

No. 25-

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IN THE  
**Supreme Court of the United States**

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JAMES EVERETT HUNT, *et al.*,

*Petitioners,*

*v.*

PRICEWATERHOUSECOOPERS LLP,

*Respondent.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

The Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (the “Act”), requires an issuer to register its securities to be offered to the public by filing a registration statement with the United States Securities & Exchange Commission. 15 U.S.C. § 77e. § 7(a) of the Act, 15 U.S.C. § 77g(a), together with Schedule A, requires a registration statement to include the issuer’s historical financial information, including a balance sheet and a profit and loss statement. 15 U.S.C. § 77aa(25) and (26). The Act also requires that the balance sheet and profit and loss statement included in a registration statement be “certified by an independent public or certified accountant.” *Id.* Where the financial information contained in a registration statement contains material misrepresentations, Section 11(a) of the Act, 15 U.S.C. § 77k(a), provides that investors have a claim against certain named defendants, including any accountant who certified the misleading or erroneous financial statements. 15 U.S.C. § 77k(a)(4). The accountant may avoid liability by meeting its burden to prove it acted with reasonable care. 15 U.S.C. § 77k(b)(3).

This petition arises from the Ninth Circuit’s affirmance of the District Court’s dismissal of Petitioners’ claims pursuant to Section 11(a) of the Act against Respondent PricewaterhouseCoopers LLP (“PwC”). *Hunt, et al. v. PricewaterhouseCoopers LLP*, 159 F.4th 603 (9th Cir. 2025). That appeal arose from PwC’s certification of misleading historical financial statements contained in the registration statement of Bloom Energy Corporation. The petition presents two issues where the Ninth Circuit’s decision departs from decisions of this Court as well as other Circuits:

1. Whether to adequately plead a claim under Section 11(a)(4) of the Act against a certifying accountant based

on material misrepresentations contained in certified financial statements in a registration statement, a plaintiff must plead facts showing that the accountant “did not have a ‘reasonable ground to believe and did [not] believe, at the time such part of the registration statement became effective, that the statements therein were true’”, thus anticipating and negating the accountant’s affirmative due diligence defense under Section 11(b)(3), on which the defendant bears the burden of proof.

2. Whether statements of historical financial information such as revenue, net loss, and net loss per share, reported in financial statements certified by an independent accountant and later restated as materially misstated, are actionable misrepresentations of fact under Section 11(a) of the Act.

**PARTIES TO THE PROCEEDING**

Petitioners are James Everett Hunt, Juan Rodriguez, Kurt Voutaz, Joel White, Andrew Austin, Scott Kline, and Ryan Fishman. Mr. Hunt was the Lead Plaintiff and the other Petitioners were additional named plaintiffs in the class action in the district court and the Appellants below.

Respondent PricewaterhouseCoopers LLP was a defendant in the district court and the Appellee below. The stock ticker symbol for Respondent is BE, and it trades on the New York Stock Exchange.

*iv*

**RELATED PROCEEDINGS**

United States District Court (N.D. Cal.):

*Hunt v. Bloom Energy Corp.*, No.19-cv-2935-HSG  
(May 9, 2024)

United States Court of Appeals (9th Cir.):

*Hunt v. PricewaterhouseCoopers LLP*, No. 24-3568  
(Dec. 29, 2025)

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## INTRODUCTION

In 1933, Congress expressly enacted a remedy for investors like plaintiffs who purchase securities traceable to a registration statement that contains erroneous financial statements. Section 11(a) of the Securities Act of 1933, 15 U.S.C. § 77k(a), provides that investors have a claim against certain named defendants, including any accountant who certified a misleading or erroneous financial statement included in the registration statement. 15 U.S.C. § 77k(a)(4). The accountant may avoid this liability by meeting its burden to prove it acted with reasonable care. 15 U.S.C. § 11(b)(3). This is entirely consistent with the two-fold purpose of the Securities Act: to require greater disclosures from issuers, especially of reliable financial information certified by public accountants, and a liability regime that places a “minimal burden” on investors, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983), and allocates “the risk of uncertainty” of liability to defendants. *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1423 (9th Cir. 1994). “The Securities Act of 1933 (1933 Act), 48 Stat. 74, as amended, 15 U.S.C. § 77a *et seq.*, was designed to provide investors with full disclosure of material information concerning public offerings of securities in commerce, to protect investors against fraud and, through the imposition of specified civil liabilities, to promote ethical standards of honesty and fair dealing.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976).

By affirming the District Court’s dismissal of Petitioners’ claims against PwC based on its certification of misleading historical financial statements contained in Bloom Energy’s registration statement, the Ninth Circuit upheld the framework created by Congress as well as

split from authority from this Court and other circuits. *First*, the Ninth Circuit upheld dismissal of Petitioners' claim because they failed to plead "that PwC did not have a 'reasonable ground to believe and did [not] believe, at the time such part of the registration statement became effective, that the statements therein were true.'" 17a (citing § 77(k)(b)(3)(A)). Under Section 11(b)(3), however, reasonable care is an affirmative defense on which PwC has the burden of proof. It is hornbook law that a plaintiff is not required to plead facts in its complaint to negate a potential affirmative defense and this Court as well as every other circuit court to address this issue have repeatedly confirmed that plaintiff bears no such burden under Section 11. *Herman & MacLean*, 459 U.S. at 382 (under Section 11, accountant bears burden of proving due diligence); *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1423 (9th Cir. 1994) (reversing summary judgment in favor of accountant and ordering trial for accountant to establish due diligence defense); *see also In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 360, at n.7 (2d Cir. 2010) ("Generally speaking, defendants bear the burden of demonstrating the applicability of each of these defenses, which are therefore unavailing as a means of defeating a motion to dismiss pursuant to Rule 12(b)(6)."); *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 369 (5th Cir. 2001) (defendants bear burden of pleading and proving due diligence defense).

*Second*, the Ninth Circuit held that Bloom Energy's statements of total revenue, net loss, and net loss per share, figures in audited financial statements that were subsequently restated as materially wrong, were not actionable misstatements of fact, but rather protected "pure statements of opinion" under *Omnicare, Inc. v.*

*Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175 (2015). Because those items reflected accounting “judgments” about lease classification, the Ninth Circuit held they could not be false unless plaintiffs pleaded that Bloom Energy disbelieved its own numbers and PwC disbelieved its own certification of them.

That holding cannot be squared with the Ninth Circuit’s own controlling precedent, which held decades ago that a company that “substantially overstate[s] its revenues . . . make[s] false or misleading statements of material fact.” *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1418 (9th Cir. 1994) (quoting *Malone v. Microdyne Corp.*, 26 F.3d 471, 478 (4th Cir.1994)); *see also Cooper v. Pickett*, 137 F.3d 616, 626-27 (9th Cir. 1997) (same). The opinion did not mention *Worlds of Wonder*. More broadly, the decision creates a circuit conflict. The Second Circuit has held that a “subsequent restatement of its financial results and disclosure of material weaknesses in its internal controls and financial-reporting and accounting practices suffice to establish that these statements were in fact false at the time they were made.” *Gimpel v. The Hain Celestial Grp., Inc.*, 156 F.4th 121, 139–40 (2d Cir. 2025); *see also Sherman v. Abengoa, S.A.*, 156 F.4th 152, 167 (2d Cir. 2025)(errors in applying percentage-of-completion accounting in financial statements were sufficient to state Section 11 claim for factual misrepresentation). Numerous other circuits, including the Fourth, Fifth, Seventh, and Eighth Circuits, are in accord with this treatment of historical financial results as statements of fact that are actionable under the Act if they are misstated.<sup>1</sup>

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1. *See Pension Tr. Fund for Operating Eng’rs v. Kohl’s Corp.*, 895 F.3d 933, 938–39 (7th Cir. 2018)(restated balance sheet due

This case provides an excellent opportunity to address the questions presented because the Ninth Circuit's opinion presents the issues cleanly. Petitioners' complaint was dismissed as a matter of law at the pleading stage so there are no factual disputes or procedural complications. At the pleading stage, the allegations of errors in Bloom Energy's financial statements certified by PwC are presumed to be true. Few securities cases proceed to trial so the opportunity to address this issue in the future will be limited.

The stakes are substantial. Each year, hundreds of billions of dollars in securities are offered to the public, and investors in those offerings rely on audited financial statements as the most important objective signal of an issuer's financial condition. The SEC has identified both net income or loss and earnings or loss per share as "financial items generally considered to be of primary importance to investors . . .". 17 C.F.R. §229.10(b)(2). The innovation by Congress in 1933 to require accountant certification was central to its reform of the securities offering legal regime following the stock market crash

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to incorrect lease accounting were actionable false statements of fact); *Edward J. Goodman Life Income Tr. v. Jabil Cir., Inc.*, 594 F.3d 783, 790 (11th Cir. 2010)(plaintiff adequately pleaded falsity based on restated financial statements); *Matrix Cap. Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 183 (4th Cir. 2009) (plaintiff pleaded falsity of restated financial statements); *Barrie v. Invoice-Brite, Inc.*, 397 F.3d 249, 258 (5th Cir.), *opinion modified on denial of reh'g*, 409 F.3d 653 (5th Cir. 2005)(restated earnings and revenue figures were adequately alleged to be false when made); *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1104 (10th Cir. 2003), *as amended on denial of reh'g* (Aug. 29, 2003)(false statements of net income and operating income were actionable); *Gebhardt v. ConAgra Foods, Inc.*, 335 F.3d 824, 829–31 (8th Cir. 2003)(restated revenues were misrepresentations of fact).

and the Great Depression. Congress required certification by an independent accountant precisely because investors cannot verify those numbers themselves and gave them an explicit remedy when the numbers prove to be false. As the Senate Report in 1933 noted: “If one of two presumably innocent persons must bear a loss, it is familiar legal principle that he should bear it who has the opportunity to learn the truth and has allowed untruths to be published and relied upon. Moreover, he should suffer the loss who occupies a position of trust in the issuing corporation toward the stockholders, rather than the buyer of stock who must rely upon what he is told.” Sen. Rep. 73-47, at 5.

The decision below undermines this Congressional purpose and insulates both the issuer and its certifying accountant from liability for misstated historical financial information unless an investor can plead and prove fraud. This contravenes the purpose of the Act which is designed to place a “minimal burden” on investors. *Herman & MacLean*, 459 U.S. at 382. In *Omnicare*, this Court observed that limiting the scope of Section 11 created a risk that issuers would have a “virtual *carte blanche*” to publish information in registration statements “free from worry about § 11.” *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 193 (2015). Such a result “would ill-fit Congress’s decision to establish a strict liability offense promoting ‘full and fair disclosure’ of material information.” *Id.* (quoting *Pinter v. Dahl*, 486 U.S. 622, 646 (1988)). The Ninth Circuit decision in this case is a similar ill fit to the express words and structure of Section 11.

This Court should grant certiorari.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is reported at 159 F.4th 603. The opinion of the district court (App. *Infra*, 28-82a) is not published in the Federal Supplement but is available at 2021 WL 4461171.

## JURISDICTION

The court of appeals denied rehearing en banc on December 18, 2025. App., *infra*, 85a-86a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in full in the appendix to this petition. App., *infra*, 87a-93a.

## STATEMENT OF THE CASE

### A. Factual Background

On July 26, 2018, Bloom Energy became a public company by offering its common shares to the public pursuant to a registration statement filed with the SEC. Dkt. 113 at 12-13, ¶50 of the Second Amended Complaint for Violations of the Federal Securities Laws.<sup>2</sup> The Registration Statement included Bloom Energy's audited financial statements for the years ended December 31,

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2. Citations to "Dkt." refer to docket entries from *Hunt v. Bloom Energy Corp.*, No.19-cv-2935-HSG.

2016 and 2017. Dkt. 113 at 25-26, ¶90; Dkt. 131-1 (Bloom Energy Corporation, Amendment No.41 to Form S-1 Registration Statement (Form S-1/A) (July 24, 2018)). PwC certified Bloom Energy's 2017 financial statements included in the registration statement. Dkt. 113 at 38-39, ¶¶170-72. Pursuant to Schedule A to the Securities Act, 15 U.S.C. § 77aa, *Schedule of Information Required in Registration Statement*, Bloom Energy could not have filed its registration statement without including its 2017 financial statements "certified by an independent public or certified accountant" such as PwC. 15 U.S.C. § 77aa(25) and (26).

The registration statement registered over 20.7 million shares at \$15 per share and began trading on July 25, 2018. *Id.*, at 13, ¶51. Bloom Energy received proceeds of \$284.3 million, net of underwriting discounts, commissions, and estimated offering costs. *Id.* Petitioners purchased shares traceable to the registration statement. *Id.*, at 7-8, ¶¶ 8-14.

On February 12, 2020, Bloom Energy announced that shareholders should not rely on its previously issued financial statements, including its 2017 audited financial statements included in its registration statement. *Id.*, at 6, ¶3. Bloom Energy later admitted that its 2017 financial statements that were certified by PwC and included in the registration statement overstated its revenues by over \$10 million and understated its net loss by \$13.7 million. *Id.*, at 25-26, ¶90. A restatement is the "process of revising previously issued financial statements to reflect the correction of an error in those financial statements." Dkt. 138-6 (FASB Accounting Standards Codification 250-10-20 (Fin. Accounting Standards Bd.)). Under GAAP,

previously issued historical financial statements are not adjusted to reflect a change in estimates, only to correct errors, which include the use of an accounting principle inconsistent with GAAP. *Id.* In announcing its restatement, Bloom Energy admitted that “the terms of our Managed Services Agreements and similar arrangements, including the events of default provisions,” did not “satisfy[y] the requirements for sales under the revenue accounting standards.” Dkt. 131, at 25, ¶ 89.

Following its February 12, 2020, announcement that shareholders should not rely on its previously issued audited financial statements, Bloom Energy’s stock price dropped from \$10.46 per share at close on February 12, 2020, to open at \$9.02 on February 13, 2020, a drop of 13.8% on high volume. Dkt. 131, at 30, ¶104; Dkt. 138-3, at 3 (Bloom Energy Corp. (BE), Historical Data, Yahoo Finance, <https://finance.yahoo.com/quote/BE/history>). Following the filing of its 2019 Annual Report on Form 10-K with the SEC on March 31, 2020, which published its correct financial statements dating back to the IPO and quantified the extent of its previous errors, Bloom Energy’s stock price dropped further from \$5.23 per share at close on March 31, 2020, to close at \$4.46 per share on April 1, 2020, a drop of 14.7% on high volume. Dkt. 131, at 30, ¶104; Dkt. 138-3, at 2. Bloom Energy’s stock price declined \$2.21 per share following the announcements of the misstatements in its audited financial statements included in its registration statement, a decline of 21% from its closing price on February 12, 2020.

Petitioners alleged claims pursuant to Section 11(a) of the Securities Act, 15 U.S.C. § 77k(a) against PwC in their Second Amended Complaint. Dkt. 131, 30-31, ¶¶105-123.

## B. Procedural Background

**1. District Court Proceedings.** In 2019, Petitioners, a putative class of former and current Bloom Energy investors, filed a class action in the United States District Court for the Northern District of California against Bloom Energy, nine of its officers and directors, and ten underwriters of the 2018 IPO. PwC was added as a defendant following Bloom Energy’s restatement of its historical financial information contained in its registration statement. In their Second Amended Complaint, Petitioners alleged that PwC was liable under Section 11(a)(4) of the Securities Act because it had certified the 2017 financial statements included in the registration statement, which were materially misstated.

All Defendants moved to dismiss. The district court partially dismissed the claims against the other Defendants — Bloom Energy, its officers and directors, and the underwriters — but dismissed the claims against PwC in their entirety. As to PwC specifically, the district court held that PwC’s audit opinion was an inactionable statement of opinion under *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175 (2015). 61a-67a. The court reasoned that PwC’s certification said only that the financial statements “present fairly, in all material respects, the financial position of the Company . . . in conformity [with GAAP],” and that such a statement reflected PwC’s professional judgment rather than an assertion of objective facts. 64a-65a.

