"WE BELIEVE": *OMNICARE*, LEGAL RISK DISCLOSURE AND CORPORATE GOVERNANCE

HILLARY A. SALE† & DONALD C. LANGEVOORT††

ABSTRACT

The Supreme Court's decision in Omnicare Inc. v. Laborers District Council Construction Industry Pension Fund *presents new challenges for boards of directors. The opinion speaks to whether and when an issuer's statement of belief can be false or misleading other than by proof that the issuer's genuine opinion was different from what it stated. Statements of opinion imply something about how the belief was formed, and that process implicates the role of directors as fiduciaries.*

This Article uses Omnicare *as a starting point for exploring and developing the interplay between disclosure, discourse, and fiduciary duties. Using the lens of corporate-discourse theory, this Article explores how the judicial process extracts (or should extract) meaning from ambiguous, often strategically crafted words communicated to vastly complicated financial markets. Questions such as what it means for a corporate entity—a legal fiction incapable of thought—to express a belief, who the "we" is in "we believe our practices are legally compliant," and what it means to believe, all help to frame the conversation about the role of directors in disciplining the corporate-disclosure process.*

Federal securities law cases that raise questions about disclosure related to legal compliance and derivative lawsuits challenging board oversight are common after a big corporate penalty for violations of federal or state law. Regulators are also pushing boards of directors to participate more in legal and disclosure quality control. To the extent

Copyright © 2016 Hillary A. Sale and Donald C. Langevoort.

† Walter D. Coles Professor of Law, Washington University School of Law.

†† Thomas Aquinas Reynolds Professor, the Georgetown University Law Center. Thank you to the participants at the ILEP-*Duke Law Journal* symposium, the Vanderbilt Law and Business Workshop, the University of Chicago Law School's Law and Economics Workshop, and the Washington University School of Law Faculty Seminar Series for helpful comments; to Jim Cox for inspiring so much scholarship about so many corporate and securities legal issues; and to Kelsey Bolin, Alana Siegel, Elizabeth Sinclair, and Laura Venn for their invaluable research assistance.

that Omnicare *was favorable to plaintiffs in allowing some suits to proceed notwithstanding belief or opinion qualifiers, this Article posits that boards need to exercise greater responsibility for disclosures, particularly with respect to legal compliance. In this manner, the securities laws perform in an information-forcing-substance manner, creating a disclosure regime that is backed by due diligence and fiduciary performance. Finally, this Article argues that the* Omnicare *litigation—and control over discourse about legal risk—belongs in the broader context of board fiduciary responsibility for enterprise risk management generally, and legal compliance in particular.*

INTRODUCTION

The Supreme Court's decision in *Omnicare Inc. v. Laborers District Council Construction Industry Pension Fund*[1] is an extended exercise in corporate-discourse theory. Omnicare's registration statement for a public offering under the Securities Act of 1933[2] stated the company's *belief* that its marketing practices to certain kinds of pharmacies were lawful.[3] Later, the government decided that they were not and took legal action against the company.[4]

The question before the Court was whether and when that statement of belief could be found false or misleading other than by proof that the issuer's genuine opinion at the time was different from what it stated.[5] The Court said it might, because words in context can generate inferences for the reasonable investor that go beyond narrow linguistic confines.[6] The statement of opinion could imply something about how the belief was formed that might be untrue, or it could imply that certain facts do not exist when in fact they do. Thus, the case was remanded for further proceedings, including to consider evidence that a lawyer had supposedly described one of Omnicare's contracts as

1. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1323 (2015).

2. Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2012).

3. *Omnicare*, 135 S. Ct. at 1323.

4. *Id.* at 1324.

5. As discussed below, this issue followed the Supreme Court's decision in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), which held that misstatements of opinion can be material and hence actionable under certain circumstances. *Id.* at 1097. Dicta in the Court's decision suggested that liability would follow if, but only if, the statement was both not genuinely believed and objectively false. *Id.* at 1095–96. Many lower courts followed that instruction literally. *See, e.g.*, MHC Mut. Conversion Fund, L.P. v. Sandler O'Neill & Partners, L.P. 761 F.3d 1109, 1114 n.2 (10th Cir. 2014). For a good discussion of the case law, see generally Wendy Gerwick Couture, *Opinions Actionable as Securities Fraud*, 73 LA. L. REV. 381 (2013).

6. *Omnicare*, 135 S. Ct. at 1328–30.

high-risk. The question on remand would be whether that or anything similar uncovered by the plaintiffs rendered the unqualified compliance opinion misleading even if genuinely believed.

A lower court has two main options to deal with these kinds of claims. First, it can declare the matter a contested fact question reserved for the fact finder at trial. But securities-law trials rarely occur. The probability of settlement is overwhelming in the aftermath of any such declaration, and perceptions about meritless (or low-merit) settlements make many judges uneasy.[7] Second, the court can dismiss the case for failure to state a cause of action or on a motion for summary judgment, which seems to happen more frequently in securities litigation than civil procedure doctrine would suggest. Judges often take on the role of assessing what reasonable investors think, employing heuristics—often empirically questionable ones, as both authors have written elsewhere[8]—that have a big normative bite when they result in dismissal.

After examining *Omnicare*'s teachings in Part I, Part II explores the Court's decision through this discourse lens: how the judicial process extracts (or should extract) meaning from ambiguous, often strategically crafted, words and actions communicated to vastly complicated financial markets. The focus will be on compliance-related disclosures, though it applies to other disclosure issues as well. One need not be an obsessive postmodernist to doubt that a single preferred meaning can ever confidently be extracted from text. Meanings vary based on, among other things, prior beliefs and expectations brought to the task of interpretation by a diverse audience of investors. Privileging one meaning as the "reasonable" one in hindsight invites arbitrariness at best, bias at worst.

Lurking in all of this is a palpable epistemological question: What does it mean for an entity—a legal fiction, incapable of thought—to express a belief? Who is "we" when the company says "we believe our practices are legally compliant," and what does it mean to believe?[9]

---

7. *See, e.g.*, Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc., 552 U.S. 148, 163–64 (2008) (expressing concerns about settlement pressures).

8. *See generally* Donald C. Langevoort, *Disclosures that "Bespeak Caution*,*"* 49 BUS. LAW. 481 (1994) (examining the bespeaks caution doctrine in securities-fraud litigation); Hillary A. Sale, *Judging Heuristics*, 35 U.C. DAVIS L. REV. 903 (2002) (exploring use of judge-made heuristics in securities-fraud cases). *Cf.* Stephen Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everyone Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 84–85 (2002) (discussing ill-informed rules of thumb).

9. *See Omnicare*, 135 S. Ct. at 1325 (discussing the meaning of statements of belief).

This is important when the authors of the disclosure lack personal knowledge of whatever was amiss, but someone else in the company knew troubling facts. Using this prompt, Part III sheds light on what (and if so how much) *Omnicare* has to say about liability for statements of opinion in a Rule 10b-5 lawsuit, where corporate scienter, rather than strict liability, is the norm for issuers. Indeed, a companion *Omnicare* case involving the same alleged misstatements of opinion about compliance raises exactly this issue.[10]

That is a natural bridge to this Article's main goal of exploring *Omnicare* through the lens of corporate governance and fiduciary responsibility.[11] Part IV addresses this issue. Arguably, Omnicare made a poor legal decision in its contracting practices. Federal securities law cases challenging disclosure about legal compliance are common in the aftermath of a big corporate penalty for a violation of federal or state law.[12] Derivative lawsuits are brought under state corporate law in the same circumstances, complaining that the board of directors failed to prevent the wrongdoing through inadequate monitoring. In Delaware, these so-called "*Caremark* cases"[13] have dwindled in importance because the Delaware courts have made them extremely difficult for shareholders to win on the merits, insisting on proof that the directors acted in bad faith.[14] There are many interesting connections between these two lines of cases despite—or maybe because of—their different trajectories. There is also a growing perception from a variety of other authorities—the Justice Department, the SEC, and other financial regulatory agencies—that boards of directors must become more deeply involved in legal and disclosure quality control in any event.[15]

10. *See In re* Omnicare, Inc. Sec. Litig., 769 F.3d 455, 473 (6th Cir. 2014); *infra* notes 101–104 and accompanying text.

11. The symposium honoree, Jim Cox, shares this particular interest. *See generally* James D. Cox, *"We're Cool" Statements After* Omnicare*: Securities Fraud Suits for Failures to Comply with the Law*, 68 S.M.U. L. REV. 715 (2015) (exploring implications of the *Omnicare* case).

12. For examples of such cases, see JAMES D. COX, ROBERT W. HILLMAN & DONALD C. LANGEVOORT, SECURITIES REGULATION: CASES AND MATERIALS 686–93 (7th ed. 2013).

13. The seminal case is *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996), which set the standard for board of director liability for a compliance breakdown, effectively limiting such liability to instances of sustained and systematic indifference. *Id.* at 971; *see also* Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 369–70 (Del. 2006) (en banc) (describing liability standard as one of bad faith).

14. Interestingly, however, these cases have occurred elsewhere, like California, and survived motions to dismiss. *See, e.g.*, *In re* Intuitive Surgical S'holder Derivative Litig., 146 F. Supp. 3d 1106, 1121–22 (N.D. Cal. 2015) (finding shareholders successfully alleged demand futility in oversight and monitoring case).

15. *See infra* Part IV.C.

