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 AMICUS CURIAE OF AARP IN SUPPORT OF RESPONDENTS

JAY E. SUSHELSKY*
AARP FOUNDATION LITIGATION
601 E Street, NW
Washington, DC 20049
(202) 434-2060
jsushelsky@aarp.org
**Counsel of Record*

## Table of Contents

## Table of Authorities

### Cases

**Statutes, Rules and Regulations**



**Legislative History**

**Miscellaneous**

## Statement of Interest of Amicus Curiae[1]

AARP is a nonpartisan, nonprofit organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. AARP is greatly concerned about fraudulent, deceptive and unfair business practices, many of which disproportionately harm older people and disrupt their retirement security. AARP thus supports laws and public policies designed to protect older people from such business practices, including supporting laws regulating corporate disclosures, such as Section 11 of the Securities Act of 1933 ("Section 11"). Among these activities, AARP advocates to uphold the standards by which those harmed may pursue judicial relief.

The ruling in this case will affect a significant percentage of the population AARP fights to protect. Pension funds constitute a very important segment of the investing public in the United States markets, managing essential assets for the age fifty and older population. AARP advocates to preserve the integrity

---

[1] In accordance with this Court's Rule 37.6, no party's counsel wrote this brief in whole or in part and no person other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. The parties have consented to the filing of amicus briefs and have filed letters reflecting their blanket consent with the Clerk of the Court.

of standards that apply to corporate disclosures, and takes special interest in this case relating to securities issuers' registration statements which are broadly disseminated and broadcast pursuant to requirements of the securities laws. AARP believes that the standards for disclosure in this context should be demanding, in keeping with Section 11's imposition of strict liability on issuers of registration statements. AARP also believes it is important to prevent lenient disclosure standards from taking root in any area of consumer law because older people are especially vulnerable to fraudsters and con artists.

## Introduction and Summary of Argument

Willful blindness, recklessness, or negligence must constitute actionable failures of due diligence for corporate actors making statutorily mandated filings with government entities. Petitioners' brief portrays the $6.22 billion Omnicare[2] as an innocent victim that is simply trying to be forthcoming in the statements contained in its company prospectus. Such a depiction is disingenuous, and not compelling.

Section 11 of the Securities Act of 1933, 15 U.S.C. § 77a, *et seq.*, imposes a diligence standard on public issuers so as to not mislead the public. The standard does not constrain companies from making reasonable business forecasts in Registration Statements; but it does require them to inform the

[2] Key Statistics of Omnicare, Inc. (OCR), Yahoo Finance, yhoo.it/1qk9pzm (last visited August 27, 2014) (market capitalization at $6.22 billion; yearly net revenue at $6.23 billion).

public of the factual bases for their statements if the forecasts otherwise are likely to mislead. Because members of the public are in a position of vulnerability, the securities statutes and the SEC's regulatory and enforcement agenda are in place to ensure that quality information is disseminated. *See* U.S. Sec. and Exchange Comm., *The Investors Advocate: How The SEC Protects Investors Maintains Market Integrity, And Facilitates Capital Formation*, http://1.usa.gov/WM2PYF (last visited Aug. 28, 2014) (noting that the SEC's mission is to "protect investors, [and] maintain fair, orderly, and efficient markets").

Petitioners' posture amounts to an attempt to subvert strict liability of Section 11 through erroneous reliance on the distinction between fact and opinion. This position is untenable. The characterization of a statement as an opinion rather than a fact itself requires careful consideration of the speaker's mental state. Petitioners' view would thwart the overriding concern for a strict liability objective standard of materiality in Section 11. It also would have absurd consequences in other areas where materiality is a relevant factor in determining whether there has been unlawful deception, such as in consumer law or contract law. Under Petitioners' view, an act of calculated, willful blindness or procedural negligence could escape Section 11's reach, despite its likely harmful effect. Furthermore, because of the higher burden of proof Petitioners' position would impose on plaintiffs, the rule for which Petitioners contend would deprive litigants of compelling claims seeking redress for an issuer's unreasonable actions. The Court should reject Petitioners' proposed rule.

