No. 24-3568

In the United States Court of Appeals for the Ninth Circuit

JAMES EVERETT HUNT, JUAN RODRIGUEZ, KURT VOUTAZ, JOEL WHITE, ANDREW AUSTIN, SCOTT KLINE, AND RYAN FISHMAN,
PLAINTIFFS-APPELLANTS,
v.
PRICEWATERHOUSECOOPERS LLP (PWC),
DEFENDANT-APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NO. 4:19-CV-02935-HSG

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE

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The Securities Industry and Financial Markets Association states that it is a non-profit corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of concern to the nation's business community, including in cases involving the federal securities laws, such as *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175 (2015); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014); and *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013).

[1] No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person other than the *amici curiae*, their members, or their counsel contributed money intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

The Securities Industry and Financial Markets Association (SIFMA) is the leading trade association for broker-dealers, investment banks, and asset managers operating in the United States and global capital markets. On behalf of industry members and their one million employees, SIFMA advocates on legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed-income markets, and related products and services. SIFMA, too, regularly files amicus briefs in cases arising under the federal securities laws, including *Omnicare*, 575 U.S. 175; *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377 (2014); *Amgen*, 568 U.S. 455; and *Gabelli v. SEC*, 468 U.S. 442 (2013).

Amici curiae are well suited to furnish the Court with the tools it needs to evaluate these technical issues regarding liability under the federal securities laws—as well as to appreciate their impact. *Amici* have a keen interest in this case because of the significant burdens imposed on their members by private securities class action litigation, which adversely affects access to capital markets and raises costs for American businesses of all sizes. The issues in this case are directly relevant to *Amici*'s shared goal of promoting fair and efficient markets.

INTRODUCTION

Amici urge this Court to uphold the district court's well-reasoned decision. This Court should make clear that certain line items within a company's financial statement—as well as an auditor's audit opinion as a whole—are properly understood as statements of opinion, not fact. As a result, they are subject to liability under the federal securities laws only as narrowly circumscribed by *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175 (2015).

The questions presented here are of vital importance to *Amici* and their members. Plaintiffs effectively invite the Court to hold that numerical line items in financial statements can ***never*** be statements of opinion—simply because they are numerical. This rule cannot be squared with *Omnicare* or the statutes that underlie it. Courts can and do consider on a case-by-case (and line-by-line) basis whether the applicable standards—here, certain Generally Accepted Accounting Principles (GAAP)—"call for the exercise of judgment." If so, the resulting line item is a statement of opinion analyzed under *Omnicare*, even if it is ultimately expressed in numerical form. *See In re AmTrust Fin. Servs., Inc. Sec. Litig.*, 2019 WL 4257110 (S.D.N.Y.) (*AmTrust I*),

rev'd in part on other grounds, New Eng. Carpenters Guar. Annuity & Pension Funds v. DeCarlo, 2023 WL 11965444 (2d Cir.).

Adopting Plaintiffs' position—which conflates facts with genuinely held statements of belief and opinion—would vastly expand the scope of liability under Section 11 of the Securities Act. It would make securities suits more difficult to dismiss at the pleading stage, thus raising the specter of increased litigation costs. And it would risk holding auditors and issuers strictly liable for inherently subjective assessments that later prove to be mistaken—in violation of Supreme Court precedent. Such an expansion would compound the burdens of litigation on *Amici*'s members and on the business community at large.

For the reasons discussed below—and those articulated in the response brief of defendant-appellee PricewaterhouseCoopers LLP (PwC)—this Court should affirm.

SUMMARY OF THE ARGUMENT

I. *Amici* have a particular interest in two questions raised here: (a) whether an auditor's liability extends beyond the limits of its audit report and opinion, and (b) whether financial statement line items are necessarily "facts"—not "opinions" under *Omnicare*—simply because they present information in numerical form. The answer to both questions is no.

A. Section 11 makes clear that an auditor may be sued only "with respect to the statement . . . which purports to have been *prepared or certified by him*." 15 U.S.C. § 77k(a)(4) (emphasis added). An audit opinion typically "certifies" financial statements only as a whole and only as presenting "fairly"—"in all material respects"—the issuer's financial position in accordance with the relevant accounting standards. That was the case here. Given the inherent limitation in PwC's certification and the auditor's role, any liability for the auditor can arise only from statements made *within the audit opinion itself*—not from individual line items that are included in the public filings that accompany the audit opinion. Auditors should not face liability for statements they did not make.

