

IN THE
Supreme Court of the United States

STIEFEL LABORATORIES, INC.,
AND CHARLES STIEFEL,

Petitioners,

v.

TIMOTHY FINNERTY,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

REPLY BRIEF

TODD D. WOZNIAK
GREENBERG TRAURIG, LLP
Terminus 200
3333 Piedmont Road NE
Suite 2500
Atlanta, Georgia 30305
(678) 553-2100

ELLIO H. SCHERKER
Counsel of Record
HILARIE BASS
DAVID A. COULSON
BRIGID F. CECH SAMOLE
GREENBERG TRAURIG, P.A.
333 S.E. Second Avenue
Suite 4400
Miami, Florida 33131
(305) 579-0579
scherkere@gtlaw.com

Counsel for Petitioners

258187



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

	<i>Page</i>
RULE 29.6 STATEMENT	i
TABLE OF CONTENTS.....	ii
TABLE OF CITED AUTHORITIES	iii
REPLY BRIEF FOR PETITIONERS STIEFEL LABORATORIES, INC., AND CHARLES STIEFEL.....	1
I. THE CIRCUITS ARE DIVIDED ON THE EXISTENCE AND SCOPE OF A DUTY TO UPDATE PRIOR TRUTHFUL CORPORATE STATEMENTS.....	2
II. THIS COURT'S REVIEW IS REQUIRED TO ESTABLISH A UNIFORM RULE	6

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases	
<i>Arlinghaus v. Ritenour,</i> 622 F.2d 629 (2d Cir. 1980)	3
<i>Citizens United v. F.E.C.,</i> 558 U.S. 310 (2010)	3
<i>Exxon Shipping Co. v. Baker,</i> 554 U.S. 471 (2008)	3
<i>Finnerty v. Stiefel Labs., Inc.,</i> 2013 WL 3777508 (11th Cir. July 15, 2013)	2
<i>Finnerty v. Stiefel Labs., Inc.,</i> No. 12-13947, 2013 WL 2458093 (11th Cir. May 29, 2013)	2
<i>Fry v. UAL Corp.,</i> 895 F. Supp. 1018 (N.D. Ill. 1995), <i>aff'd</i> , 84 F.3d 936 (7th Cir.), <i>cert. denied</i> , 519 U.S. 987 (1996)	5
<i>Gallagher v. Abbott Labs.,</i> 269 F.3d 806 (7th Cir. 2001)	4
<i>Grassi v. Info. Res., Inc.,</i> 63 F.3d 596 (7th Cir. 1995)	5-6

	<i>Cited Authorities</i>	<i>Page</i>
<i>Higginbotham v. Baxter Int'l, Inc.,</i> 495 F.3d 753 (7th Cir. 2007)	4, 5	
<i>In re Burlington Coat Factory Sec. Litig.,</i> 114 F.3d 1410 (3d Cir. 1997)	6, 7	
<i>Lebron v. Nat'l R.R. Passenger Corp.,</i> 513 U.S. 374 (1995)	3	
<i>Singleton v. Wulff,</i> 428 U.S. 106 (1976)	3	
<i>Stransky v. Cummins Engine Co.,</i> 51 F.3d 1329 (7th Cir. 1995)	4, 5, 6	
<i>United States v. Schiff,</i> 602 F.3d 152 (3d Cir. 2010)	7	
<i>United States v. Wells,</i> 519 U.S. 482 (1997)	3	
<i>United States v. Williams,</i> 504 U.S. 36 (1992)	2, 3	
<i>Va. Bankshares, Inc. v. Sandberg,</i> 501 U.S. 1083 (1991)	3	
<i>Yee v. City of Escondido, Cal.,</i> 503 U.S. 519 (1992)	3	

Cited Authorities

	<i>Page</i>
Statutes and Other Authorities	
Harold S. Bloomenthal & Samuel Wolff, 3C Sec. & Fed. Corp. Law § 18:23 (2d ed. 2015).	1
Jeffrey A. Brill, <i>The Status of the Duty to Update</i> , 7 Cornell J. L. & Pub. Pol'y 605, 677 (1998)	1, 4, 5, 8

**REPLY BRIEF FOR PETITIONERS
STIEFEL LABORATORIES, INC., AND
CHARLES STIEFEL**

The “bewildering case law” addressing “whether and when a company has a duty to update a prior disclosure which was originally accurate but became materially inaccurate, misleading, or incomplete due to the passage of time or subsequent events,” Jeffrey A. Brill, *The Status of the Duty to Update*, 7 Cornell J. L. & Pub. Pol'y 605, 677 (1998) (hereinafter, *Duty to Update*), cannot possibly be harmonized. Finnerty’s attempts nonetheless to shield the Eleventh Circuit’s decision from review are unavailing. As set forth in SLI’s Petition (Pet. 10-17), “[i]t would be an understatement of major proportions to say that the federal courts are not in agreement as to whether federal securities law imposes a ‘duty to update.’” Harold S. Bloomenthal & Samuel Wolff, 3C Sec. & Fed. Corp. Law § 18:23 (2d ed. 2015) (hereinafter, Bloomenthal & Wolff).

