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アメリカのクラスアクション・代表訴訟の最近の動向－証券クラスアクション

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はじめに

Ⅰ．最近の最高裁判例　～Omnicare 判決の検討～

Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund, 135 S. Ct. 1318 (2015)

１．事実の概要と判旨

（１）事実の概要

O 社は、介護施設の長期入所者のために調剤サービスを提供する国内最大規模の会社である。2005 年 12 月、O 社は、普通株式の公募を行い、SEC に登録届出書を提出した。本件で問題となった記載は次の 2 点である。「①我々は、他の医療サービス提供者との契約の定め、我々の薬剤提供者、および我々の調剤業務が、適用される連邦法および州法を遵守していると考える。②我々は、製薬業者との契約の定めが、我々がサービスを提供する医療サービス制度および患者に価値をもたらすこととなる法的かつ経済的に有効なものであると考える。」

なお、O 社は、上記の法的意見に次のような警告を付していた。すなわち、①の記載と同頁には、州が着手した製薬業者に対する何件かの法執行活動(enforcement actions)に言及し、調剤薬局への支払いに関する諸法は、将来、O 社の解釈および適用とは異なる方法で解釈されうるとの警告がなされ、②の記載の傍には、連邦政府が製薬業者による薬局へのリベートについて重大な懸念を示していることを述べるとともに、このような値引きがなされなければ事業は難しくなるかもしれないとの警告が記載されていた。

2006 年 1 月、O 社の施設において、製薬業者からのリベートの受け取りに関して、複数の強制捜査が行われた。主導的原告である Funds は、上記公募に応じて普通株式を取得した者である。Funds は、O 社がキックバックを禁止する諸法に違反したことから、O 社の法令遵守についての上記①②の記載が、重要な虚偽記載に該当し、また記載が誤解をもたらさないために必要な重要な事実の記載を省略したと主張して、O 社およびその役員らを相手方として、1933 年証券法 11 条に基づき、損害賠償を請求した。

第一審の連邦地方裁判所は、O 社がその内容を実際に信じていなかった意見表示を行ったと Funds が主張していないとして、却下申立を認めた（2012 WL 462551 (E. D. Ky. Feb. 13, 2012)）。これに対し、原審の第 6 巡回区控訴裁判所は、Funds は意見表示の客観的な虚偽を主張すれば足り、O 社の誰かが意見を信じていなかったことまで訴答・証明する必要はないとして、この点についての地裁の判断を破棄した。

（２）本件原審の判断（719 F. 3d 498 (6th Cir. 2013)）

a）11 条が発行者につき厳格責任を課す規定で、規則 10b-5 のように被告の欺罔の意図を要求していない点を強調。

b）Virginia Bankshares 事件の法廷意見もスカーリア判事の意見も、14 条 a 項や規則 10b-5 の意見表明の要件としては、異論ない。

c）11 条は表示者の内心(state of mind)の立証を要求しないから、Virginia Bankshares 判決の主観的要件（表示当時、その表示が虚偽であると知っていた）は、厳格責任を定める 11 条の要件として採用できない。

（３）判決の要旨　（Kagan 判事執筆）

（ア）事実と意見の相違について

Funds は、「我々は法を守っていると考える。」という表示が、「我々は実際に法を守っている」ことを伝えるものであるという。事実の表示（そのコーヒーは熱い）は、あるものについての確実さを表すのに対し、意見の表示（そのコーヒーは熱いと思う）はそうではない。議会は、「真実でない表示」ではなく、「事実についての真実でない表示」についてのみ発行者に責任を負わせて、11 条の前半部分においてまさにその違いを効果的に用いたのである。

（イ）意見表示が事実表示の責任を生じさせうる場合について

いずれの意見表示も１つの事実を明白に表している。すなわち、表示者がその述べた考えを実際に有していることである。製品の品質についての CEO の表示（「私は、我々の TV が市場で利用しうる最高の解像度を備えていると考える。」）は、その TV が 2 番目であることを当該 CEO が知っていたならば、事実、つまり、自己の考えという事実についての不実の表示となるであろう。そして、法令遵守（「私は、我々の販売業務が合法であると考える。」）についての表示も同様に、その会社が法を犯していると考えていたならば、内心の状態を偽って述べたことになるであろう。このような場合、発行者は 11 条の前半部分の責任を負うであろう。

さらに、CEO が「我々は競合他社が利用できない特許技術を用いているので、私は、我々の TV が利用可能な最高の解像度を備えていると考える。」と述べた場合、かかる表示は、表示者の内心だけでなく、同社が特許技術を利用しているという基礎的事実をも述べていると理解しうる。よって、11 条の責任は、表示者が表明した考えを有しない場合だけでなく、提示した裏付けとなる事実が真実でない場合にも生ずるのである。

Funds が問題にする２つの文は、純粋な意見の表示である。Funds は、O 社が意見を誠実に有していたかを主張していない。O 社の考えが誤りであることが判明したという Funds の主張は、それだけでは 11 条前半の責任を生じさせない。

（ウ）意見表示が事実についての誤解をもたらす表示となる場合について

表示が誤解を生じさせるか否かは、合理的な投資家の立場によって決せられる。合理的な投資家は、状況によっては、表示者がその意見をどのように形成したのかについての事実、換言すると、そのような見解をもつ表示者の根拠についての事実を伝えるものであると意見表示を理解するかもしれない。「我々は、我々の行為が合法であると考える。」という法令遵守に関する簡単な例でいえば、弁護士に相談しないで発行者がそのような表示をするならば、その表示は誤解を生じさせるような不完全なものである。投資家は、結果的に法的意見が誤りとなりうることは認識しているが、このような表明が何らかの意味のある法的な調査に依拠することを期待する可能性が高い。同様に、弁護士の反対の助言にもかかわらず、または連邦政府の異なる立場を知りつつ、発行者がそのように表示をした場合、投資家は、発行者がその意見を信じていることだけでなく、その当時発行者が有していた情報に当該意見が完全に整合的であることを期待する。よって、登録届出書が、意見表示に関して発行者の調査や知識についての重要な事実を省略しており、かつ、それらの事実が合理的な投資家がその表示から受け取ることと矛盾する場合、11 条の省略の責任が生ずる。

合理的な投資家は、意見が相対立する事実の比較検討に基づくこともあると理解する。たとえば、法令遵守についての意見を述べる際に、年上の 6 人の弁護士が承認をしたのに対し、若手の弁護士 1 人が業務の合法性について疑念を表明したことを開示しなかった場合、たとえ少数者の立場が最終的に正しかったとしても、その省略は誤解をもたらす意見表示とはしないだろう。合理的な投資家は、発行者が知っているすべての事実がその意見表示を裏付けることを期待していない。

さらに、省略が意見表示に誤解をもたらすものとするか否かは常に文脈に左右される。投資家は、SEC に提出される公式な書類である登録届出書に含まれる意見が、根拠のない、思いつきの判断を反映するものであるとは期待しないし、期待しないことは正当である。同時に、投資家は、事実であれ、意見であれ、間接的表現(hedges)や免責文言、そして明らかに矛盾する情報を含む、すべての周辺の記載に照らして、書類の各表示を読む。そして投資家は、関係する業界の慣行や実務を考慮に入れる。11 条は、このような適切な読解と一致しない重要な事実についての省略に対してのみ責任を生じさせるのである。

（エ）意見表示への萎縮効果について

投資家は、その省略により、適正かつ文脈の中で記載を読む合理的な者にとって誤解を生ずる意見表示となるような、発行者の意見の根拠となる特定の（かつ重要な）事実、すなわち、発行者が行いまたは行わなかった調査や、発行者が有しまたは有していなかった認識についての事実を明示しなければならない。これは投資家にとって小さな負担ではない。11 条の省略の責任を免れるため、発行者は、意見の根拠を明らかにするだけで、ある

いは、その考えについての真の躊躇を明確にするだけで十分である。

（オ）スカーリア判事の一部同意および結論同意意見

法廷意見は、私またはコモンローが考えるよりもはるかに多くの意見表示が追加の事実を伝えると考えているので、一部のみ同意する。

法廷意見の 11 条の省略条項の意見表示への拡大的な適用は、不実表示の広範な領域を創り出し、実際にコモンローのルールと反対の結果を生ずる。裁判所は、合理的な投資家は登録届出書のすべての意見について合理的な根拠を正当に期待すると判示する。しかし、このような考え方はコモンローに合致しない。

また、「我々は、我々の行動が合法であると考える。」という意見表示が、「我々はこの意見を発表する前に意味のある法的調査を行った」という事実の黙示的な表明を伝えると理解するのは、私には奇異に思える。会社の行動が合法であると結論づける際に、意味のある法的調査よりむしろ、取締役は業界の慣行や従来の経験または規制当局からの助言など依拠することもあるという現実を無視するのはおかしい。当裁判所のルールは、登録届出書に自発的に行ったすべてのトピックにつき専門性の推定を採用するものである。

登録届出書への記載義務がある事項については経営者が専門家であり、このような推定の採用は合理的である。しかし、法令遵守は届出書への記載が特に要求されておらず、経営者が自発的な情報提供において「我々は～と考える」を前置きしたときは、これは我々の専門分野ではないという事実を警告する。

意見表示が合理的な調査を暗示することを両当事者が知っていたとしても、調査の内容につき両当事者の意見が実際のところ異なる場合、話し手は、主観的に欺罔を意図していないならば、詐欺的不実表示の責任を負わない。

※トーマス判事の結論同意意見　＜略＞

２．検討

（１）1933 年証券法 11 条の規定の概要

登録届出書の虚偽記載に関する証券取得者に対する民事責任規定

責任対象者（11 条 a 項各号）：登録届出書の署名者（発行者含む）、取締役、会計士等の専門家、引受人）

･･･registration statement, ･･･, ①contained an untrue statement of a material fact or ②omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading,･･･

※発行者以外の者：免責事由、デュー・ディリジェンスの抗弁（11 条ｂ項）

※発行者：免責事由の定めなし。原告は、重要な虚偽記載または省略を主張・立証すれば足りる。善意(innocent)の虚偽記載についても責任を負う。1934 年法 10 条ｂ項で要求される被告の欺罔の意図(scienter)の主張・立証が不要。絶対責任 or 厳格責任といわれる

（Herman & MacLean v. Huddleston, 459 U. S. 683, 687 (1983)）。

（２）重要な事実についての真実でない表示［判旨（イ）］
－意見表示が 11 条①の責任を生じさせる場合

11 条①は「事実」についての表示を問題にする

「意見」と「事実」の違い［判旨（ア）］

→　本判決は、「意見」が「事実」についての表示といえる場合を２つ挙げる

ａ．意見表示は、表示者がその表示した考えを実際に有しているという「事実」を示すもの　⇒　表示者がその考えを実際に有していないとき、①の責任

ｂ．意見表示のなかで意見の裏付けとなる事実を提示するもの（特許取得済みの技術を用いた TV の例）　⇒　２つの事実を含む（表示者の内心＋技術利用した TV）。その事実が真実でないとき、①の責任。裏付けとなる根拠だけに虚偽があった場合も？

cf. 内心では表示した通り考えていなくても、結果的に表示が正確であった場合は？

→　11 条の①責任は生じない。誰かに損害を与えるものでないし、内心の不純な点を争えるなら、取締役は嫌がらせ(strike)訴訟に脅かされるので、1934 年法 14 条ａ項の責任を生じさせないと判示した Virginia Bankshares, Inc. v. Sandberg, 501 U. S. 1083, 1095-96 (1991)を引用して、11 条においても同様であるとした（本判決・脚注 2)。⇒　主観的虚偽だけでは責任発生しない趣旨と思われる。

本件：O 社の表示した２つの文は単純な意見。Funds は O 社の考えが誠実でなかったという主張をしていないので、①の責任は生じない。

（３）重要な事実についての主略［判旨（ウ）］
－意見表示が 11 条②の責任を生じさせる場合

（ｉ）11 条①の要件との違い

①は、「事実についての表示 statement)」であるのに対し、②の「表示(statement)」は、①のように修飾を受けていないので、「事実と意見」の両方を含み、事実や意見が誤解を生じないようにするために必要な重要「事実」の省略について責任が生じる（本判決・脚注 4)。

（ⅱ）合理的投資家基準の採用

誤解をもたらす(misleading)か否か･･･合理的な投資家を基準

文面上は正確でも、合理的な投資家にとって、事実を省略したことで誤解をもたらすような意見表示となるのは、どのような場合か？

cf. O 社の主張：合理的な投資家であれば、意見は内心を伝えるものに過ぎないと考えるはず、表明した意見を確実なものとして理解しないはず。誠実に意見を持ったのであれば、免責されるべき。→　本判決は O 社の主張を斥ける。

（ⅲ）合理的投資家の意見表示の受け止め方

状況によって、合理的な投資家であれば、意見表示は意見形成についての事実や見解の根拠を伝えると理解するだろう。本当の事実が違っているのに、それが提供されないなら、誤解をもたらすものとなる。投資家は、発行者が表示した意見を信じるだけでなく、その当時有していた情報とかなり整合する(fairly align)意見であると期待する。

┌ａ．意見表示に関する調査や知識についての重要事実を省略
└ｂ．合理的投資家が意見表示から受け取ることと当該事実が相反する

→　11 条②の責任が生ずる。

◆原告は、誤解をもたらさないために必要な事実が欠けていることについて、発行者が気づいていたと証明する必要はないとの見解[1]。

（ⅳ）上記（ⅲ）を検討するうえで留意すべき事項

ａ．意見表示が競合する事実の比較検討・評価に基づくものであることを理解している。　→　発行者の知るすべての事実が意見表明の裏付けとなっているとは期待していない。

ｂ．意見表示は文脈のなかで理解されるべき

・登録届出書は SEC に提出される公式書類。投資家は、根拠のない思いつきの判断が含まれているとは考えない。（11 条では責任加重の要素？）それと同時に、間接的表現(hedges)、断り書き(disclaimers)、明らかに矛盾する情報など含む、その前後の文すべてに照らして、そのような書類の表示を読む。合理的投資家は、全体の文脈から意見表示を理解する。

（４）意見表示への萎縮効果［判旨（エ)］

・原告の立証負担は小さくない。

・コモンローにおける、意見表示は、表示者がその意見形成を正当化するに十分な事実を知っているか、または、少なくとも意見と矛盾するような事実を知らないことを黙示的に表す表示として合理的に理解される（Restatement (second) of Torts §539）との考えのもとでも、弊害はみられない。

（５）本判決の位置づけ

◆本判決は、「法令遵守」についての「意見」の虚偽につき、「11 条」の責任を判断した。

（ⅰ）11 条①の責任について

Virginia Bankshares, Inc. v. Sandberg, 501 U. S. 1083, (1991)判決[2]との関係

「客観的証拠による証明なしに、信じていないこと(disbelief)、考えまたは動機の不開

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[1] James D. Cox, “We’re Cool” Statement after Omnicare：Securities Fraud Suits for Failures to Comply with Law, 68 SMU L. Rev. 715, 718 (2015).

[2] 黒沼悦郎「委任状説明書における重要事実と因果関係の立証」商事法務 1446 号（1997）32 頁。締め出し合併を受ける会社の株主が、当該会社の取締役会による委任状説明書類に、対価が公正でかつ高いと記載したことが 1934 年法 14 条 a 項および規則 14a-9 に違反する重要な事実についての虚偽記載または誤解を生ずる記載であるとして、当該取締役らに対し、損害賠償請求した事案。

示だけでは、14 条 a 項のもとで訴訟を維持する十分な根拠があるのかという問題がある。我々は、信じていないことや動機の不開示それだけでは、14 条 a 項のもとで要求される事実の要素を満たさないと判断する。」［多数意見］

「私は、法廷意見を、『取締役の意見では、これは株式の高い価値である。』という表示は、実際には高い価値でなく、かつ、取締役がそれを知っていた場合に責任を生じさせるものと理解する。実際には価値は高くなかったが、取締役が誠実に(honestly)高いと信じていたならば責任は生じない。」［スカーリア判事の一部同意意見］

ａ）Virginia Bankshares **判決**：表示者の主観的虚偽（そうであると信じていないことを表示した）だけでは訴訟の対象とならず、表示者の主観的虚偽と意見の内容に矛盾する（実際に高い価値ではなかった）客観的証拠があれば訴訟対象となるという趣旨[3]。本判決は 11 条の①の責任について、意見表示が事実の表示となりうる場合があることを確認したうえで、主観的虚偽と客観的虚偽の要件を課した点で、Virginia Bankshares 判決と立場は異ならないように思われる。

ｂ）学説では、Virginia Bankshares 判決の定式は、発行者の厳格責任を定める 11 条には整合しないという見解がある[4]。下級審裁判例では、11 条・12 条の責任についても、Virginia Bankshares 判決を踏襲して、主観的虚偽と客観的虚偽の両方が認められる場合に限り、意見や考えの表示は責任を生じさせるとするものがある。たとえば、Fait v. Regions Financial Corp., 655 F. 3d 105 (2d Cir. 2011) では、原告は、住宅市場およびモーゲージ市場の深刻な悪化の状況下で、暖簾の異なる額の計上をすべきであったと主張したが、裁判所は、Virginia Bankshares 判決を引用しながら、被告が表示の当時に暖簾に関する表示を信じていなかったことを説得的に主張していないとして主張を斥けた。貸倒引当金についても、同判決を引用して、原告は被告の意見につき主観的虚偽を主張していないとして、これを斥けた。一方、本件原審は、客観的虚偽のみで足りるとしたが、本判決により、11 条責任に関しては控訴裁判所間での争いが解消されたといえる。

ｃ）Virginia Bankshares 判決の示した要件は、その後、虚偽の意見表示を争う規則 10b-5 上の訴訟で採り入れられた[5]。多くの下級審裁判所は、①表示者が実際に自己の表示意見を信じておらず、かつ、②客観的に虚偽である場合に限って、意見表示が詐欺的であるという立場を採用した[6]。ただし、少数の下級審裁判例には、明らかに Virginia Bankshares 判決を無視して、主観的虚偽のみを要求するもあったと指摘されている[7]。

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[3] James D. Cox, Robert W. Hillman & Donald C. Langevoort, Securities Regulation Cases and Materials, 642 (7th ed. 2013).
[4] Cox 前掲 716 頁。
[5] Donna M. Nagy, Richard W. Painter & Margaret V. Sachs, Securities Litigation and Enforcement Cases and Materials, 44 (3d ed. 2012).
[6] Wendy Gerwick Couture, Opinions Actionable as Securities Fraud, 73 La. L. Re. 381, 393-94 (2013)；Hillary A. Sale & Donald C. Langevoort, "We Believe"：Omnicare, Legal Risk Disclosure and Corporate Governance, Washington University in St. Louis School of Law, Legal Studies Reseach Paper Series, Paper No. 16-03-03, at 5 (Mar. 2016).
[7] Couture 前掲 73 La. L. Re. at 392-93.

そこでは、予測や考えの表示は、①表示内容を誠実に信じていた、②その考えに合理的な根拠がある、③表示者が表示の正確性を著しく損なうこととなる不開示の事実について気づいていない、という３つの事実に関する黙示的表明を含む。そして、これらのうちの１つが欠けていれば、訴訟対象になると述べられていた（In re Apple Computer Sec. Litig., 886 F 2d 1109 (9th Cir. 1989)；Kaplan v. Rose, 49 F. 3d 1363 (9th Cir. 1994)）。論者のなかには、本判決の射程が 10 条ｂ項にも及ぶものと広く捉えて、上のような下級審裁判所の立場の対立が本判決によって解消されると指摘する見解がある[8]。

ｄ）Virginia Bankshares 事件でも、本件の TV の例でも、表示された意見の内容は、真偽が判明するものであった。学説では、たとえば、決定的でないデータに基づく医薬品と病状の関連性などのように、本質的に結論が不確実にならざるをえず、真実か虚偽か判明しえない事柄もあるので、客観的虚偽には、意見の中で述べられた事項が明らかに虚偽である場合のほか、客観的にみて不合理であった場合も含まれるよう解釈するべきと主張する見解がある[9]。

＜参照：主観的虚偽の立証成功事例＞Reese v. Malone, 747 F. 3d 557 (9th Cir. 2014)

British Petroleum の一連の原油漏れに関連するクラスアクション。BP 社の 2005 年の年次報告書で、「経営者は、グループの活動が適用される環境に関する諸法およびレギュレーションをすべての重要な点において遵守していると考える。」と記載されていた部分の虚偽記載が争点の１つとなった。裁判所は、「考えの表示は、①表示が実際には信じられていない、②その考えに合理的根拠がない、または、③表示者が表示の正確性を著しく損なうこととなる不開示の事実について気づいていたならば、10 条ｂ項のもとで訴訟可能な事実に関する(factual)不実表示となる。」としたうえで、本件訴状で、BP 社の環境に関する諸法令の数多くの違反の証拠を挙げており、また違反の重大性からみて主要経営者が法令遵守の信念を弱めるような事実に気づかなかったとは言いがたいことなどから、BP 社の経営者がどのように同社が法令を遵守していたと考え、その違反を重大でないと考えていたのか不明であるとして、原告が訴答に成功した判断した。

（ⅱ）11 条②の責任について

たとえ表示者が真に自己の意見内容を信じていたとしても、11 条②の責任の可能性が残ることを明らかにした[10]。

＜発行者の免責＞

→ 誤解をもたらす意見表示とならないよう、追加的情報提供が必要となる場合もありうる。この要件は、新しいものであり、発行者は、意見を補強する何らかの事実を明示するか、意見が仮定的なものであることを明示する必要が生じるかもし

[8] Wendy Gerwick Couture, False Statements of Belief as Securities Fraud, 43 Sec. Reg. L. J. 351, 356 (2015).
[9] Courture 前掲 43 Sec. Reg. L. J. at 356-57.
[10] Sale & Langevoort 前掲 10 頁。

れない[11]。本判決は、発行者が意見表示をする前に、その根拠や、その存在・合理性に関する調査をしなければならないことを明らかにしたとの見解[12]。

＜原告の訴答＞

→ 合理的投資家の受け止め方を変えていたような、意見の前提となった事実（調査や認識）を特定し、かつ、重要であったことを主張・立証する。本判決も述べるように、これは原告にとってかなり厳しいとみられている[13]。もっとも、合理的投資家には、疑い深い目で明確な事項しか信用しない者もいれば、経営者を信用して間接表現された内容でさえ信用する者もいるわけで、複数の見方があるのではないか[14]。

a）本判決の射程は明らかでない。本判決が 11 条の責任を論じつつ虚偽の意見表示について一般的な考え方を示したのか、11 条のみに限定した理解を示したのか定かではない。

cf. 本判決の 11 条の趣旨に関する言及：

「登録届出書は、公衆に証券を売りつけるための法が前提要件とする SEC に提出される公式書類の類いのものである。」「議会は投資家への完全な真実開示を発行者が行うことを確保するため、11 条を規定した。そのため、文面上の正確性だけでは不十分である。発行者は、あることを述べて別のことを隠すことにより投資家に誤解をもたらしてはならない。O 社の立場は、『私たちは～考える』や『私たちは～思う』で始まるすべての文について制定法の要求を無意味にする。」「O 社の主張が正当なら、会社は 11 条の心配から解かれて登録届出書に意見表明を実質上完全に自由になしうるであろう。このような結果は、厳格責任(strict liability)を設けた議会の意図に合わない。」

b）学説では、厳格責任を定める 11 条のもとでは、上級役員が法律上のリスクを知っていたか、知らなかったかに関係なく、誤解をもたらす表示をすればそれで責任が生ずるのに対し、規則 10b-5 のもとでは、原告は被告の欺罔の意図を立証しなければならない点で、やはり違いがあると指摘されている[15]。さらに、デュー・ディリジェンスによって登録届出書の正確性確保が強化されている点は、合理的投資家がその記載（意見表示）をどう理解するかに影響するのではないかと考えられている[16]。厳格責任、そしてデュー・ディリジェンスに基づく責任の目的は、組織内に散在する重要事実を収集させることにあると考えるならば[17]、規則 10b-5 と 11 条とでは、行うべき調査や根拠の程度に違いを生じることになるのだろうか。

（iii）Puffery Defense との関係

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[11] Sale & Langevoort 前掲 6～7 頁。
[12] Sale & Langevoort 前掲 18 頁。
[13] Sale & Langevoort 前掲 7 頁。
[14] Sale & Langevoort 前掲 9 頁。
[15] Sale & Langevoort 前掲 12 頁～13 頁。
[16] Sale & Langevoort 前掲 13 頁。
[17] Sale & Langevoort 前掲 9 頁、12 頁。

楽観的意見の表示が意味をなさないほど曖昧である場合、それは「puffery（誇張）」として、法律上重要ではない(immaterial)ものとされる[18]。近年になって、裁判所が抗弁としての puffery を認めるケースがあるという[19]。

＜ex.＞ 『当社では品質が第一である。･･･』

「かかる表示は、合理的な投資家であれば、利用可能な情報の全体的な主旨を著しく変更するものとみなさないであろう単なる誇張(puffery)または誇大表現(hyperbole)にすぎない。したがって、たとえミスリーディングであるとしても、重要ではない。」（In re Ford Motor Co. Sec. Litig., 381 F.3d 563, 570 (6th Cir. 2004)

puffery は意見と同じように省略に基づく推論を生じさせるので､本判決は従来の puffery defense の範囲に影響を与えるのではないかという指摘がある[20]。

Ⅱ. SEC の公正基金（Fair Fund）による投資家の被害救済

1. 我が国の状況

課徴金の法的位置づけは、違反行為の抑止のために一定の金銭的負担を課す行政上の措置であり、金銭的負担の水準は利得相当額とするものとされている[21]。そして課徴金は国庫に納付されることと規定されている（172 条～175 の 2「･･･課徴金を国庫に納付することを命じ･･･」）。

学説では、一定の金銭的負担による違反行為の抑止が目的であるならば、徴収した金銭が国庫に帰属することとは関係なく、金銭的負担をさせることで目的は達成されるはずであるとする見解がある[22]。投資家の被害救済が不十分なケースにおいて、徴収した課徴金を被害者救済に利用すべきであるとする見解、またはそのような制度の可能性を示唆する見解は少なくない[23]。

2．米国の状況の概要

米国では、SEC のエンフォースメント手段は多様であり、そのうち金銭的賦課を行うものとして、利得剥奪・吐出し(disgorgement)と民事制裁金(civil penalty)がある。利得吐出

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[18] Nagy, Painter &Sachs 前掲 63 頁、龍田節「発行者の会社情報開示」証券取引法研究会国際部会編『証券取引における自己責任原則と投資者保護』（日本証券経済研究所、1996）34-35 頁。

[19] Louis Loss, Joel Seligman & Troy Paredes, Fundamentals of Securities Regulation Vol. 2, at 1266 (6ht ed. 2011).

