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 THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. Among other things, SIFMA's members underwrite almost every public offering that is subject to section 11 of the Securities Act of 1933 (the "1933 Act"). SIFMA has offices in New York and Washington, D.C. and is the United States regional member of the Global Financial Markets Association. SIFMA regularly files *amicus curiae* briefs in cases that raise matters of vital concern to participants in the securities industry.

SIFMA has appeared before this Court as *amicus curiae* in many cases involving issues arising under the federal securities laws, most recently in *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014), *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013), *Gabelli v. SEC*, 133 S. Ct. 1216 (2013), *Credit*

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1. The parties have consented to the filing of this brief. Petitioners and Respondents have filed with the Clerk of the Court letters granting blanket consent to the filing of *amicus curiae* briefs.

Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

Suisse Securities (USA) LLC v. Simmonds, 132 S. Ct. 1414 (2012), *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011), and *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011).

This case involves important issues regarding liability under the federal securities laws for opinions in public offering documents. These issues are directly relevant to SIFMA's mission of promoting fair and efficient markets and a strong financial services industry. Resolution of these issues will have a profound effect on SIFMA's members.

SIFMA's members participate in a variety of public offerings, including initial public offerings, secondary equity offerings, and registered offerings of debt securities. To focus on initial public offerings as an illustration, the process of taking a company public is a complicated one, with numerous players, considerations and risks. After a company decides to go public, it generally selects one or more investment banks to underwrite—sell—its shares to the public in the offering. The lead underwriter generally forms a syndicate of underwriters to assist in the purchase and distribution of the securities that are the subject of the offering. A variety of factors lead to syndicate formation, not the least of which is the need to spread the capital risk associated with the offering and the general desire by issuers for wide distribution of their securities. Considerable activity occurs before the offering.

The issuer and its counsel put together a registration statement, which includes the preliminary prospectus, to be filed with the Securities and Exchange Commission

(the "SEC"), containing information about the issuer and the offering, except the price and the date the securities will be offered for sale (which are not yet established). On behalf of the syndicate, the lead underwriter (and, sometimes, other syndicate members) investigates factual statements in the registration statement.

Using the preliminary prospectus, the issuer and the lead underwriter (and the other syndicate members) then attempt to build, as well as gauge, market interest in the offering, which will influence subsequent negotiations on price. Once the SEC declares the registration statement effective, which entitles the underwriters to sell the securities to investors, the price of those securities is set. The issuer then sells the securities to the underwriters.

Section 11 of the 1933 Act imposes liability for misstatements and omissions of material *facts* in a registration statement, not only upon the issuer of the securities, but also sometimes upon other parties including underwriters. An important defense available to underwriters (but not issuers) is the due diligence defense. Under this defense, underwriters avoid section 11 liability if they can prove that, after a reasonable investigation, they had reasonable ground to believe, and did believe, that the registration statement did not contain a misstatement or omission of material *fact*.

The Sixth Circuit has held that statements of opinion in registration statements are actionable under section 11 just as if they were statements of "material fact." If allowed to stand, this approach would create a dramatic change in the scope of section 11—a statute that has worked effectively (and without significant alteration by

Congress) for 81 years and has helped give the United States the broadest and strongest capital markets in the world. The Sixth Circuit's novel view would create uncertainties and undermine the effective and efficient functioning of the securities markets. In particular, when an issuer gave an honest but incorrect opinion, the decision below would increase the liability risk and costs of underwriting and will further burden the U.S. capital markets. This would be especially true during the period of uncertainty when the federal courts were addressing what is required for an underwriter to have a due diligence defense concerning the correctness of an opinion. Particularly for companies in new technologies, the uncertainties and additional costs presented by the Sixth Circuit's approach may drive securities offerings to foreign markets. Such a dramatic change in the scope of section 11—if it happens at all—is the prerogative of Congress, not the courts. The Sixth Circuit's decision should be reversed.

