No. 15-88

IN THE

Supreme Court of the United States

BOCA RATON FIREFIGHTERS AND POLICE PENSION FUND,

Petitioner,

—v.—

ROBERT J. BAHASH, THE MCGRAW-HILL COMPANIES, INC. and HAROLD MCGRAW, III,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals for the Second Circuit err in concluding that the District Court did not abuse its discretion by denying petitioner's motion for relief from final judgment pursuant to Fed. R. Civ. P. 60(b) on the ground that the purported "new evidence" proffered by petitioner would not have changed the outcome of the case?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, the Court is advised that The McGraw-Hill Companies, Inc., n/k/a McGraw Hill Financial, Inc., ("McGraw Hill") has no parent corporation and that no publicly held company owns 10% or more of the stock of McGraw Hill.

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Petitioner Boca Raton Firefighters and Police Pension Fund seeks review of an unpublished decision that states on its face that it does "not have precedential effect" and that affirmed the denial of a Rule 60(b)(2) motion for relief from a final judgment. The petition presents no issue worthy of this Court's review.

STATEMENT OF THE CASE

Respondent McGraw Hill is a leading global information services provider serving the financial services and business information markets. Standard & Poor's Ratings Services ("S&P"), which is registered with the United States Securities and Exchange Commission as a nationally recognized statistical rating organization, is comprised of the credit rating businesses housed within certain wholly owned subsidiaries of McGraw Hill. S&P assigns credit ratings to securities issued by, *inter alia*, corporations, financial institutions, municipalities, and structured finance vehicles, including residential mortgage-backed securities ("RMBS") and collateralized debt obligations ("CDOs").

Over this case's long history, petitioner has claimed that McGraw Hill and two individuals, Robert J. Bahash and Harold McGraw, III, (collectively "respondents") violated federal securities laws by allegedly making false and misleading statements. Petitioner's theory of the case and the nature of the alleged misstatements on which it bases its claims have changed with each new pleading. Ultimately, the District Court dismissed the complaint for failure to state a claim, and the Court of Appeals for the Second Circuit affirmed that dismissal in a nonprecedential

summary order in 2012. Petitioner did not seek a writ of certiorari.

Now, in an attempt to revive its case, petitioner seeks review of the denial of its Rule 60(b)(2) motion for relief from final judgment, which was affirmed by the Second Circuit in another nonprecedential summary order in 2014. Petitioner's current attempt to argue the existence of a circuit split — which not a single Court of Appeals has identified as existing — is merely the last gasp in this protracted litigation.

Procedural Background

This case began more than eight years ago when, in August 2007, petitioner's predecessor Claude Reese filed suit in the United States District Court for the District of Columbia against Robert J. Bahash, the then Executive Vice President and Chief Financial Officer of McGraw Hill. *Reese* v. *Bahash*, No. 1:07-cv-01530-CKK (D.D.C.), Docket Entry 1. The complaint alleged claims of breach of fiduciary duty and violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, arising out of alleged misstatements or omissions in McGraw Hill's public filings and other public statements. The initial complaint was brought on behalf of a purported class of those who purchased McGraw Hill common stock between July 25, 2006 and August 15, 2007.

In February 2008, the District of Columbia District Court entered an order appointing petitioner as lead plaintiff. (*Id*. D.E. 18.) Not long thereafter, petitioner filed a consolidated complaint, adding as defendants McGraw Hill and Harold McGraw, III, the then President and Chief Executive Officer of McGraw Hill and Chairman of McGraw Hill's Board of Directors, and

extending the class period to March 11, 2008. (*Id.* D.E. 21.) In response to a consent motion, the District of Columbia District Court transferred the action to the Southern District of New York. (*Id.* D.E. 26, 28.) Petitioner filed a new amended consolidated complaint in December 2008. (Dist. Ct. Dkt. 22.)[1]

Although many of the allegations in the amended complaint related to S&P's methodologies and processes for rating RMBS and CDOs, the pleading expressly stated that the case was not "about the substance of S&P's ratings" or "an attack on the veracity or reasonableness of [S&P's rating] opinions." (Dist. Ct. Dkt. 22 ¶ 3.) Instead, the pleading urged that the case was "based upon Defendants' false and misleading statements regarding McGraw-Hill's true financial circumstances and future business prospects." (*Id.*)

In February 2009, respondents filed a motion to dismiss the amended complaint. (Dist. Ct. Dkt. 24.) Months later — after respondents' motion to dismiss was fully briefed — petitioner filed a motion for leave to file yet another amended complaint. (Dist. Ct. Dkt. 33.) On June 30, 2010, the District Court granted petitioner "one additional opportunity" to amend the complaint, which it did on July 1, 2010, filing the fourth complaint in this matter, identified as the Second Amended Consolidated Complaint ("SAC"). (Dist. Ct. Dkt. 36, 37.)

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[1] References to "Dist. Ct. Dkt." are to the docket entries in the United States District Court for the Southern District of New York (Case No. 1:08-cv-7202-SHS).