To the extent that *Omnicare* was favorable to plaintiffs in allowing some suits to proceed notwithstanding belief or opinion qualifiers, boards and executives have more to worry about in terms of corporate and (perhaps) personal liability risk when the company has a compliance failure. Part IV therefore situates the *Omnicare* litigation—and control over discourse about legal risk—in the broader context of board fiduciary responsibility for enterprise risk management generally, and legal compliance in particular.

I. *OMNICARE*'S TEACHINGS

In *Omnicare*, the Supreme Court addressed one of the more complicated areas of securities fraud: statements of opinion and belief in the context of omissions or "half-truths." An omission is not a statement. It is the absence of a statement or fact, and that absence is one of the key aspects of the Supreme Court's opinion in *Omnicare*. Determining when a statement of opinion or belief requires more information or factual clarification so that it is not misleading is important because that omission will then support a claim for securities fraud. For this Article's purposes, however, the "absence" of the information is also important because it can define the content of the corporate fiduciaries' duties. That is the issue on which this Article focuses: the interplay between securities and corporate law in the context of the board of directors and its role in the oversight and risk-management decisions that form the bounds for business choices and compliance. Or, put differently, how the decisions of board fiduciaries with respect to the exercise of their duties might be influenced by the need to disclose information about those decisions and choices.

In *Omnicare*, the plaintiffs alleged that the company's offering documents contained misstatements about contract arrangements with pharmaceutical manufacturers and suppliers, including that the arrangements were in compliance with the law or legally valid.[16] At some point, however, it became clear that the federal government believed that the arrangements involved illegal kickbacks.[17] The allegations included both affirmative misstatements and half-truths, which are misstatements that omit information necessary to make the statements not misleading.[18]

16. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1324 (2015).

17. *Id.*

18. *Id.*

The key statutory provision at issue here is Section 11 of the 1933 Act, which states:

> In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security . . . may . . . sue.[19]

This provision provides for two different types of misstatements. The first clause focuses on what the issuer stated affirmatively and the second on what the issuer did not say or omitted.[20] Neither requires fraud or the intent to deceive,[21] and as a result, neither involves the scienter-based pleading standard that applies to Rule 10b-5 claims. Indeed, Section 11 is a strict-liability provision.

The purpose of Section 11 is well understood as providing an enforcement mechanism for the Securities Act's provisions requiring "full and fair disclosure of information" when engaging in a public offering.[22] The premise is that issuer offerings of securities—particularly initial public offerings—present significant information asymmetries. The officers and directors of the issuer know far more than outside purchasers. In that sense, offerings resemble insider trading, and the purpose of the disclosures is to correct for the asymmetry.[23] The regulatory apparatus requires an extensive array of specific disclosures, as well as containing a requirement of additional information necessary to prevent misleading disclosures.[24] Thus, embedded in the disclosure requirements is a prohibition against misleading half-truths.[25]

---

19. Securities Act of 1933 § 11, 15 U.S.C. § 77k(a) (2012).

20. *Omnicare*, 135 S. Ct. at 1323.

21. *Id.*

22. *Id.* (citing Pinter v. Dahl, 486 U.S. 622, 646 (1988)).

23. Hillary A. Sale, *Disappearing Without a Trace: Sections 11 and 12(a)(2) of the 1933 Securities Act*, 75 WASH. L. REV. 429, 482 (2000).

24. *See* 17 C.F.R. § 230.408(a) (2015) ("In addition to the information expressly required to be included in a registration statement, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.").

25. The scope of this prohibition is at issue here and has been the focus of considerable scholarly writing including by one of the authors here. *See generally* Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences by Investors and Others*, 52 STAN. L. REV. 87 (1999) (placing the half-truth doctrine in the context of the broader debate over the affirmative duty to disclose information to parties on the other side of a transaction).

In *Omnicare*, the Supreme Court's analysis focused on two alleged misstatements, both of which contained the words, "we believe," at the beginning. There is a special category of disclosures referred to as statements of opinion and belief. The first statement pointed to by the plaintiffs was:

> We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws.[26]

The second was:

> We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve.[27]

Both of these statements are grounded in legal analysis. Both were also surrounded by other statements that provided context, including that there were actual and potential state and federal enforcement actions against pharmaceutical manufacturers for illegal payments to pharmacies.[28] After the offering, the federal government in fact brought charges against Omnicare, and the plaintiffs sued, arguing that the above-quoted statements were misleading.

The district court dismissed the case, and the Sixth Circuit reversed. The main issues were whether a statement of belief, here denoted by the language "we believe," is actionable and whether there are "hard facts" included in (or omitted from) these statements.[29] On appeal, the Supreme Court divided its analysis into two parts. The first was whether the alleged misstatements contained statements of material fact. This question, the Court noted, required it to resolve when an opinion or belief can be a factual misstatement.[30] The second part of the Court's analysis focused on whether Omnicare failed to include material facts necessary to make a statement not misleading. This question required a different approach centered on when an opinion or belief statement can be misleading by virtue of "the omission of discrete factual representations."[31]

---

26. *Omnicare*, 135 S. Ct. at 1323 (citing Joint Appendix at 95, *Omnicare*, 135 S. Ct. 1318 (No. 13-435)).

27. *Id.* (citing Joint Appendix at 137, *Omnicare*, 135 S. Ct. 1318 (No. 13-435)).

28. *See* Omnicare, Inc., Annual Report (Form 10-K), at 14–15 (Mar. 16, 2005).

29. *Omnicare*, 135 S. Ct. at 1324.

30. *Id.* at 1325.

31. *Id.*

This bifurcated approach seems almost self-evident given the statutory text, yet it arose from substantial doctrinal uncertainty in the lower courts over the last few decades. Many lower courts had adopted the view that statements of opinion or belief can be fraudulent only if they were not actually believed *and* were objectively false.[32] The effect was a safe harbor, or a space in which liability did not exist, for most such statements absent the plaintiff's willingness and ability to challenge the honesty of the belief.[33]

The Supreme Court said that such an approach makes sense when plaintiffs are attacking the statement as a misrepresentation. The Court started by differentiating factual statements from opinion statements, noting that a true opinion does not convey definiteness. Indeed, the Court held that an opinion communicates the opposite: that the speaker does not know the matter in question with certainty.[34] This distinction was important because liability under Section 11's first clause penalizes only misstatements of *fact*. The difference is one of determinable or verifiable statements that, under Section 11, are subject to liability even if unintentional or uninformed. In contrast, opinion statements are actionable in two circumstances—when they are not honestly held or believed and when they contain inaccurate "embedded statements of fact."[35] As construed by the Court, the latter

---

32. *See* MHC Mut. Conversion Fund, L.P. v. Sandler O'Neill & Partners, L.P., 761 F.3d 1109, 1113 (10th Cir. 2014) (explaining that a plaintiff must show that a defendant both expressed an opinion he did not believe ("subjective disbelief") and that the opinion was actually false ("objective falsity")); *In re* Donald J. Trump Casino Sec. Litig.—Taj Mahal Litig., 7 F.3d 357, 368 (3d Cir. 1993) (stating that opinions "may be actionable misrepresentations if the speaker does not genuinely and reasonably believe them").

33. In securities litigation, plaintiffs' lawyers are reluctant to challenge good-faith beliefs. One reason often given is that subjective disbelief—or a bad-faith belief—is hard to prove because delving into the minds of corporate actors is too challenging. Perhaps so, but this seems overstated. Judges and juries can infer dishonesty from facts and circumstances, and do so all the time. Perhaps the bigger reason has to do with insurance. Because most officer and director policies contain fraud exclusions, plaintiffs' lawyers will often want to play down that which smacks of deliberate deceit in favor of characterizations (ranging from strict liability to recklessness) that justify resort to the insurance notwithstanding the policy language. *See* TOM BAKER & SEAN J. GRIFFITH, ENSURING CORPORATE MISCONDUCT 186–87 (2010). In addition, there is case law under Section 11 imposing a higher pleading burden with respect to claims that "sound in fraud." *See, e.g.*, Rubke v. Capitol Bancorp, Ltd., 551 F.3d 1156, 1161 (9th Cir. 2009) (holding that a Section 11 claim sounding in fraud must state with particularity circumstances constituting fraud).

34. *Omnicare*, 135 S. Ct. at 1325.

35. *Id.* at 1327.

situation would occur when the speaker offers an opinion statement with supporting facts that are not true.[36]

The Court then applied these two categories of liability to the statements cited by the plaintiffs and held that neither was subject to liability under Section 11's first clause, misstatement of a material fact. First, because the alleged misstatements were *pure* opinions, the Court held that the supporting-facts situation did not apply.[37] Second, the Court held that the plaintiffs had not alleged that Omnicare's belief was not honestly held (in fact, the complaint disclaimed any allegation sounding in fraud),[38] and, thus, the claim was not actionable. Instead, the Court reasoned that the first allegation amounted to one about a belief that turned out to be wrong, which is not actionable under the first part of Section 11.[39]

For this Article's purposes, however, it is the second part of the Court's opinion that is the most interesting,[40] particularly as it pertains to corporate fiduciary duties. Here is where the Court explored the context of omissions and half-truths and holds that liability can exist when the omission of a fact makes an opinion statement misleading to the reasonable investor.[41] The Court first rejected the defendant's argument that "a pure statement of opinion [cannot] convey anything more than the speaker's own mindset."[42] This interpretation of the second clause of Section 11, the Court noted, would essentially eliminate liability absent proof of the opposite mindset and collapse liability under the second clause to that under the first. This crucial move essentially rejects the position of many lower courts that had found otherwise.

