

University of Tennessee College of Law

Legal Scholarship Repository: A Service of the Joel A. Katz Law Library

UTK Law Faculty Publications

9-12-2014

Brief of Professors at Law and Business Schools as Amici Curiae in Support of Respondents, Omnicare, Inc., Et Al., Petitioners, v. Laborers District Council Construction Industry Pension Fund, Et Al., Respondents, No. 13-435 (S. Ct. Sept. 2, 2014)

Joan M. Heminway

J. Robert Brown

Celia Taylor

Lyman P.Q. Johnson

Follow this and additional works at: https://ir.law.utk.edu/utklaw_facpubs



Part of the [Law Commons](#)

**Research Paper #259
February 2015**

**Brief of Professors at Law and Business Schools as *Amici
Curiae* in Support of Respondents, Omnicare, Inc., Et
Al., *Petitioners*,**
v.
**Laborers District Court Council Construction Industry
Pension Fund, Et. Al.,
Respondents,
*No. 13-435 (S. Ct. Sept. 2, 2014)***

**J. Robert Brown
Celia Taylor
Joan MacLeod Heminway
Lyman Johnson**

**Do not cite without authors' permission
Copyright © 2014**

**This paper may be downloaded without charge
from the Social Science Research Network Electronic library at
<http://ssrn.com/abstract=2493901>**

**Learn more about the University of Tennessee College of Law:
law.utk.edu**



UNIVERSITY *of*
DENVER

STURM COLLEGE OF LAW

University of Denver Sturm College of Law

Legal Research Paper Series

Working Paper No. 14-46

**BRIEF OF PROFESSORS AT LAW AND
BUSINESS SCHOOLS AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS,
OMNICARE, INC., ET AL.,
*Petitioners,***

v.

**LABORERS DISTRICT COUNCIL
CONSTRUCTION INDUSTRY PENSION FUND, ET AL.,
Respondents,
*No. 13-435 (S. Ct. Sept. 2, 2014)***

J. Robert Brown

University of Denver Sturm College of Law

Celia Taylor

University of Denver Sturm College of Law

Joan Heminway

University of Tennessee College of Law

Lyman Johnson

Washington and Lee School of Law

**In The
Supreme Court of the United States**

—◆—
OMNICARE, INC., ET AL.,

Petitioners,

v.

LABORERS DISTRICT COUNCIL
CONSTRUCTION INDUSTRY PENSION FUND, ET AL.,

Respondents.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit**

—◆—
**BRIEF OF PROFESSORS AT LAW AND
BUSINESS SCHOOLS AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS**

—◆—
J. ROBERT BROWN, JR.
Counsel of Record

CELIA TAYLOR
Professor of Law
UNIVERSITY OF DENVER
STURM COLLEGE OF LAW
Denver, CO 80208

LYMAN JOHNSON
Robert O. Bentley
Professor of Law
WASHINGTON AND LEE
UNIVERSITY SCHOOL OF LAW
Lexington, VA 24450
and Professor of Law
ST. THOMAS SCHOOL OF LAW
Minneapolis, MN 55403

Professor of Law
Director
Corporate-Commercial
Law Program
UNIVERSITY OF DENVER
STURM COLLEGE OF LAW
2255 E. Evans Ave.
Denver, CO 80208
(720) 933-5292
jbrown@law.du.edu

JOAN MACLEOD HEMINWAY
W.P. Toms Distinguished
Professor of Law
THE UNIVERSITY OF TENNESSEE
COLLEGE OF LAW
Knoxville, TN 37909

QUESTION PRESENTED

Whether, for purposes of issuer liability under Section 11 of the Securities Act of 1933, 15 U.S.C. §77k, a statement in a registration statement attempting to characterize a verifiable, present fact about the legal validity of contracts as a “belief” rather than a fact can shield an issuer from liability.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. The Representation in the Registration Statement about the Legal Validity of Contracts Is a Statement of Present, Verifiable Fact, the Falsity of Which can be Determined through the Use of Settled Principles of Law	6
II. <i>Virginia Bankshares</i> Does Not Determine the Standard of Review for a Statement of Opinion that is Subjectively Believed ...	18
CONCLUSION.....	22
APPENDIX	
<i>Amici Curiae</i>	App. 1

TABLE OF AUTHORITIES

Page

CASES

<i>Basic Inc. v. Levinson</i> , 485 U.S. 224 (1988).....	8, 17
<i>Bissett v. Ply-Gem Indus., Inc.</i> , 533 F.2d 142 (11th Cir. 1976).....	21
<i>City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.</i> , 399 F.3d 651 (6th Cir. 2005), <i>cert. denied</i> , 546 U.S. 936 (2005).....	21
<i>Ernst & Ernst v. Hochfelder</i> , 425 U.S. 185 (1976).....	14
<i>Fait v. Regions Fin. Corp.</i> , 655 F.3d 105 (2d Cir. 2011)	7
<i>First Am. Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.</i> , 412 F.3d 1166 (10th Cir. 2005)	9
<i>Glazer Capital Mgmt., LP v. Magistri</i> , 549 F.3d 736 (9th Cir. 2008)	11
<i>Helwig v. Vencor, Inc.</i> , 251 F.3d 540 (6th Cir. 2001) (en banc)	20
<i>Herman & MacLean v. Huddleston</i> , 459 U.S. 375 (1983).....	<i>passim</i>
<i>Herskowitz v. Nutri/System, Inc.</i> , 857 F.2d 179 (3d Cir. 1988).....	20
<i>Ind. State Dist. Council v. Omnicare, Inc.</i> , 719 F.3d 498 (6th Cir. 2013), <i>cert. granted</i> , 134 S. Ct. 1490 (2014).....	3, 23