In the 425-paragraph, 276-page SAC, petitioner alleged that virtually every public statement by the respondents during the putative class period was false or misleading, including statements made in McGraw Hill's quarterly earnings announcements, public SEC filings, earnings conference calls, and various other conferences in which McGraw or Bahash participated. (Dist. Ct. Dkt. 37.) Petitioner, however, continued to assert that the case was not about the ratings. (*Id*. at ¶ 3.) Respondents moved to dismiss the SAC on four grounds: (1) it failed to plead an actionable misrepresentation; (2) it failed to plead how and why the challenged statements were false or misleading; (3) it failed to plead facts giving rise to a strong inference that any statement was made by the respondents with the requisite intent to deceive; and (4) it failed to plead loss causation.

The District Court's 2012 Decision

On March 30, 2012 the District Court dismissed the SAC under Rule 12(b)(6). (A47a-50a.)[2] The District Court identified three categories of statements challenged by petitioner, concluding that none were actionable.

First, petitioner alleged that the respondents had "misled investors by representing that [S&P] had 'market lead[ing] software,['] that it used 'transparent and independent decision-making' to produce 'independent and objective analysis,' and that [it] 'excelled' in its role." The District Court concluded that such statements were "precisely" the type of indefinite,

[2] References to "A" are to the appendices to the petition.

vague, or general statements that "may not undergird a Section 10b-5 claim." (A48a-49a.)

Second, petitioner alleged that respondents "conceal[ed] that S&P's surveillance was 'perpetually late' and its surveillance group was 'over-worked, understaffed, and underfunded.'" The District Court found that plaintiffs had failed to show how any of these allegedly omitted facts regarding S&P's surveillance practices rendered any of the respondents' public statements misleading and had thus "fall[en] short of the [Private Securities Litigation Reform Act's] particularity threshold." (A49a.)

Third, petitioner challenged McGraw Hill's reports of its financial condition. The District Court rejected this category of alleged misstatements — which the petitioner had previously described as the foundation of its case (Dist. Ct. Dkt. 37 ¶ 3.) — because petitioner admitted that McGraw Hill's reported earnings figures were accurate, and "a defendant's [alleged] failure to disclose that its earnings were unsustainable is not securities fraud." (A49a.)

The District Court also held that petitioner had failed to set forth facts that constituted strong circumstantial evidence of conscious misbehavior or recklessness or that supported the inference that the individual respondents knew of facts or had access to information that contradicted their public statements. (A50a.) The District Court did not reach the loss causation issue.

The Second Circuit's First Summary Order

In a December 20, 2012 nonprecedential summary order, the Court of Appeals for the Second Circuit af-

firmed dismissal after conducting a de novo review of the pleadings. (A31a-46a.)

Noting that the determination of whether an alleged statement is material is "'fact specific' and 'depends on all relevant circumstances'" (A39a (quoting *ECA & Local 134 IBEW Joint Pension Trust* v. *JP Morgan Chase Co.*, 553 F.3d 187, 197 (2d Cir. 2009))), the Second Circuit held that the "generic, indefinite nature" of statements regarding McGraw Hill's "integrity and credibility and the objectivity of S&P's credit ratings" was such that "no reasonable purchaser of McGraw-Hill common stock would view statements such as these as meaningfully altering the mix of available information about the company." (A40a-41a.)[3]

The Second Circuit also agreed that, with respect to the alleged misstatements regarding McGraw Hill's "oversight and surveillance procedures," the com-

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[3] The Second Circuit pointed to two such statements as exemplary:

> For instance, in a conference call in October 2004 to discuss McGraw-Hill's quarterly financial results, a McGraw-Hill representative asserted that S&P's recently posted code of practices and procedures "underscores our own dedication towards transparent and independent decision-making process." In another conference call in July 2006, McGraw purportedly claimed that "[t]he integrity, reliability and credibility of S&P has enabled us to compete successfully in an increasingly global and complex market, and that is true today and we are confident it will be so in the future." (A40a (internal citation omitted).)

plaint "fell far short" of the required pleading standards, "basically leaving the District Court to search the long quotations in the complaint for particular false statements, and then determine on its own initiative how and why the statements were false and how other facts might show a strong inference of scienter." (A41a-43a.)

The Second Circuit also upheld the District Court's ruling that McGraw Hill's accurate statements about its earnings could not be actionable. (A43a.)

With respect to the element of scienter, the Second Circuit "agree[d] with the District Court's assessment that the complaint failed to 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'" (A44a (quoting *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 345 (2005) (internal quotation marks omitted)).) The Second Circuit found that the complaint failed to explain "how and why" the alleged facts might show scienter, and that this defect was "especially problematic here, where the underlying theory of securities fraud vacillates within the complaint." (A44a-45a.) The court concluded: "Whatever the failings of S&P's business model, the well-pleaded factual allegations do not give rise to a strong inference that McGraw-Hill executives misled investors about S&P's services in an effort to artificially inflate McGraw-Hill's stock price." (A45a.)

The Second Circuit also denied a motion by petitioner seeking judicial notice of the substance of certain deposition testimony unsealed in another case, and it struck references to that material in petitioner's reply brief, stating, "we see no reason to allow [petitioner] to effectively amend [its] complaint on ap-

peal." (A38a-39a n.4 (citation and internal quotation marks omitted).)

Petitioner did not seek rehearing or file a petition for a writ of certiorari, and the judgment became final and non-appealable.

