (9th Cir. 1992); evaluation of trends and risks, *see, e.g.*, *Herskowitz v. Nutri/System, Inc.*, 857 F.2d 179, 184 (3d Cir. 1988); and characterization of policies and practices, *see, e.g.*, *IBEW Local 90 Pension Fund v.*

Deutsche Bank AG, No. 11 Civ. 4209(KBF), 2013 WL 1223844, at *14 (S.D.N.Y. March 27, 2013).[3]

The second category includes personal beliefs, thoughts, motivations, or feelings conveyed by individual people or groups of people. These opinions might describe reasons for taking certain actions, *see, e.g.*, *Virginia Bankshares*, 501 U.S. at 1087-88; feelings of optimism or confidence, *see, e.g.*, *City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 659 (6th Cir. 2005); worries or concerns, *see, e.g.*, *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1212 (1st Cir. 1996); or feelings about people or projects, *see, e.g.*, *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1274-75 (D.C. Cir. 1994).[4]

A third category involves the expression of the "belief of the [speaker], without certainty, as to the

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[3] Everyday examples abound. A review of a dozen recent investor conference calls conducted by random companies revealed opinions including: characterizations of "positive selling price changes," a "strong new production flow," a "good bidding environment," "continued broad based organic growth," and clinical trials that "exhibited significant meaningful and long-lasting results"; and assurances regarding the "attainment of significant regulatory milestones," "demonstrable progress in advancing our . . . programs," and that "we continue to manage our [risk] exposures carefully."

[4] Examples from recent conference calls include statements indicating that company officers "believe that we can accelerate . . . growth," are "excited about our future opportunities together," think it is "an important and exciting day," and "feel much better today than we did last time we were on the call."

existence of a fact." Restatement (Second) of Torts § 538A (1977); *see, e.g.*, *In re MBIA, Inc. Sec. Litig.*, 700 F. Supp. 2d 566, 573 (S.D.N.Y. 2010). Such statements are typically made in situations where facts cannot be immediately confirmed, such as on investor conference calls, and are usually expressly qualified with a statement such as "I think."[5] Although the underlying information is factual, such statements are nonetheless opinions because they expressly represent only what the speaker believes to be true about the fact.

The final classification of opinions includes forward-looking statements, such as predictions, forecasts, statements of future plans, and evaluations of risks. Such opinions are given heightened statutory protection under the Reform Act's safe harbor for forward-looking statements ("Safe Harbor"). 15 U.S.C. §§ 77z-2 and 78u-5 (1995). However, the Safe Harbor's protections are limited to certain parties, so they do not govern all liability for forward-looking opinions, such as analyst ratings and recommendations. *See, e.g.*, *In re Credit Suisse First Boston Corp.*, 431 F.3d 36, 46-47 (1st Cir. 2005) (analyst buy ratings are actionable opinions under § 10(b)).

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[5] Recent conference call examples include officers' statements that "I think the biggest acquisition [the company] had done is . . . $1 billion or so" and "I think the authorization remaining is roughly $40 million."

B. Opinions About Current Conditions Can Be Just as Material as Forward-Looking Opinions.

For several decades, the Securities and Exchange Commission ("SEC") prohibited companies from releasing "conjectures and speculations as to the future," because it deemed them inherently unreliable, and believed the typical investor was "as competent as anyone to predict the future from the given facts." Harry Heller, *Disclosure Requirements under Federal Securities Regulation,* 16 Bus. Law. 300, 307 (1961). This policy changed in the 1970s, and decades of debate ensued regarding whether such forecasts were too uncertain to ever be material, or so valuable that they were worthy of special protection. Courts were caught in this whipsaw. *See, e.g.*, *Raab v. General Physics Corp.*, 4 F.3d 286, 290 (4th Cir. 1993) (contending forecasts are generally immaterial as a matter of law, while simultaneously asserting they should be protected because "liability would deter companies from discussing their prospects, and the securities markets would be deprived of the information those predictions offer.").

The uncertainty was resolved when Congress passed the Safe Harbor in 1995, protecting a company's material forward-looking statements if they are either accompanied by meaningful cautionary statements *or* made without actual knowledge of falsity. 15 U.S.C. §§ 77z-2 and 78u-5 (1995). Congress determined that such strong protections were necessary to encourage

dissemination of forward-looking opinions, because it understood that "'a company's own assessment of its future potential would be among the most valuable information shareholders and potential investors could have about a firm.'" H.R. Rep. No. 104-369, at 42-43 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730 (quoting testimony of Richard C. Breeden, former SEC Chairman).