TABLE OF AUTHORITIES – Continued

	Page
<i>In re Credit Suisse First Boston Corp. Analyst Reports Sec. Litig.</i> , 431 F.3d 36 (1st Cir. 2005)	16
<i>In re MobileMedia Sec. Litig.</i> , 28 F. Supp. 2d 901 (D.N.J. 1998)	11
<i>In re Wells Fargo Sec. Litig.</i> , 12 F.3d 922 (9th Cir. 1993), <i>cert. denied</i> , 513 U.S. 917 (1994).....	20
<i>Kimmell v. Schaefer</i> , 224 A.D.2d 217 (N.Y. App. Div. 1st Dep't), <i>aff'd</i> , 89 N.Y.2d 257 (1996).....	21
<i>Matrixx Initiatives, Inc. v. Siracusano</i> , 131 S. Ct. 1309 (2011).....	1, 8, 17
<i>Merck & Co. v. Reynolds</i> , 559 U.S. 633 (2010)	1
<i>Meyer v. JinkoSolar Holdings Co.</i> , No. 13-616-cv, 2014 WL 3747181 (2d Cir. July 31, 2014).....	7
<i>Nursing Home Consultants v. Quantum Health Servs.</i> , 926 F. Supp. 835 (E.D. Ark. 1996), <i>aff'd</i> , 112 F.3d 513 (8th Cir. 1997).....	10
<i>Pinter v. Dahl</i> , 486 U.S. 622 (1988)	13
<i>Reese v. Malone</i> , 747 F.3d 557 (9th Cir. 2014)	11, 21
<i>Roberts v. Lanier</i> , 72 So. 3d 1174 (Ala. 2011)	8
<i>Spitzberg v. Houston Am. Energy Corp.</i> , No. 13-20519, 2014 WL 3442515 (5th Cir. July 15, 2014)	22
<i>United States v. Mardirosian</i> , 602 F.3d 1 (1st Cir. 2010)	9
<i>Virginia Bankshares, Inc. v. Sandberg</i> , 501 U.S. 1083 (1991).....	<i>passim</i>

TABLE OF AUTHORITIES – Continued

	Page
<i>Wagner v. First Horizon Pharm. Corp.</i> , 464 F.3d 1273 (11th Cir. 2006).....	13
<i>Weiss v. SEC</i> , 468 F.3d 849 (D.C. Cir. 2006).....	20
<i>Wharf (Holdings) Ltd. v. United Int’l Holdings, Inc.</i> , 532 U.S. 588 (2001).....	11
<i>Zucker v. Andreessen</i> , No. 6014-VCP, 2012 WL 2366448 (Del. Ch. June 21, 2012)	7

STATUTES

15 U.S.C.

§77k	1, 2, 4, 13, 17
§77k(a)	2, 16
§77k(a)(1-5)	14
§77k(b)	4, 15
§77k(b)(3).....	4, 14
§13(b), [§78m(b)]	11
§14(a), [§78n(a)]	12
§78cc(b).....	9

42 U.S.C.

§1320a-7b(b).....	10
-------------------	----

REGULATIONS

17 C.F.R.

§230.164.....	17
§230.175.....	17, 20
§230.433.....	17

TABLE OF AUTHORITIES – Continued

Page

42 C.F.R.

§1001.952.....10

LEGISLATIVE HISTORY

77 Cong. Rec. 2914 (1933) (Statement of Rep.
Greenwood).....1577 Cong. Rec. 2934 (1933) (Statement by Rep.
Chapman).....14

H.R. 85, 73rd Cong., 1st Sess. (1933).....13

OTHER MATERIALS

Brief of *Amici Curiae* Faculty at Law and
Business Schools in Support of Respondents,
Merck & Co., Inc. v. Reynolds, No. 08-905,
Oct. 26, 2009, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1498672.....1Brief as *Amicus Curiae* for Professors at Law
and Business Schools in Support of Respon-
dents, *Matrixx Initiatives, Inc. v. Siracusano*,
No. 09-1156, Nov. 12, 2010, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=17100151Brief as *Amicus Curiae* by Securities and Ex-
change Commission Filed in Response to
Court Order, *Slayton, et al. v. Am. Express
Co., et al.*, No. 08-5442-cv, 2d Cir., Jan. 21,
2010, at 1, *available at* <http://www.sec.gov/litigation/briefs/2010/slayton0110.pdf>.....21

TABLE OF AUTHORITIES – Continued

	Page
J. Robert Brown, Jr. & Lisa L. Casey, <i>Corporate Governance: Cases and Materials</i> 733 (Lexis-Nexis 2012).....	7
W. Page Keeton, <i>et al.</i> , <i>Prosser & Keeton On Torts</i> (5th ed. 1984)	12, 18, 20
Marilou M. King, Esq. & Elizabeth S. Turqman, Esq., <i>Year in Review, Seminar Materials, Health Law Update and Annual Meeting</i> , Dallas, TX, June 4, 1997, AHLA-PAPERS P06049705	8
Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 Fed. Reg. 35952-01 (July 29, 1991).....	10
Securities Offering Reform, Exchange Act Release No. 52056 (Aug. 3, 2005)	17
William K. Sjostrom, Jr., <i>The Due Diligence Defense Under Section 11 of the Securities Act of 1933</i> , 44 Brandeis L.J. 549 (2006).....	15
<i>Restatement (Second) of Torts</i>	6, 9, 12, 19, 20
<i>Shorter Oxford English Dictionary</i>	19