Numerous commentators have urged that this issue was ripe for this Court’s review even before the Eleventh Circuit’s decision in this case, e.g., Bloomenthal & Wolff, *supra* at § 18:23; *Duty to Update*, *supra* at 677-78, and the Eleventh Circuit’s decision – far from being a fact-specific outlier – has exacerbated that conflict, creating further uncertainty, both in corporate boardrooms and federal courts. There is an acute need for this Court’s review, and the Court will not likely find a better vehicle for that review than the Eleventh Circuit’s uncabined adoption of an amorphous “duty to update.”

I. THE CIRCUITS ARE DIVIDED ON THE EXISTENCE AND SCOPE OF A DUTY TO UPDATE PRIOR TRUTHFUL CORPORATE STATEMENTS

Finnerty tries to avoid review with a meritless “waiver” argument. (Opp. 9-12). The Eleventh Circuit fully embraced a duty to update “forward-looking statements,” true when made, based on subsequent events (App. 8a-9a, 14a), such that the precise issue raised in the Petition was “passed upon below” and is therefore properly before this Court. *United States v. Williams*, 504 U.S. 36, 41 (1992). Finnerty’s argument, such as it is, seeks to take advantage of his own belated assertion of a duty-to-update theory, and he fails to establish any basis for evading this Court’s review.

Finnerty did not articulate anything resembling a distinct duty-to-update theory until his response brief in the Eleventh Circuit, which includes citations to Second and Third Circuit decisions on the duty to update. Br. for Plaintiff-Appellee, *Finnerty v. Stiefel Labs., Inc.*, No. 12-13947, 2013 WL 2458093, at *15-16 (11th Cir. May 29, 2013). SLI responded in kind, Reply Br., *Finnerty v. Stiefel Labs., Inc.*, 2013 WL 3777508, at *7 (11th Cir. July 15, 2013). The Eleventh Circuit – eschewing a decision based on the established duty to *correct*, upon which theory the case had been tried – adopted instead its version of a duty to update. (App. 8a, 14a-16a). SLI appropriately challenged the Eleventh Circuit’s ruling on rehearing (Pet. for Rehearing, *Finnerty v. Stiefel Labs., Inc.*, No. 12-13947 (July 18, 2014)), but to no avail.

It is frivolous for Finnerty to assert that SLI waived its right to seek review of an issue that Finnerty himself injected into the case, and which the Eleventh Circuit seized upon to avoid SLI’s meritorious attack on the theory Finnerty actually tried.¹ This Court’s “traditional rule … precludes a grant of certiorari only when the question presented was not pressed or passed upon below,” a rule that “operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon.” *Williams*, 504 U.S. at 41 (emphasis added); *accord Citizens United v. F.E.C.*, 558 U.S. 310, 323 (2010); *United States v. Wells*, 519 U.S. 482, 488 (1997); *Lebron*, 513 U.S. at 379; *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n. 8 (1991). The issue indisputably was “passed upon”; and inter-circuit conflict is thus properly before this Court.

Finnerty’s argument that the precedent on the existence and extent of a duty to update “is harmonious” (Opp. 18) cannot be taken seriously.

¹ Even if the issue had not been fully briefed, the Eleventh Circuit had full discretion to address the duty-to-update theory raised by Finnerty in his brief. *E.g., Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008); *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *Arlinghaus v. Ritenour*, 622 F.2d 629, 638 (2d Cir. 1980) (appellate court may “raise[] the decisive theory *sua sponte*,” so long as parties have “a full opportunity” to address the issue). Moreover, to the extent that the duty-to-update theory became more of a feature after the Eleventh Circuit’s decision, SLI’s position throughout has been that – regardless of Finnerty’s shifting theories – there was *no* duty to disclose the preliminary merger discussions. See *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (petitioner may present new argument to support what has been its consistent claim); *accord Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534-35 (1992).

