No. 13-1505

In the Supreme Court of the United States

MARSHALL FREIDUS, ET AL.,

Petitioners,

v.

ING GROEP N.V., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 11 of the Securities Act of 1933 provides a private remedy for a purchaser of securities offered pursuant to a registration statement that "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." 15 U.S.C. § 77k. In *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1092 (1991), the Court held that for the purposes of the federal securities laws, "statements of reasons or belief . . . . are factual in two senses: as statements that the [speakers] do act for the reasons given or hold the belief stated and as statements about the subject matter of the reason or belief expressed."

The question presented here is whether the United States Court of Appeals for the Second Circuit correctly held that a statement of opinion – that the issuer "consider[ed]" a specified portion (2.24 percent) of its asset portfolio "to be of limited size and relatively high quality" – can only be considered "an untrue statement of a material fact" under Section 11 if the plaintiff alleges that the disclosed opinion was both objectively "wrong" and subjectively false – i.e. not truly held – at the time it was made.

RULE 29.6 STATEMENT

Respondents ING Financial Holdings Corporation and ING Financial Markets LLC are wholly-owned subsidiaries of Respondent ING Groep, N.V. No publicly-held corporation owns or has agreed to own 10 percent or more of the stock of Respondent ING Groep, N.V.

Respondent Stichting ING Aandelen is akin to an administrative trust that holds approximately 99 percent of the outstanding ordinary shares of Respondent ING Groep, N.V., and that issues bearer depositary receipts for such ordinary shares.

Respondent ABN AMRO Incorporated (now merged into RBS WCS Holding Company) is a wholly-owned subsidiary of The Royal Bank of Scotland N.V. (formerly known as ABN AMRO Bank N.V.), which is a wholly-owned subsidiary of RBS Holdings N.V., which is a wholly-owned subsidiary of RFS Holdings B.V., which is more than 97 percent owned by The Royal Bank of Scotland Group plc, a publicly-held corporation. No publicly-owned corporation owns 10 percent or more of the stock of The Royal Bank of Scotland Group plc.

On or about January 1, 2008, Respondent A.G. Edwards & Sons, Inc. converted to A.G. Edwards & Sons, LLC. Wells Fargo & Company is the ultimate parent company of A.G. Edwards & Sons, LLC. Wells Fargo & Company is a publicly-traded corporation organized under the laws of the State of Delaware, and no publicly-held company owns 10 percent or more of its stock.

Effective November 1, 2010, Respondent Banc of America Securities LLC merged with and into Merrill Lynch, Pierce, Fenner & Smith Incorporated. Merrill Lynch, Pierce, Fenner & Smith Incorporated is a wholly-owned subsidiary of Merrill Lynch & Co., Inc. Merrill Lynch & Co., Inc. is a wholly-owned subsidiary of Bank of America Corporation, a publicly-held corporation, which owns all the common stock of Merrill Lynch & Co., Inc. No other publicly-held corporation owns 10 percent or more of Banc of America Securities LLC.

Respondent Citigroup Global Markets Inc. is wholly owned by Citigroup Financial Products Inc., which is wholly owned by Citigroup Global Markets Holdings Inc., which is wholly owned by Citigroup Inc.

Respondent Credit Suisse Securities (USA) LLC is a wholly-owned subsidiary of Credit Suisse (USA), Inc., which, in turn, is a wholly-owned subsidiary of Credit Suisse Holdings (USA), Inc., which, in turn, is jointly owned by Credit Suisse AG and Credit Suisse Group AG. Credit Suisse AG is a wholly-owned subsidiary of Credit Suisse Group AG, which is a corporation organized under the laws of the Country of Switzerland and whose shares are publicly traded on the Swiss Stock Exchange and are also listed on the New York Stock Exchange in the form of American Depositary Shares. No publicly-held company owns 10 percent or more of Credit Suisse Group AG.

Respondent HSBC Securities (USA) Inc. is a wholly-owned indirect subsidiary of HSBC Holdings plc, a United Kingdom public limited

company. No other publicly-held company owns 10 percent or more of HSBC Securities (USA) Inc.

Respondent J.P. Morgan Securities LLC (f/k/a J.P. Morgan Securities Inc.) is a wholly-owned indirect subsidiary of JPMorgan Chase & Co. No other publicly-held company owns 10 percent or more of the stock of J.P. Morgan Securities LLC.

Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated is a wholly-owned subsidiary of Merrill Lynch & Co., Inc. Merrill Lynch & Co., Inc. is a wholly-owned subsidiary of Bank of America Corporation, a publicly-held corporation, which owns all the common stock of Merrill Lynch & Co., Inc. No other publicly-held corporation owns 10 percent or more of Banc of America Securities LLC.

Respondent Morgan Stanley & Co. LLC (f/k/a Morgan Stanley & Co. Incorporated) is a limited liability company whose sole member is Morgan Stanley Domestic Holdings, Inc., a corporation wholly owned by Morgan Stanley Capital Management, LLC, a limited liability company whose sole member is Morgan Stanley. Morgan Stanley is a publicly-held corporation that has no parent corporation. Based on Securities and Exchange Commission Rules regarding beneficial ownership, Mitsubishi UFJ Financial Group, Inc. 7-1 Marunouchi 2-chome, Chiyoda-ku, Tokyo 100-8330, beneficially owns greater than 10 percent of Morgan Stanley's outstanding common stock.

Respondent RBC Capital Markets LLC (f/k/a RBC Capital Markets Corporation) is an indirect wholly-owned subsidiary of Royal Bank of Canada,

which is publicly traded on the New York Stock Exchange and the Toronto Stock Exchange.

Respondent UBS Securities LLC is an indirect wholly-owned subsidiary of UBS AG, a public company whose stock is listed on the SIX Swiss Exchange and the New York Stock Exchange. No other publicly-held company owns 10 percent or more of the stock of UBS Securities LLC.

