No. 13-1505

IN THE

Supreme Court of the United States

MARSHALL FREIDUS, RAY RAGAN, AND BELMONT HOLDINGS CORP., Individually and On Behalf of All Others Similarly Situated,

Petitioners,

v.

NG GROEP N.V., ING FINANCIAL HOLDINGS CORPORATION, ING FINANCIAL MARKETS LLC, UBS SECURITIES LLC, CITIGROUP GLOBAL MARKETS INC., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, WACHOVIA CAPITAL MARKETS, LLC, MORGAN STANLEY & CO. INCORPORATED, BANC OF AMERICA SECURITIES LLC, RBC CAPITAL MARKETS CORPORATION, J.P. MORGAN SECURITIES INC., HUIB J. BLAISSE, ERIC F. BOYER DE LA GIRODAY, PAUL M.L. FRENTROP, ALEXANDER H.G. RINNOOY KAN, A.H.J. RISSEEUW, STICHTING ING AANDELEN, J. HANS VAN BARNEVELD, JAN J.M. VERAART, HANS K. VERKOREN, ELI P. LEENAARS, TOM REGTULJT, MICHEL J. TILMANT, CEES MAAS, ABN AMRO INCORPORATED, A.G. EDWARDS & SONS, INC.,

Respondents.

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

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

STATUTES, RULES AND REGULATIONS

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INTRODUCTION

The petition here presents the same issue currently pending before the Court in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, __ U.S. __, 134 S. Ct. 1490 (2014) (petition for writ of certiorari granted): it presents the question of whether a statement of opinion in a registration statement that is objectively false is nonetheless excluded from the purview of Section 11, 15 U.S.C. §77k, unless the plaintiff can also allege that that the maker of the statement subjectively believed the statement was false. Indeed, the Court of Appeals affirmed the dismissal of the claim at issue here for only one reason: it found petitioner "Ragan failed to plausibly allege [respondent] ING did not believe [its] statement [that its Residential Mortgage Backed Securities were of 'relatively high quality'] at the time that it was made." *Freidus v. ING Groep, N.V.*, 543 F. App'x 93, 95 (2d Cir. 2013); Pet. App. at 5a.

Because the only basis for affirmance was precisely the issue the Court will address in *Omnicare*, a determination in *Omnicare* that the Court of Appeals' analysis is incorrect will certainly give rise to a "reasonable probability" that a remand would "determine the ultimate outcome of the litigation," which is the standard that the Court employs in determining whether to grant a petition, vacate and remand ("GVR"). *See generally Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). Moreover, should the Court for some reason not reach the merits in *Omnicare*, this case would be an appropriate vehicle in which to resolve the question.

Respondents oppose the petition, but do not dispute that this case raises the same legal question at issue in *Omnicare*. *See* Brief In Opposition ("BIO") at 14-16 (acknowledging petitioners' contention but not disputing it). Instead, respondents argue the merits, claiming that even if the Court rejected the rule applied by the Court of Appeals, they would still prevail. BIO at 21-27. Respondents' arguments are premature: the Court of Appeals has not passed on any of them. Nor do the respondents even acknowledge the Court's GVR jurisprudence; they do not address the Court's "reasonable probability" standard for determining whether the Court would issue a GVR. *See Lawrence*, 516 U.S. at 167. While respondents speculate as to how the future decision in *Omnicare* might be applied, there is certainly a "reasonable probability" that a remand here would "determine the ultimate outcome of the litigation," *see id.*, because petitioners have alleged that respondents' "high quality" opinion was false and misleading. CAC¶¶124, 126 (JA0060-62).[1]

Respondents also contend that if *Omnicare* does not reach the merits, the Court should nonetheless decline to grant review in this case. BIO at 27-29. These arguments, too, are based solely on the merits. They are based upon contentions that petitioners did not allege that ING's opinion was objectively false and that petitioners' claim would be rejected on statute-of-limitations grounds. Their arguments were not addressed by the Court of Appeals and are insubstantial in any event. Petitioners certainly alleged that ING's

[1] "CAC" refers to the Consolidated Amended Complaint. "JA" refers to the Joint Appendix filed in the Court of Appeals.

opinion was false, CAC¶¶124, 126 (JA0060-62), and respondents' affirmative limitations defense was not raised in the district court and thus is not properly before the Court (or the Court of Appeals).