In any event, audit certifications and opinions are just that—*opinions* subject to the analysis set out in *Omnicare*. The potential liability of auditors like PwC under the federal securities laws should not extend past the limits set there.

B. This Court should also decline Plaintiffs' invitation to apply a categorical rule holding that numerical line items in financial statements can never be considered "opinions" for purposes of *Omnicare*. *See* 575 U.S. at 186 ("a sincere statement of pure opinion is not an 'untrue statement of material fact'") (quoting 15 U.S.C. § 77k(a)). Under Plaintiffs' theory, any numbers in a financial statement are necessarily "facts"—and therefore are subject to strict liability under Section 11—regardless of the evaluative process used to calculate them.

Plaintiffs' proposed rule cannot be squared with the case law. Both before and after *Omnicare*, courts have engaged in a situation-specific inquiry to determine what constitutes an opinion. These courts focus on "whether the relevant statement reflects the speaker's determination of a matter of objective fact or instead expresses the speaker's judgment about a matter that lacks any objective standard." *New Eng. Carpenters Guar. Annuity & Pension Funds v. DeCarlo*, --- F.

4th ----, 2023 WL 11965444, at *5 (2d Cir.) (as amended on rehearing) (internal quotation omitted). If the statement expresses the speaker's subjective judgment—whether it is presented in numerical form or in text—it is an opinion and must be analyzed as such under *Omnicare*. *See* 575 U.S. at 183–86.

Under this approach, there is no basis for holding auditors like PwC—or issuers themselves, for that matter—strictly liable for line items that are fundamentally subjective.

II. Plaintiffs' expansive view of securities liability—holding auditors strictly liable for individual line items in financial statements prepared by management, and defining all numerical line items as "facts" no matter how subjective the process was that produced them—would have serious negative ramifications across the business community. In essence, Plaintiffs' approach would hold auditors and issuers alike strictly liable for subjective, judgment-laden statements that are later proven to be incorrect. The prospect of such liability would disadvantage U.S. markets on the world stage, chill candid disclosure and thus harm the market at home, and increase the cost of securities litigation generally.

For all these reasons, Plaintiffs' proposed approach should be rejected. *Amici* urge this Court to make clear that auditor liability is limited to the terms of the relevant audit opinions—typically a certification with respect to the financial statements taken as a whole—and also adopt the subjective/objective distinction used by numerous federal courts to evaluate specific line items in financial statements. The district court's sound decision should be affirmed.

ARGUMENT

Plaintiffs' arguments raise two issues that are particularly troubling to *Amici*: (1) they would extend auditor liability beyond the audit opinion, regardless of what the auditor purports to have certified, and (2) they take a rigid, cramped view—unsupported by the case law—of when line items in financial statements count as opinions that must be assessed through the lens of *Omnicare*. But for the reasons explained below, PwC (like any auditor) should not be held strictly liable for statements it did not make. And Plaintiffs should not be permitted to circumvent clear distinctions made in *Omnicare* by stamping all numerical line items in financial statement "facts," regardless of how much judgment went into them.

I. An auditor's liability under Section 11 is limited to the terms of its audit opinion and must be analyzed under *Omnicare*.

Section 11 provides a cause of action against an auditing professional based on material misstatements or omissions in a registration statement "only as to those portions of the statement that purport to have been prepared or certified by" the auditor. *Monroe v. Hughes*, 31 F.3d 772, 774 (9th Cir. 1994); *see also* 15 U.S.C. § 77k(a)(4) (statement must "purport[] to have been prepared or certified by" the accountant or auditor); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381 n.11 (1983) (accountants may be liable under Section 11 "only for those matters which purport to have been prepared or certified by them"). Liability under Section 11 cannot extend beyond the express terms of what the auditor "prepared or certified." 15 U.S.C. § 77k(a)(4).