Second, the district court held that “the financial statements are the responsibility of [Bloom Energy’s]

management” and that PwC had only “the responsibility to express an opinion on [Bloom Energy’s] consolidated financial statements based on [its] audits.” *Id.* The court declined to hold PwC liable for the underlying revenue, net loss, and net loss per share figures contained in Bloom Energy’s financial statements, on the ground that those figures were prepared by Bloom Energy’s management, not by PwC.

Third, the district court rejected Petitioners’ theory that PwC’s audit opinion incorporated, as embedded statements of fact, the specific financial figures in the underlying financial statements that PwC had audited and certified. 65a-66a. The court held that PwC’s certification was not a guarantee that those figures were accurate but was limited to the conclusions expressed in PwC’s audit opinion itself.<sup>3</sup>

The district court entered its order dismissing all claims against PwC on September 29, 2021, and granted Petitioners leave to amend. After Petitioners settled their remaining claims against all other Defendants the district court entered final judgment dismissing all claims against PwC. 83a-84a.

**3. The Ninth Circuit’s Decision.** Petitioners appealed to the United States Court of Appeals for the Ninth Circuit, Case No. 24-3568. The Ninth Circuit affirmed the dismissal in full, relying on two independent holdings now presented as Questions for this Court’s review.

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3. The District Court did not address PwC’s argument that the errors and misstatements in Bloom Energy’s 2017 financial statements were not material. 35a.

**First**, the Ninth Circuit held that Section 11 does not impose strict liability on accountants. The court read Section 11(b)(3)(B) — which permits an accountant to escape liability by demonstrating that it had “after reasonable investigation, reasonable ground to believe and did believe” that the statements it certified were true — as establishing a negligence standard that displaces liability at the pleading stage absent allegations that the accountant lacked a reasonable basis for its belief. 2a. The Ninth Circuit affirmed dismissal because Petitioners had not pleaded facts establishing that PwC lacked a reasonable ground to believe the financial statements were accurate. 12a-23a. It did not cite, distinguish, or otherwise address *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), in which this Court held that under Section 11 the accountant bears the burden of proving due diligence, or the Ninth Circuit’s own precedent holding that an accountant bears the burden of proving its due diligence, not the plaintiff. *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1418 (9th Cir. 1994).

**Second**, the Ninth Circuit extended *Omnicare* to accountants and held that neither PwC’s certification nor the revenue, net loss, and net loss per share figures in Bloom Energy’s financial statements were actionable misrepresentations of fact. 2a-3a, 24a-27a. As to the financial statements that Bloom Energy later restated as in error, the Ninth Circuit held that they were statements of opinion because they reflected accounting judgments about Bloom Energy’s lease classification. Because those figures were to be treated as opinions, Petitioners were required under *Omnicare* to plead that Bloom Energy and PwC subjectively disbelieved the accuracy of the revenue and loss figures when they were initially published. The

Ninth Circuit did not cite or discuss *In re Worlds of Wonder Securities Litigation*, 35 F.3d 1407, 1418 (9th Cir. 1994), in which the Ninth Circuit held that a company that “substantially overstate[s] its revenues . . . make[s] false or misleading statements of material fact.”<sup>4</sup>

Petitioners timely filed a Petition for Panel Rehearing and Rehearing En Banc. The petition argued that the two holdings directly conflicted with controlling decisions of the Ninth Circuit and the Supreme Court and urged the full Ninth Circuit to reconsider. The court denied rehearing without opinion on December 18, 2025. 85a-86a. This petition for a writ of certiorari follows.

## **REASONS FOR GRANTING THE PETITION**

### **I. THE NINTH CIRCUIT’S PLEADING RULE FOR SECTION 11(b)(3) DUE DILIGENCE CONFLICTS WITH THIS COURT’S PRECEDENT AND WARRANTS REVIEW.**

Section 11’s liability structure is deliberately sequential. A plaintiff establishes a *prima facie* case by alleging that a registration statement contained a material misstatement. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983). That showing triggers strict liability for the issuer and a burden shift for other defendants such as a certifying accountant: the defendant must then

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4. Like the District Court, the Ninth Circuit appropriately did not address the argument that the errors in Bloom Energy’s 2017 financial statements were immaterial as a matter of law. See *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976) (materiality is a mixed question of law and fact that is rarely appropriate for resolution as a matter of law).

come forward and prove, as an affirmative defense, that it conducted a reasonable investigation and held a reasonable belief that the certified statements were true. 15 U.S.C. § 77k(b)(3)(B)(i); *Herman & MacLean*, 459 U.S. at 382. The plaintiff has no role in that second step. Under Rule 8(a) and the transsubstantive rule this Court confirmed in *Jones v. Bock*, 549 U.S. 199, 212 (2007), a complaint need not anticipate, address, or negate an affirmative defense that the defendant has not yet raised. The Ninth Circuit collapsed this two-step structure into one. By dismissing Petitioners’ complaint because it did not allege that PwC “lacked a reasonable ground to believe” its certification opinion was true, the opinion imported the elements of PwC’s affirmative defense directly into Petitioners’ prima facie case—converting Section 11’s minimal-burden regime into one that requires plaintiffs to plead the absence of due diligence.

**A. The Decision Below Conflicts With This Court’s Holding in *Herman & MacLean* and the Text of Section 11.**

**1. Congress Designed Section 11 to Create Accountability for Materially False Registration Statements.**

The Securities Act was Congress’s foundational response to the market failures that produced the Great Depression, a guarantee to the investing public that when a company sells securities, the financial statements in the offering documents have been independently verified and that those who certify them stand behind that certification with legal accountability.

The Securities Act of 1933 was introduced in the fourth week of President Roosevelt’s administration, as part of the rush of legislation known as the Hundred Days. See Michael E. Doron, *The Colonel Carter Myth and the Securities Act: Using Accounting History to Establish Institutional Legitimacy*, 20 *Accounting History* 5, 8–9 (2015). The major safeguard Congress chose was full disclosure: Roosevelt told Congress that “no essentially important element attending the issue shall be concealed from the buying public.” See Elisabeth Keller, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, *Ohio State L.J.* 49, 338–39 (1988) (quoting Address to Congress by Franklin D. Roosevelt (March 1933)). Roosevelt’s stated aim was to add to the ancient rule of caveat emptor the further doctrine: “let the seller beware.” *Id.*

Congress replaced the common-law view that auditors could not be liable for negligence to third parties unless those third parties were named in the engagement letter, with the broad negligence liability of section 11 of the 1933 Act, which makes auditors potentially liable to all investors in a public offering if the auditors cannot prove their due diligence. *Ultramares Corp. v. Touche*, 174 N.E. 441, 444–45 (N.Y. 1931) (adopting the privity view of auditor’s third-party liability for negligence); Dain C. Donelson & Robert A. Prentice, *Scienter Pleading and Rule 10b-5: Empirical Analysis and Behavioral Implications*, 63 *Case W. Res. L. Rev.* 441, 509, n.16 (2012). Congress recognized that “private actions for damages could play an important role in assuring compliance” with the disclosure requirements. See Keller, *supra*, at 344–45 (citing Harold Bloomenthal, *Securities Law in Perspective* 64 (1977)).

The Securities Act reflects the Congressional determination that accountants certifying financial statements are among “those whose moral responsibility to the public is particularly heavy.” *Gustafson v. Alloyd Co.*, 513 U.S. 561, 581 (1995) (quoting H.R. Rep. No. 85, 73d Cong., 1st Sess., at 5 (1933)).

## 2. The Statutory Architecture of Section 11.

All registration statements must include certified financial statements, as required by Sections 7(a) and 10 of the Securities Act, 15 U.S.C. §§ 77g(a), 77aa. Those provisions obligate issuers to supply the thirty-two categories of information set out in Schedule A, which the statute treats as the core elements of a compliant registration statement. Schedule A specifically requires “a detailed balance sheet of the assets and liabilities of the issuer *certified* by an independent public or certified accountant.” 15 U.S.C. § 77aa(25)) (emphasis added). The certification of an accountant is not a formality; it is a statutory prerequisite for including financial statements in a registration statement. *Sec. & Exch. Comm’n v. N. Am. Fin. Co.*, 214 F. Supp. 197, 201 (D. Ariz. 1959) (“such a certification cannot be dismissed under the Act as a mere ‘tag’ attached to financial statements.”); *see also Bulldog Inv’rs Gen. P’ship v. Sec’y of Commonwealth*, 953 N.E.2d 691, 698 (Mass. 2011); *Kress v. PricewaterhouseCoopers LLP*, No. 08-0965, 2013 WL 140102, at \*8 n.20 (E.D. Cal. Jan. 10, 2013).

Under the Securities Act, the independent auditor is responsible for examining the issuer’s books and records to determine whether its financial statements have been prepared in accordance with generally accepted accounting

principles (GAAP). *United States v. Arthur Young & Co.*, 465 U.S. 805, 811 (1984). As this Court explained in *Arthur Young*, the independent auditor “assumes a *public* responsibility transcending any employment relationship with the client” and owes “ultimate allegiance to the corporations’ creditors and stockholders, as well as to the investing public.” *Id.* at 817–18 (emphasis in original). This “public watchdog” function “demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust.” *Id.* The purpose of the audit report is to opine “whether the financial statements, taken as a whole, fairly present the financial position and operations of the corporation for the relevant period.” *Id.* at 811.

It is precisely because the certification carries such weight with investors, serving as the independent imprimatur that the financial statements can be trusted, that Congress made the certifying accountant directly answerable when the information in the registration statement is materially false. “Section 11 was designed to assure compliance with the disclosure provisions of the Securities Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering.” *Herman & MacLean*, 459 U.S. at 381–82.

### **3. Section 11’s Plain Text Assigns the Burden of Proving Diligence to the Accountant, Not the Investor.**

Section 11 of the Securities Act, 15 U.S.C. § 77k(a), creates a straightforward liability regime. Section 11(a) provides a cause of action for any person who acquired a security in reliance on a registration statement that

“contained an untrue statement of a material fact or omitted to state a material fact . . . necessary to make the statements therein not misleading,” as against, *inter alia*, “every accountant . . . who has with his consent been named as having prepared or certified any part of the registration statement . . . with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him.” 15 U.S.C. § 77k(a)(4) (emphasis added).

Any investor who purchases a security pursuant to a registration statement containing a material misstatement has a claim against the certifying accountant. 15 U.S.C. § 77k(a)(4). Congress gave investors a path to recovery requiring no proof of fraud, no proof of reliance, and no proof of loss causation. *Herman & MacLean*, 459 U.S. at 382. To establish a *prima facie* case, the investor need only show that the registration statement contained a material misstatement. *Id.* Congress then gave the accountant—not the investor—the opportunity to escape liability by proving that the accountant “had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true.” 15 U.S.C. § 77k(b)(3)(B)(i). This Court expressly confirmed that the due diligence defense “is an affirmative defense” on which “defendants bear the burden of demonstrating.” *Herman & MacLean*, 459 U.S. at 382.

The liability regime enacted by Congress was designed to place “minimal burden” on the plaintiff. *Id.* The Securities Act of 1933 “was designed to provide investors with full disclosure of material information concerning public offerings of securities in commerce,

to protect investors against fraud and, through the imposition of specified civil liabilities, to promote ethical standards of honesty and fair dealing.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976) (citing H.R.Rep. No.85, 73d Cong., 1st Sess., 1-5 (1933)).

Section 11 affords the auditor a due diligence defense if it had, “after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading.” 15 U.S.C. § 77k(b)(3)(B)(i) *See generally* William K. Sjostrom, Jr., *The Due Diligence Defense Under Section 11 of the Securities Act of 1933*, 44 Brandeis L.J. 549 (2006). The reasonable investigation standard requires that accountants be held to the standard “recognized in their profession.” *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643, 703 (S.D.N.Y. 1968). An accountant’s “good faith compliance” with GAAP “discharges the accountant’s professional obligation to act with reasonable care” and establishes the due diligence defense. *Monroe v. Hughes*, 31 F.3d 772, 774 (9th Cir. 1994).

#### **4. This Court’s Precedent and Other Circuit Authority Confirms the Burden Allocation—and the Ninth Circuit Inverted It.**

To state a claim against an accountant under Section 11, the accountant must have prepared *or certified* a statement in connection with a registration statement that was false or misleading. *Herman & MacLean*, 459 U.S. at 382 n.13. (emphasis added).

A long line of precedent applying the statute’s plain language provides that an auditor which consents to serve as an accounting expert in connection with a registration statement is liable under Section 11 for the misstatements of material fact contained in the registration statement’s certified financial statements. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82, n. 13 (1983); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 581 (1995); see also, *In re Lehman Bros. Sec. & ERISA Litig.*, 131 F. Supp. 3d 241, 259–60 (S.D.N.Y. 2015) (“It is difficult to imagine what Congress might have meant by an accountant’s certification if not auditor’s opinions such as those at issue in this case.”).

The Ninth Circuit previously applied those principles directly. In *Worlds of Wonder*, the Ninth Circuit reversed summary judgment for an auditor because, despite complex accounting issues, the auditor had to face liability to investors if “the 1987 financial statements were in fact misleading.” *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1423 (9th Cir. 1994). Every other defendant had been entitled to rely on the auditor’s expertise—and therefore escaped liability. *Id.* at 1421. But not the auditor itself. *Id.* Similarly, in *Garbini v. Protection One, Inc.*, 49 F. App’x 169, 170 (9th Cir. 2002), the Ninth Circuit upheld a § 11 claim against an auditor based on misrepresentations in the issuer’s financial statements, finding that fact-intensive inquiries into whether the issuer overstated its earnings are best left to trial or summary judgment. Other Circuit Courts were in accord. See *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 360, at n.7 (2d Cir. 2010) (“Generally speaking, defendants bear the burden of demonstrating the applicability of each of these defenses, which are therefore unavailing as a means of

defeating a motion to dismiss pursuant to Rule 12(b)(6).”); *Lone Star Ladies Inv. Club v. Schlotzsky’s Inc.*, 238 F.3d 363, 369 (5th Cir. 2001)(defendants bear burden of pleading and proving due diligence defense).

Here, the Ninth Circuit inverted this allocation of burden. It affirmed dismissal because Petitioners had not alleged in their complaint facts showing that PwC did not have a reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the financial statements contained therein were accurate. In other words, the Ninth Circuit required Petitioners to plead facts sufficient to negate PwC’s affirmative due diligence defense before PwC had ever been required to raise it, let alone prove it. This directly contradicts *Herman & MacLean* and other circuit authority which would assign that burden to PwC, not to the investors.

The Ninth Circuit did not attempt to distinguish *Herman & MacLean* or other authority. The conflict is unambiguous and squarely presented.

**5. The Ninth Circuit Committed A Textual Error That Renders the Word “Certified” Superfluous and Negates the Role for Due Diligence Statutory Defense.**

The Ninth Circuit concludes its analysis on this issue with “PwC’s audit opinion did not make any material misstatements of *fact* or omissions but rather was merely a statement of opinion based, again, upon the subjective judgment of the MSA classification.” Thus, “PwC is not liable for the statements in its audit opinion.” 9a. This

conclusion betrays a fundamental misunderstanding of both the Act and Petitioners' claims. Section 11(a)(4) of the Act, 15 U.S.C. § 77k(a)(4) states that where a registration statement contains a misrepresentation, investors have a claim against "every accountant . . . with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him." Section 11(a)(4) does not, therefore require, and Petitioners do not argue, that PwC's audit opinion itself contains any misrepresentation. The alleged misrepresentation is contained in Bloom Energy's financial statements. PwC's liability under Section 11(a)(4) of the Act results from its certification of the financial statements containing Bloom Energy's misrepresentations. It is conceded by PwC and the Ninth Circuit that PwC certified Bloom Energy's financial statements and, therefore, it is liable for any misrepresentations contained therein, subject to its due diligence affirmative defense.