Despite the fact that they enjoy such explicit protections, forward-looking opinions are not necessarily any more material than judgments about current conditions. Indeed, the opposite is often true. Forward-looking opinions are now typically accompanied by a bevy of cautionary statements, warning of all the factors that may cause them to be inaccurate. Even without these warnings, the uncertainty of such predictions is obvious. On the other hand, investors value opinions about current conditions from company insiders, because "[s]hareholders know that directors usually have knowledge and expertness far exceeding the normal investor's resources . . . ." *Virginia Bankshares*, 501 U.S. at 1091; *see* Couture*, supra*, at 406 ("[T]he unique insights of companies and their officers and directors are essential to market efficiency.").[6]

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[6] Indeed, analysts often ask company officers for their opinions. During recent investor conference calls, analysts asked officers to "put some color" on their disclosures, "share with us what inning do you think we are in," give their "mix of impressions," discuss what they are "currently thinking," and divulge which opportunities are the "most exciting."

II. The Law Governing Opinions Is Muddled.

A. Early Law Embraced *Caveat Emptor.*

The schizophrenic nature of the current law governing statements of opinion can best be understood by tracing its evolution. Employing the doctrine of *caveat emptor*, courts long recognized "puffery" as a defense to the common law torts of deceit and fraudulent misrepresentation, reasoning that because salespeople were expected to "puff" up their products, such vague positive statements could not form the basis of a claim. *See* Restatement (Second) of Torts § 542 cmt. e (1977). Early on, this doctrine was incorporated into the securities laws, which were initially held to apply only to "facts," and not "opinions." *See* Harry Shulman*, Civil Liability and the Securities Act*, 43 Yale L. J. 227, 236, 249 (1933).

As courts began to reject the notion of *caveat emptor* as incompatible with the protective securities laws, the circuits diverged, developing differing standards for when opinions could be actionable. Some continued to hold that opinions were almost always immaterial as a matter of law. Others held statements of belief "may be actionable," and imposed both subjective and objective standards to determine falsity. *See, e.g.*, *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113 (9th Cir. 1989) (holding opinions are actionable if they are not genuinely believed, there is no reasonable basis for the belief, *or* the speaker knows undisclosed facts that tend to seriously undermine the opinion); *Eisenberg v. Gagnon*, 766 F.2d 770, 776 (3d

Cir. 1985) (opinions are actionable if issued without a genuine belief *or* a reasonable basis).

B. *Virginia Bankshares* Held Opinions Can Be Actionable Only If Subjectively False.

In *Virginia Bankshares*, the Court definitively answered the question of whether corporate opinions could be material under the federal securities laws, finding there is "no serious question" that "such statements may be materially significant." 501 U.S. at 1090-91. In addition to holding they could be material, the Court found corporate opinions could be actionable as "fact[s]." *Id.* at 1092. The Court reasoned that a statement of belief conveyed the "fact" that the speaker held that belief, and that it was open to challenge "solely as a misstatement of the psychological fact of the speaker's belief in what he says." *Id.* at 1095.[7]

The plaintiffs in *Virginia Bankshares* alleged that a company's directors had been dishonest in claiming they supported a merger because it gave shareholders a "high value." *Id.* at 1090. A jury found the directors guilty of violating Rule 14a-9, which prohibits statements in proxy materials that are "false or misleading with respect to any material fact . . . ." 17 C.F.R. § 240.14a-9 (1990). The Court assumed the

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[7] This reasoning was consistent with prior scholarship examining opinions in the context of the tort of fraudulent misrepresentation. *See, e.g.*, W. Page Keeton et. al., *Prosser and Keeton on the Law of Torts* § 109, at 755 (5th Ed. 1984) (a statement of opinion conveys the factual representation that the speaker believed the truth of the statement when made).

verdict meant the jury had found the directors "did not hold the beliefs or opinions expressed." 501 U.S. at 1090. Implicitly holding that such a finding was necessary, the Court then examined whether a "disbelief or undisclosed motivation, standing alone" was sufficient to allege falsity. *Id.* at 1096. The Court found it was not, holding that plaintiffs must also demonstrate an opinion "expressly or impliedly asserted something false or misleading about its subject matter." *Ibid.* Justice Scalia summarized the ruling with a characterization with which no member of the Court disagreed:

> [T]he 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.

Id. at 1108-09 (Scalia, J., concurring).

C. Confusion Remains After *Virginia Bankshares.*

Virginia Bankshares should have brought clarity and uniformity to the law governing corporate opinions. But the circuit courts were slow to embrace *Virginia Bankshares*, and there has been some disparity and confusion in its application. Meanwhile, a minority of courts have ignored *Virginia Bankshares* completely, continuing to invoke precedent incompatible with its holding. As a result, a thicket of contradictory standards remains. *See* Couture*, supra*, at 384 (courts

have adopted various tests for opinions "that are analytically unsound, that yield inconsistent results, and that fail to further the fundamental policy goal of the securities acts 'to insure the maintenance of fair and honest markets.'") (citation omitted).