Instead, the Court held that the objective reasonable investor can "understand an opinion statement to convey facts about how the speaker has formed the opinion—or, otherwise put, about the

36. *Id.*

37. *Id.* But that allegation alone will not give rise to liability under Section 11's first clause because, as this Article has shown, a sincere statement of pure opinion is not an "untrue statement of material fact" regardless whether an investor can ultimately prove the belief wrong. *Id.*

38. *Id.* at 1324 (indicating that Plaintiffs did "explicitly exclude and disclaim any allegation that could be construed as alleging fraud or intentional or reckless misconduct." (quoting Joint Appendix at 273, *Omnicare*, 135 S. Ct. 1318 (No. 13-345))).

39. *Id.* ("That clause, limited as it is to factual statements, does not allow investors to second-guess inherently subjective and uncertain assessments.").

40. For a thorough discussion of *Omnicare*'s first prong and its implications, see Wendy Gerwick Couture, *False Statements of Belief as Securities Fraud*, 2015 SEC. REG. L.J. 351, 352–53.

41. *Omnicare*, 135 S. Ct. at 1327–28.

42. *Id.* at 1328.

speaker's basis for holding that view."[43] The Court then applied this definition to legal-compliance situations, noting that the statement, "[w]e believe our conduct is lawful," could be incomplete and misleading if the issuer had not consulted a lawyer or if the issuer did not believe the statement.[44] Thus, the Court held that a reasonable investor interpreting such a statement would expect both that the issuer actually believed it *and* that it "fairly align[ed] with the information in the issuer's possession at the time."[45]

The Court clarified, however, that an issuer might be in possession of conflicting facts that it does not have to disclose. This situation does not necessarily make the opinion statement actionable as an omission. To clarify this type of fact pattern, the Court offered the example of a single junior attorney doubting the legality of a compliance choice with six or more senior colleagues approving of it.[46] Here, the Court noted, the omission would not be actionable even if the junior lawyer turned out to be correct.[47] The rationale for this distinction was that reasonable investors do not expect to know every fact the issuer knew when making the statement. And issuers are not required to share all of their knowledge or internal information. Indeed, context is everything, and customs and practices matter. Nevertheless, the Court noted that opinion statements should not be "baseless, off-the-cuff judgments."[48]

Importantly for this Article's purposes, the Court also held that some opinions can be reasonably understood to mean that the issuer had information to justify the opinion and that, in some circumstances, an issuer might have to add information to an opinion to ensure that the opinion is not misleading by omission.[49] This requirement is by no means new,[50] but in the context of situations like legal compliance, it presses on the already porous boundary between securities disclosure and state-law corporate fiduciary duties. As a result, it is another

43. *Id.* Here, for example, the plaintiffs alleged that a lawyer had opined that a "particular contract 'carrie[d] a heightened risk' of liability under anti-kickback laws." *Id.* at 1324 (quoting Joint Appendix at 225, *Omnicare*, 135 S. Ct. 1318 (No. 13-435)).

44. *Id.* at 1328.

45. *Id.* at 1329.

46. *Id.*

47. *Id.*

48. *Id.* at 1330. The court referred to tort law more generally in support for these arguments. *Id.*

49. *Id.* at 1330–31.

50. *See, e.g.*, 17 C.F.R. § 230.408 (2015).

example of how the federal securities laws act in an information-forcing manner. Simply put, fiduciaries—who make securities disclosures and face potential liability—must consider whether the disclosure is sufficiently fulsome and, in doing so, may well expand the role that they play in ensuring the compliance or oversight situation is properly handled. Indeed, when opinions are based on expertise, simple statements of belief may not suffice. Instead, in addition to offering the opinion, issuers may need to articulate some facts undergirding that opinion or "make clear the real tentativeness of [the] belief."[51] In this manner, the required federal securities disclosure forces action or conduct on the part of fiduciaries and becomes an information-forcing-substance regulation that occupies space in the state-law, fiduciary-duty zone.

The Court's required pleading for such a claim is strict: plaintiffs must identify particular, material facts about "the inquiry the issuer did or did not conduct or the knowledge it did or did not have" such that their absence renders the opinion misleading by omission.[52] As explored below, the nature of this type of omission may have particular salience for the risk-management and compliance roles of corporate fiduciaries, or their so-called good-faith and *Caremark* duties.

II. HALF-TRUTHS AND LEGAL RISK

Part I demonstrated how *Omnicare* adds powerfully to the ways plaintiffs in securities-fraud actions can seek to have an opinion statement relating to legal compliance declared false or misleading. Part II.A turns to how courts will address these new challenges and how they should go about drawing inferences from compliance-related disclosures. Part II.B then addresses how *Omnicare* applies to statements that may not explicitly be labelled as opinions but involve the similar exercise of judgment or estimation.

A. Omnicare *and the Process of Inference*

The securities law relating to the disclosure of legal risk is, to nonlawyers at least, unintuitive and deeply muddled. When an issuer is held responsible for a violation of law, the sanctions—monetary, preventative, and reputational—can be powerful. Legal wrongdoing

51. *Omnicare*, 135 S. Ct. at 1332. The Court also rejected the argument that liability for misleading opinions would "chill disclosures useful to investors." *Id.* Instead, the Court's view was that issuers have an incentive to sell and therefore to disclose. *Id.*

52. *Id.*

and legal risk can be highly material to investors, related directly to their (and the market's) valuation of the company. A company whose business model depends on a continuing pattern of illegality is probably not a good investment.

Materiality notwithstanding, there is no automatic duty to disclose wrongdoing or legal risk.[53] The absence of duty is partly because of a gradual judicial narrowing of "duty to disclose" doctrine under the major liability provisions of the securities laws, particularly Section 11 and Rule 10b-5. More so, it is because the SEC has never specified disclosure obligations regarding unlawful behavior, leaving a murky line that lawyers have to navigate that leaves temptation for concealment. For some time now, courts have indicated that they are reluctant to imply affirmative duties of disclosure when the SEC has failed to explicitly articulate one.[54] There are line-item disclosure duties with respect to "risk factors," pending or threatened litigation, and known trends and uncertainties reasonably likely to occur that might impact the company's valuation metrics.[55] Each of these may indirectly force some disclosure of legal risk, but not necessarily. Even if the risk has to be disclosed, moreover, there is no duty to "handicap" the likelihood of liability.[56] There are many reasons for the SEC's reticence to regulate these disclosures explicitly, some stemming from the same general legal principles that permit legal advice to be kept confidential. The law normally allows people and firms to advocate their legal interests in good faith without forcing them to self-handicap

---

53. *E.g.*, Roeder v. Alpha Indus., Inc., 814 F.2d 22, 27 (1st Cir. 1987). This lack of duty coheres with the more general point that a duty to disclose does not exist simply because the speaker knows of material nonpublic information. *See generally* Basic Inc. v. Levinson, 485 U.S. 224 (1988). For a discussion of resulting efforts to create a duty, see generally Donald C. Langevoort & G. Mitu Gulati, *The Muddled Duty to Disclose Under Rule 10b-5*, 57 VAND. L. REV. 1639 (2004). For a good illustration of the inconsistency between whether there is a duty or not, compare Stratte-McClure v. Morgan Stanley, 776 F.3d 94, 102 (2d Cir. 2015) (recognizing a duty based on SEC line-item requirements), with *In re* NVIDIA Corp. Sec. Litig., 768 F.3d 1046, 1054 (9th Cir. 2014) (no such duty).

54. *E.g.*, Gallagher v. Abbott Labs., Inc., 269 F.3d 806, 808–10 (7th Cir. 2001).

55. For a recent judicial discussion of each of these in assessing the duty to disclose an SEC investigation into disclosure wrongdoing, see *In re* Lions Gate Entertainment Corp. Sec. Litig., No. 14-CV-5197, 2016 WL 297722, at *6–11 (S.D.N.Y. Jan. 22, 2016).

56. *E.g.*, *In re* UBS AG Sec. Litig., No. 07 Civ. 11225, 2012 WL 4471265, at *31 (S.D.N.Y. Sept. 28, 2012), *aff'd sub nom.* City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173 (2d Cir. 2014) ("Indeed, absent an express prior disclosure, a corporation has no affirmative duty to speculate or disclose 'uncharged, unadjudicated wrongdoings or mismanagement,' illegal internal policies, or violations of a company's internal codes of conduct and legal policies." (quoting Ciresi v. Citicorp., 782 F. Supp. 819, 823 (S.D.N.Y. 1991), *aff'd*, 956 F.2d 1161 (2d Cir. 1992))).

by laying all their low cards on the table. Moreover, legal analysis is often complicated and contingent, not well-suited to concise summarization.

The absence of any clear duty means that plaintiffs have to look at what was said rather than simply what was concealed. Before *Omnicare*, many courts assumed that opinions were fraudulent only if not genuinely believed, based on the Supreme Court's earlier decision in *Virginia Bankshares, Inc. v. Sandberg*.[57] Omnicare's disclosure lawyers therefore probably thought that inserting the words "we believe" would substantially reduce, if not eliminate, their client's securities-law liability risk. *Omnicare*'s holding that opinions may imply more than they say thus increases the scope of liability that issuers face. The Court's opinion now invites plaintiffs to stress the implications of what was said to escape having to prove that defendants actually knew of the falsity.

The Court's decision, however, does not say much about the size of this escape route. In the law of half-truths, an overly broad approach to implication turns the doctrine into a back-door duty to disclose based solely on materiality.[58] To limit the scope, the common touchstone—given context and the background norms of disclosure or confidentiality with respect to the kind of information at stake[59]—is whether the omitted information "fairly aligns" or not with what the issuer chose to say.[60] If the dissonance between the statement and the truth is too great, the result is an actionable omission.[61] How much dissonance is too much is hard to predict in advance, but it is the kind of question disclosure lawyers frequently confront.

