No. 13-435

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 AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENTS

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PAUL ALAN LEVY
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public.

Public Citizen is concerned that a ruling for petitioner Omnicare, Inc., in this case would substantially diminish the protection of investors and consumers against false and misleading statements couched as "opinions." At the same time, Public Citizen has long supported protection of genuine statements of opinion against liability because of their important role in public discourse.

Public Citizen believes that the proper balance of these concerns supports the court of appeals' decision that the claims in this case may proceed because the statements at issue can potentially be shown to be false or misleading as to objective matters of fact. That showing, moreover, does not depend on whether Omnicare and the individuals named as codefendants genuinely believed the statements at the time they were made. Furthermore, that the statements here may be actionable does not mean that statements of opinion (including statements involving legal conclusions) will always be subject to challenge in litigation. Context is everything. In situations unlike the one

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for all parties are on file with the Clerk.

here, and particularly in noncommercial settings, statements of belief or opinion about legal compliance and similar subjects will often—indeed, usually—be protected against liability.

Public Citizen accordingly submits this brief as amicus curiae in the hope that it will assist the Court in arriving at and presenting a nuanced explanation of why the potential imposition of liability in this case is both appropriate and consistent with the protection of speech involving the expression of opinion in other circumstances.

SUMMARY OF ARGUMENT

Omnicare's position that the complaint against it fails to state a claim that its registration statement contained untrue or misleading statements rests entirely on a syllogism:

> The only "fact" conveyed by a statement of opinion or belief is the fact that the speaker held the stated belief. It naturally follows that such a statement can be "untrue" as to a "material fact" only if the speaker did not actually hold the stated belief.

Pet. Br. 11.

Omnicare's syllogism underlies all of its arguments before this Court. It is simple, easy to understand—and entirely wrong. Its premise is directly at odds with the way our legal system has traditionally dealt with the distinction between statements of fact and statements of opinion, and the circumstances in which statements framed as matters of belief or opinion may or may not give rise to liability. It is firmly established that a statement couched as one of "belief" or "opinion" may, depending on the circumstanc-

es, convey factual information that is falsifiable. Provided that any applicable requirement of proof of fault is satisfied, such a statement may serve as a basis for liability if its factual content is untrue or misleading, a question that does not turn on the speaker's subjective belief in the truth of the matter asserted.

In the area of defamation law, for example, First Amendment as well as common-law considerations provide robust protections for genuine statements of opinion and limit liability to provably false statements of fact. But merely framing a statement on a factual subject with words of opinion or belief does not exempt it from potential liability on the ground that it asserts no fact other than that the speaker held the stated belief. Rather, statements of opinion or belief may serve as the basis of liability if they are reasonably understood to state or imply false and defamatory facts about the subject of the statement.

Similarly, in the area of commercial and consumer law, statements made in the form of opinions may constitute actionable misrepresentations if a listener would reasonably understand them to contain or imply false factual assertions relating to a transaction.

These principles, moreover, are fully applicable to statements that concern questions of law or legal compliance. Although such statements in many instances will amount to protected, non-falsifiable statements of opinion, in other circumstances they may be treated as false statements of fact—or, at a minimum, as statements that are misleading without the disclosure of additional facts. Such circumstances are most likely to exist when, as here, the setting is commercial, the speaker has exclusive access to the facts relevant to its legal assertions, and the speaker

has a fiduciary or similar duty to the recipients of its statements with respect to their accuracy.

The imposition of liability for statements in the form of opinions or beliefs is a matter that must be addressed with care to ensure that robust public debate over matters on which citizens are entitled to have strong and divergent views is not stifled. But Omnicare was not engaged in any public debate over whether and to what extent kickbacks in the health care industry are or should be illegal. Omnicare sought to engage in a commercial transaction—the sale of securities. In connection with that activity, Omnicare assured investors and regulators that its corporate conduct was lawful. And even while specifically referencing the prohibition on kickbacks that it was violating, Omnicare asserted that it "believe[d]" its contractual arrangements were "legally … valid" and "in compliance with applicable federal and state laws." *See* Resp. Br. 10–12 (citing registration statement). In the context of the duty of care applicable to the preparation of a registration statement, a reasonable investor would understand that Omnicare and its individual officers and directors were saying that they had investigated and were aware of no contractual arrangements that would violate the anti-kickback statute. That factual statement can be determined to be false or misleading and can serve as a basis for liability if it is.