A number of circuit courts have now correctly applied *Virginia Bankshares* to multiple sections of the securities laws, allowing plaintiffs to challenge opinions only by pleading subjective falsity. *See Credit Suisse*, 431 F.3d at 47 (applying *Virginia Bankshares* to § 10(b)); *Fait*, 655 F.3d at 110 (holding plaintiffs must allege opinion was "actually disbelieved" under §§ 11 and 12); *Nolte v. Capital One Fin. Corp.*, 390 F.3d 311, 315 (4th Cir. 2004) (same); *Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 670 (5th Cir. 2004) (holding plaintiffs must show opinion was not actually held under § 10(b)); *Rubke*, 551 F.3d at 1162 (holding plaintiffs must allege opinions were subjectively false under § 11).

At the same time, however, some courts still articulate a standard that suggests some kind of objective showing of falsity is sufficient. Although the Ninth Circuit applied *Virginia Bankshares* in 2009 through *Rubke*, it did not expressly overrule its incompatible three-part *Apple* standard. *See Rubke*, 551 F.3d at 1162 (implementing *Virginia Bankshares* without mention of how it intersects with *Apple*). As a result, some courts, both within and without the Ninth Circuit, continue to refer to the *Apple* standard, which allows false opinion claims that allege *either* subjective

falsity *or* that an opinion lacked a reasonable basis *or* was undermined by undisclosed facts. As explained *infra* at 23-24, allowing opinions to be challenged on the basis that they are "unreasonable" or inconsistent with the facts subverts the subjective falsity requirement.

Increasing the confusion, some courts cite to both the *Virginia Bankshares* line of cases and the *Apple* standard, seemingly oblivious to their incompatibility. *See, e.g.*, *In re XM Satellite Radio Holdings Sec. Litig.*, 479 F. Supp. 2d 165, 177 (D.D.C. 2007) (asserting it is applying the "doctrine established by *Virginia Bankshares*," and then citing to, and actually applying, the *Apple* standard); *In re REMEC Inc. Sec. Litig.*, 702 F. Supp. 2d 1202, 1228-29 (S.D. Cal. 2010) (using the *Apple* standard, but citing to *Virginia Bankshares* and *Rubke*); *but see McGuire v. Dendreon Corp.*, 688 F. Supp. 2d 1239, 1244 (W.D. Wash. 2009) (recognizing that *Rubke* implicitly overruled *Apple*).

Other courts have continued to cite directly to *Apple* (or precedent stemming from *Apple*), ignoring *Virginia Bankshares* entirely. *See, e.g.*, *Helwig v. Vencor, Inc.*, 251 F.3d 540, 557 (6th Cir. 2001) (*en banc*); *Slayton v. Am. Express Co.*, 604 F.3d 758, 775 (2d Cir. 2010); *In re Allstate Life Ins. Co. Litig.*, No. CV-09-08162-PCT-GMS, 2013 WL 5161688, at *16 (D. Ariz. Sept. 13, 2013); *Patrick v. Patrick*, No. 2:08cv450, 2010 WL 569740, at *3 (W.D. Pa. Feb. 12, 2010). Meanwhile, some courts invoke standards derived from sources other than *Apple*, but which similarly allow

plaintiffs to assert the falsity of opinions without regard to the speaker's state of mind. *See, e.g.*, *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 62 (1st Cir. 2008) (allowing liability for "unreasonable" opinions); *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, ___ F. Supp. 2d ___, 2013 WL 6621024, at *27 (S.D.N.Y. Dec. 12, 2013) (holding opinions actionable if not genuinely believed *or* unreasonable *or* worded as guarantees or supported by specific facts).

Finally, some courts still use the "puffery" doctrine to automatically discount allegations against opinions—essentially applying a different standard of materiality for statements of opinion. Although the puffery doctrine was declared at one time to have "'all but gone the way of the dodo,'" it has made a resurgence. *See* Jennifer O'Hare, *The Resurrection of the Dodo: The Unfortunate Re-Emergence of the Puffery Defense in Private Securities Fraud Actions*, 59 Ohio St. L. J. 1697, 1697 (1998) (quoting 7 Louis Loss & Joel Seligman, *Securities Regulation* 3434 (3d ed. 1991)). Courts define puffery in various ways, sometimes encompassing virtually all opinions, and sometimes just a subset. *See, e.g.*, *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 372 (5th Cir. 2004) (holding "generalized, positive statements" are puffery); *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997) (finding "generalized statements of optimism that are not capable of objective verification" are puffery); *Malin v. XL Capital Ltd.*, 499 F. Supp. 2d 117, 144 (D. Conn. 2007), *aff'd*, 312 F. App'x 400 (2d Cir.

2009) (collecting cases and holding opinions are generally not actionable as puffery).