[20] Sale & Langevoort 前掲 11 頁（注）35。

[21] 三井秀範編『課徴金制度と民事賠償責任』（金融財政事情研究会、2005）13 頁。

[22] 黒沼悦郎「投資者保護のための法執行」商事法務 1907 号（2010）47 頁。

[23] 森田章「証券取引法上の民事救済としての課徴金制度のあり方」商事法務 1736 号（2005）18 頁、梅本剛正『現代の証券市場と規制』306 頁（商事法務、2005）、証券取引法研究会編『商法・証券取引法の諸問題シリーズ　平成 16 年の証券取引法等の改正』別冊商事法務 290 号（2005）121 頁［芳賀良発言］、黒沼悦郎「ディスクロージャーの実効性確保―民事責任と課徴金―」金融研究 25 巻（2006）93 頁-94 頁、川口恭弘「金融商品取引法上の課徴金制度」同志社法学 61 巻 2 号（2009）282 頁、黒沼・前掲・商事法務 45 頁等。

しは、不正に得た利益を違反者に保持させないことを主たる目的とし、これによって違反行為の抑止を図ろうとするものである。しかし、利得吐出しだけでは十分な抑止効果が期待できない理由で[24]、1990 年証券執行救済およびペニーストック改革法により民事制裁金の制度が設けられた（ただし、海外腐敗行為防止法違反に対する 1934 年法 32 条 c 項(1)(B)・(2)(B)、インサイダー取引に対する 1934 年法 21A 条 a 項(1)(A)に基づく民事制裁金は、1990 年以前から置かれていた）。民事制裁金は、自然人・法人それぞれにつき、違反行為を 3 類型に分けて、各違反に対する民事制裁金額の上限を定めている（1934 年法 21 条 d 項(3)(B)・21B 条 b 項）。

利得の吐出金も、民事制裁金も、これを被害投資家の損害の填補に用いることができる点で、我が国とは制度が大きく異なる。すなわち、米国では、SEC v. Texas Gulf Sulphur Co., 446 F 2d 1310 (2d Cir. 1971)判決において初めて裁判所のエクイタブル上の権限により、SEC の利得吐出しおよび返還(restitution)の請求が付随的救済の一つとして認められた。SEC が、インサイダー取引事件や他のポンジー・スキームのような悪質な詐欺的行為に吐出しを積極的に利用するようになったのは、前掲の 1990 年改革法において、明文規定（1934 年法 21C 条 e 項）でもって SEC に吐出しを求める権限を与え、被害投資家に対する分配金に関する規則制定を授権した後であるといわれる[25]。もっとも、SEC は、虚偽記載等を行った発行者に対して、当該発行者が証券の売付けをしていない場合、利得を特定することが困難であるため、吐出しを求めなかったと指摘されている[26]。

その後、2002 年 SOX 法 308 条の制定により、民事制裁金も吐出金と合わせて Fair Fund に組み入れることが可能となり[27]、2010 年 Dodd-Frank 法 929B 条による SOX 法 308 条の改正では、民事制裁金のみの Fair Fund 創設も許容されるに至っている[28]。SOX 法 308 条の制定まで、民事制裁金は、抑止目的のエンフォースメント手段として位置づけられていたが、同条制定により、損害填補の機能をも有するようになったといえよう。

なお、前掲の 1990 年改革法では、連邦証券諸法・規則・レギュレーション・停止命令等の違反につき、SEC が、①裁判所への申立てにより（すべての違反者）（1934 年法 21 条 d 項(3)）、または、②行政手続きにより（一定の規制対象者のみ：証券会社・投資顧問・清算

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[24] Senate Report No. 101-337, at 1, 10 (1990).

[25] Adam S. Zimmerman, Distributing Justice, 86 N.Y.U. L. Rev. 500, 528 (2011).

[26] Barbara Black, Should the SEC Be a Collection Agency for Defrauded Investors ?, 63 Bus. Law. 317, 332 (2008). なお、「吐出し額の算定のルールは、適法な利得と正確に区分けすることが場合によってはほぼ不可能な作業であると認識しなければならない。吐出しの額は、違反行為と一般に関連する(casually connected)利得の合理的な概算額で足りる」とする裁判例がある（Schedule 13D 違反につき、書類を提出していた場合よりもより安い価格で証券を取得したとして、SEC が裁判所に吐出し命令を求めた事例：SEC v. First City Financial Corp., Ltd., 890 F. 2d 1215, 1231 (D. C. Cir. 1989)。

[27] 吐出金を徴収するには SEC は特定の被告の違反行為による利得を証明しなければならなかったが、この点実務では、SEC は、違反者の利得金額を立証できる場合であっても、名目的に利得額 1 ドルの吐出しを求めることで SOX 法 308 条の制限を回避し、民事制裁金を分配ファンドに組み入れて被害投資家への分配を行ってきたといわれる。Black 前掲 330 頁。

[28] SEC は、吐出命令の有無に関係なく、民事制裁金を被害投資家の分配に利用できるよう、SOX 法 308 条の改正を要求していた。SEC, Report Pursuant to Section 308(c) of The Sarbanes Oxley Act of 2002, 34 (2003).

機関等)、民事制裁金の支払いを求めることができることとされた。その後、Dodd-Frank 法 929P 条が、②につき、適用対象者を「すべての者」に拡大したことにより、発行者や取締役らへの行政手続きによる民事制裁金の賦課が可能となった(1934 年法 21B 条 a 項(2))。

３．SOX 法 308 条 a 項（15 U.S.C. §7246）

「証券諸法に基づき委員会によって提起された裁判上もしくは行政上の訴訟において、委員会が証券諸法の違反について何人かに対する民事制裁金を得た場合、または、この者がかかるいずれかの訴訟の和解において民事制裁金に同意した場合、当該民事制裁金の金額は、委員会の申立てまたは裁量により、当該違反行為の被害者の利益のために設けられる吐出し基金もしくは他の基金に加えられ、その一部となるものとする。」

→　具体的な手続きは、SEC Rules on Fair Fund and Disgorgement Plans（17 CFR 201.1100～201.1106）に規定されている。

①SEC は命令により吐出金および民事制裁金をファンド創設に利用できる。

②被審人の金銭等の支払後 60 日以内に SEC 執行部門が分配プラン案を策定する。分配プラン案には、追加の金銭の受領手続き、金銭の受領資格者の範囲、受領資格者にファンドの存在と受領資格がある旨を知らせる手続き、請求と承認の手続きおよび請求の締切日、ファンドの終了予定日、ファンドの管理の手続き、その他の事項を定める。

③係争中の事件については裁判所管理部署(registry)または裁判所が指定する管財人への支払いを定めることができる。プランの管理コストからみて分配が正当化されない場合に吐出金および民事制裁金を国庫に納めることを定めることができる。

④プラン案を SEC ウェブサイト等で公表する。

⑤プラン案公表から 30 日経過以降、SEC はその承認、修正、不承認をする。

⑥SEC は SEC の職員を含む何者かをプラン管理人に指名する[29]。管理人が SEC の職員でない場合の管理サービス手数料の支払いに関する事項、管理の手数料・費用は原則としてファンドから拠出すること等を定める[30]。

⑦上記④に際してコメントを提出できる以外、行政手続きへの参加やファンド創設の命令、プランの承認等について異議を述べることはできない。

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[29] Verity Winship, Fair Fund and the SEC's Compensation of Injured Investors, 60 Fla. L. Rev. 1103, 1135 (2008)によると、典型的な Fair Fund では、SEC に雇われた「独立分配コンサルタント（Independent Distribution Consultants：IDCs)」が分配プランの策定を行い、被害投資家への支払いの監視を「ファンド管理者」が行っている。このほか、コンサルティング会社、法律事務所、税金の管理者、支払代理人などが関与する。

[30] Fair Fund の管理費用の負担は明確に決まっていないようであり、2007 年の GAO レポートによると、約 3 分の 2 の Fair Fund が管理費用をファンドで負担しているとの分析があり、管理費用が増大すると被害投資家への分配が減少すると指摘されている。GAO, Rep. No. GAO-07-830, 29 (2007).

４．Fair Fund の利用実態

【SEC の公表したデータ[31]】

SEC が徴収した吐出金と民事制裁金のうち、

2006 年度　国庫に 1 億 2,200 万ドル納付、被害投資家に 1 億 850 万ドルを分配

2007 年度　国庫に 1 億 7,680 万ドル納付、被害投資家に 5 億 8,050 万ドルを分配

【Velikonja の分析[32]】（対象期間：2002 年から 2013 年までの間）

①Fair Fund の件数と分配総額：243 件（創設：裁判手続き 143 件、行政手続き 100 件）、被害投資家への分配総額は 146 億 6,000 万ドル（350-01 頁）。

③Fair Fund の大きさ：最大規模は、AIG の会計詐欺事件で創設された 8 億 1,650 万ドル、最小規模はインサイダー取引事件で創設された 2 万 4,959 ドル（351 頁）。

④違反行為のタイプ別による Fair Fund の件数：ブローカー・ディーラー51 件、インサイダー取引 15 件、投資顧問・投資会社 65 件、発行者の報告・開示 71 件、相場操縦 9 件、証券募集 21 件、その他 4 件と広い範囲に及ぶ（354 頁）。

⑤私的訴訟との並行の状況：SEC が Fair Fund を創設した事件のうち、64.7%で私的訴訟が提起されている。発行者の報告・開示違反の事件では、創設された 71 件の Fair Fund のすべてで、私的訴訟が提起されているが、被害投資家の総回復額に占める Fair Fund からの分配金の割合は 15.1%と小さい（373-74 頁）。発行者の報告・開示違反以外のタイプでは、Fair Fund による分配が唯一の損害填補となったものが 71.3%であり、有力な被害填補手段となっている（360 頁）。

cf. プラン実施完了の状況：約 8 割の Fair Fund・吐出しファンドで、分配プラン承認から 2 年以内に基金の 80%を分配済み[33]。Fair Fund の分配完了時に残高がある場合、それは国庫に納められる[34]。

５．JP Morgan 事件の例（In the Matter of JPMorgan Chase & Co., SEC Rel. No. 34-70458 (Sept. 19, 2013)）

臨時報告書と四半期報告書においてクレジット・デリバティブ取引による損失の過少計上をする虚偽記載および開示統制・手続きが有効でない旨の不開示があったとして、SEC が JP Morgan に対し違法行為の停止と 2 億ドルの民事制裁金を命じた事例。

2014 年 3 月 5 日　　SEC が Fair Fund 創設を承認

2014 年 12 月 11 日　分配プラン案の公表とコメント受付

2015 年 2 月 12 日　　SEC が分配プランを承認

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[31] SEC, 2007 Performance and Accountability Report, 18 (2007).

[32] Urska Velikonja, Public Compensation for Private Harm：Evidence from the SEC's Fair Fund Distributions, 67 Stan. L. Rev. 331 (2015).

[33] SEC, FY 2017 Congressional Justification & FY 2015 Annual Performance Report and FY 2017 Annual Performance Plan, 39 (2016).

[34] たとえば、In the Matter of Zurich Capital Markets Inc., SEC, Rel. No. 34-74154 (Jan. 27, 2015).

【分配プランの内容】　①ファンド管理者の設置（5～8）、②資格者の特定方法、情報提供方法（12～21）、③分配請求の手続き、資格者の確定手続き（22～37）、④資格者の範囲（38～43）、⑤支払代理人の設置（44～49）、⑥分配の手続き（50～60）、⑦分配後のチェック不達等への対応（61～67）、⑧ファンドの資金状況の報告等（68）、⑨ファンドの終了に関する手続き（69～72）、⑩プランの変更（73～74）

６．Fair Fund 制度の意義と課題

（１）分配プラン実施の判断基準

SOX 法制定前の吐出しファンドについて、少額しか徴収できなかった場合や特定しうる被害投資家の数がファンドの額に対してかなり多い場合、SEC は裁判所に対し吐出金を国庫に納めるよう求めていた[35]。同法制定後も、分配の実現可能性や経済合理性が低い場合は、ファンドの基金を国庫に納めることを分配プランで定めておくことができる（17 CFR 201.1102(b)）。

SEC は Fair Fund を必ずしも創設する必要はなく、その創設は SEC による裁判所への申立てまたは裁量に基づくものとなっている。どのような場合に国庫に納められ、どのような場合に分配プランが実施されるのか、明確な基準は明らかでないようである。

（２）Circularity の問題

私的訴訟において、投資家の分散投資を前提にすれば、発行者の虚偽記載によって流通市場で取引を行った投資家は、全体的にみれば損をしていないので、そのような投資家に対する発行者の損害賠償責任を認めることは違法行為の抑止にならない、という富の循環(Circularity)の問題が有力に指摘されている[36]。

同様に、発行者から徴収した利得吐出金・民事制裁金を Fair Fund を通じて被害投資家に分配する場合も、社会的にみて無駄な富の移転であるとして、Circularity の問題を指摘する見解が有力である[37]。SEC は、私的訴訟では認められない幇助者・教唆者への責任追及が可能であることからすると（Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A., 511 U. S. 164 (1994); 1934 年証券取引所法 20 条 e 項）、これらの者や個人からの利得吐出金・民事制裁金を Fair Fund を通じて被害投資家に分配することは、Circularity の問題に抵触しないで、投資家の被害救済を補完する方法であるといえる[38]。ただし、幇助者・教唆者や個人から損害填補に十分な救済資金を徴収できる可能性は高くないかもしれない。

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[35] SEC, Report 前掲 14 頁。
[36] Frank H. Easterbrook and Daniel R. Fischel, “Optimal Damages in Securities Cases, 52 U. Chi. L. Rev. 611, 639-44 (1985)等.
[37] Black 前掲 331 頁、Winship 前掲 1128 頁、William W. Bratton & Michael L. Wachter, The Political Economy of Fraud on The Market, 160 U. Pa. L. Rev. 69, 139 (2011).
[38] Black 前掲 344 頁、Winship 前掲 1130 頁。

（3）私的訴訟と Fair Fund の重複

学説では、私的訴訟と SEC の執行訴訟・分配プランが並行することにより、被害投資家への損害填補のメカニズムが重複し、これに伴うコストの重複が生じうることから、両者は重複すべきではなく、その調整メカニズムが必要であると主張する見解がある[39]。現在のところ、分配プランと私的訴訟の提起・結果を調整する仕組みは明確でない[40]。論者のなかには、両制度が並行する場合、多額の資金返還に SEC は時間をかける必要があるのかと疑問視する見解や[41]、すでに私的訴訟が利用可能となっている場合には SEC は損害填補を選択すべきでないという見解がみられる[42]。

SEC も裁判所も、並行する Fair Fund と私的訴訟による賠償が、被害額を越えることとなる損害填補は否定している[43]。たとえば、マーケットタイミングの被害投資家が SEC から Fair Fund を通じて受け取った金額を超える損害を受けたことを証明していないとして、被告に有利な略式判決を下した事例がある（In re Mutual Funds Inv. Lit., 608 F. Supp. 2d 677 (D. Md. 2009)）。

SEC の行政訴訟における同意審決では、分配プランに組み込まれる民事制裁金を支払ったことをもって、私的訴訟において賠償金との相殺を主張したり減額請求をしたりしないことに同意する旨の条項（Penalty Offset）が盛り込まれている[44]。最近の例では、SEC の行政訴訟の命令のなかで、上記の Penalty Offset 条項を盛り込み、さらに、「民事制裁金の抑止効果を確保するため」として、裁判所が私的訴訟で相殺を認めた場合、被審人は SEC にその旨を通知し、相殺された支払いの減額分を国庫または Fair Fund のために支払うことに同意する旨の条項も定められている点は興味深い（前掲 JP Morgan の同意審決、In the Matter of TD Bank, N. A., SEC Rel. No. 33-9453 (Sept.23, 2013)等）。

（4）裁判所の関与

SEC が裁量により分配プランを設ける場合、分配プラン案は、公表され、コメント期間を経て、SEC によって承認される。そこでは、裁判所は関与しない。一方、SEC が申立てをして裁判手続きで Fair Fund が創設される場合、裁判所は SEC の提出した分配プランを審査する。その場合の審査基準は、SOX 法制定前の吐出しプランについて採用されていた「公正かつ合理的」基準と同じであり、プランが全体として公正かつ合理的であれば、どのように分配するかについては SEC の経験と専門性が尊重される。裁判所がそのような態度を示した例として、対象期間中の売買全体で利益が生じている者や、債券保有者のうち更生手続きで 1 ドルにつき 36 セント（一般の無担保債権者の回復率）以上の払戻しを受けた者などを受領資格者から除外するプランであっても、他の投資家の Fair Fund の利用可

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[39] Black 前掲 342 頁、Winship 前掲 1132 頁, 1142 頁、Zimmerman 前掲 505 頁。
[40] Winship 前掲 1141 頁、Zimmerman 前掲 544 頁。
[41] Zimmerman 前掲 540 頁。
[42] Winship 前掲 1141 頁。
[43] Velikonja 前掲 365 頁。
[44] Black 前掲 330 頁（注）88、Winship 前掲 1120-21 頁。

能性を考慮したものであるとして、許容したものが挙げられる（Official Comm. of Unsec. Cred., WorldCom v. SEC, 467 F. 3d 73, 82-83 (2d Cir. 2006)）。

（５）発行者に対する民事制裁金

1990 年改革法以降、SEC の民事制裁金の賦課権限は拡大している。民事制裁金を課す際の公益性の判断要素として、ALJ：行政審判官については、1934 年法 21B 条 c 項が規定しており、裁判所においても同項と類似の判断要素が採用されている（SEC v. Librand, 281 F. Supp. 2d 726, 730 (S.D.N.Y. 2003)）。

問題は、発行者に対する民事制裁金の賦課である。発行者からの多額の民事制裁金は、被害者救済に寄与するようにも思われるが、発行者の何者かの違法行為により、すでに被害を受けた株主が、さらに発行者への民事制裁金の賦課により最終的に金銭的負担をするという「二重の犠牲」の構造も生じうる。SEC v. Bank of America Corp., 653 F Supp. 2d 507 (S.D.N.Y. 2009)事件で裁判所は、Bank of America に対する 3,300 万ドルの民事制裁金は公正ではない、結局のところ同社の株主が負担するものであり、「犠牲者にさらに犠牲を強いる」こととなる点などを批判して、SEC が求めた行政制裁の同意判決を拒否した。

1990 年改革法の制定時、上院の銀行住宅都市委員会は、株主が違反行為の主たる犠牲者である場合、SEC が個々の違反行為者に民事制裁金を課すことを期待すること、そして裁判所は、発行者への民事制裁金を課すか否か、その程度を判断する際に、被害を受けた株主が最終的に負担することを適切に考慮しうる、と述べて、かかる問題への懸念を報告書に明記していた（S. Rep. No. 337, 101th Cong., 2d Sess. at 17 (1990)）。

なお、2006 年 1 月 4 日、SEC は、「財産上の制裁に関する SEC の声明」を発表し、発行者への民事制裁金の妥当性につき、（１）違反による会社への直接的な利益の有無、（２）民事制裁金が被害を受けた株主への補償またはさらなる損失となる程度、を主たる考慮要素とし、さらに、特定の違反類型を防止する必要性、罪のない当事者への損失の程度、組織ぐるみの違反か否か、加害者の意図の程度、特定の類型の違反を摘発する困難性、会社による是正対応の有無、SEC 等への協力の程度という７つの考慮要素を挙げている（SEC Press Rel. No. 2006-4, “Statement of the Securities and Exchange Commission Concerning Financial Penalties”）。

（６）私的訴訟の代替手段としての Fair Fund？

Fair Fund は、私的訴訟を実際に利用しない、または、法的に利用できないケースでの損害填補に意義が認められるという見解が主張されている[45]。たとえば、時価総額の比較的小さい会社に対する私的訴訟は提起されない傾向にある[46]ことから、SEC が行政執行を行っ

[45] Winship 前掲 1132-33 頁。
[46] John C. Coffee, Jr., Reforming The Securities Class Action: An Essay on Deterrence and Its

て Fair Fund により被害救済をすることは、私的賠償制度を補完する役割として意義があるといえる。また、前述のように、幇助者・教唆者に対する SEC の責任追及は、私的訴訟の及ばない部分であるから、これらの者から徴収した吐出金・民事制裁金を被害救済に用いることができる点にも私的賠償制度を補完する意義があるといえそうである。

私的訴訟とは違い、弁護士費用が分配可能な額から差し引かれない点は、Fair Fund のメリットであると指摘されている[47]。弁護士費用が高額（たとえば、私的訴訟の和解額が 500 万ドル以上の事件で、弁護士費用の和解額に占める割合は約 30%といわれる[48]）であることを考えると、その負担がないことの意味は小さくない。さらに、そもそも私的訴訟を提起しなくても、損害填補を得られる点で、被害投資家にメリットがある。

Fair Fund による分配は、私的訴訟による被害回復にとって代わるものとなるか。これについては、難しいとみるのが学説の大勢である。吐出しファンドに民事制裁金を追加しうることとなったが、それでも発行者の虚偽記載事例のように被害総額が巨額となる場合、私的訴訟の和解金（投資家の損失に対する和解金額の割合の中央値は、2014 年は 1.9%、2015 年は 1.6%であった[49]）がわずかなうえ、Fair Fund による填補額も被害額に比べてわずかとなる場合が少なくなく、十分な被害救済とはならないであろうと考えられている[50]。また、SEC 自身も認めるように、SEC のエンフォースメント活動の資源には限界がある点からも、私的訴訟の代替性を期待することは難しいとされる[51]。

学説のなかには、損害填補を SEC の執行活動の主たる目的とすべきではなく、規制の発展や違法行為の抑止に努めるべきであり、被害投資家のために民事制裁金の徴収への取り組みを強めると、SEC の執行案件の選択に歪んだ影響が生ずるのではないかと危惧する見解もある[52]。

－以上－

Implementation, 106 Colum. L. Rev. 1534, 1543 (2006)；Black 前掲 344 頁。

47 Black 前掲 335 頁。

48 Svetlana Starykh & Stefan Boettrich, Recent Trends in Securities Class Action Litigation：2015 Full Year Review (NERA), 36 (2016).