ARGUMENT

I. Omnicare's Conception of Falsity Is at Odds with the Way the Law Has Long Treated Factual Statements Framed as Matters of Belief or Opinion.

Omnicare's insistence that only subjective falsity can make a statement that is framed as one of opinion actionable has no basis in long-established legal principles dealing with such statements. Courts long ago developed doctrines that clarify when ostensible statements of opinion may be treated as objectively false statements of fact. The same test applies both to defamation and misrepresentation claims: Statements that imply objectively falsifiable factual assertions may be actionable even when they are expressed as matters of belief or opinion.

Common-law and First Amendment limitations on liability for defamation have converged on a fundamental point: Liability may be imposed only for a *false* and defamatory statement of fact concerning the plaintiff. *See*, *e.g.*, *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). It follows that if Omnicare's syllogism were correct—that is, if a statement of belief conveyed only the fact that the speaker held a belief and hence could be false only if he did not—then liability could not be imposed for a defamatory statement prefaced "I believe" unless the plaintiff proved the defendant did not subjectively believe the statement. That is not how the law of defamation treats such statements.

To be sure, the law of defamation, both in its common-law and constitutional dimensions, affords very substantial protection to statements that genuinely involve matters of opinion. That protection rests

in part on the insight that "there is no such thing as a false idea." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339 (1974). Thus, the constitutional requirement that a defamation plaintiff prove that the defendant made a false statement "ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

This constitutional protection for opinion, and the even broader protection for opinion provided by common-law principles in many jurisdictions, provides the "breathing space" that "[f]reedoms of expression require in order to survive." *Id*. at 19 (citations and internal quotation marks omitted). As a result, "rhetorical hyperbole" or "imaginative expression," *id*. at 20, as well as "a subjective view, an interpretation, a theory, conjecture, or surmise," is protected against the imposition of liability. *Haynes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222, 1227 (7th Cir. 1993); *see also*, *e.g.*, *Gardner v. Martino*, 563 F.3d 981, 986–90 (9th Cir. 2009); *Levin v. McPhee*, 119 F.3d 189, 196–97 (2d Cir. 1997); *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 313–19 (D.C. Cir. 1994); *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 727–31 (1st Cir. 1992).

Extensive as these protections are, this Court has emphatically rejected the view that there is "a wholesale defamation exemption for anything that might be labeled 'opinion.'" *Milkovich*, 497 U.S. at 18. In particular, the Court in *Milkovich* pointed out that merely prefacing a statement that has factual content with words such as "I think," "I believe," or "In my opinion" does not alter its essential factual and falsifiable character, ameliorate the harmful impact of its false

and defamatory content, or otherwise justify insulating it from potential liability. *See id*. at 18–19. Quoting Judge Friendly, the Court stated that it "would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" *Id.* at 19 (quoting *Cianci v. New Times Pub'g Co.*, 639 F.2d 54, 64 (2d Cir. 1980)).

The Court did not limit its refusal to grant blanket immunity for statements couched as opinion to statements that merely tack the words "I believe" or the like to statements of fact. Rather, as the Court pointed out, "expressions of 'opinion' may often imply an assertion of objective fact." *Id.* "Simply couching such statements in terms of opinion does not dispel these implications[.]" *Id.* at 18–19. Thus, the Court held, if (and only if) a statement implies facts whose falsity can be proved, then the statement is actionable even if it was expressed in the form of an opinion. *Id.* at 20. In this way, the constitutional principles that require a defamation plaintiff to prove the falsity of an allegedly defamatory statement are fully consistent with the common-law principle that an actionable falsehood may be either "expressly stated or implied from an expression of opinion." *Id.* (quoting Restatement (Second) of Torts, § 566, Comment *a* (1977)).