---

57. Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991); *see supra* note 5; *see also* MHC Mut. Conversion Fund, L.P. v. Sandler O'Neill & Partners, L.P., 761 F.3d 1109, 1114 n.2 (10th Cir. 2014) (criticizing the Sixth Circuit's *Omnicare* opinion). Some other courts had anticipated *Omnicare* by allowing the subjective falsity element to be avoided when the statement of opinion implied the absence of additional facts tending seriously to undermine the accuracy of the statement. *E.g.*, Reese v. Malone, 747 F.3d 557, 572 (9th Cir. 2014); *In re* Apple Comput. Sec. Litig., 886 F.2d 1109, 1113 (9th Cir. 1989).

58. *See* Langevoort, *supra* note 25, at 90.

59. For a discussion of background norms and reasonable implications, see *id.* at 92. *See also* Robert J. Bloomfield, *A Pragmatic Approach to More Efficient Corporate Disclosure*, 26 ACCT. HORIZONS 357, 358–61 (2012) (offering an implications-based approach).

60. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1329 (2015).

61. *E.g.*, *In re* BP p.l.c. Sec. Litig., MDL NO. 4:10-MD-2185, 2016 WL 3090779, at *15 (S.D. Tex. May 31, 2016) (applying half-truth teachings of *Omnicare* to statements pertaining to oil spill).

The underlying problem—which courts have never fully addressed—is that there are conflicting visions of the reasonable investor. To some judges, reasonable investors are steely-eyed skeptics, who are unlikely to draw many inferences at all beyond what was clearly said.[62] Other judges view the reasonable investor as more trusting in management's candor and hence willing to draw inferences that make reliance more natural and normal.[63]

Imagine the following scenario: a company's lawyers have identified a legal risk, which they are working to reduce without drawing the attention of regulatory authorities to the prior practice, which might trigger an unwanted lawsuit. They fail to tell the CEO any of these details, creating the impression that things are under control. They also craft the "we believe" language for the next 10-K, which is then incorporated by reference into the registration statement for a forthcoming public offering.

The first issue is who is "we"? Under the '33 Act, "we" presumably should be construed fairly broadly, not simply as expressing the CEO's—as well as other executives' and board members'—personal opinions. "We" fairly connotes something of a corporate, collective belief, and when the law is involved, a reasonable investor would naturally assume that this view emanates from the legal experts and that executive knowledge is simply derivative. The purpose of strict and due diligence-based liability is to force a search for material facts that may be scattered throughout the organization.[64] Indeed, a CEO who fails to ask whether there are or have been changes in the issuer's legal status or risks is likely failing to fulfill her fiduciary duties.

The harder question involves the magnitude of the legal risk the lawyers have identified, not whether they have shared their fears with the CEO or the board. Statements of opinion do not, as the Court said, promise or guarantee legality, even if those responsible for the legal analysis (that is, the company's lawyers) are not sure of the legality. In complex regulatory settings, legal answers are often uncertain. The Court addresses this issue with the hypothetical about a junior attorney

62. *E.g.*, Wielgos v. Commonwealth Edison Co., 892 F.2d 509, 514–15 (7th Cir. 1989) (treating investors as sophisticated readers of corporate disclosure).

63. *E.g.*, Basic Inc. v. Levinson, 485 U.S. 224, 245–46 (1988) (granting presumption of reliance on the "integrity" of the market price).

64. *See, e.g.*, *In re* Worldcom, Inc. Sec. Litig., 346 F. Supp. 2d 628, 662–63, 674 (S.D.N.Y. 2004).

who expresses doubts about a particular compliance situation, noting that a less senior attorney's doubts do not necessarily render an opinion statement as to compliance misleading.[65] Situations can readily arise where the internal legal evaluation is that there may be some risk, but that the company is *probably* acting lawfully. The question becomes, would a reasonable investor be misled by an omission of the doubts?

Plaintiffs' lawyers will surely make that argument, which the Court encouraged by remanding the case for further consideration in light of allegations that a lawyer had raised questions about the heightened legal risk associated with one of Omnicare's contracts. To be sure, that evidence would be damning if it undermined the argument that Omnicare genuinely believed it was in compliance, but that is not the question here. Rather, would a reasonable investor take the "we believe" statement as effectively saying that there are no serious doubts about that assessment, even if the issuer's confidence is real? The result of the Court's holding and the remand is a new sort of balancing test, which increases the pressure on corporate fiduciaries to try to assure a sound basis for statements of belief.

There is no self-evident answer to the question just posed, although the Court provides some guidance by suggesting that an investor would likely be misled by a "we believe"—or other opinion—statement if the issuer knew federal authorities were taking the opposite position.[66] One can certainly imagine a situation where a lawyer tells a client that the lawyer believes the client will win without revealing a private assessment that the chance of the client losing is 33 percent. Most would agree that an omission of that risk renders the advice misleading and unfair to the client. So, the argument would go, the same is true for investors once the issuer has put the matter "in play" by expressing its belief about compliance.

But the space for liability is not that straightforward. A lawyer has a fiduciary duty of full disclosure to her client; a company does not have the same duty to its investors, even when making a public offering. Sophisticated investors understand (or intuit) that companies are not affirmatively obliged to reveal their legal weaknesses. So perhaps they should not assume that a statement of belief means anything more than that the lawyers genuinely think the company is acting lawfully, based both on private information that they are not inclined to share and that the fiduciaries have determined that relying on that belief is

65. *Omnicare*, 135 S. Ct. at 1329.

66. *Id.* at 1328–29.

reasonable. Other likely scenarios pose comparable problems of inference. Suppose, for example, that plaintiffs claim that the company lawyers were negligent in their legal analysis, either in how they gathered their facts or how they construed the law. Does "we believe" imply—as a handful of lower courts had suggested[67]—that there are *reasonable* grounds for the belief, so that the omission of what they missed was misleading even if unintentional? Remember that in the Section 11 context, as the Court pointed out, there is strict liability for the issuer, and considerable due diligence is expected in public offerings.[68] That should affect how a reasonable investor interprets opinion-based language in a registration statement, providing a basis in the right circumstances for an implied representation of due care.

Based on the experience with the half-truth doctrine generally, and the fact-based nature of all such questions, courts likely will not provide consistent answers to these disclosure issues. As noted earlier, the Supreme Court appears to have endorsed what before its decision was probably a minority view: that opinions can be actionable, even if genuinely believed, if they omit "facts tending to seriously undermine the accuracy of the statement."[69] To some judges, as noted earlier, the inference a reasonable investor would draw is a quintessential fact question, appropriate for resolution only at trial. Applying *Omnicare* under this approach is enforcement oriented, plaintiff friendly, and settlement inducing, even if the judge makes the decision but does so pursuant to a broad "could a reasonable investor have thought" standard. There is, however, a distinctive trend to turn disclosure interpretation into a question of law so that the judge can determine its reasonable meaning when the surrounding facts are assumed or uncontested. It is troubling when courts make overly strict and questionable assumptions about what reasonable investors think and do, dismissing cases much too readily.[70] But there is the concern that jury determinations may, in hindsight, default to a de facto affirmative duty to disclose, and thus the inclination toward more rigorous judicial gatekeeping via an enhanced judicial interpretive power. *Omnicare* stresses how competent "courts" are to make these kinds of

67. *See, e.g.*, *In re* XM Satellite Radio Holdings Sec. Litig., 479 F. Supp. 2d 165, 177 (D.D.C. 2007) (finding liability if, among other things, there was no reasonable basis for the statement of opinion).

68. *Omnicare*, 135 S. Ct. at 1330.

69. *E.g.*, *In re* Apple Comput. Sec. Litig., 886 F.2d 1109, 1113 (9th Cir. 1989); *see supra* note 57 and accompanying text.

70. *See supra* note 8 and accompanying text.

determinations,[71] which arguably can be read to make this a judge question.

Judges might well follow the lead of Judge Richard Posner in a decision on the related issue of inference, puffery.[72] He suggested that when soft words are used by corporate officials, reasonable investors sense that they may not be being given the whole story and are more cautious in their inferences. But even puffery fails to protect the executives and their company from liability if the truth simply clashes with the words written or spoken when addressing the situation. So, too, with legal opinions after *Omnicare*: using "we believe" or other opinion-based language narrows the inferences a reasonable investor should draw about compliance, but not to a point where the undisclosed facts known or available to the company and its lawyers indicate real doubts. When the latter is so, "we believe" creates a misleading impression by omission of those facts, making it appropriate to let the claim of fraud go to trial.

B. Applying Omnicare *Beyond Opinions:* Fait*'s Fate*

Omnicare opens up lines of attack against statements of opinion that many lower courts had previously closed off by insisting on proof of subjective awareness of falsity. Some courts had extended this already powerful doctrine to expressions of "judgment" even when not explicitly prefaced by words like "we believe." Most notable was the Second Circuit's decision in *Fait v. Regions Financial Corp.*,[73] which held in the context of Section 11 that accountants' goodwill and loan-loss-reserve judgments were not actionable absent knowing falsity because, in essence, those judgments were opinions. There was no better example of turning the text of Section 11 on its head, potentially constricting accountants' liability risk in ways that powerfully undermine the diligence-forcing role commonly ascribed to that provision. Indeed, it is fair to say that there is no gatekeeping in that standard.

71. *Omnicare*, 135 S. Ct. at 1332.