Respondent Wells Fargo Securities, LLC (f/k/a Wachovia Capital Markets, LLC) is a wholly-owned subsidiary of EVEREN Capital Corp. EVEREN Capital Corp. is a wholly-owned subsidiary of Wells Fargo & Company, a publicly-traded corporation organized under the laws of the State of Delaware. There is no person or entity that owns more than 10 percent of the shares of Wells Fargo & Company.

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STATEMENT OF THE CASE

In September 2008, sudden and unprecedented events shocked the financial markets. Among other things, Lehman Brothers failed, Fannie Mae, Freddie Mac, and AIG were essentially nationalized, and the United States government undertook a $700 billion bailout that channeled funds to many hundreds of companies. These events led to a near-collapse of the financial markets, during which the share prices of virtually every financial institution, worldwide, became severely depressed. In the wake of this economic tsunami, many class actions were filed alleging (with the benefit of hindsight) that stock declines for particular institutions resulted from alleged material misstatements and omissions they made, rather than the global financial crisis. This is one such case.

Petitioners invested in three offerings of securities issued by ING Groep, N.V. (together with its affiliates, "ING") between one and two years before Lehman Brothers' failure rocked the markets: (1) a $1 billion offering of 6.375 percent ING Perpetual Hybrid Capital Securities issued on June 8, 2007 (the "June 2007 Offering"); (2) a $1.5 billion offering of 7.375 percent ING Perpetual Hybrid Capital Securities issued on September 27, 2007 (the "September 2007 Offering"); and (3) a $2 billion offering of 8.50 percent ING Perpetual Hybrid Capital Securities issued on June 12, 2008 (the "June 2008 Offering"). Pet. App. at 11a-14a. After Lehman Brothers failed, the trading price of the securities sold in these three offerings (the "Offerings") fell, which precipitated the filing of the

underlying lawsuits here beginning in February 2009. Since the filing of those lawsuits, however, the Offerings have recovered their lost value and (for several years) regularly traded at or above par. *See* Resp't C.A. Br. at 12-13.

A. ING's Disclosed Opinions Concerning Its RMBS Holdings

ING is a Dutch bank that purchased residential mortgage-backed securities ("RMBS") in the years before the financial crisis. ING's investments in RMBS constituted a relatively trivial percentage of its assets (2.24 percent). ING nonetheless made frequent disclosures concerning its RMBS portfolio, which became increasingly detailed as conditions in the housing market and broader economy worsened.

For example, when ING announced its financial results for the first six months of 2007 on September 24, 2007, it warned that "[c]redit markets have recently become more turbulent amid concerns about U.S. subprime mortgages, collateralised debt obligations (CDOs) and leveraged finance," which "resulted in a general widening of credit spreads, reduced price transparency, reduced liquidity, ratings agencies downgrades and increased volatility across all markets." JA0134.[1] ING also explained that its "exposure to subprime and Alt-A mortgages is almost entirely through asset-backed securities"

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[1] Citations to "JA" are to the joint appendix filed below, which is available electronically in the Second Circuit's PACER docket for this appeal. Citations to "SuppA" are to the supplemental appendix filed below.

and that "ING does not originate subprime mortgages in the U.S." *Id.* The disclosure continued:

> To date this market disruption has had a limited impact on ING. *Overall, ING considers its subprime, Alt-A and CDO/CLO exposure to be of limited size and of relatively high quality*.

Id. (emphasis added). ING then explained why it believed that its RMBS asset exposure was "of limited size":

> ING's total exposure to CDOs and CLOs was EUR 0.9 billion, or 0.07% of assets, as of July 31, 2007. As of that date, subprime exposure amounted to EUR 3.2 billion, representing 0.24% of total assets, and Alt-A exposure amounted to EUR 28.7 billion, representing 2% of total assets.

Id. And then why it believed its assets were "of relatively high quality":

> ING classifies a security for Alt-A if one of the following three conditions is met with respect to the underlying portfolio: (a) the weighted-average FICO-credit scores are between 640 and 730, (b) the Loan-To-Value (LTV) equals or exceeds 70% but does not exceed 100% or (c) low documentation including limitations to income verification, are at least 50%, but less than 100%. ING's Alt-A portfolio has an average FICO score of 721 and an LTV of 70%. . . .

> As of July 31, 2007, 93% of the subprime assets and 99.9% of the Alt-A assets were rated AAA or AA. ING is not responsible for these securities ratings, which are not a measure of liquidity and which may be changed or withdrawn without notice by the rating agencies. As of July 31, 2007, the negative revaluation, based on a mark-to-market approach reflecting credit developments and prevailing interest rates, were EUR 35 million (for CDOs and CLOs), EUR 58 million (for subprime) and EUR 233 million (for Alt-A), respectively, despite the significant market downturn. . . .
>
> ING has been monitoring the effects of the recent market disruption, and believes the foregoing exposures have not changed materially since July 31, 2007.

Id.

On May 14, 2008, after further deterioration in the housing market and general economy, ING published a presentation disclosing (among other things) extensive, granular details about the mortgages underlying its RMBS portfolio. In that presentation, ING disclosed every granular loan-level characteristic that Petitioners subsequently alleged – for the first time, in their September 2009 consolidated complaint (the "Consolidated Complaint" or "CAC") – had been omitted. JA0635-38; JA1115-21.

B. Petitioners' Inadequate and Belated Claims

Petitioner Freidus commenced this action on February 5, 2009 by filing a putative class action complaint asserting claims under Sections 11, 12(a)(2), and 15 of the Securities Act. Five copycat complaints were filed soon thereafter. In conclusory fashion, each of these complaints (the "Placeholder Complaints") alleged – in identical words – that the relevant offering materials were misleading, asserting that ING had misreported the value of its assets, lacked adequate controls to value them, and was not well-capitalized as a result. *See* SuppA015, 053, 086, 105-06, 141, 162-63.

