No. 09-1400

JUN 17 2010

IN THE

Supreme Court of the United States

THE LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND, and the CEMENT MASONS LOCAL 526 COMBINED FUNDS, On Behalf of Themselves and All Others Similarly Situated,

Petitioners,

—v.—

OMNICARE, INC., JOEL F. GEMUNDER, DAVID W. FROESEL, JR., CHERYL D. HODGES, EDWARD L. HUTTON, and SANDRA E. LANEY,

Respondents.

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

BRIEF IN OPPOSITION

FROST BROWN TODD LLC
WM. T. ROBINSON III
DOUGLAS R. DENNIS
2200 PNC Center
201 East Fifth Street,
Suite 2200
Cincinnati, Ohio 45202-4182
(513) 651-6800

DEWEY & LEBOEUF LLP
HARVEY KURZWEIL
(Counsel of Record)
hkurzweil@dl.com
RICHARD W. REINTHALER
JAMES P. SMITH III
1301 Avenue of the Americas
New York, New York 10019-6092
(212) 259-8000

DEWEY & LEBOEUF LLP
JOHN E. SCHREIBER
MAYA C. DHARWARKAR
333 South Grand Avenue, Suite 2600
Los Angeles, California 90071-1530
(213) 621-6000

Attorneys for Respondents

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QUESTION PRESENTED

Whether this Court should review the Sixth Circuit's interlocutory decision reversing the dismissal of Petitioners' claim under Section 11 of the Securities Act of 1933 and remanding it to the district court for further proceedings including application of Federal Rule of Civil Procedure 9(b)'s heightened pleading standard, where (a) it remains to be seen, on remand, whether and to what extent the application of Rule 9(b) to Petitioners' Section 11 claim will be outcome determinative, and (b) Petitioners have not shown that this is a case "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate [interlocutory] determination in this Court" (*see* Sup. Ct. R. 11; 28 U.S.C. §1254(1)).

PARTIES TO THE PROCEEDING

Plaintiffs-Appellants-Petitioners are The Laborers District Council Construction Industry Pension Fund; and Indiana State District Council of Laborers and Hod Carriers.

Defendants-Appellees-Respondents are Omnicare, Inc.; Joel F. Gemunder; David W. Froesel; Cheryl D. Hodges; Edward L. Hutton;[1] and Sandra E. Levy.

RULE 29.6 DISCLOSURE STATEMENT

Respondent Omnicare, Inc. does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

[1] Regrettably, Mr. Hutton passed away while the case was on appeal to the Sixth Circuit.

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STATUTES AND RULES INVOLVED

This case involves Federal Rules of Civil Procedure 8 and 9(b), and Section 11 of the Securities Act of 1933, 15 U.S.C. §77k. *See* Appendix to the Petition at 49a-62a.

SUMMARY OF THE ARGUMENT

Following the district court's dismissal of their second amended complaint in its entirety, Petitioners appealed to the Sixth Circuit. There, Petitioners obtained a reversal of the district court's dismissal of their Section 11 claim and a remand of that claim to the district court for further proceedings. By this application, Petitioners seek extraordinary interlocutory review of the Sixth Circuit's decision reviving their dismissed Section 11 claim, insofar as it directed the district court, on remand, to apply the heightened pleading standard of Federal Rule of Civil Procedure 9(b) to their fraud-based Section 11 claim. Because it remains to be seen whether and to what extent that directive will be outcome determinative on remand, and because Petitioners have failed to make the requisite showing that this case is "of such imperative public importance" as to warrant interlocutory review by this Court, Respondents respectfully request that the Petition be denied.

STATEMENT OF THE CASE

In their "sprawling and repetitive" second amended complaint, as the Sixth Circuit described it, Petitioners asserted four disparate theories of securities fraud, including that Omnicare know-

ingly and intentionally violated Generally Accepted Accounting Principles ("GAAP") by "fraudulently recognizing revenues," "fraudulently overvaluing its inventory" and "fraudulently overvaluing its receivables." Based on these allegations, Petitioners purported to assert claims under Sections 10(b) and 20(a) of the Exchange Act of 1934 and under Section 11 of the Securities Act. The Section 11 claim was premised on the allegation that the same purported GAAP violations that gave rise to a claim of securities fraud also rendered the registration statement issued in connection with Omnicare's 2005 public offering materially false and misleading.