Virginia Bankshares created an obvious conflict with the extreme spectrum of the puffery doctrine, under which virtually all opinions are immaterial as a matter of law, by finding that there was "no serious question" that opinions *could be* material. 501 U.S. at 1090-91. Some courts have tried to reconcile this tension by casting subjective falsity as an exception to puffery, thus mixing up the concepts of materiality and falsity, and "characterizing apples as an exception to oranges." Couture, *supra*, at 420; *see, e.g.*, *Longman v. Food Lion, Inc.*, 197 F.3d 675, 683 (4th Cir. 1999) (opinions will "often not be actionable" as puffery, unless they are "both factual and material" because they are not genuinely believed, as in *Virginia Bankshares*).

III. The Sixth Circuit Demonstrated a Basic Misunderstanding of Falsity.

The somewhat muddled precedent governing statements of opinion culminated in the anomalous Sixth Circuit decision under review, which expressly contradicts the holding of *Virginia Bankshares* and of the other circuit courts to examine this issue. The Sixth Circuit began by drawing on precedent that is a close cousin to puffery, to construct a false dichotomy between the materiality of "hard" information (facts) and "soft" information ("matters of opinion and predictions"). Pet. App. 12a. The court then jumbled the concepts of materiality and falsity, postulating that

there is "generally no duty to disclose soft information" unless "knowledge of falsity is shown," in which case, "'opinions cease to be soft information' and become hard facts."[8] *Id.* at 14a (citing *Kushner v. Beverly Enters., Inc.*, 317 F.3d 820, 831 (8th Cir. 2003)). Stumbling through the maze erected by this nonsensical proposition, the court eventually concluded that this disclosure standard only applies to § 10(b), finding that because § 11 provides for strict liability, "if the defendant discloses information that includes a material misstatement . . . a complaint may survive a motion to dismiss without pleading knowledge of falsity." *Id.* at 16a.

While this statement of law is correct as far as it goes, it illustrates the Sixth Circuit's failure to distinguish the subjective falsity inquiry from "knowledge of falsity"—which, in turn, stems from its fundamental failure to examine how an opinion is different from a fact. It is not that an opinion requires a different standard of materiality (because it is "soft information") or that it necessitates a stronger showing of scienter (because "knowledge of falsity" somehow transforms it into "hard information"). A statement of opinion is different because the "material fact" that it represents inherently implicates the speaker's state of mind. Accommodation of this difference does not

[8] This proposition also misstated the disclosure responsibilities under § 10(b), by asserting that a party who speaks on a subject has a duty to speak "fully." Pet. App. 15a. No such duty exists, unless the failure to "speak fully" causes a statement to be misleading. *See infra* at 25-26.

require an elaborate doctrine designed specifically for opinions. Rather, a straightforward application of the falsity requirement suffices: In order to show falsity, whether of facts or opinions, plaintiffs must plead that the fact represented by the statement was, in fact, "false."

But the Sixth Circuit bypassed this threshold question of how an opinion might constitute a "false" statement of "fact." Instead, it assumed, without discussion, that an opinion can be "indisputably wrong." *Id.* at 16a. The court did not explain how this wrongness was to be demonstrated, or how the truth of a statement about someone's state of mind can be explored *without* inquiring into that person's state of mind. Instead, it mechanically equated any inquiry into a speaker's thoughts with "scienter," and formalistically concluded that because "scienter" is not required under § 11, such an inquiry is improper.

This superficial analysis ignores the reasoning of *Virginia Bankshare*s, which examined the nature of statements of "reasons or belief" and the ways in which they are "factual"—"as statements that the directors do act for the reasons given or hold the belief stated[.]" 501 U.S. at 1092. Any inquiry into the truth or falsity of such beliefs thus necessitates an inquiry into whether the speakers "hold the belief stated. . . ." *Ibid.* For the *Virginia Bankshares* Court, this was clearly a question of falsity, *not* scienter. Indeed, the Court expressly reserved the question of whether or not scienter was required for liability under § 14(a), and

this open question had no effect on its analysis. *Id.* at 1090 n.5.

By improperly framing the question as whether "knowledge of falsity" of opinions is required, the Sixth Circuit transformed a falsity analysis into a scienter requirement, and concluded it would be "unwise for this Court to add an element to § 11 claims" based on "tea-leaf reading" of *Virginia Bankshares*. Pet. App. 19a. But the Sixth Circuit's holding actually *removes* the element of falsity from § 11 claims challenging opinions. Under the Sixth Circuit's rule, plaintiffs must show an opinion was false because it was not genuinely believed for a claim under § 14(a) or § 10(b), but *not* when bringing a § 11 claim. This would impose a different standard of falsity for § 11 claims than for the other securities laws, even though the laws employ essentially identical language. Pet. Br. 24 & n.6.

IV. A Clear Subjective Falsity Rule Is Needed to Resolve Confusion and Promote Fairness.

WLF agrees with Petitioners that the Sixth Circuit should be reversed, and the Court should hold that plaintiffs must plead subjective falsity to state a claim under § 11. But WLF also urges the Court to seize this opportunity to resolve the inconsistencies that plague the jurisprudence regarding statements of opinion. WLF thus writes separately to emphasize the need for a clear standard for the adjudication of corporate opinions under the securities laws—a standard that is faithful to both statutory text and Supreme Court

precedent, and which emphasizes the importance of distinguishing between the elements of a securities fraud claim.