Seven months later, in September 2009, Petitioners filed the Consolidated Complaint. It abandoned the conclusory, valuation-based allegations on which the Placeholder Complaints rested, and replaced them with allegations built on the magnitude, and underlying loan-level details, of ING's RMBS assets. Notably, all of the facts that Petitioners alleged ING omitted from the June and September 2007 Offerings had been disclosed by ING more than one year earlier in its May 2008 published analyst presentation:

- **Petitioners alleged that, in connection with the June 2007 Offering, ING failed to disclose that it "had more than €31 billion ($45.26) of exposure to Alt-A and subprime RMBS."** CAC ¶ 120(a). [2] However, the

[2] This omission allegation was made only with respect to the June 2007 Offering, not the September 2007 Offering, which is the only offering at issue here. CAC ¶¶ 120, 126.

Consolidated Complaint itself admitted that ING disclosed in SEC filings during August and September 2007 that "it was holding €3.2 billion ($4.6 billion) in subprime RMBS and a dramatic €28.7 billion ($41.9 billion) in its Alt-A RMBS portfolio" – together, €32 billion in such securities. CAC ¶ 7.

- **Petitioners alleged that ING failed to disclose "the extremely risky nature of ING's RMBS," including various granular, loan-level characteristics of the RMBS.** CAC ¶¶ 120(b), 126(a). However, in September 2007, ING disclosed how much of its RMBS were backed by subprime and Alt-A loans, and the complaint conceded that investors understood that Alt-A and subprime RMBS were "inherently more risky" than RMBS backed by prime mortgages. CAC ¶ 5. ING also disclosed the precise amounts the specific RMBS it owned had lost in value, thereby quantifying how the risk embedded in those assets had impacted the value of that portfolio. JA0134. ING further disclosed detailed information about the loans underlying its RMBS in May 2008, more than one year before the allegations based upon these details first appeared in Petitioners' pleadings. JA0635-38, 1115-21.

With respect to the September 2007 Offering, the Consolidated Complaint alleged that ING omitted an explanation of its capital position in certain quarterly reports, but the District Court noted that this allegation was not pressed in Petitioners' briefing before the district court, and that the allegation was "not actionable in any event." Pet. App. at 43a n.136.

- **Petitioners alleged that ING failed to disclose that its "RMBS had begun defaulting at a much faster and higher rate than RMBS comprised of conforming loans, thereby reducing the value of ING's portfolio."** CAC ¶¶ 120(c), 126(b). However, more than a year earlier, ING disclosed not only that it owned "inherently more risky" RMBS, but also that they had declined in value, and precisely how much. JA0134. The Consolidated Complaint notably abandoned the unfocused valuation challenges made in the Placeholder Complaints, and never alleged that the disclosed valuations were anything but accurate.

- **Petitioners alleged that ING failed to disclose "the substantial and material risk that ING's exposure to Alt-A and subprime RMBS had on the Company's stated capital ratio, shareholders equity and its liquidity."** CAC ¶¶ 120(d), 126(c). However, the Consolidated Complaint alleged that investors had become "increasingly concerned" about RMBS backed by subprime and Alt-A loans by early 2006 (long before the Offerings), CAC ¶ 75, and conceded that, by September 2007, ING had already disclosed the precise amount of its RMBS that were backed by such loans. ING also disclosed its capital ratio and shareholder equity, CAC ¶¶ 7, 125; JA0267-72; investors therefore could determine the potential effect of further RMBS writedowns on those metrics and ING's liquidity.

- **Petitioners alleged that ING failed to disclose that "the unrealized losses on ING's debt portfolio . . . increased by more than 10-fold—from a loss of €347 million to €3.9 billion" between March 2007 and June 2007.** CAC ¶ 120(e) (emphasis omitted). However, the Consolidated Complaint admitted that ING disclosed these facts "shortly after the [June 2007] offering," CAC ¶ 120(e), in an August 2007 SEC filing, JA0273.

Moreover, the Consolidated Complaint included virtually no allegations *about the specific RMBS that ING owned*. Instead, the Consolidated Complaint discussed at length general industry-wide trends and market-wide conditions, and the performance of: (1) individual mortgage loans, even though ING's portfolio consisted of RMBS (which are structured interests in pools of mortgages, in which the senior-most tranches – which ING owned – are protected against credit risk by junior tranches, Pet. App. at 10a-11a) rather than individual mortgage loans; and (2) RMBS that were not in ING's portfolio. Indeed, not once did the Consolidated Complaint set forth a fact about any *RMBS* ING actually owned, or any *mortgage* actually included in a mortgage pool in which ING had invested, that pre-dated the June 2007 Offering or the September 2007 Offering.

C. The Numerous Grounds for Dismissal of Petitioners' Claims

In a September 14, 2010 decision, Judge Lewis A. Kaplan of the Southern District of New York granted Respondents' motion to dismiss all claims

concerning the June 2007 Offering and the September 2007 Offering, and further dismissed many of the claims concerning the June 2008 Offering.

With respect to the June 2007 Offering, Judge Kaplan held that the Petitioners' claims were barred by the Securities Act's one-year statute of limitations, 15 U.S.C. § 77m, because the disclosures made by ING in September 2007 triggered the limitations period and the Placeholder Complaints were not filed until February 2009, more than a year later. Pet. App. at 22a-28a.