The only thing an auditor "prepares" is *its own certification or report*, which is expressly a statement of "opinion." 17 C.F.R. § 230.405 ("certified" by definition requires "*an opinion*" by an accountant (emphasis added)); *see also In re WorldCom, Inc. Sec. Litig.*, 346 F. Supp. 2d 628, 664 (S.D.N.Y. 2004) (auditors typically "give an opinion as to whether [a company's] financial statements have been presented

in conformity with GAAP"). As self-evidently a statement of opinion, the auditor's certification itself must be analyzed as an opinion under *Omnicare*. *See* 575 U.S. at 185–86 (Section 11 liability for opinions can lie "only if the speaker did not hold the belief she professed" or "if the supporting fact she supplied were untrue"); *see, e.g.*, *Querub v. Moore Stevens H.K.*, 649 F. App'x 55, 58 (2d Cir. 2016) (where audit reports are "labeled 'opinions' and involv[e] considerable subjective judgment," they "are statements of opinion subject to the *Omnicare* standard"); *Johnson v. CBD Energy Ltd.*, 2016 WL 3654657, at *10 (S.D. Tex.) (where an "audit report provides a disclaimer that it is an opinion and it involves subjective judgment . . . the *Omnicare* standard applies").

Like all audit opinions, PwC's certification stated on its face that it was a statement of "opinion." *See* 2-ER-313 ("express[ing] [PwC's] opinion on the Company's consolidated financial statements based on [its] audits"). The district court thus correctly assessed PwC's own statements as statements of opinion under *Omnicare*. *See* 1-ER-25–29. The court rightly determined that PwC expressed the uncertainty that is the hallmark of an opinion when it disclaimed that, "*In* [*its*] *opinion*, the consolidated financial statements present fairly, in all material

respects, the financial position of the Company." 1-ER-26–27. The court appreciated—as the *Omnicare* Court had—that "a reasonable person 'recognizes the import of words like "I think" or "I believe," and grasps that they convey some lack of certainty as to the statement's content.'" *Id.* (quoting 575 U.S. at 187).

Moreover, the *subject* of an auditor's certification is not any specific line item in the financial statements. In the context of audited financial statements, the term "certified" simply "means examined and reported upon with an opinion expressed by an independent public or certified public accountant." 17 C.F.R. § 230.405. The auditor's certification typically says only that the financial statements taken as a whole—or, in other words, their "overall presentation"—"fairly" present the issuer's financial position "in all material respects." 2-ER-313. By definition, then, the auditor does not "'certify' [the disputed] financial statements in the sense that [it] 'guarantee[d]' or 'insure[d]' them," nor, "by virtue of auditing [the] financial statements, [does it] somehow make, own or adopt the assertions" they contain. *Deephaven Private Placement Trading, Ltd. v. Grant Thornton & Co.*, 454 F.3d 1168, 1174 (10th Cir. 2006); *accord Special Situations Fund III QP v. Deloitte*

Touche Tohmatsu CPA, Ltd., 33 F. Supp. 3d 401, 443 (S.D.N.Y. 2014) (same). It simply expresses an opinion on the financial statements taken as a whole.

Here, the express terms of PwC's audit opinion provided no guarantee that every single line item in the financial statements was accurate. *See* 2-ER-313. The individual line items in the financial statements were thus neither "prepared" nor "certified" by PwC, so PwC cannot be held strictly liable for their contents.

II. Whether line items are opinions for purposes of *Omnicare* depends on whether the calculation required the exercise of subjective judgment.

Besides lumping audit certifications in with the accompanying financial statements, Plaintiffs' appeal also impermissibly seeks to expand Section 11 liability in another way—one that would harm issuers as well. They would exempt all line items in a financial statement from being treated as opinions under *Omnicare* simply because those line items are expressed as numbers.

This categorical rule depends on the incorrect premise that *numbers* are always *facts*—a view too simplistic to accommodate the complexity of modern financial statements. Financial statements are

"the written record of the financial status of an [entity]," which may "include a statement of cash flows, a statement of changes in retained earnings, and other analyses." *Boyce v. Soundview Tech. Grp., Inc.*, 464 F.3d 376, 386 n.7 (2d Cir. 2006). They inherently include both facts *and* opinions, and which category a particular line item falls into will depend on its particular characteristics.

For this reason, this Court should reject Plaintiffs' categorical rule and instead adopt the nuanced position common among the federal courts: a line item is a fact when it is determined objectively, and it is an opinion when it expresses or incorporates a subjective judgment.