A. The Falsity Inquiry Must Examine What Makes Each Statement False.

Falsity is the fundamental element of any claim brought under the securities laws, which generally forbid either "false" or "untrue" statements "of material fact." *See* Pet. Br. 26 n.7. Because the securities statutes forbid false "statement[s] of material fact" —and not incorrect, unreasonable, or even "indisputably wrong" opinions—the proper standard must start by identifying the ways in which an opinion conveys a "fact." As the *Virginia Bankshares* Court established, opinions are "factual" statements as to what the speaker believes. 501 U.S. at 1092. Since opinions only state the "fact" of the speaker's belief, it directly follows that they are only "false" if the speaker does not genuinely believe them when they are uttered. *See, e.g.*, *Fait*, 655 F.3d at 112.

Such an analysis precludes a showing of falsity that is based solely upon any "objective" standard. *See In re Salomon Analyst AT&T Litig.*, 350 F. Supp. 2d 455, 466 (S.D.N.Y. 2004) ("It is not sufficient . . . to allege that an opinion was unreasonable, irrational, excessively optimistic, not borne out by subsequent events, or any other characterization that relies on hindsight or falls short of an identifiable gap between the opinion publicly expressed and the opinion truly held."). The fallacy in such inquiries is clear: An

opinion is not "false" because a judge later surveys the facts and, with the benefit of both omniscience and hindsight, deems the opinion to have been unreasonable. Reasonableness is always in the beholder's eye. Whether a statement is "reasonable" is itself an opinion, and a "reasonableness" standard would make a speaker liable for an honestly held opinion if someone else later reached a different subjective judgment. Indeed, there are many reasons why a company executive might hold a genuine belief that later appears to have been unreasonable, especially with the hindsight supplied by a negative outcome. *See Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1129-30 (2d Cir. 1994) ("People in charge of an enterprise are not required to take a gloomy, fearful or defeatist view of the future; subject to what current data indicates, they can be expected to be confident about their stewardship and the prospects of the business that they manage.").

Similarly, a speaker may genuinely hold an opinion even if other people disagree with him, or there are undisclosed facts that could undermine that belief.[9] The existence of such facts, or such disagreement, does not render the speaker's opinion a lie. And securities jurisprudence has long made clear that a statement (whether fact or opinion) is not "false" just because it is

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[9] As the *Virginia Bankshares* Court observed, facts about the speaker's knowledge of information supporting or discrediting his or her opinion could be used as circumstantial evidence regarding the speaker's actual belief. 501 U.S. at 1092-93. But such facts, without more, are insufficient to show subjective falsity.

proven incorrect in hindsight. *See, e.g.*, *Shields*, 25 F.3d at 1129.

This analysis, however, does not import a subjective falsity requirement into the standard for judging any objective *facts* that are included as part of an opinion. For example, corporate officers speaking in investor conference calls will often intertwine objective facts, subjective judgments (which should be examined as opinions), and statements that are expressly opinions.[10] In such a case, the objective and subjective elements of the statement must be distinguished, with the plaintiffs required to allege specifically which part of each statement is false, and why. Then, the proper falsity analysis should be applied separately to the portions of the statement that constitute opinions, and to those that convey facts.

The subjective falsity analysis also does not control the evaluation of whether a statement is misleading due to omissions. Whether information is "soft" or "hard," there is no general obligation to disclose it under the securities laws, even if investors may deem it material. *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1321-22 (2011); *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988) ("Silence, absent a duty to

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[10] A review of recent conference calls reveals numerous examples, such as: "Worldwide organic local-currency [growth] was 4.6% in the first quarter with volumes up 3.4% and selling prices up 1.2%. We continue to experience positive selling price changes across our businesses, boosted by world-class innovation and strong new production flow, both of which are important elements of [our] business model."

disclose, is not misleading under Rule 10b-5."). Absent an affirmative disclosure obligation, disclosure is required only when necessary "'to make . . . statements made, in the light of the circumstances under which they were made, not misleading.'" *Ibid.* (quoting 17 CFR § 240.10b-5(b)); *see also, e.g.*, 15 U.S.C. § 77k (Section 11 prohibits registration statements that "omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading . . . .").