INTEREST OF *AMICI CURIAE*¹

Amici are scholars at American law and business schools whose research and teaching focus on federal securities regulation and the governance of public corporations. Two of the four authors appearing as counsel on this brief have together submitted to this Court briefs on prior occasions as *amici* in cases arising under the federal securities laws on behalf of law and business faculty.² *Amici* have an interest in ensuring a proper interpretation of the statutory framework put in place by Congress under Section 11 of the Securities Act of 1933. See 15 U.S.C. §77k. *Amici* have no financial stake in the outcome of this litigation.



¹ This brief was not authored, in whole or in part, by counsel for either party, and no person other than *amici* and their academic institutions contributed monetarily to the preparation or submission of this brief. None of the schools that employ *amici* are a signatory to this brief, and the views expressed here are not affiliated with those institutions. This *amicus* brief is filed pursuant to the blanket consent executed by both parties and filed with this Court (by Respondents and Petitioners on March 28, 2014).

² Two of the four authors on this brief also submitted *amicus* briefs on behalf of law and business faculty in *Merck & Co. v. Reynolds*, 559 U.S. 633 (2010) and in *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011). See Br. of *Amici Curiae* Faculty at Law and Business Schools in Support of Resp'ts, *Merck & Co., Inc. v. Reynolds*, No. 08-905, Oct. 26, 2009; Br. for Professors at Law and Business Schools as *Amicus Curiae* in Support of Resp'ts, *Matrixx Initiatives, Inc. v. Siracusano*, No. 09-1156, Nov. 12, 2010.

SUMMARY OF ARGUMENT

This is a garden-variety action alleging false disclosure that requires nothing more than application of settled principles under the federal securities laws. The statement at issue is one of present material fact, not opinion. Falsity is established, as Respondents have alleged, through evidence showing that the statement at issue was incorrect on the date made.

Respondents seek to recover under Section 11 of the Securities Act of 1933, 15 U.S.C. §77k (“1933 Act”), for alleged misstatements of material fact made by Petitioners. The provision makes actionable a misstatement or omission of a material fact in an effective registration statement. 15 U.S.C. §77k(a). To establish a *prima facie* case, a purchaser of the securities subject to the registration statement “need only show a material misstatement or omission. . . .” *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983).

Respondents have met this standard. Petitioners represented in the registration statement that “[w]e 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.” Second Am. Complaint (“Complaint”) ¶46. The Complaint asserts that the statement was materially false and misleading “when made.” *Id.* at ¶47. The Complaint includes a number of allegations, which, when taken as true,

demonstrate that the contracts were not legally valid at the time of the statement. *See id.* at ¶¶47-90. The Sixth Circuit found these allegations sufficient to demonstrate falsity. *See Ind. State Dist. Council v. Omnicare, Inc.*, 719 F.3d 498, 505-07 (6th Cir. 2013), *cert. granted*, 134 S. Ct. 1490 (2014).

Petitioners, however, contend that the statement should be characterized as an “opinion.” Relying on *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), they assert that the falsity of an opinion can only be shown through evidence of subjective disbelief. We disagree with this characterization of the statement at issue as an opinion. A representation about the legal validity of contracts, like other matters of present fact, can be false on the date made. To the extent, for example, that contracts are conduits for illegal kickbacks, it will not always be necessary for an issuer to obtain a court ruling or await future developments to know that the contracts are invalid.

A speaker may, in some cases, express an opinion or belief with respect to present facts. An opinion in these circumstances conveys uncertainty or doubt as to the accuracy of the representation. Where, however, the speaker possesses information establishing the plain invalidity of the stated facts, the requisite uncertainty does not exist. Nor does the issuer create uncertainty by adding the words “[w]e believe” to the statement.

Allowing an issuer to escape liability for untrue statements of present fact in a registration statement

by treating them as beliefs or opinions contradicts the statutory framework set out in, and policies underlying, Section 11. *See* 15 U.S.C. §77k. Under the provision, issuers are assigned unique responsibility for ensuring the accuracy of a registration statement. Insiders and underwriters are permitted to avoid liability for a false representation where they “believe” that the facts in the registration statement are accurate. *See* 15 U.S.C. §77k(b)(3) (providing that insiders and underwriters can avoid liability where, “after reasonable investigation,” they had “reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading”).

Issuers, in contrast, are held to a standard of liability that is “virtually absolute. . .” *Herman & MacLean*, 459 U.S. at 382. They are specifically denied the right to raise as a defense to a Section 11 claim alleging a misrepresentation or omission of material fact that they “believe” otherwise. *See* 15 U.S.C. §77k(b) (due diligence defense applicable to those “other than the issuer”). Issuers, therefore, have additional incentive to verify the accuracy of the registration statement.

Permitting a statement about the validity of contracts to be treated as a belief or opinion when the issuer possesses information to the contrary fundamentally alters this regulatory scheme. If such

treatment is judicially validated, issuers will be able to rely on a litigation strategy that Congress sought to foreclose in denying issuers the right to resort to a reasonable belief defense under Section 11. Moreover, the approach effectively introduces into Section 11 a state of mind requirement. Purchasers required to establish a subjective disbelief as to present facts will be obligated to present evidence similar to that needed to demonstrate scienter.