## Argument

### I. Section 11 Requires Companies To Act Reasonably and Responsibly.

Omnicare, a fortune 500 company, is the nation's largest provider of pharmaceutical care services for millions of elder patients in nursing and assisted living facilities across the U.S. and Canada. J.A. 180-81; Corporate Profile of Omnicare, Inc. (OCR), Yahoo Finance, yhoo.it/VSGHuc (last visited August 28, 2014). Notably, Omnicare "is the largest U.S. provider of professional pharmacy, related consulting and data management services for skilled nursing, assisted living and other institutional healthcare providers as well as for hospice patients in homecare and other settings." *Omnicare Reports Third Quarter Results*, BusinessWire.Com (Oct. 30, 2008 8:00 AM EDT), http://bit.ly/1oC4yK9.

Amicus submits that Omnicare, which boasts that it is "the market leader in professional pharmacy, related consulting and data management services for skilled nursing, assisted living and other chronic care institutions,"[3] should similarly be a

---

[3] *See* Omnicare, Corporate Profile, Omnicare.com, bit.ly/1pLALPW (last visited Aug. 27, 2014) (characterizing itself as "the market-leader in professional pharmacy, related consulting and data management services for skilled nursing, assisted living and other chronic care institutions, Omnicare leverages its unparalleled clinical insight into the geriatric

leader in its standard of compliance with public securities issuers' disclosure standards. Yet Omnicare purports to be naïve about the appropriate manner to make reasonable inquiry and disclosure as to its level of legal compliance in its operations. Petitioners argue that the Sixth Circuit ruling is wrong because the ruling would lead to a company being held liable for making a legal prediction which turns out, in "hindsight," to be wrong. Br. of Pet'rs 33-36, *Omnicare v. Laborers*, No. 13-435, 2014 U.S. S. Ct. LEXIS 94. This is not the Sixth Circuit ruling. Petitioners' argument fails to address the important Section 11 policy that statements must be *materially misleading* to be the basis of liability. *See Omnicare, Inc., v. Laborers Dist. Coun. Construction Ind. Pension Fund*, 719 F.3d 498, 501 (6th Cir. 2013) ("Section 11 provides a remedy for investors who have acquired securities under a registration statement that was materially misleading or omitted material information."). Under the ruling, a company may be liable only when it acts unreasonably, such as when it makes an ill-founded statement about its legal compliance without disclosing facts necessary to prevent the statement from misleading potential investors. 15 U.S.C. § 77k(a) (liability 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").

---

market along with some of the industry's most innovative technological capabilities to the benefit of its long term care customers.")

### A. Disclosure of Adequate Factual Bases for Opinions is Required Under Section 11.

Section 11 requires corporations to disclose adequate factual bases for statements of legal compliance. Section 11 was enacted with the "essential purpose [of] protecting investors." *A.C. Frost & Co. v. Coeur D'Alene Mines Corp.*, 312 U.S. 38, 40 (1941); *accord*, *e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 571-72 (1995). The Securities and Exchange Act was "designed to provide investors with full disclosure of material information concerning public offerings of securities." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976).

Incorrect statements of opinion can falsely imply that the speaker has a reasonable basis for his views. *See* Br. of Resp'ts 26-28, *Omnicare v. Laborers*, No. 13-435, 2014 US. S. Ct. LEXIS 94 (demonstrating the common law has recognized such); *see also* Dean W. Page Keeton, *Defamation and Freedom of the Press*, 54 Tex. L. Rev. 1221, 1240 (1976) (noting even proponents of the view that opinions should not be actionable as defamation require that "the publisher set forth the basis of the opinion expressed"). Under Section 11, when a corporation "chooses to reveal relevant, material information [whether voluntarily or as required] it must disclose the whole truth." *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 26 (1st Cir. 1987); *In re WorldCom, Inc. Sec. Litig.*, 346 F. Supp. 2d 628, 657 (S.D.N.Y 2004) (noting the SEC regulations provide that in addition to expressly required information in a registration statement, a filer must add such further information as is necessary to make the required statements not misleading). Omnicare elected to make statements about its legal compliance in regards to its contractual relationships with pharmaceutical suppliers and healthcare providers in several places throughout its registration materials without disclosing facts necessary for potential investors to understand the company's legal risk. *See e.g.* J.A. ¶ 95, 137. The high investor protection standards imposed by Section 11 do not support Petitioners' position that Omnicare is relieved of legal review because the statement was in the form of a belief.