49 Starykh & Boettrich, 前掲 34 頁。

50 James D. Cox & Randall S. Thomas, with Dana Kiku, SEC Enforcement Heuristics：An Empirical Inquiry, 53 Duke L. J. 737, 755-56 (2003)；Winship 前掲 1131 頁。

51 Cox & Thomas 前掲 756 頁、SEC, Report 前掲 20 頁、Black 前掲 337-38 頁。

52 Black 前掲 342 頁。

F.3d at 336 (noting that "*Dorsey* itself disfavors [retroactive application of the Fair Sentencing Act] in the context of § 3582").

Finally, the majority contends that "it cannot seriously be argued that race does not play a role in the failure to retroactively apply the Fair Sentencing Act." Maj. Op. 488. To the contrary, the failure to retroactively apply the Fair Sentencing Act is solely due to a faithful interpretation of the statutory scheme and a recognition of the rule of stare decisis. Congress is of course free to amend the Fair Sentencing Act to make it fully retroactive, but that is a legislative prerogative and not appropriate for this court to do simply by decree.

For all of the reasons set forth above, I respectfully dissent.

INDIANA STATE DISTRICT COUNCIL OF LABORERS AND HOD CARRIERS PENSION AND WELFARE FUND, on behalf of itself and all others similarly situated, Plaintiff,

Cement Masons Local 526 Combined Funds; Laborers District Council Construction Industry Pension Fund, Plaintiffs–Appellants,

v.

OMNICARE, INC.; Joel F. Gemunder; David W. Froesel, Jr.; Cheryl D. Hodges; Edward L. Hutton; Sandra E. Laney, Defendants–Appellees.

No. 12–5287.

United States Court of Appeals, Sixth Circuit.

Argued: Jan. 15, 2013.

Decided and Filed: May 23, 2013.

Rehearing and Rehearing En Banc Denied July 23, 2013.

Background: Investors brought securities fraud class action against corporation and its officers and directors, alleging defendants made material misstatements and/or omissions in a registration statement filed with the Securities and Exchange Commission (SEC) in connection with a public stock offering. The United States District Court for the Eastern District of Kentucky, William O. Bertelsman, J., 2012 WL 462551, dismissed the complaint. Investors appealed.

Holdings: The Court of Appeals, Cole, Circuit Judge, held that:

(1) a plaintiff is not required to plead knowledge of falsity to state a claim for a material misstatement in a registration statement;

(2) investors pled fraud with requisite particularity on their claim that defendants made misleading statements in the registration statement indicating compliance with the law, but

(3) investors failed to plead fraud with requisite particularity on their Securities Act claim for Generally Accepted Accounting Principles (GAAP)-based misstatements and omissions.

Affirmed in part, reversed in part, and remanded.

Gwin, District Judge, filed a concurring opinion.

1. Federal Courts ⚿776

Whether the district court properly dismissed a complaint for failure to state a claim is a question of law subject to de novo review. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

2. Federal Civil Procedure ⚿636

In order to meet the requirement of pleading fraud with particularity, a plain-

tiff must allege the time, place, and content of the alleged misrepresentations on which he or she relied, the fraudulent scheme, the fraudulent intent of the defendants, and the injury resulting from the fraud. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

3. Securities Regulation ⚿25.21(2)

Securities Act provision imposing liability for material misstatements or omissions in registration statements provides for strict liability, and does not require a plaintiff to plead a defendant's state of mind. Securities Act of 1933, § 11(a), 15 U.S.C.A. § 77k(a).

4. Securities Regulation ⚿60.28(10.1)

Under § 10(b) and Rule 10b–5 there is no duty to disclose soft information, which includes matters of opinion and predictions, unless it is virtually as certain as hard facts; additionally, because there is generally no duty to disclose soft information for purposes of § 10(b) and Rule 10b–5, a defendant corporation that chooses to keep completely silent regarding soft information cannot be held liable for a material omission under those provisions. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b–5.

5. Securities Regulation ⚿25.21(2)

A plaintiff is not required to plead knowledge of falsity to state a claim under the Securities Act for a material misstatement in a registration statement; the Securities Act provides for strict liability when a registration statement contains an untrue statement of a material fact. Securities Act of 1933, § 11(a), 15 U.S.C.A. § 77k(a).

6. Federal Civil Procedure ⚿636

Investors pled fraud with sufficient particularity, as required to state a Securities Act claim against corporation and its officers and directors for making misleading statements in the registration statement indicating compliance with the law, despite relying on qui tam complaints against the corporation; instead of relying on the mere existence of qui tam complaints or investigations, the investors comprehensively discussed how the details were relevant to their own complaint, and gave extensive rationale for that support. Securities Act of 1933, § 11(a), 15 U.S.C.A. § 77k(a).

7. Federal Civil Procedure ⚿2769

Rule 11 sanctions are a question of whether the attorney's conduct was reasonable under the circumstances. Fed. Rules Civ.Proc.Rule 11, 28 U.S.C.A.

8. Federal Civil Procedure ⚿636

Investors failed to allege how or when any of corporations' alleged violations of Generally Accepted Accounting Principles (GAAP) rules occurred, as required to plead fraud with particularity, in stating a Securities Act claim for GAAP-based misstatements and omissions in the registration statement. Securities Act of 1933, § 11(a), 15 U.S.C.A. § 77k(a).

9. Securities Regulation ⚿60.47

"Loss causation," as an element of a securities fraud claim under § 10(b) and Rule 10b–5, refers to the causal connection between the defendant's material misrepresentation or omission and the plaintiff's loss. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b–5.

See publication Words and Phrases for other judicial constructions and definitions.

10. Federal Civil Procedure ⚿1752.1

When an affirmative defense is evident on the face of a complaint, the complaint may be subject to dismissal for failure to state a claim. Fed.Rules Civ.Proc. Rule 12(b)(6), 28 U.S.C.A.

11. Federal Courts ⇨947

When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question.

ARGUED: Eric Alan Isaacson, Robbins Geller Rudman & Dowd LLP, San Diego, California, for Appellants. Harvey Kurzweil, Winston & Strawn LLP, New York, New York, for Appellees. **ON BRIEF:** Eric Alan Isaacson, Henry Rosen, Jennifer L. Gmitro, Amanda M. Frame, Robbins Geller Rudman & Dowd LLP, San Diego, California, for Appellants. Harvey Kurzweil, Richard W. Reinthaler, John E. Schreiber, Winston & Strawn LLP, New York, New York, Wm. T. Robinson III, Michael E. Nitardy, Frost Brown Todd LLC, Florence, Kentucky, for Appellees.

Before: COLE and GRIFFIN, Circuit Judges; GWIN, District Judge.*

COLE, J., delivered the opinion of the court in which GRIFFIN, J., and GWIN, D.J., joined. GWIN, J. (pp. 510–11), delivered a separate concurring opinion.

OPINION

COLE, Circuit Judge.

Plaintiffs, all Omnicare investors, appeal the dismissal of their securities suit under § 11 of the Securities Act of 1933, 15 U.S.C. § 77k (2010), against Defendants Omnicare, Inc., its officers, and directors. Plaintiffs allege that Defendants made material misstatements and/or omissions in a Registration Statement filed with the Securities and Exchange Commission in connection with a December 2005 public stock offering. The district court held that Plaintiffs had not adequately pleaded knowledge of wrongdoing on the part of Defendants and dismissed the complaint for failure to state a claim upon which relief can be granted. Plaintiffs seek reversal of the district court's dismissal order on the grounds that § 11 is a strict liability provision. For the following reasons, we REVERSE and REMAND in part and AFFIRM in part.

I.

Defendant Omnicare is the nation's largest provider of pharmaceutical care services for the elderly and other residents of long-term care facilities in the United States and Canada. *Ind. State Dist. Council v. Omnicare Inc.*, 583 F.3d 935, 938 (6th Cir.2009) (hereinafter "*Omnicare I*"); *Ind. State Dist. Council v. Omnicare Inc.*, 527 F.Supp.2d 698, 700–01 (E.D.Ky. 2007). During the relevant time period, Defendant Joel Gemunder was Omnicare's Chief Executive Officer; Defendant David Froesel was Omnicare's Chief Financial Officer and a Senior Vice President; Defendant Cheryl Hodges was Omnicare's Secretary and a Senior Vice President; Defendant Edward Hutton was Chairman of the Board of Directors;[1] and Defendant Sandra Laney was a Director.

Plaintiffs are investors who purchased Omnicare securities in a December 15, 2005, public offering. In conjunction with the public offering, Omnicare offered 12.8 million shares of common stock and made related filings with the Securities and Exchange Commission. These filings were incorporated into a Registration Statement

* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

1. According to Defendants, Mr. Hutton is deceased.

which is central to the current litigation. Plaintiffs did not hold the stock long. They sold all of these securities by January 31, 2006.

Plaintiffs seek relief under § 11 of the Securities Act of 1933, 15 U.S.C. § 77k. Section 11 provides a remedy for investors who have acquired securities under a registration statement that was materially misleading or omitted material information. It imposes liability on issuers and signers of registration statements containing untrue statements or omissions of material fact. 15 U.S.C. § 77k(a). Section 11 also imposes liability on the directors of the issuer. *Id.* at § 77k(a)(2).

According to the Third Amended Complaint [2], Omnicare was engaged in a variety of illegal activities including kickback arrangements with pharmaceutical manufacturers and submission of false claims to Medicare and Medicaid. Plaintiffs allege that representations in the Registration Statement were material, untrue and misleading because they effectively concealed Omnicare's illegal activities from its investors. According to the Plaintiffs, the Registration Statement stated "that [Omnicare's] therapeutic interchanges were meant to provide [patients with] . . . more efficacious and/or safer drugs than those presently being prescribed" and that its contracts with drug companies were "*legally and economically valid* arrangements that bring value to the healthcare system and patients that we serve." Plaintiffs claim that given Omnicare's alleged illegal activities, these and other statements indicating compliance with the law were misleading. Specifically, Plaintiffs allege that these statements of "legal compliance" made in the Registration Statement were material, false and misleading, and therefore in violation of § 11.

Furthermore, Plaintiffs allege that Omnicare failed to comply with Generally Accepted Accounting Principles ("GAAP"), such that the financial statements filed in connection with the December 2005 public offering substantially overstated the company's revenue. Therefore, according to Plaintiffs, the financial statements contained material misstatements and omissions in violation of § 11.

Plaintiffs filed this case in the United States District Court for the Eastern District of Kentucky in February 2006 as a putative securities class action, alleging claims for violations of § 10(b), Rule 10b–5 and § 20(a) of the Securities and Exchange Act of 1934. *Omnicare I,* 583 F.3d at 939. A class was never certified. Plaintiffs later amended the complaint, adding a claim under § 11 for material misstatements and omissions in the Registration Statement. That § 11 claim is the basis of the instant appeal.

Defendants moved to dismiss the complaint on a variety of grounds. On October 12, 2007, the district court granted Defendants' motion and dismissed the complaint in its entirety. *Omnicare,* 527 F.Supp.2d at 712. With respect to the § 10(b), Rule 10b–5 and § 11 claims, the district court determined that Plaintiffs had failed to plead loss causation—the causal connection between a defendant's misconduct and the plaintiff's loss. *Id.* at 704–05. The claim made under § 20(a) was dismissed as well. *Id.* at 711. Plaintiffs appealed.

On October 21, 2009, this Court affirmed the judgment of the district court with respect to all claims except the § 11 claim.

2. Although the Third Amended Complaint is titled "Second Amended Consolidated Complaint," it is the third amendment to the original complaint in this litigation. The parties and the district court have consistently referred to it as the "Third Amended Complaint."

We held that "loss causation" is not an element of a § 11 claim but is instead an affirmative defense. *Omnicare I,* 583 F.3d at 947. Accordingly, we determined that the district court had erred by requiring Plaintiffs to plead loss causation in order to state their § 11 claim. We remanded the case to district court for further analysis. *Id.* at 948.

Plaintiffs pursued a writ for certiorari, which they later dismissed, and then moved for leave to amend the complaint in order to re-plead the § 11 claim. The motion was granted. The Third Amended Complaint encompasses two types of § 11 allegations: (1) material misstatements and omissions made with reference to the statements of "legal compliance"; and (2) material misstatements and omissions in reference to GAAP. Defendants filed a motion to dismiss the Third Amended Complaint.

On February 13, 2012, the district court granted Defendants' motion, concluding that because the Plaintiffs' § 11 claim "sounds in fraud," it was subject to but failed to meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b). The court furthermore held that, for both claims asserted under § 11, Plaintiffs were required, but failed to plead, knowledge of falsity on the part of the Defendants. Because the court found that the complaint failed to satisfy the pleading standards of Rule 9(b), and because Plaintiffs had not sufficiently pleaded Defendants' knowledge of falsity, the complaint was dismissed. Plaintiffs again appealed.

II.

[1] Whether the district court properly dismissed a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) is a question of law subject to de novo review. *Kottmyer v. Maas,* 436 F.3d 684, 688 (6th Cir.2006). The court must construe the complaint in a light most favorable to the plaintiff and accept all factual allegations as true. *Id.* at 688. The factual allegations must "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Stated otherwise, the Rule 12(b)(6) standard requires that the plaintiff provide "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570, 127 S.Ct. 1955. A complaint must "contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Mezibov v. Allen,* 411 F.3d 712, 716 (6th Cir.2005).

While notice pleading requirements are based on Rule 8, *see Twombly,* 550 U.S. at 555, 127 S.Ct. 1955, claims for fraud are held to the heightened pleading standard of Rule 9(b). We held in *Omnicare I* that, although § 11 claims do not require pleading of scienter, Rule 9(b) pleading standards still apply to § 11 claims that sound in fraud. *Omnicare I,* 583 F.3d at 948. We furthermore held that the § 11 claims pleaded by Plaintiffs in the instant case met this requirement. *Id.*

Plaintiffs argue that, since this Court's decision in *Omnicare I,* they have amended their complaint to abandon all claims "that could be construed as alleging fraud or intentional or reckless misconduct" and that, as a result, Rule 9(b) no longer applies. They base this argument primarily on a disclaimer that has been added to the complaint stating: "Plaintiffs expressly exclude and disclaim any allegation that could be construed as alleging fraud or intentional or reckless misconduct, as this claim is based solely on the theories of strict liability and negligence under the Securities Act." This one-sentence disclaimer, however, does not achieve Plaintiffs' desired result. *See Cal. Pub. Emps.*

Ret. Sys. v. Chubb Corp., 394 F.3d 126, 160 (3rd Cir.2004) ("[A]n examination of the factual allegations that support Plaintiffs' section 11 claims establishes that the claims are indisputably immersed in ... fraud. The one-sentence disavowment of fraud contained [in] ... the ... [c]omplaint does not require us to infer" otherwise) (footnote omitted). The basis of Plaintiffs' allegations has not changed since *Omnicare I*, and therefore the heightened pleading standard of Rule 9(b) still applies to the § 11 claims.

[2] Complaints subject to Rule 9(b) must plead "with particularity the circumstances constituting fraud or mistake." Fed.R.Civ.P. 9(b). In order to meet the "particularity" requirement of Rule 9(b), "a plaintiff [must] allege the time, place, and content of the alleged misrepresentations on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Sanderson v. HCA–The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir.2006) (internal quotation marks and citation omitted); *see also Omnicare I*, 583 F.3d at 942–43. "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R.Civ.P. 9(b).

III.

Plaintiffs have brought two separate § 11 claims in their Third Amended Complaint: one for material misstatements and/or omissions of legal compliance and one for Defendants' alleged failure to comply with GAAP such that the Registration Statement contained material misstatements and/or omissions. We address each of these claims in turn.

A.

1.

Plaintiffs allege that Omnicare's statements of legal compliance led investors to believe that Omnicare—which was allegedly engaged in illegal activities—was in compliance with the law. Plaintiffs assert that these statements of legal compliance made in the Registration Statement were therefore material, untrue, and misleading, in violation of § 11.

The district court held that Plaintiffs were required to plead that Defendants knew that the statements of legal compliance were false at the time they were made. Because the court found that Plaintiffs failed to plead knowledge of falsity, it dismissed the complaint for failure to state a claim. On appeal, Plaintiffs argue that § 11 provides for strict liability and it was therefore inappropriate for the district court to require them to plead knowledge in connection with their § 11 claim. We agree.

[3] Section 11 provides for the imposition of liability if a registration statement, as of its effective date, "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(a). It provides a remedy for investors who have acquired securities pursuant to a registration statement that was materially misleading or omitted material information. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 381–82, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983). Section 11 provides for strict liability, and does not require a plaintiff to plead a defendant's state of mind. *See id.* at 382, 103 S.Ct. 683. Plaintiffs contend that the argument should end here and that the district court erred by requiring them to plead state of mind.

[4] Defendants respond, however, that the issue is not so simple. Section 10(b) of

the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b–5, 17 C.F.R. § 240.10b–5, have elements parallel to § 11, prohibiting "fraudulent, material misstatements or omissions in connection with the sale or purchase of a security." *Miller v. Champion Enters. Inc.*, 346 F.3d 660, 671 (6th Cir.2003) (internal quotation marks and citation omitted). This Court held in *Omnicare I*—for purposes of § 10(b) and Rule 10b–5—that legal compliance statements are "soft information." *See Omnicare I*, 583 F.3d at 945 (citation omitted). Soft information includes matters of opinion and predictions. There is no duty to disclose soft information unless it is "virtually as certain as hard facts." *In re Sofamor Danek Grp. Inc.*, 123 F.3d 394, 401–02 (6th Cir.1997) (internal quotation marks and citations omitted). Because there is generally no duty to disclose soft information for purposes of § 10(b) and Rule 10b–5, a defendant corporation that chooses to keep *completely silent* regarding soft information cannot be held liable for a material omission under those provisions. *See id.*

A thornier issue arises when a defendant chooses to disclose some soft information, as occurred in the instant case. Defendants were not completely silent, but instead spoke on issues of legal compliance. With regard to § 10(b) and Rule 10b–5, this Court has reasoned:

> [T]he protections for soft information end where speech begins . . . .: [H]ow can a rule of non-disclosure apply to a company's disclosure? If—as defendants contend—the protection for soft information remains intact even after a company speaks on an emerging issue, the speaker could choose which contingencies to expose and which to conceal. On any subject falling short of reasonable certainty, then, a company could offer a patchwork of honesty and omission. This proposition is untenable . . . . *Helwig v. Vencor, Inc.*, 251 F.3d 540, 560 (6th Cir.2001) (en banc), *abrogated on other grounds by Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007).

In *Omnicare I*, this Court addressed Plaintiffs' § 10(b) and Rule 10b–5 claims regarding statements of legal compliance. The Court reasoned, citing *Kushner v. Beverly Enterprises, Inc.*, 317 F.3d 820, 831 (8th Cir.2003), and *Helwig*, that Plaintiffs could not stop at pleading that Defendants' disclosures were untruthful. *See Omnicare I*, 583 F.3d at 945. We held that in order for § 10(b) and Rule 10b–5 liability to attach to Omnicare's general assertions of legal compliance, the complaint must "adequately plead[ ] that the defendants knew the statements were untruthful" at the time they were made. *Id.* at 945 (internal quotation marks and citation omitted). The *Omnicare I* panel found that Plaintiffs had not adequately pleaded any allegation that Defendants knew that the legal compliance statements were false when made and accordingly held that Plaintiffs had failed to state a claim. *Id.* at 946–47.

The *Omnicare I* panel relied heavily on *Kushner*, which had in turn relied heavily on our *Helwig* and *Sofamor* opinions. *See Omnicare I*, 583 F.3d at 945 (citing *Kushner*, 317 F.3d at 831.). *Kushner* frames the knowledge of falsity pleading requirement as one of disclosure. *Kushner* does not appear to have distinguished between material misstatements and omissions under § 10b and Rule 10b–5. Although the primary issue in *Kushner* was whether defendants were liable for a material misstatement, the court began by commenting: "Before liability for non-disclosure can attach, the defendant must have violated an affirmative duty of disclosure." *Kushner*, 317 F.3d at 831 (internal quota-

tion marks and citation omitted). Citing *Sofamor,* the court noted that there is generally no duty to disclose soft information. When knowledge of falsity is shown, however, "[o]pinions cease to be soft information" and become hard facts. *Id.* At that point, the duty to disclose and liability for disclosure of false information under § 10b and Rule 10b–5 attach. *See id.* Although the court agreed that "even absent a duty to speak, a party who voluntarily discloses material facts in connection with securities transactions assumes a duty to speak fully and truthfully," it held that "[a]bsent a clear allegation that the defendants knew of the scheme and its illegal nature at the time they stated the belief that the company was in compliance with the law, there [was] nothing further to disclose." *Id.* (internal quotation marks and citation omitted). According to *Kushner,* under § 10b and Rule 10b–5 a defendant may only be liable for a material misstatement if she knew the statements were false and therefore knew there was something further to disclose.

Language in *Helwig* supports the view taken by the Eighth Circuit in *Kushner* for purposes of § 10b and Rule 10b–5. In *Helwig,* this Court stated: "With regard to future events, uncertain figures, and other so-called soft information, a company may choose silence or speech elaborated by the factual basis *as then known* . . . ." 251 F.3d at 561 (emphasis added). In other words, a company that chooses to disclose soft information assumes the duty to do so fully and truthfully, but only to the extent that facts are known at the time the statements are made. *Helwig, Kushner* and *Omnicare I,* therefore appear to indicate that, in § 10(b) and Rule 10b–5 cases, a plaintiff must plead knowledge of falsity because there can be no liability for a material misstatement if a defendant was not aware there was anything further to disclose in order to correct the misstatement.

[5] Defendants now argue that the same reasoning should apply under § 11 to the case at hand. We do not agree. Section 10(b) and Rule 10b–5 require a plaintiff to prove scienter, § 11 is a strict liability statute. It makes sense that a defendant cannot be liable for a fraudulent misstatement or omission under § 10(b) and Rule 10b–5 if he did not know a statement was false at the time it was made. The statement cannot be fraudulent if the defendant did not know it was false. Section § 11, however, provides for strict liability when a registration statement "contain[s] an untrue statement of a material fact." 15 U.S.C. 77k(a); *see Huddleston,* 459 U.S. at 382, 103 S.Ct. 683. No matter the framing, once a false statement has been made, a defendant's knowledge is not relevant to a strict liability claim.

It is immaterial that this issue has been framed as a disclosure requirement. Disclosed information can nevertheless be indisputably wrong. Under the language of § 10(b) and Rule 10b–5, a defendant may take shelter in the fact that she did not know there was anything further to disclose; it was not *fraudulent* for the defendant to fail to disclose anything further. A plaintiff therefore fails to state a claim if she has not pleaded knowledge of falsity. Under § 11, however, if the defendant discloses information that includes a material misstatement, that is sufficient and a complaint may survive a motion to dismiss without pleading knowledge of falsity.

Finally, Defendants urge us to follow *Fait v. Regions Financial Corp.,* 655 F.3d 105 (2d Cir.2011). In *Fait,* a case similar to the instant one, the Second Circuit held "when a plaintiff asserts a claim under section 11 . . . based upon a belief or opinion alleged to have been communicated by a defendant, liability lies only to the extent

that the statement was both objectively false and disbelieved by the defendant at the time it was expressed." *Id.* at 110 (citing *Virginia Bankshares, Inc. v. Sandberg,* 501 U.S. 1083, 1095–96, 111 S.Ct. 2749, 115 L.Ed.2d 929 (1991)). Defendants argue that in *Fait* the Second Circuit correctly interpreted and applied the Supreme Court opinion *Virginia Bankshares,* 501 U.S. 1083, 111 S.Ct. 2749, 115 L.Ed.2d 929 (1991), and this Court is bound to follow suit. *See also Rubke v. Capitol Bancorp Ltd.,* 551 F.3d 1156, 1162 (9th Cir.2009) (citing to *Virginia Bankshares* and holding that 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").