Any other reading is illogical and renders the words "or certified" entirely superfluous. § 11(a)(4) creates liability for an accountant for statements that "have been prepared or certified by him". The audit opinion is undeniably a document prepared by the accountant. Thus, under the Ninth Circuit's interpretation, where liability is limited to the audit opinion, there are no actionable statements against an accountant that were not "prepared by him". Thus, an accountant does not "certify" any statement that is not already potentially actionable under § 11(a)(4). This is not an appropriate interpretation of a statute, especially where there is another interpretation that gives meaning to each word in § 11(a)(4). *Williams v. Taylor*, 529 U.S. 362, 404–05 (2000)(every word in a statute must be given effect if possible). Thus, under the

plain meaning of § 11(a)(4), an accountant such as PwC is *prima facie* liable to investors for any misstatements contained in its audit opinion itself (a statement prepared by the accountant) *or* contained in the financial statements of the issuer that are the subject of the audit opinion (a statement certified by the accountant). Petitioners here rely on the second option.

The Ninth Circuit’s interpretation of the pleading standard pursuant to § 11(a)(4) of the Act also negates any role for the due diligence defense expressly provided to accountants in § 11(b)(3) of the Act. 15 U.S.C. § 77k(b)(3). Under the standard applied by the Ninth Circuit, it is a practical impossibility for any § 11 plaintiff to plead and prove *prima facie* liability of an accountant without proving at least negligence, if not fraud. According to the Ninth Circuit, to establish liability, a plaintiff would have to prove that either the accountant did not have a basis for its audit opinion (negligence) or did not believe its audit opinion was true when it was published (fraud). Once liability was established under this standard, there would be no remaining scope for any due diligence defense and it would be rendered superfluous. Such an interpretation should be rejected. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“cardinal principle” that a statute ought not to be construed that a clause shall be superfluous).

**B. The Decision Below Also Conflicts With the Transsubstantive Rule That Plaintiffs Need Not Plead Around Affirmative Defenses.**

The Ninth Circuit’s error violates a foundational principle of federal pleading law. Federal Rule of Civil Procedure 8(a) requires only “a short and plain statement

of the claim showing that the pleader is entitled to relief.” This Court has made clear that a complaint need not anticipate affirmative defenses to survive a motion to dismiss. *Jones v. Bock*, 549 U.S. 199, 212 (2007); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The Ninth Circuit itself has applied this principle repeatedly, holding that “a plaintiff is not required to plead around affirmative defenses.” *United States v. Page*, 116 F.4th 822, 829 (9th Cir. 2024); *accord CFTC v. Monex Credit Co.*, 931 F.3d 966, 972 (9th Cir. 2019).

These Supreme Court precedents establish that plaintiffs must plead their *prima facie* case, not disprove potential defenses. Here, that distinction reflects the burdens that Congress confirmed when it expressly placed due diligence on the defense side of the ledger in § 77k(b)(3)(B)(i).

Most recently, the Supreme Court reaffirmed this principle in *Cunningham v. Cornell University*, 604 U.S. 693 (2025). The Court held that ERISA § 1108 exemptions are affirmative defenses, and that a plaintiff need only allege the elements of a claim “notwithstanding the potential applicability of a § 1108 exemption, because an ‘affirmative defense’ is ‘not something the plaintiff must anticipate and negate in her pleading.’” 604 U.S. at 702. The principle is transsubstantive: it applies across all civil litigation. *See also Perry v. Merit Sys. Prot. Bd.*, 582 U.S. 420 (2017) (“in civil litigation, a release is an affirmative defense to a plaintiff’s claim for relief, not something the plaintiff must anticipate and negate in her pleading”).

The opinion correctly noted that PwC certified, within the meaning of Section 11(a)(4), the financial

statements included in its registration statement that were later restated as erroneous. 18a. With sufficient allegations of material misrepresentations in those financial statements—as indicated by the subsequent restatement—that should have been sufficient, under Section 11(a)(4), 15 U.S.C. § 77k(a)(4), to plead a claim against PwC. As in *Worlds of Wonder*, PwC would then have had the opportunity to meet its burden to prove due diligence.

Instead, the Ninth Circuit dismissed Petitioners’ claims at the pleading stage because they failed to allege that PwC did not have a reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were true. 23a. (“Plaintiffs made no allegation that PwC did not sincerely believe that Bloom Energy’s classification of the MSAs aligned with proper accounting principles based on the evidence available at that time.”). The rule the Ninth Circuit thus announced is that, to plead a Section 11 claim against an accountant for misstatements in certified financials, a plaintiff must allege that, after reasonable investigation, the accountant lacked reasonable grounds to believe—and did not believe—those statements were true and free of material omissions.

This conflicts with well-established authority in the Ninth Circuit that plaintiffs are not required to “plead around affirmative defenses.” *Page*, 116 F.4th at 829; *see also Monex Credit*, 931 F.3d at 972. The pleading requirements articulated by the Court below are also inconsistent with the express language of Section 11 and the recognized Congressional intent to place “minimal burden” on plaintiffs. *Herman & MacLean*, 459 U.S. at

382. The Ninth Circuit did not address these conflicts in its opinion.

The practical effect of the ruling below is severe. By requiring Section 11 plaintiffs to plead facts negating the accountant's due diligence defense before the accountant answers the complaint, the Ninth Circuit effectively converted an investor-protective strict liability regime into one requiring near-pleading of negligence. This Court should grant certiorari to reaffirm what *Herman & MacLean* already established and to correct the Ninth Circuit's departure from both the Securities Act and the general federal pleading standard.

**II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT, OTHER CIRCUITS, AND THE NINTH CIRCUIT ITSELF BY HOLDING THAT UNCONDITIONAL STATEMENTS OF REVENUE, LOSS, AND LOSS PER SHARE ARE "PURE STATEMENTS OF OPINION".**

Bloom Energy's 2017 financial statements, certified by PwC and included in its registration statement, reported total revenue of \$375,996,000, a net loss attributable to common stockholders of \$262,599,000, and a net loss per share of \$26.97. The SEC has identified net income or loss and earnings or loss per share as "financial items generally considered to be of primary importance to investors." 17 C.F.R. § 229.10(b)(2). No reasonable investor reading them would understand them as expressing a belief or view rather than a reported result. That, as this Court explained in *Omnicare*, is the defining difference between a statement of fact and a statement of opinion.

The Ninth Circuit nonetheless held that these figures were pure statements of opinion because they resulted from accounting judgments and dismissed Petitioners' claims on the grounds that Petitioners could not show that Bloom Energy's "subjective opinions were based on untrue facts or information that it did not believe." 27a. That holding is wrong for four independent reasons and creates an explicit conflict with decisions from at least four other circuits.

First, *Omnicare* does not apply to unconditional reported financial figures. This Court's holding in *Omnicare* rested on a foundational distinction: a statement framed as an opinion ("We believe our contracts are in compliance with applicable law") conveys uncertainty in a way that a bare assertion of fact does not. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 183 (2015). The statements at issue in *Omnicare* were explicitly framed as beliefs—"We believe our contract arrangements . . . are in compliance with applicable federal and state laws" and "We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements." *Id.* at 179–80. This Court emphasized that such framing signals to investors that the speaker is offering a view rather than a verified result, and that this uncertainty is precisely why such statements are not subject to second-guessing. *Id.* at 189–90 ("Reasonable investors understand that opinions sometimes rest on a weighing of competing facts; indeed, the presence of such facts is one reason why an issuer may frame a statement as an opinion, thus conveying uncertainty."). The *Omnicare* majority said nothing about financial statements that are not framed as opinions. Its reasoning does not extend to them.

Bloom Energy’s reported revenue, net loss, and net loss per share contained none of the signals that *Omnicare* identified as distinguishing opinion from fact. They were not preceded by “we believe” or any equivalent hedge. Nothing on their face indicated that the figures expressed a view rather than a reported result or a statement of fact. Furthermore, Bloom Energy could not have become a publicly traded company without providing this information and without PwC certification.

Second, the decision below conflicts with well-established Ninth Circuit precedent that the Court below failed to address. Long before *Omnicare*, the Ninth Circuit held that reported revenue figures, even those that result from complex accounting analyses, constitute statements of fact. In *In re Worlds of Wonder Securities Litigation*, 35 F.3d 1407 (9th Cir. 1994), the Ninth Circuit affirmed that a company that “substantially overstate[s] its revenues by reporting consignment transactions as sales . . . mak[es] false or misleading statements of material fact,” and it did so even though the underlying GAAP issues were “enormously complex.” *Id.* at 1418, 1421 (quoting *Malone v. Microdyne Corp.*, 26 F.3d 471, 478 (4th Cir. 1994)). Similarly, the revenue recognition in *Software Toolworks* required analysis and exercise of judgment over the terms of certain sales contracts and misstatements of revenue were still held to be misstatements of fact. *In re Software Toolworks, Inc. Securities Litigation*, 50 F.3d 615, 620-22 (9th Cir. 1994); see also *Hemmer Grp. v. SouthWest Water Co.*, 527 F. App’x 623, 625–26 (9th Cir. 2013) (§11 claim alleged when the complaint “adequately alleges the originally reported financial data, the restated financial data, and the difference between the two” thus adequately alleging falsity).

The Court below did not address *Worlds of Wonder*, *Software Toolworks*, or *Hemmer Group*. Its holding that accounting complexity converts unconditional financial figures into unactionable opinions cannot be reconciled with those decisions. This Court has been clear that Section 11 imposes broad liability without regard to reliance or fraudulent intent for any material misstatements or omissions contained in a registration statement, and that the Act’s “stringent standard of liability” extends to all parties who play a direct role in a registered offering. *Herman & MacLean*, 459 U.S. at 381–82. The court’s opinion is irreconcilable with those principles.

Third, the decision below conflicts with the Second Circuit and other circuits to have addressed the question. The rule the Ninth Circuit announced below, that unconditional financial figures are “pure statements of opinion” whenever they involve accounting judgments, has not been embraced by other appellate courts. The conflict is deep and wide.

The Second Circuit has squarely held that statements contained in historical financial statements, even those that depend on the application of complex accounting standards, are not automatically transformed into statements of opinion by virtue of that dependence. In *Gimpel v. The Hain Celestial Group, Inc.*, 156 F.4th 121, 139-40 (2d Cir. 2025), the Second Circuit held that a subsequent restatement of financial results and disclosure of material weaknesses was sufficient to establish that the originally reported figures were false statements of fact when made.<sup>5</sup> This is directly contrary to the holding

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5. Courts in the Second Circuit regularly hold that while restatements are not admissions of wrongdoing, they are a

by the Ninth Circuit in this case. Similarly, in *Sherman v. Abengoa, S.A.*, 156 F.4th 152, 167-69 (2d Cir. 2025), the Second Circuit held that errors in applying percentage-of-completion accounting were sufficient to state a Section 11 factual-misrepresentation claim.

Other Circuits are in accord in their treatment of misstated and restated financials as statements of fact. See *Pension Tr. Fund for Operating Eng'rs v. Kohl's Corp.*, 895 F.3d 933, 938–39 (7th Cir. 2018)(restated balance sheet due to incorrect lease accounting contained actionable false statements of fact); *Edward J. Goodman Life Income Tr. v. Jabil Cir., Inc.*, 594 F.3d 783, 790 (11th Cir. 2010)(plaintiff adequately pleaded falsity based on restated financial statements); *Matrix Cap. Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 183 (4th Cir. 2009) (plaintiff pleaded falsity of restated financial statements); *Barrie v. Intervoice-Brite, Inc.*, 397 F.3d 249, 258 (5th Cir.), *opinion modified on denial of reh'g*, 409 F.3d 653 (5th Cir. 2005)(restated earnings and revenue figures were adequately alleged to be false when made); *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1104 (10th Cir. 2003), *as amended on denial of reh'g* (Aug. 29, 2003) (false statements of net income and operating income were actionable); *Gebhardt v. ConAgra Foods, Inc.*, 335 F.3d 824, 829–31 (8th Cir. 2003)(restated revenues were misrepresentations of fact).

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sufficient basis for pleading that financial statements were false when made. See *zCap Equity Fund LLC v. LuxUrban Hotels Inc.*, 792 F. Supp. 3d 407, 437-39 (S.D.N.Y. 2025), *reconsideration denied*, 2025 WL 2962772 (S.D.N.Y. Oct. 21, 2025) (collecting cases); see also *Africa v. Jianpu Tech. Inc.*, 2022 WL 4537973, at \*9 (S.D.N.Y. Sept. 28, 2022) (“Courts in this District have generally held that ‘misreported financial data are . . . false statements of fact.’”) (internal citations omitted).

The Ninth Circuit's decision in this case is thus an outlier in holding that statements of historical revenue, profit or loss, and earnings or loss per share are statements of opinion rather than fact. This entrenched, multi-circuit conflict warrants this Court's review.

Fourth, even under *Omnicare*, Bloom Energy's financial figures contained embedded factual representations that are independently actionable. SEC Regulation S-X requires registration statements to include financial statements reflecting an issuer's actual financial position, not the issuer's speculation about what that position might be. 17 C.F.R. pt. 210; *see also In re Petrobras Securities Litigation*, No. 14-CV-9662 (JSR), 2016 WL 1533553, at \*4 (S.D.N.Y. Feb. 19, 2016). When Bloom Energy reported its revenue using operating-lease accounting for its MSAs, that reporting carried with it an embedded factual representation: that the terms of those agreements qualified for that accounting treatment and thus permitted the recognition of revenue as sales. Bloom Energy subsequently conceded in its restatement that "the terms of our Managed Services Agreements and similar arrangements, including the events of default provisions," did not "satisfy the requirements for sales under the revenue accounting standards." That concession confirms the falsity of the factual predicate embedded in the original reporting, which PwC certified as part of Bloom Energy's registration statement. The Ninth Circuit erred in treating those figures as "pure statements of opinion" rather than recognizing the factual representations they necessarily contained.

The decision below effectively immunizes from Section 11 liability any misstatement in a financial statement that

can be attributed to an accounting choice. That outcome is irreconcilable with the statute. Section 11 imposes liability for “untrue statement[s] of a material fact,” 15 U.S.C. § 77k(a), and the SEC identifies revenue, net loss, and loss per share as among the most material facts a registration statement can contain. The decision below renders those figures essentially unactionable as a matter of law, no matter how dramatically they overstate revenues or understate losses. This Court should grant certiorari to resolve the circuit conflict, restore *Omnicare*’s proper and limited scope, and preserve the investor protections that Section 11 was enacted to provide.

### **III. THE QUESTIONS PRESENTED ARE OF EXCEPTIONAL IMPORTANCE TO THE INTEGRITY OF THE SECURITIES MARKETS.**

The Ninth Circuit is the locus of American capital formation. The Northern and Central Districts of California handle more technology company IPOs than any other federal judicial district. Hundreds of billions of dollars in securities are offered each year to investors who rely on audited financial statements as the most critical signal of a company’s financial condition.

The decision below sends a disquieting message to those investors. It tells them that when an auditor certifies an issuer’s revenue and loss figures — figures that the issuer is legally required to present, that the auditor is legally required to certify, and that investors depend on to evaluate the offering — and those figures subsequently prove to be wrong enough to require formal restatement, the investors may not even access discovery to investigate the error. They must instead plead, in

their initial complaint, not only that the numbers were wrong (which the restatement conceded) but that the auditor secretly lacked a reasonable basis for believing they were right. That information, uniquely within PwC's possession, is unavailable to Petitioners prior to discovery. The Ninth Circuit's pleading standard is therefore not merely burdensome — it is systematically unachievable, effectively immunizing certified financial statements from Section 11 challenge in the circuit responsible for supervising the majority of the nation's technology sector IPOs.

Congress wrote Section 11 to prevent precisely this outcome. It placed independent accountants on the list of named defendants because it understood their moral responsibility to the investing public is “particularly heavy.” *Gustafson v. Alloyd Co.*, 513 U.S. 561, 581 (1995). It gave investors a cause of action requiring minimal burden and allocated the risk of uncertainty to the professionals who certified the statements, because it understood that investors cannot audit the auditors. *See Herman & MacLean*, 459 U.S. at 382. The decision below nullifies both of those choices.

The Questions presented here are also important because they address a trend in lower courts regarding the over-application of this Court's decision in *Omnicare*. This Court in *Omnicare* was explicit about preserving the scope of potential liability under Section 11 of the Act. The critical fact in *Omnicare* is that the statements at issue were “pure statements of opinion”. 575 U.S. at 186. Indeed, Justice Kagan noted that framing of a statement as an opinion signifies to investors the uncertainty that may surround that statement. 575 U.S. at 189-90 (“Reasonable

investors understand that opinions sometimes rest on a weighing of competing facts; indeed, the presence of such facts is one reason why an issuer may frame a statement as an opinion, thus conveying uncertainty.”)