72. Eisenstadt v. Centel Corp., 113 F.3d 738, 745–46 (7th Cir. 1997). As others have pointed out, *Omnicare* should be read to call into question the scope of the puffery defense, insofar as puffery can trigger the same omission-based inferences as opinions. *See* Couture, *supra* note 40, at 359–61; Cox, *supra* note 11, at 718–20.

73. Fait v. Regions Fin. Corp., 655 F.3d 105, 112 (2d Cir. 2011). Wendy Gerwick Couture has discussed the case law on what constitutes an opinion both before and after *Omnicare*. *See* Couture, *supra* note 40, at 355–57.

Omnicare did not directly address what constitutes an opinion, though the Court's discussion stressed the importance of words like "we believe" in signaling to readers some degree of uncertainty.[74] There is, however, nothing in *Omnicare* to suggest unnatural breadth to the meaning of opinion or belief: discretion surely can be exercised recklessly, not just dishonestly. More clearly, *Omnicare* rejects the idea that the absence of dishonesty is a complete defense to opinion-based fraud.[75] *Fait* assumed otherwise.[76] At the very least, plaintiffs can now argue that the accountants' attestation or agreement as to the application of generally accepted accounting principles implied the absence of any facts that would seriously undermine the reasonableness of their exercise of discretion, whether or not those facts were actually known by the accountants.[77] As a background norm, investors reasonably assume that what is or is not said comes out of a process that conforms to professional standards for both accounting and auditing, something on which either plaintiffs or defendants might seize depending on whether there was a departure from those standards and the reasons for the departure.[78]

III. LEGAL COMPLIANCE AND CORPORATE SCIENTER

That Omnicare raised capital via a registered public offering in which the lawfulness of its marketing practices were at issue was something of a happenstance, making the availability of the Section 11 remedy to some plaintiffs fortuitous. In the absence of a contemporaneous public offering, these kinds of compliance-failure cases are brought as "fraud on the market" class actions under the less plaintiff-friendly Rule 10b-5. Even when Section 11 is available, the class of purchasers who can take advantage of it is limited to those who acquired newly issued securities, not all of those who bought stock in the open market at some time during the time of the fraud.[79]

74. *See Omnicare*, 135 S. Ct. at 1328–29.

75. *Id.* at 1329 & n.7.

76. The Second Circuit has acknowledged this recently, though it applied *Omnicare* to dismiss the plaintiffs' claim anyway. Tongue v. Sanofi, 816 F.3d 199, 209–10 (2d Cir. 2016).

77. *See, e.g.*, *In re* Genworth Fin. Inc. Sec. Litig., 103 F. Supp. 3d 759, 776 (E.D. Va. 2015) (addressing such an argument).

78. For a discussion of *Fait* and *Omnicare* suggesting that liability will be rare unless a plaintiff shows an inconsistency between the accounting judgment and GAAP, see Linda L. Griggs, John J. Huber & Christian J. Mixter, Omnicare *and GAAP-Based 'Numerical Opinions*,*'* 47 SEC. REG. & L. REP. (BNA) 1293, 1294 (June 29, 2015).

79. *See* Sale, *supra* note 23, at 432.

Hence—as was the case in the litigation against Omnicare—a parallel 10b-5 suit accompanies the Securities Act complaint. The statements as to belief in the legality of Omnicare's marketing practices were made in the company's 10-Ks and 10-Qs, which were incorporated by reference into the '33 Act registration statement.[80]

As explored above, the Court's decision in *Omnicare* is heavily grounded in Section 11's text, so a fair question is whether the decision affects 10b-5 cases. There are two main points of distinction. First, Section 11 creates strict liability, so that what senior management knew or did not know about the legal risk is not dispositive if what is said was misleading. By contrast, 10b-5 has a demanding scienter requirement. Second, public offerings have a unique discipline—required disclosure backed up by extensive due diligence—that affects how reasonable investors read the disclosures.

Those differences are important, to be sure, but as most courts post-*Omnicare*[81] have held, the decision says much that also governs 10b-5 litigation. Most of the Court's opinion focuses on the words in Section 11 that impose liability when the disclosure contained "an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading."[82] Rule 10b-5(b) is nearly identical in linguistic structure: it is unlawful "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading."[83] The Court's extended discussion of how reasonable investors construe statements of opinion involves

80. *See, e.g.*, Omnicare, Inc., Prospectus Supplement (Form 424B5), at S-58 (June 11, 2003) ("We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws"); Omnicare, Inc., Prospectus Supp. (Form 424B5), at S-52 (June 4, 2003) (same); Omnicare, Inc., Annual Report (Form 10-K), at 13 (Mar. 28, 2002) (same); Omnicare, Inc., Registration Statement (Form S-3), S-16 (Feb. 26, 1996) (same).

81. *E.g.*, *In re* BP p.l.c. Sec. Litig., MDL NO. 4:10-MD-2185, 2016 WL 3090779, at *15 (S.D. Tex. May 31, 2016) (applying *Omnicare* under Rule 10b-5 to statements pertaining to oil spill); *In re* Merck & Co., Sec., Derivative & "ERISA" Litig., MDL No. 1658, 2015 WL 2250472, at *21, *23–24 (D.N.J. 2015) (applying *Omnicare* under Rule 10b-5 to statements about the safety of Vioxx).

82. Securities Act of 1933 § 11, 15 U.S.C. § 77k(a) (2012).

83. 17 C.F.R. § 240.10b-5(b) (2015).

essentially the same textual exegesis regardless of which provision is invoked.[84]

Yet, as the Court stresses, context matters.[85] The *in terrorem* nature of Section 11 in the public-offering context may be unique, justifying greater reliance on what was said, but in the last few decades, Congress and the SEC have worked to make '34 Act reporting much more disciplined and reliable too. That is the point of the Sarbanes-Oxley Act[86]—created after the Enron and WorldCom scandals—which imposed an executive-certification requirement, stepped up internal controls responsibilities, and enhanced its audit committee obligations among many other reforms.[87] Regardless of the message, this requirement is about the solemnity and diligence that goes into the drafting of registration statements, which applies just as well to other SEC filings. Indeed, the idea behind shelf registration and integrated disclosure for seasoned issuers (like Omnicare) is comparable to reliability. Reasonable investors are unlikely to read registration statements and 10-Ks very differently.

Moving beyond SEC filings under the '34 Act as the source of a misrepresentation or half-truth, however, clearly changes the context. Statements may be made to investors in conference calls and meetings, for example, and there is increasing use of social media for company disclosure. When the disclosure environment is less formal, reasonable implications may shift. Perhaps there is less expectation of careful drafting or due diligence behind a brief tweet expressing good news.[88] But even if this is so, *Omnicare*'s reader-centric approach has much to say in 10b-5 cases.

Scienter is a harder challenge because it removes the anomaly that so troubled the Court in reconciling the defendants' claim that opinions are necessarily intent-based with the Securities Act's regime of strict liability for issuers, and a due-diligence defense for others. Defense

---

84. *See* Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1328–1330 (2015). The same is also true of SEC enforcement actions under Section 17(a) of the Securities Act, or Rule 14a-9 for misrepresentations in proxy materials.

85. *Id.* at 1330.

86. Sarbanes-Oxley Act of 2002, Pub. L. 107–204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

87. For a review of both the law and economics, see generally John C. Coates, IV & Suraj Srinivasan, *SOX After Ten Years: A Multidisciplinary Review*, 28 ACCT. HORIZONS 627 (2014).

88. *See* Gregory S. Miller & Douglas J. Skinner, *The Evolving Disclosure Landscape: How Changes in Technology, the Media, and Capital Markets Are Affecting Disclosure*, 53 J. ACCT. RES. 221, 227–28 (2015) (discussing new forms of information dissemination).

lawyers will no doubt try to cabin *Omnicare* and revert to the pre-*Omnicare* argument that a genuine (if misplaced) belief is a complete defense to 10b-5 liability, even as to half-truth claims.

This is both dangerous and wrong.[89] It is dangerous because it opens up too much room for dissembling: internal legal opinions are predictably subject to self-serving biases and overly intricate rationalizations. The line between advocacy and analysis often gets blurred, leading to overconfidence in the preferred assessment.[90] As social scientists point out, "artful paltering"—that is, telling half-truths—seems easier for most people to justify to themselves than abject lies.[91] Consciously or not, lawyers often keep their clients in the dark, withholding detail and nuance. Senior executives may not always get much more than that the lawyers are "comfortable" with the company's practices.[92] And this practice is wrong because the effect of reckless omissions on investors can be just as harmful as deliberate ones. "We believe our marketing practices are compliant with law" means the same thing to investors (whatever that may be) even when their only private-litigation recourse is Rule 10b-5. A standard that fails to push executives and directors to develop an understanding of the basis for legal opinions, then, creates space for dissembling and due-diligence failures.

In sum, the better reading of *Omnicare* is that the scienter requirement for statements of opinion attacked as half-truths is the conventional formulation: knowledge or recklessness.[93] But that approach still leaves open some crucial questions about whose knowledge or recklessness counts when talking about corporate

---

89. For a case where defendants' argument was raised and rejected, see *In re* BP p.l.c. Sec. Litig., 2016 WL 3090779, MDL No. 4:10-MD-2185 at *10 (S.D. Tex. May 31, 2016).

90. *E.g.*, Jane Goodman-Delahunty, Pär Anders Granhag, Maria Hartwig & Elizabeth F. Loftus, *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCH. PUB. POL'Y & L. 133, 150 (2010).