While Defendants are correct that we are bound by Supreme Court precedent, we see nothing in *Virginia Bankshares* that alters the outcome in the instant case, and we decline to follow the Second and Ninth Circuits as a result. Reserving the question of whether scienter is necessary to make out a § 14(a) claim, the Supreme Court held in *Virginia Bankshares* that a plaintiff may bring a claim under § 14(a) of the Securities and Exchange Act of 1934 for a material misstatement or omission even if the statement is vague and conclusory. *Virginia Bankshares,* 501 U.S. at 1093, 111 S.Ct. 2749 ("[S]uch 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"); 15 U.S.C. § 78n(a). The Court furthermore held that a defendant's disbelief in his own statement is not enough, on its own, for a plaintiff to make out a claim for a material misstatement under § 14(a). *Id.* at 1090, 1095–96, 111 S.Ct. 2749. In other words, under § 14(a) a plaintiff is required to plead objective falsity in order to state a claim; pleading belief of falsity alone is not enough. *Id.* at 1095–96, 111 S.Ct. 2749 ("proof of mere disbelief or belief undisclosed [standing alone] should not suffice for liability under § 14(a)"). In the instant case, the Plaintiffs have pleaded objective falsity. The *Virginia Bankshares* Court was not faced with and did not address whether a plaintiff must additionally plead knowledge of falsity in order to state a claim. *Id.* It therefore does not impact our decision today.

The Court, *at the same point* that it declined to discuss scienter, also explicitly limited its discussion to statements of opinion and belief that it presumed were made with knowledge of falsity: "[W]e interpret 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 we confine our discussion to statements so made." *Id.* at 1090, 111 S.Ct. 2749. A footnote to this sentence reserves "the question whether scienter [is] necessary for liability ... under § 14(a)." *Id.* at 1090 n. 5, 111 S.Ct. 2749. The connection of these two statements indicates that the *Virginia Bankshares* Court itself tied the knowledge of falsity requirement to scienter but explicitly declined to address the issue further. Instead, it assumed the jury in the case had already found knowledge of falsity—whether necessary or not—and proceeded from there. *See id.* at 1090, 111 S.Ct. 2749.

The Second and Ninth Circuits have read more into *Virginia Bankshares* than the language of the opinion allows and have stretched to extend this § 14(a) case into a § 11 context. Since the Supreme Court assumed knowledge of falsity for the purposes of the discussion in *Virginia Bankshares,* § 14(a) was effectively treat-

ed as a statute that required scienter.[3] The *Virginia Bankshares* discussion, therefore, has very limited application to § 11; a provision which the Court has already held to create strict liability. *See Huddleston*, 459 U.S. at 381–82, 103 S.Ct. 683.

The Second Circuit reads Justice Scalia's concurring opinion as support for their interpretation of *Virginia Bankshares*. *See Fait*, 655 F.3d at 111 (citing *Virginia Bankshares*, 501 U.S. at 1108–1109, 111 S.Ct. 2749). Justice Scalia wrote: "As I understand the Court's opinion, the statement 'In the opinion of the Directors, this is a high value for the shares' would produce liability if in fact it was not a high value and the directors knew that. It would not produce liability if in fact it was not a high value but the directors honestly believed otherwise." *Virginia Bankshares*, 501 U.S. at 1108–09, 111 S.Ct. 2749. We do not think it is necessary to ignore Justice Scalia's interpretation of the majority *Virginia Bankshares* opinion; we only believe it is unreasonable to extend it to this case and § 11. Because the Court chose to limit its discussion to "statements of belief and opinion . . . made with knowledge that" the statements were false, *id.* at 1090, 111 S.Ct. 2749, any musings regarding mens rea are dicta. The Supreme Court was not faced with the question of knowledge of falsity requirements. Justice Souter carefully declined to discuss strict liability in his introduction to the majority opinion, and it would be unwise for this Court to add an element to § 11 claims based on little more than a tea-leaf reading in a § 14(a) case. While there are contexts in which dicta provides valuable insight into the Court's outlook, we must be careful in how it is extended and applied. This is a context in which extension of dicta is most dangerous. Even Justice Scalia's seemingly direct statement must be read in the context of § 14(a)—a non-strict liability statute. In writing the opinion, the Court could not have intended that musings regarding the requirement would later be applied to an unrelated statute. We therefore refuse to extend *Virginia Bankshares* to impose a knowledge of falsity requirement upon § 11 claims.

2.

[6] We construe facts alleged in the complaint in the light most favorable to the Plaintiffs and accept all factual allegations as true. *Kottmyer*, 436 F.3d at 688; *see Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007). But complaints subject to Rule 9(b) must plead "with particularity the circumstances constituting fraud or mistake." Fed.R.Civ.P. 9(b). Defendants argue that Plaintiffs have not met their burden under Rule 9(b) due to their reliance on *qui tam* complaints and confidential sources. We disagree.

[7] Defendants first argue that Plaintiffs' citations to *qui tam* complaints are insufficient to sustain their claim. In order to support this argument, Defendants first contend that Plaintiffs have failed to conduct a "reasonable investigation" as required under Rule 11. *See Albright v. Upjohn Co.*, 788 F.2d 1217, 1220 (6th Cir. 1986); *see also* Fed.R.Civ.P. 11. This argument, however, was also raised in district court, and the court, at its discretion, did not issue sanctions or strike the relevant portions of the Third Amended Complaint. *See Mich. Div.-Monument Builders of N. Am. v. Mich. Cemetery Ass'n*, 524 F.3d 726, 739 (6th Cir.2008) ("We re-

3. In this Circuit § 14(a) does in fact require proof of scienter to state a claim. *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 430 (6th Cir.1980).

view a district court's decision to grant or deny sanctions ... arising from ... Rule 11, under the abuse-of-discretion standard"). Rule 11 sanctions are a question of "whether the ... attorney's conduct was reasonable under the circumstances." *Id.* (internal quotation marks and citations omitted). We see no reason to conclude that the district court abused its discretion for purposes of Rule 11.

Defendants next argue that allegations based on *qui tam* complaints nevertheless cannot withstand a motion to dismiss under Rule 9(b). Defendants cite to several cases in which courts, after noting reliance on third-party actions, have dismissed complaints under Rule 9(b). We do not believe this case necessitates such action. The only Sixth Circuit opinion cited by Defendants, *Konkol v. Diebold, Inc.,* 590 F.3d 390 (6th Cir.2009), *abrogated on other grounds by Frank v. Dana Corp.,* 646 F.3d 954 (6th Cir.2011), is inapposite. In *Konkol,* this Court began by determining that the complaint, in a § 10b and Rule 10b–5 case, was insufficient to state a claim—on grounds that had nothing to do with third-party complaints.[4] *Id.* at 397–400. We then proceeded to address the plaintiffs' list of defenses to that holding, finding each of them insufficient. *Id.* at 400–04. One of these defenses was the existence of government investigations into the defendants' actions. *Id.* at 401–02. We stated that "[a]lthough a government investigation is not altogether irrelevant to the ... analysis ... [g]overnment investigations can result from any number of causes, and the investors have not pointed to any facts suggesting that the SEC investigation" supports their claim. *Id.* at 402.

The same is not true in the instant case. Plaintiffs do not simply cite to the *existence* of government investigations, they allege numerous reasons why the facts of those investigations support their claim. In *Konkol,* the plaintiffs relied on the fact that government agencies had dedicated resources to investigating defendants, and they therefore concluded, "as a matter of common sense," that something must be amiss. *Id.* at 401–02. The Plaintiffs here jump to no such conclusions. Instead of relying on the mere existence of *qui tam* complaints or investigations, they comprehensively discuss how the details are relevant to their own complaint, and give extensive rationale for that support. We find the other cases cited by Defendants similarly inapplicable.

Defendants' second argument is that the confidential witness statements in the complaint should be "steeply discounted." *See Omnicare I,* 583 F.3d at 946 (discounting the weight of the confidential witness statements). Even giving the confidential witness statements minimal weight, however, we do not doubt that sufficient facts have been presented to "raise a reasonable expectation that discovery will reveal evidence." *Twombly,* 550 U.S. at 556, 127 S.Ct. 1955. We therefore conclude that Plaintiffs have adequately met the particularity requirement of Rule 9(b).

B.

Plaintiffs also appeal the dismissal of their § 11 claim for GAAP-based misstatements and omissions. The district court held that Plaintiffs failed to plead knowledge of falsity and therefore failed to state a claim. Defendants argue that we should affirm because the GAAP allegations are based on "soft information." *Cf. In re Almost Family, Inc. Sec. Litig.,* No. 3:10–

4. We also note that plaintiffs in *Konkol* were not only subject to Rule 9(b) but also to the higher more exacting pleading standards of the Private Securities Litigation Reform Act, 15 U.S.C. § 78u–4(b), which are inapplicable in this case. *Konkol,* 590 F.3d at 396.

CV–00520–H, 2012 WL 443461, at *4 (W.D.Ky. Feb. 10, 2012) (holding that some GAAP allegations were soft information because the allegations in plaintiff's complaint focused on defendants' beliefs about accounting numbers, not on the actual data they reported). We disagree that Plaintiffs' GAAP allegations qualify as soft information. Plaintiffs' allegation is that Defendants' hard numbers were incorrect. These are allegations of hard facts and do not require pleading knowledge of falsity under any standard. Even if we were to hold that the GAAP allegations are soft information, however, plaintiffs are not required to plead knowledge of falsity under § 11 to make out a claim for a material misstatement. Therefore, the district court erred in requiring Plaintiffs to plead knowledge of falsity with regard to the GAAP violations.

[8] However, Plaintiffs still have to meet the particularity requirements of Rule 9(b) in pleading that GAAP violations occurred. As this Court noted in *Omnicare I,* Plaintiffs' GAAP allegations appear to contain some factual holes. In assessing Plaintiffs' 10(b) and 10b–5 claims, the *Omnicare I* Court stated:

> Although Plaintiffs list numerous alleged violations of GAAP rules, the complaint nowhere suggests how or when any of these alleged accounting improprieties were disclosed. Rather, Plaintiffs argue that they were implicitly disclosed because Omnicare's allegedly illegal conduct (drug recycling, etc.) translated into accounting violations. Thus, when news of the government raids appeared, the accounting statements were thrown into question by extension. This causation theory, however, rests entirely on speculation and is substantially undercut both by the lack of any financial restatements on Omnicare's part and by the willingness of third-party auditors to continue to certify Omnicare's GAAP compliance.

Omnicare I, 583 F.3d at 945.

While that analysis concerned whether Plaintiffs had adequately alleged "loss causation" with particularity, it is applicable to whether they have pleaded a GAAP violation at all. Plaintiffs' Third Amended Complaint alleges many GAAP-based violations, but as the Court noted in *Omnicare I,* the details of the accounting violations remain unclear. Although Plaintiffs' complaint has been amended since our previous opinion, Plaintiffs have not pointed to any updated information that would resolve these issues.

C.

[9, 10] Defendants urge us to affirm the district court on the alternative ground that the affirmative defense of loss causation is evident on the face of the complaint. "Loss causation" refers to the causal connection between the defendant's material misrepresentation or omission and the plaintiff's loss. *See Omnicare,* 527 F.Supp.2d at 704–05. When an affirmative defense is evident on the face of a complaint, the complaint may be subject to dismissal under Rule 12(b)(6). *Jones v. Bock,* 549 U.S. 199, 215, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007). Furthermore, this Court held in *Omnicare I* that the complaint did not adequately plead loss causation for the 10(b) and Rule 10b–5 claims. *Omnicare I,* 583 F.3d at 943–47.

Loss causation is an element of a § 10(b) and Rule 10b–5 claim but only an affirmative defense to a § 11 claim. The Omnicare I panel reversed the district court on the § 11 claim on exactly that basis. Had the Court determined that the affirmative defense of loss causation was evident from the face of the pleadings, it would have affirmed and dismissed the case. Instead, it chose to remand to the

district court for further analysis. *Id.* at 948. The district court, having declined to reach this issue on remand, has not yet addressed the merits of the argument. Although the complaint has been amended since *Omnicare I* was decided, the Defendants urge us to find loss causation on the basis of language in the outdated complaint. We therefore have no more information on this issue now than we had at the time of the *Omnicare I* opinion.

[11] "When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court." *Dandridge v. Williams,* 397 U.S. 471, 476 n. 6, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); *see also Lewis v. Philip Morris Inc.,* 355 F.3d 515, 534 (6th Cir.2004) (remanding due to the fact-intensive nature of the review required). The district court in this case has had many years to familiarize itself with the facts of this case and is in a stronger position than this Court to conduct the fact-intensive analysis this ruling requires.

IV.

For the foregoing reasons, we REVERSE the district court with regard to Plaintiffs' legal compliance claims and REMAND for further proceedings consistent with this opinion; and AFFIRM with respect to Plaintiffs' GAAP-based claims.

GWIN, District Judge, concurring.

I concur in the majority's thoughtful and comprehensive opinion. I write separately to make clear that the district court retains the statutory and inherent discretion to resurrect previously dismissed claims and previously dismissed parties should later discovered evidence warrant it. *See Rodriguez v. Tenn. Laborers Health & Welfare Fund,* 89 Fed.Appx. 949, 959 (6th Cir.2004) ("District courts have authority both under common law and Rule 54(b) to reconsider interlocutory orders and to reopen any part of a case before entry of final judgment.").

Rule 54(b) of the Federal Rules of Civil Procedure provides the statutory vehicle for such revision. If a court decides fewer than all the claims presented, as is the case here, dismissed claims can be revived until the entry of final judgment. Fed. R.Civ.P. 54(b) ("[A]ny order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."). The district court's ability to reconsider past rulings must be tempered by "the sound public policy that litigation be decided and then put to an end." *Petition of U.S. Steel Corp.,* 479 F.2d 489, 494 (6th Cir.1973).

In deciding whether to revisit previously dismissed claims or parties, a district court may consider "(1) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice." *Rodriguez,* 89 Fed.Appx. at 959. (citing *Reich v. Hall Holding Co.,* 990 F.Supp. 955, 965 (N.D.Ohio 1998)). Simple reargument of evidence that had been available at the time of the earlier decision is usually not enough to warrant reconsideration. *Id.*

Rule 54(b) is particularly relevant in suits subject to the Private Securities Litigation Reform Act (PSLRA). The PSLRA, passed in 1995 after considerable lobbying by corporate and investment interests, mandates heightened pleading requirements to avoid dismissal. As one scholar notes, the PSLRA "created a super-heightened pleading standard for certain aspects of securities claims and deferred discovery until after resolution of an

inevitably protracted motion to dismiss. . . ." Arthur Miller, *From* Conley *to* Twombly *to* Iqbal: *A Double Play on the Federal Rules of Civil Procedure,* 60 Duke L.J. 1, 11 (2010). Such motions to dismiss, as is the case here, often include questions of "scienter, loss causation, reliance, and materiality—questions that formerly would have been considered trial worthy." *Id.* Remarkably, the PSLRA imposes what amounts to a probabilistic pleading standard for scienter. *See Tellabs v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 314, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007) (defining the "strong inference" of scienter under the PSLRA as "more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent").

If newly-found evidence in a PSLRA case supports a previously dismissed claim's scienter (or materiality, or reliance, or loss causation) allegation, the district court could allow the claim to be revived. District courts are charged with enforcing rules "to secure the just, speedy, and inexpensive determination" of an action. Fed. R.Civ.P. 1. There's a reason that "just" precedes "speedy."

UNITED STATES of America, Plaintiff–Appellee,

v.

Marvin Charles GABRION, II, Defendant–Appellant.

Nos. 02–1386, 02–1461, 02–1570.

United States Court of Appeals, Sixth Circuit.

Argued: June 6, 2012.

Decided and Filed: May 28, 2013.

Background: Defendant was convicted in the United States District Court for the Western District of Michigan, Robert Holmes Bell, J., 2006 WL 2473978, of first degree capital murder within special maritime and territorial jurisdiction of United States. Court imposed sentence of death. Defendant appealed. The Court of Appeals, 517 F.3d 839, affirmed. Parties then filed supplemental briefs and, after a second oral argument, Court was prepared to decide other issues on the merits. The Court of Appeals, 648 F.3d 307, affirmed. The Court granted government's petition to rehear the case en banc.

Holdings: The Court of Appeals, Kethledge, Circuit Judge, held that:

(1) murder's location in state that lacked death penalty could not count as mitigating factor in sentencing phase of capital trial as that term was used under Eighth Amendment;

(2) murder's location in state that lacked death penalty could not count as mitigating factor in sentencing phase of capital trial as that term was used under Federal Death Penalty Act;

(3) exclusion of defendant's argument from sentencing phase of his trial, claiming that there was residual-doubt about whether victim had been murdered within National Forest, was harmless beyond reasonable doubt;

(4) defendant's right to impartial jury drawn from venire that had not been tilted in favor of capital punishment by selective prosecutorial challenges for cause had not been violated by excluding generally anti-death penalty venirepersons;

(5) requirement for jury to weigh mitigating and aggravating factors when considering whether defendant should be sentenced to death did not have to be based on reasonable doubt standard;

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Firefighters Pension & Relief Fund of the City of New Orleans v. Bulmahn, E.D.La., August 14, 2015

135 S.Ct. 1318
Supreme Court of the United States

OMNICARE, INC., et al., Petitioners
v.
LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND et al.

No. 13–435.
|
Argued Nov. 3, 2014.
|
Decided March 24, 2015.

Synopsis
Background: Investors brought securities fraud class action under § 11 of the Securities Act of 1933 against corporation and its officers and directors, alleging defendants made material misstatements and/or omissions in a registration statement filed with the Securities and Exchange Commission (SEC) in connection with a public stock offering. The United States District Court for the Eastern District of Kentucky, William O. Bertelsman, J., 2012 WL 462551, dismissed the complaint. Investors appealed. The United States Court of Appeals for the Sixth Circuit, Cole, Circuit Judge, 719 F.3d 498, affirmed in part, reversed in part, and remanded. Certiorari was granted.

Holdings: The Supreme Court, Justice Kagan, held that:

[1] investors failed to state a claim for an untrue statement of material fact in the registration statement, but

[2] omission of material facts about inquiry into or knowledge concerning a statement of opinion could be actionable.

Vacated and remanded.

Justice Scalia filed an opinion concurring in part and concurring in the judgment.

Justice Thomas filed an opinion concurring in the judgment.

West Headnotes (11)

[1] Securities Regulation
Purpose

The Securities Act of 1933 protects investors by ensuring that companies issuing securities make a full and fair disclosure of information relevant to a public offering. Securities Act of 1933, § 1 et seq., 15 U.S.C.A. § 77a et seq.

Cases that cite this headnote

[2] Securities Regulation
Scienter, absolute or strict liability

Under § 11 of the Securities Act of 1933, which gives a buyer of securities a right of action against an issuer or designated individuals for an untrue statement of material fact or omission of a material fact in a registration statement for a public offering, the buyer need not prove that the defendant acted with any intent to deceive or defraud. Securities Act of 1933, § 11(a), 15 U.S.C.A. § 77k(a).

3 Cases that cite this headnote

[3] Federal Courts
Presentation of Questions Below or on Review; Record; Waiver

Federal Courts
Scope and Extent of Review

Lower courts' erroneous conflation of questions concerning liability, under § 11 of Securities Act of 1933, for an untrue statement of material fact or for omission of a material fact in a registration statement for a public offering of securities, did not limit the scope of Supreme Court's certiorari review; securities purchasers' complaint raised discrete omissions claim, lower courts chose not to address that claim separately but understood that the complaint alleged not only misstatements but also omissions, omissions issue was crux of parties' dispute before Supreme Court, omissions issue was fully briefed by both parties plus the Solicitor General

as amicus curiae, and issuer had not objected in its Supreme Court briefs or at oral argument that purchasers' omissions theory had been forfeited or was not properly before the Supreme Court. Securities Act of 1933, § 11(a), 15 U.S.C.A. § 77k(a).

1 Cases that cite this headnote

[4] Securities Regulation
Pleading

Allegation of purchasers of common stock in public offering, that issuer, which provided pharmacy services for residents of nursing homes, turned out to be wrong with respect to its stated belief, in its registration statement, that it was obeying applicable federal and state laws concerning its contractual arrangements with other health care providers, its pharmaceutical suppliers, and its pharmacy practices, failed to state a claim for an untrue statement of material fact in a registration statement, in action for damages under § 11 of Securities Act of 1933. Securities Act of 1933, § 11(a), 15 U.S.C.A. § 77k(a).

2 Cases that cite this headnote

[5] Securities Regulation
False Statements or Omissions; Accuracy

A sincere statement of pure opinion, in a registration statement for a public offering of securities, is not an untrue statement of material fact, as basis for liability to investors under § 11 of the Securities Act of 1933, regardless of whether an investor can ultimately prove the belief wrong; such liability, limited as it is to factual statements, does not allow investors to second-guess inherently subjective and uncertain assessments. Securities Act of 1933, § 11(a), 15 U.S.C.A. § 77k(a).

8 Cases that cite this headnote

[6] Securities Regulation
False Statements or Omissions; Accuracy

A statement of opinion in a registration statement for a public offering of securities is not misleading, as basis for liability under § 11 of the Securities Act of 1933 for omitting a statement of material fact necessary to make other statements nonmisleading, just because external facts show the opinion to be incorrect, since reasonable investors do not understand such statements as guarantees, and § 11's omissions clause therefore does not treat them that way. Securities Act of 1933, § 11(a), 15 U.S.C.A. § 77k(a).

14 Cases that cite this headnote

[7] Securities Regulation
False Statements or Omissions; Accuracy

If a registration statement for a public offering of securities omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the opinion statement itself as conveying facts regarding how the issuer formed the opinion, then liability is created under § 11 of the Securities Act of 1933 for omitting a statement of material fact necessary to make other statements nonmisleading. Securities Act of 1933, § 11(a), 15 U.S.C.A. § 77k(a).

28 Cases that cite this headnote

[8] Securities Regulation
False Statements or Omissions; Accuracy

An opinion statement in a registration statement for a public offering of securities is not necessarily misleading, as basis for liability under § 11 of the Securities Act of 1933 for omitting a statement of material fact necessary to make other statements nonmisleading, when an issuer knows, but fails to disclose, some fact cutting the other way, since reasonable investors understand that opinions sometimes rest on a weighing of competing facts; indeed, the presence of such facts is one reason why an issuer may frame a statement as an opinion, thus conveying uncertainty. Securities Act of 1933, § 11(a), 15 U.S.C.A. § 77k(a).

12 Cases that cite this headnote

[9] **Fraud**

Matters of Fact or of Opinion

For the common-law tort of misrepresentation, a statement of opinion as to facts not disclosed and not otherwise known to the recipient may in some circumstances reasonably be interpreted by him as an implied statement that the speaker knows facts sufficient to justify him in forming the opinion, or that he at least knows no facts incompatible with the opinion. Restatement (Second) of Torts § 539.

2 Cases that cite this headnote

[10] **Securities Regulation**

False Statements or Omissions; Accuracy

Congress adopted § 11 of the Securities Act of 1933, concerning registration statements for public offerings of securities, to ensure that issuers tell the whole truth to investors, and for that reason, literal accuracy is not enough: an issuer must as well desist from misleading investors by saying one thing and holding back another. Securities Act of 1933, § 11(a), 15 U.S.C.A. § 77k(a).

Cases that cite this headnote

[11] **Securities Regulation**

Pleading

An investor cannot state a claim under § 11 of the Securities Act of 1933, that an issuer's statement of opinion in the registration statement for a public offering of securities was misleading because it omitted material facts about the issuer's inquiry into or knowledge concerning the statement of opinion, by simply alleging that the issuer failed to reveal the basis for its opinion; the buyer must identify particular and material facts going to the basis for the issuer's opinion, i.e., facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have, whose omission makes the opinion statement misleading to a reasonable person reading the statement fairly and in context. Securities Act of 1933, § 11(a), 15 U.S.C.A. § 77k(a).

33 Cases that cite this headnote

***1320** *Syllabus* [*]

The Securities Act of 1933 requires that a company wishing to issue securities must first file a registration statement containing specified information about the issuing company and the securities offered. See 15 U.S.C. §§ 77g, 77aa. The registration statement may also include other representations of fact or opinion. To protect investors and promote compliance with these disclosure requirements, § 11 of the Act creates two ways to hold issuers liable for a registration statement's contents: A purchaser of securities may sue an issuer if the registration statement either "contain[s] ***1321** an untrue statement of a material fact" or "omit[s] to state a material fact ... necessary to make the statements therein not misleading." § 77k(a). In either case, the buyer need not prove that the issuer acted with any intent to deceive or defraud. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381–382, 103 S.Ct. 683, 74 L.Ed.2d 548.