Despite the concern over “second-guessing” of opinion statements by investors, the Court was more concerned about excluding them from liability under Section 11 altogether. This was the position advocated by *Omnicare* itself. The majority rejected this position, noting that it would effectively eviscerate the liability regime under the Securities Act. “Were *Omnicare* right, companies would have virtual *carte blanche* to assert opinions in registration statements free from worry about § 11. That outcome would ill-fit Congress’s decision to establish a strict liability offense promoting “full and fair disclosure” of material information.” *Id.* at 193.

Perversely, this precise result has come about because of the expansive application of *Omnicare* to any statement in a registration statement that may involve any aspect of subjectivity. This is vividly demonstrated by the differing outcomes in this case compared with *Worlds of Wonder*, 35 F.3d 1407. The cases are legally indistinguishable; both concern material misrepresentations of revenue in an issuer’s financial statements involving complex accounting judgment. Whereas the court in *Worlds of Wonder* properly treated the statements as actionable misrepresentations of fact with the remaining dispute being whether the certified accountant can prove it acted with due diligence, the Ninth Circuit in this case dismissed the claims as a matter of law. This result is purportedly required by this Court’s decision in *Omnicare*, a case which did not concern financial

statements. Thus, a decision that was intended to preserve potential liability under Section 11 has resulted in the substantial curtailment of liability for any statement that might involve an element of subjectivity, judgment, or estimation; even statements such as “the company made x million dollars in profit last year” that were previously regarded as examples *par excellence* of statements of fact. Not only is this result not required by *Omnicare*, but Justice Scalia noted in his concurrence that financial statements would not be subject to its framework because such information would never be expressed as an opinion. 575 U.S. at 200. Certiorari is thus required to address the unintended confusion resulting from this Court’s *Omnicare* decision.

This case offers an excellent vehicle to address the scope of liability under Section 11. The questions presented are clean issues of interpretation. They were thoroughly argued below and have produced a lengthy opinion setting forth the Ninth Circuit’s reasoning. And there are no jurisdictional, threshold, or prudential barriers to this Court’s review. The importance of reliable financial information was recognized by Congress when it passed the Act in 1933 and is central to that Act’s disclosure regime. The Ninth Circuit’s flawed reasoning and mis-application of *Omnicare* undermines the protections provided by Congress and is now the law of one of the most important securities-related courts in the Nation. There are no relevant factual disputes here; instead, both questions presented involve pure questions of law on which the lower courts are in disagreement. This Court’s resolution of the questions presented would bring urgently needed clarity to foundational securities-law requirements.

**CONCLUSION**

The Court should grant certiorari to correct the Ninth Circuit's unacknowledged departure from *Herman & MacLean*, restore *Omnicare* to its proper and limited scope, and preserve the investor protections that Section 11 was enacted to provide to the millions of Americans who rely on audited financial statements when deciding whether to invest their savings in a public offering.

Respectfully submitted,

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## **APPENDIX**

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**APPENDIX A — OPINION OF THE UNITED  
STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT, FILED NOVEMBER 10, 2025**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 24-3568

D.C. No. 4:19-cv-02935-HSG

JAMES EVERETT HUNT; JUAN RODRIGUEZ;  
KURT VOUTAZ; JOEL WHITE; ANDREW AUSTIN;  
SCOTT KLINE; RYAN FISHMAN,

*Plaintiffs-Appellants,*

v.

PRICEWATERHOUSECOOPERS LLP (PWC),

*Defendant-Appellee,*

and

BLOOM ENERGY CORPORATION, JP MORGAN  
SECURITIES, LLC, MORGAN STANLEY SMITH  
BARNEY, LLC, CREDIT SUISSE SECURITIES  
(USA) LLC, KEYBANC CAPITAL MARKETS INC.,  
MERRILL LYNCH, PIERCE, FENNER & SMITH  
INCORPORATED, ROBERT W. BAIRD & CO.  
INCORPORATED, COWEN AND COMPANY, LLC,  
HSBC SECURITIES (USA) INC., OPPENHEIMER &  
CO. INC., RAYMOND JAMES & ASSOCIATES, INC.,

*Defendants.*

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Filed November 10, 2025

**OPINION**

Argued and Submitted June 11, 2025  
San Francisco, California

Appeal from the United States District Court  
for the Northern District of California  
Haywood S. Gilliam, Jr., District Judge, Presiding

Before: Milan D. Smith, Jr. and N. Randy Smith,  
Circuit Judges, and Douglas L. Rayes, District Judge.\*

Opinion by Judge N. Randy Smith

N.R. SMITH, Circuit Judge:

Under § 11 of the Securities Act of 1933, an independent accountant is not strictly liable for the information in a Registration Statement or a client's financial statements simply because the accountant certified the financial statements prepared by the issuer. Instead, an independent accountant certifies the underlying statements without liability if, "after reasonable investigation, [the accountant has a] reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required

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\* The Honorable Douglas L. Rayes, United States District Judge for the District of Arizona, sitting by designation.

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to be stated therein or necessary to make the statements therein not misleading.” 15 U.S.C. § 77k(b)(3)(B)(i). Moreover, an independent accountant is also protected from liability for its opinions (not factual statements) made about those underlying documents as long as the opinion was sincerely held. *See Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 187–88, 135 S.Ct. 1318, 191 L.Ed.2d 253 (2015).

**FACTUAL BACKGROUND**

Bloom Energy designs, manufactures, sells, and (in some instances) installs fuel-cell servers (Energy Servers) that convert natural gas or biogas into electricity for on-site power generation.

This case arises because of the manner in which Bloom Energy accounted for a type of contract that it used in connection with these Energy Servers; such contracts are known as Managed Services Agreements (MSA). MSAs are a type of sale-leaseback arrangement, where Bloom Energy first sells the Energy Server to a bank and then leases it back from the bank. Bloom Energy then subleases the Energy Server to a customer, whereby Bloom Energy becomes the lessee (from the bank) and the lessor (to the customer) of the Energy Server. At the time of the lease to the customer, Bloom Energy also enters into another contract with the customer to service the Energy Server (from which customer payment for the service, Bloom Energy pays its lease to the bank and generates income for servicing the Energy Server).

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Bloom Energy can account for these types of sale-leaseback arrangements in either of two ways: (1) as an “operating lease,” accounting for the revenue it earns when it sells the Energy Server to the bank; or (2) as a “capital lease,” accounting for the revenue it earns when it gets the payment from the customer over the course of the service agreement with the customer. MSAs are classified as either an operating lease or a capital lease based on specific criteria. A capital lease is recognized if it meets any of the following criteria: (1) ownership is transferred to the lessee by the end of the lease term; (2) the lease contains a bargain purchase option; (3) the lease term is at least 75% of the property’s estimated remaining economic life; or (4) the present value of the minimum lease payments is 90% or more of the fair value of the leased property. *See* Accounting Standards Codification (ASC) 840-10-25-1<sup>1</sup>. If none of these criteria are met, the MSA is

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1. ASC 840-10-25-1 was superseded by Topic 842 in the Accounting Standards Update 2016-02. *See* <https://asc.fasb.org/1943274/1855311/GUID-4073757B-B23C-4931-ABE0-8A1DF61EAFEA> (last visited Oct. 29, 2025). Lease classification, as of February 25, 2016, can be found at ASC 842-10-25-2. This section does not use 75% as a benchmark but rather a majority standard (ASC 842-10-25-2(c): “[t]he lease term is for the major part of the remaining economic life of the underlying asset”). However, the February 2016 amendments were not effective for public business entities until fiscal years beginning after December 15, 2018, and the parties and the district court relied upon ASC 840-10-25-1. Moreover, the district court did not find the ASC to be dispositive: “ASC 840-10-10-1 merely states the ‘objectives’ underlying the more detailed provisions that follow,” and “[d]espite Plaintiffs’ urging, it does not appear to provide the definitive method for classifying a lease.”

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classified as an operating lease. Under an operating lease, an Energy Server would not be recognized as an asset on Bloom Energy's books (because the Energy Server was sold to the bank); instead, lease payments to the bank would be recorded as an expense and payments from the customer would be recorded as revenue. In contrast, a capital lease would be recorded on Bloom Energy's balance sheet by recognizing the Energy Server as an asset with a corresponding liability to the bank.

Initially, Bloom Energy accounted for MSAs as operating leases. Bloom Energy determined that the MSAs were best classified as operating leases because the Energy Servers were not "integral equipment," as the cost to remove and relocate an Energy Server would not exceed 10% of its original installation value. Bloom Energy also determined that its MSAs failed to meet the capital lease criteria because Bloom Energy determined that Energy Servers had useful lives of 15–21 years, with typical MSAs for each Energy Server having a lease term of 6–10 years—less than 75% of the estimated life, thus not triggering capital lease treatment.

In 2018 (after more than 15 years as a private company), Bloom Energy decided to go public. To go public, it had to conduct an initial public stock offering (IPO) and file a Registration Statement with the Securities and Exchange Commission (SEC). To prepare the materials for the IPO and Registration Statement, Bloom Energy had already prepared its own financial statements for 2016, 2017, and the first quarter of 2018. It also retained responsibility for preparing all other financial statements

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for the IPO and Statement. However, Bloom Energy engaged PricewaterhouseCoopers LLP (PwC), as an outside accountant, to audit its 2016 and 2017 financial statements, so it could include that audit opinion with the Registration Statement.

PwC was hired to express an opinion on Bloom Energy's 2016 and 2017 financial statements based on audits. In its audits, PwC would investigate the business, operations, financial statements, and accounting of Bloom Energy. Those audits included "performing procedures to assess the risks of material misstatement of the consolidated financial statements, whether due to error or fraud, and performing procedures that respond to those risks" and "examining, on a test basis, evidence regarding the amounts and disclosure of consolidated financial statements." It also "conducted [its] audits of the[ ] consolidated financial statements in accordance with standards of the" Public Company Accounting Oversight Board (PCAOB).<sup>2</sup>

Following the audit, PwC concluded:

In our opinion, the consolidated financial statements present fairly, in all material respects, the financial position of the Company as of December 31, 2017 and December 31, 2016, and the result of its operations and its cash flows for each of the two years in the period

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2. Again, PwC did not prepare the 2016 and 2017 financial statements because Bloom Energy's management had prepared them.

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ended December 31, 2017 in conformity with accounting principles generally accepted in the United States of America.

PwC's audit did not identify any issue with Bloom Energy classifying the MSAs as operating leases under Generally Accepted Accounting Principles (GAAP) or Generally Accepted Auditing Standards (GAAS).

When Bloom Energy prepared the Registration Statement, it included the PwC audit opinion. The Registration Statement also described an MSA and how the sale-leaseback arrangement operated. The Statement expressly stated an MSA may be "classified as a capital lease or an operating lease"; that Bloom Energy "[d]etermine[d] if the leaseback [was] classified as a capital lease or an operating lease," and stated that its MSA "are classified as operating leases"; and it explained that this classification affected Bloom Energy's recognition of revenue and liabilities.

Its Registration Statement registered over 20.7 million Bloom Energy shares for sale. These shares were sold in the IPO at \$15 per share and began trading on July 25, 2018. Bloom Energy received proceeds of \$284.3 million, net of underwriting discounts, commissions, and estimated offering costs.

In 2019, Bloom Energy reviewed the accounting for an MSA that had "closed on November 27, 2019 under an MSA financing . . . , [wherein] PwC identified an issue it had not previously identified related to the accounting for

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the Impacted MSA transactions.” Based upon this review, Bloom Energy reevaluated its MSAs and determined the MSAs should be treated as capital leases (loans from the bank rather than sales). Thus, Bloom Energy (with the advice of its Audit Committee and PwC) reclassified certain MSAs as capital leases. To reflect these new classifications, Bloom Energy revised its 2016 and 2017 financial statements, and restated its 2018 and 2019 financial statements.<sup>3</sup> The next day, the price of Bloom Energy stock dropped by 13.8%.

**PROCEDURAL BACKGROUND**

In 2019, Plaintiffs (consisting of former and current stockholders) filed a class action against Bloom Energy, nine of its officers and directors, and ten underwriters of the IPO. PwC was not a named defendant in the class action complaint. The complaint asserted claims under § 10(b) and § 11 of the Securities Exchange Act of 1934, based on alleged misstatements Bloom Energy made from 2018 to 2019 and alleged misstatements in the Registration Statement. None of the allegations involved PwC or the classification of MSAs.

A year into the litigation, Bloom Energy announced the restatements of the 2018 and 2019 financial statements that it deemed material and revisions of the 2016 and 2017

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3. A restatement corrects a material error in prior financial statements, whereas a revision corrects an error that is “immaterial to the prior year financial statements.” SEC Staff Accounting Bulletin No. 108, 71 Fed. Reg. 54,580, 54,582 (Sept. 18, 2006).

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financial statements that it deemed immaterial. After the amendment, Plaintiffs amended their complaint to add allegations, under § 10(b) and § 11, regarding the classifications of the MSAs. As a part of that amendment, PwC was added as a defendant. Plaintiffs alleged that PwC was liable under § 11 for the actionable statements and omissions in the Registration Statement because it purported to have “conducted an adequate and reasonable investigation into the business, operations, financial statements, and accounting of Bloom Energy.”

All Defendants moved to dismiss all claims against them. PwC moved to dismiss the § 11 claims against it. The district court partially dismissed the claims against the other defendants and dismissed the claims against PwC.

As to PwC, the court found that PwC’s audit opinion was an inactionable opinion under *Omnicare*; that the PwC opinion said only that the financial statements “present fairly, in all material respects, the financial position of the Company . . . in conformity [with GAAP]”; that “the financial statements are the responsibility of [Bloom Energy’s] management”; that PwC only had the responsibility “to express an opinion on [Bloom Energy’s] consolidated financial statements based on [its] audits”; that the classification of “MSAs are complex”; and thus, PwC was not liable. The district court also rejected Plaintiffs’ argument that PwC’s opinions contained within them, as “embedded statements of fact,” the financial statements prepared by Bloom Energy. Lastly, the district court held that PwC’s certification of the financial statements was not a guarantee that they were

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accurate but rather was limited to the conclusions of the audit opinion.

After the district court ruled on Defendants' motions to dismiss, Plaintiffs settled their claims with all Defendants except PwC. Following the settlement, the district court entered a final judgment, dismissing all claims against PwC. However, the district court granted Plaintiffs leave to amend as to PwC, but Plaintiffs conceded that an amendment would be futile.

Instead, Plaintiffs filed this timely appeal, challenging the alleged incorrect statements of revenue, net loss, and net loss per share in Bloom Energy's 2017 financial statement (due to the improper treatment of the MSAs as operating rather than capital leases).<sup>4</sup>

**STANDARD OF REVIEW**

We review de novo a district court's order granting a motion to dismiss for failure to state a claim. *Dunn v. Castro*, 621 F.3d 1196, 1198 (9th Cir. 2010). We must accept

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4. In their opening brief, Plaintiffs admit that they do not challenge the dismissal of claims arising from their allegations concerning: (1) the alleged incorrect disclosure in Bloom Energy's 2017 financial statements of contingent liabilities arising from MSAs; or (2) the alleged misrepresentations contained in PwC's audit opinion on Bloom Energy 2017 financial statements, meaning they do not challenge the district court's dismissal of claims that the audit opinion itself was false or misleading apart from its certification of the financial statements. Accordingly, those issues are waived. See *McKay v. Ingleson*, 558 F.3d 888, 891 n.5 (9th Cir. 2009).

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sufficient factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

**ANALYSIS**

Under *Omnicare*, an accountant's opinion is actionable under § 11 if: (1) "the speaker did not hold the belief she professed" and the supporting fact she supplied is objectively untrue; (2) the opinion contains false "embedded statements of fact"; or (3) the opinion omits facts "whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context." 575 U.S. at 185–86, 194, 135 S.Ct. 1318. Before the district court, Plaintiffs focused their arguments primarily on the assertion that PwC's audit opinion contained material misrepresentations or omissions that met one or more of the three exceptions under *Omnicare*. Because Plaintiffs' allegations did not meet any of the *Omnicare* exceptions, the district court dismissed their case.