STATUTORY PROVISIONS INVOLVED

Section 11 of the 1933 Act, 15 U.S.C. § 77k, provides in part with emphasis added, that:

> (a) In case any part of the registration statement, when such part became effective, contained *an untrue statement of a material fact* or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of *such untruth or omission*) may . . . sue [certain parties,

> including] (5) every underwriter with respect to such security. . . .
>
> (b) Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof . . . (3) that (A) . . . he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were *true* and that there was no omission to state a material *fact* required to be stated therein or necessary to make the statements therein not misleading. . . .

SUMMARY OF ARGUMENT

Section 11 of the 1933 Act provides for liability for "an untrue statement of a material fact" made in registration statements. 15 U.S.C. § 77k.[2] This Court has previously held, in interpreting the indistinguishable section 14(a) of the Securities Exchange Act of 1934, that a statement of opinion "may be open to objection . . . solely as a misstatement of the psychological *fact* of the speaker's *belief* in what he says." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1095 (1991) (emphases added). *Virginia Bankshares* has been recognized by the Second,

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2. Although not addressed by the Sixth Circuit's opinion below, section 12(a)(2), in certain circumstances, likewise provides for liability for "an untrue statement of a material fact" contained in a prospectus or oral communication. 15 U.S.C. § 77*l*(a)(2). Underwriters are often targeted as defendants in section 12(a)(2) cases.

Third, and Ninth Circuit as applying to section 11 of the 1933 Act. *See Fait v. Regions Fin. Corp.*, 655 F.3d 105 (2d Cir. 2011); *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156 (9th Cir. 2009); *In re Donald J. Trump Casino Sec. Litig.-Taj Mahal Litig.*, 7 F.3d 357, 372 (3d Cir. 1993).

The Sixth Circuit's decision below, however, adopted a novel and expansive reading of section 11 that conflicts with the indistinguishable *Virginia Bankshares* decision and the law of other circuit courts that have applied that decision to section 11. The brief of Petitioner Omnicare, Inc. has demonstrated why this Court should reverse the Sixth Circuit's decision given the only very limited sense in which a statement of opinion can be considered "an untrue statement of a material fact."

Rather than restate the Petitioner's arguments, this brief demonstrates additional reasons why the Sixth Circuit's position is untenable. The Sixth Circuit's ruling would make statements of opinion actionable as if they were statements of material fact. This would create uncertainty about the express due diligence defense under section 11, especially when offering documents may contain disputable opinions. In particular, making a statement of opinion actionable as if it were a statement of fact would breed potential issues about how much underwriter diligence was necessary in order to establish the defense that the underwriter reasonably believed that the issuer's opinion was correct. Those issues would very likely arise as opinions on accounting, legal, and other issues are often subject to strong differences of opinion. This could expose underwriters to trials in massive securities cases because, as we know from professional malpractice cases, challenges to opinions are too often resolved by juries.

The effects of this exposure on the economy would be pronounced. The result of the Sixth Circuit's rule becoming the law nationwide may well be that fewer U.S. companies are able to raise capital, and that more companies may choose foreign markets to issue securities.

ARGUMENT

Petitioner Omnicare, Inc. has already demonstrated that, under the plain meaning of the phrase "untrue statement of material fact" as used in section 11, a statement of opinion is actionable only if the speaker did not genuinely believe the stated opinion. Omnicare's brief has also demonstrated that the language of section 11 of the 1933 Act and Rule 14a-9 under the 1934 Act are indistinguishable on this point. Therefore, the Sixth Circuit improperly failed to follow *Virginia Bankshares*.

The Sixth Circuit's rule that a statement of opinion is actionable as if it were a statement of fact also would create practical difficulties in the application of the statutory "due diligence" defense for underwriters and impose significant additional costs on underwriters, to the detriment of the U.S. capital markets. These problems are discussed below.