Section 11 imposes rigid standards of diligence upon companies to provide accurate information in filing their registration statements. 15 U.S.C.S. § 77k(a) (excluding need for plaintiffs to prove scienter); *Herman & Maclean v. Huddleston*, 459 U.S. 375, 381-382 (1983) ("The section was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering.") Such diligence requires a company to conduct proper inquiry into statements of legal compliance. Statements made in registration statements must not be made negligently, recklessly or through willful blindness. *Id.* Omnicare has the obligation to ensure when it stated its "belief" about its legal compliance, it did not do so negligently.

### B. Petitioners Were Required to Perform the Proper Inquiry and Analysis Prior to Undertaking to Make the Disclosures Pertinent Here.

Omnicare has no justification for not verifying its legal compliance, especially once it elected to encourage investors on the basis of that information. *See id.*; *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1090 (1991) (materiality based on impact on potential shareholders). In fact, Omnicare was required not only by Section 11, but also by reason of its participation in Medicare and Medicaid, to conduct a proper analysis of its legal compliance in regard to the Federal Anti-Kickback Statute, one of the laws Omnicare allegedly violated at the time of making the registration statements. *See* Third Am. Complaint ¶ 50, J.A. at 206. Omnicare is well accustomed to inquiries into its legal compliance, having been entangled in numerous lawsuits regarding unlawful behavior. For example, in the past decade Omnicare settled a False Claims Act allegation of accepting kickbacks from drug giant Johnson & Johnson and defrauding state funded Medicaid programs. *See United States ex rel. Quinn v. Omnicare, Inc.,* 382 F.3d 432 (3rd Cir. 2004) (allegations included Omnicare misrepresentations to Medicaid that "medications were destroyed when they, in fact, had been returned and redispensed").[4]

---

[4] *See also* Jesse Greenspan, *Omnicare Settles Fraud Charges For $49.5 Million*, Law360 (Nov. 14, 2006, 12:00AM), *available at* http://bit.ly/1qHAqQw (noting that leading provider of pharmaceutical care for the elderly, Omnicare, agreed to pay

More recently, other accusations of Omnicare wrongdoing have been brought by the U.S. Securities and Exchange Commission and the U.S. Department of Justice. *See e.g.* Terry Baynes, *Omnicare to pay $120 million to settle U.S. kickback lawsuit*, Reuters (Oct. 23, 2013, 6:56 PM), bit.ly/1rBSuvS (2013 $120 million S.E.C. settlement of accusations of giving nursing homes heavily discounted drugs in exchange for patient referrals); Drew Armstrong, *Omnicare CEO Figueroa Resigns After 18 months In The Job*, Bloomberg (Apr. 16, 2012, 4:12 PM), http://bloom.bg/UxNo4D (2012 $50 million D.O.J. settlement of accusations of illegally dispensing medicine to residents of nursing facilities); U.S. Dep't of Justice,, *Nation's Largest Nursing Home Pharmacy Company to Pay $124 Million to Settle Allegations Involving False Billings to Federal Health Care Programs*, Press Release (June 25, 2014), 1.usa.gov/1qaxvyy (2014 $124 million D.O.J. settlement of accusations of offering improper financial incentives to skilled nursing facilities in exchange for drug supply). Omnicare's tendency towards non-compliance with federal regulation and other unlawful conduct even resulted in the closure of one of its most prominent drug repackaging facilities. *See* Anna Lewcock, *FDA pulls up Omnicare on quality violations*, In-PharmaTechnologist, (Feb. 13, 2007), bit.ly/1tOsQl8.

Despite Omnicare's abundant past compliance travails, Petitioners argue that for them to disclose

nearly $50 million in 2006 "to the federal government and 42 states to settle allegations that it overcharged Medicaid").

the facts necessary to make the company's legal compliance opinion reasonable would be an impossible burden because "the government may interpret the law differently." Br. of Pet'rs 33-36. Petitioners' argument does not properly address the allegations against them. Petitioners argue as if accounting for uncertain future regulation is as unpredictable as accounting for a future lawsuit based on currently illegal behavior. *Id.* at 36 (arguing that similar to determining the uncertainty of future regulation, it is impossible to know whether the company "might be sued."). The chance that business regulation may change is inherent to running a business, which is not this case. *See Levin v. Hunter Envtl. Servs. (In re Hunter Envtl. Servs.)*, 921 F. Supp. 914, 920-21, n.14 (D. Conn. 1996) (potential investors not misled because company did not get certain permits; government regulation listed as an "inherent risk" for the business). Here, Omnicare allegedly had already violated existing law and reported erroneous "speculations" about whether it would get caught. Third Am. Complaint ¶¶ 48-90. The fact finder should determine whether the statement was misleading, taking into consideration the context of the statement of legal compliance. Certainly, the disclosure of risks associated with a statement of legal compliance could have helped with Omnicare's defense. *See Levin*, 921 F. Supp. at 921 (holding statements clearly immaterial because company gave far more than a "blanket warning" about the uncertainty of the government decision making process). Omnicare did not make disclosures adequate to escape judicial review under Section 11.