Duty to Update, *supra* at 678 (“[w]hile the courts have almost universally accepted the duty to correct, several ... cases have refused to recognize a duty to update, and most are averse to imposing it on companies”). He attempts to shoehorn *all* of the disparate cases into two categories: “run-of-the-mill, ordinary projections, statements of historical fact, and indefinite expressions of optimism”; and “forward-looking statements concerning fundamental corporate policy.” (Opp. 20-23). As Finnerty sees it, the first category of statements “cannot give rise to a duty to update,” while such a duty may arise from “forward-looking statements,” and the circuits are in complete agreement on this dichotomy. *Id.* at 21-22. This is simply – and demonstrably – not so.

The Seventh Circuit has never, since declining to adopt a duty to update in *Stransky v. Cummins Engine Co.*, 51 F.3d 1329, 1332 (7th Cir. 1995), wavered on the existence of such a duty. E.g., *Higginbotham v. Baxter Int'l, Inc.*, 495 F.3d 753, 760-61 (7th Cir. 2007); *Gallagher v. Abbott Labs.*, 269 F.3d 806, 808-10 (7th Cir. 2001). (Pet. 13-15).² And

² Finnerty seizes on a footnote in the *Stransky* opinion. 51 F.3d at 1332 n.4 (noting that *Stransky* had contested “only statements that were predictions or projections”; “express[ing] no opinion on whether the outcome would be the same if a plaintiff contested statements of intent to take a certain action”). (Opp. 22-23). Thus, although the Seventh Circuit unambiguously has rejected the notion that “a duty to update arises when a company makes a forward-looking statement – a projection – that because of subsequent events becomes untrue,” *Stransky*, 51 F.3d at 1332 (footnotes omitted), Finnerty suggests that the Seventh Circuit might recognize a duty to update “statements of intent to take a certain action.” (Opp. 23-24). No court has followed that course since *Stransky*’s announcement in 1995, and at least one district court, following *Stransky*, has ruled that “a statement of intent – like a projection or prediction – will (continued . . .)

Finnerty attempts to paint too wide a swath with his “historical statement of fact” characterization. (Opp. 23-24).

For example, the Seventh Circuit’s decision in *Higginbotham* decision did not involve mere “historical earnings reports” (Opp. 23), but rather the defendant company’s receipt of information that its overseas unit was falsely reporting sales and revenue, which information plaintiffs asserted should have been reported immediately, rather than in a 10-Q. The Seventh Circuit rejected that contention under *Stransky*, “distinguish[ing] between a duty to update disclosures by adding the latest information and a duty to correct disclosures false when made.” *Higginbotham*, 495 F.3d at 760-61. There is no support in the case law for the notion that Finnerty could have prevailed on his claim in the Seventh Circuit. Under that circuit’s uniform law, “a company has no duty to update forward-looking statements merely because changing circumstances have proven them wrong.” *Grassi v.*

(... continued)

result in liability only if the plaintiff can establish that it was not made in good faith or upon a reasonable basis.” *Fry v. UAL Corp.*, 895 F. Supp. 1018, 1052 (N.D. Ill. 1995), *aff’d*, 84 F.3d 936 (7th Cir.), *cert. denied*, 519 U.S. 987 (1996); see *Duty to Update*, *supra* at 647 (“[c]ourts deciding duty to update cases in the Seventh Circuit after *Stransky* have not cited the case to support this potential recognition of a duty to update statements expressing intent to take a particular action,” but “have cited *Stransky* in support of decisions that do not recognize a duty to update” (footnotes omitted)). To the extent that the *Stransky* footnote could be exploited to drive a chink into the Seventh Circuit’s armor on this issue, that possibility serves only further to demonstrate the need for a definitive resolution by this Court of whether or to what extent, there should be a duty-to-update basis for securities fraud liability.

Info. Res., Inc., 63 F.3d 596, 599 (7th Cir. 1995) (quoting *Stransky*, 51 F.3d at 1333 n.9).

That is the law in the Eighth Circuit and although not as definitively, in the Fourth Circuit as well. (Pet. 15). It is *not* the law in the Third Circuit, although the narrow duty to update recognized in that circuit, *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1433-34 & n.20 (3d Cir. 1997) (Pet. 15-17), on which the Third Circuit has yet to grant relief to a securities fraud plaintiff, is irreconcilable with the Eleventh Circuit’s newly created, unbounded duty to update. (App. 14a-16a).

