No. 24-224

IN THE

Supreme Court of the United States

PLUMBERS LOCAL #290 PENSION TRUST FUND, Individually and on Behalf Of All Others Similarly Situated,

Petitioner,

v.

ROOT, INC.; ALEXANDER TIMM; DANIEL ROSENTHAL; MEGAN BINKLEY; CHRISTOPHER OLSEN; DOUG ULMAN; ELLIOT GEIDT; JERRI DEVARD; LARRY HILSHEIMER; LUIS VON AHN; NANCY KRAMER; NICK SHALEK; SCOTT MAW; BARCLAYS CAPITAL INC.; GOLDMAN SACHS & COMPANY LLC; MORGAN STANLEY & COMPANY LLC; WELLS FARGO SECURITIES, LLC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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I. INTRODUCTION

In this securities case, Petitioner challenged Root's purported risk warning—"[a]s we grow, we *may* struggle to maintain cost-effective marketing strategies, and our customer acquisition costs *could* rise substantially," Pet. App.:54a (emphasis in original)—as false or misleading because when Respondents spoke at the time of Root's initial public offering ("IPO"), Root's customer-acquisition costs ("CAC") had already increased substantially.[1] Petitioner thus maintained Root's "[c]autionary words about future risk c[ould not] insulate from liability the failure to disclose that the risk ha[d] transpired." *Rombach v. Chang*, 355 F.3d 164, 173 (2d Cir. 2004).

Rejecting that challenge, the Sixth Circuit affirmed dismissal of Petitioner's claims under §§11, 12(a)(2), and 15 of the Securities Act of 1933 ("1933 Act"), 15 U.S.C. §§77k, 77l(a)(2), 77o. Pet. App.:65a-70a. The court's reason was simple: although Petitioner's allegations survived Fed. R. Civ. P. 9(b)'s heightened-pleading standard, Pet. App.:56a-60a; Pet App.:71a n.1, the alleged facts, taken as true, failed to state a claim because risk warnings are inherently prospective in nature and carry no historical or present-oriented meaning.[2] Pet. App.:69a-70a. Put differently, in rejecting Petitioner's claim that Respondents' risk warning that CAC "may" or "could rise substantially" was misleading because Root's CAC had risen at the time of the IPO, the court held "cautionary statements are not actionable to the extent plaintiffs contend

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[1] *See* Dist. Ct. Dkt. 31, ¶¶7, 15, 80, 94, 131-135.

[2] Separately, the court concluded the bespeaks-caution doctrine immunized any forward-looking misstatements in the purported risk warning. Pet. App.:69a.

defendants should have disclosed risk factors *are* affecting financial results rather than *may* affect financial results." Pet. App.:54a, 69a-70a (quoting *Bondali v. Yum! Brands, Inc.*, 620 F. App'x 483, 491 (6th Cir. 2015), and *In re FBR, Inc. Sec. Litig.*, 544 F. Supp. 2d 346, 362 (S.D.N.Y. 2008)) (cleaned up).[3]

That *per se* rule represents an outlier position. Indeed, six other appellate courts have adopted the opposite view. Pet.:20-21 (citing *Karth v. Keryx Biopharmaceuticals, Inc.*, 6 F.4th 123, 138 (1st Cir. 2021); *Set. Cap. LLC v. Credit Suisse Grp. AG*, 996 F.3d 64, 85 (2d Cir. 2021); *Williams v. Globus Med., Inc.*, 869 F.3d 235, 242 (3d Cir. 2017); *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 249 (5th Cir. 2009); *In re Alphabet, Inc. Sec. Litig.*, 1 F.4th 687, 703 (9th Cir. 2021); *In re Harman Int'l Indus., Inc. Sec. Litig.*, 791 F.3d 90, 104 (D.C. Cir. 2015)). These courts agree risk warnings can violate the securities laws by creating false or misleading impressions about past or present facts.