With respect to the September 2007 Offering at issue here, Judge Kaplan held that Petitioners had failed to plead sufficient factual allegations to state a plausible claim for relief. Pet. App. at 28a-43a. Regarding ING's opinion that it "consider[ed] its subprime, Alt-A and CDO/CLO exposure to be of limited size and of relatively high quality," Judge Kaplan held that Petitioners had failed to adequately allege that it was incomplete or inaccurate at the time that it was made. Pet. App. at 30a-35a. In reaching this conclusion, Judge Kaplan noted that none of Petitioners' allegations regarding the alleged riskiness of ING's RMBS concerned the particular assets that ING actually owned; instead, the allegations concerned the market generally, individual mortgage loans instead of mortgage-backed securities, or lower-rated tranches of RMBS than those held by ING (that, in any event, were not even linked to the mortgage pools in which ING had invested). Pet. App. at 33a-35a. In addition, many of these

allegations in the Consolidated Complaint post-dated the allegedly misleading statements in the offering materials, and therefore failed to establish those statements were false at the time made. Pet. App. at 33a. Accordingly, Judge Kaplan dismissed the claims based on the September 2007 Offering.

With respect to the June 2008 Offering, Judge Kaplan held that, as to the majority of the claims in the Consolidated Complaint, Petitioners likewise failed to allege sufficient facts to establish a plausible claim for relief. Pet. App. at 43a-56a. However, Judge Kaplan permitted some June 2008 Offering claims to survive, although he noted that their sufficiency was "a close call." Pet. App. at 50a-54a.

Petitioners subsequently moved for reconsideration of the dismissal of their September 2007 and June 2008 Offerings claims based upon an intervening decision issued by the Second Circuit that Petitioners argued changed the standard of materiality. Pet. App. at 59a. In a decision issued on March 29, 2011, Judge Kaplan granted Petitioners' motion for reconsideration, but adhered to his prior holdings. Pet. App. at 59a-64a.

As to the claim regarding ING's statement that it "consider[ed] its subprime, Alt-A and CDO/CLO exposure to be of limited size and of relatively high quality," Judge Kaplan concluded that certain of his reasoning "would be unaffected, even if [Petitioners'] reading [of the Second Circuit's opinion] were correct." Pet. App. at 61a. Judge Kaplan further reiterated that Petitioners' allegations "relied heavily on matters that occurred

after the September 2007 Offering Materials were disseminated and that therefore have no logical connection to the truth or falsity of the statements in those materials at the time they were made." Pet. App. at 62a. And, "[e]ven more importantly," Judge Kaplan reiterated that Petitioners' allegations generally related to the performance of tranches that were lower-rated than those held by ING, and "therefore were of little or no relevance" to Petitioners' claims. Pet. App. at 62a-63a. Judge Kaplan therefore adhered to his prior ruling that Petitioners had failed to allege sufficient facts to demonstrate a plausible entitlement to relief.

Moreover, as "a second and quite independent basis for adhering to the original result with respect to" the September 2007 Offering, Judge Kaplan concluded that the challenged statement – that ING "considered its subprime [and] Alt-A . . . exposure to be of limited size and of relatively high quality" – "was one of opinion," which "can be false if, and only if, the company in fact did not so consider the exposure." Pet. App. at 63a. Finding the Consolidated Complaint to be "devoid of any allegation that ING did not hold the view set forth in the offering materials at the time those materials were published," Judge Kaplan held that Petitioners had failed to state a claim for this additional reason. Pet. App. at 63a-64a.

The few claims concerning the June 2008 Offering that survived Respondents' motion to dismiss subsequently proceeded to discovery and class certification, with Petitioner Belmont Holdings Corporation ("Belmont") – as the only plaintiff who purchased securities in the June 2008

Offering – alone at the helm. However, that discovery revealed that Belmont had sold all of the securities it purchased from the June 2008 Offering for their "original cost" before it filed the Consolidated Complaint – a fact which Belmont, "neglected to mention [to Judge Kaplan] when it filed [that complaint]." *Freidus v. ING Groep N.V.*, No. 09 Civ. 1049(LAK), 2012 WL 2878637, at *1 (S.D.N.Y. July 10, 2012). When Judge Kaplan learned of this fact, he denied class certification, *id.* at *2, and, with no other plaintiff left with standing to pursue the few remaining claims concerning the June 2008 Offering, dismissed the case, *Freidus v. ING Group N.V.*, No. 09 Civ. 1049(LAK), 2012 WL 4857543, at *3 (S.D.N.Y. Oct. 11, 2012).

Thereafter, Petitioners filed a notice of appeal. On appeal, Petitioners did not contest the dismissal of the June 2008 Offering claims. Instead, they only contended that Judge Kaplan erred in concluding that their claims concerning the June 2007 Offering were time-barred and that their claims concerning the September 2007 Offering were inadequately pled. *See* Pet'r C.A. Br. at 2, 12 n.7.

In a summary order issued on November 22, 2013, the Second Circuit affirmed the District Court. Pet. App. at 1a-5a. With respect to the June 2007 Offering, the Second Circuit agreed that the claims were time-barred even under this Court's decision in *Merck & Co. v. Reynolds*, 559 U.S. 633 (2010), because "the facts disclosed by the end of September 2007 would have alerted a reasonably diligent plaintiff to the alleged misstatements and omissions in the June 2007 offering, such that a reasonably diligent plaintiff could plead such

omissions in a complaint." Pet. App. at 4a-5a. With respect to the September 2007 Offering, the Second Circuit held that the challenged statement that ING considered its assets to be of "relatively high quality" was "one of opinion," which could only be false if "the statement was both objectively false and disbelieved by the defendant at the time it was expressed." Pet. App. at 5a (quoting *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 110 (2d Cir. 2011)). Because Petitioners "failed to plausibly allege that ING did not believe this statement at the time that it was made," the Second Circuit affirmed the dismissal of these claims. Pet. App. at 5a.