To the extent, however, that this Court treats the statements at issue as opinions, we do not agree that the matter is “answered” by the decision in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991). See Pet’r’s Br. at 2. In *Virginia Bankshares*, this Court “confine[d]” its analysis to statements of opinion by directors that were not subjectively believed. 501 U.S. at 1090. The Court did not, therefore, resolve the standard for showing the falsity of opinions in the absence of allegations of subjective insincerity.

We agree with the Government that opinions sincerely held may nonetheless be false if they lack a reasonable basis, a longstanding and familiar test widely used under the federal securities laws. Lower courts and the common law also recognize that an opinion may be false where the maker possesses undisclosed facts that contradict the accuracy of the statement.

In this case, Respondents have alleged that Petitioners possessed facts demonstrating that the contracts referenced in its statement were invalid on the

date the statement was made. This allegation, as the Sixth Circuit found, is sufficient to allege falsity. To the extent that Petitioners' statement is treated as an opinion, Respondents have alleged facts sufficient to meet the pleading standards applicable in Section 11 actions.

◆

ARGUMENT

I. The Representation in the Registration Statement about the Legal Validity of Contracts Is a Statement of Present, Verifiable Fact, the Falsity of Which can be Determined through the Use of Settled Principles of Law

According to the Complaint, Petitioners represented in the registration statement that “[w]e 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.” Complaint ¶46. Petitioners have characterized the statement as one of opinion that can be “objectively erroneous. . . .”³ Pet’r’s Br. 18

³ An opinion may in some cases not be objectively verifiable under any circumstances. *See Virginia Bankshares*, 501 U.S. at 1090 (petitioners describing opinions at issue in that case as “indefinite and unverifiable expressions”). *See also Restatement (Second) of Torts* §538A (“A representation is one of opinion if it expresses only . . . (b) his judgment as to quality, value, authenticity, or other matters of judgment.”). In this case, however, Petitioners recognize that a statement of legal validity

(Continued on following page)

n. 4. They assert, however, that the statement at issue cannot be definitively true or false on the date made “except in the rare case in which a court has already definitively ruled on the legality of the issuer’s actions.” Pet’r’s Br. 35. Instead, “ultimate accuracy of the stated belief hinges on future events and the decisions of judges, juries, and regulators.” *Id.*

It is true that contracts described as legally valid today may be found to be invalid tomorrow. In some cases, a basis for invalidity of a contract may be known but unresolved.⁴ In other cases, validity may depend upon unexpected but ultimately successful challenges by “[c]reative counsel.” *See Zucker v. Andreessen*, No. 6014-VCP, 2012 WL 2366448, at *8 (Del. Ch. June 21, 2012). Sometimes the law will change, causing a contract to no longer be valid. Indeed, these sorts of uncertainties are an inherent and important attribute of the common law system, particularly with respect to corporate governance and capital-raising. *See J. Robert Brown, Jr. & Lisa L.*

can be “objectively false.” *See* Pet’r’s Br. 27 (asserting that statement must be “both objectively false and disbelieved by the defendant at the time it was expressed.”) (*quoting Fait v. Regions Fin. Corp.*, 655 F.3d 105, 110 (2d Cir. 2011)).

⁴ We note, however, that where the speaker is aware of existing challenges to the validity of contracts, even though unresolved, a statement of legal validity may be materially incomplete under the antifraud provisions. *See Meyer v. JinkoSolar Holdings Co.*, No. 13-616-cv, 2014 WL 3747181, at *4 (2d Cir. July 31, 2014) (“Even when there is no existing independent duty to disclose information, once a company speaks on an issue or topic, there is a duty to tell the whole truth.”).

Casey, *Corporate Governance: Cases and Materials* 733 (Lexis-Nexis 2012) (noting that common law countries “are typically more comfortable with legal requirements created by, or left to, the courts. The likely effect of judicially created legal requirements is that it can be changed more quickly, arguably providing both increased flexibility and increased uncertainty.”).

A statement of legal validity is not, however, invariably dependent upon future events or a determination by a judge, jury, or regulator. A contract may be plainly and well understood to be invalid in the present. *See Roberts v. Lanier*, 72 So. 3d 1174, 1187-88 (Ala. 2011) (where it was “undisputed that contractual provisions for non-refundable retainers [were] unenforceable,” case allowed to go forward as to whether certain defendants “misrepresented . . . that the contract as written was valid and enforceable. . . .”).⁵

⁵ Requiring a definitive ruling from a court as a precondition for invalidity would preclude such a finding even where a legal opinion stated otherwise. *See* Marilou M. King, Esq. & Elizabeth S. Turqman, Esq., *Year in Review, Seminar Materials, Health Law Update and Annual Meeting*, Dallas, TX, June 4, 1997, AHLA-PAPERS P06049705 (representing that “[a]fter entering into the contract, [the company] was advised by counsel that the contract violated the federal Medicare Anti-Kickback Statute”). The need for a court decision to show invalidity seeks to impose the type of “bright-line” rule under the federal securities laws that this Court has twice rejected in other contexts. *See Matrixx Initiatives*, 131 S. Ct. at 1319 (rejecting “categorical rule” as test for materiality); *see also Basic Inc. v. Levinson*, 485

(Continued on following page)

Contracts can, therefore, be invalid *ab initio* where, for example, they lack mandatory formalities. See *First Am. Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166, 1176 (10th Cir. 2005) (“Certain formalities . . . must take place before an agreement becomes a contract. The regulations’ requirement that management contracts be approved to be valid creates no ontological mystery whereby a contract springs fully-fashioned from nothingness, but rather identifies a formality necessary before an agreement to manage a tribal gaming operation can become a contract so to manage. Lacking the formality . . . an agreement to manage does not become a contract: it is void.”).