Moreover, as the Court in *Milkovich* explained, determining the truth or falsity of a statement that, though framed as one of opinion, implies an assertion of objective fact does not involve an inquiry into the statement's subjective truth (*i.e.*, whether the statement in fact reflected the speaker's opinion), but into the objective truth of the implied assertion of fact. *See id.* at 20, n.6; *id*. at 21. For example, "If a speaker

says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth." *Id.* at 18. If that factual conclusion can be proved untrue, the speaker is potentially subject to liability for defamation. *Id.* at 19.

Thus, acceptance of Omnicare's position that a statement couched as one of belief can present no issue of truth or falsity other than whether the speaker believed what he said would be fundamentally inconsistent with the treatment of such statements in *Milkovich* and the law of defamation. A ruling for Omnicare would therefore either upset well-settled principles of defamation law that this Court and others have repeatedly considered and applied, or create a greater degree of protection for statements of opinion in securities law than in defamation law.

The latter result would be particularly odd given that the speech at issue in this case is commercial speech that is, under the statute, subject to liability not only if it contains an untrue statement of fact but also if it is misleading in the absence of additional factual disclosures. *See* 15 U.S.C. § 77k(a); *see also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651–52 (1985) (holding that the interest in preventing deceptive or misleading commercial speech is sufficient to support reasonable disclosure requirements). By contrast, defamation law typically involves speech that is fully protected by the First Amendment unless it is actually "provable as false." *Milkovich*, 497 U.S. at 19 (citing *Hepps*, 475 U.S. 767). Neither the Constitution nor the common law permits imposition of defamation liability merely because a statement is misleading without additional disclosures. *Cf. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)

(holding that a public figure may not recover damages for offensive speech absent a false statement made with actual malice).

Not surprisingly, therefore, this Court considered *Milkovich*'s discussion of falsity instructive when it decided, in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), that a corporate director's statement of opinion could not be actionable under the securities laws based solely on its claimed subjective falsity, but could be a basis for liability under the traditional doctrine that implied statements of fact are actionable. *Id*. at 1096, 1098. As both the respondents and the United States demonstrate in their briefs, Omnicare's argument turns *Virginia Bankshares* on its head. We will not repeat that discussion here, except to point out that *Virginia Bankshares*' discussion of truth in the context of statements couched as opinion is consistent with the principles applied in defamation law, while Omnicare's is not.

Long-established doctrines of commercial and consumer law similarly allow claims based on fraud or misrepresentation stemming from statements of opinion if those statements imply objective facts. A statement of opinion by a party to a transaction often implies that there are facts that justify the opinion. If that implied factual basis is absent, the statement can be found to be false or misleading and serve as a basis of liability for misrepresentation. *See* Restatement (Second) of Torts § 539; *id*. Comments *a* & *b*.

Whether a statement is an assertion of fact or mere opinion or "puffery" is a factual inquiry that does not turn on whether the statement is phrased in the form of an opinion. "The test is 'whether the seller assumes to assert a fact of which the buyer is igno-

rant, or whether he merely states an opinion or expresses a judgment about a thing as to which they may each be expected to have an opinion and exercise a judgment.'" *Overstreet v. Norden Labs., Inc.*, 669 F.2d 1286, 1290–91 (6th Cir. 1982) (citation omitted); *see also Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir. 1918) ("we should treat very differently the expressed opinion of a chemist to a layman about the properties of a composition from the same opinion between chemist and chemist, when the buyer had full opportunity to examine").

Again, this Court applied this standard to securities law in *Virginia Bankshares*, holding that "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." 501 U.S. at 1093. The factual basis for an opinion can be attacked through the normal evidentiary process and, if found lacking, can show that the expression of opinion was false or misleading. *Id.* (citing *Vulcan Metals Co.*, 248 F. at 856). Thus, the stated belief of the directors in *Virginia Bankshares* that a proposed merger would increase share value "depended on … provable facts about the Bank's assets, and about actual and potential levels of operation"—not facts about the directors' subjective beliefs. *Id.*

Adopting Omnicare's contrary view would either broadly threaten protection of consumers and commercial actors against misrepresentations that are couched in terms of the speaker's belief or opinion, or would give offerors of corporate securities a privileged position among fraudsters by exempting them from generally applicable standards. Neither course is justified.