A. Factual statements are *objective*; opinions are *subjective*.

In general, "a fact is 'a thing done or existing' or '[a]n actual happening.'" *Omnicare*, 575 U.S. at 183 (quoting *Fact*, *Webster's New International Dictionary* 782 (1927)). This "actual or alleged event or circumstance" is by definition "distinguished from its interpretation." *Fact (2)*, *Black's Law Dictionary* (12th ed. 2024). Because it is presented "without distortion by . . . interpretations," a fact is objective. *Objective (1.a)*, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/objective (last visited Dec. 1, 2024).

Financial statements include many statements of fact. For example, a representation made about an asset "traded on the New York Stock Exchange or some other efficient market where the fair market value typically is the price at which a share or other asset is trading at any given moment" would be a statement of fact, because it states with certainty the objective, measurable value of that asset at a given time. *See Fait v. Regions Fin. Corp.*, 712 F. Supp. 2d 117, 122 (S.D.N.Y. 2010), *aff'd*, 655 F.3d 105 (2d Cir. 2011).

Similarly, a line item based on "market price"—another "objective measure"—would be a statement of fact. *See City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 65 F. Supp. 3d 840, 853 (N.D. Cal. 2014). A representation made about *how much* of a product is in a company's inventory is also a statement of fact about an objective reality. *See Ortiz v. Canopy Growth Corp.*, 537 F. Supp. 3d 621, 669 (D.N.J. 2021).

The key question is whether a line item "call[s] *only* for the application of or evaluation under *objective criteria*"; if so, "the resulting data would be a statement of fact." *AmTrust I*, 2019 WL 4257110, at *14 (emphases added). Applied to the last example listed above, if an

issuer or auditor "lied factually about how much [of a certain product] was in [its] inventory," it could be liable under Section 11 for that factual misrepresentation. *See Ortiz*, 537 F. Supp. 3d at 669.

An opinion, by contrast, is "'a belief[,] a view,' or a 'sentiment which the mind forms of persons or things.'" *Omnicare*, 575 U.S. at 183 (quoting *Opinion*, *Webster's New International Dictionary* 1509). Opinions are subjective rather than objective. When a line item "lacks 'any objective standard'" by which to calculate it, that line item is "inherently subjective." *DeCarlo*, 2023 WL 11965444, at *5 (quoting *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 110 (2d Cir. 2011)). The line of demarcation between fact and opinion is thus drawn between objectivity and subjectivity.

If the plaintiff cannot show that a line item in question rests solely on objective criteria—and thus incorporates "the speaker's judgment about [the] matter" (*id.*)—"the resulting data" should be construed as a "statement of opinion." *AmTrust I*, 2019 WL 4257110, at *14.

B. Federal courts apply the objective-data-vs.-subjective-judgment test on a line-by-line basis.

Under the principles outlined above, "if determining the relevant provision of GAAP [or other relevant guidance] to apply in a certain area of accounting or with respect to a certain transaction involve[s] a subjective evaluation, *then any data resulting from that application . . . would be a statement of opinion*"—even if the end result is a number. *Id.* (emphasis added).

"Generally accepted accounting principles . . . tolerate a range of reasonable treatments, leaving the choice among alternatives to [judgment calls by] management." *Thor Power Tool Co. v. C.I.R.*, 439 U.S. 522, 544 (1979) (quotations omitted). Of course, this is not to suggest that every "misreading, misinterpretation, or misapplication" of GAAP standards "necessarily mean[s] that they entail an exercise of subjective judgment."[2] *DeCarlo*, 2023 WL 11965444, at *10. Which

[2] Although the Second Circuit in *DeCarlo*, reviewing *AmTrust I*, did not decide whether certain calculations at issue (e.g., when a bonus can be expensed) were facts or opinions, the court of appeals retained the district court's focus on objectivity as the dividing line between fact and opinion. *DeCarlo*, 2023 WL 11965444, at *5 ("whether the relevant statement reflects the speaker's determination of a matter of objective fact or instead expresses the speaker's judgment about a matter that lacks any objective standard").

side of the line a particular line item falls on must be ascertained on a case-by-case (and line-by-line) basis.