Petitioners subsequently filed a petition for rehearing or rehearing en banc with the Second Circuit, asking the court to overrule its holding that statements of opinion can only be considered false if they are not truly held, based on the Sixth Circuit's contrary decision in *Indiana State District Council of Laborers & HOD Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 719 F.3d 498 (6th Cir. 2013), which explicitly rejected the Second Circuit's approach to the issue. On March 18, 2014, the Second Circuit denied that petition. Pet. App. at 57a-58a.

D. The Limited Scope of Petitioners' Remaining Appeal

In their petition for a writ of certiorari, Petitioners do not seek review of Judge Kaplan's holding that Belmont lacked standing to assert its claims – nor could they given that they did not raise this issue before the Second Circuit. Petitioners likewise do not seek review of the

Second Circuit's decision that the claims concerning the June 2007 Offering were properly dismissed as time-barred.

Accordingly, the only Petitioner with a live claim is Ray Ragan, who allegedly invested in the September 2007 Offering. (Neither of the two other Petitioners did so; they exclusively invested in the June 2007 and June 2008 offerings. *See* CAC ¶¶ 21-23.) In his petition for a writ of certiorari, Ragan only challenges the Second Circuit's conclusion that he failed to state a claim with respect to ING's subjective opinion that, "[o]verall, ING considers its subprime, Alt-A and CDO/CLO exposure to be of limited size and of relatively high quality." *See* Pet. at 13-15.

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED REGARDLESS OF HOW THE COURT RULES IN *OMNICARE*

Petitioners argue that this appeal presents the same question as *Omnicare*, and therefore ask the Court to hold their petition pending the resolution of *Omnicare*.

In *Omnicare*, the plaintiffs alleged that the defendants "engaged in a variety of illegal activities including kickback arrangements . . . and submission of false claims to Medicare and Medicaid." 719 F.3d at 501. The *Omnicare* plaintiffs – investors in securities issued by the defendants – therefore asserted that the defendants' statements in SEC filings that their contracts were "legally and

economically valid" were false and misleading in violation of Section 11. *Id.* (emphasis omitted).

The district court in *Omnicare* granted the defendants' motion to dismiss, but the Sixth Circuit reversed. In doing so, the Sixth Circuit recognized that the challenged statements concerning legal compliance were "soft information" (akin to opinions), but nonetheless held that the plaintiffs stated a claim because they "pleaded objective falsity." *Id.* at 504-06. The Sixth Circuit declined to impose what it referred to as an additional "knowledge of falsity requirement upon § 11 claims" challenging soft information and statements of opinion because "§ 11 is a strict liability statute." *Id.* at 505-07.[3] In reaching this decision, the Sixth Circuit explicitly disagreed with prior decisions from the Second and Ninth Circuits, which held that statements of opinion can only be actionable under Section 11 if they are both

[3] The Sixth Circuit's apparent conclusion that requiring a plaintiff to plead that an opinion was not truly held would impose a scienter requirement on Section 11 claims is mistaken. Section 11 requires plaintiffs to establish falsity – i.e. "an untrue statement of a material fact" or an omission of "a material fact required to be stated therein or necessary to make the statement therein not misleading." 15 U.S.C. § 77k. A statement of opinion – for example, "I believe that Abraham Lincoln was a better president than Thomas Jefferson" – can only be considered "false" if the speaker does not truly hold the opinion (i.e. if the speaker did not actually believe that Lincoln was a better president than Jefferson). Therefore, requiring a plaintiff to plead that an opinion was not truly held does not impose a scienter element on a Section 11 claim, as the Sixth Circuit assumed. Instead, doing so merely reflects the explicit statutory requirement that the plaintiff establish the challenged statement of "material fact" was false or misleading.

objectively false and subjectively disbelieved by the defendant at the time expressed. *Id.*

The defendants in *Omnicare* subsequently filed a petition for a writ of certiorari. That petition presented the following question:

> For purposes of a Section 11 claim, may a plaintiff plead that a statement of opinion was "untrue" merely by alleging that the opinion itself was objectively wrong, as the Sixth Circuit has concluded, or must the plaintiff also allege that the statement was subjectively false – requiring allegations that the speaker's actual opinion was different from the one expressed – as the Second, Third, and Ninth Circuits have held?

Pet. for a Writ of Cert., *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund,* 134 S. Ct. 1490 (No. 13-435). The Court granted the petition in *Omnicare* on March 3, 2014. *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 134 S. Ct. 1490 (2014).

Although Petitioners here claim that this appeal raises the same issue as *Omnicare*, their petition should be denied regardless of the outcome in *Omnicare*.

A. If the Court in *Omnicare* Adopts the Holdings of the First, Second, Third, Fourth, Fifth, and Ninth Circuits, the Petition Should Be Denied

In *Omnicare*, the Sixth Circuit departed from its sister circuits in holding that Section 11 liability

can be imposed on issuers for disclosed opinions that are genuinely held but objectively "false." 719 F.3d at 503-07. If this Court reverses the Sixth Circuit's outlier decision in *Omnicare* and instead adopts the holdings of the First, Second, Third, Fourth, Fifth, and Ninth Circuits – that a statement of opinion can only be considered a "false" statement of "fact" under the federal securities laws if the plaintiff pleads that it was not truly held – the petition here should be denied because Petitioners' claims plainly fail under that standard.

Prior to the Sixth Circuit's decision in *Omnicare*, several other circuits held that statements of opinion can only be considered false statements of fact under Section 11 if they were not truly held. For example, in *Fait v. Regions Financial Corp.*, the Second Circuit held that "liability lies" under Section 11 for a statement of opinion "only to the extent that the statement was both objectively false and disbelieved by the defendant at the time it was expressed." 655 F.3d 105, 110 (2d Cir. 2011).