II. Statements Concerning Legal Compliance May Constitute Actionable False or Misleading Statements of Fact.

Statements about compliance with the law, even if framed as opinions, are—like other ostensible matters of opinion—potentially actionable if they imply objective facts. Both the law of defamation and that of misrepresentation recognize that, in appropriate circumstances, statements about whether a person has complied with or violated the law, and other statements involving legal matters, may give rise to liability.

In the area of defamation, specific accusations of criminal or illegal conduct have traditionally been treated as libel *per se*—meaning plaintiffs do not need to allege special damages—and generally remain actionable if they imply falsifiable facts. *See Gross v. N.Y. Times Co.*, 623 N.E.2d 1163, 1168 (N.Y. 1993). Couching such a statement as a "legal opinion" does not by itself shield it from liability if it is objectively provable or falsifiable. *See id*. at 1169; *Harrell v. Colonial Holdings, Inc.*, 923 F. Supp. 2d 813, 824 (E.D. Va. 2013). Statements that, in context, represent genuine accusations of specific criminal conduct may raise objectively provable issues as to (a) whether the person engaged in the conduct at issue and (b) whether such conduct was illegal. *Id.* Thus, "concrete acccusations of criminality" may be actionable even if they are "asserted as opinion." *Gross*, 623 N.E.2d at 1169.

By contrast, a statement that is "too vague" to allege specific criminal conduct is not actionable, nor is a statement that, in context, is "an expression of opinion or rhetorical hyperbole." *Id*. Thus, in *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 14 (1970), this Court held that, in context, the defend-

ant's use of the term "blackmail" was not an accusation of a crime but a "vigorous epithet" expressing the opinion that the plaintiff's "negotiating position [was] extremely unreasonable." *See also 600 W. 115th St. Corp. v. Von Gutfeld*, 603 N.E.2d 930, 932–33 (N.Y. 1992) (holding that the defendant's statements about "fraud[]," "bribery," and "corruption" were not actionable because they "cannot be construed to allege facts"); *Brahms v. Carver*, __ F. Supp. 2d __, 2014 WL 3569347, at *4–5 (E.D.N.Y. July 18, 2014) (holding that the defendant's characterization of the plaintiff on an internet forum as a "2-bit thief and counterfeiter," in context, was not a provable statement of fact but "rhetorical hyperbole"). The requirement that an actionable statement be objectively falsifiable also means that pure legal opinions, such as an analysis comparing certain assumed facts to an analogous case offered to assess a legal question, are not actionable if they do not make or imply factual assertions. *McNamara v. Costello*, 2008 WL 142723, at *3–4 (Mass. Super. Ct. Jan. 2, 2008).

In the law of misrepresentation, the trend is likewise to treat statements of legal opinion as subject to liability to the same degree as other statements of opinion. *See* Restatement (Second) of Torts § 545. That is, if a statement of legal opinion implies objectively falsifiable facts, it is potentially actionable. *See id.* § 545(1). Although the common-law view was formerly that misrepresentations of law were not actionable in fraud, this view is now seen as overly rigid. Some states no longer apply any special exemptions to statements about the law, but apply the distinction between statements of opinion that imply factual assertions and those that do not regardless of whether legal questions are involved. *See*, *e.g.*, *AIU Ins. Co. v.*

Deajess Med. Imaging, P.C., 882 N.Y.S.2d 812, 820 (Sup. Ct. 2009); *Travis v. Knappenberger*, 204 F.R.D. 652, 660 (D. Or. 2001).