91. *See generally* Todd Rogers, Richard Zeckhauser, Francesca Gino, Maurice Schweitzer & Mike Norton, *Artful Paltering: The Risks and Rewards of Using Truthful Statements to Mislead Others* (Harvard Kennedy Sch. Faculty Research Working Paper Series, RWP14-045, Sept. 2014), https://research.hks.harvard.edu/publications/getFile.aspx?Id=1105 [https://perma.cc/6BSJ-QLVH] (documenting this form of deception).

92. *See generally* Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk and the Financial Crisis*, 2012 WISC. L. REV. 495, 507–14 (describing cognitive pressures on in-house lawyers to view circumstances favorably to their client's self-interest).

93. This level of scienter would not be so if the statement of opinion qualifies as a protected "forward-looking statement" under the safe harbor created by Congress for such statements. As Jim Cox points out, that safe harbor is not necessarily deep and may be lost if a court finds that the cautionary language itself is misleading as in *Omnicare*. *See* Cox, *supra* note 11, at 725.

opinions. Although this was not at issue in the case before the Supreme Court, it was in a separate proceeding brought under Rule 10b-5 against Omnicare for its opinion-based compliance disclosures. In late 2014, the Sixth Circuit rendered a decision on the 10b-5 claims that shows how crucial attribution of knowledge is to determining when opinions become half-truths.[94]

Plaintiffs in the 10b-5 action stressed that at the time Omnicare said what it did about compliance, its Vice President for Internal Audit had flagged certain compliance deficiencies.[95] As the Sixth Circuit saw it, the key question was one of corporate scienter—was the VP's awareness attributed to Omnicare so that the opinion was false or misleading?[96] Notwithstanding the importance of corporate scienter, the doctrine remains ambiguous, both as to pleading and proof. So the court sought to knit together different strands of analysis into a common standard.[97]

The ambiguity relates to collective intent. The respondeat superior approach to entity knowledge is that the entity is deemed to know everything its agents know, but that strict approach is not used for imputing scienter under Rule 10b-5. The judicial instinct seems to be that scienter connotes awareness (or recklessness) on the part of those who make the disclosures being challenged. A common formulation says that courts should "look to the state of mind of the individual corporate official or officials who make or issue the statement (or order or approve it or its making or issuance, or who furnish information or language for inclusion therein or the like)."[98] Although this test begins fairly narrowly, the reference to all those who "furnish information" is elastic, and it could be read to include all those with responsibility pursuant to the issuer's disclosure controls for "reporting up." That could include almost anyone with significant

94. *In re* Omnicare, Inc. Sec. Litig., 769 F.3d 455 (6th Cir. 2014).

95. *Id.* at 462.

96. *Id.* at 473.

97. The court drew heavily from Patricia S. Abril & Ann Morales Olazábal, *The Locus of Corporate Scienter*, 2006 COLUM. BUS. L. REV. 81, 133, but it did not adopt their test in its entirety. Like all scienter questions, the question more often arises at the time of pleading—does the plaintiff offer enough to create a strong inference of scienter as opposed to on the merits at trial. Some courts have suggested a somewhat lighter burden (and more room for "collective" pleading) at the pre-discovery stage of the litigation when only the pleadings are being reviewed. *See, e.g.*, Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc., 531 F.3d 190, 195 (2d Cir. 2008).

98. Southland Sec. Corp. v. INSpire Ins. Sols. Inc., 365 F.3d 353, 366 (5th Cir. 2004); *see also* Makor Issues & Rights, Ltd. v. Tellabs Inc., 513 F.3d 702, 710 (7th Cir. 2008).

responsibilities in the organization, bringing the test close to a respondeat superior standard.[99]

The Sixth Circuit in *Omnicare* created a wholly new test.[100] It was concerned that too tight a standard would promote plausible deniability, pressuring or encouraging managers to cheat as they allowed corporations to hide behind the lack of direct complicity by the highest-ranking officers.[101] On the other hand, it acknowledged that attribution of all employee knowledge went too far. So its modification of the common standard was two-fold. To clarify, it included within the zone of attribution the knowledge of any agent "who authorized, requested, commanded, furnished information for, prepared (including suggesting or contributing language for inclusion therein or omission therefrom), reviewed, or approved the statement in which the misrepresentation was made."[102] Then to expand the scope of responsibility, it added "any high managerial agent or member of the board of directors who ratified, recklessly disregarded, or tolerated the misrepresentation *after* its utterance or issuance."[103] The latter creates an internal duty to correct and, arguably, one to inquire, at least for purposes of attribution of knowledge. Using this approach to assess the adequacy of the pleadings, the court determined that the Vice President for Internal Audit's knowledge was attributable to Omnicare because plaintiffs claimed that he both furnished information to higher-ranking employees before the disclosure and quietly tolerated the misstatements afterward.[104]

The two Omnicare cases relate, although the connection is subtle. Scienter and materiality—what a reasonable investor thinks important—have a connection in the sense that the speaker must be aware of (or recklessly disregard) the propensity of the words or actions to mislead reasonable investors. This Article suggests a second connection: from the standpoint of the reasonable investor, *corporate*

99. In a later Sixth Circuit decision, the court did not go that far on imputation. *See* Doshi v. Gen. Cable Corp., No. 15-5621, 2016 WL 2991006, at *5 (6th Cir. May 24, 2016).

100. For a discussion and criticism, see generally Daniel V. McCaughey & Gregory L. Demers, *Revisiting Corporate Scienter: In Search of a Middle Ground*, 47 SEC. REG. & L. REP. (BNA) 858 (Apr. 27, 2015).

101. *In re* Omnicare, Inc. Sec. Litig., 769 F.3d 455, 475 (6th Cir. 2014).

102. *Id.* at 476.

103. *Id.* (emphasis added).

104. *Id.* at 483–84. Nonetheless, the court ultimately determined that a strong inference of scienter had not been shown. This was based on factual doubts about the attributed knowledge, not whether attribution was appropriate. *Id.*

disclosure implies a scope of knowledge or awareness of facts not limited to those actually crafting the words in question, or certifying their accuracy. The courts' struggle regarding corporate scienter is about defining that scope of knowledge in a way that syncs to investors' reasonable expectations—the same elicitation process endorsed by the Supreme Court in assessing opinion liability. Reasonable investors surely expect that corporate speech reflects more than the often limited (or compromised) knowledge of a handful at the very top.

This Article need not resolve the question of what locution best captures this approach. To maintain consistency with a meaningful scienter requirement, there must be some kind of culpable breakdown in information flow—a deliberate or reckless failure to elevate in the face of an appreciation of the information's disclosure importance.[105] What is crucial here is how much in the way of compliance-related information might satisfy this test and trigger corporate liability.

IV. DISCOURSE THEORY AND CORPORATE GOVERNANCE

One of the most interesting aspects of the Supreme Court's *Omnicare* opinion is its implications for the duties of corporate fiduciaries and, in particular, the board of directors. It arguably expands the zone of overlap between federal securities disclosure duties and state-law-based fiduciary duties. *Omnicare*'s direction that statements of belief be grounded in fact and, in some circumstances, require disclosure of the basis for the belief, may create a duty to justify the belief and, sometimes, explicate it.[106] This holding is the essence of the information-forcing-substance nature of required disclosure. Put simply, especially after *Omnicare*, board members must ask enough questions about significant legal-risk matters to be comfortable that neither the words making up the disclosure nor their fair implications could be misleading to investors.

A. Information-Forcing-Substance Theory and Corporate Governance

First, a discussion about the information-forcing-substance theory is in order.[107] The range of issues about which disclosure is required is

105. *See* Donald C. Langevoort, *Agency Law Inside the Corporation: Problems of Candor and Knowledge*, 71 U. CIN. L. REV. 1187, 1229–30 (2003).

106. *See supra* note 51 and accompanying text.

107. *See generally* Hillary A. Sale, *J.P. Morgan: An Anatomy of Corporate Publicness*, 79 BROOK. L. REV. 1629 (2014) (developing information-forcing-substance theory); Hillary A. Sale

extremely broad and includes far more than just financial information. At issue in *Omnicare* were the disclosures related to risk factors required by Item 503.[108] This provision—as well as several other provisions of Regulation S-K—requires registrants' offering documents and annual reports to include descriptions of financial conditions, changes to financial conditions, and results of operations, as well as any other factors that might make an "offering speculative or risky."[109] The risk provisions require a concise, "plain English" discussion that is organized logically and is specific to the issuer.[110] The purpose of this disclosure provision is to ensure that issuers provide potential investors with information that might reveal problems, including a lack of profits in recent periods or issues with the business or financial position. In effect, every disclosure under Regulation S-K requires those drafting the report to: (1) ensure that the information exists; (2) confirm it is accurate; (3) determine whether and how to disclose it, including ensuring sufficient disclosure; and (4) disclose the information. This is the information-forcing-substance theory at work.

Importantly, the core of the theory is not just a disclosure requirement. Instead, by requiring disclosures and officer and director signatures on offering documents, the SEC forces attention to the underlying details, backed up by the potential for a strict-liability cause of action in the public-offering context.[111] Thus, by combining ex ante required disclosures with ex post liability, the securities framework places the directors in a gatekeeping role that ties to their state-law-based fiduciary duties. To meet the disclosure requirements, directors must ensure accurate and complete disclosures, and to do so, directors should dialogue with officers and peers. Once engaged and informed, they must make a choice about what else, if anything, should be disclosed and whether changes in the conduct of business should occur to lessen the risks.