Fait involved statements concerning goodwill – meaning "the future economic benefits arising from other assets acquired in a business combination." *Id.* The calculation of goodwill requires a company to calculate the "excess of the purchase price over the fair value of the assets acquired and the liabilities assumed." *Id.* As such, "[e]stimates of goodwill depend on management's determination of the 'fair value' of the assets acquired and liabilities assumed," and "will vary depending on the particular methodology and assumptions used." *Id.*

Because statements regarding goodwill are "subjective ones rather than 'objective factual matters,'" the Second Circuit concluded that the plaintiff in *Fait* could not establish that the defendants' statements were false merely by alleging that they "should have reached different conclusions about the amount of and the need to test for goodwill." *Id.* at 111-12. Instead, relying on this Court's decision in *Virginia Bankshares v. Sandberg*, 501 U.S. 1083 (1991), the Second Circuit held that statements concerning goodwill – and other statements of opinion or belief – may only be actionable "if they misstate the opinions or belief held, or, in the case of statements of reasons, the actual motivation for the speaker's actions, *and* are false or misleading with respect to the underlying subject matter they address." *Fait*, 655 F.3d at 111 (citing *Va. Bankshares*, 501 U.S. at 1092).

The Third and Ninth Circuits, applying *Virginia Bankshares*, have reached the same conclusion. *See Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009) (opinions "can give rise to a claim under section 11 only if the complaint alleges with particularity that the statements were both objectively and subjectively false or misleading"); *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 368 (3d Cir. 1993) ("opinions . . . may be actionable misrepresentations" under Section 11 only "if the speaker does not genuinely and reasonably believe them").[4]

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[4] The only circuit to consider the issue of opinion liability under Section 11 for the first time since the Sixth Circuit issued its opinion in *Omnicare* has likewise rejected the Sixth Circuit's approach. *See MHC Mut. Conversion Fund, L.P. v.*

The First, Fourth, and Fifth Circuits have likewise recognized that statements of opinion can only be considered "false" under other provisions of the federal securities laws if they are not truly held. *See Nolte v. Capital One Fin. Corp.*, 390 F.3d 311, 315 (4th Cir. 2004) (stating, in case asserting Section 10(b) claims, that "[i]n order to plead that an opinion is a false factual statement under *Virginia Bankshares*, the complaint must allege that the opinion expressed was different from the opinion actually held by the speaker").[5] Indeed, the Sixth Circuit itself recognized as much in two opinions issued before – but overlooked by – *Omnicare*. *See Mayer v. Mylod*, 988 F.2d 635, 639 (6th Cir. 1993) ("statements which contain the speaker's opinion are actionable under Section

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Sandler O'Neill & Partners, L.P., __ F.3d __, No. 13-1016, 2014 WL 3765717, at *4 n.2 (10th Cir. Aug. 1, 2014) (noting that "*Omnicare*'s result stands in a good deal of tension with the common law, securities law authorities, and experience suggesting that the failure of an opinion about future events to materialize, without more, doesn't establish that the opinion was a false or misleading statement of fact at the time it was made," and observing, "we are aware of no other court of appeals to have adopted the view *Omnicare* did; that case is now the subject of Supreme Court review; and the Solicitor General has recommended the Supreme Court repudiate its approach").

[5] *See also In re Credit Suisse First Bos. Corp.*, 431 F.3d 36, 47 (1st Cir. 2005) (under Section 10(b), "[a] plaintiff can challenge a statement of opinion by pleading facts sufficient to indicate that the speaker did not actually hold the opinion expressed"); *Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 670 (5th Cir. 2004) (under Section 10(b), "[a] statement of belief is only open to objection where the evidence shows that the speaker did not in fact hold that belief and the statement made asserted something false or misleading about the subject matter").

10(b) of the Securities Exchange Act if the speaker does not believe the opinion and the opinion is not factually well-grounded"); *see also Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs. LLC*, 700 F.3d 829, 842-43 (6th Cir. 2012) (applying same test to negligent misrepresentation claims concerning statements of opinion).

Petitioners fail to establish a false statement of fact – as required by Section 11 – under this standard. As the Second Circuit correctly concluded, Petitioners' allegations here do not plead a claim under *Fait* because Petitioner "Ragan failed to plausibly allege that ING did not believe [its] statement [of opinion] at the time that it was made." Pet. App. at 5a.

Notably, Petitioners do not dispute that this case was correctly decided under *Fait*. Nor could they. The Consolidated Complaint does not contain any allegation that ING did not truly hold its disclosed opinion. Pet. App. at 5a; *see also* Pet. App. at 63a-64a ("The [Consolidated Complaint] is devoid of any allegation that ING did not hold the view set forth in the offering materials at the time those materials were published."). To the contrary, the Consolidated Complaint routinely disavows any such allegation. *See, e.g.*, CAC ¶¶ 238, 248, 254 ("plaintiffs expressly exclude and disclaim any allegation that could be construed as alleging fraud or intentional or reckless misconduct").

Accordingly, if the Court in *Omnicare* adopts the prior holdings of the First, Second, Third, Fourth, Fifth, and Ninth Circuits, then the petition here

should be denied because Petitioners have clearly failed to meet that standard.

B. If the Court Adopts the Government's Position in *Omnicare*, the Petition Should Still Be Denied

In its brief as *amicus curiae* in *Omnicare*, the Government argues that a statement of opinion can be actionable under Section 11 if either: (1) the speaker does not genuinely hold the opinion given; or (2) there is not a basis for the opinion that is reasonable under the circumstances. *See* Br. for the United States as Amicus Curiae in Supp. of Vacatur and Remand at 10-11, *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 134 S. Ct. 1490 (No. 13-435). If the Court adopts this test in *Omnicare*, the petition here still should be denied because Petitioners have not met – and cannot meet – this standard.