Even courts that continue to maintain that statements in the form of legal opinions are generally not actionable as misrepresentations typically recognize four circumstances in which such statements may give rise to liability: (1) where there is a relationship of trust or confidence between the parties, (2) where one party possesses or claims to possess superior knowledge and takes advantage of the other party's ignorance, (3) where the misrepresentation concerns the law of a foreign jurisdiction, and (4) where the misrepresentation includes an express or implied misrepresentation of fact. 26 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 69:10 (4th ed. 2003); *Bowman v. City of Indianapolis*, 133 F.3d 513, 519 (7th Cir. 1998); *Brodeur v. Am. Home Assur. Co.*, 169 P.3d 139, 154 (Colo. 2007). The fourth "exception," of course, is merely a restatement of the general condition under which any statement in the form of an opinion may constitute an actionable misrepresentation of fact.

Here, Omnicare's assertions fall comfortably within the exception for implied misrepresentations of fact. A statement of law can be an actionable misrepresentation if it implies that facts exist to justify the conclusion of law. *Hoyt Props., Inc. v. Prod. Resource Grp., L.L.C.*, 736 N.W.2d 313, 318 (Minn. 2007); Restatement (Second) of Torts § 545(1). For example, a statement by an attorney that there is no way to pierce the corporate veil in a given case is not necessarily a statement merely about what the law is. *Hoyt*, 736 N.W.2d at 319. It may also express a factual as-

sertion that the business operations of the two companies involved in the case would not support a piercing claim—for example, that no facts known to the attorney indicate that the companies have not observed corporate formalities. *Id.*

Likewise, Omnicare's statement that it believed it was in compliance with the laws applicable to its contractual relationships with drug companies similarly implied (if it did not directly state) that the facts concerning those contractual relationships would not constitute a violation of the law. Omnicare's statement thus was not only, or even principally, an opinion about the law, but was primarily an assertion of facts about Omnicare's business (like the "fact" that it was not accepting kickbacks) that could not have been known to investors. Nothing prevents that assertion of fact, even if it was merely implied, from being proved true or false.

Moreover, a statement of law can also be actionable when a relationship of trust leads one party justifiably to believe the representations of law made by the other. *Busiere v. Reilly*, 75 N.E. 958, 960 (Mass. 1905). Because corporate directors and officers owe shareholders a fiduciary duty of loyalty that may be violated when they knowingly withhold material information, *see In re Reliance Sec. Litig.*, 91 F. Supp. 2d 706, 732 (D. Del. 2000), a representation of law in a corporate statement falls within this exception. That the statute at issue here, 15 U.S.C. § 77k(c), expressly imposes a duty of care designed to codify the fiduciary duty of officers and directors, *see* Resp. Br. 5 & n.2, underscores the point.

Finally, courts have recognized that legal opinions may be actionable in settings "where the party mak-

ing the misrepresentation has or professes to have superior knowledge which is not reasonably available to the person to whom the representation is made." *Brodeur*, 169 P.3d at 154 (quoting *Seal v. Hart*, 755 P.2d 462, 464 (Colo. App. 1988)). Here, Omnicare had superior knowledge of its own contractual arrangements with drug companies. The very purpose of Omnicare's statement was to assure investors and regulators that those with the best knowledge of the company's affairs (that is, the company itself and its officers and directors) had conducted a reasonable inquiry and determined that the company's operations conformed to applicable legal requirements. That conclusion, even though framed as a "belief" about a matter involving both law and fact, is subject to objective testing as a matter of truth or falsehood.

III. Recognizing That the Complaint in This Case States a Claim Against Omnicare Is Consistent with the Caution That Courts Should Exercise in Addressing Genuine Questions of Opinion.

Although the law does not, as Omnicare asserts, support the view that statements couched as ones of opinion or belief cannot, in any circumstances, be treated as assertions of objective fact and subjected to liability, courts must exercise care in assessing such statements. Statements of opinion, particularly statements about the operation of laws and their potential application, should not lightly be treated as statements of fact, particularly in settings where doing so would risk chilling protected speech and debate over matters of public concern (as may often be the case where the issue arises in a defamation action).