Contracts that violate the terms of a statute may be invalid. See Section 29(b) of the Exchange Act, 15 U.S.C. §78cc(b) (contracts made in violation of title “shall be void”); see also *Restatement (Second) of Torts* §774, cmt. a (“An agreement may be clearly illegal, as when it is forbidden by statute.”).

Contracts that involve an illegal purpose may also be invalid. See *United States v. Mardirosian*, 602 F.3d 1, 7 (1st Cir. 2010) (“It is well-established that contracts for illegal purposes are void as a matter of public policy. . . . We tread no new ground in declaring that the act of demanding a fee for the return of stolen property is unlawful.”).

U.S. 224, 249 (1988) (“We reject ‘agreement-in-principle as to price and structure’ as the bright-line rule for materiality.”).

Contracts can be invalid as a result of violations of the federal Anti-Kickback statute. The law prohibits remuneration in return for patient referrals or in return for the purchase of goods, facilities, services or items paid for under a federal health care program. See 42 U.S.C. §1320a-7b(b); see also 42 C.F.R. §1001.952 (safe harbor for payments otherwise subject to Anti-Kickback statute). Contracts cannot, therefore, provide for payments that are inconsistent with these provisions. See *Nursing Home Consultants v. Quantum Health Servs.*, 926 F. Supp. 835, 843-44 (E.D. Ark. 1996), *aff'd*, 112 F.3d 513 (8th Cir. 1997) (marketing agreement “plainly falls within the literal purview” of Anti-Kickback statute and “[p]lainly . . . fails” to fall within safe harbor and, as a result, “is illegal, and hence unenforceable, in that it contemplates a business arrangement that is prohibited by §1320a-7b(b)(1), and which is not saved by the ‘safe harbor’ regulations.”). An agreement that appears to be valid on its face but is, in reality, a “sham” designed to mask prohibited payments is an unlawful kickback arrangement. See Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 Fed. Reg. 35952-01 (July 29, 1991) (“[S]ham contracts in which remuneration is exchanged for property that does not exist or space which is not used are among the most egregious kickback arrangements.”). To the extent that contracts are conduits for illegal kickbacks, therefore, it will not always be necessary for an issuer to always obtain a court ruling or await future developments to know that such agreements are invalid.

Courts interpreting the federal securities laws have recognized that statements of legal validity or compliance can be matters of present fact that may be false when made. In *Glazer Capital Mgmt., LP v. Magistri*, 549 F.3d 736, 741 (9th Cir. 2008), for example, the court addressed allegations that defendants misrepresented in a merger agreement that the company was “in compliance in all material respects with all laws’” and, specifically, that the company was “in compliance with the books and records provision of Section 13(b) of the Exchange Act. . . .” The court found that it was sufficient for plaintiff to allege “facts demonstrating that [the company] was not in compliance with Section 13(b) of the Exchange Act at the time the warranties were made. . . .” *Id.* at 742 (emphasis in original); see also *Reese v. Malone*, 747 F.3d 557, 578 (9th Cir. 2014) (“Statements of legal compliance are pled with adequate falsity when documents detail specific violations of law that existed at the time the warranties were made.”); *In re MobileMedia Sec. Litig.*, 28 F. Supp. 2d 901, 939 (D.N.J. 1998) (“[F]acts demonstrating [that the company] was not in compliance with the terms of the Credit Agreement from the moment it was signed would be important to a reasonable investor.”).⁶

⁶ Statements with respect to contracts can be misleading in other respects. Representations about the existence of a contract can be misleading where there is no intent to perform. See *Wharf (Holdings) Ltd. v. United Int’l Holdings, Inc.*, 532 U.S. 588, 596 (2001) (“To sell an option while secretly intending not to
(Continued on following page)

Admittedly, a speaker may sometimes express a genuine belief about a matter of present fact. An opinion in these circumstances conveys uncertainty or doubt as to the accuracy of the representation. *See Restatement (Second) of Torts* §538A (“A representation is one of opinion if it expresses only (a) the belief of the maker, without certainty, as to the existence of a fact”); *see also* W. Page Keeton, *et al.*, *Prosser & Keeton on Torts* §109, at 755 (5th ed. 1984) (“Prosser & Keeton”) (statement of opinion can “indicate[] some doubt as to the speaker’s belief in the existence of a state of facts”).

Where, however, the speaker possesses information establishing plain invalidity, the requisite uncertainty does not exist. Nor can the speaker create uncertainty by adding the words “[w]e believe” to the statement. As Justice Scalia reminded in *Virginia Bankshares*, “not every sentence that has the word ‘opinion’ in it . . . leads us into this psychic thicket. Sometimes such a sentence actually represents facts as facts rather than opinions – and in that event no more need be done than apply the normal rules for §14(a) liability.” 501 U.S. 1108, 1109 (Scalia, J., concurring in part and concurring in the judgment); *see also Restatement (Second) of Torts* §538A cmt. d (“The form of the statement is not, however, controlling in all cases.”); *Prosser & Keeton*, at 755 (“It is not, however, the form of the statement which is

permit the option’s exercise is misleading, because a buyer normally presumes good faith.”).

important or controlling, but the sense in which it is reasonably understood.”).