Respondents urge denial of the petition, but they concede several critical points.

First, Respondents agree the question of whether and when a risk warning is misleading is already pending before the Court in *Facebook, Inc. v. Amalgamated Bank*, No. 23-980, and is closely related to the question presented here. Respondents' Brief in Opposition ("BIO"):1 ("[Petitioner]'s question presented mirrors the question presented in the *Facebook* case.").

Second, Respondents do not contest that the question here is recurring or important.

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[3] Unless otherwise stated, emphasis is added and citations are omitted.

Third, Respondents do not dispute that the appellate courts hold two divergent and irreconcilable views on Petitioner's question presented. BIO:7.

Given these concessions, Respondents' only real challenge is that the "decision below is not a proper vehicle to consider" the question presented. BIO:1. Respondents' vehicle concerns reflect a fundamental misunderstanding of the opinion below.

By its plain terms and in context, the decision below holds that Root's purported risk warning was not a sham because no reasonable investor understands a risk warning to carry *any* present-oriented meaning. Pet. App.:69a-70a (citing *Bondali*, 620 F. App'x at 491; *FBR*, 544 F. Supp. 2d at 362; and *Zeid v. Kimberley*, 930 F. Supp. 431, 437 (N.D. Cal. 1996)). The Sixth Circuit's categorical rule thus squarely implicates the question presented, here and in *Facebook*. Respondents' claims that Petitioner has put forth a "purely artificial and hypothetical issue," *Conway v. Cal. Adult Auth.*, 396 U.S. 107, 110 (1969) (*per curiam*), and asked the Court to render an advisory opinion, BIO:1; *id.* at 7-9, are therefore illusory. The Court should grant the petition.

II. ARGUMENT

A. Respondents' vehicle concerns provide no reason to deny review.

Respondents effectively mount a one-note opposition: the decision below is supposedly an unsuitable vehicle to consider the question presented because "the Sixth Circuit affirmed the district court's conclusion below that no risk had materialized."[4] BIO:5; *see also id.* at

[4] Contrary to Respondents' suggestion, "the district court[]" did not reach a "conclusion below that no risk had materialized." BIO:5. Rather, like the Sixth Circuit, it concluded that a risk

i (in Respondents' version of the question presented, "[w]here a risk factor ... warned of a risk that had not materialized"); *id.* at 1 ("[T]he Sixth Circuit held that the risk warning at issue was *not* a sham warning and that the risk warned of had *not* already materialized."); *id.* at 6 ("Petitioner's assertion in its Petition that there 'is no question that the *materialized* risk here—increased CAC at the time of the IPO—posed a business threat' ... is wrong."); *id.* at 7 ("However, here the district court and Sixth Circuit ruled the complaint had failed to plausibly allege any real 'sham warning' at all."); *id.* ("Petitioner's question presented, and much of its petition, assumes that it has plausibly pleaded a materialized risk.... Both courts below expressly concluded otherwise."); *id.* at 8 ("Petitioner lacks" a "well-pleaded, and materialized risk."); *id.* (the question presented "is premised on there being a materialized risk"); *id.* ("the decision below [found] that no risk materialized").[5]

Respondents thus insist the Sixth Circuit made a fact-bound determination that Petitioner failed to plead that Root's CAC had risen by the time of the IPO. Because, in Respondents' view, the court found no

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warning conveys no present information and cited *Zeid*, 930 F. Supp. at 437. Pet. App.:25a.

[5] Respondents also contend, in passing, that Petitioner's amended complaint did not challenge the purported risk warning as "misleading by omission." BIO:4 n.2. Any suggestion of waiver is meritless. The amended complaint repeatedly alleges that Root's purported risk disclosure was affirmatively false *and* misleading by omission. Dist. Ct. Dkt. 31, ¶¶9-11, 15, 87-104, 131, 133-135, 138. The Sixth Circuit recognized this too. Pet. App.:55a ("According to [Petitioner]'s complaint, these statements were misleading and/or omitted material facts about Root's CAC."); Pet. App.:59a (amended complaint "alleg[ed] that Root made materially false and misleading statements and omissions").

increase in Root's CAC had transpired when it issued its purported risk warning, "the outcome in this case would not change" no matter "how the Court decides the *Facebook* case." *Id.* at 1.