Petitioner Omnicare, a pharmacy services company, filed a registration statement in connection with a public offering of common stock. In addition to the required disclosures, the registration statement contained two statements expressing the company's opinion that it was in compliance with federal and state laws. After the Federal Government filed suit against Omnicare for allegedly receiving kickbacks from pharmaceutical manufacturers, respondents, pension funds that purchased Omnicare stock (hereinafter Funds), sued Omnicare under § 11. They claimed that Omnicare's legal-compliance statements constituted "untrue statement[s] of ... material fact" and that Omnicare "omitted to state [material] facts necessary" to make those statements not misleading.

The District Court granted Omnicare's motion to dismiss. Because the Funds had not alleged that Omnicare's officers knew they were violating the law, the court found that the Funds had failed to state a § 11 claim. The Sixth Circuit reversed. Acknowledging that the statements at issue expressed opinions, the court held that no showing of subjective disbelief was required. In the court's view, the Funds' allegations that Omnicare's legal-compliance opinions were objectively false sufficed to support their claim.

Held:

1. A statement of opinion does not constitute an "untrue statement of ... fact" simply because the stated opinion ultimately proves incorrect. The Sixth Circuit's contrary holding wrongly conflates facts and opinions. A statement of fact expresses certainty about a thing, whereas a statement of opinion conveys only an uncertain view as to that thing. Section 11 incorporates that distinction in its first clause by exposing issuers to liability only for "untrue statement[s] of ... *fact*." § 77k(a) (emphasis added). Because a statement of opinion admits the possibility of error, such a statement remains true—and thus is not an "untrue statement of ... fact"—even if the opinion turns out to have been wrong.

But opinion statements are not wholly immune from liability under § 11's first clause. Every such statement explicitly affirms one fact: that the speaker actually holds the stated belief. A statement of opinion thus qualifies as an "untrue statement of ... fact" if *that fact* is untrue—*i.e.*, if the opinion expressed was not sincerely held. In addition, opinion statements can give rise to false-statement liability under § 11 if they contain embedded statements of untrue facts. Here, however, Omnicare's sincerity is not contested and the statements at issue are pure opinion statements. The Funds thus cannot establish liability under § 11's first clause. Pp. 1325 – 1328.

2. If a registration statement omits material facts about the issuer's inquiry into, or knowledge concerning, a statement of opinion, and if those facts conflict with what a reasonable investor, reading the statement fairly and in context, would take from the statement itself, then § 11's omissions clause creates liability. Pp. 1327 – 1333.

(a) For purposes of § 11's omissions clause, whether a statement is "misleading" is an objective inquiry that depends on a reasonable investor's perspective. Cf. ***1322** *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 445, 96 S.Ct. 2126, 48 L.Ed.2d 757. Omnicare goes too far by claiming that no reasonable person, in any context, can understand a statement of opinion to convey anything more than the speaker's own mindset. A reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about the speaker's basis for holding that view. Specifically, an issuer's statement of opinion may fairly imply facts about the inquiry the issuer conducted or the knowledge it had. And if the real facts are otherwise, but not provided, the opinion statement will mislead by omission.

An opinion statement, however, is not misleading simply because the issuer knows, but fails to disclose, some fact cutting the other way. A reasonable investor does not expect that every fact known to an issuer supports its opinion statement. Moreover, whether an omission makes an expression of opinion misleading always depends on context. Reasonable investors understand opinion statements in light of the surrounding text, and § 11 creates liability only for the omission of material facts that cannot be squared with a fair reading of the registration statement as a whole. Omnicare's arguments to the contrary are unavailing. Pp. 1327 – 1333.

(b) Because neither court below considered the Funds' omissions theory under the right standard, this case is remanded for a determination of whether the Funds have stated a viable omissions claim. On remand, the court must review the Funds' complaint to determine whether it adequately alleges that Omnicare omitted from the registration statement some specific fact that would have been material to a reasonable investor. If so, the court must decide whether the alleged omission rendered Omnicare's opinion statements misleading in context. Pp. 1332 – 1333.

719 F.3d 498, vacated and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment. THOMAS, J., filed an opinion concurring in the judgment.

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Opinion

***1323** Justice KAGAN delivered the opinion of the Court.

Before a company may sell securities in interstate commerce, it must file a registration statement with the Securities and Exchange Commission (SEC). If that document either "contain[s] an untrue statement of a material fact" or "omit[s] to state a material fact ... necessary to make the statements therein not misleading," a purchaser of the stock may sue for damages. 15 U.S.C. § 77k(a). This case requires us to decide how each of those phrases applies to statements of opinion.

I

[1] The Securities Act of 1933, 48 Stat. 74, 15 U.S.C. § 77a *et seq.*, protects investors by ensuring that companies issuing securities (known as "issuers") make a "full and fair disclosure of information" relevant to a public offering. *Pinter v. Dahl*, 486 U.S. 622, 646, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988). The linchpin of the Act is its registration requirement. With limited exceptions not relevant here, an issuer may offer securities to the public only after filing a registration statement. See §§ 77d, 77e. That statement must contain specified information about both the company itself and the security for sale. See §§ 77g, 77aa. Beyond those required disclosures, the issuer may include additional representations of either fact or opinion.

[2] Section 11 of the Act promotes compliance with these disclosure provisions by giving purchasers a right of action against an issuer or designated individuals (directors, partners, underwriters, and so forth) for material misstatements or omissions in registration statements. As relevant here, that section provides:

> "In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security ... [may] sue." § 77k(a).

Section 11 thus creates two ways to hold issuers liable for the contents of a registration statement—one focusing on what the statement says and the other on what it leaves out. Either way, the buyer need not prove (as he must to establish certain other securities offenses) that the defendant acted with any intent to deceive or defraud. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381–382, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983).

This case arises out of a registration statement that petitioner Omnicare filed in connection with a public offering of common stock. Omnicare is the nation's largest provider of pharmacy services for residents of nursing homes. Its registration statement contained (along with all mandated disclosures) analysis of the effects of various federal and state laws on its business model, including its acceptance of rebates from pharmaceutical manufacturers. See, *e.g.*, App. 88–107, 132–140, 154–166. Of significance here, two sentences in the registration statement expressed Omnicare's view of its compliance with legal requirements:

- "We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws." *Id.*, at 95.
- "We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve." *Id.*, at 137.

***1324** Accompanying those legal opinions were some caveats. On the same page as the first statement above, Omnicare mentioned several state-initiated "enforcement actions against pharmaceutical manufacturers" for offering payments to pharmacies that dispensed their products; it then cautioned that the laws relating to that practice might "be interpreted in the future in a manner inconsistent with our interpretation and application." *Id.*, at 96. And adjacent to the second statement, Omnicare noted that the Federal Government had expressed "significant concerns" about some manufacturers' rebates to pharmacies and warned that business might suffer "if these price concessions were no longer provided." *Id.*, at 136–137.

Respondents here, pension funds that purchased Omnicare stock in the public offering (hereinafter Funds), brought suit alleging that the company's two opinion statements about legal compliance give rise to liability under § 11.

Citing lawsuits that the Federal Government later pressed against Omnicare, the Funds' complaint maintained that the company's receipt of payments from drug manufacturers violated anti-kickback laws. See *id.*, at 181–186, 203–226. Accordingly, the complaint asserted, Omnicare made "materially false" representations about legal compliance. *Id.*, at 274. And so too, the complaint continued, the company "omitted to state [material] facts necessary" to make its representations not misleading. *Id.*, at 273. The Funds claimed that none of Omnicare's officers and directors "possessed reasonable grounds" for thinking that the opinions offered were truthful and complete. *Id.*, at 274. Indeed, the complaint noted that one of Omnicare's attorneys had warned that a particular contract "carrie[d] a heightened risk" of liability under anti-kickback laws. *Id.*, at 225 (emphasis deleted). At the same time, the Funds made clear that in light of § 11's strict liability standard, they chose to "exclude and disclaim any allegation that could be construed as alleging fraud or intentional or reckless misconduct." *Id.*, at 273.

The District Court granted Omnicare's motion to dismiss. See Civ. No. 2006–26 (ED Ky., Feb. 13, 2012), App. to Pet. for Cert. 28a, 38a–40a, 2012 WL 462551, *4–*5. In the court's view, "statements regarding a company's belief as to its legal compliance are considered 'soft' information" and are actionable only if those who made them "knew [they] were untrue at the time." App. to Pet. for Cert. 38a. The court concluded that the Funds' complaint failed to meet that standard because it nowhere claimed that "the company's officers knew they were violating the law." *Id.*, at 39a. The Court of Appeals for the Sixth Circuit reversed. See 719 F.3d 498 (2013). It acknowledged that the two statements highlighted in the Funds' complaint expressed Omnicare's "opinion" of legal compliance, rather than "hard facts." *Id.*, at 504 (quoting *In re Sofamor Danek Group Inc.*, 123 F.3d 394, 401–402 (C.A.6 1997)). But even so, the court held, the Funds had to allege only that the stated belief was "objectively false"; they did not need to contend that anyone at Omnicare "disbelieved [the opinion] at the time it was expressed." 719 F.3d, at 506 (quoting *Fait v. Regions Financial Corp.*, 655 F.3d 105, 110 (C.A.2 2011)).

[3] We granted certiorari, 571 U.S. ——, 134 S.Ct. 1490, 188 L.Ed.2d 374 (2014), to consider how § 11 pertains to statements of opinion. We do so in two steps, corresponding to the two parts of § 11 and the two theories in the Funds' complaint. We initially address the Funds' claim that Omnicare made "untrue statement[s] of ... material fact" in offering its views on legal compliance. § 77k(a); ***1325** see App. 273–274. We then take up the Funds' argument that Omnicare "omitted to state a material fact ... necessary to make the statements [in its registration filing] not misleading." § 77k(a); see App. 273–274. Unlike both courts below, we see those allegations as presenting different issues. [1] In resolving the first, we discuss when an opinion itself constitutes a factual misstatement. In analyzing the second, we address when an opinion may be rendered misleading by the omission of discrete factual representations. Because we find that the Court of Appeals applied the wrong standard, we vacate its decision.

II

The Sixth Circuit held, and the Funds now urge, that a statement of opinion that is ultimately found incorrect—even if believed at the time made—may count as an "untrue statement of a material fact." 15 U.S. C § 77k(a); see 719 F.3d, at 505; Brief for Respondents 20–26. As the Funds put the point, a statement of belief may make an implicit assertion about the belief's "subject matter": To say "we believe X is true" is often to indicate that "X is in fact true." *Id.*, at 23; see Tr. of Oral Arg. 36. In just that way, the Funds conclude, an issuer's statement that "we believe we are following the law" conveys that "we in fact are following the law"—which is "materially false," no matter what the issuer thinks, if instead it is violating an anti-kickback statute. Brief for Respondents 1.

But that argument wrongly conflates facts and opinions. A fact is "a thing done or existing" or "[a]n actual happening." Webster's New International Dictionary 782 (1927). An opinion is "a belief[,] a view," or a "sentiment which the mind forms of persons or things." *Id.*, at 1509. Most important, a statement of fact ("the coffee is hot") expresses certainty about a thing, whereas a statement of opinion ("I think the coffee is hot") does not. See *ibid.* ("An opinion, in ordinary usage ... does not imply ... definiteness ... or certainty"); 7 Oxford English Dictionary 151 (1933) (an opinion "rests[s] on grounds insufficient for complete demonstration"). Indeed, that difference between the two is so ingrained in our everyday ways of speaking and thinking as to make resort to old dictionaries seem a mite silly. And Congress effectively incorporated just that distinction in § 11's first part by exposing issuers to liability not for "untrue statement[s]" full stop (which would have included ***1326** ones of opinion), but only for "untrue statement[s] of ... *fact*." § 77k(a) (emphasis added).

Consider that statutory phrase's application to two hypothetical statements, couched in ways the Funds claim are equivalent. A company's CEO states: "The TVs we manufacture have the highest resolution available on the market." Or, alternatively, the CEO transforms that factual statement into one of opinion: "I *believe* " (or "I think") "the TVs we manufacture have the highest resolution available on the market." The first version would be an untrue statement of fact if a competitor had introduced a higher resolution TV a month before—even assuming the CEO had not yet learned of the new product. The CEO's assertion, after all, is not mere puffery, but a determinate, verifiable statement about her company's TVs; and the CEO, however innocently, got the facts wrong. But in the same set of circumstances, the second version would remain true. Just as she said, the CEO really did believe, when she made the statement, that her company's TVs had the sharpest picture around. And although a plaintiff could later prove that opinion erroneous, the words "I believe" themselves admitted that possibility, thus precluding liability for an untrue statement of fact. That remains the case if the CEO's opinion, as here, concerned legal compliance. If, for example, she said, "I believe our marketing practices are lawful," and actually did think that, she could not be liable for a false statement of fact—even if she afterward discovered a longtime violation of law. Once again, the statement would have been true, because all she expressed was a view, not a certainty, about legal compliance.

That still leaves some room for § 11's false-statement provision to apply to expressions of opinion. As even Omnicare acknowledges, every such statement explicitly affirms one fact: that the speaker actually holds the stated belief. See Brief for Petitioners 15–16; W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts § 109, p. 755 (5th ed. 1984) (Prosser and Keeton) ("[A]n expression of opinion is itself always a statement of ... the fact of the belief, the existing state of mind, of the one who asserts it"). For that reason, the CEO's statement about product quality ("I believe our TVs have the highest resolution available on the market") would be an untrue statement of fact—namely, the fact of her own belief—if she knew that her company's TVs only placed second. And so too the statement about legal compliance ("I believe our marketing practices are lawful") would falsely describe her own state of mind if she thought her company was breaking the law. In such cases, § 11's first part would subject the issuer to liability (assuming the misrepresentation were material). [2]

***1327** In addition, some sentences that begin with opinion words like "I believe" contain embedded statements of fact —as, once again, Omnicare recognizes. See Reply Brief 6. Suppose the CEO in our running hypothetical said: "I believe our TVs have the highest resolution available because we use a patented technology to which our competitors do not have access." That statement may be read to affirm not only the speaker's state of mind, as described above, but also an underlying fact: that the company uses a patented technology. See *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1109, 111 S.Ct. 2749, 115 L.Ed.2d 929 (1991) (SCALIA, J., concurring in part and concurring in judgment) (showing that a statement can sometimes be "most fairly read as affirming separately both the fact of the [speaker's] opinion and the accuracy of the facts" given to support or explain it (emphasis deleted)). Accordingly, liability under § 11's false-statement provision would follow (once again, assuming materiality) not only if the speaker did not hold the belief she professed but also if the supporting fact she supplied were untrue.

[4] **[5]** But the Funds cannot avail themselves of either of those ways of demonstrating liability. The two sentences to which the Funds object are pure statements of opinion: To simplify their content only a bit, Omnicare said in each that "we believe we are obeying the law." And the Funds do not contest that Omnicare's opinion was honestly held. Recall that their complaint explicitly "exclude[s] and disclaim[s]" any allegation sounding in fraud or deception. App. 273. What the Funds instead claim is that Omnicare's belief turned out to be wrong—that whatever the company thought, it was in fact violating anti-kickback laws. But that allegation alone will not give rise to liability under § 11's first clause because, as we have shown, a sincere statement of pure opinion is not an "untrue statement of material fact," regardless whether an investor can ultimately prove the belief wrong. That clause, limited as it is to factual statements, does not allow investors to second-guess inherently subjective and uncertain assessments. In other words, the provision is not, as the Court of Appeals and the Funds would have it, an invitation to Monday morning quarterback an issuer's opinions.

III

A

That conclusion, however, does not end this case because the Funds also rely on § 11's omissions provision, alleging that Omnicare "omitted to state facts necessary" to make its

opinion on legal compliance "not misleading." App. 273; see § 77k(a).[3] As all parties accept, whether a statement is "misleading" depends on the perspective of a reasonable investor: The inquiry (like the one into materiality) is objective. Cf. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 445, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976) (noting that the securities laws care only about the "significance of an omitted or misrepresented fact to a reasonable investor"). We therefore must consider when, if ever, the omission of a fact can make a statement of opinion like Omnicare's, even if literally ***1328** accurate, misleading to an ordinary investor.

Omnicare claims that is just not possible. On its view, no reasonable person, in any context, can understand a pure statement of opinion to convey anything more than the speaker's own mindset. See Reply Brief 5–6. As long as an opinion is sincerely held, Omnicare argues, it cannot mislead as to any matter, regardless what related facts the speaker has omitted. Such statements of belief (concludes Omnicare) are thus immune from liability under § 11's second part, just as they are under its first.[4]

[6] That claim has more than a kernel of truth. A reasonable person understands, and takes into account, the difference we have discussed above between a statement of fact and one of opinion. See *supra*, at 1325 – 1326. She recognizes the import of words like "I think" or "I believe," and grasps that they convey some lack of certainty as to the statement's content. See, *e.g.*, Restatement (Second) of Contracts § 168, Comment *a*, p. 456 (1979) (noting that a statement of opinion "implies that [the speaker] ... is not certain enough of what he says" to do without the qualifying language). And that may be especially so when the phrases appear in a registration statement, which the reasonable investor expects has been carefully wordsmithed to comply with the law. When reading such a document, the investor thus distinguishes between the sentences "we believe X is true" and "X is true." And because she does so, the omission of a fact that merely rebuts the latter statement fails to render the former misleading. In other words, a statement of opinion is not misleading just because external facts show the opinion to be incorrect. Reasonable investors do not understand such statements as guarantees, and § 11's omissions clause therefore does not treat them that way.

[7] But Omnicare takes its point too far, because a reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion—or, otherwise put, about the speaker's basis for holding that view. And if the real facts are otherwise, but not provided, the opinion statement will mislead its audience. Consider an unadorned statement of opinion about legal compliance: "We believe our conduct is lawful." If the issuer makes that statement without having consulted a lawyer, it could be misleadingly incomplete. In the context of the securities market, an investor, though recognizing that legal opinions can prove wrong in the end, still likely expects such an assertion to rest on some meaningful legal inquiry—rather than, say, on mere intuition, however sincere.[5] Similarly, if ***1329** the issuer made the statement in the face of its lawyers' contrary advice, or with knowledge that the Federal Government was taking the opposite view, the investor again has cause to complain: He expects not just that the issuer believes the opinion (however irrationally), but that it fairly aligns with the information in the issuer's possession at the time.[6] Thus, if a registration statement omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself, then § 11's omissions clause creates liability.[7]

[8] An opinion statement, however, is not necessarily misleading when an issuer knows, but fails to disclose, some fact cutting the other way. Reasonable investors understand that opinions sometimes rest on a weighing of competing facts; indeed, the presence of such facts is one reason why an issuer may frame a statement as an opinion, thus conveying uncertainty. See *supra*, at 1325 – 1326, 1328. Suppose, for example, that in stating an opinion about legal compliance, the issuer did not disclose that a single junior attorney expressed doubts about a practice's legality, when six of his more senior colleagues gave a stamp of approval. That omission would not make the statement of opinion misleading, even if the minority position ultimately proved correct: A reasonable investor does not expect that *every* fact known to an issuer supports its opinion statement.[8]

***1330** Moreover, whether an omission makes an expression of opinion misleading always depends on context. Registration statements as a class are formal documents, filed with the SEC as a legal prerequisite for selling securities to the public. Investors do not, and are right not to, expect opinions contained in those statements to reflect baseless, off-the-cuff judgments, of the kind that an individual might communicate in daily life. At the same time, an investor reads each statement within such a document, whether of fact or of

opinion, in light of all its surrounding text, including hedges, disclaimers, and apparently conflicting information. And the investor takes into account the customs and practices of the relevant industry. So an omission that renders misleading a statement of opinion when viewed in a vacuum may not do so once that statement is considered, as is appropriate, in a broader frame. The reasonable investor understands a statement of opinion in its full context, and § 11 creates liability only for the omission of material facts that cannot be squared with such a fair reading.

[9] These principles are not unique to § 11: They inhere, too, in much common law respecting the tort of misrepresentation. [9] The Restatement of Torts, for example, recognizes that "[a] statement of opinion as to facts not disclosed and not otherwise known to the recipient may" in some circumstances reasonably "be interpreted by him as an implied statement" that the speaker "knows facts sufficient to justify him in forming" the opinion, or that he at least knows no facts "incompatible with [the] opinion." Restatement (Second) of Torts § 539, p. 85 (1976). [10] When that is so, the Restatement explains, liability may result from omission of facts—for example, the fact that the speaker failed to conduct any investigation—that rebut the recipient's predictable inference. See *id.*, Comment *a*, at 86; *id.*, Comment *b*, at 87. Similarly, the leading treatise in the area explains that "it has been recognized very often that the expression of an opinion may carry with it an implied assertion, not only that the speaker knows no facts which would preclude such an opinion, but that he does know facts which justify it." Prosser and Keeton § 109, at 760. That is especially (and traditionally) the case, the treatise continues, where—as in a registration statement—a speaker "holds himself out or is understood as having special knowledge of the matter which is not available to the plaintiff." *Id.*, at 760–761 (footnote omitted); see Restatement (Second) of Torts § 539, Comment *b*, at 86 (noting that omissions relating to an opinion's basis are "particularly" likely to give rise to liability when the speaker has "special knowledge of facts unknown to the recipient"); *Smith v. Land and House Property Corp.*, [1884] 28 Ch. D. 7, 15 (App. Cas.) (appeal taken from Eng.) (opinion of Bowen, L.J.) (When "the facts are not equally known to both sides, then a statement of ***1331** opinion by the one who knows the facts best ... impliedly states that [the speaker] knows facts which justify his opinion"). [11]

[10] And the purpose of § 11 supports this understanding of how the omissions clause maps onto opinion statements. Congress adopted § 11 to ensure that issuers "tell[ ] the whole truth" to investors. H.R.Rep. No. 85, 73d Cong., 1st Sess., 2 (1933) (quoting President Roosevelt's message to Congress). For that reason, literal accuracy is not enough: An issuer must as well desist from misleading investors by saying one thing and holding back another. Omnicare would nullify that statutory requirement for all sentences starting with the phrases "we believe" or "we think." But those magic words can preface nearly any conclusion, and the resulting statements, as we have shown, remain perfectly capable of misleading investors. See *supra*, at 1328 – 1329. Thus, Omnicare's view would punch a hole in the statute for half-truths in the form of opinion statements. And the difficulty of showing that such statements are literally false —which requires proving an issuer did not believe them, see *supra*, at 1326 – 1327—would make that opening yet more consequential: Were Omnicare right, companies would have virtual *carte blanche* to assert opinions in registration statements free from worry about § 11. That outcome would ill-fit Congress's decision to establish a strict liability offense promoting "full and fair disclosure" of material information. *Pinter*, 486 U.S., at 646, 108 S.Ct. 2063; see *supra*, at 1323.

Omnicare argues, in response, that applying § 11's omissions clause in the way we have described would have "adverse policy consequences." Reply Brief 17 (capitalization omitted). According to Omnicare, any inquiry into the issuer's basis for holding an opinion is "hopelessly amorphous," threatening "unpredictable" and possibly "massive" liability. *Id.*, at 2; Brief for Petitioners 34, 36. And because that is so, Omnicare claims, many issuers will choose not to disclose opinions at all, thus "depriving [investors] of potentially helpful information." Reply Brief 19; see Tr. of Oral Arg. 59–61.

But first, that claim is, just as Omnicare labels it, one of "policy"; and Congress gets to make policy, not the courts. The decision Congress made, for the reasons we have indicated, was to extend § 11 liability to all statements rendered misleading by omission. In doing so, Congress no doubt made § 11 less cut-and-dry than a law prohibiting only false factual statements. Section 11's omissions clause, as applied to statements of both opinion and fact, necessarily brings the reasonable ***1332** person into the analysis, and asks what she would naturally understand a statement to convey beyond its literal meaning. And for expressions of opinion, that means considering the foundation she would expect an issuer to have before making the statement. See *supra*, at 1328 – 1329. All that, however, is a feature, not a bug, of the omissions provision.

[11] Moreover, Omnicare way overstates both the looseness of the inquiry Congress has mandated and the breadth of liability that approach threatens. As we have explained, an investor cannot state a claim by alleging only that an opinion was wrong; the complaint must as well call into question the issuer's basis for offering the opinion. See *supra,* at 1328 – 1329. And to do so, the investor cannot just say that the issuer failed to reveal its basis. Section 11's omissions clause, after all, is not a general disclosure requirement; it affords a cause of action only when an issuer's failure to include a material fact has rendered a published statement misleading. To press such a claim, an investor must allege that kind of omission—and not merely by means of conclusory assertions. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice"). To be specific: The investor must identify particular (and material) facts going to the basis for the issuer's opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context. See *supra,* at 1328 – 1330. That is no small task for an investor.