But just because "not all statements of opinion include . . . qualifying language" like "'I believe' or 'I think'"—the familiar phrases from *Omnicare*—does not mean the exercise must be prohibitively difficult. *See DeCarlo*, 2023 WL 11965444, at *5. "Certain statements address issues so plainly subjective . . . that the statement is one of opinion not just by virtue of the words used but also because of the *nature* of the information conveyed." *Id.* (emphasis added). Line items are by nature subjective where "the relevant accounting guidance call[s] for the exercise of judgment." *AmTrust I*, 2019 WL 4257110, at *14.

"[A]ctuarial or accounting assumptions," for example, "'depend[] on the particular methodology and assumptions used' and are not 'objective factual matters.'" *In re Avon Sec. Litig.*, 2019 WL 6115349, at *16 (S.D.N.Y.) (quoting *Harris v. AmTrust Fin. Servs., Inc.*, 135 F. Supp. 3d 155, 172 (S.D.N.Y. 2015), *aff'd*, 649 F. App'x 7 (2d Cir. 2016)). Nor are two other types of line items that tend to recur in the federal case law: valuations and projections.

While the amount of product in a company's inventory may be a fact, "valuations of inventory" are opinions because the relevant governing accounting principles used in that determination "are inherently subjective and involve management's opinion." *Ortiz*, 537 F. Supp. 3d at 666 (quotation omitted). And while a snapshot of market price conveys a fact, "difference[s] of opinion [may arise] over [the] fair market value for a given asset," rendering that determination an opinion. *See City of Dearborn Heights*, 65 F. Supp. 3d at 852.

Like valuations, projections tend to be subjective. Where "the challenged statement is a projection relating to a company's future performance, it is considered an opinion and not a statement of fact," because it expresses the speaker's judgment about a matter that lacks any objective standard. *Maso Cap. Invs. Ltd. v. E-House (China) Holdings Ltd.*, 2024 WL 2890968, at *3 (2d Cir.) (citing *Fait*, 655 F.3d at 110–12); *accord Pape v. Braaten*, 2022 WL 888812, at *24 (N.D. Ill.) (same); *cf.* 15 U.S.C. § 78u-5(c) (PSLRA's statutory "safe harbor" from liability for certain "forward-looking statement[s]").

The Second Circuit reached the same conclusion in a case that hinged on "management's opinion or judgment about what, if any,

portion of amounts due on the loans ultimately might not be collectible"—another example of a subjective assessment of the likelihood of future events coming to pass. *See Fait*, 655 F.3d at 113. The *Omnicare* Court called this element of uncertainty the "[m]ost important" hallmark of an opinion. *Omnicare*, 575 U.S. at 183 ("[A] statement of fact ('the coffee is hot') expresses certainty about a thing, whereas a statement of opinion ('I think the coffee is hot') does not.").

These valuations and projections are not the only examples of subjective line items; others abound, even in the same cases. *See, e.g.*, *Fait*, 655 F.3d at 110 (goodwill is necessarily subjective); *see also infra* Part II.C. What matters is the exercise of judgment.

C. The line items at issue here require subjective judgment and therefore must be analyzed as opinions under *Omnicare*.

Within this framework, the line items at issue in this case—revenue, net loss, and net loss per share—are properly understood as opinions. They rest on an "express[ion of] judgment" as to whether a Managed Services Agreement (MSA) should be classified as either an operating or capital lease, based on the projected "useful life" of a

product. *See DeCarlo*, 2023 WL 11965444, at *5 (quoting *Fait*, 655 F.3d at 119–10).

And the "useful life" of the leased property itself requires an estimate—another exercise of judgment. *See* Appellants' Br. 38 (citing 3-ER-457–58 ¶ 169). While an estimation like this might "involve some factual inputs, [it] necessarily require[s] judgment and thus [is a] statement[] of opinion or belief, not of fact." *City of Westland Police & Fire Ret. Sys. v. MetLife, Inc.*, 129 F. Supp. 3d 48, 68 (S.D.N.Y. 2015) (quotation omitted); *see, e.g.*, *Fait*, 655 F.3d at 110 (estimates of goodwill, which "depend on management's determination of the 'fair value' of the assets acquired and liabilities assumed," are opinions); *Chapman v. Mueller Water Prods.*, 466 F. Supp. 3d 382, 398 (S.D.N.Y. 2020) (same, as applied to estimates of warranty reserves); *Pirnik v. Fiat Chrysler Autos., N.V.*, 2016 WL 5818590, at *8 (S.D.N.Y.) (same, as applied to estimates of "reserves for product warranties and recalls").