Respondents' attempt to transform the holding below into a fact-based, pleading error fails. While Respondents are correct the Sixth Circuit held "the risk warning at issue was *not* a sham warning," *id.*, they are wrong about the reason. The court did not conclude there was no sham warning due to the absence of a "well-pleaded, and materialized risk." *Id.* at 8. Rather, it did so because of its blanket rule that issuers, like Respondents, cannot be held liable as a matter of law for any misstatements of *present* fact conveyed by a purported risk warning—a rule Respondents do not attempt to reconcile with that of other circuits or defend on the merits. Petitioner, meanwhile, challenges that *per se* rule, Pet:20-22 (explaining the Sixth Circuit's *per se* rule is an erroneous outlier approach), contrary to Respondents' repeated assertions, BIO:1; *id.* at 7.

To start, Respondents acknowledge "[t]he Sixth Circuit considered [Petitioner]'s 'argu[ment] that the [Bespeaks Caution] doctrine will not shield Root from liability because the risk that Root warned of had already occurred, *i.e.*, the warning was a sham.'" *Id.* at 5 (quoting Pet. App.:66a) (some alterations in original). Respondents further recognize "[t]he Circuit expressly held ... that the risk warning '[wa]s not a sham warning, and a reasonable investor would understand as much.'" *Id.* (quoting Pet. App.:70a). From those two sentences, Respondents make the unsupported leap that "the Sixth Circuit affirmed the district court's

conclusion below that *no risk had materialized*."[6] *Id.* at 5. Respondents go so far as to insist the Sixth Circuit "expressly concluded" so. *Id.* at 7.

But besides stringing together two separate sentences spread four pages apart, Respondents point to nothing in the court's opinion to that express effect. If the court intended Respondents' reading, one would expect the court to say just that. It didn't. Nor do Respondents offer any sound reason to imply their reading of the opinion below *sub silentio*.

Indeed, Respondents' argument apparently relies on the unstated notion that the word "sham"—employed by the Sixth Circuit in describing Petitioner's argument, Pet. App.:66a, and in following up on that court's adoption of *Bondali*, *FBR*, and *Zeid*'s categorical analysis, Pet. App.:69a-70a—is somehow a term of art signifying rejection of Petitioner's well-pleaded allegations establishing a significant pre-IPO CAC increase. Pet. App.:60a. Nothing supports that suggestion, and the court's unanimous conclusion that Petitioner satisfied Rule 9(b)'s demanding standard contradicts it. Moreover, the court's actual (albeit mistaken) conclusion was that "a reasonable investor would understand" the risk warning to not be a "sham," Pet. App.:70a, reasoning that turns on whether a risk warning can impart present-oriented information, which is before the Court in *Facebook*.

One would also expect the Sixth Circuit to have explained its basis for rejecting Petitioner's allegations that the risk of increasing CAC had materialized prior to the IPO (if it had concluded so). That court acknowledged that, at this stage, "[p]lausibly pled facts

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[6] Again, the district court reached no such conclusion. *See supra* at 3 n.4.

are taken as true." Pet. App.:56a. Here, Petitioner alleged that low CAC was a major selling point for Root's shares—it "attracted investors such as [Petitioner]," and "[f]rom August 2018 to August 2020, Root's average CAC was $332," which compared favorably to "traditional car insurance companies[]" whose "CAC is between $500 to $800." Pet. App.:53a. Yet as of the IPO—but not disclosed in the offering materials—Root's CAC exceeded $500, a significant increase over its previous $332 figure and one placing it in the range of traditional car-insurance companies, thus belying the notion that Root enjoyed a competitive advantage as to CAC. Dist. Ct. Dkt. 31, ¶¶7-8, 15, 80, 94, 131-135. That CAC increase was particularly ominous—suggesting a long-term trend—because Root was then increasing expenditures due to an ambitious plan to "expand [its] licensed footprint to 50 states." Dist. Ct. Dkt. 31, ¶106. These allegations, "taken as true," Pet. App.:56a, demonstrate the risk of increased CAC had materialized as of the IPO.