Nor does the inquiry such a complaint triggers ask anything unusual of courts. Numerous legal rules hinge on what a reasonable person would think or expect. In requiring courts to view statements of opinion from an ordinary investor's perspective, § 11's omissions clause demands nothing more complicated or unmanageable. Indeed, courts have for decades engaged in just that inquiry, with no apparent trouble, in applying the common law of misrepresentation. See *supra,* at 1330 – 1331.

Finally, we see no reason to think that liability for misleading opinions will chill disclosures useful to investors. Nothing indicates that § 11's application to misleading factual assertions in registration statements has caused such a problem. And likewise, common-law doctrines of opinion liability have not, so far as anyone knows, deterred merchants in ordinary commercial transactions from asserting helpful opinions about their products. That absence of fallout is unsurprising. Sellers (whether of stock or other items) have strong economic incentives to ... well, *sell* (*i.e.*, hawk or peddle). Those market-based forces push back against any inclination to underdisclose. And to avoid exposure for omissions under § 11, an issuer need only divulge an opinion's basis, or else make clear the real tentativeness of its belief. Such ways of conveying opinions so that they do not mislead will keep valuable information flowing. And that is the only kind of information investors need. To the extent our decision today chills *misleading* opinions, that is all to the good: In enacting § 11, Congress worked to ensure better, not just more, information.

B

Our analysis on this score counsels in favor of sending the case back to the lower courts for decision. Neither court below considered the Funds' omissions theory with the right standard in mind—or indeed, ***1333** even recognized the distinct statutory questions that theory raises. See *supra,* at 1324 – 1325. We therefore follow our ordinary practice of remanding for a determination of whether the Funds have stated a viable omissions claim (or, if not, whether they should have a chance to replead).

In doing so, however, we reemphasize a few crucial points pertinent to the inquiry on remand. Initially, as we have said, the Funds cannot proceed without identifying one or more facts left out of Omnicare's registration statement. See *supra,* at 1331 – 1332. The Funds' recitation of the statutory language—that Omnicare "omitted to state facts necessary to make the statements made not misleading"—is not sufficient; neither is the Funds' conclusory allegation that Omnicare lacked "reasonable grounds for the belief" it stated respecting legal compliance. App. 273–274. At oral argument, however, the Funds highlighted another, more specific allegation in their complaint: that an attorney had warned Omnicare that a particular contract "carrie[d] a heightened risk" of legal exposure under anti-kickback laws. *Id.,* at 225 (emphasis omitted); see Tr. of Oral Arg. 42, 49; *supra,* at 1324. On remand, the court must review the Funds' complaint to determine whether it adequately alleged that Omnicare had omitted that (purported) fact, or any other like it, from the registration statement. And if so, the court must determine whether the omitted fact would have been material to a reasonable investor—*i.e.*, whether "there is a substantial likelihood that a reasonable [investor] would consider it important." *TSC Industries*, 426 U.S., at 449, 96 S.Ct. 2126.

Assuming the Funds clear those hurdles, the court must ask whether the alleged omission rendered Omnicare's legal compliance opinions misleading in the way described earlier —*i.e.*, because the excluded fact shows that Omnicare lacked

the basis for making those statements that a reasonable investor would expect. See *supra*, at 1328 – 1329. Insofar as the omitted fact at issue is the attorney's warning, that inquiry entails consideration of such matters as the attorney's status and expertise and other legal information available to Omnicare at the time. See *supra*, at 1329. Further, the analysis of whether Omnicare's opinion is misleading must address the statement's context. See *supra*, at 1330. That means the court must take account of whatever facts Omnicare *did* provide about legal compliance, as well as any other hedges, disclaimers, or qualifications it included in its registration statement. The court should consider, for example, the information Omnicare offered that States had initiated enforcement actions against drug manufacturers for giving rebates to pharmacies, that the Federal Government had expressed concerns about the practice, and that the relevant laws "could "be interpreted in the future in a manner" that would harm Omnicare's business. See App. 95–96, 136–137; *supra*, at 1323 – 1324.

* * *

With these instructions and for the reasons stated, we vacate the judgment below and remand the case for further proceedings.

It is so ordered.

Justice SCALIA, concurring in part and concurring in the judgment.

Section 11 of the Securities Act of 1933 imposes liability where a registration statement "contain[s] an untrue statement of a material fact" or "omit[s] to state a material fact necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). I agree with the Court's discussion of what it means for an expression of ***1334** opinion to state an untrue material fact. But an expression of opinion implies facts (beyond the fact that the speaker believes his opinion) only where a reasonable listener would understand it to do so. And it is only when expressions of opinion *do* imply these other facts that they can be "misleading" without the addition of other "material facts." The Court's view would count far more expressions of opinion to convey collateral facts than I—or the common law—would, and I therefore concur only in part.

The common law recognized that most listeners hear "I believe," "in my estimation," and other related phrases as *disclaiming* the assertion of a fact. Hence the (somewhat overbroad) common-law rule that a plaintiff cannot establish a misrepresentation claim "for misstatements of opinion, as distinguished from those of fact." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Torts § 109, p. 755 (5th ed. 1984) (Prosser & Keeton). A fraudulent misrepresentation claim based on an expression of opinion could lie for the one fact the opinion reliably conveyed: that the speaker in fact held the stated opinion. Restatement of Torts § 525, Comment *c*, p. 60 (1938). And, in some circumstances, the common law acknowledged that an expression of opinion reasonably implied "that the maker knows of no fact incompatible with his opinion." *Id.* § 539(1), at 91. The no-facts-incompatible-with-the-opinion standard was a demanding one; it meant that a speaker's judgment had to "var[y] so far from the truth that no reasonable man in his position could have such an opinion." Restatement of Contracts § 474(b), p. 902, and Comment *b* (1932). But without more, a listener could only reasonably interpret expressions of opinion as conveying this limited assurance of a speaker's understanding of facts.

In a few areas, the common law recognized the possibility that a listener could reasonably infer from an expression of opinion not only (1) that the speaker sincerely held it, and (2) that the speaker knew of no facts incompatible with the opinion, but also (3) that the speaker had a reasonable basis for holding the opinion. This exceptional recognition occurred only where it was "very reasonable or probable" that a listener should place special confidence in a speaker's opinion. Prosser & Keeton § 109, at 760–761. This included two main categories, both of which were carve-outs from the general rule that "the ordinary man has a reasonable competence to form his own opinion," and "is not justified in relying [on] the ... opinion" of another. Restatement of Torts § 542, Comment *a*, at 95. First, expressions of opinion made in the context of a relationship of trust, such as between doctors and patients. Second, expressions of opinion made by an expert in his capacity as an expert (for example, a jeweler's statement of opinion about the value of a diamond). These exceptions allowed a listener to deal with those special expressions of opinion as though they were facts. As the leading treatise put it, "the ordinary man is free to deal in reliance upon the opinion of an expert jeweler as to the value of a diamond [or] of an attorney upon a point of law." Prosser & Keeton § 109, at 761. But what reasonable person would assume that a lawyer's assessment of a diamond or a jeweler's opinion on a point of law implied an educated investigation?

The Court's expansive application of § 11's omissions clause to expressions of opinion produces a far broader field of misrepresentation; in fact, it produces almost the opposite of the common-law rule. The Court holds that a reasonable investor is right to expect a reasonable basis for *all* opinions in registration statements—for example, the conduct of a "meaningful ... ***1335** inquiry,"—unless that is sufficiently disclaimed. *Ante,* at 1328 – 1329, 1330 – 1331, 1332 – 1333. Take the Court's hypothetical opinion regarding legal compliance. When a disclosure statement says "we believe our conduct is lawful," *ante,* at 1328, the Court thinks this should be understood to suggest that a lawyer was consulted, since a reasonable investigation on this point would require consulting a lawyer. But this approach is incompatible with the common law, which had no "legal opinions are different" exception. See Restatement of Torts § 545, at 102.

It is also incompatible with common sense. It seems to me strange to suggest that a statement of opinion as generic as "we believe our conduct is lawful" conveys the implied assertion of fact "we have conducted a meaningful legal investigation before espousing this opinion." It is strange to ignore the reality that a director might rely on industry practice, prior experience, or advice from regulators—rather than a meaningful legal investigation—in concluding the firm's conduct is lawful. The effect of the Court's rule is to adopt a presumption of expertise on all topics volunteered within a registration statement.

It is reasonable enough to adopt such a presumption for those matters that are required to be set forth in a registration statement. Those are matters on which the management of a corporation *are* experts. If, for example, the registration statement said "we believe that the corporation has $5,000,000 cash on hand," or "we believe the corporation has 7,500 shares of common stock outstanding," the public is entitled to assume that the management has done the necessary research, so that the asserted "belief" is undoubtedly correct. But of course a registration statement would never preface such items, within the expertise of the management, with a "we believe that." Full compliance with the law, however, is another matter. It is not specifically required to be set forth in the statement, and when management prefaces *that* volunteered information with a "we believe that," it flags the fact that this is not within our area of expertise, but we think we are in compliance.

Moreover, even if one assumes that a corporation issuing a registration statement is (by operation of law) an "expert" with regard to all matters stated or opined about, I would still not agree with the Court's disposition. The Court says the following:

> "Section 11's omissions clause, as applied to statements of both opinion and fact, necessarily brings the reasonable person into the analysis, and asks what she would naturally understand a statement to convey beyond its literal meaning. And for expressions of opinion, that means considering the foundation *she would expect an issuer to have* before making the statement." *Ante,* at 1332 (emphasis added).

The first sentence is true enough—but "what she [the reasonable (female) person, and even he, the reasonable (male) person] would naturally understand a statement [of opinion] to convey" is not that the statement has the foundation *she* (the reasonable female person) considers adequate. *She* is not an expert, and is relying on the advice of an expert—who ought to know how much "foundation" is needed. She would naturally understand that the expert has conducted an investigation that *he* (or she or it) considered adequate. That is what relying upon the opinion of an expert means.

The common law understood this distinction. An action for fraudulent misrepresentation based on an opinion of an ***1336** expert [*] was only allowed *when the expression of the opinion conveyed a fact*—the "fact" that summarized the expert's knowledge. Prosser and Keeton § 109, at 761. And a fact was actionable only if the speaker *knew* it was false, if he *knew* he did not know it, or if he *knew* the listener would understand the statement to have a basis *that the speaker knew was not true*. Restatement of Torts § 526, at 63–64. Ah!, the majority might say, so a speaker is liable for knowing he lacks *the listener's reasonable basis!* If the speaker *knows*—is actually aware—that the listener will understand an expression of opinion to have a specific basis that it does not have, then *of course* he satisfies this element of the tort.

But more often, when any basis is implied at all, both sides will understand that the speaker implied a "reasonable basis," but honestly disagree on what that means. And the common law supplied a solution for this: A speaker was liable for ambiguous statements—misunderstandings—

as fraudulent misrepresentations *only* where he both knew of the ambiguity *and* intended that the listener fall prey to it. *Id.* § 527, at 66. In other words, even assuming both parties *knew* (a prerequisite to liability) that the expression of opinion implied a "reasonable investigation," if the speaker and listener honestly disagreed on the nature of that investigation, the speaker was not liable for a fraudulent misrepresentation unless *he subjectively intended* the deception. And so in no circumstance would the listener's belief of a "reasonable basis" control: If the speaker subjectively believes he lacks a reasonable basis, then his statement is simply a knowing misrepresentation. *Id.* § 526(a), at 63. If he does not know of the ambiguity, or knows of it, but does not intend to deceive, he is not liable. *Id.* § 527, at 66. That his basis for belief was "objectively unreasonable" does not impart liability, so long as the belief was genuine.

This aligns with common sense. When a client receives advice from his lawyer, it is surely implicit in that advice that the lawyer has conducted a reasonable investigation—reasonable, that is, *in the lawyer's estimation.* The client is relying on the expert lawyer's judgment for the amount of investigation necessary, no less than for the legal conclusion. To be sure, if the lawyer conducts an investigation that he does not believe is adequate, he would be liable for misrepresentation. And if he conducts an investigation that he believes is adequate but is *objectively unreasonable* (and reaches an incorrect result), he may be liable for malpractice. But on the latter premise he is not liable for misrepresentation; all that was implicit in his advice was that he had conducted an investigation *he* deemed adequate. To rely on an expert's opinion is to rely on the expert's evaluation of *how much time to spend* on the question at hand.

The objective test proposed by the Court—inconsistent with the common law and common intuitions about statements of opinion—invites roundabout attacks upon expressions of opinion. Litigants seeking recompense for a corporation's expression of belief that turned out, after the fact, to be incorrect can always charge that even though the belief rested upon an investigation ***1337** the corporation thought to be adequate, the investigation was not "objectively adequate."

Nor is this objective test justified by § 11's absence of a *mens rea* requirement, as the Court suggests. *Ante,* at 1330 n. 10. Some of my citation of the common law is meant to illustrate *when* a statement of opinion contains an implied warranty of reasonable basis. But when it does so, the question then becomes *whose* reasonable basis. My illustration of the common-law requirements for misrepresentation is meant to show that a typical listener assumes that *the speaker's* reasonable basis controls. That showing is not contradicted by § 11's absence of a *mens rea* requirement.

Not to worry, says the Court. Sellers of securities need "only divulge an opinion's basis, or else make clear the real tentativeness of [their] belief [s]." *Ante,* at 1332. One wonders what the function of "in my estimation" is, then, except as divulging such hesitation. Or what would be sufficient for the Court. "In my highly tentative estimation?" "In my estimation that, consistent with *Omnicare,* should be understood as an opinion only?" Reasonable speakers do not speak this way, and reasonable listeners do not receive opinions this way. When an expert expresses an opinion instead of stating a fact, it implies (1) that he genuinely believes the opinion, (2) that he believes his basis for the opinion is sufficient, and (most important) (3) that he is not certain of his result. Nothing more. This approach would have given lower courts and investors far more guidance and would largely have avoided the Funds' attack upon Omnicare's opinions as though Omnicare held those opinions out to be facts.

I therefore concur only in part and in the judgment.

Justice THOMAS, concurring in the judgment.
I agree with the Court that the statements of opinion at issue in this case do not contain an untrue statement of a material fact. 15 U.S.C. § 77k(a); *ante,* at 1325 – 1327. I write separately because I do not think it advisable to opine, as the majority does, on an additional theory of liability that is not properly before us.

The question whether and under what circumstances an omission may make a statement of opinion misleading is one that we should have left to the lower courts to decide on remand. As the majority acknowledges, that question was never passed on below. See *ante,* at 1332 – 1333. With good reason: Apart from a few conclusory allegations in their complaint and some *pro forma* references to "misleading statements and omissions" in their briefs, respondents did not elaborate on the omissions theory of liability before either the District Court or the Court of Appeals. They certainly did not articulate the theory the majority now adopts until they filed their merits brief before this Court. And it was not until oral argument that they identified a factual allegation in their complaint that *might* serve to state a claim under that theory. See *ante,* at 1332 – 1333. This delay is unsurprising given that, although various Courts of Appeals have discussed the

theory, they have been reluctant to commit to it. See *MHC Mut. Conversion Fund, L.P. v. Sandler O'Neill & Partners, L.P.*, 761 F.3d 1109, 1116 (C.A.10 2014) ("[I]t is difficult to find many [courts] actually holding a security issuer liable on this basis, ... and ... the approach has been questioned by others on various grounds"); see also *ibid.*, n. 5.

We should exercise the same caution. This Court rarely prides itself on being a pioneer of novel legal claims, as "[o]urs is a court of final review and not first view." ***1338** *Zivotofsky v. Clinton*, 566 U.S. ——, ——, 132 S.Ct. 1421, 1430, 182 L.Ed.2d 423 (2012) (internal quotation marks omitted). Thus, as a general rule, "we do not decide in the first instance issues not decided below." *Ibid.* (internal quotation marks omitted). This includes fashioning innovative theories of liability as much as it includes applying those theories to the circumstances of the case.

The Court has previously relied on a lower court's failure to address an issue below as a reason for declining to address it here, even when the question was fairly presented in the petition and fully vetted by other lower courts. See, *e.g.*, *CSX Transp., Inc. v. Alabama Dept. of Revenue*, 562 U.S. 277, 284, n. 5, 131 S.Ct. 1101, 179 L.Ed.2d 37 (2011); see also *id.*, at 303, n. 3, 131 S.Ct. 1101 (THOMAS, J., dissenting). Surely the feature that distinguishes this case—a novel legal theory that is not fairly included in the question presented—counsels more strongly in favor of avoidance.

As Justice SCALIA's concurrence reveals, the scope of this theory of liability is far from certain. And the highly fact-intensive nature of the omissions theory provides an additional reason not to address it at this time. The majority acknowledges that the facts a reasonable investor may infer from a statement of opinion depend on the context. And yet it opines about certain facts an investor may infer from an issuer's legal compliance opinion: that such an opinion is based on legal advice, for example, or that it is not contradicted by the Federal Government. See *ante*, at 1328 – 1329. These inferences may seem sensible enough in a vacuum, but lower courts would do well to heed the majority's admonition that every statement of opinion must be considered "in a broader frame," *ante*, at 1330, taking into account all the facts of the statement and its context. Would that the majority had waited for the "broader frame" of an actual case before weighing in on the omissions theory.

All Citations

135 S.Ct. 1318, 191 L.Ed.2d 253, 83 USLW 4187, Fed. Sec. L. Rep. P 98,411, 15 Cal. Daily Op. Serv. 2873, 2015 Daily Journal D.A.R. 3315, 25 Fla. L. Weekly Fed. S 139

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 In his concurrence, Justice THOMAS contends that the lower courts' erroneous conflation of these two questions should limit the scope of our review: We should say nothing about omissions, he maintains, because that issue was not pressed or passed on below. We disagree. Although the Funds could have written a clearer complaint, they raised a discrete omissions claim. See, *e.g.*, App. 191 ("[T]he Company's 2005 Registration Statement ... omitted material information that was ... necessary to make the Registration Statement not misleading"); *id.*, at 273 ("The Registration Statement ... omitted to state facts necessary to make the statements made not misleading, and failed to adequately disclose material facts as described above"). The lower courts chose not to address that claim separately, but understood that the complaint alleged not only misstatements but also omissions. See App. to Pet. for Cert. 38a (describing the Funds' claims as relating to "misstatements/omissions" and dismissing the lot as "not actionable"); 719 F.3d, at 501 (giving a single rationale for reversing the District Court's dismissal of the Funds' claims "for material misstatements and omissions"). And the omissions issue was the crux of the parties' dispute before this Court. The question was fully briefed by both parties (plus the Solicitor General), and omissions played a starring role at oral argument. Neither in its briefs nor at argument did Omnicare ever object that the Funds' omissions theory had been forfeited or was not properly before this Court. We therefore see no reason to ignore the issue.

2 Our decision in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 111 S.Ct. 2749, 115 L.Ed.2d 929 (1991), qualifies this statement in one respect. There, the Court considered when corporate directors' statements of opinion in a proxy solicitation give rise to liability under § 14(a) of the Securities Exchange Act, 15 U.S.C. § 78n(a), which bars conduct similar to that described in § 11. In discussing that issue, the Court raised the hypothetical possibility that a director could think he was lying while actually (*i.e.*, accidentally) telling the truth about the matter addressed in his opinion. See *Virginia*

Bankshares, 501 U.S., at 1095–1096, 111 S.Ct. 2749. That rare set of facts, the Court decided, would not lead to liability under § 14(a). See *ibid.* The Court reasoned that such an inadvertently correct assessment is unlikely to cause anyone harm and that imposing liability merely for the "impurities" of a director's "unclean heart" might provoke vexatious litigation. *Id.,* at 1096, 111 S.Ct. 2749 (quoting *Stedman v. Storer,* 308 F.Supp. 881, 887 (S.D.N.Y.1969)). We think the same is true (to the extent this scenario ever occurs in real life) under § 11. So if our CEO did not believe that her company's TVs had the highest resolution on the market, but (surprise!) they really did, § 11 would not impose liability for her statement.

3 Section 11's omissions clause also applies when an issuer fails to make mandated disclosures—those "required to be stated"—in a registration statement. § 77k(a). But the Funds do not object to Omnicare's filing on that score.

4 In a different argument that arrives at the same conclusion, Omnicare maintains that § 11, by its terms, bars only those omissions that make statements of *fact*—not opinion—misleading. See Reply Brief 3–5. The language of the omissions clause, however, is not so limited. It asks whether an omitted fact is necessary to make "statements" in "any part of the registration statement" not misleading; unlike in § 11's first clause, here the word "statements" is unmodified, thus including both fact and opinion. In any event, Omnicare's alternative interpretation succeeds merely in rephrasing the critical issue. Omnicare recognizes that every opinion statement is also a factual statement about the speaker's own belief. See *supra,* at 1326 – 1327. On Omnicare's view, the question thus becomes when, if ever, an omission can make a statement of *that fact* misleading to an ordinary investor. The following analysis applies just as well to that reformulation.

5 In some circumstances, however, reliance on advice from regulators or consistent industry practice might accord with a reasonable investor's expectations.

6 The hypothetical used earlier could demonstrate the same points. Suppose the CEO, in claiming that her company's TV had the highest resolution available on the market, had failed to review any of her competitors' product specifications. Or suppose she had recently received information from industry analysts indicating that a new product had surpassed her company's on this metric. The CEO may still honestly believe in her TV's superiority. But under § 11's omissions provision, that subjective belief, in the absence of the expected inquiry or in the face of known contradictory evidence, would not insulate her from liability.

7 Omnicare contends at length that *Virginia Bankshares* forecloses this result, see Brief for Petitioners 16–21, relying on the following sentence: "A statement of belief may be open to objection ... solely as a misstatement of the psychological fact of the speaker's belief in what he says," 501 U.S., at 1095, 111 S.Ct. 2749. But Omnicare's argument plucks that statement from its context and thereby transforms its meaning. *Virginia Bankshares* concerned an expression of opinion that the speaker did not honestly hold—*i.e.,* one making an "untrue statement of fact" about the speaker's own state of mind, § 77k(a). See *id.,* at 1090, 111 S.Ct. 2749 ("[W]e interpret the jury verdict as finding that the ... directors did not hold the beliefs or opinions expressed, and we confine our discussion to statements so made"). The Court held that such a statement gives rise to liability under § 14(a) when it is also "false or misleading about its subject matter." *Id.,* at 1096, 111 S.Ct. 2749. Having done so, the Court went on to consider the rare hypothetical case, described in this opinion's second footnote, in which a speaker expresses an opinion that she does not actually hold, but that turns out to be right. See *supra,* at 1326, n. 2. The sentence Omnicare cites did no more than introduce that hypothetical; it was a way of saying "someone might object to a statement—even when the opinion it expressed proved correct—solely on the ground that it was disbelieved." And the Court then held, as noted above, that such an objection would fail. See *ibid.* The language thus provides no support for Omnicare's argument here.

8 We note, too, that a reasonable investor generally considers the specificity of an opinion statement in making inferences about its basis. Compare two new statements from our ever-voluble CEO. In the first, she says: "I believe we have 1.3 million TVs in our warehouse." In the second, she says: "I believe we have enough supply on hand to meet demand." All else equal, a reasonable person would think that a more detailed investigation lay behind the former statement.

9 Section 11 is, of course, "not coextensive with common-law doctrines of fraud"; in particular, it establishes "a stringent standard of liability," not dependent on proof of intent to defraud. *Herman & MacLean v. Huddleston,* 459 U.S. 375, 381, 388–389, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983); see *supra,* at 1323; *infra,* at 1331, n. 11. But we may still look to the common law for its insights into how a reasonable person understands statements of opinion.

10 The Restatement of Contracts, discussing misrepresentations that can void an agreement, says much the same: "[T]he recipient of an assertion of a person's opinion as to facts not disclosed" may sometimes "properly interpret it as an assertion (a) that the facts known to that person are not incompatible with his opinion, or (b) that he knows facts sufficient to justify him in forming it." Restatement (Second) of Contracts § 168, p. 455 (1979).