Bloom Energy's valuation of revenue required it to exercise judgment to determine how certain contingent liabilities should be treated under certain GAAP provisions that required "the exercise of considerable judgment." 1-ER-27–28; *see* Appellants' Br. 4, 12. It is

therefore an opinion, just as courts have found other similar revenue statements to be. *See, e.g.*, *Ortiz*, 537 F. Supp. 3d at 666 (far from merely "counting beans," the "valuations of . . . revenue" in dispute were "plainly 'not matters of objective fact' but rather '. . . inherently subjective and involve management's opinion'" (ultimately quoting *Fait*, 655 F.3d at 110)); *Sjunde AP-Fonden v. Gen. Elec. Co.*, 417 F. Supp. 3d 379, 404 (S.D.N.Y. 2019) (valuation of "contract assets," which are recognized revenues, is an opinion that reflects "'management's opinion or judgment' as to how 'a variety of predictable and unpredictable circumstances' will play out" (citation omitted)).

Bloom Energy's valuation of projected losses is also a matter of opinion because it, too, required an exercise of professional judgment. *See, e.g.*, *Fait*, 655 F.3d at 113 (estimations of "loan loss reserves reflect management's opinion or judgment about what, if any, portion of amounts due on the loans ultimately might not be collectible"); *In re Perrigo Co. PLC Sec. Litig.*, 435 F. Supp. 3d 571, 585 (S.D.N.Y. 2020) (disputed estimate of possible loss was subjective, as it "require[d] the exercise of judgment" in applying "GAAP to a particular set of circumstances").

In sum, whether the MSA was a capital lease or an operating lease required layers of subjective analysis, and the estimates and valuations "resulting from" that determination—including the challenged line items here—are opinions. *See AmTrust I*, 2019 WL 4257110, at *14. The district court appropriately analyzed these line items as opinions under *Omnicare*.

* * *

This Court should decline Plaintiffs' invitation to apply a categorical rule that all financial statement line items are facts, regardless of the evaluative process by which those line items were derived. Instead, it should adopt the situation-specific inquiry used by other federal courts: where a judgment cannot be based solely on objective standards, it is inherently subjective and therefore must be analyzed as an opinion under *Omnicare*.

III. Extending Section 11 liability in the ways Plaintiffs suggest would harm American capital markets, issuers, and investors.

Expanding Section 11 liability as Plaintiffs suggest—holding auditors liable for untrue statements they did not make, and holding auditors and issuers liable for subjective judgments in financial

statement line items later proven to be mistaken—would threaten auditors and issuers with essentially unchecked liability for professional opinions that later prove to be incorrect.

It is critically important to the securities markets that Section 11 liability does not extend beyond *the statement(s)* that an auditor "purports to have . . . prepared or certified" within the meaning of the statutory text. 15 U.S.C. § 77k(a)(4). And it is equally important that, when a disputed line item in a financial statement is derived from professional opinion or belief, the auditor or issuer not be held strictly liable if the statement later proves to be wrong. *See id.* To hold otherwise would lead to at least three adverse consequences.

First, Plaintiffs' proposed rule would hinder American capital markets in their efforts to compete against foreign capital markets. Either holding auditors liable for statements they did not make or imposing strict liability under Section 11 for truthful opinions and beliefs included in financial statements would likely "raise the cost of being a publicly traded company under [U.S.] law and shift securities offerings away from domestic capital markets," as "[o]verseas firms with no other exposure to our securities laws could be deterred from doing

business here." *Stoneridge Inv. Partners, LLC v. Sci.-Atl.*, 552 U.S. 148, 164 (2008).

Indeed, there is a growing world market for securities offerings—in significant part because foreign companies seek to avoid litigation risks for offerings in the United States. *See, e.g.*, Comm. on Capital Mkts. Reg., *Continuing Competitive Weakness in U.S. Capital Markets* (May 1, 2014) ("U.S. capital market competitiveness showed even greater signs of weakness in the first quarter of 2014, when measures of aversion to U.S. public equity markets remained at levels not seen since the 2007–2008 financial crisis."). And because opinions are more likely to later be proved inaccurate in innovative and risky industries, companies in emerging fields could be at special risk of being deterred from engaging in public offerings in the United States. The potential costs of litigation could discourage companies from participating in the American capital markets at all.