Ultimately, Respondents' interpretation of the Sixth Circuit's holding is untenable for at least two additional reasons.

First, the court expressly recognized that Petitioner satisfied what it determined to be the applicable pleading standard for Petitioner's claims based on Root's purported risk disclosure. Pet. App.:60a ("[Petitioner]'s claims meet that [Fed. R. Civ. P. 9(b)] standard, *but* the complaint fails to state a claim for relief for the reasons outlined below."). The court's use of the conjunction "but" makes clear it was not rejecting Petitioner's claim for any fact-based pleading deficiencies. Rather, it affirmed the district court because it found the risk-warning allegations failed to state claims under the 1933 Act, *even though Root's CAC had already risen by*

the time of the IPO. Pet. App.:62a, 69a-70a. Thus, the court found Petitioner's allegations were well-pleaded, accepted them as true, but found they still failed *as a matter of law*.

Judge Clay's separate opinion makes this clear. Pet. App.:71a n.1 (Judge Clay, concurring in part and dissenting in part, states "the majority and I share the view that Plaintiffs satisfy Rule 9(b) but still fail to state a cognizable claim.").

Respondents' baseless reading of the opinion below—that the Sixth Circuit held the amended "complaint … fail[ed] to adequately plead a materialized risk," BIO:8—conflicts with the court's unanimous, explicit holding that Petitioner's amended complaint satisfied Rule 9(b)'s heightened pleading standard. Pet. App.:56a-60a.

Second, had the court rejected Petitioner's factual allegations that Root's CAC had increased by the time of the IPO, one would expect to see the cases Respondents cite for the proposition that a purported risk warning is not actionable where the complaint fails to adequately plead a materialized risk. BIO:8 (citing *Karth*, 6 F.4th at 138; *Williams*, 869 F.3d 235, 242; and *Rombach*, 355 F.3d at 173). But in holding that Petitioner's "argument that Root should have said its marketing strategy *was* affecting Root's CAC, instead of saying that it *could*, fails," the Sixth Circuit did not cite those cases. Pet. App.:69a.

Instead, the court cited a different trio of cases: *Bondali*, *FBR*, and *Zeid*. Pet. App.:69a-70a. Specifically, the court cited *Bondali*, 620 F. App'x at 491, which, in turn, quoted the categorical rule from *FBR*, 544 F. Supp. 2d at 362, that "cautionary statements are 'not actionable to the extent plaintiffs contend defendants should have disclosed risk factors "are" affecting

financial results rather than "may" affect financial results.'" Pet. App.:69a-70a. *FBR* cites *Zeid*, 930 F. Supp. at 437 as support. *FBR*, 544 F. Supp. 2d 362. *Zeid* is thus the progenitor of the holding below.

In *Zeid*, investors alleged the company, "Firefox[,] released misleading warnings" because it failed to "disclos[e] ... the adverse factors which were then negatively impacting Firefox's business." 930 F. Supp. at 437. "In other words, Plaintiffs argue[d] that Firefox should not have stated that certain adverse factors *may* effect (sic) the financial statements, but rather it should have said they *are* effecting (sic) Firefox's business." *Id.* (emphasis in original). The district court rejected that argument as "absurd" and found the "[d]efendants' warnings regarding potential adverse factors are not actionable *as a matter of law*." *Id.* Significantly, *Zeid* did *not* find that the investors failed to plead that the adverse factors were "then negatively impacting Firefox's business" at the time of the risk disclosures. *Id.*