II. THIS COURT’S REVIEW IS REQUIRED TO ESTABLISH A UNIFORM RULE

There are two short answers to Finnerty’s attempts to characterize the Eleventh Circuit’s decision as a unique outlier and thus “a poor candidate for certiorari.” (Opp. 12-17). First, the opinion *expressly* adopts a duty to update “forward-looking statements – statements that contain ‘an implicit factual representation that remain[s] ‘alive’ in the minds of investors as a continuing representation” (App. 8a) (quoting *Burlington*, 114 F.3d at 1432), and the Seventh Circuit has, as noted above, held directly to the contrary. *Stransky*, 51 F.3d at 1332. The “unique fact[s]” upon which Finnerty relies to argue that the Court should not address the circuit split in this case (Opp. 12-14) had no impact on, and do not limit, the Eleventh Circuit’s broad holding. The Court is confronted with two conflicting rules of law – if nothing else, with the Third and Eleventh Circuits adhering to one rule, and the Seventh Circuit adhering to another – and this case presents itself as an entirely appropriate vehicle for resolving the law on this important issue.

Second, the Eleventh Circuit adopted the forward-looking principle from *Burlington* – but without the stringent limitation imposed by the Third Circuit, *i.e.*, that the duty to update has only “been plausible in cases where the initial statement concerns ‘fundamental[] change[s]’ in the nature of a company – such as merger, liquidation, or takeover attempt – and when subsequent events produce an ‘extreme’ or ‘radical change’ in the continuing validity of that initial statement.” *United States v. Schiff*, 602 F.3d 152, 170-71 (3d Cir. 2010) (emphasis omitted) (quoting *Burlington*, 114 F.3d at 1433-34 & n.20).³ Instead, the Eleventh Circuit created a dangerously unbounded duty to update with “facts that were necessary to make its ‘will continue to be privately held’ statements not misleading,” refusing to establish rules for “whether SLI had an immediate duty to update the public when the negotiations … became serious,” and “entrust[ing] the timing of disclosures to the business judgment of corporate officers where, as here, a duty to update exists.” (App. 14a).⁴

³ The Eleventh Circuit would have encountered significant difficulty in attempting to satisfy that standard in this case. SLI’s August 2007 announcement of the Blackstone investment not only represented a major change in SLI’s corporate governance, but raised – for the first time – the possibility of an IPO in SLI’s future and further cautioned that “[s]enior management continues to evaluate all options when looking at the long-term financial needs of the company.” (App. 3a-4a; Pet. 3-4). Preliminary discussions with potential merger partners would hardly represent an “extreme” or “radical change” from the disclosures in that statement. The Eleventh Circuit’s decision thus cannot possibly be read as adopting the Third Circuit’s limitations on the duty to update.

⁴ Finnerty attempts to avoid review because SLI was a privately held entity and Finnerty, as an ESBP participant, was putting his shares to SLI in a process that required SLI automatically to purchase the shares. (Opp. (continued . . .)

The long-simmering conflict among the circuits on the question whether the courts should create a duty-to-update liability theory and, if it is appropriate to do so, the precise contours of such a theory, has been escalated by the Eleventh Circuit’s decision to a level that warrants this Court’s review. Absent a definitive resolution, “companies remain uncertain of their duties with respect to updating prior disclosures, and will remain reluctant to make forward-looking statements,” while “shareholders and their lawyers are uncertain whether companies have breached a duty to correct, a duty to update, or whether a duty to update exists at all.” *Duty to Update, supra* at 677 (footnote omitted). The need for this Court’s review is pressing and imminent.

(. . . continued)

12-17). But the Eleventh Circuit declined to “address Finnerty’s other theories of nondisclosure,” beyond the duty-to-update theory on which the court decided the case, and further refused to “answer the question of whether SLI is a ‘close corporation’ with a fiduciary duty to disclose material facts before trading in its own stock.” (App. 13a n.4, 14a n.5).

Respectfully submitted,

Todd D. Wozniak
Greenberg Traurig, LLP
Terminus 200
3333 Piedmont Road
NE, Suite 2500
Atlanta, Georgia 30305
Tel: 678.553.2100

Elliot H. Scherkere
Counsel of Record
Hilarie Bass
David A. Coulson
Brigid F. Cech Samole
Greenberg Traurig, P.A.
333 S.E. Second Avenue
Suite 4400
Miami, Florida 33131
Tel: 305.579.0579
scherkere@gtlaw.com

Counsel for Petitioners

February 20, 2015