Respondents thus offer no legitimate bases for denying the petition. The Court should hold it pending *Omnicare* or grant it in the event that it does not reach the merits in that case.

ARGUMENT

A. Petitioners Alleged that Respondents' "High Quality" Opinion Was False and Misleading

Petitioners alleged that respondents' opinion that their extremely risky assets were of "high quality" was false, CAC¶¶124, 126 (JA0060-62), and supported that claim by alleging facts, which respondents did not disclose, that demonstrated that respondents' residential mortgage-backed assets ("RMBS") were based upon pools of the most risky sorts of loans: up to 36% of ING's Alt-A portfolio (more than €8 billion) was composed of negative-amortization loans and as much as 41% (more than €12 billion) were hybrid variable-rate "Option" mortgages; up to 65% were from 2006 and 2007; and up to 68% of the negative-amortization loans, as well as an unknown percentage of other loans, were originated in California and Florida. CAC¶126 (JA0061-62). Consequently, respondents' RMBS were defaulting at a much faster and higher rate than RMBS comprised of conforming loans, thereby reducing the value of ING's portfolio and significantly increasing the likelihood of future default. *Id.*

These facts demonstrate that respondents' "high quality" opinion was false. As the Court has observed,

> conclusory terms in a commercial context are reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading. Provable facts either furnish good reasons to make a conclusory commercial judgment, or they count against it, and expressions of such judgments can be uttered with knowledge of truth or falsity just like more definite statements, and defended or attacked through the orthodox evidentiary process that either substantiates their underlying justifications or tends to disprove their existence.

Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1093 (1991). The facts withheld by respondents demonstrate the "absence" of a legitimate basis for respondents' opinion which "renders [it] misleading." *See id.*

Similarly, several lower courts acknowledge that an opinion embraces "three implicit factual assertions – '(i) that the statement is genuinely believed; (ii) that there is a reasonable basis for that belief; and (iii) that the speaker is not aware of any undisclosed facts tending to seriously undermine the accuracy of the statement.'" *Slayton v. Am. Express Co.*, 604 F.3d 758, 774 (2d Cir. 2010) (quoting an amicus brief filed by the SEC); *accord In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113 (9th Cir. 1989). Consequently, "[a]n opinion may still be misleading if it . . . knowingly omits undisclosed facts tending seriously to undermine the accuracy of the statement."

Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp., 632 F.3d 762, 775 (1st Cir. 2011); *accord City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 675 (6th Cir. 2005) ("selective disclosure" is actionable). Thus, respondents' opinion is "misleading" for failure to disclose "facts tending seriously to undermine the accuracy of the statement," *Nomura*, 632 F.3d at 775, namely, the extremely risky nature of the loans underlying respondents' assets.

B. Respondents' Merits-Based Arguments Offer No Basis for Denying the Petition Prior to Resolution of *Omnicare*

1. Respondents Ignore the Court's GVR Jurisprudence

Respondents urge the Court to deny the petition and decline to hold it pending resolution of *Omnicare*. In short, respondents contend that the Court should not determine whether, in light of its future decision in *Omnicare*, it should consider granting, vacating and remanding based on that decision. In so doing, respondents do not address the Court's standard in exercising its GVR discretion. *See generally Lawrence*, 516 U.S. 163.

In *Lawrence*, the Court stated that

> Where intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

Id. at 167; *accord Wellons v. Hall*, 558 U.S. 220, 225 (2010). The "reasonable probability" standard is not a demanding one: "the standard that we apply in deciding whether to GVR is somewhat more liberal than the All Writs Act standard, under which relief is granted only upon a showing that a grant of certiorari and eventual reversal are probable." *Lawrence*, 516 U.S. at 168 (citation omitted). Thus, the Court has described a grant of a GVR as "indicat[ing] that, in light of 'intervening developments,' there was a 'reasonable probability' that the Court of Appeals would reject a legal premise on which it relied and which may affect the outcome of the litigation." *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) (quoting *Lawrence*, 516 U.S. at 167). None of respondents' various arguments supporting denial of the petition address this standard.