Bondali and *FBR*, the two other cases the Sixth Circuit relied on below, hold the same. *See Bondali*, 620 F. App'x at 491; *FBR*, 544 F. Supp. 2d at 362. While both concluded, in the alternative, that the plaintiffs had not adequately alleged that the specific risk had materialized, the court below did not rely upon those portions of *Bondali* and *FBR*. *See Bondali*, 620 F. App'x at 491; *FBR*, 544 F. Supp. 2d at 362. Rather, the Sixth Circuit invoked only *Zeid*'s *per se* ruling, and quoted the categorical language from *Bondali* and *FBR*. *See* Pet. App.:69a-70a.

Thus, the opinion below, through its plain terms and the cases it relies on, establishes that the risk of increased CAC transpired at the time of the IPO, but the court rejected that claim because "cautionary

statements are not actionable to the extent [Petitioner] contends [Respondents] should have disclosed risk factors *are* affecting financial results rather than *may* affect financial results." Pet. App.:69a-70a (cleaned up). That is why the Sixth Circuit held that Petitioner's "argument that Root should have said its marketing strategy *was* affecting Root's CAC, instead of saying that it *could*, fails." Pet. App.:69a (emphasis in original). Consequently, this case is not "entirely different from *Facebook*." BIO:1. It is substantially similar and raises a closely related question: whether risk disclosures are misleading when they warn that a risk *may* or *could* materialize when that risk has already transpired at the time the company spoke.[7]

Finally, even assuming Respondents are right that Petitioner's claims should be dismissed for failure to adequately plead that increased CAC had already materialized, they will have the opportunity to make that argument on remand, once this Court resolves the question presented in *Facebook* or here.

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[7] Notably, should the Court consider "an order granting *certiorari*, vacating the judgment below, and remanding the case (GVR), [such an order] is appropriate when 'intervening developments ... reveal *a reasonable probability* that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination *may* determine the ultimate outcome' of the matter." *Wellons v. Hall*, 558 U.S. 220, 225 (2010) (some alterations in original). As demonstrated above, there is far more than "a reasonable probability" the court of appeals rejected Petitioner's risk-warning claim based on a categorical rule that such warnings do not convey present information, and to the extent there is ambiguity in that rationale—there isn't—"[i]t would be highly inappropriate to assume away that ambiguity in respondent[s'] favor." *Id.*

B. Properly framing the question presented as teed up by the decision below, there is a split of authority.

Beyond their vehicle concerns, Respondents half-heartedly disavow a circuit split on the question presented. Specifically, Respondents assert "there is no split among the circuits that a warning of a potential future risk accompanied by cautionary language is not actionable where, as here, a plaintiff fails to plausibly plead that a risk already materialized." BIO:7; *see also id.* at 8 (emphasis in original) ("The alleged circuit split presented by *Facebook* does not extend to situations such as this one, where the disclosed risk factor had *not* materialized.").

Respondents' attempt to elide a circuit split is unconvincing. The only way Respondents can do so is by mischaracterizing the holding below and re-writing the question presented to fit that mischaracterization. As explained above, there is no question the Sixth Circuit "t[ook] as true" Petitioner's allegations that Root's CAC had risen by the time of the IPO. Pet. App.:56a. Because Respondents' denial of a circuit split hinges on the contrary assumption, it necessarily fails.

III. CONCLUSION

The Court should hold this petition pending its resolution of *Facebook*. Should the Court reject the Sixth Circuit's approach to risk warnings in *Facebook*, the Court should grant the petition, vacate the decision below, and remand for further proceedings consistent with the Court's *Facebook* decision. Should the Court not address the conflict between the Sixth Circuit's decision here and the decisions of the First, Second, Third, Fifth, Ninth, and D.C. Circuits in *Facebook*, the Court should grant this petition.

Respectfully submitted,

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