On appeal, Plaintiffs have abandoned those arguments. Plaintiffs do not deny that Bloom Energy prepared its own financial statements or that PwC neither prepared the statements nor repeated those statements in its opinion. Instead, they ask us to adopt the position that PwC is strictly liable under § 11(a)(4) for Bloom Energy's 2017 financial statement.

*Appendix A***I. Section 11 of the Securities Exchange Act does not provide for strict liability for accountants.**

Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, provides a private cause of action for investors who purchase securities pursuant to a registration statement containing “an untrue statement of a material fact” or a registration statement that omits “to state a material fact required to be stated therein or necessary to make the statements therein not misleading.” *Id.* § 77k(a). Section 11 allows purchasers to file an action against anyone who signed or helped prepare the registration statement, including the issuer, underwriter, director, partner, accountant, engineer, or appraiser. *See id.* However, § 11 does not impose the same type of liability on all of these potential defendants.

Section 11 is a strict liability statute with respect to issuers of securities, company directors, and partners of issuers, without requiring proof of intent, negligence, or scienter. *Id.* § 77k(a). However, the statute provides defenses for other non-issuer defendants, such as experts, based on their reasonable investigation and belief in the accuracy of the registration statement. *Id.* § 77k(b). We have also said that only “issuers are held strictly liable under § 11 for damages resulting from misrepresentations in a registration statement.” *Monroe v. Hughes*, 31 F.3d 772, 774 (9th Cir. 1994).

Relevant here, § 11(a)(4) imposes liability on an accountant “who has with his consent been named as having prepared or certified any part of the registration

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statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him.”<sup>5</sup> However, the statute allows accountants to raise a defense to liability if they employed due diligence in preparing or certifying statements the registration statement, by showing that they “had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading.”<sup>6</sup> *Id.* § 77k(b)(3)(B)(i). Courts have interpreted § 77k(b)(3)(B)(i) to require accountants “to investigate, to various degrees, facts supporting and contradicting inclusions in registration statements. They must undertake that investigation which a reasonably prudent man in that position would conduct.” *Endo v. Albertine*, 863 F. Supp. 708, 728 (N.D. Ill. 1994) (citation omitted); *see* 15 U.S.C. § 77k(c) (defining “standard of reasonableness” as “that required of a prudent man in the management of his own property”). In other words, accountants must exercise due diligence in investigating the materials provided to them using the accepted practices of their profession.

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5. “The term certified, when used in regard to financial statements, means examined and reported upon with an opinion expressed by an independent public or certified public accountant.” 17 C.F.R. § 230.405.

6. PwC did not raise a due diligence defense in this case because Plaintiffs did not identify any statements of fact made by PwC.

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However, “[a]ccountants cannot be held liable under Section 11 unless the misleading information can be expressly attributed to them.” *In re Worlds of Wonder Sec. Litig.*, 694 F. Supp. 1427, 1434 (N.D. Cal. 1988). Thus, while, § 11(a)(4) outlines that investors may sue accountants for materially false registration statements, accountants are only subject to suit “with respect to the statement in such registration statement . . . , which purports to have been prepared or certified by [that accountant].” *Id.* § 77k(a)(4). The statute distinguishes between “prepar[ing]” and “certif[y]ing.” This distinction limits liability for certifiers and expands it for preparers, who may be subject to more general liability for the content they create. *See id.*

Nevertheless, the statute does not impose strict liability on accountants for the statements or omissions regardless of whether they prepared or certified them. § 77k(b)(3)(B)(i). Instead, because “an accountant has a due diligence defense; § 11 therefore imposes a negligence standard for an accountant’s liability.” *Monroe*, 31 F.3d at 774 (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976)); *see also In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 379 (S.D.N.Y. 2011) (“[A]lthough issuers are subject to virtually absolute liability under Section 11, experts such as accountants who have prepared portions of the registration statement are accorded a due diligence defense.” (cleaned up)).

As the Second Circuit correctly explained, strict liability is limited to those persons involved in “enumerated distributional activities.” *See In re Lehman Bros. Mortg.-*

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*Backed Sec. Litig.*, 650 F.3d 167, 181 (2d Cir. 2011). “This approach avoids the implausible result of transforming every lawyer, accountant, and other professional whose work is theoretically ‘necessary’ to bringing a security to market into an ‘underwriter’ subject to strict liability under § 11, a dramatic outcome that Congress provided no sign of intending.” *Id.*

This approach is consistent with *Omnicare* and extending its holding to accountants does not negate the due diligence defense. In *Omnicare*, the Supreme Court examined § 11 and addressed an issuer’s liability for statements of opinion, because “Congress effectively incorporated . . . [a] distinction [between facts and opinions] in § 11’s first part by exposing issuers to liability not for ‘untrue statement[s]’ . . . (which would have included ones of opinion), but only for ‘untrue statement[s] of fact.’” 575 U.S. at 183, 135 S.Ct. 1318 (quoting § 77k(a) (alterations in original)). Focusing on the language of the statute, the Supreme Court excluded statements of opinions from liability. Under the Supreme Court’s reasoning, accountants may be liable for statements of fact if they did not act with due diligence; however, accountants will not be liable for statements of opinion, even if they reflect a subjective belief that admits there is a possibility of error, as long as the statement of opinion was sincerely held. *See id.* As the Supreme Court aptly explained:

A fact is “a thing done or existing” or “[a]n actual happening.” Webster’s New International Dictionary 782 (1927). An opinion is “a belief[,] a view,” or a “sentiment which the mind forms

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of persons or things.” Most important, 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. . . . Indeed, that difference between the two is so ingrained in our everyday ways of speaking and thinking as to make resort to old dictionaries seem a mite silly. And Congress effectively incorporated just that distinction in § 11’s first part by exposing issuers to liability not for “untrue statement[s]” full stop (which would have included ones of opinion), but only for “untrue statement[s] of . . . fact.”

*Id.* (citations omitted). The Supreme Court further explained a statement of opinion is not an “untrue statement of a *material fact*” simply because it is later determined to be incorrect (as here). *Id.* at 186–88, 135 S.Ct. 1318.

That said, *Omnicare* did not insulate accountants from liability. Accountants may instead be challenged based on their audit opinion as *Omnicare* outlines. The opinion can still be subject to liability under § 11 as a material misstatement, where (1) “the speaker did not hold the belief she professed”; (2) “the supporting fact[s] [the speaker] supplied were untrue”; or (3) the opinion omits facts “whose omission makes the opinion statement at issue misleading.” *See id.* at 186, 194, 135 S.Ct. 1318. In the district court, Plaintiffs attempted to establish liability for PwC under these standards and failed. Rather than appeal that decision, they abandon those arguments.

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Simply stated, an accountant's liability is limited to "statement[s] in such registration statement, report, or valuation, which purports to have been prepared or certified by him." § 77k(a)(4). Here, the PwC audit report did not incorporate the alleged misstatements or untrue facts, and clearly stated, in relevant part, that "[i]n our opinion, the consolidated financial statements present fairly, in all material respects, the financial position of [Bloom Energy] as of December 31, 2017 and December 31, 2016, and the results of its operations and its cash flows for each of the two years in the period ended December 31, 2017 in conformity with accounting principles generally accepted in the United States of America."

Thus, in order for Plaintiffs to prevail, they must establish that PwC did not have a "reasonable ground to believe and did [not] believe, at the time such part of the registration statement became effective, that the statements therein were true." § 77(k)(b)(3)(A). As explained below, PwC made statements of opinion protected under *Omnicare*. PwC did not make or prepare any statements of material fact or omit any material statements.

**A. PwC is not liable as a preparer.**

In this case, Plaintiffs argue that, because PwC certified Bloom Energy's financial statements, it became liable for any misstatements contained therein. However, no one disputes that PwC did not prepare the financial statements for 2017, or that Bloom Energy was responsible for preparing the consolidated financial statements.

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Frankly, PwC was not permitted (under the regulations) to prepare the financial statements. The regulations make clear that an accountant, who prepares the financial statements, is disqualified from being the independent accountant authorized to certify it. *See* 17 C.F.R. § 230.405.

Although PwC expressed an opinion in its audit with regard to Bloom Energy’s 2016–2017 financial statements, there is no evidence that PwC *prepared* materially false statements. Accountants do not, “by virtue of auditing a company’s financial statements, somehow make, own or adopt the assertions contained therein.” *Deephaven Priv. Placement Trading, Ltd. v. Grant Thornton & Co.*, 454 F.3d 1168, 1174 (10th Cir. 2006). Instead, PwC merely affirmed that, in its opinion, Bloom Energy followed the proper accounting principles, and those statements of opinions are protected under *Omnicare*.

**B. PwC is not liable as a certifier.**

Plaintiffs also seek to have us impose strict liability for PwC for Bloom Energy’s financial statements that they certified in their audit opinion. We decline to interpret the term “certify” so broadly.

Bloom Energy prepared “consolidated financial statements,” which included the “accompanying consolidated balance sheets of Bloom Energy Corporation and its subsidiaries as of December 31, 2016 and December 31, 2017, and the related consolidated statements of operations, of comprehensive loss, of convertible redeemable preferred stock and stockholders’ deficit

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and of cash flows for each of the two years in the period ended December 31, 2017, including the related notes.” PwC certified the “consolidated financial statements” using audit procedures aimed to obtain reasonable assurance. Section 11 does not require that PwC, by certifying the financial statements, guarantee that the documents provided by Bloom Energy were free from error. Instead, PwC was required to act in compliance with GAAP and GAAS, by performing a reasonable investigation and having reasonable grounds to believe, and did believe, that the statements provided by Bloom Energy were true and that there were no omissions that made the statement misleading. *See* 15 U.S.C. § 77k(b) (3). It was not the job of PwC to “guarantee or insure” the financial statements. *Deephaven Priv. Placement Trading, Ltd.*, 454 F.3d at 1174 (internal quotation marks omitted); *see also Dronsejko v. Thornton*, 632 F.3d 658, 663 (10th Cir. 2011) (“A company’s management—not the auditor—is responsible for the information contained in its financial statements and the propriety of its underlying accounting policies, including compliance with GAAP.”); *Fehribach v. Ernst & Young LLP*, 493 F.3d 905, 910 (7th Cir. 2007) (“The purpose of an audit report is to make sure the audited company’s financial statements—which are prepared by the company, not by the auditor, . . . — correspond to reality, lest they either have been doctored by a defalcating employee or innocently misrepresent the company’s financial situation.”).

An accountant “is in a position to express an unqualified opinion on the financial statements when the auditor conducted an audit in accordance with

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the standards of the Public Company Accounting Oversight Board (“PCAOB”) and concludes that the financial statements, taken as a whole, are presented fairly, in all material respects, in conformity with the applicable financial reporting framework.” AS 3101.02.<sup>7</sup> “Misstatements arising from fraudulent financial reporting are intentional misstatements or omissions of amounts or disclosures in financial statements designed to deceive financial statement users where the effect causes the financial statements not to be presented, in all material respects, in conformity with [GAAP].” AS 2401.06. The independent accountant’s objective is to express “an opinion on the fairness with which [he or she] present[s], in all material respects, [the company’s] financial position, results of operations, and its cash flows in conformity with [GAAP].” AS 1001.01. However, “[e]ven with good faith and integrity, mistakes and errors in judgment can be made.” AS 1015.11. “[A]ccounting presentations contain accounting estimates, the measurement of which is inherently uncertain and depends on the outcome of future events. The auditor exercises professional judgment in evaluating the reasonableness of accounting estimates

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7. AS references the Codification of Accounting Standards and Procedures, Statement on Auditing Standards No. 1, § 150 (American Inst. of Certified Pub. Accountants 2001). Relevant here, the PCAOB auditing standards were reorganized and went into effect after Dec. 30, 2016, and were applicable to audits of financial statements for fiscal years ending before Dec. 15, 2017. See <https://pcaobus.org/oversight/standards/auditing-standards> (last visited Oct. 29, 2025). Other revisions occurred after December 15, 2017. However, the reorganized standards are substantially the same and would not alter PwC’s review of the 2016 or 2017 financial statements.

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based on information that could reasonably be expected to be available prior to the completion of field work.” *Id.* To be sure, the division of responsibility is based on practical realities: Bloom Energy “operate[s] the business daily” and has superior knowledge of transactions, assets, and liabilities, whereas PwC’s function was confined to reasonable assurance through its audit. These limits placed on accountants to assess a company’s financial statements preclude its ability to ensure that there are no misstatements, and thus, accountants should consider risk factors such as:

conditions in the company’s industry and environment, and company-specific factors, such as the nature of the company, its activities, and internal control over financial reporting. For example, external or company-specific factors can affect the judgments involved in determining accounting estimates or create pressures to manipulate the financial statements to achieve certain financial targets. Also, risks of material misstatement may relate to, e.g., personnel who lack the necessary financial reporting competencies, information systems that fail to accurately capture business transactions, or financial reporting processes that are not adequately aligned with the requirements in the applicable financial reporting framework.

AS 2110.05.

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Again, “an accountant is not a guarantor of the reports he prepares and is only duty bound to act honestly, in good faith and with reasonable care in the discharge of his professional obligations.” *SEC v. Arthur Young & Co.*, 590 F.2d 785, 788 (9th Cir. 1979) (citation omitted). Nor does § 11 make accountants guarantors of every statement made by the issuer; to make such a holding would turn the whole accounting world upside down. Holding accountants strictly liable as if they were preparers would transform audits, making them prohibitively expensive. This was not Congress’s goal. When Congress enacted the statute, Congress was clear that it was limiting the liability of accountants by only requiring a “reasonable investigation and reasonable ground for belief, [for which] the standard of reasonableness shall be that required of a prudent man in the management of his own property.” § 77k(c).

Moreover, an accountant’s certification of financial statements is nothing more than an opinion. The term “certify” has been defined to mean that an independent public or certified public accountant has “examined and reported upon [the financial statements] with an opinion.” 17 C.F.R. § 230.405. *Omnicare* protects opinions from liability unless one of the three exceptions is met. *Omnicare* made clear that “whether a statement is ‘misleading’ depends on the perspective of a reasonable investor.” 575 U.S. at 186, 135 S.Ct. 1318. “Reasonable investors understand that opinions sometimes rest on a weighing of competing facts; indeed, the presence of such facts is one reason why an issuer may frame a statement as an opinion, thus conveying uncertainty.” *Id.* at 189–90, 135 S.Ct. 1318; *see also Deephaven Priv. Placement Trading*,

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*Ltd.*, 454 F.3d at 1175 (explaining that “the phrase ‘in our opinion’ indicates that there may be some information risk associated with the [reviewed] financial statements, even though the statements have been audited”).

In this case, PwC did just that. It conveyed its opinion as to Bloom Energy’s financial statements. There may have been some differing opinions with regard to the Energy Server’s useful life, but “[a] reasonable investor does not expect that every fact known to an [accountant] supports its opinion statement.” *Omnicare*, 575 U.S. at 176, 135 S.Ct. 1318. And in this case, the classification and reasons for classification were provided to the investor. Thus, PwC’s “statement of opinion [was not] viewed in a vacuum,” but rather allowed each investor to “read[] each statement within such a document, whether of fact or of opinion, in light of all its surrounding text, including hedges, disclaimers, and apparently conflicting information.” *Id.* at 190, 135 S.Ct. 1318.

In summary, Plaintiffs’ attempts to hold PwC liable fail. PwC’s audit opinion did not make any material misstatements of *fact* or omissions but rather was merely a statement of opinion based, again, upon the subjective judgment of the MSA classification. Plaintiffs made no allegation that PwC did not sincerely believe that Bloom Energy’s classification of the MSAs aligned with proper accounting principles based on the evidence available at that time. *See id.* at 186, 135 S.Ct. 1318.

Accordingly, PwC is not liable for the statements in its audit opinion.