Thus, the assessment of such statements requires a sensitive consideration of the context in which they are made and how that context would affect the way a reasonable recipient of the statement would understand it. As one federal district judge recently stated, "context is key." *Brahms*, 2014 WL 3569347, at *5. Relevant considerations include not only the words used, and whether in the abstract they are amenable to interpretations under which they present objectively determinable issues of fact, but also such matters as the nature of the forum in which they appear, the reasonable expectations of readers or listeners concerning discourse in that forum, whether the statements are made in the context of a public debate involving the expression of subjective opinions, and whether the speaker is or purports to be a person who possesses access to factual information about the subject. *See Cochran v. NYP Holdings, Inc.*, 58 F. Supp. 2d 1113, 1121–26 (C.D. Cal. 1998), *aff'd*, 210 F.3d 1036 (9th Cir. 2000) (per curiam); *see also*, *e.g.*, *Letter Carriers v Austin,* 418 U.S. 264, 283–84 (1974); *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 853–56 (10th Cir. 1999); *Summit Bank v. Rogers*, 142 Cal. Rptr. 3d 40, 60–63 (Cal. Ct. App. 2012); *Moats v. Republican Party*, 796 N.W.2d 584, 596–597 (Neb. 2011); *Wampler v. Higgins*, 752 N.E.2d 962, 976–82 (Ohio 2001). Consideration of these factors is essential to a determination of whether a statement is genuinely susceptible to a reasonable interpretation as an assertion of objectively ascertainable facts that may potentially serve as a basis of liability.

Here, all these considerations point toward treating Omnicare's statements as ones of fact, subject to liability if they are proved false. First, Omnicare's

words (notwithstanding that they were stated as a matter of "belief") make an assertion on a matter that "is sufficiently factual to be susceptible of being proved true or false," *Milkovich*, 497 U.S. at 21—whether Omnicare's contracts violated the criminal prohibition on kickbacks. That issue could be tried in a criminal prosecution of Omnicare; it can equally be tried in a case testing whether Omnicare's denial of criminal activity was true or false.

Second, the context confirms that a reasonable recipient of Omnicare's statements would construe them as making a true factual claim rather than as merely expressing an unverifiable opinion. The statements were made not in a political advertisement or debate, internet chat room, op-ed column, letter to the editor, radio talk show, or some other forum where rhetoric and opinion hold sway, but in a legally mandated registration statement subject to the requirement that its disclosures be truthful, non-misleading, and complete. 15 U.S.C. § 77k(a). And the speakers—the company itself, its officers and its directors—were not only those in the best position to know its practices, but were specifically charged to base their statements on "reasonable investigation," *id*. § 77k(b)(3), and owed a duty of care to the recipients of the statement.

Third, nothing in the statement suggests that it reflects an expression of Omnicare's opinion about whether contracts containing kickbacks are or ought to be illegal. Indeed, while one might expect Omnicare to express such opinions in a public debate over the application of anti-kickback laws, a reader would not expect to encounter an opinion of that nature in a document of this kind. Nor does the registration

statement suggest to a reasonable reader that Omnicare is basing its "belief" that its contracts are legal on some aggressive or idiosyncratic opinion that such arrangements are not in fact illegal.[2]

In short, a reasonable reader of Omnicare's registration statement would understand it to be equivalent to a factual statement that Omnicare did not participate in kickback arrangements of the type condemned by federal law. Omnicare's assertion that, as a matter of law, its statement cannot be construed as containing any factual statement other than that it subjectively "believed" it was in compliance is flatly at odds with longstanding principles determining the law's treatment of statements of belief or opinion. When those principles are properly applied, Omnicare's contention that its statement cannot be actionable must be rejected.

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[2] Even if Omnicare's "belief" was based on such an opinion, it would surely be misleading for Omnicare to assert its compliance while omitting facts as to the nature of its contracts that would have allowed investors and regulators to understand that Omnicare's position reflected a dubious legal interpretation rather that the actual legitimacy of its contracts.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PAUL ALAN LEVY
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amicus Curiae

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