A. THE SIXTH CIRCUIT'S RULE WOULD CREATE UNCERTAINTIES FOR UNDERWRITERS CONCERNING SECTION 11'S DUE DILIGENCE DEFENSE.

Section 11 is *not* a strict liability statute for underwriters. When its affirmative defenses are taken into account, section 11 imposes liability only on underwriters that underwrite without a "reasonable investigation" that

reveals "a reasonable ground to believe" that the issuer's challenged statements "were true." 15 U.S.C. § 77k(b)(3)(A) (quoting affirmative defense).[3]

As *Stoneridge* made clear, section 11 reaches underwriters in their role as non-speaking "secondary actors." *Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 166 (2008). Likewise, *Central Bank* recognized that underwriters' 1933 Act liability is based not on their making a statement themselves, but rather for offering or selling securities "by means of" the issuer's false statements in offering documents. *Cen. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 179 (1994); *see also SEC v. Tambone*, 597 F.3d 436, 461 (1st Cir. 2010) (en banc) (holding that a securities professional cannot be said to "make" a statement in the issuer's offering document).

Because underwriters do not themselves speak in offering documents, they have a due diligence defense with regard to any factual misstatements made by the issuer. *See* 15 U.S.C. § 77k(b)(3)(A). The due diligence defense under section 11 is present when, at the time that the "registration statement became effective," the underwriters had conducted a "reasonable investigation," giving them "reasonable ground to believe and [they] did believe . . . that the statements therein were true." 15 U.S.C. § 77k(b)(3)(A). This defense is satisfied when "underwriters . . . make some reasonable attempt to

3. Likewise, an underwriter is not liable under section 12(a)(2) for "an untrue statement of a material fact" in a prospectus when the underwriter "did not know, and in the exercise of reasonable care could not have known, of such untruth." 15 U.S.C. § 77*l*(a)(2).

verify the data submitted to them [by the issuer]." *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643, 697 (S.D.N.Y. 1968) (emphasis added).

The application of this defense is straightforward if *Virginia Bankshares* applies to section 11 such that the only fact conveyed by an issuer's statement of opinion is that the issuer genuinely holds the opinion. Under the *Virginia Bankshares* approach, underwriters have a due diligence defense when they reasonably investigate and reasonably believe the *issuer's* factual statement that it actually believes *its* opinion.

The Sixth Circuit's rule, in contrast, would create significant uncertainty. Suppose, for example, an issuer's registration statement expressed the opinion "We believe our facility's location gives us a competitive advantage." Under the Sixth Circuit's view, a plaintiff could file a claim arguing that the facility's location did *not* give it a competitive advantage, no matter that the issuer actually believed the statement to be true at the time. The underwriter's due diligence defense would turn on whether it "had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein . . . ." 15 U.S.C. § 77k(b)(3)(A). But what exactly is the underwriter to take reasonable steps to assess as "true"? Should the underwriter determine the "truth" of management's assertion that it held this belief? Or must the underwriter assess whether the most persuasive opinion is that the facility's location does give a competitive advantage? Under the Sixth Circuit's

interpretation of section 11, the answer is unclear and class action counsel would certainly seek to impose the broader obligation, leading to the attendant problem of how exactly underwriters would go about making such an assessment of the competitive effect on the issuer's business.