On October 12, 2007, the district court dismissed Petitioners' complaint in its entirety. *See Indiana State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 527 F. Supp. 2d 698 (E.D. Ky. 2007).[2] Recognizing this as a classic "fraud by hindsight" case in which Plaintiffs "attempted to 'reverse engineer' a securities fraud action based on bad corporate news," the district court held that Plaintiffs failed to state a claim under either §§10(b) or 20(a) of the Exchange Act or §11 of the Securities Act. *Id* at 712.[3] With respect to Petitioners' claims premised on Omnicare's alleged GAAP violations, the district court found that the complaint failed to "allege facts that would establish the truth about these alleged accounting vio-

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[2] The district court's opinion and order appears as Appendix C to the Petition.

[3] The district court also denied, as futile and untimely, Plaintiffs' eleventh-hour motion seeking leave for a new named plaintiff to intervene. *See id.* at 711-12.

lations was ever revealed or disclosed to the market so as to cause a corresponding drop in Omnicare's stock price which harmed plaintiffs." *Id.* at 707. Rather:

> Omnicare has never restated the challenged earnings reports, nor has it been required to correct any of its financial reports or filings because of these alleged accounting irregularities. Moreover, Omnicare's independent auditors certified throughout the class period that the company's financial statements were "fairly presented" in accordance with GAAP.

Id. The district court went on to hold, in a footnote, that "[t]he Section 11 claim, which also sounds in fraud and is based on the alleged accounting violations, fails on the same grounds." *Id.* at 708 n.8.

On appeal, the Sixth Circuit affirmed the dismissal of all of Plaintiffs' Exchange Act claims—finding that Petitioners had attempted to transform mere "bad corporate news into a securities class action" by what the court termed "alchemy"—but reversed and remanded the case with respect to the Section 11 claim. *See Indiana State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935, 938 (6th Cir. 2009).[4] Significantly, in dismissing the Exchange Act claims, the Sixth Circuit held that Petitioners' GAAP-based theory was "substantially undercut both by the lack of any financial restatements on Omnicare's part

[4] The Sixth Circuit's opinion appears as Appendix 1A to the Petition.

and by the willingness of third-party auditors to continue to certify Omnicare's GAAP compliance" and that "loss causation is . . . lacking" with respect to Plaintiffs' attempt to plead securities fraud based on purported GAAP violations because "the complaint does not suggest that the alleged GAAP violations were ever recognized by or revealed to the market." *Id.* at 945.

While signaling that the Section 11 claim could likewise be dismissed on loss causation grounds if the applicability of this affirmative defense was apparent on the face of the complaint, the Sixth Circuit concluded that the "brief footnote" on Section 11 in the district court's opinion did not make clear whether the court had made such a finding. *See id.* at 947-48. Further, the Sixth Circuit held that Petitioners' Section 11 claim was "based on . . . [the same] alleged GAAP abuses" as their Exchange Act claims and, "since the GAAP violations sound in fraud, Rule 9(b) must apply" to the Section 11 claim. *Id.* at 948. Noting that Petitioners' failure to allege the underlying GAAP violations with the specificity required by Rule 9(b) would constitute an alternative ground for affirming the dismissal of the Section 11 claim, the Sixth Circuit "[n]evertheless decline[d] to affirm on this alternate ground and instead le[ft] the application of Rule 9(b) standards to the district court." *See id.* Accordingly, the Sixth Circuit reversed the district court's dismissal of the Section 11 claim and remanded the case to the district court for further proceedings. *Id.*

After denial of a motion for rehearing, this Petition followed.

REASONS FOR DENYING THE PETITION

I. This Case Is Not Ripe for Review by this Court

The Sixth Circuit's decision remanding Petitioners' Section 11 claim to the district court for further proceedings, including application of Rule 9(b)'s heightened pleading standard, is not ripe for this Court's review, as it remains to be seen whether and to what extent the Sixth Circuit's direction that Rule 9(b) be applied will be outcome determinative. *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case, [and] it is not yet ripe for review by this Court").