Nor do respondents address the considerations that the Court has identified as being served by the GVR mechanism.

> In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the 'potential for unequal treatment' that is inherent in our inability to grant plenary review of all pending cases raising similar issues.

Lawrence, 516 U.S. at 167 (citation omitted). Respondents essentially ask the Court to adjudicate petition-

ers' claims in summary fashion without the benefit of briefing and without the benefit of the Court of Appeals' insight, and to deny petitioners application of the forthcoming rule in *Omnicare*, without explaining why the Court's GVR rationale should be discarded in this case.

2. Respondents' Arguments Are Insubstantial

a. The "Reasonable Basis" Scenario

Respondents speculate that if the Court rejects the standard applied by the Court of Appeals here – that there is liability for an opinion "'only to the extent that the statement was both objectively false and disbelieved by the defendant at the time it was expressed,'" *Freidus*, 543 F. App'x at 95 (quoting *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 110 (2d Cir. 2011)); Pet. App. at 5a – it may adopt a reasonable-basis test that respondents attribute to the Solicitor General under which there may be liability where "there is not a basis for the opinion that is reasonable under the circumstances." *See* BIO at 21. Under that scenario an allegation of subjective falsity would not be required. *See id.* Thus, respondents assume that, if the Court adopts that approach, "the Court of Appeals [here] would [necessarily] reject [the] legal premise on which it relied," *Tyler*, 533 U.S. at 666 n.6, because the Court would overrule *Fait* under that scenario. In that event, there would certainly be a "reasonable probability" that that change in the law "may affect the outcome of the litigation." *See id.*

Indeed, petitioners have already explained that, based on facts concealed by respondents, there was no reasonable basis for respondents' "high quality"

opinion based on the analysis set forth in *Virginia Bankshares*, 501 U.S. at 1093, and that respondents' opinion omitted "facts tending seriously to undermine the accuracy of the statement." *Nomura*, 632 F.3d at 775. *See supra* at 4-6. Those arguments have not been briefed on the merits in this Court – indeed, the merits cannot be briefed because the Court's resolution of *Omnicare* is unknown – and the Court lacks the Court of Appeals' "insight" into the issues because it did not address them. *See Lawrence*, 516 U.S. at 167. Respondents' speculative "reasonable basis" scenario thus provides no basis for declining to hold the petition.

Again arguing the merits, respondents suggest that if the Court adopts respondents' assumed "reasonable-basis" test, then the Tenth Circuit would reject petitioners' claim on the merits. *See* BIO at 22-24 (citing *MHC Mut. Conversion Fund, L.P. v. Sandler O'Neill & Partners, L.P.*, No. 13-1016, 2014 U.S. App. LEXIS 14769 (10th Cir. Aug. 1, 2014)). But the issues raised in *MHC* have nothing to do with this case. There, the defendant company acknowledged losses in its mortgage-backed securities but "the company stated that it had conducted internal analyses and consulted independent experts and now expected the level of delinquencies and defaults to level off and the market for its securities to rebound soon." *MHC*, 2014 U.S. App. LEXIS 14769, at *2-*3. Plaintiffs challenged only this prediction; they did not allege that, as is the case here, the company concealed "'facts tending to seriously undermine the accuracy of the statement.'" *Slayton*, 604 F.3d at 774 (citation omitted).

Nor did the *MHC* plaintiffs' claim implicate the Court's observation that "[p]rovable facts either fur-

nish good reasons to make a conclusory commercial judgment, or they count against it." *Virginia Bankshares*, 501 U.S. at 1093. Petitioners here, unlike the *MHC* plaintiffs, allege facts that "count against" respondents' "conclusory commercial judgment" about the purported high quality of their assets. *See id.* *MHC* is thus inapposite, and certainly does not affect in any way the "reasonable probability" that if the Court rejects the only basis for the Court of Appeals' affirmance – its requirement of subjective falsity – that decision "may affect the outcome of the litigation." *Tyler*, 533 U.S. at 666 n.6.