The Rule 60(b) Motion

Nearly a year after judgment was entered by the District Court, petitioner moved for relief from final judgment based on "newly discovered evidence" pursuant to Rule 60(b)(2) and for leave to amend the complaint once again to submit a fifth complaint — this time of 525 paragraphs and 194 pages — identified as the Third Amended Complaint.[4] (Dist. Ct. Dkt. 61-64.) Petitioner based its Rule 60(b)(2) motion on two items that it claimed constituted newly discovered evidence: (1) excerpts of deposition testimony from another case that counsel for petitioner had elicited in 2010 and 2011, which was unsealed in 2012[5] and (2) allegations contained in a complaint filed by the U.S. Attorney's Office for the Central District of California asserting claims against McGraw Hill and S&P under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 for damages allegedly sustained by federally insured financial institu-

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[4] Petitioner incorrectly refers to this proposed complaint as the "operative Third Amended Complaint." (Petition at 3 n.1.) Petitioner was never granted leave to file the proposed complaint (A28a; 7a) and thus it was never operative.

[5] This was the same material that the Second Circuit refused to take judicial notice of in its 2012 decision. *See supra*, p. 7.

tions that purchased certain complex securities rated by S&P.

The proposed Third Amended Complaint is *only* about alleged misstatements regarding S&P's ratings. (Petition at 6.) Petitioner abandoned its claims based on alleged misstatements regarding McGraw Hill's "true financial circumstances and future business prospects." (*See* A11a n.1.)

The District Court's 2013 Decision

The District Court began with a review of the stringent standard for Rule 60(b)(2) relief. Recognizing that a court's "sound discretion" in considering a Rule 60(b)(2) motion must be exercised "with the purpose of finding 'a balance between serving the ends of justice and ensuring that litigation reaches an end within a finite period of time,'" the District Court noted that such relief may be "'properly granted only upon a showing of exceptional circumstances.'" (A19a (citations omitted).)

After reviewing petitioner's "extensive" submissions, the District Court held that petitioner's motion "represent[ed] an attempt to reargue their prior motion" and that the "purported new evidence would not have changed the outcome of the original decision because those allegations do not correct the pleading defects for which the Court dismissed its previous complaint." (A21a-22a.) According to the District Court:

> [Plaintiffs] select different carefully excerpted phrases from the large number of alleged misrepresentations included in the second amended complaint and claim that they were misleading based on alleged new facts that — although not specifically referenced in the second amended complaint — are of the same charac-

> ter as the facts plaintiffs previously claimed demonstrated falsity and scienter. The new evidence thus would not have changed this Court's previous ruling and is cumulative of plaintiffs' previous allegations in its nature and purpose, if not in all its details. (A22a.)

Specifically, the District Court found that the alleged new facts did not alter its previous conclusion that McGraw Hill's statements regarding S&P's independence and integrity are generic and indefinite, nor did the complaint explain why such new facts allegedly rendered McGraw Hill's prior statements false. (A25a.)

> Moreover, even if plaintiffs had somehow persuaded the Court that the new select phrases it emphasizes were specific enough to be proven false — which they have not — plaintiffs have not showed why these statements are misleading as a result of their new evidence. Take, for example, the most arguably definite statement: that S&P "appl[ies] its own predetermined, nonnegotiable, and publicly available criteria and assumptions to the fact presented" — couched by the caveat that "there may be more dialogue between S&P and an issuer in [a] structured finance transaction." (Second Am. Compl. ¶ 362.) Newly alleged facts — such as that S&P slowed the adoption of a new ratings model due to its negative impact on CDO ratings or that S&P analysts discussed that CDO issuers were upset by subprime RMBS ratings downgrades — do not demonstrate why this statement or others like it are false. (A25a.)

Similarly, the District Court held that the alleged new facts regarding S&P's ratings surveillance practices were "cumulative of the previous allegations and

are insufficient to convince the Court that the outcome of the motion to dismiss would have been different had those facts been included in the original pleadings." (A27a.) The District Court therefore denied petitioner's Rule 60(b) motion.

The Second Circuit's Second Summary Order

In a nonprecedential summary order issued on September 8, 2014, the Court of Appeals for the Second Circuit again affirmed the District Court. (A1a-7a.) The court reviewed the denial of petitioner's Rule 60(b) motion only for abuse of discretion.

After reviewing the record and case law, the Second Circuit concluded that the District Court "was well within its discretion" in denying the motion. (A5a.) "As the District Court found, the new evidence does not alter the District Court's and this Court's previous conclusion that defendants' statements regarding the 'independence' and 'integrity' of their ratings constitute 'mere commercial puffery.'" (*Id*. (citation omitted).)

> Alleged new evidence showing that, for example, S&P slowed the roll out of a new ratings model that might negatively affect CDO ratings, S&P analysts discussed that CDO issuers were upset by subprime RMBS ratings downgrades, or S&P may have been concerned about market share and profits, does not alter the "generic, indefinite nature" of the statements at issue or demonstrate why they are false. As the District Court correctly observed, these statements are too general to cause a reasonable investor to rely upon them as a guarantee that ratings would not be made without regard to profits, market share, or client feedback. (*Id*. (internal citation omitted).)

The Second Circuit also held that the District Court had not abused its discretion in holding that the "new evidence" failed to demonstrate "why defendants' statements regarding their surveillance practices were false." (A6a.) The petition does not challenge this holding. (Petition at 7 n.2.)