Now apply that theory to the oversight and risk-management role of directors. The basic premise here is that issuers must choose whether a risk requires disclosure at all and, if so, what (and how much) information should be disclosed. Either way, dialogue about whether

& Robert B. Thompson, *Market Intermediation, Publicness, and Securities Class Actions*, 93 WASH. U. L. REV. 487 (2015) (stressing the importance of transparency and "publicness" goals to a complete theory of securities regulation).

108. *See* 17 C.F.R. § 229.503(c) (2015).

109. *Id.*

110. *Id.* § 229.503.

111. 15 U.S.C. § 77k (2012).

risks exist and how significant they might be is required before the disclosure can be approved. The directors' job is to ask questions and question answers to assure themselves that management is on track with respect to understanding and vetting risks to the company. The absence of this type of risk conversation means that the directors have not effectively monitored the oversight and disclosure processes. It means that they are not actively engaged, which in turn means that they did not make a conscious choice. In the end, that may be their undoing. Indeed, the failure to make a conscious choice precludes business-judgment-rule protection for state fiduciary-breach claims and can result in federal securities disclosure violations.[112] In short, the disclosure regulations essentially require the board to have and understand information about risk and financial issues. The directors must go beyond the words presented to them and, in doing so, create an expectation that management will push information up to the board. This process would allow the board to assure itself that it understands the risk issues and ensure that the underlying compliance, oversight, and risk-management systems are in place.

This discourse about disclosure is the core of the information-forcing-substance theory. Indeed, when the dialogue occurs, it is possible that the result will be a different and more accurate assessment. It is, however, also possible that the result will be no change in the disclosure, and that too is a choice and a form of active decisionmaking. Thus, the disclosure requirements create a space in which the board and management must have a discussion about the underlying issue, thereby creating pressure for disclosure accuracy. The outcome is conversation and conscious decisionmaking that result in substantive changes and, as appropriate, disclosures.[113] And it is here that disclosures connect to the state-law-based fiduciary duties of officers and directors.

B. Omnicare*'s Impact on the Information-Forcing-Substance Theory*

Now consider the disclosures at issue in *Omnicare*. Both of the alleged omissions involved assertions of legal compliance with respect

112. *See, e.g.*, Aronson v. Lewis, 473 A.2d 805, 813 (Del. 1984) ("[I]t should be noted that the business judgment rule operates only in the context of director action. Technically speaking, it has no role where directors have either abdicated their functions, or absent a conscious decision, failed to act.").

113. Hillary A. Sale, *Independent Directors as Securities Monitors*, 61 BUS. LAW. 1375, 1380 (2006).

to contracts, presenting the question of how these types of omissions might connect to the role of directors who generally are not, and do not need to be, legal experts. Thus, for this Article's purposes, the question is whether the Court's discourse about these particular disclosures and its approach to registrants' use of "we believe" more generally, implicates what directors need to do before signing off on filings. Our answer is yes.

Recall the two alleged misstatements:

> We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws.[114]

And:

> We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve.[115]

As the Court noted, both of these statements are grounded in legal analysis. Thus, for the statements to be accurate, legal analysis had to occur and the conclusions had to be based in reality. As held by the Court, an objective reasonable investor can "understand opinion statement[s] to convey facts about how the speaker has formed the opinion—or, otherwise put, about the speaker's basis for holding that view."[116] In short, reasonable investors would expect not only that the issuer in fact believed the statement but also that the statement was "fairly align[ed] with the information in the issuer's possession at the time."[117] Issuers do not have to share all of their knowledge or internal information. *Omnicare* makes clear, however, that before signing off on an opinion statement, directors must inquire as to the basis for the opinion and assure themselves both of its existence and its

114. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1323 (2015) (citing Joint Appendix at 95, *Omnicare*, 135 S. Ct. 1318 (No. 13-435)). This disclosure was incorporated by reference into the registration statement of the offering at issue. Joint Appendix at 12, *Omnicare*, 135 S. Ct. 1318 (No. 13-435). It appeared in Omnicare's annual report for multiple years as part of Item 1, the "Description of Business." It also appeared in prior offering documents. *See supra* note 80.

115. *Omnicare*, 135 S. Ct. at 1323 (citing Joint Appendix at 137, *Omnicare*, 135 S. Ct. 1318 (No. 13-435)). This disclosure appears for the first time in the offering document at issue and is in the Item 503(c) Risk section.

116. Here, for example, the plaintiffs alleged that a lawyer had opined that a "particular contract carried a heightened risk of liability under anti-kickback laws." *Id.* at 1324 (citing Joint Appendix at 225, *Omnicare*, 135 S. Ct. 1318 (No. 13-435)).

117. *Id.* at 1329.

reasonableness.[118] This approach further explicates the directors' duty to inquire: to ask questions, question answers, and, at times, insist on changes. That is the core of the directors' monitoring and oversight role—ensuring that managers have functioning compliance systems in place and insisting on changes when alerted to red flags or risk-management and compliance concerns.[119]

The Court also held that in some circumstances, an issuer may have to add information to an opinion statement to make certain that the it is not misleading by omission.[120] This half-truth requirement also pushes on director duties. In addition to establishing that a well-functioning compliance system is in place, directors must consider whether statements about that system require clarification and whether the disclosure is sufficiently fulsome. Confirming completeness, however, may well press directors to expand their understanding of the issuer's determinations about the validity and legality of its compliance systems and proffered legal opinions.

C. How Securities Law Develops Corporate Fiduciary Duties

The *Omnicare* opinion has the potential for considerable traction in the fiduciary-duty-of-monitoring context. One of the alleged misstatements was not new: the same language appeared in prior offering documents.[121] Yet, in the interim, the regulatory and enforcement climate surrounding some of Omnicare's practices had changed.[122] Consistent with the understanding of the duty of good faith,

---

118. *Id.* at 1332–33.

119. *Cf. In re* Rita L. Schwartz, Exchange Act Release No. 42,684, 72 SEC Docket 432, 434–435 (Apr. 13, 2000) (entering cease and desist order against outside director; stating that "directors have a duty . . . to oversee the corporation's financial reporting process and to ensure the integrity and completeness of public statements made by the corporation"); *see also* SEC v. Chancellor Corp., Litigation Release No. 19177, 85 SEC Docket 588, 588 (Apr. 11, 2005) (settling allegations, with no admission, against an outside director who, the Commission alleged, had recklessly signed materially misleading financial statements without inquiring about the basis for accounting choices).

120. *Omnicare*, 135 S. Ct. at 1332.

121. *See supra* note 80.

122. The late 1990s and early 2000s saw a rise in the number of investigations of and suits against pharmaceutical manufacturers for Medicaid and Medicare fraud under the False Claims Act and Anti-Kickback Act. *See, e.g.*, Reed Abelson & Jonathan D. Glater, *New York Will Sue 2 Big Drug Makers on Doctor Discount*, N.Y. TIMES (Feb. 13, 2003), http://www.nytimes.com/2003/02/13/business/new-york-will-sue-2-big-drug-makers-on-doctor-discount.html [https://perma.cc/B2BE-8MF8] (stating that New York state joined six other states in "a growing legal attack on a longstanding practice" of providing discounts to doctors and pharmacists to entice them to choose certain drugs over others to prescribe and distribute). As a result of the increased number of

directors should be aware of changes in enforcement practices, and those changes should prompt directors to ask questions to fulfill their duties.[123] Now, the federal-disclosure side adds muscle to that duty and, arguably, raises the ante by requiring either the articulation of facts undergirding the opinion or a statement clarifying that the belief is tentative.[124] Directors who see the language "we believe" or are reviewing statements of opinion should ask about the underlying facts supporting the statement and assure themselves that the belief or opinion is warranted, particularly where, as in *Omnicare*, the second alleged misstatement contains legal-risk language that appeared for the first time in an increasingly aggressive enforcement environment. When directors review the language, they should be aware that they will likely be asking the drafter of the "we believe" language to take a step back and question her own choice.[125] However difficult this situation might be, it is arguably the purpose of the disclosure requirements and supports the healthy skepticism that directors are supposed to apply to issuer documents.[126] As noted earlier, excessive deference to the company's lawyers on legal-risk matters is dangerous in light of incentives and biases that lawyers have to protect the company from disclosure of uncomfortable facts and to be overly wedded to advice given previously, especially if those lawyers work in-house.

Importantly, the connection between directors and disclosure is not new. Indeed, over time, the SEC has reiterated the role that the board is expected to play in monitoring disclosures or, put differently,

---

investigations into the practices of large pharmaceutical companies, the Office of the Inspector General released compliance standards for those companies in their financial arrangements with doctors and pharmacies regarding the pricing of their drugs. Office of Inspector General, Compliance Program Guidance for Pharmaceutical Manufacturers, 68 Fed. Reg. 23,731 (May 5, 2003).

123. *Cf.* McCall v. Scott, 239 F.3d 808, 823 (6th Cir. 2001) (holding in the context of monitoring duty that directors should have been aware of enforcement actions and increased regulatory push).

124. *Omnicare*, 135 S. Ct. at 1332. The Court also rejected the argument that liability for misleading opinions would "chill disclosures useful to investors." *Id.* Instead, the Court's view was that issuers have an incentive to sell and therefore to disclose. *Id.*

125. *See* Adair Morse, Wei Wang, & Serena Wu, Executive Lawyers: Gatekeepers or Totems of Governance? 26 (Mar. 2016) (unpublished manuscript), http://ssrn.com/abstract=2469931 [https://perma.cc/Q2VZ-YRET] (offering "evidence that executive lawyers are incentivized to compromise internal governance monitoring time when faced with the call to add strategic input"). Indeed, the study casts doubt on lawyers as gatekeepers when the lawyers are paid like senior managers.