*Appendix A***II. The district court's decision should also be affirmed because Bloom Energy's financial statements regarding classification of the MSAs were opinions.**

In this appeal, Plaintiffs challenge only the three line items referenced in the Registration Statement that related to whether MSAs should be classified as operating or capital leases. These line items in Bloom Energy's financial report were based on Bloom Energy's subjective judgments (not statements of fact) concerning the actual useful life of the Energy Server. Under ASC 840-10-25-1, an MSA qualifies as a capital lease if "[t]he lease term is at least 75% of the property's [i.e., the Energy Servers'] estimated remaining economic life." Plaintiffs allege that the lease terms were 6 to 10 years; that Bloom Energy improperly estimated that the Energy Servers' useful lives were 15-21 years. However, there is no dispute that Bloom Energy was basing its estimates on newly designed Energy Servers whose useful life was unknown. Nevertheless, Plaintiffs allege that the actual useful lives of these Energy Servers were "much shorter." With that shorter lease term, Plaintiffs claim that the 75% rule required a capital lease classification.

However, the district court correctly concluded that Plaintiffs failed to allege sufficient facts to establish that Bloom Energy's judgments were untrue. Throughout the district court opinion, it properly outlines that Bloom Energy's classification of its MSAs was based on an exercise of judgment related to its information about its Energy Servers, which Bloom Energy used to classify MSAs as operating or capital leases. For example, the

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district court highlighted that “Plaintiffs contend that the service contracts ‘*typically* last[ ] from 10 to 21 years and can last as long as 25 years,’ in total, and are renewed each year at the customer’s option,” but failed “to explain how Defendants could meaningfully estimate the length of future contracts from such a large range.” “Plaintiffs also suggest that Bloom knew the estimated life of its Energy Servers and fuel cells because it had to replace some of its earlier generation systems,” but “acknowledge[d], Bloom also had newer systems in place, and Plaintiffs [did] not explain how Defendants could extrapolate to determine the life or replacement schedule for all its Energy Servers.”

Thus, the district court correctly concluded that Plaintiffs failed to adequately plead that the challenged line items were statements of fact. Instead, the district court recognized that Bloom Energy’s classification of the MSAs was the product of accounting judgments; it determined that those judgments “involve[d] complex consideration[ ]” of various GAAP provisions in determining how to evaluate the term of the MSAs and the value of the Energy Servers. Thus, the district court found those three line items to be opinions. Then, because Plaintiff failed to plead nor argue any of the *Omnicare* exceptions to establish liability, the district court concluded that those three line items were not actionable. We agree.

On appeal Plaintiffs argue that “statements of revenue, net loss, and net loss per share contained within a company’s financial statements” cannot be opinions because they are always statements of fact. However, again Plaintiffs ignore the language in *Omnicare*.

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*Omnicare* does not limit an opinion to words over figures. To be sure, the language of the statute is limited to *facts*, not *opinions*. Thus, as long as Bloom Energy’s statements were opinions and not facts, it is irrelevant whether the subject matter being opined about were words or figures. Instead, we need only determine whether Bloom Energy had a “sincere statement of pure opinion.” *Omnicare*, 575 U.S. at 186, 135 S.Ct. 1318. If it did, then it does not qualify as an “untrue statement of material fact,” regardless whether an investor can ultimately prove the belief wrong.” *Id.*

An “untrue statement of a material fact,” 15 U.S. C § 77k(a), “limited as it is to *factual* statements, does not allow investors to second-guess inherently subjective and uncertain assessments.” *Omnicare*, 575 U.S. at 186, 135 S.Ct. 1318 (emphasis added). Although figures, by themselves, do not clearly convey whether it is an opinion or a fact, “an investor [should] read[] each statement within such a document, whether of fact or of opinion, in light of all its surrounding text, including hedges, disclaimers, and apparently conflicting information[,] . . . tak[ing] into account the customs and practices of the relevant industry.” *Id.* at 190, 135 S.Ct. 1318. “Section 11’s omissions clause, as applied to statements of both opinion and fact, necessarily brings the reasonable person into the analysis, and asks what she would naturally understand a statement to convey beyond its literal meaning.” *Id.* at 193–94, 135 S.Ct. 1318.

The district court correctly applied *Omnicare*’s reasoning to conclude that numbers can sometimes be

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facts and other times be opinions, depending on whether “the considerations underlying the figures—such as which GAAP provisions apply and how to apply them— . . . require the exercise of judgment.”

Plaintiffs do not explain what additional actions PwC should have taken in its audit, nor do they allege any facts that establish that PwC overlooked or disregarded warning signs about the Energy Server’s useful life or Bloom Energy’s MSA accounting.

Because Plaintiffs failed to show that Bloom Energy’s subjective opinions were based on untrue facts or information that it did not believe, *see Omnicare*, 575 U.S. at 187, 135 S.Ct. 1318, Plaintiffs cannot demonstrate that PwC certified untrue facts or information. Accordingly, Plaintiffs have failed to establish liability for PwC’s opinion. The record demonstrates that the classification of MSAs was a judgment call, and the Registration Statement thoroughly explained how it reached the classification. PwC was reasonable under the circumstances to certify Bloom Energy’s classification based on the evidence at that time.<sup>8</sup>

**AFFIRMED.**

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8. Based on the foregoing, we need not decide whether the line item errors were material.

**APPENDIX B — ORDER OF THE UNITED  
STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA,  
FILED SEPTEMBER 29, 2021**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Case No. 19-cv-02935-HSG

JAMES EVERETT HUNT, *et al.*,

*Plaintiffs,*

v.

BLOOM ENERGY CORPORATION, *et al.*,

*Defendants.*

Filed September 29, 2021

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTIONS TO DISMISS  
Re: Dkt. Nos. 127, 129, 130**

In his second amended complaint, Lead Plaintiff James Everett Hunt and additional plaintiffs assert violations of the federal securities laws under Sections 11 and 15 of the Securities Act of 1933 (the “Securities Act”); Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”); and SEC Rule 10b-5 against Bloom Energy Corporation and certain of its top

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officials (collectively, “Defendants”). *See* Dkt. No. 113 (“SAC”) at ¶ 1.

Pending before the Court are three motions to dismiss the second amended complaint. *First*, the Section 11 Defendants<sup>1</sup> bring a motion to dismiss the Section 11 claims, as well as the Section 15 “controlling persons” claims. Dkt. No. 130. *Second*, Pricewaterhouse Coopers LLP (“PwC”), Bloom’s independent auditor, brings its own motion to dismiss the Section 11 claims. Dkt. No. 127. *Third*, the Section 10(b) Defendants<sup>2</sup> bring a motion to dismiss the Section 10(b) claims. Dkt. No. 129. The Court finds these matters appropriate for disposition without oral argument and the matters are deemed submitted. *See* Civil L.R. 7-1(b). For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** the motions to dismiss.

## I. BACKGROUND

Plaintiff Elissa M. Roberts initially filed this securities class action on behalf of all persons who purchased or otherwise acquired Bloom Energy Corporation common stock during Bloom’s July 25, 2018 initial public stock

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1. The Section 11 Defendants include Bloom Energy Corporation, nine of Bloom’s current and former officers and directors, and the ten underwriters of Bloom’s initial public offering. *See* Dkt. No. 130.

2. The Section 10(b) Defendants include Bloom Energy Corporation, Bloom’s CEO KR Sridhar, and Bloom’s former CFO Randy Furr. *See* Dkt. No. 129.

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offering (the “IPO” or “Offering”). *See* Dkt. No. 1. The original complaint asserted claims under Sections 11 and 15 of the Securities Act. *Id.* at ¶ 2. On September 3, 2019, the Court<sup>3</sup> appointed James Everett Hunt as the lead plaintiff in this action. *See* Dkt. No. 39. As part of the motion granting the appointment, the Court granted Lead Plaintiff Hunt leave to file an amended complaint. *See id.*

On April 21, 2020, Lead Plaintiff Hunt filed a second amended complaint. *See* SAC. As relevant to the pending motions, the SAC alleges that Bloom manufactures and leases solid-oxide fuel cells, called “Energy Servers,” which convert natural gas or biogas into electricity. *See id.* at ¶¶ 2-3, 41. These Energy Servers provide customers with an alternative to drawing energy from the electrical grid. *See id.* at ¶ 41. After many years as a private company, Bloom held its IPO on July 25, 2018. *Id.* at ¶¶ 2, 50-51. The Registration Statement included Bloom’s disclosures regarding the nature of its business, risk factors, executive compensation, and numerous other matters. *See* Dkt. No. 131-1, Ex. 1. It also included Bloom’s financial statements for the years 2016 and 2017, and for the first three months of 2018. The Registration Statement also included PwC’s audit report on Bloom’s 2016 and 2017 annual financial statements. *Id.* The Registration Statement registered over 20 million Bloom shares of common stock for sale, and the stock sold in the IPO at \$15 per share. *See* SAC at ¶ 51. Bloom received net proceeds of \$284.3 million from the IPO. *Id.*

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3. On December 13, 2019, the matter was reassigned from the Honorable Judge Orrick to this Court. *See* Dkt. No. 100.

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Plaintiffs allege that on September 17, 2019, a third-party market analyst, Hindenburg Research, issued a critique of Bloom's business. *See id.* at ¶ 72. The Hindenburg authors projected that Bloom's business would be massively unprofitable in the future. They calculated that Bloom had "an estimated [net] \$2.2 billion in undisclosed servicing liabilities" to repair and replace the Energy Servers that Bloom had omitted from the Registration Statement at the time of the IPO. *Id.* (alteration in original). In reaching this conclusion, the authors reasoned that the lifespan of Bloom's fuel cells was materially shorter, their efficiency was lower than represented, and they therefore needed to be replaced years earlier than represented by Bloom in the Registration Statement. *Id.* at ¶¶ 72-74.

Plaintiffs further allege that in February 2020, Bloom restated the financial statements that it gave to investors in the IPO. *See id.* at ¶¶ 3, 400-417. In doing so, Bloom disclosed that (1) its net loss attributable to common stockholders for 2017 was in fact \$276.362 million, or 5.2% worse than the loss of \$262.599 million reported in its Registration Statement; and (2) the net loss attributable to common stockholders for the first three months in 2018 ending March 31, 2018 was \$21.591 million, or 21.9% worse than the loss of \$17.716 million that Bloom initially reported. *See id.* at ¶¶ 90, 413. Plaintiffs also allege that Bloom had considerable "construction delays," which impeded Bloom's ability to install the Energy Servers. *Id.* at ¶¶ 55-59.

Plaintiffs allege that since the IPO, Bloom's stock price has declined from \$15 per share of common stock,

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to a 52-week low of \$2.44 per share of common stock. *See id.* at ¶ 4. Plaintiffs bring their Securities Act and Exchange Act claims on behalf of themselves and other similarly situated persons who purchased or otherwise acquired Bloom common stock in Bloom's IPO and/or on the public market between July 25, 2018 and February 12, 2020. *See id.* at ¶ 1.

**II. LEGAL STANDARD****A. Rule 12(b)(6) Standard**

Federal Rule of Civil Procedure 8(a) requires that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A defendant may move to dismiss a complaint for failing to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule 12(b)(6) motion, a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when a plaintiff pleads “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In reviewing the plausibility of a complaint, courts “accept factual allegations in the complaint as true and

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construe the pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Nonetheless, Courts do not “accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

**B. Heightened Pleading Standard**

Section 10(b) of the Securities Exchange Act of 1934 provides that it is unlawful “[t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance . . .” 15 U.S.C. § 78j(b). Under this section, the SEC promulgated Rule 10b-5, which makes it unlawful, among other things, “[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.” 17 C.F.R. § 240.10b-5(b). To prevail on a claim for violations of either Section 10(b) or Rule 10b-5, a plaintiff must prove six elements: “(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.” *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008).

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At the pleading stage, a complaint alleging claims under Section 10(b) and Rule 10b-5 must not only meet the requirements of Federal Rule of Civil Procedure 8, but also satisfy the heightened pleading requirements of both Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act (“PSLRA”). *In re Rigel Pharm., Inc. Sec. Litig.*, 697 F.3d 869, 876 (9th Cir. 2012). Under Rule 9(b), claims alleging fraud are subject to a heightened pleading requirement, which requires that a party “state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Additionally, all private securities fraud complaints are subject to the “more exacting pleading requirements” of the PSLRA, which require that the complaint plead with particularity both falsity and scienter. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 990 (9th Cir. 2009).

**III. DISCUSSION****A. Section 11 Motion**

Under Section 11 of the Securities Act, Plaintiffs contend that Bloom’s Registration Statement contained several untrue statements and omissions of material facts. *See* SAC at ¶ 52. According to Plaintiffs, the challenged statements involved (1) the existence and scale of construction delays; (2) improper accounting under Generally Accepted Accounting Principles (“GAAP”) for loss contingencies and revenue relating to the Energy Servers; (3) the life cycle of the fuel cells in the Energy Servers; (4) weaknesses in Bloom’s internal controls; and (4) the efficiency and emissions of the Energy Servers. *See*

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*id.* at ¶¶ 52-103. The Section 11 Defendants contend that even under the more lenient Rule 8(a) standard, Plaintiffs have failed to plausibly allege that these statements were materially false or misleading. *See* Dkt. No. 130. They ask the Court to dismiss Plaintiffs' claims in their entirety.

“[S]ection 11 of the 1933 Securities Act creates a private remedy for any purchaser of a security if ‘any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading.’” *In re Daou Sys., Inc.*, 411 F.3d 1006, 1027 (9th Cir. 2005) (quoting 15 U.S.C. § 77k(a)). To allege a Section 11 claim, a plaintiff must show “(1) that the registration statement contained an omission or misrepresentation, and (2) that the omission or misrepresentation was material, that is, it would have misled a reasonable investor about the nature of his or her investment.” *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2009) (quotation omitted). Importantly, “[n]o scienter is required for liability under § 11; defendants will be liable for innocent or negligent material misstatements or omissions.” *In re Daou*, 411 F.3d at 1027 (quotation omitted).

Unlike Section 10(b) claims, the heightened pleading standards of the PSLRA do not apply to Section 11 claims. *See Rubke*, 551 F.3d at 1161. Instead, “only allegations of fraudulent conduct must satisfy the heightened pleading requirements of Rule 9(b),” and “[a]llegations of non-fraudulent conduct need satisfy only the ordinary notice

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pleading standards of Rule 8(a).” *In re Daou*, 411 F.3d at 1027. Here, Plaintiffs have explicitly disavowed “any allegation that any Section 11 Defendant engaged in fraud or any other deliberate and intentional misconduct.” SAC at ¶ 49. Accordingly, the Rule 8(a) pleading standard applies. Because Plaintiffs challenge discrete categories of statements in the Registration Statement, the Court addresses the Section 11 Defendants’ motion by category below.

**i. Accounting Errors**

Plaintiffs assert that the Section 11 Defendants failed to follow the relevant GAAP provisions for Bloom’s liabilities and revenue in its financial statements.<sup>4</sup>

**a. Maintenance Service Agreements**

Plaintiffs first claim that Bloom failed to follow GAAP in accounting for contingent liabilities related to Bloom’s service contracts. Plaintiffs allege that when Bloom sells, leases, or finances an Energy Server, it includes a one-year warranty and performance guarantee as part of the purchase price. SAC at ¶ 63. At the end of this one-year

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4. Plaintiffs appear to have abandoned any argument that Bloom failed to comply with or made “false and self-serving statements” regarding the new revenue recognition guidance under the Financial Accounting Standards Board Accounting Standards Codification (“ASC”) 606 for purposes of its Section 11 and Section 10(b) claims. *See generally* Dkt. No. 138; Dkt. No. 139; *see also* SAC at ¶¶ 78-80. The Court therefore GRANTS the motion to dismiss on this basis.

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term, customers may then enter into Maintenance Service Agreements (“service contracts”) to extend the initial warranty and performance guarantee. *See id.* Customers may elect to either renew or cancel their service contracts for successive one-year terms for a period up to 20-25 years. *Id.* at ¶¶ 63, 68. Plaintiffs allege that “virtually no customers have elected to cancel their [service contracts].” *See id.* at ¶ 68. These service contracts generate both revenue and expenses for Bloom. *See id.* at ¶¶ 63-64. Under the terms of the agreements, Bloom must service, repair, and replace Energy Servers when their output or efficiency falls below a certain threshold. *See id.* at ¶ 64. And customers, in turn, make annual service payments to Bloom under these agreements. *See id.* at ¶ 63.