As discussed above, Petitioners have failed to allege that ING did not genuinely hold its disclosed opinions. Petitioners therefore cannot satisfy the first prong of the Government's test. Moreover, Petitioners also fail to satisfy the second prong of the Government's test because the Consolidated Complaint does not allege – and cannot plausibly allege – that ING's disclosed opinion lacked a reasonable basis.

ING itself disclosed the basis for its opinion that it considered its subprime and Alt-A exposure to be of a "limited size": its "subprime exposure amounted to EUR 3.2 billion, representing 0.24% of total assets, and Alt-A exposure amounted to EUR 28.7 billion, representing 2% of total assets."

JA0134. Petitioners do not argue that those figures were inaccurate or that they did not provide a reasonable basis for ING's opinion.

ING likewise disclosed the basis for its opinion that it considered its subprime and Alt-A exposure to be of "relatively high quality": (1) 93 percent of its subprime assets and 99.9 percent of its Alt-A assets were rated AAA or AA by the credit rating agencies; (2) its Alt-A portfolio had an average FICO score of 721 and an average loan-to-value ratio of 70 percent; and (3) its subprime and Alt-A portfolio had largely retained its value despite the significant market downturn. *Id.* Petitioners cannot plausibly dispute that these facts, including facts that were provided by several independent third parties, supplied a reasonable basis for ING's disclosed opinions.

MHC Mutual Conversion Fund, L.P. v. Sandler O'Neill & Partners, L.P., is instructive on this point. __ F.3d __, No. 13-1016, 2014 WL 3765717 (10th Cir. Aug. 1, 2014). There, the Tenth Circuit noted many reasons why the "reasonable basis" test proposed by the Government in *Omnicare* would not be an appropriate standard for opinion liability under Section 11, including because it may be inconsistent with Section 11's statutory text and history, the purposes of investor protection, and this Court's decision in *Virginia Bankshares*. *Id.* at *5-6. Nonetheless, the Tenth Circuit did not resolve the question of whether to adopt the "reasonable basis" test because – as here – "even under the terms of this test the outcome in our case does not change." *Id.* at *6.

The Tenth Circuit reached the conclusion that the plaintiffs in *MHC Mutual* did not satisfy the "reasonable basis" test for two reasons. *First*, the court noted that the challenged statement of opinion was supported by "information a reasonable issuer of securities could rely on," including "not just [the defendants'] own internal forecasting" but also "multiple outside independent investment analysts who reached the same conclusion about the company's portfolio." *Id.* In light of that disclosed basis for the defendants' opinions, the Tenth Circuit concluded that the plaintiffs' allegation that other analysts may have reached a different conclusion "serve[d] only to confirm rather than undermine the conclusion that the company's opinion had a reasonable (if not universally shared) basis for the opinion it expressed." *Id. Second*, the Tenth Circuit acknowledged that the defendant had "disclose[d] that only certain clearly limited bases support[ed its] opinion," and as a result it "c[ould not] be easily faulted for implying the existence of others." *Id.* at *7. The Tenth Circuit therefore analogized the allegations before it to "an attorney who is asked to render an opinion in a short period [who] may do much to avoid liability by delineating the limits of his research, indicating further areas meriting exploration that could change his opinion, and noting that his efforts are preliminary." *Id.* Because the defendants in *MHC Mutual* disclosed that they had already taken losses and that their opinion that they could avoid future losses rested on certain disclosed assumptions, investors were "on notice that the company's opinion about the prospects for its securities wasn't unqualified" and were not misled. *Id.*

Both of these reasons apply with equal force here. ING's disclosed opinion that its RMBS assets were of "relatively high quality" was based on the credit ratings that multiple independent rating agencies had given to its RMBS, the FICO scores assigned by several independent credit bureaus to the borrowers of the underlying loans, and the loan-to-value ratios for the underlying properties that were calculated based on valuation opinions provided by many independent real estate appraisers. These are sources of "information a reasonable issuer of securities could rely on" and that provided a reasonable basis for ING's disclosed opinion. *Id.* at *6. Not only did the Consolidated Complaint fail to allege that ING had not, in fact, believed these third-party generated reports, but it also disclaimed any allegation that ING did not believe what it said. *See* CAC ¶¶ 238, 248, 254. Moreover, ING clearly disclosed the limited bases supporting its opinion – it neither stated that additional, undisclosed favorable information supported its opinion nor guaranteed that its RMBS would be immune from future loss. Investors were thus able to judge the soundness of ING's opinion for themselves based on the information it provided. *MHC Mutual*, 2014 WL 3765717, at *7. In light of these circumstances, Petitioners cannot plausibly allege that ING lacked a reasonable basis for its disclosed opinions.

Indeed, even the plaintiffs in *Omnicare* – who are represented by the same counsel as Petitioners here – have conceded to this Court that, "[o]ften, an incorrect opinion can be rendered non-misleading simply by fully disclosing its underlying basis." Br. for the Resp'ts at 27, *Omnicare, Inc. v. Laborers*

Dist. Council Constr. Indus. Pension Fund, 134 S. Ct. 1490 (No. 13-435) (citing Restatement (Second) Torts § 539(1) (1977)). Thus, the plaintiffs in *Omnicare* have stated that "Omnicare might have avoided giving investors a misleading impression of the nature of the payments it was receiving from drug companies by disclosing the relevant terms of its contracts and its theory about why those payments were lawful." *Id.* That is precisely what ING did here by "fully disclosing [the] underlying basis" of its opinions. Under these circumstances, Petitioners could evaluate for themselves whether they agreed with the bases for ING's disclosed opinions and those opinions were not misleading, as the plaintiffs in *Omnicare* have acknowledged.