In this respect, the Sixth Circuit's rule would create litigation and risk for underwriters. This is because issuer opinions often address judgment-laden issues on which opinions may differ. For example, most of the section 11 litigation about opinions has addressed opinions by issuers with regard to legal and accounting issues, which may be the subject of debate among reasonable professionals. *Omnicare* itself concerns opinions on legal compliance and accounting matters. 719 F.3d at 501. *Fait* concerned accounting for goodwill and loan loss reserves. 655 F.3d at 106. *See also, e.g.*, *In re Apple REITs Litig.*, No. 11-CV-2919, 2013 WL 1386202, at *14 (E.D.N.Y. Apr. 3, 2013) (valuation of real estate investment trust shares not traded on an exchange); *In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 943 F. Supp. 2d 1035, 1055 (C.D. Cal. 2013) (credit ratings and appraised values of real estate); *Bartesch v. Cook*, 941 F. Supp. 2d 501, 511-12 (D. Del. 2013) (carrying value of a geothermal generation plant in context of alleged impairment); *In re Am. Int'l Grp., Inc., 2008 Sec. Litig.*, No. 08-CV-4772, 2013 WL 1787567, at *4 (S.D.N.Y. Apr. 26, 2013) (existence of significant concentrations of credit risk); *Lighthouse Fin. Grp. v. Royal Bank of Scotland Grp., PLC*, 902 F. Supp. 2d 329, 345 (S.D.N.Y. 2012) (portfolio risk); *In re Gen. Elec. Co. Sec. Litig.*, 856 F. Supp. 2d 645, 657 (S.D.N.Y. 2012) (reliability of source of financing); *MHC Mut. Conversion Fund, L.P. v. United W. Bancorp, Inc.*, 913 F. Supp. 2d 1026, 1027 (D. Colo. 2012) (other-than-temporary impairment in collateralized

mortgage obligations and mortgage-backed securities); *In re Lehman Bros. Sec. & ERISA Litig.*, 799 F. Supp. 2d 258, 300 (S.D.N.Y. 2011) (compliance with auditing standards); *City of Monroe Emps.' Ret. Sys. v. Hartford Fin. Servs. Grp., Inc.*, No. 10-CV-2835, 2011 WL 4357368, at *14-15 (S.D.N.Y. Sept. 19, 2011) (adequacy of issuer's capitalization); *Freidus v. ING Groep N.V.*, 736 F. Supp. 2d 816, 836 (credit ratings).

Of course, issuers have lawyers and accountants that assist in preparing offering documents. Congress decided, however, that the issuer's own lawyers and accountants would be section 11 defendants *only* where they consent in writing as part of the registration statement to having prepared or certified a part thereof. *See* 15 U.S.C. §§ 77g, 77k(a)(4).

Surely, if Congress had wanted a third party to vouch for the reliability of an issuer's opinions in offering documents, section 11 instead would have made the issuer's accountants and lawyers liable whenever an offering document stated an opinion on a legal or accounting matter. Congress did not do that. It would be a poor and unjustified substitute for the courts eight decades later to rope in underwriters as responsible for the accuracy of the issuer's accounting, legal, and other opinions. Again, this would lead to uncertainty and breed litigation concerning what due diligence is required from underwriters regarding the issuer's opinions. It would take years for the courts to develop a stable body of precedent on these new issues. And since those precedents would be interpreting an 81-year-old statute, they would apply retroactively—and unfairly—to myriad securities offerings that would have already occurred during the

period of uncertainty before definitive guidance from the courts.

In the meantime, aggressive class action counsel might even argue that underwriters could not reasonably rely on the opinions of the issuer's accountants and lawyers but rather should hire a second set of accountants and lawyers to examine the accuracy of the issuer's opinions independently. Even this extreme diligence might still expose underwriters to trial risk in billion-dollar securities cases. This is because, as we know from professional malpractice cases challenging accounting, legal, and medical opinions, allegations challenging opinions are too often left to juries to decide.

B. THE UNCERTAINTIES CAUSED BY THE SIXTH CIRCUIT'S RULE WOULD HARM U.S. CAPITAL MARKETS.

All these extra risks and uncertainties create predictable—and adverse—consequences. To start, the Sixth Circuit rule would encourage issuers to say nothing about their opinions in their offering documents. That serves neither disclosure to investors nor the efficiency of U.S. capital markets. If issuers did continue to include opinions in their offering documents, this could result in increased underwriting fees as compensation for the increased risk and uncertainty.

Moreover, issuers and underwriters may choose to conduct more offerings overseas or forgo offerings altogether. This is especially true for companies in new or unproven industries, and other innovative and risky ventures, where opinions are second-guessed whenever

a stock's price falls, but where capital is most needed. *See Cent. Bank*, 511 U.S. at 189. Such unintended but natural consequences would impede economic growth in this country by decreasing the availability and increasing the cost of capital.