Indeed, given that a reversal was the relief Petitioners sought from the Sixth Circuit with respect to the dismissed Section 11 claim, Petitioners were the prevailing, not the aggrieved, party on the Section 11 claim in the Court of Appeals. *See Bunting v. Mellon*, 541 U.S. 1019, 1023 (2004) (stating that "our practice reflects a 'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed"); *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper,* 445 U.S. 326, 333-334 (1980) ("Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom.").

Here, the district court could, on remand, conclude any of the following: (a) that Petitioners' allegations of a material misstatement or omission satisfy Rule 9(b) (and *decline* to dismiss the claim on that basis); (b) that Petitioners have failed to

state a plausible Section 11 claim in a non-conclusory manner, even under the Rule 8 pleading standard (and dismiss on that basis) in light of this Court's recent clarification that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not" satisfy that standard, *Ashcroft v. Iqbal*, 556 U.S. __, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007)[5]; (c) that the affirmative defense of loss causation is clear on the face of the complaint (and dismiss the Section 11 claim on that alternative, and altogether independent, basis without even reaching the question of whether Petitioners have adequately pleaded a material misstatement under Rule 9(b)); *or* (d) that Petitioners' allegations of a material misstatement or omission based on a purported GAAP violation fail to satisfy Rule 9(b)'s heightened pleading standard (and dismiss the Section 11 claim on that basis).

Only under the last of these four scenarios would the Sixth Circuit's holding as to the applicability of Rule 9(b) ultimately prove to be outcome determinative. That being the case, even if the Court were otherwise inclined to take up the issue of whether and under what circumstances

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[5] It is also worth noting that all three of the Eighth Circuit decisions cited by Petitioners as creating a purported split among the Circuits predate this Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. __, 129 S. Ct. 1937 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 554 (2007), which clarified that the pleading standard under Rule 8 itself requires a higher degree of particularity than Petitioners have provided here. With the ramifications of *Iqbal* only beginning to percolate through the lower federal courts, to grant the Petition now would be premature.

Rule 9(b) may be applied to claims under Section 11 (and for the reasons discussed in the following section, Respondents submit that there is no reason that it should), this case, in its current posture, does not present the best, or even an appropriate, vehicle to do so.

II. Petitioners Have Made No Showing of "Imperative Public Importance" Warranting Interlocutory Review by this Court

It is well-established that "[a] petition for writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Where, as here, the petition seeks review of a case prior to entry of final judgment, the bar is even higher. Such petitions for interlocutory review "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11 (citing 28 U.S.C. §2101(e)); *see Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 350-51 (1985) (explaining that the Court will exercise pre-judgment certiorari review only in cases "of extraordinary constitutional moment and in cases demanding prompt resolution for other reasons").[6]

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[6] *See also, e.g., Mistretta v. U.S.*, 488 U.S. 361, 371 (1989) (granting pre-judgment certiorari in case challenging validity of Federal Sentencing Guidelines adopted under the Sentencing Reform Act of 1984 "[b]ecause of the 'imperative public importance' of the issue . . . and . . . the disarray among the Federal District Courts"); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (granting pre-judgment certiorari in case challenging power of the President to suspend claims

(*footnote continued on next page*)

Moreover, in every case of which Respondents are aware in which interlocutory certiorari review has been sought (let alone granted), the petitioner was the aggrieved—not the prevailing—party with respect to the claim for which review was sought. Here, Petitioners, who, as noted previously, succeeded in obtaining a reversal and remand of the Section 11 claim in the Sixth Circuit, have made no showing that this case is of any constitutional moment or imperative public importance, nor could they.

As Petitioners acknowledge, the overwhelming majority of other Circuit Courts that have addressed the issue—including, the First, Second, Third, Fourth, Fifth, Seventh, Ninth, Tenth and Eleventh—have, like the Sixth Circuit, repeatedly held (or, in the case of the Tenth Circuit, at least signaled its agreement) that Section 11 claims that either "sound in fraud" or are "grounded in