### C. Members of the Public Have the Right to Rely on Company Representations.

Deceitful language in company statements harms the investing public, including pension plans and plan beneficiaries. When making investment decisions, pension fund investors are charged with a high standard of fiduciary duty to plan members. Restatement (Second) of Trusts 2d § 2, comment b (1959); *Tatum v. RJR Pension Investment Committee*, No. 13-1360, 2014 U.S. App. LEXIS 14924 at *17 (4th Cir. Aug. 4, 2014) ("The fiduciary obligations of the trustees to the participants and beneficiaries of [an ERISA] plan are . . . the highest known to the law," *quoting Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982)). Under the Employee Retirement Income Security Act ("ERISA"), fiduciaries must "engage in a reasoned decision-making process, consistent with that of a 'prudent man acting in like capacity,' 29 U.S.C. § 1104(a)(1)(B)." *Difelice v. U.S. Airways, Inc.*, 497 F.3d 410, 420 (4th Cir. 2007). Fiduciaries must act prudently, but they need not follow a procedural checklist when investigating potential investments. *Tatum*, 2014 U.S. App. LEXIS 14924, at *24. The ERISA reasonableness standard imposed on fiduciaries, in essence, requires one to "appropriately investigate the merits of an investment decision prior to acting." *Id.* at 25.

Section 11 standards should interact consistently with the standards imposed on readers of the statements. Under Petitioners' view, a fiduciary would never have the right to rely on a statement of belief in a registration statement. By rendering every statement of belief immaterial, a fiduciary would have to treat them as completely valueless. In other words, if a jury ruled the statement objectively false and likely to deceive a reasonable potential shareholder, Petitioners' position holds that as long as the statement was not subjectively false, the reader has no right to rely on it. Yet, suppose a fiduciary of a plan relied on the statements of belief, invested as a result, causing harm to the plan. Because the ERISA standards imposed on the fiduciary are based on objective reasonableness, the fiduciary could claim that she acted reasonably to defend against an ERISA plan action against her. Would, then, only the plan beneficiaries suffer the consequences of the deception? Under Petitioners' view, neither the company nor the fiduciary investor is responsible. The harm falls on the plan – in sharp contrast to the outcome that accepted liability analysis would dictate, that the responsibility should fall at the beginning of the stream of commerce. *Home Warranty Corp. v. Caldwell*, 777 F.2d 1455, 1462 (11th Cir. 1986) ("[Strict liability transfers the] ultimate risk of injury resulting from the product . . . from the injured person (whether purchaser, user, or otherwise) to those parties who put the product in the stream of commerce."); *see also e.g. Wheeler v. John Deere Co.*, 862 F.2d 1404, 1412 (10th Cir. 1988); *Taylor v. Elliott Turbomachinery Co. Inc.*, 171 Cal. App. 4th 564, 576 (2009) (discussing "stream of commerce" strict liability theory, placing the responsibility at the beginning of the product's entry into the marketplace: "Other manufacturers cannot be expected to determine the relative dangers of various products they do not produce or sell and certainly do not have a chance to inspect or evaluate.").

Omnicare did not intend for its statements of legal compliance to be absolutely meaningless. It wanted readers to rely on the statements and it would derive "personal profit or other benefit" from use of the statements. *See id.* (factor calling for "imposition of strict liability"). Omnicare should be bound by the effects its statements have, as demanded by the strict liability of Section 11. *See* S. Rep. No. 47, 73d Cong., 1st Sess., at 4-5 (1933); H.R. Rep. No. 85, at 9-10 (indicating the burden of the risk of harm from negligently made representations in registration statements should be placed on the party who stands to financially benefit).

## II. The Fact-Opinion Distinction Proposed by Petitioners Thwarts Section 11's Overriding Policy to Avoid Inquiry into Corporate Mental State.