Judge Straub dissented, suggesting that the case be remanded for further consideration of the alleged new evidence. (A7a.) Petitioner then sought rehearing or rehearing en banc, which was denied without dissent on February 20, 2015. (A29a-30a.)

REASONS FOR DENYING THE PETITION

A. The Second Circuit's finding that the District Court did not abuse its discretion in declining to vacate the judgment presents no issue worthy of this Court's review.

The only question presented by this case is whether the Second Circuit erred in concluding that the District Court had not abused its discretion in denying the Rule 60(b)(2) motion. The Second Circuit's 2012 summary order is not before the Court: petitioner did not seek certiorari, and it is now far too late to do so.[6]

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[6] This is not a circumstance in which an interlocutory decision of a court of appeals may be reviewed on certiorari after final judgment. *Compare, e.g.*, *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 (2001); *Mercer* v. *Theriot*, 377 U.S. 152, 153-54 (1964). *See* Stephen M. Shapiro et al., Supreme Court Practice Ch. 2.3 (10th ed. 2013). There was nothing interlocutory about the Second Circuit's 2012 summary order. It affirmed a final judgment, and when petitioner did not seek certiorari, that judgment became unreviewable. *See, e.g.*, *Toledo Scale*

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And "an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review." *Browder* v. *Director, Dep't of Corrections*, 434 U.S. 257, 263 n.7 (1978); *see also Polites* v. *United States*, 364 U.S. 426, 437 (1960) (affirming denial of relief under Rule 60(b)(5) and noting that "[t]he validity of the District Court's interpretation of § 305 is not before us; we are not here directly reviewing the [earlier] decision."). If it did, neither the rules of finality nor the time limits on certiorari review would have any meaning.

Thus, this Court's review is limited to the Rule 60(b) motion, under the abuse-of-discretion standard. Petitioner contends that this Court should treat this case as if it involved de novo review of pleading standards, and even makes the remarkable assertion that "it makes no difference that this Petition arises after the denial of a motion under Federal Rule of Civil Procedure 60(b)." (Petition at 25)[7] Petitioner is plainly incorrect to suggest that this Court can consider the question presented without regard to the post-judgment posture of the case. Petitioner's motion asked the District Court to consider reopening the

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Co. v. *Computing Scale Co. et al.*, 261 U.S. 399, 417-19 (1923) (holding that the Court lacked jurisdiction to review issues resolved by previous judgment that had been final for more than 90 days before the petition for certiorari was filed).

[7] The only authority petitioner cites for this dubious line of argument is *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384 (1990), a case that does not even involve Rule 60(b).

judgment based on "newly discovered evidence," not to revisit the prior legal rulings about the sufficiency of petitioner's allegations — which is what petitioner now seeks. A decision declining to reconsider an earlier one — where the later decision does not "disturb[] or revise[] legal rights and obligations which, by [the court's] prior judgment, had been plainly and properly settled with finality" — does not bring up the earlier judgment for review. *FTC v. Minneapolis Honeywell Regulator Co.*, 344 U.S. 206, 212 (1952); *see Browder*, 434 U.S. at 263 n.7. And the District Court concluded that the newly discovered evidence was inadequate to change the result for independent reasons, including reasons entirely outside the question presented by petitioner.

The District Court's decision on the Rule 60(b)(2) motion entailed the kind of straightforward application of law to facts that this Court generally declines to review. *See* Supreme Court Rule 10. In considering the purported newly discovered evidence and determining that its prior dismissal of the complaint should stand, the trial court carried out one of its quintessential duties. Indeed, this Court has noted that "the trial court is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b)." *Standard Oil Co.* v. *United States*, 429 U.S. 17, 19 (1976) (citation and internal quotation marks omitted). Accordingly, certiorari review of judgments on Rule 60(b) motions is rare and usually involves special circumstances. *See, e.g.*, *Klapprott* v. *United States*, 335 U.S. 601, 608-09 (1949) (granting review where more liberal Rule 60(b) had been adopted after denial of the Rule 60 motion in a denaturalization case); *Horne* v. *Flores*, 557 U.S. 433, 447-48 (2009) (noting unique function of Rule 60(b)(5) in con-

text of institutional reform litigation featuring prospective relief). This case presents no such circumstance and no basis for reviewing the District Court's discretionary judgment applying law to fact.

Had petitioner wished to challenge the materiality standard applied by the District Court and the Second Circuit in 2012 in deciding the motion to dismiss, petitioner could have sought certiorari from the Second Circuit's first summary order affirming the District Court's judgment. That judgment finally decided that the statements at issue were inactionable as a matter of law and that the complaint failed adequately to plead both falsity and scienter. The decision on the Rule 60(b) motion did no more than decline to disturb those conclusions because the purported new evidence did not change the result.

B. The complaint was properly dismissed for independent grounds not encompassed by the question presented or addressed in the petition.

Even assuming *arguendo* that petitioner may now be permitted to attack the Second Circuit's December 2012 nonprecedential summary order affirming the judgment dismissing the complaint,[8] there were two independent and adequate grounds for that dismissal

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[8] On its face the order states that "[r]ulings by summary order do not have precedential effect" (*see* 2012 Second Circuit Dkt. 87 (Case No. 12-1776-cv)), although that legend was not reprinted in petitioner's appendix. Identical language appears on the face of the Second Circuit's second summary order. *See* 2014 Second Circuit Dkt. 64 (Case No. 13-4039-cv).

that are neither encompassed by the question presented nor even addressed in the petition. The complaint in this action was dismissed on three bases: (i) the statements at issue were too generic and vague to be material as a matter of law; (ii) the complaint failed to allege *how and why* the challenged statements were false or misleading; and (iii) the complaint failed to allege scienter. The petition here challenges only the first basis for dismissal. *See* Petition at i.