11 In invoking these principles, we disagree with Justice SCALIA's common-law-based opinion in two crucial ways. First, we view the common law's emphasis on special knowledge and expertise as supporting, rather than contradicting, our view of what issuers' opinion statements fairly imply. That is because an issuer has special knowledge of its business—

including the legal issues the company faces—not available to an ordinary investor. Second, we think Justice SCALIA's reliance on the common law's requirement of an intent to deceive is inconsistent with § 11's standard of liability. As we understand him, Justice SCALIA would limit liability for omissions under § 11 to cases in which a speaker "subjectively intend[s] the deception" arising from the omission, on the ground that the common law did the same. *Post,* at 1336 (opinion concurring in part and concurring in judgment) (emphasis deleted). But § 11 discards the common law's intent requirement, making omissions unlawful—regardless of the issuer's state of mind—so long as they render statements misleading. See *Herman & MacLean,* 459 U.S., at 382, 103 S.Ct. 683 (emphasizing that § 11 imposes liability "even for innocent" misstatements or omissions). The common law can help illuminate when an omission has that effect, but cannot change § 11's insistence on strict liability. See *supra,* at 1330, n. 9.

* At the time of the Act's passage, the common law did not permit suit for negligent misrepresentation under the circumstances here. An action for negligent misrepresentation resting upon a statement of opinion would lie only if the opinion—a professional opinion—was "given upon facts equally well known to both the supplier and the recipient." Restatement of Torts § 552, Comment *b,* at 123 (1938). That is of course not the situation here. The typical opinion "given upon facts equally known to both the supplier and the recipient" is a lawyer's legal advice on facts described by his client.

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15507

In the Matter of **JPMorgan Chase & Co.,** **Respondent.**	**PLAN OF DISTRIBUTION**

I. OVERVIEW

The Division of Enforcement submits this Plan of Distribution (the "Distribution Plan") to the United States Securities and Exchange Commission (the "Commission") pursuant to Rule 1101 of the Commission's Rules on Fair Fund and Disgorgement Plans ("Rules"), 17 C.F.R. § 201.1101. As described more specifically below, the Distribution Plan proposes to utilize civil money penalties paid by JPMorgan Chase & Co. ("Respondent" or "JPM") to compensate investors harmed when JPM failed to disclose accurately in public filings made with the Commission the true amount of trading losses it suffered in the first quarter of 2012, and the effectiveness of its disclosure controls and procedures.

Beneficial owner investors who will be eligible for a distribution must have purchased and/or held eligible securities, defined in Paragraph 11.i. below, during the time period delineated in the Plan of Allocation described in Paragraphs 38-43 below, and met all other requirements of the Distribution Plan.

The Distribution Plan is subject to approval by the Commission and the Commission retains jurisdiction over its implementation.

II. BACKGROUND

1. On September 19, 2013, the Commission issued an Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order ("Order").[1] In the Order, the Commission found that the Respondent violated federal securities laws when it made material misstatements in its public filings with the Commission. Specifically, the Commission found that JPM made misstatements in its public filings regarding: a) the true amount of its losses in the first quarter of 2012 from positions held in the JPM Chief Investment Office's ("CIO") Synthetic Credit Portfolio; and b) the effectiveness of its disclosure controls and procedures. Respondent filed a Form 8-K on April 13, 2012, containing its earnings release for the first quarter of 2012. A misstatement concerning Respondent's trading losses suffered during the first quarter of 2012 resulted in reported earnings being overstated. On May 10, 2012, after trading had closed, Respondent filed a Form 10-Q for the first quarter and held an analyst call. Respondent disclosed it had suffered approximately $2 billion in trading losses since the start of the second quarter on the CIO's Synthetic Credit Portfolio positions, and that there could be additional losses. However, the May 10 disclosures were not fully effective as corrective disclosure because the 10-Q (a) understated the size of the losses as of quarter end and b) failed to disclose that JPM's disclosure controls and procedures were not effective.

2. The Commission ordered JPM to pay a civil money penalty in the amount of $200,000,000. Respondent timely paid the total $200,000,000 ordered by the Commission on September 19, 2013. In addition, JPM agreed to pay all reasonable administrative costs and expenses of any distribution, including the fees and expenses of a tax administrator, within thirty (30) days after receipt of an invoice for such services.[2]

3. The Commission established a Fair Fund in the amount of $200,000,000 on March 5, 2014 pursuant to Section 308(a) of Sarbanes-Oxley for distribution to injured investors.[3]

4. The Fair Fund has been deposited at the United States Treasury Department's Bureau of the Fiscal Service ("BFS") for investment. Other than potential interest income from the BFS investment, the Commission does not anticipate that the Fair Fund will receive additional funds. All BFS fees will be paid from the Fair Fund.

[1] *See* Exchange Act Rel. No. 70458 (September 19, 2013).
[2] *Id.*
[3] *See* Order Establishing a Fair Fund, Exchange Act Rel. No. 71654 (March 5, 2014).

A. Fund Administrator

5. The Commission has appointed RCB Fund Services, LLC as the fund plan administrator (the "Administrator").[4]

6. The Administrator has obtained a bond in the manner prescribed in Rule 1105(c) in the amount of $200,000,000.

7. The Administrator will be entitled to reasonable administrative costs and expenses in connection with the administration and distribution of the Fair Fund (including any such costs and expenses incurred by agents, consultants or third parties retained, after consultation with and approval of the Commission staff, by the Administrator in furtherance of its duties). The Administrator will invoice all costs and expenses for the administration and distribution of the Fair Fund directly to the Respondent. A copy of the invoice will be provided to the Commission staff.

8. The Administrator will be responsible for administering the Fair Fund in accordance with the Distribution Plan. This will include, among other things, taking reasonable steps to identify and contact Potential Claimants as defined in Paragraph 11.p. below; obtaining accurate mailing information for Potential Claimants; establishing a website and staffing a call center to address inquiries during the claims process; developing a claims database; preparing accountings; cooperating with any tax administrator appointed by the Commission to satisfy any tax liabilities and to ensure compliance with income tax reporting requirements; advising Potential Claimants of deficiency in claims and providing an opportunity to cure any documentary defects; taking antifraud measures, such as identifying false, ineligible and overstated claims; making determinations under the criteria established herein as to Potential Claimant eligibility; advising Potential Claimants of final claim determinations; and disbursing the Fair Fund in accordance with this Distribution Plan.

B. Tax Administrator

9. The Commission has appointed Damasco & Associates, LLP as the Tax Administrator of the Fair Fund (the "Tax Administrator").[5] The Tax Administrator is required to administer the Fair Fund as a Qualified Settlement Fund under Section 468B (g) of the Internal Revenue Code, 26 U.S.C. §468B (g), and related regulations, 26 C.F.R. §§1.468B-1 through 1.468B-5. The Tax Administrator is responsible for

[4] *See* Exchange Act Rel. No. 71825 (March 27, 2014).
[5] *See* Order Appointing Tax Administrator, Exchange Act Rel. No. 70615 (October 4, 2013).

all income tax related reporting requirements including the preparation and filing of tax returns. The Administrator will cooperate with the Tax Administrator in providing any information necessary for income tax compliance.

10. Tax compliance fees and costs will be paid by JPM as part of the cost of the administration of the Fair Fund. Any taxes on interest earned by the Fair Fund will be paid by the Fair Fund.

III. DEFINITIONS

11. As used in this Distribution Plan, the following definitions will apply:
    a. "**Claim Form**" means the form designed by the Administrator for the filing of claims in accordance with the terms of this Distribution Plan. The claim form will require, at a minimum, sufficient documentation reflecting any Potential Claimant's purchases and dispositions of Eligible Securities during the Relevant Period, and the tax identification number of the Potential Claimant.
    b. "**Claims Packet**" means the materials relevant to submitting a claim that may be provided to Potential Claimants known to the Administrator or to those who request such materials through a website or other appropriate delivery mechanisms. These materials will include a copy of the Fair Fund Notice and Claim Form (together with instructions for completion of the Claim Form).
    c. "**Days**" means calendar days, unless otherwise specified herein.
    d. "**Determination Notice**" means the notice sent by the Administrator to all Potential Claimants that submitted a Claim Form. The Determination Notice will state the Administrator's determination of the validity (eligible, partially or wholly deficient, or ineligible) and amount of the claim of the Potential Claimant. The Determination Notice will provide to each Potential Claimant whose claim is deficient, in whole or in part, the reason(s) for the deficiency, notify the Potential Claimant of the opportunity to cure such deficiency, and provide instructions regarding what is required to do so. In the event the claim is denied, the Determination Notice will state the reason for such denial and notify the Potential Claimant of their opportunity to request reconsideration of their claim.
    e. "**Distribution Payment**" means a payment to an Eligible Claimant in accordance with the terms of this Distribution Plan.
    f. "**Distribution Plan**" means this Distribution Plan in the form approved by the Commission.
    g. "**Eligible Claimant**" means a Potential Claimant who is finally determined by the Administrator to be eligible for a Distribution Payment from the Fair Fund

as a result of transactions in Eligible Securities during the Relevant Period. Eligible Claimants do not include:

i. Respondent and any person who served from January 1, 2012 through the end of the Relevant Period as an officer or director of JPM[6], and any assigns, creditors, heirs, distributees, spouses, parents, dependent children or controlled entities of any of the foregoing persons or entities;

ii. Any defendant in *SEC v. Martin-Artajo & Grout*, 1:13-cv-05677-GBD (SDNY);

iii. Any Person who, as of the claims filing deadline, has been the subject of criminal charges related to the violations found in the Order or any related Commission action;

iv. The Administrator, its employees, and those persons assisting the Administrator in its role as the Administrator;

v. Any affiliates[7], assigns, creditors, heirs, distributees, spouses, parents, dependent children or controlled entities of any of the foregoing persons or entities described in g.ii.-g.iv. hereof; and/or

vi. Any assignee of another Person's right to obtain a recovery in the Commission's action against JPM, provided, however, that this provision shall not be construed to exclude those Persons who obtained such a right by gift, inheritance or devise.

h. "**Eligible Loss Amount**" means the amount of loss an Eligible Claimant has incurred through the investment in Eligible Securities during the Relevant Period, to be calculated in accordance with the Plan of Allocation.

i. "**Eligible Securities**" refers to shares of JPM common stock listed on a U.S. exchange and registered with the Commission. Transactions in JPM common stock during the Relevant Period that are pursuant to, or in connection with, a swap, an option or other derivative will not be eligible for a recovery.

j. "**Fair Fund**" means the $200,000,000 fund created by the Commission for the benefit of investors harmed by Respondent's violations discussed in the Order, plus any interest accrued from the BFS or escrow investments.

k. "**Fair Fund Notice**" means a written notice from the Administrator to Potential Claimants informing them of the Fair Fund and its eligibility requirements, and explaining how to submit a claim. The notice will both be mailed and published pursuant to Paragraphs 14 and 15, below.

[6] An "officer" excluded under this paragraph is any officer of JPM (not including any JPM subsidiaries or affiliates) required to file a Form 3, 4, or 5 with the Commission pursuant to Section 16 of the Securities Exchange Act of 1934 to report transactions in Eligible Securities during the 2012 calendar year.

[7] As used herein, "Affiliate" shall have the meaning described in Section 101(2) of the United States Bankruptcy Code, 11 U.S.C. § 101 et seq.

l. "**Final Determination Notice**" means the Administrator's written reply to each Potential Claimant who timely responded to the Determination Notice in an effort to cure a deficiency or seek reconsideration of a rejected claim. The Final Determination Notice will constitute the Administrator's final ruling regarding the status of the claim.

m. "**Net Fair Fund**" means the assets of the Fair Fund, less any amounts expended by the Fair Fund, plus any investment income.

n. "**Person**" means natural individuals as well as legal entities such as corporations, partnerships, or a limited liability company.

o. "**Plan of Allocation**" means the methodology by which a Potential Claimant's Eligible Loss Amount is calculated. The Plan of Allocation is located in Paragraphs 38 through 43 below.

p. "**Potential Claimants**" means those Persons, or their lawful successors, identified by the Administrator as having possible claims to recover from the Fair Fund under the Distribution Plan, or Persons asserting that they have possible claims to recover from the Fair Fund under the Distribution Plan.

q. "**Relevant Period**" means the period of time commencing on April 13, 2012 and continuing through May 20, 2012.

IV. ADMINISTRATION OF THE FAIR FUND

A. Identification of and Notification to Claimants

12. The Administrator will, insofar as practicable, use its best efforts to identify Potential Claimants from a review of trading records, account information provided by the Respondent, registered broker-dealers and investment advisors, and any other source available to them. The Administrator may also engage a third-party firm, after consultation with and approval of the Commission staff, to assist in identifying Potential Claimants to maximize the participation rate of JPM investors in the Fair Fund.

13. The Administrator will design and submit a Claims Packet, including a Fair Fund Notice and Claim Form, to the Commission staff for review and approval.

14. Within sixty days (60) after Commission approval of the Distribution Plan, the Administrator will send an initial mailing of the Fair Fund Notice to all Potential Claimants known to the Administrator. Each Fair Fund Notice will notify the Potential Claimant of the Fair Fund, generally describe the Fair Fund's claim and distribution processes, explain how to obtain a copy of the approved Distribution Plan

and Claim Form by request or from the Fair Fund website, and identify ways to submit a claim.

15. The Administrator will publish a notice of the Fair Fund on the internet and/or in print media in a manner deemed appropriate by the Administrator and not unacceptable to the Commission staff. The notice publication will include, at a minimum, a statement that the Fair Fund relates to investments in Eligible Securities, a brief description of eligibility requirements, and instructions for obtaining and submitting a Claim Form. The first notice will appear within ten (10) days of the initial mailing of the Fair Fund Notice.

16. The Administrator will establish and maintain a website devoted solely to the Fair Fund. The Fair Fund website, located at www.jpmsecfund.com, will make available a copy of the approved Distribution Plan, provide information regarding the claims process and eligibility requirements for participation in the Fair Fund in the form of frequently asked questions, include a copy of a Claim Form and related materials in downloadable form, and such other information covering process or substance that the Administrator believes will be beneficial to Potential Claimants. The Commission staff retains the right to review and approve any material posted on the Fair Fund website.

17. Persons also may obtain a copy of the Distribution Plan on the Commission's public website at http://www.sec.gov/litigation/fairfundlist.htm.

18. The Administrator will establish and maintain a toll-free telephone number for Potential Claimants to call to speak to a live representative of the Administrator during its regular business hours or, outside of such hours, to hear prerecorded information about the Fair Fund. The Administrator will advise the Commission staff of the toll-free telephone number. The Administrator will also establish and maintain a traditional mailing address and an email address which will be listed on all correspondence from the Administrator to Potential Claimants as well as on the website.

19. The Administrator will promptly provide a Claims Packet to any Potential Claimant upon request.

20. The Administrator will mail notices to the Administrator's list of banks, brokers, and other nominees, as well as any other institutions identified during the outreach process, that may have records of JPM shareholders and holdings during the Relevant

Period. The Administrator will request that these entities, to the extent that they were record holders for beneficial owners of the Eligible Securities:

a. notify the respective beneficial owners within fourteen (14) days of receipt of the Administrator's notice so that beneficial owners may timely file a claim; and/or
b. provide the Administrator a list of last known names and addresses for all beneficial owners for whom the record holders purchased Eligible Securities during the Relevant Period so that the Administrator can communicate with them directly.

21. The Administrator will attempt to locate any Potential Claimant whose mailing is returned as "undeliverable" and will document all such efforts. The Administrator will utilize all means reasonably available, including LexisNexis, to obtain updated addresses in response to undeliverable notices, and forward any returned mail for which an updated address is provided or obtained. The Administrator will make available, upon request by the Commission staff, a list of all Potential Claimants whose Fair Fund Notices have been returned as "undeliverable" due to incorrect addresses and for which the Administrator has been unable to locate current addresses.

B. Claims Process

22. In all materials that refer to the claim filing deadline, the claim filing deadline will be clearly identified as the calendar date one hundred twenty (120) days from the date of the first publication of the Fair Fund Notice, as described in Paragraph 15 above. To avoid being barred from asserting a claim, each Potential Claimant must submit to the Administrator a Claim Form reflecting such Potential Claimant's claim postmarked on or before the deadline. The burden will be upon the Potential Claimant to ensure that his or her Claim Form has been properly and timely postmarked. A claim that is postmarked after the final deadline will not be accepted unless the deadline is extended by the Administrator after consultation with the Commission staff. Any extension will be published on the Fair Fund website.

23. The burden to prove receipt of the claim by the Administrator will be upon the Potential Claimant; therefore Potential Claimants will be instructed to submit their claims in a manner that will enable them to prove receipt of the claim by the Administrator.

24. Claim Forms must be properly filled out per the instructions provided by the Administrator, and must be accompanied by such documentary evidence as the

Administrator deems necessary or appropriate to substantiate the claim. Without limitation, this information may include third party documentary evidence of purchases and dispositions of Eligible Securities during the Relevant Period, as well as holdings of Eligible Securities at pertinent dates.

25. All claims and supporting representations necessary to determine a Potential Claimant's eligibility to receive a distribution from the Fair Fund under the terms of the Distribution Plan must be verified by a declaration executed by the Potential Claimant under penalty of perjury under the laws of the United States. The declaration must be executed by the Potential Claimant, unless the Administrator accepts such declaration from a Person authorized to act on the Potential Claimant's behalf, whose authority is supported by such documentary evidence as the Administrator deems necessary.

26. The Administrator will review all claim submissions and determine the eligibility of each Potential Claimant to participate in the Fair Fund by reviewing claim data and supporting documentation (or the lack thereof), verifying the claim, and calculating each Potential Claimant's loss pursuant to the Plan of Allocation. Each Potential Claimant will have the burden of proof to establish the validity and amount of his or her claim, and that they qualify as an Eligible Claimant. The Administrator will have the right to request, and the Potential Claimant will have the burden of providing to the Administrator, any additional information and/or documentation deemed relevant by the Administrator. Any additional information supplied to the Administrator must be postmarked no later than the deadline set for responses to a Determination Notice.

27. Potential Claimants will be able to contact the Administrator via the toll-free telephone number, an email address for the Administrator, or using traditional mail to request copies of the Claim Form, ask questions about how to complete and file the Claim Form, and inquire about their claim.

28. The Administrator will provide a Determination Notice to each Potential Claimant who has filed a Claim Form with the Administrator, setting forth the Administrator's conclusions concerning such claim.

29. The Determination Notice will provide to each Potential Claimant whose claim is deemed deficient, in whole or in part, the reason(s) for the deficiency (e.g., failure to provide required information or documentation). It will also notify the Potential Claimant of the opportunity to cure such deficiency, and provide instructions regarding what is required to do so. Any Potential Claimant with a deficient claim

will have thirty (30) days from the date of the Determination Notice to cure any deficiencies identified in the Determination Notice.

30. In the event the claim is denied, the Determination Notice will state the reason for such denial. Any Potential Claimant seeking reconsideration of a rejected claim must advise the Administrator in writing within thirty (30) days of the date of the Determination Notice. All requests for reconsideration must include the necessary documentation to substantiate the basis upon which the Potential Claimant is requesting reconsideration of their claim.

31. The Administrator will send, as appropriate, a Final Determination Notice to all Potential Claimants who responded to the Determination Notice in an effort to cure a deficiency or to seek reconsideration of a rejected claim. The Administrator will consult with Commission staff regarding claim rejections before the issuance of Final Determination Notices. The Administrator will send such Final Determination Notices by no later than sixty (60) days following receipt of documentation or information in response to the Determination Notice, or such longer time as the Administrator determines is necessary for a proper determination concerning the claim.

32. The Administrator may, in its sole discretion, consider disputes of any nature presented by Potential Claimants, and will consult Commission staff as appropriate. The Final Determination Notice will constitute the Administrator's final ruling regarding the status of the claim.

33. The Administrator will have the authority, in its sole discretion, to waive technical claim deficiencies and approve claims on a case by case basis, or in groups of claims. All determinations made by the Administrator in accordance with the Distribution Plan in any dispute, request for reconsideration, or request to cure a deficient claim will be final and not subject to appeal.

34. The Potential Claimant has the burden of notifying the Administrator of a change in his or her current address and other contact information, and of ensuring that such information is properly reflected on the Administrator's records.

35. The receipt of Eligible Securities by gifts, inheritance, devise, or operation of law will not be deemed to be a purchase of Eligible Securities, nor will it be deemed an assignment of any claim relating to the purchase of such securities unless specifically so provided in the instrument of inheritance. However, the recipient of Eligible Securities as a gift, inheritance, devise or by operation of law will be eligible to file a

Claim Form and participate in the distribution of the Fair Fund to the extent the original purchaser would have been eligible under the terms of the Distribution Plan. Only one claim may be submitted with regard to the same transactions in Eligible Securities, and in cases where multiple claims are filed by the donor and donee, the donee claim will be honored, assuming it is supported by proper documentation.

36. To the extent that an Eligible Claimant, his or her representative, heir, or assign requests a distribution check to be issued or reissued in a different name than the Eligible Claimant (e.g., as the result of a name change because of marriage or divorce, or as the result of death), the Administrator will honor such request upon receipt of a written request and supporting documentation, which the Administrator in its sole discretion deems appropriate to substantiate the request.

37. Claims on behalf of a retirement plan covered by Section 3(3) of ERISA, 29 U.S.C. § 1002(3), which do not include Individual Retirement Accounts, and such plan's participants, are properly made by the administrator, custodian or fiduciary of the plan and not by the plan's participants. The Administrator will distribute any payments on such claims directly to the administrator, custodian or fiduciary of the retirement plan. The custodian or fiduciary of the retirement plan will distribute any payments received in a manner consistent with its fiduciary duties and the governing account or plan provisions.

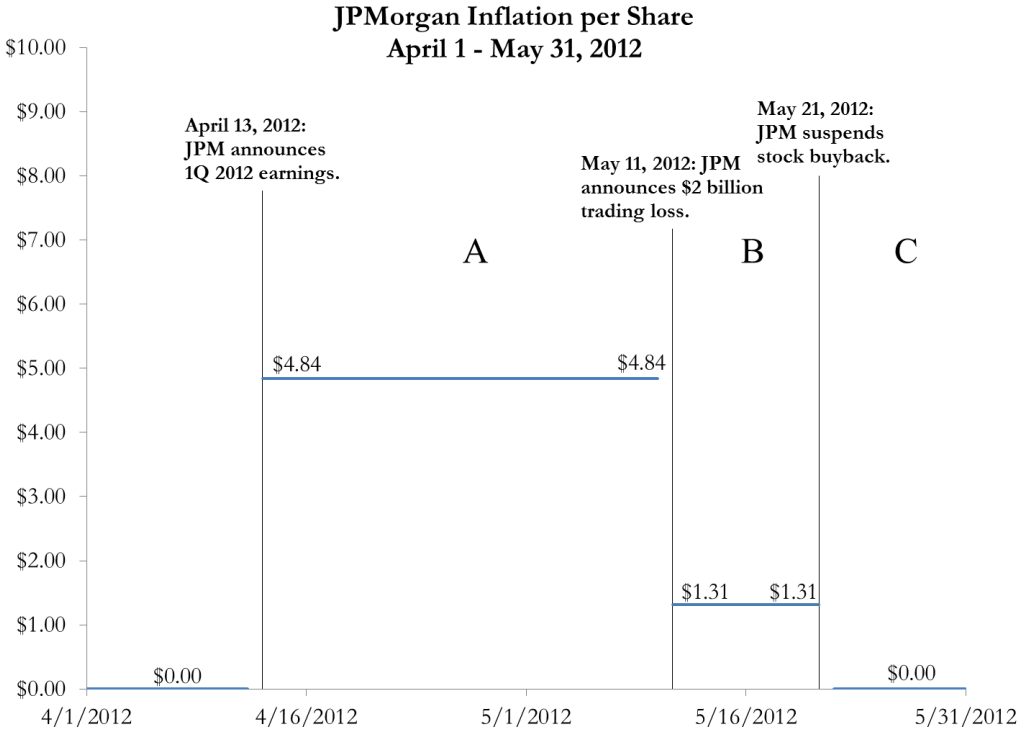
C. Plan of Allocation

38. For purposes of this Distribution Plan, the methodology to be applied in calculating Eligible Loss Amounts was derived from an event study which analyzed the effect of misstatements by the Respondents on market prices of Eligible Securities. The Eligible Loss Amount is calculated to reflect the artificially inflated portion of the per-share price of the Eligible Security that resulted from the misstatements about a) the true amount of JPM's losses in the first quarter of 2012 from positions held in the CIO's "Synthetic Credit Portfolio"; and b) the effectiveness of JPM's disclosure controls and procedures in connection with financial reporting.