Under Petitioners' view, a court must make an initial determination of whether a statement is a fact or an opinion, but that initial inquiry itself erroneously injects subjective inquiry into Section 11 analysis. The distinction between an opinion and a fact is not always black-and-white. Courts have used at least three different methods for analyzing the difference between fact and opinion in securities fraud cases. *See* Wendy Gerwick Couture, *Opinions Actionable as Securities Fraud*, 23 La. L. Rev. 381, 401-407 (2013) (noting courts do not tend to apply a uniform test).[5] Influential scholars such as Dean Keeton, whose expertise this Court acknowledged in *Virginia Bankshares*, *supra*, hold that the form of the statement alone (such as speaker use of the words "I believe…" or "It is my opinion that…") does not signify an opinion. *See* Keeton, *supra*, at 1233 (characterizing statements of opinions based on the speaker's mental state in forming them); *see also Va. Bankshares*, 501 U.S. at 1094 (indicating the context in which a statement is made influences whether it is a fact or an opinion, *citing* L. Hand, J., *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 856 (CA2 1918)). The Restatement (Second of Torts) § 538A (1977), upon which Petitioners rely as authority for the fact-opinion distinction, Br. of Pet'rs 15-16, actually holds that the speaker's intent is relevant in evaluating whether a statement is an opinion or a fact. Restatement (Second of Torts) § 538A (1977) (speaker belief or judgment required to make a representation an opinion). But Section 11 is intended to avoid just such an inquiry into the speaker's intent, *Herman & Maclean v. Huddleston*, 459 U.S. 375, 382 (1983); see *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208 (1976) ("Liability against the issuer of a security is virtually absolute."), and the fact-opinion inquiry itself undermines that strict liability policy.

[5] Couture discusses that courts have used at least three distinct tests to distinguish whether a given proposition is an opinion as opposed to a fact, including a) the "I know it when I see it" test; b) the literal test; and c) the judgment or subjectivity test).

### A. Characterizations of Opinion Require Inquiry into the Speaker's Mental State.

The assertion "We believe" does not necessarily turn a statement into an opinion. The following examples, from Professor Couture, *Opinions Actionable as Securities Fraud*, demonstrate how substance should dictate over form when identifying an opinion in the securities fraud context. The following two statements both should be treated as opinions:

> (1) "I believe that the company is well-poised to capture the additional market share vacated by Borders" and (2) "the company is well-poised to capture the additional market share vacated by Borders." The assessment about the company's ability to capture additional market share incorporates the speaker's judgment, regardless of whether it is preceded by the phrase, "I believe." The phrase "I believe" is merely implied in the second statement.

*Id.* at 410. In contrast, neither of the following two statements, if made by the chairman of the board of directors, should be treated as an opinion:

> (1) "The board met for three hours before voting on the merger"; and (2) "I believe that the board met

> for three hours before voting on the merger." *The mere addition of the qualifying phrase 'I believe' would not transform a statement of fact, which was neither inferred nor evaluative, into a statement of opinion.*

*Id.* at 411-12, n. 118 *citing* Keeton, *supra*, at 1233 (emphasis added).

In line with the two preceding examples, both under the view of Dean Keeton and under the Restatement (Second) of Torts § 538A (1977), one must consider whether the speaker made a *judgment* or *evaluation* in order to determine a statement of opinion. According to Dean Keeton, *supra*, at 1249-59, opinions are divided into two categories: evaluative and deductive. In an evaluative opinion, "the 'speaker makes a normative judgment based on facts known' to the speaker"; and in a deductive opinion, "the speaker applies his or her 'deductive skills' to a body of facts, thereby 'lead[ing] to the inference of a new fact.'" Couture, *supra*, at 408 (*citing* Ronald K. Chen, *Once More into the Breach: Fact Versus Opinion Revisited After Milkovich v. Lorain Journal Co.*, 1 Seton Hall Const. L. J. 331, 334-37 (1991)). Likewise, Petitioners state that a necessary quality of opinions is that opinions incorporate the speaker's evaluation or judgment. *See* Pet. Brief at 34 (quoting Restatement (Second) of Torts § 538A (1977)). Under each of these characterizations of opinions, the analysis requires consideration of the speaker's mental state – the speaker's intent to make a judgment. The form of the statement (existence of the words, "I believe") alone does not characterize an opinion.

### B. Interpreting Petitioners' Statement of Belief Under Section 11's Materiality and Deceit Standards is a Jury Question.