It is thus error to examine whether a specific *opinion* is misleading in isolation. And unnecessary attempts to give meaning to the concept of "subjectively misleading" can result in the subjective falsity requirement being rendered essentially meaningless. *See, e.g.*, *McGuire*, 688 F. Supp. 2d at 1244-45 (implementing the subjective falsity requirement of *Virginia Bankshares* and *Rubke*, but holding an opinion may be "subjectively misleading" if the speaker does not reveal all facts "that he knew or should know would lead someone else to a different opinion."). Rather, the proper analysis of whether a disclosure was misleading requires examination of the statement in context (including the context provided by other public statements) and an evaluation of the allegedly omitted facts, to determine if the omissions caused the statement to "affirmatively create an impression of a state of affairs that differs in a material way from the one that actually exists." *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002); *see also Halperin v. eBanker USA.com, Inc.*, 295 F.3d 352, 357

(2d Cir. 2002) ("The touchstone of the inquiry is not whether isolated statements within a document were true, but whether defendants' representations or omissions, considered together and in context, would affect the total mix of information and thereby mislead a reasonable investor . . . ."). Because this inquiry necessarily considers a company's statements holistically, no special standards need to be incorporated simply because an allegedly misleading statement contains opinions.

A hypothetical exemplar illustrates how a court should dissect each component of a statement, and each allegation of falsity, and analyze them separately. Suppose plaintiffs challenged this prototypical statement by a corporate officer:

> Since we launched the new product, I believe we have made good progress. Demand has increased and customer feedback has been positive. I think our early numbers show roughly a 20% increase in units sold, and if this pattern continues, I would be very optimistic.

This statement includes three types of opinions identified *supra* at 7-10: an inherently subjective judgment ("customer feedback has been positive"); explicit expressions of belief ("I believe we have made good progress" and "I would be very optimistic"); and an uncertain expression of fact ("I think our early numbers show roughly a 20% increase in units sold"). All these opinions are only "false" to the extent that they were not genuinely believed by the speaker at the time of the statement. But the statement also includes

assertions of fact: that the new product has launched, that demand has increased, and that the company has received feedback from customers. If the accuracy of these factual assertions is challenged, a standard objective inquiry would suffice for evaluating falsity. *See Virginia Bankshares*, 501 U.S. at 1109-10 (Scalia, J., concurring) (advocating that normal principles governing misrepresentations should apply to facts asserted as part of an opinion).

The proper approach to analyzing this statement would therefore depend on the nature of the allegations. If plaintiffs alleged that progress was not "good," customer feedback was not "positive," or the early sales numbers had not shown a 20% increase in units sold, then they must adequately plead (and, ultimately, prove) that the speaker did not genuinely believe these statements. On the other hand, if plaintiffs alleged that at the time of the statement the product had not yet been launched, there had been no customer feedback, or demand had been plummeting, then falsity could be shown simply by demonstrating the statement was objectively untrue.

Finally, if plaintiffs claimed the statement was misleading because of omissions, they would need to examine the entire statement in context, identify which facts were allegedly omitted, and explain how those omissions caused the statement to create a false impression of the state of the company's affairs. Here, plaintiffs might be able to show the statement was misleading, if, for example, it omitted mention of

serious supply problems that meant discontinuation of the new product and a decline in revenues, thereby rendering misleading the overall impression created by the statement that the new product would continue to benefit the company in the long term.

B. Failing to Preserve Scienter as a Separate Inquiry Leads to Errors.

The Sixth Circuit's basic error was in failing to distinguish subjective falsity from scienter. It is not alone in making this mistake. Even courts that have otherwise applied *Virginia Bankshares* correctly have improperly conflated the two standards. *See Credit Suisse*, 431 F.3d at 48 ("[T]he subjective aspect of the falsity requirement and the scienter requirement essentially merge; the scienter analysis is subsumed by the analysis of subjective falsity."). In some cases, such imprecision is harmless. But in others it can have significant consequences, such as when it led the Sixth Circuit to conclude that because § 11 does not require scienter, it also does not require a showing of subjective falsity. Pet. App. 19a.

In § 10(b) cases, this lack of clarity weakens both the scienter and the falsity standards. For example, some courts have applied the "recklessness" standard of scienter to subjective falsity, resulting in an incorrect holding that an opinion is false if it was "recklessly" held—the functional equivalent of showing an opinion was unreasonable. *See Freedman v. Value Health, Inc.*, 958 F. Supp. 745, 753 (D. Conn. 1997). On the flip side, the conflation of falsity and scienter can also render

scienter meaningless, as courts conclude that because subjective falsity has been shown, scienter must follow. *City of Austin Police Ret. Sys. v. Kinross Gold Corp.*, 957 F. Supp. 2d 277, 301 (S.D.N.Y. 2013) ("[I]f it is satisfactorily alleged that the defendant did not [believe his stated opinion], the elements of both falsity and scienter are met.").

Proper analysis requires the preservation of scienter as an independent element. This distinction makes clear that subjective falsity is about *falsity*, not scienter, and that the selfsame falsity standard should be used *regardless of the level of intent required by the underlying statute*. It also recognizes that, where both falsity and scienter are required, they remain fundamentally different questions. Subjective falsity asks: "Did the speaker honestly hold the opinion he expressed?" This question is essential because the nature of the falsity allegation necessitates inquiry into the speaker's state of mind. While the scienter inquiry also explores the speaker's state of mind, it asks a different question: "Did the speaker give a false opinion *with an intent to mislead investors*?" *See Fait*, 655 F.3d at 112 n.5 ("We do not view a requirement that a plaintiff plausibly allege that defendant misstated his truly held belief and an allegation that defendant did so with fraudulent intent as one and the same.").