It would especially hinder the United States' capital markets in their efforts to compete against foreign capital markets. There is a growing world market for securities offerings, and many offerings already occur in London and elsewhere, in significant part to avoid litigation risks for offerings in the United States. *See, e.g.*, Comm. On Capital Mkts. Reg., *Continuing Competitive Weakness in U.S. Capital Markets* (May 1, 2014)[4] ("U.S. capital market competitiveness showed even greater signs of weakness in the first quarter of 2014, when measures of aversion to U.S. public equity markets remained at levels not seen since the 2007-2008 financial crisis."); PricewaterhouseCoopers, *Which Market? An Overview of London, New York, Hong Kong and Singapore Stock Exchanges*, at 1 (Sept. 2013) ("As the financial markets become increasingly global, companies have more options available to them."); Jonathan Macey, *What Sarbox Wrought*, Wall St. J., Apr. 7, 2007, at A9 ("All of a sudden it is no longer fashionable to be a U.S. public company: It's for suckers who can't access the piles of sophisticated 'global' capital available elsewhere. . . . If the U.S. is to regain its former position in the world capital market, much more will have to be done. Massive litigation risk remains . . . .").

4. Available at http://capmktsreg.org/2014/05/continuing-competitive-weakness-in-u-s-capital-markets-4/.

For all these reasons, increased liability for opinions in registration statements—or liability that is increasingly unpredictable, as it would be under the Sixth Circuit's view—may well drive securities offerings overseas. *See* Michael Bloomberg & Charles Schumer, *Sustaining New York's and the US' Global Financial Services Leadership*, at ii (Jan. 2007) ("the legal environments in other nations, including Great Britain, far more effectively discourage frivolous litigation" while "the prevalence of meritless securities lawsuits and settlements in the U.S. has driven up the apparent and actual cost of business—and driven away potential investors").

This Court has rejected the expansion of private securities class actions when, as here, "[t]he practical consequences of an expansion, which the Court has considered appropriate to examine in circumstances like these, provide a further reason to reject [the expansive] approach. . . ." *Stoneridge*, 552 U.S. at 163 (internal citations omitted). Increasing litigation risks "rais[es] the costs of doing business. Overseas firms with no other exposure to our securities laws could be deterred from doing business here. This, in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets." *Id*. at 164.

The Sixth Circuit's decision below represents a major expansion of securities law liability. It would change market participants' long-settled expectations regarding the possible extent of securities liability for opinions. For instance, it would overturn two decades of settled law limiting when an opinion is a false statement of fact within the Second Circuit. *See Shields v. Citytrust Bancorp,*

Inc., 25 F.3d 1124, 1131 (2d Cir. 1994) (addressing whether plaintiff had adequately alleged a false statement of fact in a section 10(b) case, and holding that "reasons, opinion or belief . . . can be actionable under the securities laws if the speaker knows the statement to be false") (citing *Virginia Bankshares*). Many participants in the national securities market rely on the Second Circuit. *Cf. Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 274, 276 (2010) (Stevens, J., concurring) (identifying "the Second Circuit, located in the Nation's financial center" as the "'Mother Court' of securities law"). If the Sixth Circuit's new rule were adopted, it would take the courts years to explicate the contours of incorrect opinion liability, what constituted due diligence of an opinion's correctness, and myriad other issues. In the meantime, issuers and underwriters would have to try to guess where the courts will go.

It is long past time for courts to create new claims by effectively rewriting an 81-year-old and actively litigated statutory provision. Since this Court's *Virginia Bankshares* decision in 1991, Congress has made numerous significant changes to the securities laws: the Private Securities Litigation Reform Act of 1995, the Securities Litigation Uniform Standards Act of 1998, the Sarbanes-Oxley Act of 2002, and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. On none of those occasions did Congress choose to enact a rule that incorrect but honest opinions are false statements of fact. Whether to create a drastic expansion of securities liability is the province of Congress, not the courts.

CONCLUSION

The judgment of the Sixth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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