Allowing an issuer to escape liability for untrue statements of present fact in a registration statement by treating the statements as beliefs or opinions contradicts the statutory framework set out in, and policies underlying, Section 11 of the 1933 Act. *See* 15 U.S.C. §77k. In adopting the 1933 Act, Congress sought to ensure that purchasers participating in a public offering were fully informed of all facts material to the offering. *See* H.R. 85, 73rd Cong., 1st Sess. 2 (1933) (“There is, however, an obligation upon us to insist that every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public.”) (President’s message); *see also Pinter v. Dahl*, 486 U.S. 622, 638 (1988) (“The primary purpose of the Securities Act is to protect investors by requiring publication of material information thought necessary to allow them to make informed investment decisions concerning public offerings of securities in interstate commerce.”).

Congress advanced this goal by assigning to issuers a unique role in maintaining the accuracy of the registration statement. To make out a *prima facie* case under Section 11, purchasers must only “show a material misstatement or omission” in an effective registration statement. *Herman & MacLean*, 459 U.S. at 382. Evidence of the speaker’s state of mind is not an element of such a claim. *See Wagner v. First*

Horizon Pharm. Corp., 464 F.3d 1273, 1277 (11th Cir. 2006) (“There is no state of mind element to a §11 claim . . .”).

For insiders and underwriters, however, evidence of falsity will generally not be enough.⁷ Although these participants play a “direct role” in the offering process, Section 11 provides a defense to an inaccurate registration statement. *Herman & MacLean*, 459 U.S. at 382. *See also* 15 U.S.C. §77k(a)(1-5). Congress allows insiders and underwriters to escape liability for misrepresentations or omissions of material fact if they reasonably and actually “believe” that the registration statement is accurate after a “reasonable investigation, . . . ” 15 U.S.C. §77k(b)(3). *See also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208 n. 26 (1976) (“Other individuals who sign the registration statement, directors of the issuer, and the underwriter of the securities similarly are accorded a complete defense against civil liability based on the exercise of reasonable investigation and a reasonable belief that the registration statement was not misleading.”).

⁷ *See* 77 Cong. Rec. 2934 (1933) (Statement by Rep. Chapman) (“Under the terms of this bill, the corporation itself is held absolutely responsible, but its management, underwriters, and so forth, are held only to the degree of responsibility above set out. To have made them guarantors of such securities, as some urged that they should be, would have worked an intolerable hardship on many honest and responsible business men . . .”).

Issuers, however, are not allowed the same opportunity to avoid liability. Recognizing that the information in a registration statement is, for the most part, within the unique control of issuers,⁸ Congress gave issuers additional incentive to verify the accuracy of the registration statement by holding them to a standard of liability that is “virtually absolute. . . .” *Herman & MacLean*, 459 U.S. at 382. Consistent with this intent, issuers are expressly denied the right to defend against a misleading representation of material fact in a registration statement by taking the position that they “believe” otherwise. *See* 15 U.S.C. §77k(b) (due diligence defense applicable to those “other than the issuer”).⁹ As a result, issuers can only avoid liability in a meaningful sense by ensuring the factual accuracy of the registration statement.¹⁰

⁸ *See* 77 Cong. Rec. 2914 (1933) (Statement of Rep. Greenwood) (“There is a peculiar fact with respect to such investments in that the corporation that issues the securities knows more about them than anyone else, and the old rule of caveat emptor, or the buyer beware, certainly should not apply to this character of investments. The man who sells them ought to give the facts, and the Government ought to require the issuer of securities to give all the facts, and be honest with the public.”).

⁹ The right to reasonable and actual belief in the accuracy of the registration statement is commonly referred to as the “due diligence” defense. *See* William K. Sjostrom, Jr., *The Due Diligence Defense Under Section 11 of the Securities Act of 1933*, 44 *Brandeis L.J.* 549, 554 (2006).

¹⁰ Other than the obligation to bring an action within the statute of limitations, the only defense set out in the statute was
(Continued on following page)

Allowing an issuer to treat facts in registration statements as opinions or beliefs also introduces into Section 11 what is effectively a state of mind requirement, at least where falsity is conditioned upon a showing of subjective disbelief. Purchasers seeking to establish a subjective disbelief as to facts in an effective registration statement will be required to produce evidence similar to what is needed to demonstrate scienter. *See In re Credit Suisse First Boston Corp. Analyst Reports Sec. Litig.*, 431 F.3d 36, 48 (1st Cir. 2005) (“[T]he subjective aspect of the falsity requirement and the scienter requirement essentially merge; the scienter analysis is subsumed by the analysis of subjective falsity.”). As a result, purchasers will no longer be able to set out a *prima facie* case only by “show[ing] a material misstatement or omission” *Herman & MacLean*, 459 U.S. at 382.

In sum, an issuer possessing information showing that a representation of fact in a registration statement is untrue or misleading cannot defend against a claim of falsity by characterizing the statement as a belief or opinion. Such an approach does not work an unnecessary hardship on issuers. While it limits the ability to treat facts in a registration statement as a belief or opinion, this approach does not prevent the inclusion in the registration statement of any suitably qualified representation of inherently

that the purchaser “knew of such untruth or omission” 17 U.S.C. §77k(a).

uncertain information, such as projections or other forward-looking statements. *See* Rule 175, 17 C.F.R. §230.175.