Courts often lose track of this real scienter inquiry, because they have become accustomed to using shorthand to refer to scienter as "knowledge of falsity."

See, e.g., Pet. App. 14a. But as the Court has repeatedly made clear, scienter is about whether false statements were made with "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst*, 425 U.S. at 193-94 n.12; *Tellabs*, 551 U.S. at 319. Similarly, where a recklessness standard is employed, it is not recklessness as to *falsity*, but rather recklessness as "an extreme departure from the standards of ordinary care, . . . present[ing] a *danger of misleading buyers or sellers* that is either known to the defendant or is so obvious that the actor must have been aware of it." *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1044-45 (7th Cir. 1977) (emphasis added).

It is true that, in many cases, falsity and scienter are "strongly inferred from the same set of facts," such that some courts examine both elements in a single analysis. *Ronconi v. Larkin*, 253 F.3d 423, 429 (9th Cir. 2001). This may frequently be the case when the falsity analysis examines subjective falsity. But just because the facts necessary to prove each of these elements may sometimes, or even often, overlap, does not mean they are the same inquiry. *Merck & Co. v. Reynolds*, 559 U.S. 633, 649-50 (2010) (recognizing that for certain statements "to show them false is normally to show scienter as well," but that the inquiries are nonetheless separate and "context specific"). Indeed, it is possible to have subjective falsity without scienter, or the converse, scienter without subjective falsity. In the hypothetical discussed *supra* at 27, all of the statements could have been subjectively true, yet

nonetheless made with intent to mislead: The speaker could have genuinely believed that progress had been "good" and customer feedback had been "positive," yet could have expressed those opinions as part of a broader statement designed to mislead investors.

Conversely, speakers may express opinions they do not honestly hold for a variety of reasons, only one of which is an intent to mislead investors. For instance, corporate lies may be used to advance merger or contract negotiations, promote a product, boost morale, or preserve a company's competitive edge. *See* Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. Pa. L. Rev. 101, 113, 117 & n.52 (1997); *id.* at 107 ("[L]ies that influence investors may really be directed at other audiences (for example, customers or employees) in order to prevent 'runs' on external or internal resources."). A speaker may overstate his opinion because he believes "puffing" is expected and "[a]n utterly candid statement of the company's hopes and fears, with emphasis on the fears," would be "taken to indicate that the prospects . . . were much grimmer than they were." *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 746 (7th Cir. 1997) (Posner, J.) ("Where puffing is the order of the day, literal truth can be profoundly misleading, as senders and recipients of letters of recommendation well know."). Or a speaker may express a false opinion because he or she is human, and humans lie for a wide variety of reasons, ranging from petty to idiosyncratic to sinister:

Saints may always tell the truth, but for mortals living means lying. We lie to protect our privacy ("No, I don't live around here"); to avoid hurt feelings ("Friday is my study night"); to make others feel better ("Gee you've gotten skinny"); to avoid recriminations ("I only lost $10 at poker"); to prevent grief ("The doc says you're getting better"); to maintain domestic tranquility ("She's just a friend"); to avoid social stigma ("I just haven't met the right woman"); for career advancement ("I'm sooo lucky to have a smart boss like you"); to avoid being lonely ("I love opera"); to eliminate a rival ("He has a boyfriend"); to achieve an objective ("But I love you so much"); to defeat an objective ("I'm allergic to latex"); to make an exit ("It's not you, it's me"); to delay the inevitable ("The check is in the mail"); to communicate displeasure ("There's nothing wrong"); to get someone off your back ("I'll call you about lunch"); to escape a nudnik ("My mother's on the other line"); to namedrop ("We go way back"); to set up a surprise party ("I need help moving the piano"); to buy time ("I'm on my way"); to keep up appearances ("We're not talking divorce"); to avoid taking out the trash ("My back hurts"); to duck an obligation ("I've got a headache"); to maintain a public image ("I go to church every Sunday"); to make a point ("Ich bin ein Berliner"); to save face ("I had too much to drink"); to humor ("Correct as usual, King Friday"); to avoid embarrassment ("That wasn't me"); to curry favor ("I've read all your books"); to get a clerkship ("You're the greatest living jurist"); to save a dollar ("I gave at the office"); or to maintain

> innocence ("There are eight tiny reindeer on the rooftop").