Petitioner's failure to allege how and why the challenged statements are false provides an independent and adequate ground for dismissal of the complaint which does not implicate the question sought to be presented by the petition. *See, e.g.*, *Amgen Inc.* v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1200 (2013) (an element of a Rule 10b-5 claim is that "the statements or omissions on which the plaintiff's claims are based were false or misleading"). As the Second Circuit held, "[n]eedless to say, asking the Court to assess the truth of facts in light of 'the factual detail contained throughout this Complaint,'" failed to satisfy the requirement that "plaintiffs 'must demonstrate with specificity why and how' each statement is materially false and misleading." (A43a (citations omitted).)[9]

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[9] In considering petitioner's 60(b) motion, the District Court decided that "even if [petitioner] had somehow persuaded the Court that the new select phrases it emphasize[d] were specific enough to be proven false," petitioner had "not showed why these statements [we]re misleading as a result of their new evidence." (A25a.) The Second Circuit agreed that the "[a]lleged new evidence" did not "demonstrate why" the statements at issue "[we]re

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The Second Circuit also held that, in addition to the "lack of actionable false or misleading statements," the "complaint failed to 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'" (A44a (citation omitted).) Instead the "Fund's complaint left the District Court to determine on its own initiative how and why the other alleged facts in the 280-page complaint might show a strong inference of scienter, thus falling far short of the particularity required in fraud claims brought under § 10(b) and Rule 10b-5." (A44a-45a.) "This defect is especially problematic here, where the underlying theory of securities fraud vacillates within the complaint." (A45a.) Indeed, the Second Circuit found that certain statements in the complaint "would seem to negate — not support — a strong inference of intent to defraud McGraw-Hill investors." (*Id.*)[10] Because scienter is its own "im-

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false." (A5a.) Rejecting petitioner's criticism that the District Court considered only the nature of the statements "without regard to the context of the new evidence," the Second Circuit observed that the District Court "plainly analyzed the alleged misstatements in light of the new evidence and found that 'plaintiffs have not show[n] why these statements are misleading as a result of their new evidence.'" (A6a n.3.) In particular, with respect to the sole statement on which petitioner *now* focuses (*i.e.*, that S&P applies "predetermined, nonnegotiable, and publicly available criteria"), the District Court concluded that the "[n]ewly alleged facts" did "not demonstrate why this statement or others like it [we]re false." (A25a (citation and internal quotation marks omitted).)

[10] The "alleged new facts" proffered by petitioner on its motion for 60(b) relief did not cure this "defect[]" as they were "of

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portant and necessary element" of a § 10(b) claim, *see Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010), petitioner's failure to allege scienter provided an independent and adequate ground for the dismissal of petitioner's complaint in this action.

Accordingly, even if this Court were to answer petitioner's question presented in its favor, the outcome in this case would not change; the judgment would stand because petitioner also failed adequately to plead both falsity and scienter. Thus, even if plenary review of the question presented were warranted, this case would be a wholly inappropriate one in which to answer it.

C. The courts below correctly determined that the statements at issue were too vague and indefinite to be material as a matter of law, and there is no circuit split on that issue.

As even petitioner's *amicus* acknowledges, the federal circuit courts uniformly agree that statements which are too indefinite, vague, or general for a reasonable investor to rely upon are immaterial as a matter of law. *See* Blumenthal Br. at 3 ("Courts generally agree that some statements are so abstract — and thus incapable of misleading a reasonable investor — that they constitute immaterial puffery as a matter of law."). In both of its nonprecedential sum-

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the same character as the facts plaintiffs previously claimed demonstrated falsity and scienter" and "thus would not have changed th[e District] Court's previous ruling." (A21a-22a.)

mary orders in this case, the Second Circuit routinely applied this uncontroversial principle. In its 2012 summary order, the Second Circuit held that the statements at issue here were immaterial as a matter of law because they are so "generic" and "indefinite" that "no reasonable purchaser of McGraw-Hill common stock would view" such statements "as meaningfully altering the mix of available information." (A39a-41a (citing *ECA & Local 134 IBEW Joint Pension Trust*, 553 F.3d at 206).) And in its 2014 summary order the Second Circuit reiterated that the "[a]lleged new evidence" pointed to by petitioner in its 60(b) motion did "not alter the 'generic, indefinite nature' of the statements at issue." (A5a (citation omitted).)