Moreover, issuers can avoid Section 11 liability altogether to the extent the relevant disclosure does not appear in the registration statement. *See* 15 U.S.C. §77k. In the absence of a duty to disclose, issuers may remain silent. *See Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1321 (2011) (noting that antifraud provisions “do not create an affirmative duty to disclose any and all material information.”). *See also Basic Inc. v. Levinson*, 485 U.S. 224, 239 n. 17 (“Silence, absent a duty to disclose, is not misleading under Rule 10b-5.”). They also may, under certain circumstances, disclose “information the substance of which is not included in the registration statement” in a “free writing prospectus . . .” Rule 433, 17 C.F.R. §230.433; *see also* Rule 165, 17 C.F.R. §230.164. Information included in a “free writing prospectus” is not subject to Section 11 liability.¹¹

¹¹ *See* Securities Offering Reform, Exchange Act Release No. 52056, 70 Fed. Reg. 4472, 44759 (Aug. 3, 2005) (“Even when filed, a free writing prospectus will not be part of a registration statement subject to liability under Securities Act Section 11, unless the issuer elects to file it as a part of the registration statement.”).

II. *Virginia Bankshares* Does Not Determine the Standard of Review for a Statement of Opinion that is Subjectively Believed

To the extent this Court treats the statement at issue as an “opinion,” we do not agree that the appropriate standard for determining falsity is “answered” by the decision in *Virginia Bankshares*. See Pet’s Br. at 2. The Court in *Virginia Bankshares* expressly “confine[d]” its analysis to cases involving subjective disbelief. 501 U.S. at 1090 (“[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.”). The decision, therefore, left open the standard for determining the falsity of an opinion in the absence of allegations of subjective disbelief.

Particularly in the commercial context, opinions expressed by those with superior knowledge are understood to be more than a matter of pure speculation.¹² See Prosser & Keeton, at 760-61 (“There is quite general agreement that such an assertion is to be implied where the defendant holds himself out or is understood as having special knowledge of the matter which is not available to the plaintiff, so that his opinion becomes in effect an assertion summarizing

¹² Congress, in adopting Section 11, recognized the “peculiar fact” that the corporation issuing the securities “knows more about them than anyone else” See *supra* note 8.

his knowledge.”) (footnote omitted). Instead, they must be supported by a sufficient factual predicate. *See Virginia Bankshares*, 501 U.S. at 1093 (noting that the opinions at issue were “reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading.”); *see also Restatement (Second) of Torts* §539 cmt. b (“The statement of opinion may not only imply that the maker knows of no fact incompatible with the opinion, but, when the circumstances justify it, may also reasonably be understood to imply that he does know facts sufficient to justify him in forming the opinion and that the facts known to him do justify him.”).

This is particularly true where the opinion is, as is the case here, expressly characterized as a belief. A belief does more than articulate a subjective view or uncertainty. It conveys “confidence” in the accuracy of the statement. *See 1 Shorter Oxford English Dictionary* 213 (second definition of believe: “Put one’s trust or have confidence in (or on) the truth of (a proposition, doctrine, etc.), the efficacy or advisability of (a principle, institution, practice, etc.), the existence of (a person or thing), the occurrence of (an event)”). Confidence in turn suggests a “firm trust” in the position. *See id.* at 483 (first definition of confidence: “Firm trust, reliance, faith in.” Fourth definition: “Assured expectation; the state of feeling certain of.”). An expression of belief, therefore, indicates to investors that the maker has a strong foundation for the statement.

The Government has, on brief in this case, asserted that an opinion can be false where it lacks “a basis that is reasonable under the circumstances.” Gov.’s Br. 6. We agree that this is an appropriate standard for assessing whether an opinion has an adequate foundation. Lower courts have routinely applied the reasonable basis standard to statements of belief and opinion. *See Weiss v. SEC*, 468 F.3d 849, 855 (D.C. Cir. 2006); *Herskowitz v. Nutri/System, Inc.*, 857 F.2d 179, 184 (3d Cir. 1988); *Helwig v. Vencor, Inc.*, 251 F.3d 540, 557 (6th Cir. 2001) (en banc); *In re Wells Fargo Sec. Litig.*, 12 F.3d 922, 930 (9th Cir. 1993), *cert. denied*, 513 U.S. 917 (1994). Likewise the standard is commonly applied in the context of forward-looking information. *See* Rule 175, 17 C.F.R. §230.175 (safe harbor for forward-looking statements that does not apply in the absence of a “reasonable basis” for such statement).

An opinion or belief can also be false where the maker possesses undisclosed facts that contradict the accuracy of the statement. Such an understanding is consistent with the *Restatement of Torts*, see *Restatement (Second) of Torts* §539(1) (statement of opinion may be interpreted as “an implied statement (a) that the facts known to the maker are not incompatible with his opinion”), and the common law. *See* Prosser & Keeton, at 760 (“[I]t 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.”) (footnote omitted). *See also Kimmell v. Schaefer*, 224 A.D.2d 217, 218 (N.Y. App. Div. 1st Dep’t), *aff’d*, 89 N.Y.2d 257 (1996) (“[W]here one party does have superior knowledge, the expression of an opinion implies that the declarant knows facts which support that opinion and that he knows nothing which contradicts the statement.”) (internal quotation marks omitted).