C. If the Court Affirms the Sixth Circuit in *Omnicare*, the Petition Should Also Be Denied

Even if the Court affirms the Sixth Circuit's decision in *Omnicare* and holds that a plaintiff need only plead that a statement of opinion is objectively "false" in order to establish liability under Section 11, the petition here should nonetheless be denied because Petitioners fail to meet even this standard.

In order "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* A complaint must therefore contain "factual content

that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 663. This standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678. Instead, a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and must permit the court "to infer more than the mere possibility of misconduct," *Iqbal*, 556 U.S. at 679.

As Judge Kaplan correctly held on two separate occasions, Petitioners here failed to include sufficient factual allegations to plausibly allege that ING's statements of opinion concerning its RMBS were objectively false. As an initial matter, the facts pleaded in support of Petitioners' allegations do not pertain to the actual securities held by ING. *See* Pet. App. at 33a ("Here, none of the [Consolidated Complaint's] allegations concern ING's assets."). As Judge Kaplan observed:

> In most cases, [Petitioners' allegations] describe conditions related to the individual mortgage loans, not the securities structured around them. None describe ING's assets – the allegations concern the market generally, other securities, or the actions of other institutions. Perhaps most importantly, the only allegations that concern Alt-A and subprime RMBS – the categories of assets ING owned – before September 2007 discuss the performance of tranches that were lower-rated, and therefore riskier and more prone to loss, than those that ING held.

Pet. App. at 33a-34a; *see also* Pet. App. at 60a-63a. Further, "[i]n many cases, [Petitioners'] allegations post-date the statements in the offering materials alleged to be misleadingly incomplete." Pet. App. at 33a.

Therefore, as Judge Kaplan correctly concluded, Petitioners' "allegations are, at best, consistent with a theory that ING's assets were 'extremely risky' . . . in September 2007 and therefore not of 'relatively high quality.'" Pet. App. at 34a. "But absent some factual allegations suggesting that ING's assets had been impacted by the general market conditions at the time the allegedly misleading statements were made, the [Consolidated Complaint] 'stops short of the line between possibility and plausibility' that the September 2007 Offering Materials were misleading." Pet. App. at 34a-35a (quoting *Twombly*, 550 U.S. at 557).

Accordingly, the allegations in the Consolidated Complaint do not satisfy even the Sixth Circuit's standard for opinion liability because they fail to state a plausible claim that ING's disclosed opinion was objectively "false," and the petition should be denied even if the Court affirms in *Omnicare* by adopting the Sixth Circuit's test.

D. Even if the Court Does Not Resolve the Question Presented in *Omnicare*, the Petition Should Be Denied

Even if the Court does not resolve the question presented in *Omnicare*, the petition here should still be denied because this case presents a poor

vehicle for considering the issue of opinion liability under Section 11.

As discussed above, Petitioners' complaint fails to plausibly allege that ING's disclosed opinion was objectively false. Every circuit to consider the issue of liability for statements of opinion under the federal securities laws – including the Sixth Circuit – has required the challenged opinion to be objectively false. Having failed to satisfy this threshold requirement, any decision issued by the Court in this case concerning the requirements for establishing the falsity of an opinion under Section 11 would be purely advisory.

Separately, this case also presents a poor vehicle for addressing the issue of opinion liability under Section 11 because Petitioners' claims are barred by the applicable one-year statute of limitations. 15 U.S.C. § 77m. As discussed above, the Second Circuit held that Petitioners' claims regarding the June 2007 Offering were time-barred because even the earliest Placeholder Complaint was filed more than one year after ING itself disclosed the allegedly omitted information. This holding applies equally to the claims regarding the September 2007 Offering, which alleged many of the same omissions.

Moreover, the Consolidated Complaint's inclusion of certain additional allegations concerning the September 2007 Offering – including its challenge to ING's opinion that it considered its RMBS assets "to be of limited size and of relatively high quality" – does not require a different result for two independent reasons. *First*,

it is well-established that a plaintiff need not be aware of every specific allegation for its claims to be time-barred; knowledge of the general claim is enough. *See, e.g.*, 2 Calvin W. Corman, *Limitation of Actions* § 11.5.1, at 186 (1991) ("Nor is the commencement of the statutory period tolled until the plaintiff can discover all the details of an alleged fraudulent scheme.").[6]

Second, the additional allegations concerning the September 2007 Offering that were first asserted in the Consolidated Complaint were based on disclosures made by ING in May 2008 – more than a year before the Consolidated Complaint was filed in September 2009. The additional allegations concerning the September 2007 Offering are therefore time-barred in their own right.[7]

Accordingly, the Court should decline to review the issue of opinion liability in this case, which should be dismissed on remand in any event.

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[6] *See also Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 410 (2d Cir. 1975) ("the time from which the statute of limitations begins to run is not the time at which a plaintiff becomes aware of all of the various aspects of the alleged fraud, but rather the statute runs from the time at which plaintiff should have discovered the general fraudulent scheme"), *abrogated on other grounds by Menowitz v. Brown*, 991 F.2d 36 (2d Cir. 1993).

[7] These additional allegations do not relate back to the Placeholder Complaints for limitations purposes because they present an entirely different theory than those earlier complaints. *See Mayle v. Felix*, 545 U.S. 644, 664 (2005) (habeas allegations arising from the same trial do not relate back unless "the original and amended petitions state claims that are tied to a common core of operative facts").

II. BECAUSE THE PETITION SHOULD BE DENIED UNDER ANY OUTCOME IN *OMNICARE*, THE PETITION NEED NOT BE HELD

For the foregoing reasons, the petition here should be denied regardless of how (or whether) the Court rules in *Omnicare*, and thus there is no need for the Court to hold the petition pending the outcome of that matter.

CONCLUSION

The petition for a writ of certiorari should be denied and should not be held pending the Court's resolution of *Omnicare*.

Respectfully submitted,

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