Second, and relatedly, Plaintiffs' rule would increase costs associated with securities litigation even further. Section 11 "places a relatively minimal burden on a plaintiff" alleging that an auditor or issuer expressed an untrue statement of fact. *Herman & MacLean*, 459

U.S. at 382. "[P]laintiffs alleging violations of Section[] 11 . . . need [not] plead scienter, reliance, or loss causation." *Hildes v. Arthur Andersen LLP*, 734 F.3d 854, 859 (9th Cir. 2013) (citations omitted). Section 11 requires little more than pleading and proving an untrue or misleading statement of fact, and "[l]iability against the issuer of a security is virtually absolute, even for innocent misstatements." *Id.* These minimal pleading requirements and "virtually absolute" liability for factual misstatements and omissions (*see id.*) make Section 11 an attractive vehicle for investor plaintiffs and their lawyers.

So does the absence of any reliance requirement, which makes it easier for Section 11 claims to survive a motion to dismiss and to be litigated as class actions. *Cf. Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 462 (2013) ("requir[ing] . . . plaintiffs [to] establish reliance would ordinarily preclude certification of a class action seeking money damages"). "Since the passage of the Private Securities Litigation Reform Act (PSLRA) in 1995, thousands of [securities fraud] class action lawsuits have been filed alleging trillions in shareholder damages." U.S. Chamber Institute for Legal Reform, *The Real Costs of*

U.S. Securities Class Action Litigation 1–2 (2020).[3] Although most of these cases "settle or are dismissed," "shareholders experience a stock price drop associated with the filing of a securities fraud class action lawsuit and . . . lose much more than they gain in any subsequent settlement amount." *Id.* at 2. Moreover, "[t]he extensive discovery and the potential for uncertainty and disruption in a lawsuit could allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge*, 552 U.S. at 149.

These low barriers to liability are easier to justify if Section 11 remains "limited in scope." *See Herman & MacLean*, 459 U.S. at 382. But if the scope of liability is expanded in the way Plaintiffs propose, these problems will be compounded.

Third, and especially in light of this increase in potential exposure, Plaintiffs' proposed categorical rule would have a "chilling effect . . . on the robustness and candor of disclosure." H.R. Conf. Rep. 104-369, at 43 (1995). It would deter companies from providing investors with valuable insights about their businesses, including those

[3] https://instituteforlegalreform.com/wp-content/uploads/2020/10/EconomicConsequences_Web.pdf.

opinions and beliefs that prove to be correct. If issuers continue to include opinions in their offering documents, this could result in increased underwriting fees as compensation for the increased risk and uncertainty. Alternatively, "management's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448–49 (1976).

Not only would this chilling effect harm investors, it would also harm market efficiency and contravene the Securities Act's disclosure objectives. *See* Wendy Gerwick Couture, *Opinions Actionable as Securities Fraud*, 73 La. L. Rev. 381, 406 (2013) ("[T]he unique insights of companies and their officers and directors are essential to market efficiency."); Congressional Research Service, *SEC Securities Disclosure: Background and Policy Issues* 1 (Aug. 20, 2024)[4] (Securities Act, which "is often referred to as the 'truth in securities' law," "focuses on disclosure").

[4] https://crsreports.congress.gov/product/pdf/IF/IF11256.

Amici urge this Court to decline Plaintiffs' invitation to extend strict liability for opinions expressed by auditors and issuers, and instead adopt the district court's nuanced, well-reasoned approach.

CONCLUSION

For all these reasons (as well as those explained in PwC's response brief), the Court should affirm the decision below.

Dated: December 2, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this BRIEF OF *AMICI CURIAE* complies with the word-count limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Rule 32(f), it contains 5,214 words. This document complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO in 14-point Century Schoolbook.

/s/ Linda T. Coberly
Linda T. Coberly

Dated: December 2, 2024

CERTIFICATE OF SERVICE

I certify that on December 2, 2024, I caused this BRIEF OF *AMICI CURIAE* to be electronically filed with the Clerk of Court using the ECF system, which will notify all counsel of record.

/s/ Linda T. Coberly
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Dated: December 2, 2024