Plaintiffs allege that as of March 2018, “[t]he expenses and/or contingencies associated with these repairs” were approximately \$2.9 billion, and exceeded any future revenue from the service contracts by approximately \$1.7 billion. *See id.* at ¶ 64. Plaintiffs allege that the Section 11 Defendants failed to disclose the \$2.9 billion liabilities from the service contracts. *See id.* at ¶ 65.

Rather, Bloom recognized revenue on these service contracts ratably over the course of the one-year contract term. *See* SAC at ¶ 382; Dkt. No. 131-1, Ex. 1 at 97. Bloom recorded costs associated with the contracts in one of two ways. If Bloom estimated a loss on the one-year contract, it expensed the estimated loss value at the time of contract renewal. *See* SAC at ¶ 382. If Bloom estimated a profit on the one-year contract, it expensed the costs as incurred within that period. *Id.* Plaintiffs urge that such practices

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violate various ASC provisions, as well as Item 303 of Regulation S-K. *See id.* at ¶¶ 65-66. Plaintiffs therefore conclude that Bloom’s Registration Statement contained false and misleading statements about its contingent liabilities.

As an initial matter, Defendants respond that such statements in its financial reports reflect accounting judgments, and are therefore opinion statements that should be analyzed under the framework established by the Supreme Court in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175 (2015). *See* Dkt. No. 130 at 9-10. In *Omnicare*, the Supreme Court held that “a statement of opinion is not misleading just because external facts show the opinion to be incorrect,” so long as the opinion is honestly believed. 575 U.S. at 188. *Omnicare* therefore limited what constitutes an actionable opinion statement. Where, as here, a plaintiff seeks to establish liability under the omissions clause based on a statement of opinion, the complaint must: (1) “identify particular [omitted] facts going to the basis for the [defendant’s] opinion—facts about the inquiry the [defendant] did or did not conduct or the knowledge it did or did not have”; (2) establish that the facts are material, *i.e.*, that “there is a substantial likelihood that a reasonable investor would consider [them] important;” and (3) establish that the omission of the facts rendered the opinion statement misleading to a reasonable person reading it “fairly and in context,” *i.e.*, “in light of all its surrounding text, including hedges, disclaimers, and apparently conflicting information,” as well as “the customs and practices of the relevant industry.” *Id.* at 190, 194-96.

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As Defendants note, the Supreme Court has acknowledged that “[g]enerally accepted accounting principles [] tolerate a range of reasonable treatments, leaving the choice among alternatives to management.” *Thor Power Tool Co. v. C.I.R.*, 439 U.S. 522, 544 (1979) (quotations omitted). The Ninth Circuit has also recognized that the application of GAAP—at least at times—requires a company to exercise its judgment, such that a company’s financial statements may constitute opinions. *See City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605, 621 (9th Cir. 2017) (finding statements related to company’s goodwill valuation were opinion statements subject to *Omnicare*). But Plaintiffs respond that their particular GAAP-based claims are premised on “very clear bright line [GAAP] provisions,” and therefore do not hinge on estimates or the exercise of management’s judgment. *See* Dkt. No. 138 at 8, 13-14.

Plaintiffs’ argument is undermined by the plain language of their GAAP-based claims. Plaintiffs first cite ASC 450-20-25-2, which discusses obligations that are included in the sale of a product, rather than as a separately priced contract. *See* SAC at ¶¶ 65, 67; *see also* Dkt. No. 131-13, Ex. 14 (“ASC 450”). Even assuming ASC 450 would apply to the service contracts at issue here, the provision requires companies to report “reasonable estimates” of “probable” future losses. *See id.* Under ASC 450, therefore, Bloom had to determine the likelihood that it would incur costs associated with service contracts during the period covered by its financial statement, and whether it could reasonably estimate such costs based on its experience and other available data. As other courts

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have explained, ASC 450 thus asks companies to provide “an educated approximation of future claims, i.e., an opinion.” See *Kanefsky v. Honeywell Int’l Inc.*, No. 18-CV-15536, 2020 WL 2520669, at \*5 (D.N.J. May 18, 2020) (citing *In re Hertz Glob. Holdings, Inc. Sec. Litig.*, 2017 WL 1536223, at \*11 (D.N.J. Apr. 27, 2017)).

Plaintiffs also rely on ASC 605-20-25-6, which discusses separately priced extended warranty and product maintenance contracts. Dkt. No. 138-8, Ex. 33 (“ASC 605”). ASC 605 provides that “[a] loss shall be recognized on extended warranty or product maintenance contracts if the sum of expected costs of providing services under the contracts and unamortized acquisition costs exceeds related unearned revenue.” See ASC 605. Much like ASC 450, ASC 605 asks companies to estimate future costs for existing contracts. Companies must estimate expected costs to determine whether they exceed expected revenue.

Because both ASC 450 and ASC 605 require the exercise of judgment, the Court finds that Bloom’s statements about its contingent liabilities are opinion statements, and the *Omnicare* framework applies. As an initial step, Plaintiffs must therefore “call into question [Defendants’] basis for offering the opinion” about Bloom’s contingent liabilities. *Id.* at 175. To do so, Plaintiffs must identify particular facts that Defendants omitted “about the inquiry [Defendants] did or did not conduct or the knowledge [they] did or did not have.” *Omnicare*, 575 U.S. at 194. “[C]onclusory assertions” are insufficient. *Id.*

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Here, Plaintiffs do not directly explain how their allegations satisfy *Omnicare*. See Dkt. No. 138 at 13-17. The complaint does not address what “inquiry” Defendants did or did not make with respect to the service contracts or Bloom’s GAAP compliance. Nor does the complaint address Bloom’s purported knowledge that the service contracts should have been accounted for differently under GAAP.

Rather, Plaintiffs identify several facts that Defendants purportedly knew about the service contracts. More specifically, Plaintiffs allege that Bloom had information about (1) the cost to replace fuel cells; (2) the average fuel cell life; (3) the length of time of an average service contract; (4) the average number of times fuel cells are replaced; (5) the current replacement cycle; (6) the cumulative install base; and (7) the cost to replace the Energy Servers. See SAC at ¶¶ 69-73. Plaintiffs allege that based on these “known” facts, Defendants could have—and should have—estimated the costs of the service contracts and disclosed these contingent liabilities in the Registration Statement. Plaintiffs then conclude, without explanation, that the contingent liabilities from these service contracts totaled \$2.9 billion. *Id.* at ¶ 64.

The allegations about Defendants’ alleged knowledge, however, are conclusory and belied by other allegations in the complaint. For example, Plaintiffs contend that the service contracts “*typically* last[] from 10 to 21 years and can last as long as 25 years,” in total, and are renewed each year at the customer’s option. SAC at ¶¶ 63, 68 (emphasis added). But Plaintiffs fail to explain how

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Defendants could meaningfully estimate the length of future contracts from such a large range. Plaintiffs also suggest that Bloom knew the estimated life of its Energy Servers and fuel cells because it had to replace some of its earlier generation systems. *See id.* at ¶¶ 69-70. But as Plaintiffs’ allegations inherently acknowledge, Bloom also had newer systems in place, and Plaintiffs do not explain how Defendants could extrapolate to determine the life or replacement schedule for all its Energy Servers. *See id.* at ¶ 75 (statement by Bloom that “[o]ver the years we have made steady improvements in our fuel cell lives . . .”).

Instead, Plaintiffs appear to suggest that because Hindenburg Research came up with an estimate of contingent liabilities from the service contracts in September 2019, Bloom should have done so as well. *See* SAC at ¶¶ 72-73. Plaintiffs explain that the Hindenburg authors estimated that Bloom had “\$2.2 billion in undisclosed servicing liabilities that the market has missed.” *Id.* at ¶ 72. Plaintiffs do not explain how the authors arrived at this figure or why it constitutes a reasonable estimate. Plaintiffs also fail to provide any information regarding the authors of this report or their qualifications.

In opposition, Plaintiffs suggest that the Court should simply consider the Hindenburg report—and its analysis—in its entirety. *See* Dkt. No. 138 at 17. But the report indicates that Hindenburg Research holds a short position in Bloom’s stock. *See* Dkt. No. 138-4, Ex. 29 (“Hindenburg Report”) at 2, 51. The report recognizes that Hindenburg “therefore stands to realize significant

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gains in the event that the price of any [Bloom stock] declines.” *Id.* at 51. In short, Plaintiffs do not adequately explain why this self-interested report supports their claim of falsity. *See In re Nektar Therapeutics*, No. 18-CV-06607-HSG, 2020 WL 3962004, at \*10 (N.D. Cal. July 13, 2020). Even if the Court were to consider the report, it says nothing about Bloom’s inquiry into or knowledge about how to account for the service contracts under GAAP.

Plaintiffs have failed to plead that any of the opinion statements about Bloom’s contingent liabilities were false or misleading under *Omnicare*. The Court **GRANTS** the motion to dismiss on this basis.

**b. Managed Service Agreements**

Plaintiffs also challenge Defendants’ accounting for Bloom’s Managed Service Agreements (“MSAs”). Under an MSA, Bloom sells its Energy Servers to a bank, which then leases the equipment back to the company. *See* SAC at ¶ 400. Bloom, in turn, subleases the equipment to a customer. *Id.* Under the MSAs, the customer pays the bank a fixed fee for its use of the Energy Server and also pays Bloom for its maintenance and operation of the Energy Server. *Id.* at ¶¶ 81, 400. Plaintiffs note that Bloom was therefore both “lessee” and “lessor” in this arrangement. *See id.* at ¶ 81. Plaintiffs allege that when Bloom filed its Registration Statement, it accounted for MSAs as operating leases instead of capital leases, in violation of GAAP. *Id.* at ¶¶ 81-93 (citing ASC 840-10-10-1, ASC 840-10-25-1). Plaintiffs note that capital leases are generally less desirable because companies must record

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both the asset and corresponding liability on its books. *See id.* at ¶ 88. Plaintiffs assert that by accounting for the MSAs as operating leases, Bloom improperly recognized revenue from the “sales” of Energy Servers to the banks upfront, rather than recognizing any revenue over the term of the MSA. *See id.* at ¶¶ 89-91. Doing so, Plaintiffs argue, materially misrepresented Bloom’s financial position. *Id.* at ¶ 81.

Prior to late 2019, Bloom had concluded, and PwC had concurred, that its treatment of MSAs was proper. *Id.* at ¶ 400. But on February 12, 2020, Bloom announced that it would “restate” certain prior financial statements from 2018 and 2019 and “revise” other prior financial statements for 2016, 2017, and 2018 to account for the change in treatment of certain MSAs as financings (*i.e.*, loans from the banks rather than sales). *Id.* Bloom acknowledged that this would alter its reported losses and the timing of revenue recognition, with the company recognizing revenue over the loan term as customers made payments to the banks. *See id.*

Here too, Defendants urge that *Omnicare* applies because Bloom’s treatment of the MSAs and its recognition of revenue from them was the product of accounting judgments. *See* Dkt. No. 130 at 17-19.

Plaintiffs respond that Bloom’s “statements of total revenue, net loss, and net loss per share” are not statements of opinion, but rather objective facts. *See* Dkt. No. 138 at 7-8. However, the considerations underlying these figures—such as which GAAP provisions apply and

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how to apply them—may require the exercise of judgment. *See Align*, 856 F.3d at 621; *In re AmTrust Fin. Servs., Inc. Sec. Litig.*, No. 17-CV-1545 (LAK), 2019 WL 4257110, at \*14 (S.D.N.Y. Sept. 9, 2019). As the court in *In re AmTrust Financial Service* aptly explained:

If the numbers underlying that data consist only of figures that were then presently known, fixed, or definite — e.g., the price of widgets and number of widgets sold in a previous month — then any resulting data would be a statement of fact. Likewise, if the relevant provision of GAAP or ASC topic applied to produce the data called only for the application of or evaluation under objective criteria, then the resulting data would be a statement of fact. If, however, the relevant accounting guidance called for the exercise of judgment, then the resulting data would be a statement of opinion. And, if determining the relevant provision of GAAP to apply in a certain area of accounting or with respect to a certain transaction involved a subjective evaluation, then any data resulting from that application of GAAP would be a statement of opinion.

*In re AmTrust*, 2019 WL 4257110, at \*14. Plaintiffs assert that the relevant ASC provisions here are “very clear bright line provisions for when a lease should be classified as a capital lease.” *See* SAC at ¶ 84; *see also* Dkt. No. 138 at 8-9.

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*First*, Plaintiffs point to ASC 840-10-25-1, which lists four criteria to consider when determining whether to classify a lease as a capital lease:

- a. The lease transfers ownership of the property to the lessee by the end of the lease term.
- b. The lease contains a bargain purchase option.
- c. The lease term is equal to 75 percent or more of the estimated economic life of the leased property.
- d. The present value at the beginning of the lease term of the minimum lease payments . . . exceeds 90 percent of the excess of the fair value of the leased property to the lessor at lease inception . . . .

*See* Dkt. No. 131-15, Ex. 16 (“ASC 840”) at 2. As Plaintiffs note in the complaint, “[i]f, at its inception, a lease meets any of the [] four criteria, it is classified as a capital lease by the lessee.” SAC at ¶ 84. The complaint focuses exclusively on the third criterion. Plaintiffs assert that “[t]he length of Bloom Energy’s MS[A] leases was 6 - 10 years, well in excess of the 75% of the Energy Servers’ actual useful life.” *See* SAC at ¶ 89. Plaintiffs therefore conclude that Bloom should have treated the MSAs as capital leases. *Id.*

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*Second*, Plaintiffs cite ASC 840-10-10-1, which describes “[t]he objective of the lease classification criteria” in ASC 840. *See id.* at ¶ 84; *see also* Dkt. No. 138 at 8. The provision states that the classification criteria “derive[] from the concept that a lease that transfers substantially all of the benefits and risks incident to the ownership of property should be accounted for as the acquisition of an asset and the incurrence of an obligation by the lessee and as a sale or financing by the lessor. All other leases should be accounted for as operating leases.” *See* SAC at ¶ 83 (quoting ASC 840-10-10-1). Plaintiffs argue that a “sale-leaseback” transaction like the MSAs should not be treated as an operating lease because “the seller-lessee never parted with the asset.” *See id.* at ¶ 86. Plaintiffs further argue that compliance with ASC 840-10-10-1 is a threshold requirement, and the Court need not consider any other provisions in ASC 840 to determine whether Defendants accurately classified the MSAs. *See* Dkt. No. 130 at 8.

By its terms, however, ASC 840-10-10-1 merely states the “objectives” underlying the more detailed provisions that follow. Despite Plaintiffs’ urging, it does not appear to provide the definitive method for classifying a lease. ASC 840-40-25-4, for example, appears to specifically address a sale-leaseback and the recognition of related profits:

If the seller-lessee retains, through a leaseback, substantially all of the benefits and risks incident to the ownership of the property sold, the sale-leaseback transaction is merely a financing. The seller-lessee shall not recognize

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any profit on the sale of an asset if the substance of the sale-leaseback transaction is merely a financing. Accordingly, *this Subtopic does not permit any profit to be recognized on a sale if a related leaseback of the entire property sold meets one of the criteria in paragraph 840-10-25-1.*

*Id.* at 16 (emphasis added). This provision thus refers back to the four criteria discussed above in ASC 840-10-25-1.

In their opposition brief, Plaintiffs do not even reference ASC 840-10-25-1. Nor do they explain why the application of this provision does not require the exercise of judgment. Although a somewhat close call, in the Court's view, ASC 840-10-25-1 appears to involve complex considerations of the specific terms of the MSAs and the value of the Energy Servers.

Rather than discuss the ASC provision directly, Plaintiffs rely heavily on the fact that Bloom decided to revise and restate its financial statements as evidence that Bloom's treatment of the MSAs was "objectively incorrect." *See* Dkt. No. 138 at 8-10, & n.5-6. Plaintiffs point out that "[a] restatement is the 'process of revising previously issued financial statements to reflect the correction of an error in those financial statements.'" *Id.* at 9 (quoting ASC 250-10-20). But Plaintiffs do not cite any case law supporting their theory that a restatement alone can establish that a statement is one of fact rather than of opinion. As Defendants note, opinion statements can still be wrong such that a company may seek to correct them.