Faced with the unanimity of the circuits on this issue petitioner and its *amici* were driven to scour other decisions by the Second Circuit in an effort to conjure up a circuit split where none exists. Seizing on a sentence in *City of Pontiac Policemen's & Firemen's Ret. Sys.* v. *UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014), a case decided after the opinions on the merits in this case, petitioner misleadingly insists that the Second Circuit is alone in the view (said to have been articulated in *City of Pontiac*) that verifiably false statements can still be inactionable as a matter of law when those statements are so generic, vague, or aspirational that no reasonable investor could be deemed to rely upon them. (Petition at 15.) *See also* Blumenthal Br. at 3 (citing to *City of Pontiac* as the basis for the "circuit split"). But the decision below did not ap-

ply or even cite *City of Pontiac*.[11] Nor did the courts below hold that verifiably false statements are inactionable. The Second Circuit said nothing of the kind. And the District Court pointedly ruled, in a passage ignored by petitioner, that the statements at issue were not sufficiently specific to be "proven false." (A25a.)[12] Thus, even assuming *arguendo* that there were disagreement among the courts of appeals regarding whether a verifiably false statement can be inactionable puffery, such a split is not implicated by, and would not change the outcome in, this case.[13]

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[11] To the extent the petition suggests that the Second Circuit applied the standard said to be enunciated in *City of Pontiac* in its 2012 summary order (*see* Petition at 15), the assertion is not only wrong, it is impossible as *City of Pontiac* had not yet been decided in 2012.

[12] Petitioner's assertion that the District Court "flatly conclud[ed] that the statements in the complaint are immaterial as a matter of law notwithstanding their verifiability" (Petition at 25) is flatly, and irresponsibly, inaccurate. The *amici* briefs proceed from the same inaccurate, and irresponsible, premise. *See, e.g.*, Blumenthal Br. at 2; Lyons Br. at 3. Petitioner may disagree with the lower courts' determination that the specific statements at issue in this case were not verifiably false, but a court is not required to accept a plaintiff's characterization of the statements at issue. *See, e.g.*, *Police Ret. Sys.* v. *Intuitive Surgical, Inc.*, 759 F.3d 1051, 1060 (9th Cir. 2014) ("According to [plaintiff], these pronouncements are objectively verifiable and thus qualify as material misstatements, not mere puffery. The statements are, however, the antithesis of facts. They represent the 'feel good' speak that characterizes 'non-actionable puffing.'") (citation omitted).

[13] Reading the petition one might be led to believe that petitioner was asking the Court to review *City of Pontiac*. (Petition at 14, 15.) *And see* Blumenthal Br. at 3. But even if the decision

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The federal circuit courts (including the Sixth, Ninth, Tenth, and D.C. Circuits which the petition suggests are on the opposite side of the purported circuit split from the Second Circuit) all hold that statements that are too indefinite, vague, or general for a reasonable investor to rely upon them are immaterial as a matter of law. While applying that principle to particular facts sometimes results in dismissal and sometimes does not, there is no dispute over the applicable legal standard. The courts of appeals have

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in that case were at issue here, petitioner seriously overstates the Second Circuit's dicta there. Petitioner claims that *City of Pontiac* held that "even if a factual statement directly related to a company's key business is 'knowingly and verifiably false when made,' it may constitute puffery if its wording is nevertheless 'general.'" (Petition at 15.) The Second Circuit did not so hold and no reasonable reader of the opinion could suggest that it did. *See City of Pontiac*, 752 F.3d at 183. In fact the Second Circuit has more recently reiterated that "[s]tatements of corporate optimism may be actionable securities violations if 'they are worded as guarantees or are supported by specific statements of fact, or if the speaker does not genuinely or reasonably believe them.'" *IBEW Local Union No. 58 Pension Trust Fund & Annuity Fund* v. *Royal Bank of Scotland Grp., PLC*, 783 F.3d 383, 388, 392 (2d Cir. 2015) (quoting *In re IBM Corp. Sec. Litig.*, 163 F.3d 102, 107 (2d Cir. 1998)). Indeed, the standard articulated in *IBM* (quoted by the Second Circuit in *IBEW*) is precisely the standard petitioner described as the "undisputed law in this Circuit" in its opening brief on appeal of the 60(b) motion. 2014 Second Circuit Dkt. 28 at 27 (Case No. 13-4039-cv). Given the Second Circuit's recent and post-*City of Pontiac* recitation of this language from *IBM*, which was decided in 1998, it is not plausible that *City of Pontiac* reflects the change in the law the petitioner suggests it does.

not identified a circuit split on this issue and in fact frequently cite cases from other circuits when discussing this proposition. By way of example, the D.C. Circuit's decision in *Harman*, which petitioner characterizes as being inconsistent with the Second Circuit's decision in *ECA* (again not this case), actually quoted *ECA* for the proposition that "'statements [that] are too general to cause a reasonable investor to rely upon them' are immaterial and inactionable." *In re Harman Int'l Indus., Inc. Sec. Litig.*, 791 F.3d 90, 109 (D.C. Cir. 2015) (quoting *ECA*, 553 F.3d at 206 (finding that statement at issue was actionable)).