Omnicare's statement of belief might not be a genuine statement of belief. By examining contexts in which the words "We believe" might play a role other than turning a statement of fact into an opinion, it becomes clear that evaluating the statement requires analysis of scienter. Statements that look like opinions do not always play the role of an opinion – rather, they may be acts of deception, acts of willful blindness, or acts of negligence.

For example, the following are three possibilities as to the intent of Petitioners in using the words "We believe":

a. Petitioners inserted "We believe" to shield them of liability.

This is the case of subjective knowledge that Petitioners argue Respondents must allege. In this situation, Omnicare knew that it made a false statement and it inserted "We believe" so it would not be held accountable for the statement's falsity. Omnicare's statement, in that situation, would not be an opinion. The words "We believe" do not act to signify the speaker's judgment or evaluation about the fact. The words "We believe" act as an insulator of liability. The statement is, in that case, not an opinion, but a *statement of deception*.

b. Petitioners inserted "We believe" to convince them that they were in legal compliance.

This action is akin to an act of *willful blindness*: an action taken to "deliberately shield[] [oneself] from clear evidence of critical facts that are strongly suggested by the circumstances." *Global-Tech Appliances v. SEB S.A.*, 131 S. Ct. at 2068-69. Suppose Omnicare's legal compliance team began evaluating its legal compliance related to the anti-kickback statute, and once it began to find suspicious information, it discontinued its analysis and inquiry into the facts. In this case, the words "We believe" function as an act of self-deception: a way to justify ending the inquiry. *See* ALFRED KORZYBSKI, SCIENCE AND SANITY, Preface xvi-xvii (5th ed., Institute of General Semantics, 1933) (discussing that the act of verbalizing obscures the thing itself; *i.e.* words are not prior to what underlies them).

c. Petitioners inserted "We believe" to qualify the result of a negligent compliance process.

Suppose Omnicare's legal compliance practice manual requires only that its legal compliance agent inquire into the company legal compliance for two weeks, and the result of that inquiry is deserving of a belief statement of legal compliance in a registration statement. The statement of belief, in that case, would be a result of negligence. Petitioners' theory of the law would allow a company to have such a negligent policy, which would clearly offend the purpose of Section 11 in imposing diligence standards on a company.

Clearly, a strict liability statute would not allow an actor of willful blindness or negligence to escape liability. Many years ago, criminal law incorporated the doctrine of willful blindness with the rationale that "defendants who behave in this manner are just as culpable as those who have actual knowledge." *Global-Tech Appliances*, 131 S.Ct. at 2068-69 (*citing* J. Edwards, The Criminal Degrees of Knowledge, 17 Mod. L. Rev. 294, 302 (1954). This Court, in applying the doctrine in civil cases for patent infringement, held that, "persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts." *Id.* at 2069 (*citing United States v. Jewell*, 532 F.2d 697, 700 (CA9 1976) (en banc)). Strict liability is the most extreme standard of imposing fault. *Ernst & Ernst*, 425 U.S. at 200 (noting Section 11 imposes "express liability regardless of the defendant's fault"). Section 11 requires judicial review in every one of the above scenarios.

The fact-finder must consider objective unreasonableness and materiality. *Va. Bankshares*, *supra*, at 1094-95. Congress, through enacting Section 11's policy of strict liability, imposed diligence standards on companies. H.R. Rep. No. 85, at 9 (1933) (Section 11 places "upon originators of securities a duty of competence as well as innocence which the history of recent spectacular failures overwhelmingly justifies"). Congress has declared that deceptive statements formed through willful blindness, recklessness and negligence are legally actionable to those harmed as a result. 15 U.S.C. § 77k(b)(3)(B) (burden of due diligence defense placed on defendants). Thus, statements of belief formed under these conditions are not "honest" belief but rather actionable "negligent," "reckless," or "willfully blind" belief. If a company forms a statement of belief under a negligent process, for example, the statement is actionable under *Virginia Bankshares* as a "misstatement of the psychological fact of the speaker's belief," *Va. Bankshares*, 501 U.S. at 1095, because it purports to assert honest belief but actually asserts only a negligent belief. Section 11 cannot immunize a company using a less-than-diligent procedure for forming and asserting beliefs. Because the question of deciphering belief requires intricate factual analysis, the jury must conduct the analysis.