Lower courts interpreting the federal securities laws have recognized that a statement of belief can be false under these circumstances. *See Reese*, 747 F.3d at 579; *City of Monroe Employees Retirement System v. Bridgestone Corp.*, 399 F.3d 651, 675 (6th Cir.), *cert. denied*, 546 U.S. 936 (2005); *see also Bissett v. Ply-Gem Indus., Inc.*, 533 F.2d 142, 146 (11th Cir. 1976) (“[A] plaintiff may recover upon a showing that the defendant knew, or should have known, that the facts in his possession invalidated the opinion which he expressed.”). The Securities and Exchange Commission has expressed a similar position in the context of forward-looking information. *See Securities and Exchange Commission, Br. as Amicus Curiae Filed in Response to Ct. Order, 1, Slayton, et al. v. Am. Express Co., et al.*, No. 08-5442-cv, 2d Cir. Jan. 21, 2010.

In addition to the standard for subjective disbelief set out in *Virginia Bankshares*, therefore, a statement of opinion or belief can be false if it is

unsupported by a reasonable basis or the maker possesses undisclosed facts that contradict the accuracy of the statement. Respondents in this case have alleged that Petitioners were in possession of facts on the effective date of the registration statement at issue demonstrating that the contracts with pharmaceutical companies were not legally valid. Respondents, therefore, have sufficiently alleged that the Petitioners' statement was false when made or omits to state facts necessary to make the statement, in the light of the circumstances in which it was made, not misleading.

◆

CONCLUSION

In this case, Respondents have not challenged the statement as to the validity of the contracts by resorting to arguments that rely on the uncertainty of the legal system.¹³ Their claims are not dependent upon future changes in the law or the arguments of “creative counsel.” They have alleged that the statement at issue was false “when made.” Complaint

¹³ To the extent addressing a statement that can be both historical and dependent on future developments, courts in these circumstances look to the way in which the plaintiffs have framed the claim. *See Spitzberg v. Houston Am. Energy Corp.*, No. 13-20519, 2014 WL 3442515, at *12 (5th Cir. July 15, 2014) (although conceding that the term “reserve” may be “characterized as forward-looking” in some circumstances, plaintiffs’ allegations “focus on that component of the term . . . that had already occurred”).

¶47. The Complaint includes a number of allegations designed to show that the contracts were not legally valid on the effective date of the registration statement. *See id.* at ¶¶47-90. The Sixth Circuit found, and we agree, that these allegations were sufficient to establish falsity. *See Ind. State Dist. Council of Laborers*, 719 F.3d at 505-07.

For these reasons, *amici* respectfully urge this Honorable Court to affirm the ruling of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

	J. ROBERT BROWN, JR. <i>Counsel of Record</i>
CELIA TAYLOR Professor of Law UNIVERSITY OF DENVER STURM COLLEGE OF LAW Denver, CO 80208	Professor of Law Director Corporate-Commercial Law Program UNIVERSITY OF DENVER STURM COLLEGE OF LAW 2255 E. Evans Ave. Denver, CO 80208 (720) 933-5292 jbrown@law.du.edu
LYMAN JOHNSON ROBERT O. BENTLEY Professor of Law WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW Lexington, VA 24450 and Professor of Law ST. THOMAS SCHOOL OF LAW Minneapolis, MN 55403	JOAN MACLEOD HEMINWAY W.P. Toms Distinguished Professor of Law THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW Knoxville, TN 37909

APPENDIX

Amici Curiae

Jayne W. Barnard
James Goold Cutler Professor of Law
William & Mary Law School

Eric C. Chaffee
Professor of Law
The University of Toledo College of Law

Ronald J. Colombo
Associate Dean for Academic Affairs and
Professor of Law
Maurice A. Deane School of Law at Hofstra University

Lawrence A. Cunningham
Henry St. George Tucker III Research Professor
George Washington University Law School

Roger J. Dennis
Founding Dean & Professor of Law
Drexel University School of Law

Tamar Frankel
Michaels Faculty Research Scholar
Professor of Law
Boston University School of Law

Theresa A. Gabaldon
Lyle T. Alverson Professor of Law
The George Washington University Law School

Harry S. Gerla
Professor of Law
University of Dayton School of Law

App. 2

Thomas Lee Hazen
Cary C. Boshamer Distinguished Professor
School of Law
The University of North Carolina at Chapel Hill

Thomas J. Molony
Associate Professor of Law
Elon University School of Law

Daniel J. Morrissey
Professor of Law
Gonzaga University School of Law

Lisa H. Nicholson
Professor of Law
University of Louisville
Louis D. Brandeis School of Law

Ann Morales Olazábal
Professor of Business Law
University of Miami School of Business Administration

Dale A. Oesterle
J. Gilbert Reese Chair in Contract Law
The Ohio State University
Moritz College of Law

Alan R. Palmiter
Howard L. Oleck Professor of Business Law
Wake Forest University School of Law

Frank Partnoy
George E. Barrett Professor of Law and Finance
University of San Diego School of Law

Robert A. Prentice
Ed & Molly Smith Professor of Business Law
Business, Government & Society Department
McCombs School of Business
University of Texas at Austin

App. 3

Margaret V. Sachs
Robert Cotten Alston Chair in Corporate Law
The University of Georgia School of Law

Michael Siebecker
Professor of Law
University of Denver Sturm College of Law

Faith Stevelman
Professor of Law
New York Law School

Jennifer Taub
Professor of Law
Vermont Law School

Chrystyne J. Vachon
Assistant Professor of Law
University of North Dakota School of Law