As regards the Sixth Circuit, the petition focuses on a statement in *City of Monroe Emps. Ret. Sys.* v. *Bridgestone Corp.*, 399 F.3d 651 (6th Cir. 2005), which the court concluded was actionable. (*See* Petition at 17.) But the court in *City of Monroe* also determined that a number of other statements, including, *inter alia*, Bridgestone's statements that "'[r]igorous testing under diverse conditions at our proving grounds around the world helps ensure reliable quality for original equipment customers,'" and that it had "'no reason to believe there is anything wrong with [its ATX tires]'" were "best characterized as loosely optimistic statements insufficiently specific for a reasonable investor to 'find them important to the total mix of information available.'" *City of Monroe*, 399 F.3d at 670-71 (quoting *In re Ford Motor Co. Sec. Litig., Class Action*, 381 F.3d 563, 570-71 (6th Cir. 2004)). Such statements "both on their own terms and in context, lacked a standard against which a reasonable investor could expect them to be pegged," were "too squishy, too untethered to anything measurable, to communicate anything that a reasonable person would deem important to a

securities investment decision," and were "analogous to those deemed immaterial *by a broad spectrum of federal courts*." *Id.* at 671 (emphasis added) (citing, *inter alia*, *San Leandro Emergency Med. Grp. Profit Sharing Plan* v. *Philip Morris Cos.*, 75 F.3d 801, 811 (2d Cir. 1996)).[14]

The Ninth Circuit in *Oregon Public Employees Retirement Fund* (Petition at 17) held that plaintiffs had not stated a claim for securities fraud because the alleged misrepresentations were not "objectively false statements," but rather "inherently subjective 'puffing'" that "would not induce the reliance of a reasonable investor." *Oregon Pub. Emps. Ret. Fund* v. *Apollo Grp. Inc.*, 774 F.3d 598, 606 (9th Cir. 2014) ("Apollo's use of general terms like 'educational content' and 'teaching resources' 'provided nothing concrete upon which [the Plaintiffs] could rely.'") (citation omitted).[15]

Petitioner's citation to the decision in *United States* v. *McGraw-Hill Cos.*, 2013 WL 3762259 (C.D. Cal. July 16, 2013), in support of its supposed circuit

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[14] *See also Pension Fund Grp.* v. *Tempur-Pedic Int'l, Inc.*, 2015 WL 3746095, at *6 (6th Cir. June 4, 2015); *In re Ford Motor*, 381 F.3d at 570-71.

[15] *See also Police Ret. Sys.*, 759 F.3d at 1060 ("Statements of mere corporate puffery, 'vague statements of optimism like "good," "well-regarded," or other feel good monikers,' are not actionable because 'professional investors, and most amateur investors as well, know how to devalue the optimism of corporate executives.' . . . In context, any reasonable investor would have understood Intuitive's statements as mere corporate optimism.") (citation omitted) (distinguishing *Warshaw* v. *Xoma Corp.,* 74 F.3d 955 (9th Cir. 1996)).

split is particularly telling. That district court decision can hardly be said to create a circuit split between the Second and Ninth Circuits (*see* Petition at 18). Instead, it reflects significant differences between that case and this one. "[P]erhaps most significantly," as the District Court in this case noted, "this action alleges violations of civil securities laws, which require a showing of different elements to state a plausible claim for relief than the criminal fraud statutes referenced in the DOJ complaint." (A15a n.2.) Further, in *United States* v. *McGraw-Hill Cos.*, the complaint alleged that investors in rated securities had been defrauded, whereas here the complaint alleged that investors in McGraw Hill itself were misled. (*See* A15a.) While the petition seeks to dismiss this distinction as irrelevant to the puffery inquiry (Petition at 19 n.4), it is central to the question of whether the statements were material — which turns on their significance to a reasonable investor. In this case the question is whether the statements would be material to a reasonable investor in McGraw Hill, not whether they would be material to a reasonable investor in a rated security. *See United States* v. *McGraw-Hill Cos.*, 2013 WL 3762259, at *7-8 (finding the district court's decision in this case to be "distinguishable for a number of reasons" including that the "interests in and reliance on S&P's representations regarding the accuracy of credit ratings" of the shareholder plaintiffs in this case were "very different from those of the investors in [*United States* v. *McGraw-Hill*]."); (A15a n.2 ("[T]he government in that case alleges S&P defrauded the end users of its ratings, whereas this case was brought by S&P shareholders, to whom the accuracy of S&P's ratings matters only insofar as it rendered

statements upon which shareholders relied when purchasing McGraw-Hill securities materially false or misleading.").) Notably, while both courts provided grounds for distinguishing the actions from one another, neither court referenced any variance in the law of materiality between the two circuits that explained the divergent outcomes in these two cases.

Nor is the Tenth Circuit of any help to petitioner. In *In re Level 3 Commc'ns, Inc. Sec. Lit.*, 667 F.3d 1331 (10th Cir. 2012) (*see* Petition at 20), that court, recognizing that not everything defendants said on a topic of importance to investors was material, found that many of the statements in plaintiff's complaint were "as a matter of law, nothing more than puffery." *Id.* at 1340. Such statements were the "'kind of rosy affirmation[s] commonly heard from corporate managers and numbingly familiar to the marketplace — loosely optimistic statements that are so vague, so lacking in specificity. . . that no reasonable investor could find them important.'" *Id.* (citation omitted). Thus, for instance, "the assertion that 'this year is really focused on integration and getting synergies from all those acquisitions,'" "must be characterized as vague (if not meaningless) management-speak upon which no reasonable investor would base a trading decision." *Id.* The First, Third, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits have similarly recognized that there will be some statements that are too general, vague, or indefinite to be relied upon by a reasonable investor as a matter of law.[16]

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[16] *See Shaw* v. *Digital Equip. Corp.*, 82 F.3d 1194, 1217-19 (1st Cir. 1996); *In re Aetna, Inc. Sec. Litig.*, 617 F.3d 272, 283-84

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Because there is no circuit split regarding the law applied by the Second Circuit in this case, petitioner's "question presented" is not presented here and certiorari should be denied. *See, e.g.*, *Conway* v. *California Adult Auth.*, 396 U.S. 107, 110 (1969) ("Were we to pass upon the purely artificial and hypothetical issue tendered by the petition for certiorari we would not only in effect be rendering an advisory opinion but also lending ourselves to an unjustifiable intrusion upon the time of this Court. Accordingly, the writ of certiorari is dismissed as improvidently granted."); *The Monrosa* v. *Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) ("[The Court's] function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the [question presented] can await a day when the issue is posed less abstractly.").