*Virginia Bankshares* recognizes that the question of how to perceive the statement is for the jury: "'the jury was certainly justified in believing that the directors did not believe a merger at $ 42 per share was in the minority stockholders' interest but, rather, that they voted as they did for other reasons, *e. g.*, retaining their seats on the board.'" *Id.* at 1095 (*quoting Sandberg v. Va. Bankshares, Inc.*, 891 F.2d 1112, 1121 (4th Cir. 1989)). In *Virginia Bankshares*, subjective falsity of the statement was assumed. The Court interpreted the jury verdict "as finding that the directors' statements of belief and opinion were made with knowledge that the directors did not hold the beliefs or opinions expressed," and it "confin[ed its] discussion to statements so made." *Id.* at 1090. The jury played an essential role at the trial level in *Virginia Bankshares*, and a jury has the right to interpret the mental state of a speaker in assessing a statement of belief. *See In re WorldCom, Inc. Sec. Litig.*, 346 F. Supp. 2d at 658 ("materiality is necessarily a 'fact-specific inquiry' [and thus] courts within the Second Circuit have 'consistently rejected a formulaic approach to assessing the materiality' of misrepresentations," quoting *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) and *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 162 (2d Cir. 2000)). Thus, under Section 11, a jury must determine whether Omnicare's statement of belief is actually a negligent misrepresentation of a fact.

## III. Diluting Objective Standards in Evaluating Fraud Would Bar Legitimate Claims for Relief.

Materiality is an objective inquiry precisely because the subject of concern is the effect on the audience, not the actor. Scammers may tell themselves they are not doing harm, or they make statements to get people to act, the truth of which may be difficult to determine. For that reason, materiality is an objective standard. Br. of Resp'ts 32 (discussing common law fraud and contract law principles of materiality based on objective standard of right to reliance). For example, the FTC Statement on Deception incorporates an objective standard of materiality, noting, "[t]he basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception." FTC Policy Statement on Deception, *Statement to Chairman Committee on Energy and Commerce* (October 14, 1983), *available at* 1.usa.gov/1tGQ5P1. Similarly, in *Virginia Bankshares* the Court acknowledged that materiality depends on whether "there is a substantial likelihood that [the audience] would consider it important in [acting on the information]." *Va. Bankshares*, 501 U.S. at 1090 (*citing TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 48 L. Ed. 2d 757, 96 S. Ct. 2126 (1976)); *see also Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). Petitioners' view of materiality would undermine consumer protection, as fraudsters and con artists often convince themselves they are providing a service when in fact they are cheating vulnerable consumers.

### A. An Objective Standard Is Necessary To Protect Against Fraud.

Rationalization of wrongful behavior is a common trait among scammers, who seek to convince themselves they are not doing harm. *See* The Psychology of the Scam, *Better Business Bureau* (June 29, 2012), http://go.bbb.org/1zEseRP (last visited Aug. 28, 2014) (noting that scammers "rationalize away any concern that they are harming other people with any number of self-delusional discussions."). The same processes that are useful in deceiving others, such as "avoiding the truth, obfuscating the truth, exaggerating the truth, or casting doubt on the truth[,] can also be useful in deceiving the self." William von Hippel and Robert Trivers, *The evolution and psychology of self-deception*, 34 Behavioral and Brain Sciences 1, 1 (2011). What underlies this tendency is that "people favor welcome over unwelcome information in a manner that reflects their goals or motivations." *Id.*

The nature and aspects of fraudsters' behavior is something to which Amicus is sensitive as older people are especially susceptible to scams. Many scammers who convince themselves they are acting responsibly cause serious harm. In many of the cases of elder financial abuse, the perpetrator actually believes she is acting lawfully because the person convinced herself she is not doing wrong. Adult child perpetrators of elder abuse base their actions on a feeling of entitlement to the parent's funds. Metlife Mature Market Institute, *Study: Broken Trust, Elders, Family and Finances* 10 (Mar. 2009). "'She would want me to have it' is a common excuse." *Id.; see also* Leslie Callaway and Jerry Becker, *Stopping the Financial Abuse of Seniors*, ABA Bank Compliance 12 (July-Aug. 2011) (reporting family members who abuse the elderly act based on a sense of entitlement ("'I'm going to get the money anyway [after mom or dad dies]'"); they see themselves as "'borrowing' from their future inheritance"). The cases in which perpetrators do not comprehend the immorality of their actions are all-too-common. *See id.* (reporting about 60 percent of cases of elder financial abuse reported to adult protective services involved an adult child). A policy of strict liability ensures adequate review of these types of cases by avoiding this inquiry into mental state.