126. *See* Escott v. BarChris Constr. Corp., 283 F. Supp. 643, 688 (S.D.N.Y. 1968) (a director must check facts and not rely solely on representations taken at face value).

the role that disclosure plays in corporate governance. Outside directors are rarely "speakers" on behalf of issuers, except in the context of director-signed offering and proxy documents. They are, however, disclosure monitors, which arguably is their role in the context of offerings as well—"tak[ing] . . . care in ensuring the accuracy of the statements" made.[127]

The SEC has spoken clearly about the role of outside directors in this context. It has "long viewed the issue of corporate governance and the fiduciary obligations of members of management and the boards of directors of public companies to their investors as an issue of paramount importance to the integrity and soundness of capital markets."[128] And, recently, Chair White spoke strongly about the importance of the directors' gatekeeping role, noting that they must "establish expectations for senior management and the company as a whole, and exercise appropriate oversight to ensure that those expectations are met."[129] The Commission has also stated that directors should review and sometimes be involved in the preparation and drafting of disclosures.[130] Indeed, after Enron, CEOs and CFOs must discuss and review certain reports with the board's audit committee before the individuals can file their financial certifications.[131] The duty to review and question public statements and filings exists at all times, and it is particularly stringent in the context of filings that are signed by directors. For those, the SEC has stated the directors "must take

127. *Corporate Governance: SEC Official Says Enforcement Staff Seeking Actions Against Outside Directors*, 37 Sec. Reg. & L. Rep. (BNA), 2098, 2098 (Dec. 19, 2005) (quoting then-Deputy Director of the SEC's Enforcement Division Peter Bresnan).

128. Report of Investigation in the Matter of the Cooper Cos., Inc., as It Relates to the Conduct of Cooper's Board of Directors, Exchange Act Release No. 34-35082, 1994 SEC LEXIS 3975, at *20 (Dec. 12, 1994) (stating that directors must take "immediate and effective action" to protect shareholders with accurate statements).

129. Mary Jo White, Chair, Securities & Exchange Commission, A Few Things Directors Should Know About the SEC, Speech Before the Twentieth Annual Stanford Directors' College (June 23, 2014), https://www.sec.gov/News/Speech/Detail/Speech/1370542148863 [https://perma.cc/642N-52MR].

130. Circumstances Affecting the Determination of What Constitutes Reasonable Investigation and Reasonable Grounds for Belief Under Section 11 of the Securities Act, Exchange Act Release No. 33-6335, 23 SEC Docket 401, 407 (Aug. 18, 1981) (stating that involving directors in preparing Form 10-K can help satisfy due-diligence requirements in the context of Section 11).

131. Sarbanes-Oxley Act, 15 U.S.C. § 7241(a)(5) (2012).

steps to ensure the accuracy and completeness of the statements contained therein."[132]

In practice, these obligations mean that the directors must at least ask questions about disclosures and the basis for those statements, and, if they do not receive fulsome answers, they must ask for more information.[133] The Commission's longstanding view of the role of directors is one that is active rather than passive. It expects directors "to maintain a general familiarity with their company's communications with the public."[134] It has further stressed that directors must play a role because there "may be a tendency for corporate disclosure to lag behind developments [and] there may be resistance on the part of management to make full and fair disclosure."[135] Hedging and paltering occur, and directors must guard against them.[136] As a result, directors must consider any communications in the context of "what they know to be the facts."[137] If they discover inconsistencies or concerns, the Commission has stated that it is their job to demand "appropriate revisions or additions."[138] Indeed, in the words of Chair White, directors should

> ask the difficult questions, particularly if [they] see something suspicious or problematic, or, simply when [they] do not understand. [They] should never hesitate to ask more questions, and, always, insist on answers when questions arise. It also goes without saying that [they] should never ignore red flags. It is [their] job to be knowledgeable about issues, to be vigilant in protecting against wrongdoing, and to tackle difficult issues head on.[139]

Offering documents present a specific context. Here, the SEC has stated that protection via the due-diligence defense requires front-end

---

132. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Concerning the Conduct of Certain Former Officers and Directors of W.R. Grace & Co., Exchange Act Release No. 34-39157, 65 SEC Docket 1240, 1241 (Sept. 30, 1997).

133. Report of Investigation in the Matter of Stirling Homex Corporation Relating to Activities of the Board of Directors of Stirling Homex Corporation, Exchange Act Release No. 34-11516, 7 SEC Docket 298, 299 (July 2, 1975) (noting that directors asked questions, but did not push when answers were not forthcoming).

134. Report of Investigation in the Matter of National Telephone Co., Inc., Relating to Activities of the Outside Directors of National Telephone Co., Inc., Exchange Act Release No. 34-14380, 13 SEC Docket 1393, 1396 (Jan. 16, 1978).

135. *Id.*

136. *See supra* notes 89–91 and accompanying text.

137. *Id.*

138. *Id.*

139. White, *supra* note 129.

allocations of time for verifying disclosures.[140] For example, in discussing the contested disclosures in *Omnicare*, both the Court's opinion and the Commission's releases indicate that the directors have to hear the chief legal officer confirm that she agreed with the prospectus's draft language.[141] In particular, the board, or a committee of the board, needed to ask if the "we believe" statements or other statements of opinion were still valid or whether the legal environment had shifted such that the basis for the statements was actually more tentative than the language revealed. As a result, a key question directors should ask is what the current basis for the belief is and, perhaps, whether the company's choices are sufficiently different from those of its competitors facing enforcement to support the statement of belief.[142] That very discussion is the essence of the directors' role in monitoring and in monitoring through disclosure. It is also how the required federal securities disclosure forces action or conduct on the part of the directors, thereby adding to the information-forcing role of disclosure regulation and carving out its space in the state-law, fiduciary-duty zone.

Here, the Court's opinion meets the language of prior SEC Releases and presses directors to step up their vigilance of publicly filed documents as part of their "corporate governance and . . . fiduciary obligations."[143] In the context of *Omnicare*-like statements, directors who meet their obligation will discuss their legal-belief statements with the lawyers. Moreover, directors will ask whether the belief requires updating or whether the underlying circumstances have changed. Legal opinions are rarely given with iron-clad guarantees, but direct inquiries will push on hedging and should result in conscious choices about whether to provide additional disclosures. In short, in the context of compliance, directors must insert themselves in the disclosure process and actively engage in regular, good-faith monitoring of the company's systems and choices and its disclosures. They "must be vigilant in exercising their authority throughout the disclosure process."[144] In some situations, the outcome

140. 17 C.F.R. § 230.176 (2015).

141. Omnicare, Inc., v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1328–29 (2015).

142. *See* Exchange Act Release No. 34-11516, *supra* note 133, 7 SEC Docket at 299 (noting that directors learned of concerns about financial practices from media and did not press management for sufficient information to learn the truth.).

143. *See* Exchange Act Release No. 34-35082, *supra* note 128, at *19.

144. Exchange Act Release No. 34-39157, *supra* note 132, 65 SEC Docket at 1241.

may not be additional disclosure, and that is okay. Indeed, the goal is the conversation about what is or is not misleading, and these sorts of discussions should become an ongoing and enriched part of the directors' oversight duty and the director–management dialogue.

CONCLUSION

This Article reveals that *Omnicare*'s power is in how it reinforces the directors' duty to monitor through the information-forcing-substance theory. It presses directors to inquire about both the basis for public statements, here legal-risk statements, as well as whether the basis should be disclosed in order to prevent a half-truth.[145] This approach, the Court held, is consistent with what reasonable investors interpreting belief statements about legal compliance expect: that the issuer in fact believed the statement and that it "fairly align[ed] with the information in the issuer's possession at the time."[146] To ensure accuracy in the belief, the directors presumably must play their oversight role in a fulsome manner, asking questions, questioning answers, and, when needed, ensuring that changes or "revisions or additions" to communications occur.[147] Indeed, as the SEC has stated, "[D]irectors who review, approve, or sign [company documents] must take steps to ensure the accuracy and completeness of the statements contained therein."[148] Thus, the power of the information-forcing-substance theory and the role it plays in forcing fiduciaries to act both becomes apparent and reveals the ways in which it occupies space in and provides backbone to the state-law, fiduciary-duty zone.

145. *Cf.* Report of Investigation in the Matter of the Cooper Cos., Inc., as It Relates to the Conduct of Cooper's Board of Directors, Exchange Act Release No. 34-35082, 1994 SEC LEXIS 3975, at *12 (Dec. 12, 1994) (criticizing directors for omissions in public statements concerning wrongdoing by officers).

146. *Omnicare*, 135 S. Ct. at 1329; *see also* Exchange Act Release No. 34-14380, *supra* note 134, 13 SEC Docket at 1395 (criticizing directors for doing "nothing effective to ensure that they be provided accurate, current information").

147. Exchange Act Release No. 34-14380, *supra* note 134, 13 SEC Docket at 1396; *see* Exchange Act Release No. 34-11516, *supra* note 133, 7 SEC Docket at 300 (criticizing directors for relying on "self-serving" representations of management and others, rather than pushing for clarifications and additional information); *see also* Escott v. BarChris Constr. Corp., 283 F. Supp. 643, 688 (S.D.N.Y. 1968) (stating that an outside director needs to engage in reasonable investigation of answers from management and experts).

148. Exchange Act Release No. 34-39157, *supra* note 144, 65 SEC Docket at 1241.