D. This Court's decision in *Omnicare* does not impact any issue in this case.

This Court's decision in *Omnicare, Inc.* v. *Laborers District Council Constr. Industry Pension Fund*, 135 S. Ct. 1318 (2015), cannot support remand because it

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(3d Cir. 2010); *Longman* v. *Food Lion, Inc.*, 197 F.3d 675, 685 (4th Cir. 1999); *Southland Sec. Corp.* v. *INSpire Ins. Sols., Inc.*, 365 F.3d 353, 372 (5th Cir. 2004); *Searls* v. *Glasser*, 64 F.3d 1061, 1066 (7th Cir. 1995); *Parnes* v. *Gateway 2000, Inc.*, 122 F.3d 539, 547 (8th Cir. 1997); *Philadelphia Fin. Mgmt., LLC* v. *DJSP Enters., Inc.*, 572 F. App'x 713, 716-17 (11th Cir. 2014). The Federal Circuit does not appear to have considered the issue.

has no impact on any issue in this case. The *Omnicare* decision mentions the concept of puffery, but in a single sentence and in the context of distinguishing statements of puffery from the statements of opinion that were actually at issue in *Omnicare*. The Court's passing mention of the puffery doctrine in *Omnicare* cannot justify granting, vacating, and remanding here, even in the absence of the multiple independent grounds sufficient to sustain the judgment.

In *Omnicare* this Court considered whether liability could be imposed on an issuer of a registration statement under Section 11 of the Securities Act of 1933 for a statement to the effect that the issuer "believed" it was in compliance with applicable laws. *Id.* at 1323. This Court held that under the first clause of § 11 — prohibiting false or misleading statements of material fact — liability could not be established unless the plaintiff pleaded and proved that the speaker did not actually believe what he said. The rationale was that readers of registration statements, alerted by the expression of a belief, would understand that the only "fact" suggested by the statement of opinion was that the speaker believed it. *Id.* at 1326.

Turning to § 11's second clause, the omissions clause, the Court concluded that if the registration statement "omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself, then § 11's omissions clause creates liability." *Id.* at 1329.

The concept of puffery arose in the context of the Court's discussion of the first clause of § 11. Exploring a hypothetical statement by a company's CEO that "'[t]he TVs we manufacture have the highest resolution available on the market'" the Court concluded that the statement would be

> an untrue statement of fact if a competitor had introduced a higher resolution TV a month before — even assuming the CEO had not yet learned of the new product. The CEO's assertion, after all, is not mere puffery, but a determinate, verifiable statement about her company's TVs; and the CEO, however innocently, got the facts wrong.

Id. at 1326.

Far from suggesting that the concept of puffery was in play in *Omnicare*, the Court specifically distinguished it from the issues explored there, making clear that standards for examining statements of puffery are far different from those considered in *Omnicare*. The decision in *Omnicare* does not even bear on the Second Circuit's body of case law on statements of puffery, much less on whether the actual Rule 60(b) ruling in this case was an abuse of discretion.

E. This case presents no issue of national importance.

Petitioner's two *amici* insist that this case presents issues of national importance, albeit for different reasons. (Lyons Br. at 14; Blumenthal Br. at 7-14.) Neither *amicus* is correct. Even if the Court were to disregard the Rule 60(b) posture, this case does not present the issues that *amici* want this Court to consider.

Professor Lyons claims that it is vitally important to establish clear rules for conflicts of interest in the securities context. Even assuming the correctness of that sentiment, it is not implicated by this petition. Neither of the courts below had any occasion to comment on, let alone consider, the implications of the conflict of interest ratings agencies face because they are paid by the issuers they rate. For well more than a decade, Congress has been examining and the SEC has been managing those very conflicts. Indeed, in the face of claims that such conflicts should have been disclosed by issuers of mortgage-backed securities in pertinent registration statements, numerous courts have concluded that those conflicts are so well known to investors that they need not be. *See*, *e.g.*, *In re Lehman Bros. Sec. and ERISA Litig.*, 684 F. Supp. 2d 485, 492 (S.D.N.Y. 2010) (Kaplan, J.) ("[T]here was no obligation for the Offering Documents to disclose the potential for a conflict of interest arising from the fact that Lehman paid the ratings agencies for their ratings. The Securities Act does not require disclosure of that which is publicly known, and the risk that ratings agencies operated under a conflict of interest because they were paid by the issuers had been known publicly for years.") (citing the SEC's 2003 report to Congress on rating agencies' conflicts of interest and Congressional hearings on the subject that same year).

Senator Blumenthal takes a different tack, using his submission to excoriate S&P by making assertions of supposed "facts" that have not even been alleged in this case. His brief presents no reason why this case would be worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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