A scammer's belief that she is doing no harm, possibly by purporting to offer a service, is no defense for deceiving and harming others. People who are prone to misrepresent the truth, wittingly or unwittingly, cause great suffering. A whole slew of harmful consumer products exist today, purporting to provide a real service but only leach money from vulnerable people. The Federal Trade Commission fights against a breed of scams called "Last Dollar Scams," "scams [that] involve selling consumers bogus promises of a job, government grant or some other money-making opportunity." Federal Trade Commission, *Last Dollar Scams* 1.usa.gov/1sI1Xxn (last visited Aug. 28, 2014). These include scams that offer fraudulent home-based-business opportunities, bogus credit card interest rate reduction or credit repair schemes, or foreclosure rescue scams. *Id.* Such scams[6] can escape liability under Petitioners' view, where statements that deceive are not legally actionable if they are in the form of opinions ("I believe my product will repair your credit."). A ruling that subjective falsity is an appropriate inquiry would do no justice for a person who faced a con artist whose deceit is clouded in ambiguous language of subjective belief.

---

[6] Recent revelations about for-profit colleges provide another example of a scam purporting to offer a product of value but better characterized by fraud. Recent investigations by state attorneys general have revealed that many of these schools are leaving students with loads of debt and valueless degrees. *See* Andy Rosenthal (ed.), *For-Profit Education Scams*, New York Times Editorial (March 23, 2012). "They "account for nearly half of student loan defaults, even though they enroll a little more than 10 percent of higher education students." *Id.*

### B. The Burden on Defrauded Plaintiffs Would Be Unreasonably High If Subjective Falsity Becomes an Element of Materiality.

Subjectively false statements purporting to be opinions could escape liability, as long as the company kept the subjective truth hidden. Scammers use language and context [ ] as a form of deception, and they may even deceive themselves into thinking they are providing a service. "Ascertaining honesty in this context is extremely difficult." Keeton, *supra*, at 1245. The inquiry into subjective falsity would put a difficult and sometimes impossible burden on plaintiffs with valid claims. Ascertaining the truth of a speaker's state of mind "presents a difficult issue of fact as well as issues related to the admissibility and relevance of certain kinds of evidence." *Id.* at 1242.

Ascertaining corporate "belief" in litigation is a highly burdensome process. *In re Intelligroup Sec. Litig.*, 527 F. Supp. 2d 262, 283 (D.N.J. 2007) (noting "scienter[,] based on the defendant's state of mind[,] may be difficult to prove with direct evidence"); *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983) ("corporate intent is shown by the actions and statements of the officers, directors, and employees who are in positions of authority or have apparent authority to make policy for the corporation"). Proof gets even more complicated when companies outsource their legal compliance work, as Omnicare was doing at the time it made the statement at issue. *See* Julie Schaeffer, *Just What*

*Omnicare Ordered*, Profile (April/May/June 2014), *available at* http://profilemagazine.com/2014/omnicare/ (reporting Omnicare developed in-house counsel team since 2011, before which the company outsourced most of its legal affairs to private firms). Section 11's strict liability policy is intended to place objective standards of reasonableness on companies in making registration statements. *See* Br. of Resp'ts 44 (discussing the allocation of burdens and defenses Congress placed through Section 11 policy, specifically that the defendant's burden in defense of Section 11 liability requires proof "(a) that he conducted 'a reasonable investigation'; (b) that he 'had reasonable ground to believe'; and (c) that he 'did believe' that the statements were true and not misleading," *quoting* 15 U.S.C. § 77k(b)(3)(B)). Petitioners' view would erect a proof hurdle on Plaintiffs that Congress did not intend in Section 11.

**Conclusion**

Amicus submits that a subjective falsity pleading requirement under Section 11 is contrary to Congressional intent and would rob that provision of the power to protect investors. Amicus urges the Court to affirm the decision of the Sixth Circuit Court of Appeals that Respondents properly pleaded a cause of action under Section 11 by alleging only that Petitioners' statement of opinion was objectively incorrect.

Respectfully Submitted,

JAY E. SUSHELSKY*
AARP FOUNDATION LITIGATION
601 E Street, NW
Washington, DC 20049
(202) 434-2060
jsushelsky@aarp.org
**Counsel of Record*