Respondents also cite a single, out-of-context portion of a sentence from the plaintiffs-respondents' brief in *Omnicare* to the effect that "'[o]ften, an incorrect opinion can be rendered non-misleading simply by disclosing its underlying basis.'" BIO at 24 (citation omitted). While that may "***often***" be true, nothing in the quoted clause suggests that revealing the underlying basis for an opinion somehow cures the opinion-maker's concealment of "facts tending seriously to undermine the accuracy of the statement." *Nomura*, 632 F.3d at 775.

b. The Scenario Under Which the Court Affirms *Omnicare*

Respondents also contend that even assuming a future affirmance in *Omnicare*, the Court should still deny the petition here based on an analysis by the district court that the Court of Appeals did not reach in affirming the dismissal. *See* BIO at 25-27. Again, contrary to the Court's approach in analyzing whether to GVR, respondents seek an adjudication on the merits by the Court on a basis not passed upon by the appel-

late court below and not fully briefed. *See Lawrence*, 516 U.S. at 167 (a GVR "assists this Court by procuring the benefit of the lower court's insight before we rule on the merits").

Nor do respondents even argue that if the Court rejects the sole basis for the Court of Appeals' affirmance that there is no "reasonable probability" that a remand to the Court of Appeals, which has not addressed the issues raised by respondents, "may affect the outcome of the litigation." *Tyler*, 533 U.S. at 666 n.6. In fact, even the district court acknowledged that 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."'" BIO at 27 (quoting Pet. App. at 34a). Given that respondents withheld the facts that made their assets "extremely risky," *see id.*, there is at least a reasonable probability that the complaint would support a claim that respondents' opinion was "misleading" under *Virginia Bankshares*, 501 U.S. at 1093, or concealed "'facts tending to seriously undermine the accuracy of the statement'" under *Slayton*, 604 F.3d at 774 (citation omitted), and related cases. *See*, *e.g.*, *Nomura*, 632 F.3d at 775; *Bridgestone*, 399 F.3d at 675; *Apple*, 886 F.2d at 1113. Respondents' arguments thus do not justify denying the petition.

C. If the Court Does Not Reach the Merits in *Omnicare*, It Should Grant This Petition

Finally, respondents contend that the Court should deny the petition even if the Court does not reach the merits in *Omnicare*. First, respondents, offering the same meritless argument just discussed, claim this

case is a poor vehicle. On the contrary, the issue before the Court in *Omnicare* is squarely presented: the Court of Appeals found petitioner "Ragan failed to plausibly allege [respondent] ING did not believe [its] statement [that its Residential Mortgage Backed Securities were of 'relatively high quality'] at the time that it was made." *Freidus*, 543 F. App'x at 95; Pet. App. at 5a. That is precisely the issue in *Omnicare*. Moreover, respondents' quibbles about the pleadings are insubstantial: they concede that petitioners allege that respondents concealed facts that made their assets "extremely risky," *see* BIO at 27, thus opening their opinion to attack as "misleading" under *Virginia Bankshares*, 501 U.S. at 1093, or as concealing "'facts tending to seriously undermine the accuracy of the statement.'" *Slayton*, 604 F.3d at 774 (citation omitted).

Second, respondents' claim that they have a statute-of-limitations affirmative defense is of no moment. *See* BIO at 28-29. They did not raise it in the district court, and the Court of Appeals did not pass on it. It is no basis for declining to grant the petition.

CONCLUSION

The Court should hold the petition pending *Omnicare*. If it affirms *Omnicare*, or otherwise overrules *Fait*, it should GVR this case. If it does not reach the merits in *Omnicare*, it should grant the petition.

Respectfully submitted,

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DATED: September 24, 2014

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