39. JPM's statements during the first three quarters of 2012 regarding JPM's trading losses and JPM's disclosure controls and procedures around financial reporting were all considered in determining the Relevant Period. As stated above, the Relevant Period for this Distribution Plan is April 13, 2012 through May 20, 2012. The filing of the Form 8-K by Respondent on April 13, 2012 was the first time investors relied on inaccurate information in making investment decisions, and therefore this date marks the beginning of the Relevant Period. There were no partially corrective

disclosures between April 13, 2012 and May 10, 2012. The filing of the Form 10-Q on May 10, 2012 (after trading had closed), served as a partially corrective disclosure as it addressed the existence of the approximately $2 billion in trading losses suffered since the start of the second quarter on the CIO positions, and that there could be additional losses. However, the May 10 disclosure understated the size of the trading losses as of quarter end and affirmatively misstated that JPM's disclosure controls and procedures were effective. By May 21, 2012, the market had become aware that the trading losses were significantly greater than what JPM had reported and that the disclosure control issues were being addressed, as a result of the announcement that Respondent was suspending its share buyback program and the reporting by various media outlets of the extent of the losses. Thus, May 20, 2012 marks the end of the Relevant Period.

40. The inflation per share amount is a measure of the inflation in the price of the shares of the Eligible Security on the date of the transaction that is attributable to the misstatements made by JPM. After adjusting for economy-wide and industry-wide effects on share price movements, the inflation per share amounts were determined by isolating the abnormal price movements of the Eligible Security as a result of the three aforementioned disclosures. Below is a graphical depiction of the inflation per share measurement that will be used to calculate Eligible Loss Amounts.



41. The calculation of Eligible Loss Amounts will be determined based on the timing of each Potential Claimant's transactions in Eligible Securities, as follows:

a. For Eligible Claimants who purchased Eligible Securities between April 13, 2012 and May 10, 2012, inclusive, and held the shares of Eligible Securities through May 20, 2012, the calculation of loss will be the number of shares of Eligible Securities purchased during this period multiplied by $4.84 per share;
b. For Eligible Claimants who purchased Eligible Securities between April 13, 2012 and May 10, 2012, inclusive, and sold their shares of Eligible Securities between May 11, 2012 and May 20, 2012, inclusive, the calculation of loss will be the number of shares of Eligible Securities purchased during this period multiplied by $3.53 per share; and
c. For Eligible Claimants who purchased Eligible Securities between May 11, 2012 and May 20, 2012, inclusive, and held the shares of Eligible Securities through May 20, 2012, the calculation of loss will be the number of shares of Eligible Securities purchased during this period multiplied by $1.31 per share.

42. Any transaction that does not fall within the parameters described in Paragraph 41 above will be ineligible for a distribution from the Fair Fund, including but not limited to Potential Claimants who purchased and sold Eligible Securities between April 13, 2012 and May 10, 2012. Any Eligible Claimant may have transactions that fall within one or more of these categories, and in this case, his/her Eligible Loss Amount will be calculated consistent with the foregoing, taking into account all transactions in Eligible Securities during the Relevant Period. Transactions in Eligible Securities during the Relevant Period that are pursuant to, or in connection with, a swap, option or other derivative will not be eligible for a recovery.

43. A claimant's Eligible Loss Amount will be determined using the first-in, first-out ("FIFO") method, aggregating the gains and losses for all transactions that occurred during the Relevant Period. To determine Eligible Loss Amounts in accordance with the FIFO method, shares of Eligible Securities sold during the Relevant Period will be matched, in chronological order, first against shares of Eligible Securities held at the beginning of the Relevant Period. Any remaining sales of shares of Eligible Securities during the Relevant Period will be matched, in chronological order, against shares of Eligible Securities purchased during the Relevant Period. Accordingly, the inflation-related proceeds realized from a sale of Eligible Securities during the Relevant Period that were originally purchased prior to the commencement of the Relevant Period will offset any inflation-related losses suffered as a result of any purchases of Eligible Securities made during the Relevant Period. The date of any transaction for purposes of the loss methodology is the "trade" date as distinguished from the "settlement" date. Included below are a few basic examples to illustrate the loss calculation methodology and the FIFO application:

Example 1

Transaction Date	Transaction Type	Number of Shares	Inflation Per Share Amount
4/12/2012	Beginning Holding	0	$0.00
4/25/2012	Purchase	100	$4.84
5/12/2012	Purchase	100	$1.31
5/15/2012	Sale	100	-$1.31

FIFO Calculation

Shares	Purchase Date	Sale Date	Eligible Loss Amount
100	4/25/2012	5/15/2012	$353.00
100	5/12/2012	Held Through 5/20/2012	$131.00
	Total Potential Eligible Loss Amount		**$484.00**

Example 2

Transaction Date	Transaction Type	Number of Shares	Inflation Per Share Amount
4/12/2012	Beginning Holding	500	$0.00
4/20/2012	Purchase	100	$4.84
5/1/2012	Sale	100	-$4.84
5/16/2012	Sale	100	-$1.31
5/19/2012	Sale	100	-$1.31

FIFO Calculation

Shares	Purchase Date	Sale Date	Eligible Loss Amount
100	Beginning Holding	5/1/2012	-$484.00
100	Beginning Holding	5/16/2012	-$131.00
100	Beginning Holding	5/19/2012	-$131.00
100	4/20/2012	Held Through 5/20/2012	$484.00
	Total Potential Eligible Loss Amount		**$0.00**

Example 3

Transaction Date	Transaction Type	Number of Shares	Inflation Per Share Amount
4/12/2012	Beginning Holding	500	$0.00
4/15/2012	Sale	500	-$4.84
4/16/2012	Purchase	500	$4.84
5/21/2012 Holding	Held	500	$0.00

FIFO Calculation

Shares	Purchase Date	Sale Date	Eligible Loss Amount
500	Beginning Holding	4/15/2012	-$2,420.00
500	4/16/2012	Held Through 5/20/2012	$2,420.00
	Total Potential Eligible Loss Amount		**$0.00**

D. Establishment of the Escrow Account

44. The Administrator will establish an escrow account (the "Escrow Account") and a distribution account ("Distribution Account") at a well-capitalized[8] U.S. commercial bank (the "Bank"), to be proposed by the Administrator and not unacceptable to the staff of the Commission. The Escrow Account will be established pursuant to an escrow agreement not unacceptable to the Commission staff. The name of the Escrow Account will be in the following form: Name of Escrow Account, TIN, as custodian for the benefit of distributees of the Fair Fund.

45. During the term of the escrow agreement, any investment of the funds will be with a view toward: first, conserving and preserving the principal; and second, maximizing investment return. The Administrator may invest and reinvest the assets of the Escrow Account only in direct obligations of the United States of America, including United States Treasury securities backed by the full faith and credit of the United States Government. This may also include a AAA-rated United States Treasury money market fund that directly invests 100% in short term United States Treasury securities and obligations, provided however, that the money market mutual funds' investments in short term United States Treasury securities will not be made through repurchase agreements or other derivative products.

46. The assets of the Fair Fund are subject to the continuing jurisdiction and control of the Commission. Prior to the receipt of any funds in the Escrow Account, the Bank

[8] A well-capitalized bank is a bank that meets the Federal Reserve Board's definition of "well capitalized" as defined by the Federal Reserve Act Subpart D, 12 C.F.R. § 208.43(b)(1).

will provide the Administrator an attestation, in a form not unacceptable to the Commission staff, that all funds in the Escrow Account will be held for the Fair Fund and that the Bank will not place any lien or encumbrance of any kind upon the funds. The Administrator will be the signatory on the Escrow Account, subject to the continuing jurisdiction and control of the Commission.

47. All interest earned will accrue for the benefit of the Fair Fund, and all costs associated with the Escrow and Distribution Accounts will be paid by the Respondent.

48. Upon transfer from the BFS, the assets of the Fair Fund will be held in the Escrow Account, separate from Bank assets, until the presentation of checks. All Fair Fund checks presented for payment or electronic transfers will be subject to "positive pay" controls before they are honored by the Bank. The "positive pay" system provides protection against fraud arising from counterfeit or altered checks. The "positive pay" system will require, at a minimum, confirmation by the Bank that all checks presented for payment match the identifiers and amounts on the payee list prior to honoring such checks. In each instance, funds will be transferred from the Escrow Account to the Distribution Account on the Bank's confirmation that a presented check matches the relevant "positive pay" criteria.

49. The Administrator will authorize the Bank to provide the Escrow Account information to the Tax Administrator, including duplicate statements for the Escrow Account, to prepare federal and state tax returns.

E. Distribution of the Fair Fund

50. The Net Fair Fund will be distributed to Eligible Claimants as provided under the terms of this Distribution Plan. An Eligible Claimant's Eligible Loss Amount, as determined in accordance with the methodology detailed in the Plan of Allocation in Paragraphs 38-43 above, will be used to determine the amount of their Distribution Payment.

51. The Administrator will distribute the Net Fair Fund to all Eligible Claimants only after all Claim Forms have been processed and all Potential Claimants whose claims have been rejected or disallowed, in whole or in part, have been notified and provided the opportunity to contest or cure pursuant to the procedures set forth herein, and after a Commission Order to Disburse has been issued.

52. Should the total amount of the Eligible Loss Amounts of all Eligible Claimants exceed the Net Fair Fund, the Administrator will distribute the funds to the Eligible

Claimants *pro rata* based upon the ratio of the Eligible Loss Amount of each Eligible Claimant to the aggregate Eligible Loss Amounts of all Eligible Claimants. No Distribution Payment will be made to an otherwise Eligible Claimant unless the amount to be paid equals or exceeds $10.00.

53. The Administrator may, pursuant to a Commission Order, make one or more re-distributions to Eligible Claimants.[9]

54. In order to disburse the Fair Fund, the Administrator will compile and submit a list of Eligible Claimants (including names, addresses, and Claim IDs) and Eligible Loss Amounts to the Commission staff after mailing the Final Determination Notices to Potential Claimants.

55. The Administrator will also provide a reasonable assurances letter to the Commission staff, representing that the list of Eligible Claimants: a) was compiled in accordance with the approved Distribution Plan; b) is accurate as to Eligible Claimants' names, addresses, and Eligible Loss Amounts; and c) provides all information necessary to make payments to each Eligible Claimant.

56. Upon receipt and review of the Eligible Claimant list, the Commission staff will obtain authorization from the Commission to disburse pursuant to Rule 1101(b)(6). Upon approval by the Commission, the Commission staff will cause the transfer of funds to the Escrow Account. The Administrator will then use its best efforts to commence mailing Distribution Payment checks or effect wire transfers within ten (10) business days of the release of the funds into the Escrow Account. All efforts will be coordinated to limit the time between the Escrow Account's receipt of the funds and the issuance of Distribution Payments.

57. All checks will be issued by the Administrator from the Distribution Account set up at the Bank. All checks will bear a stale date of one hundred twenty (120) days from the date of issuance. Checks that are not negotiated by the stale date will be voided, and the Bank will be instructed to stop payment on those checks, except as provided in Paragraphs 63 to 65 below.

[9] In the event of a re-distribution, such re-distribution will be limited to those Eligible Claimants that negotiated their initial distribution checks, or received electronic payments, and who would receive at least $20.00 in the re-distribution.

58. All payments will be preceded or accompanied by a communication that includes, as appropriate:
    a. A statement characterizing the distribution;
    b. A statement that the tax treatment of the distribution is the responsibility of each Eligible Claimant and that the Eligible Claimant should consult his or her tax advisor for advice regarding the tax treatment of the distribution;
    c. A statement that checks will be void and cannot be reissued after one hundred twenty (120) days from the date the original check was issued;
    d. A statement that reissued checks will expire on the later of one hundred twenty (120) days from the date of the original check or sixty (60) days from the date of the reissued check (the "Limit Date"); and
    e. Contact information for the Administrator for questions regarding the Distribution Payment.

59. A Distribution Payment, either on the face of the check or in the accompanying letter, will clearly indicate that the money is being disbursed from the Fair Fund established by the Commission for the benefit of the injured investors of the Respondent. The letter and other mailings to Eligible Claimants characterizing a Distribution Payment will be submitted to the Commission staff for review and approval.

60. Electronic or wire transfers may be utilized at the discretion of the Administrator to transfer approved Distribution Payments to filers of claims on behalf of twenty (20) or more Eligible Claimants. Wire transfers will be initiated by the Administrator using a two-party check and balance system, whereby completion of a wire transfer will require an authorization by two members of the Administrator's senior staff.

F. Post Distribution; Handling of Returned or Un-Cashed Checks

61. The Administrator will research and attempt to reconcile all returned items due to non-delivery, insufficient addresses, or any other deficiencies.

62. The Administrator will reissue checks to Eligible Claimants upon the receipt of a valid, written request from the Eligible Claimant. Such reissued checks will be void if not negotiated by the Limit Date.

63. In cases where an Eligible Claimant is unable to endorse a Distribution Payment check as written (e.g., name changes, IRA custodian changes, or recipient is deceased) and the Eligible Claimant or a lawful representative requests the reissuance of a Distribution Payment check in a different name, the Administrator will request, and must receive, documentation to support the requested change. If such change

request is properly documented in the sole discretion of the Administrator, the Administrator will issue an appropriately redrawn Distribution Payment check.

64. If any Distribution Payment check is returned as "undeliverable," the Administrator will use all reasonable commercially available resources to locate the most up-to-date address after receipt of such check. The Administrator will mail a reissued check to the updated address obtained through the database search, subject to the Limit Date.

65. The Administrator will make reasonable efforts to contact Eligible Claimants who have failed to negotiate any Distribution Payment checks over $500.00 (other than those returned as "undeliverable") and take appropriate action to follow up on the status of uncashed checks at the request of Commission staff. If appropriate in the sole discretion of the Administrator, the Administrator will have the authority to reissue such checks subject to the Limit Date.

66. A residual within the Fair Fund will be established for any amounts remaining after all assets have been disbursed. The residual may include, among other things, funds reserved for future taxes and for post distribution contingencies, amounts from Distribution Payment checks that have not been cashed, amounts from Distribution Payment checks that were not delivered or accepted upon delivery, and tax refunds. Any funds remaining in the residual after the Commission approves the final accounting will be sent to the Commission for transfer to the United States Treasury.

67. The Administrator will retain all claims materials in paper and electronic form for a period of six (6) years from the transfer of any remaining funds from the Fair Fund Escrow Account to the Commission or the U.S. Treasury. The Administrator will destroy all documents, including documents in any media, upon expiration of this period. In addition, the Administrator will shut down the website, P.O. Box and customer service telephone line(s) established specifically for the administration of the Fair Fund two (2) months after the transfer of any remaining funds to the Commission or to the United States Treasury, or at such earlier time as the Administrator determines with concurrence of the Commission staff.

G. Accountings

68. Pursuant to Rule 1105(f), once the Fair Fund has been transferred from the BFS to the Bank, the Administrator will file an accounting with the Commission during the first ten (10) days of each calendar quarter on a standardized accounting form provided by the Commission staff. The Administrator will file an accounting of all monies earned or received and all monies spent in connection with the administration of the

Distribution Plan. The accounting will also report all monies billed to JPM in connection with the administration of the Distribution Plan during the prior quarter. Upon final distributions to Eligible Claimants pursuant to the procedures described above, and the payment of all taxes, the Administrator will submit a final accounting for approval by the Commission on a standardized form provided by the Commission staff prior to the discharge of the Administrator and cancellation of the Administrator bond.

H. Termination of the Fair Fund

69. The Fair Fund will be eligible for termination and the Administrator will be eligible for discharge after all of the following have occurred:
    a. a final accounting, in a standard accounting format provided by the Commission staff, has been submitted by the Administrator and approved by the Commission;
    b. all taxes and other post distribution expenses have been paid; and
    c. any amount remaining in the Fair Fund has been returned to the Commission for transfer to United States Treasury.

70. The Commission staff will seek an order from the Commission to approve the termination of the Fair Fund, the discharge of the Administrator, the cancellation of the bond, and the transfer of any amount remaining in the Fair Fund to the United States Treasury.

71. Once the Fair Fund has been terminated and funds, if any, are transferred to the United States Treasury, no further claims will be allowed and no additional payments will be made whatsoever.

72. When administering this Distribution Plan, the Administrator, and/or each of their designees, agents and assigns, may rely on: all applicable law; orders issued by the Commission, including orders issued by delegated authority; orders issued by an administrative law judge, if any, appointed in this proceeding; and any records, including records containing investor information, provided by Commission staff.

I. Amendments

73. The Administrator will take reasonable and appropriate steps to disburse the Fair Fund pursuant to the Commission approved Distribution Plan. The Administrator will inform the Commission staff of any changes needed in the approved Distribution Plan. Upon agreement with the Commission staff, the Administrator may implement

immaterial changes to the approved Distribution Plan to effectuate its general purposes. For example, in consultation with the Commission staff, the Administrator may extend any of the procedural deadlines set forth in the approved Distribution Plan.

74. If a change is deemed to be material by the Commission staff, Commission approval of the change is required prior to the implementation of the change by amending the approved Distribution Plan. The Distribution Plan may be amended upon motion by any party, the Administrator, or upon the Commission's own motion.

【1933 年証券法 11 条ａ項】

Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue--

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

【1934 年証券取引所法 10 条】

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

(a)(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security other than a government security, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement1 any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(c)(1) To effect, accept, or facilitate a transaction involving the loan or borrowing of securities in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Nothing in paragraph (1) may be construed to limit the authority of the appropriate Federal banking agency (as defined in section 1813(q) of Title 12), the National Credit Union Administration, or any other Federal department or agency having a responsibility under Federal law to prescribe rules or regulations restricting transactions involving the loan or borrowing of securities in order to protect the safety and soundness of a financial institution or to protect the financial system from systemic risk.

【規則 10b-5】

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

【SOX 法 308 条ａ項ｂ項】

(a) Civil penalties to be used for the relief of victims

If, in any judicial or administrative action brought by the Commission under the securities laws, the Commission obtains a civil penalty against any person for a violation of such laws, or such person agrees, in settlement of any such action, to such civil penalty, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of a disgorgement fund or other fund established for the benefit of the victims of such violation.

(b) Acceptance of additional donations

The Commission is authorized to accept, hold, administer, and utilize gifts, bequests and devises of property, both real and personal, to the United States for a disgorgement fund or other fund described in subsection (a) of this section. Such gifts, bequests, and devises of money and proceeds from sales of other property received as gifts, bequests, or devises shall be deposited in such fund and shall be available for allocation in accordance with subsection (a) of this section.

【SEC Rules on Fair Fund and Disgorgement Plans】

§ 201.1100 Creation of Fair Fund.

In any agency process initiated by an order instituting proceedings in which the Commission or the hearing officer issues an order requiring the payment of disgorgement by a respondent and also assessing a civil money penalty against that respondent, the Commission or the hearing officer may order that the amount of disgorgement and of the civil penalty, together with any funds received pursuant to 15 U.S.C. 7246(b), be used to create a fund for the benefit of investors who were harmed by the violation.

§ 201.1101 Submission of plan of distribution; contents of plan.

(a) Submission. The Commission or the hearing officer may, at any time, order any party to submit a plan for the administration and distribution of funds in a Fair Fund or disgorgement fund. Unless ordered otherwise, the Division of Enforcement shall submit a proposed plan no later than 60 days after the respondent has turned over the funds or other assets pursuant to the Commission's order imposing disgorgement and, if applicable, a civil money penalty and any appeals of the Commission's order have been waived or completed, or appeal is no longer available.

(b) Contents of plan. Unless otherwise ordered, a plan for the administration of a Fair Fund or a disgorgement fund shall include the following elements:

(1) Procedures for the receipt of additional funds, including the specification of any account where funds will be held, the instruments in which the funds may be invested; and, in the case of a Fair Fund, the receipt of any funds pursuant to 15 U.S.C. 7246(b),

if applicable;

(2) Specification of categories of persons potentially eligible to receive proceeds from the fund;

(3) Procedures for providing notice to such persons of the existence of the fund and their potential eligibility to receive proceeds of the fund;

(4) Procedures for making and approving claims, procedures for handling disputed claims, and a cut-off date for the making of claims;

(5) A proposed date for the termination of the fund, including provision for the disposition of any funds not otherwise distributed;

(6) Procedures for the administration of the fund, including selection, compensation, and, as necessary, indemnification of a fund administrator to oversee the fund, process claims, prepare accountings, file tax returns, and, subject to the approval of the Commission, make distributions from the fund to investors who were harmed by the violation; and

(7) Such other provisions as the Commission or the hearing officer may require.

§ 201.1102 Provisions for payment.

(a) Payment to registry of the court or court-appointed receiver. Subject to such conditions as the Commission or the hearing officer shall deem appropriate, a plan for the administration of a Fair Fund or a disgorgement fund may provide for payment of funds into a court registry or to a court-appointed receiver in any case pending in federal or state court against a respondent or any other person based upon a complaint alleging violations arising from the same or substantially similar facts as those alleged in the Commission's order instituting proceedings.

(b) Payment to the United States Treasury under certain circumstances. When, in the opinion of the Commission or the hearing officer, the cost of administering a plan of disgorgement relative to the value of the available disgorgement funds and the number of potential claimants would not justify distribution of the disgorgement funds to injured investors, the plan may provide that the disgorgement funds and any civil penalty shall be paid directly to the general fund of the United States Treasury.

§ 201.1103 Notice of proposed plan and opportunity for comment by non-parties.

Notice of a proposed plan of disgorgement or a proposed Fair Fund plan shall be published in the SEC Docket, on the SEC website, and in such other publications as the Commission or the hearing officer may require. The notice shall specify how copies of the proposed plan may be obtained and shall state that persons desiring to comment on the proposed plan may submit their views, in writing, to the Commission.

§ 201.1104 Order approving, modifying, or disapproving proposed plan.

At any time after 30 days following publication of notice of a proposed plan of disgorgement or of a proposed Fair Fund plan, the Commission shall, by order, approve,

approve with modifications, or disapprove the proposed plan. In the discretion of the Commission, a proposed plan that is substantially modified prior to adoption may be republished for an additional comment period pursuant to § 201.1103. The order approving or disapproving the plan should be entered within 30 days after the end of the final period allowed for comments on the proposed plan unless the Commission or the hearing officer, by written order, allows a longer period for good cause shown.

§ 201.1105 Administration of plan.

(a) Appointment and removal of administrator. The Commission or the hearing officer shall have discretion to appoint any person, including a Commission employee, as administrator of a plan of disgorgement or a Fair Fund plan and to delegate to that person responsibility for administering the plan. An administrator may be removed at any time by order of the Commission or hearing officer.

(b) Assistance by respondent. A respondent may be required or permitted to administer or assist in administering a plan of disgorgement subject to such terms and conditions as the Commission or the hearing officer deems appropriate to ensure the proper distribution of the funds.

(c) Administrator to post bond. If the administrator is not a Commission employee, the administrator shall be required to obtain a bond in the manner prescribed in 11 U.S.C. 322, in an amount to be approved by the Commission. The cost of the bond may be paid for as a cost of administration. The Commission may waive posting of a bond for good cause shown.

(d) Administrator's fees. If the administrator is a Commission employee, no fee shall be paid to the administrator for his or her services. If the administrator is not a Commission employee, the administrator may file an application for fees for completed services, and upon approval by the Commission or a hearing officer, may be paid a reasonable fee for those services. Any objections thereto shall be filed within 21 days of service of the application on the parties.

(e) Source of funds. Unless otherwise ordered, fees and other expenses of administering the plan shall be paid first from the interest earned on the funds, and if the interest is not sufficient, then from the corpus.

(f) Accountings. During the first 10 days of each calendar quarter, or as otherwise directed by the Commission or the hearing officer, the administrator shall file an accounting of all monies earned or received and all monies spent in connection with the administration of the plan of disgorgement. A final accounting shall be submitted for approval of the Commission or hearing officer prior to discharge of the administrator and cancellation of the administrator's bond, if any.

(g) Amendment. A plan may be amended upon motion by any party or by the plan administrator or upon the Commission's or the hearing officer's own motion.

§ 201.1106 Right to challenge.

Other than in connection with the opportunity to submit comments as provided in § 201.1103, no person shall be granted leave to intervene or to participate or otherwise to appear in any agency proceeding or otherwise to challenge an order of disgorgement or creation of a Fair Fund; or an order approving, approving with modifications, or disapproving a plan of disgorgement or a Fair Fund plan; or any determination relating to a plan based solely upon that person's eligibility or potential eligibility to participate in a fund or based upon any private right of action such person may have against any person who is also a respondent in the proceeding.