United States v. Alvarez, 638 F.3d 666, 674-75 (9th Cir. 2011) (Kozinski, J., concurring).[11]

The correct standard thus preserves falsity and scienter as distinct inquiries, while recognizing that many of the same facts may be relevant to both. Thus, in a motion to dismiss a § 10(b) complaint challenging an opinion, the first task should be to inquire whether plaintiffs have pleaded specific facts to show subjective falsity. If not, a scienter inquiry is unnecessary. Only if falsity has been adequately pleaded would a court turn to the question of whether plaintiffs had established a "strong inference" that the false opinion had been uttered with an "intent to deceive, manipulate, or defraud" investors, rather than for some other purpose. *See Tellabs*, 551 U.S. at 319, 324.

C. The Same Materiality Standard Applies to Statements of Fact and Opinion.

Finally, a proper application of the subjective falsity standard means that the archaic "puffery" doctrine is no longer necessary to shield honest opinions from liability. Before *Virginia Bankshares*,

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[11] Because all circuits employ some type of recklessness standard, however, scienter could still be found if a speaker gave a false opinion without actually intending to mislead investors, but with severe or deliberate recklessness as to whether or not investors would be misled. Such an inquiry should involve a fact-specific examination of the context of the statement, the speaker's state of mind, and the danger the statement actually posed of misleading investors.

the use of the puffery doctrine was understandable, as courts struggled to find a way to adequately protect statements of opinion. *See* Stefan J. Padfield, *Immaterial Lies: Condoning Deceit in the Name of Securities Regulation*, 61 Case W. Res. L. Rev. 143, 160-61, 179-80 (2010) (characterizing puffery as a "safety-valve" doctrine designed to "release the pressure created by frivolous suits"). But the puffery defense is a crude instrument without a sound analytical basis, making it no surprise that it has been applied in a haphazard manner that defies predictability. *See id.* at 159-60 (puffery includes "interpretations of materiality that at times sound like they sprang from the lips of Humpty Dumpty"); O'Hare, *supra*, at 1699 (criticizing the puffery defense for its lack of reasoned analysis).

The puffery defense is also incompatible with the Court's guidance on the question of materiality. The proper materiality analysis does not ask whether a *statement* is material, but rather whether it is false or misleading "as to a material fact." *Basic*, 485 U.S. at 238. Falsity is material if there is "a substantial likelihood" that a "reasonable investor" would view the withheld or misrepresented information as "having significantly altered the 'total mix' of information . . . ." *Id.* at 231-32. This analysis requires examination of the context of the statement and the allegations of falsity, to determine their significance to the reasonable investor under "all the circumstances." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). And it precludes the use of "bright-line"

standards, because "[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive." *Basic*, 485 U.S. at 236.

Under this materiality standard, it is inappropriate to apply special rules for statements of opinion—whether by classifying them as "soft" information, or as "puffery." Indeed, the puffery doctrine illustrates the Court's concern that any attempt to employ bright-line rules will be both "overinclusive" and "underinclusive." *Basic*, 485 U.S. at 236. Puffery is overinclusive, and thus overprotective, because it gives investors the troubling message that companies may lie with impunity, as long as they couch their statements in subjective terms. *See* O'Hare, *supra*, at 1715-16, 1725-26 (puffery is based on the doctrine of *caveat emptor*, which is outdated and at odds with the fundamental objectives of the securities laws). At the same time, because it does not apply any consistent standard, puffery is underinclusive, and thus underprotective. Corporate actors are unable to predict whether their opinions will be virtually immunized as puffery, or possibly subjected to liability under a standard that ignores whether they were honestly held. As a result, puffery is not a principled standard of liability on which either companies or investors can depend. *See* Couture, *supra*, at 411 ("A uniform and predictable test is imperative so that corporate actors are not afraid to speak, lest they inadvertently subject themselves to liability.").

Although the puffery defense once served a purpose, it is now unnecessary. A disciplined implementation of the subjective falsity standard would replace the crude implement of puffery with a refined tool that has a firm basis in both logic and law, and which can be applied in a precise and consistent manner. Of course, plaintiffs must still allege that opinions are false or misleading in a *material* respect. And courts may still hold some opinions immaterial before even reaching the question of subjective falsity —including opinions that are akin to the traditional notion of sales "puffery." A proper materiality analysis would arrive at this conclusion after taking into account unique characteristics of each opinion, including its degree of vagueness and the circumstances under which it was conveyed. *See* O'Hare, *supra*, at 1737-40. The key is that courts employ the same fundamental materiality standards for opinions as for any other statement, including examining the context, the allegations of falsity, and the effect on a reasonable investor when considered within the total "mix" of information.

By thus articulating consistent and principled standards for falsity, scienter, and materiality, the Court can achieve the proper balance in the implementation of the securities laws—promoting investor confidence, encouraging open and honest disclosure, and protecting against abusive litigation.

CONCLUSION

For the reasons discussed above, WLF respectfully asks the Court to reverse the Sixth Circuit's decision, and to seize this opportunity to clarify the standards for analyzing statements of opinion under the securities laws.

Respectfully submitted,

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