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(*footnote continued from previous page*)

and vacate attachments in actions brought by United States citizens against the government of Iran seeking enforcement of executive orders and regulations implementing hostage release agreement); *Wilson v. Girard*, 354 U.S. 524, 526 (1957) (granting pre-judgment certiorari in habeas corpus case challenging delivery of a United States soldier to Japanese authorities for criminal trial); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (granting pre-judgment certiorari in case testing validity of President's attempt to seize steel mills in the face of nationwide strike); *United States v. United Mine Workers of America*, 330 U.S. 258 (1947) (granting pre-judgment certiorari in face of national mine strike); *Ex parte Quirin*, 317 U.S. 1 (1942) (granting pre-judgment certiorari in case regarding doubts about the Court's power to proceed by way of petition for habeas corpus in extraordinarily compressed time period to meet the needs of a specially convened session of the Supreme Court).

fraud" are subject to Rule 9(b)'s particularity requirement.[7] Requiring particularity in the pleading of Section 11 claims that sound in fraud serves two important purposes: (1) it prevents plaintiffs from using Section 11 to perform an end-run around the heightened pleading requirements applicable to securities fraud claims under the Private Securities Litigation Reform Act of 1995 ("PSLRA") through the expedient of labeling them Section 11 claims, and (2) it preserves "one of the primary purposes of Rule 9(b): protecting defendants from the reputational harm that results from frivolous allegations of fraudulent conduct." *Cozzarelli*, 549 F.3d at 629; *see also id.* ("When a plaintiff makes an allegation that has the substance of fraud . . . he cannot escape the requirements of Rule 9(b) by adding a superficial label of negligence or strict liability," as "[a]llowing a plaintiff to do so would undermine one of the primary purposes of Rule 9(b)".); *see also Wagner*, 464 F.3d at 1278.

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[7] *See, e.g.*, *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 68 (1st Cir. 2008); *Caiafa v. Sea Containers Ltd.*, No. 08-3006-cv, 2009 WL 1383457, at *16 (2d Cir. 2009); *In re Corning Inc. Sec. Litig.*, No. 04-2845-CV, 2005 WL 714352, at *1 (2d Cir. Mar. 30, 2005); *Rombach v. Chang*, 355 F.3d 164, 170-71 (2d Cir. 2004); *California Pub. Employees' Retir. Sys. v. Chubb Corp.*, 394 F.3d 126, 160-63 (3d Cir. 2004); *Cozzarelli v. Inspire Pharm. Inc.*, 549 F.3d 618, 629 (4th Cir. 2008); *Melder v. Morris*, 27 F. 3d 1097, 1100 n. 6 (5th Cir. 1994); *Sears v. Likens*, 912 F.2d 889, 892-93 (7th Cir. 1990); *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2009); *In re Daou Sys., Inc. Sec. Litig.*, 411 F.3d 1006, 1027-28 (9th Cir. 2005); *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1404-05 (9th Cir. 1996); *Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1252 (10th Cir. 1997); *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1277 (11th Cir. 2006).

The only Court of Appeals to have arguably analyzed the issue any differently is, as Petitioners acknowledge, the Eighth Circuit. *See Romine v. Acxiom Corp.*, 296 F.3d 701, 704 (8th Cir. 2002); *In re NationsMart Corp. Sec. Litig.*, 130 F.3d 309, 314-15 (8th Cir. 1997) (declining to apply Rule 9(b) to Section 11 claim (a) based on court's conclusion that claim was not in fact "grounded in fraud," and (b) "because proof of fraud or mistake is not a prerequisite to establishing liability under §11"); *In re Acceptance Sec. Litig.*, 423 F.3d 899, 903 (8th Cir. 2005) (adopting *NationsMart*).

But the Eighth Circuit's decisions on this issue are not really in conflict with, but rather appear simply to misapprehend, the approach taken by the vast majority of Circuits described above. The Eighth Circuit's conclusion in *Romine* that "Section 11 claims do not *require* proof of fraud" (*Romine*, 296 F.3d at 704-05 (emphasis added); *see also* Petition at 12), is neither a revelation nor at odds with the ten Circuits which have recognized that Rule 9(b) applies to Section 11 claims "grounded in fraud." The majority approach does not hold that all Section 11 claims are "grounded in fraud" and therefore subject to Rule 9(b)'s heightened pleading requirements. On the contrary, the majority, the Eighth Circuit and Respondents all agree that (a) there are, indeed, Section 11 claims that do *not* sound in fraud, and (b) a Section 11 claim that does *not* "sound in fraud" is not subject to Rule 9(b)'s heightened pleading requirements. Nor, contrary to Petitioners' and the Eighth Circuit's apparent concerns, does applying Rule 9(b) to a Section 11 claim that does "sound in fraud" somehow operate to engraft additional elements onto that claim or

"revers[e] the burden of pleading." *See* Petition at 9-10, 16-20. Application of Rule 9(b) affects only the particularity with which a fraud-based Section 11 claim must be pleaded, not the elements thereof.

The elements of a Section 11 claim are well-established and not in dispute. To prevail on such a claim, a plaintiff must plead and prove that the registration statement provided in connection with the issuance of a security "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein necessary to make the statements therein not misleading." 15 U.S.C. §77k(a). As Circuit Courts following the majority approach have explained, applying Rule 9(b)'s heightened pleading standard to a Section 11 claim simply means that "plaintiffs must demonstrate, *with particularity*, (1) that the registration statement contained an omission or misrepresentation, and (2) that the omission or misrepresentation was material, that is, it would have misled a reasonable investor about the nature of his or her investment." *Daou*, 411 F.3d at 1028 (citations and internal quotation marks omitted; emphasis added); *see also Cozzarelli*, 549 F.3d at 629 (where Rule 9(b) applies to a Section 11 claim, the plaintiff is required to "explain[] with particularity why the statements [in the Registration Statement] were false or misleading"); *Rubke*, 551 F.3d at 1161 (where a Section 11 claim is subject to Rule 9(b), the complaint must set forth with particularity "what is false or misleading about a statement, and why it is false") (citations omitted); *accord Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006) (Rule 9(b) requires a plaintiff to plead "the who,

what, when, where, and how" of the alleged fraudulent statement) (citations omitted).

Given that the overwhelming number of Circuit Courts that have addressed the issue are in agreement, together with the overlay of the clarified Rule 8 pleading standard under *Twombly* and *Iqbal*, Petitioners cannot show that the issues raised by the Sixth Circuit's interlocutory decision in this case are "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate [interlocutory] determination in this Court" (*see* Sup. Ct. R. 11; 28 U.S.C. §1254(1)). Indeed, in apparent confirmation of this fact, this Court has to date declined all prior requests that it consider the question of whether and under what circumstances Rule 9(b)'s particularity requirement may apply to a Section 11 claim (three times since the Eight Circuit decided *Romine*).[8] The case at bar presents no

[8] *See, e.g., Anderson v. Clow*, 520 U.S. 1103 (1996) and Pet. for Cert. (No. 96-845), *avail. at* 1996 U.S. Briefs S. Ct. Briefs LEXIS 1398 (denying certiorari notwithstanding petitioners' contentions that there was a Circuit split and that applying Rule 9(b) contravened Congressional intent that Section 11 impose strict liability without requiring proof of fraud); *Oxford Asset Mgmt., Ltd. v. Jaharis*, 540 U.S. 872 (2003) and Pet. for Cert. (No. 03-2), *avail. at* 2003 WL 22428393 (denying certiorari notwithstanding petitioners' contentions that there was a Circuit split and that applying Rule 9(b) contravened Congressional intent *vis-a-vis* the application of PSLRA and Rule 8(a)); *Merix Corp. v. Central Laborers Pension Fund*, 129 S. Ct. 763 (2008) and Pet. for Cert. (No. 08-374), *avail. at* 2008 WL 4360905 (denying certiorari where defendants-petitioners argued that there was a Circuit split); *Leadis Tech. Inc. v. Safron Capital Corp.*, 129 S. Ct. 1545 (2008) and Pet. for Cert. (No. 08-376) *avail. at* 2008 WL 4360907 (same).

additional "compelling reasons," and a far less appropriate vehicle, for doing so.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

HARVEY KURZWEIL
Counsel of Record
RICHARD W. REINTHALER
JAMES P. SMITH III
DEWEY & LEBOEUF LLP
1301 Avenue of the Americas
New York, New York 10019
(212) 259-8000

JOHN E. SCHREIBER
MAYA C. DHARWARKAR
DEWEY & LEBOEUF LLP
333 South Grand Avenue,
Suite 2600
Los Angeles, CA 90071
(213) 621-6370

WM. T. ROBINSON III
DOUGLAS R. DENNIS
FROST BROWN TODD LLC
2200 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 651-6981

Attorneys for Respondents

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