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This does not, however, transform the opinion statement into an objective statement of fact. The Supreme Court in *Omnicare* implicitly recognized this, explaining that “an investor cannot state a claim by alleging only that an opinion was wrong; the complaint must as well call into question the issuer’s basis for offering the opinion.” *See Omnicare*, 575 U.S. at 194.

Plaintiffs have not alleged facts calling into question Defendants’ basis for concluding that the MSAs could be treated as sales rather than capital leases. Plaintiffs do not sufficiently explain how the MSAs meet any of the four criteria in ASC 840-10-25-1. In the complaint, Plaintiffs do not specify the economic life of an Energy Server, a necessary input to determine whether the lease term is at least 75% of the Energy Servers’ estimated economic life under the third criterion. As Defendants point out, the only insight Plaintiffs provide is that Bloom represented that the Energy Servers had useful lives of 15 to 21 years. *See* SAC at ¶ 469. Even assuming a useful life of 15 years, Plaintiffs have not established that the MSAs meet the 75% of estimated useful life threshold in ASC 840-10-25-1. And Plaintiffs do not allege that the MSAs meet any of the other three criteria. The Court therefore **GRANTS** the motion to dismiss regarding the treatment of Bloom’s MSAs.

**ii. Fuel Cell Life**

Plaintiffs next challenge Bloom’s representations about the Energy Servers’ fuel cell life. In the Registration Statement, Defendants included a letter from then-CFO

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Randy Furr. *See* SAC at ¶ 75; *see also* Dkt. No. 131-1, Ex. 1 at 68-70. In the letter, Mr. Furr acknowledged that Bloom’s service business “experienced losses” historically as it installed Energy Servers that had a lifespan below the company’s break even point. *See* Dkt. No. 131-1, Ex. 1 at 68. However, Mr. Furr expressed optimism that Bloom could break even in its service business in the future “provided the time between [fuel cell] stack replacements across all of our fleet is five years or better.” *Id.* Mr. Furr explained that although earlier generations of Bloom’s fuel cells had needed replacement “typically [every] 12 to 18 months,” “[o]ver the years we have made steady improvements in our fuel cell lives, and from 2017 onwards we expect to average over five years between replacements.” *See id.*

Plaintiffs assert that these statements were materially false and misleading because in reality, “Bloom Energy routinely replaced its fuel cells after just three years.” *See* SAC at ¶ 77. Here again, Plaintiffs base their allegations on the Hindenburg Research report. *See id.* at ¶ 76. In their September 2019 report, the Hindenburg authors explained that they had collected public utility records for New York and California for generators installed after 2016, covering 35 of Bloom’s projects. Hindenburg Report at 10-12, 46-48; *see also* SAC at ¶ 76. The authors concluded that “[a]fter aggregating this data, [they] found that even Bloom’s newest fuel cells will degrade below replacement thresholds in under 3 years . . . .” Hindenburg Report at 11. The authors also cited to several unnamed experts who said that they would be “highly skeptical” of solid oxide fuel cells lasting five years or longer in the field. *Id.* at 11.

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Defendants again argue that Plaintiffs are challenging statements of opinion. *See* Dkt. No. 130 at 13-14. They point out that in the letter, Mr. Furr states that “*we expect* to average over five years between [fuel cell] replacements” from 2017 onward. *See* Dkt. No. 131-1, Ex. 1 at 68 (emphasis added). The letter further said “*we believe* we can break-even in our service business provided the time between stack replacements across all of our fleet is five years or better.” *Id.* (emphasis added). Plaintiffs respond that Mr. Furr’s statements, taken in their entirety, contain an embedded statement of fact that Defendants “saw improvements in fuel cell life averaging five years between replacements.” *See* Dkt. No. 138 at 21.

The Supreme Court in *Omnicare* recognized that the use of “words like ‘I believe’” is not dispositive of whether a statement is one of fact or opinion. *See Omnicare*, 575 U.S. at 185. For example, the Supreme Court provided a hypothetical in which a CEO said “I believe our TVs have the highest resolution available because we use a patented technology to which our competitors do not have access.” *Id.* The Court explained that the statement not only affirms the CEO’s opinions about the company’s TV resolution, “but also an underlying fact: that the company uses a patented technology.” *Id.* Defendants do not appear to contest that Mr. Furr’s statements contain an embedded statement of fact like the hypothetical in *Omnicare*. *See* Dkt. No. 145 at 6. And the Court agrees that despite the use of the words “expect” and “believe,” Mr. Furr’s letter represents that Bloom saw improvements in fuel cell life. *See* Dkt. No. 131-1, Ex. 1 at 68. However, the Court disagrees with Plaintiffs’ interpretation that

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Mr. Furr’s letter contains any embedded statement of fact about how much improvement Bloom saw in fuel cell life. Rather, Mr. Furr simply offered his opinion that based on the improvement the company had seen in the past, they expected “to average over five years between [fuel cell] replacements” from 2017 onward. *See* Dkt. No. 131-1, Ex. 1 at 68.

Plaintiffs’ basis for concluding that this statement is false appears to rest entirely on the Hindenburg report. As the Court has already discussed, the authors of this report are short sellers with a financial interest in highlighting possible problems with Bloom’s business. *See* Hindenburg Report at 2, 51. The Hindenburg authors state that they analyzed California and New York public utility data. *Id.* at 10-11. Given the deterioration that the authors saw in the efficiency of Bloom’s newest generation fuel cells, the authors explained that the cells were on track to need replacement within three—not five—years. *See id.* As Defendants note, however, this is just a projection. *See* Dkt. No. 145 at 6. The public utility data does not appear to bear on the veracity of Mr. Furr’s statement that Bloom saw improvement in its fuel cell technology over time.

The Hindenburg authors also appear to rely on other experts to buttress their analysis. The report cites to unnamed experts who express skepticism that Bloom could achieve an average fuel cell life over five years. *See id.* The two quotations from “experts in the field” state that they are “highly skeptical” and “doubt” Bloom’s claim. *Id.* at 11. But critically, none of these experts claim to have any experience with or knowledge of Bloom’s Energy

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Servers or their fuel cells. To the extent Plaintiffs rely on these other anonymous experts, the Court does not find this probative of falsity. The Court finds that Plaintiffs have not plausibly alleged falsity as to Bloom's average fuel cell life and **GRANTS** the motion on this basis.

**iii. Efficiency and Emissions**

Plaintiffs also challenge statements that Bloom made about the efficiency and emissions of its latest Energy Server technology. *See* SAC at ¶¶ 96-103.

*First*, Plaintiffs challenge Defendants' assertion in the Registration Statement that the "latest generation of [Bloom's] Energy Servers" is capable of "beginning-of-life efficiencies of 65%," with an efficiency "range from 53% to 65% over the project term depending on environmental conditions and the age of the power modules." *See* SAC at ¶ 97; *see also* Dkt. No. 131-1, Ex. 1 at 9, 14. To establish the falsity of this statement, Plaintiffs cite a 2019 study conducted by the University of Delaware in which the author found that the actual operating efficiency of Bloom's fuel cells was only 45% in 2018. *See* SAC at ¶ 98; *see also* Dkt. No. 131-21, Ex. 22. Defendants point out that in the study, the author acknowledges that they did not evaluate the newest model of Energy Server. *See* Dkt. No. 130 at 23. However, Bloom's alleged misstatement was limited to the "latest generation." *See* SAC at ¶ 97. In their opposition brief, Plaintiffs appear to acknowledge this and do not explain why the University of Delaware study is nonetheless evidence of falsity.

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Instead, Plaintiffs point out that the Hindenburg report, which evaluated Energy Servers installed after 2016, found that “Bloom’s newer fuel cell installations” had “a median starting efficiency of 58.3%,” which is below the stated 65%. *See* Dkt. No. 138 at 22 (citing SAC at ¶ 76). Defendants argue that the authors do not explain their methodology. *See* Dkt. No. 145 at 13. However, the report explains that the authors analyzed monthly performance data from the California Self-Generation Incentive Program and the New York State Energy Research and Development Authority. *See* Hindenburg Report at 47. The report also includes links to the reports, and notes how the authors sorted the data to look at Bloom’s latest Energy Servers. *Id.* Defendants also argue that the “58.3% ‘median’ figure does not show that the latest-generation Energy Servers were not capable of 65% efficiency.” *See* Dkt. No. 145 at 13. The Court is not persuaded. Defendants no doubt disagree with the report’s conclusions and the weight of the evidence Plaintiffs have pled. But at this stage, Plaintiffs need only plead enough facts to make it plausible that Bloom’s statement about the Energy Servers was false, and they have done so.

*Second*, Plaintiffs challenge several of Bloom’s statements regarding emissions. Plaintiffs identify statements that (1) “Energy Servers deployed since 2012 running on natural gas produce nearly 60% less carbon emissions compared to the average U.S. combustion power generation”; and (2) “Energy Servers emit virtually no criteria air pollutants, including NOx or SOx.” SAC at

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¶ 99.<sup>5</sup> Plaintiffs contend that these statements were false because the Energy Servers in fact produce pollutants such as nitrogen oxides, volatile organic compounds, and hazardous solid waste. *See id.* at ¶ 100. Plaintiffs identify recent litigation in the Superior Court of California in which concerns were raised about the pollution from Bloom’s technology. *See id.* (citing *Bloom v. City of Santa Clara*, Superior Court of California, County of Santa Clara, 19-cv-348838). The Hindenburg report also noted that the Servers “generate more CO<sub>2</sub> than the electric grid in key states they operate in and produce CO<sub>2</sub> levels comparable to modern natural gas power plants.” *Id.* at ¶ 101. And in February 2020, 16 Delaware state senators wrote to the Department of Natural Resources and Environmental Control, expressing concern over Bloom’s alleged misrepresentations about the Energy Servers’ CO<sub>2</sub> emissions. *See id.* at ¶ 102.

Defendants argue that Plaintiffs are “comparing apples to oranges,” and that none of the cited sources establish that Bloom’s statements were false and misleading. *See* Dkt. No. 130 at 23-24. Defendants urge that Bloom “never represented that its Energy Servers produce *no* emissions,” just that they compare favorably to other energy sources. *See id.* at 24 (emphasis in original). But as Plaintiffs point out, at least one of Defendants’ challenged statements is that “Energy Servers emit *virtually no criteria air pollutants*, including NO<sub>x</sub> or SO<sub>x</sub>.” SAC at ¶ 99 (emphasis added).

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5. Although the complaint includes additional statements from Bloom about its emissions, Plaintiffs do not appear to address these in their opposition and instead focus only on these two statements. *See* Dkt. No. 38 at 22-23.

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Nevertheless, Plaintiffs offer few allegations to support the falsity of the statement. Plaintiffs cite the court's order in *Bloom v. City of Santa Clara*. See Dkt. No. 138 at 22. In the order, the court noted that Santa Clara "cite[d] materials showing [Bloom's Energy Server fuel cells] produce NO<sub>x</sub>, CO<sub>2</sub>, VOCs, and hazardous solid waste." See Dkt. No. 131-23, Ex. 24 at 8. However, the court did not cite to these materials or adopt their findings. Rather, later in the order the court indicated that one report showed that Energy Servers "do not produce SO<sub>x</sub>." See *id.* at 14. The report also found that the NO<sub>x</sub> emission factor for the Energy Servers was .0017, lower than the NO<sub>x</sub> emission factor for the natural gas power plant that the report analyzed. See *id.*; see also *id.* at 6. Plaintiffs do not explain how this supports their theory of falsity.

Regarding Bloom's claim that its Energy Servers emit 60% less carbon emissions than the average U.S. combustion power generation, Plaintiffs again cite the Hindenburg report. See SAC at ¶ 101. The report concludes that the "Servers emit significantly more CO<sub>2</sub> than the electric grid in key states where it operates . . . comparable to those of modern natural gas power plants." See Dkt. No. 138 at 22 (quoting Hindenburg Report at 1). The complaint does not explain how the "power grid in key states" compares to "U.S. combustion power generation." In opposition, Plaintiffs suggest that "combustion power plants are included in 'the grid.'" See Dkt. No. 138 at 23. However, they offer no support for this conclusion, and importantly have not alleged this is in the complaint. Plaintiff also notes that "Bloom self-identified as a 'large quantity generator of hazardous waste,' to the EPA." See Dkt. No. 138 at 22. Yet again, however, Plaintiffs do not

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explain how this is relevant to the challenged statements about the Energy Servers' carbon emissions compared to U.S. combustion power generation.

The Court therefore **GRANTS IN PART** the motion as it relates to statements about Bloom's emissions, but otherwise **DENIES** the motion as to claims based on Bloom's statements about the Energy Servers' efficiency.

**iv. Construction Delays**

Plaintiffs challenge statements in the Registration Statement about "risks" of delay related to Bloom's construction schedule. SAC at ¶ 54. In particular, Bloom noted that its "business is subject to risks associated with construction . . . that may arise in the course of completing installations." *See id.* at ¶ 53. Plaintiffs contend that these were not just possible risks, but that construction delays actually existed at the time of the Registration Statement. *See id.* at ¶¶ 54-58. According to a confidential witness ("CW1"), a senior program manager for Bloom from June 2016 to February 2018, construction delays were "constant, "on-going," and "occurred during almost every project." *See id.* at ¶¶ 55-57. Plaintiffs allege that Bloom "did not disclose that . . . at the time of the Registration Statement, [it was] already facing significant construction delays that were interfering with its installations and 'acceptances.'"<sup>6</sup> SAC at ¶ 54. And on November 5, 2018,

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6. "Acceptances" signify that an Energy Server is fully installed and running at full power. *See, e.g.*, SAC at ¶ 44; Dkt. No. 130 at 1.

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after the IPO, Bloom reported that it had only achieved 206 acceptances, less than the 215 to 235 acceptances it had provided as third-quarter guidance. *See id.* at ¶ 59.

Defendants first argue that “the Registration Statement plainly *did* tell investors that installation delays and the difficulty in predicting the timing of acceptances were ongoing features of its business.” *See* Dkt. No. 130 at 6 (emphasis in original). For example, Bloom warned investors that “[m]any factors can cause a lag” in the construction process and that “[m]any of these factors are unpredictable.” SAC at ¶ 53. Defendants argue that reasonable investors would assume after reading these risks that Bloom had already experienced construction delays. *See* Dkt. No. 130 at 6.

Defendants cite to *Lomingkit v. Apollo Educ. Grp. Inc.*, 275 F. Supp. 3d 1139, 1161-62 (D. Ariz. 2017), to support their contention that Bloom sufficiently warned that construction delays existed. *See* Dkt. No. 145 at 12, & n.7. In *Lomingkit*, the company’s Form 10-K stated “[f]rom time to time we experience intermittent outages of the information technology systems used by our students and by our employees.” *See id.* at 1161. The court found that these were not “future-oriented warnings” but rather discussed issues that the company was experiencing. *See id.* at 1161-62. However, the court in *Lomingkit* also recognized that a “where a party states that something *might* occur, that warning may be actionable because it omits that ‘that something’ has already occurred.” 275 F. Supp. 3d at 1161. Here, Defendants stated that construction delays “may” arise. Although a factfinder

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may ultimately agree with Defendants' interpretation, the Court finds that it is not the only plausible interpretation. Based on the allegations and language of the Registration Statement, a factfinder could conclude that Defendants failed to disclose preexisting construction delays.

Defendants next argue that Plaintiffs' only evidence of preexisting construction delays is statements from CW1, and that this is insufficient because CW1 is unreliable. *See* Dkt. No. 130 at 6-7. Defendants argue that even as alleged, CW1 left Bloom in February 2018, five months before the IPO. *See* SAC at ¶ 55. Defendant thus urges that CW1 could have no personal knowledge about construction delays at the time of the IPO. Dkt. No. 130 at 7. The complaint alleges that in his role, CW1 "was responsible for overseeing sales from development to acceptance, providing technical help during installation and sales, overseeing construction contracts, and ensuring that the construction and installation met all government requirements." *See* SAC at ¶ 58. Plaintiffs have therefore alleged how CW1 was in a position to know about construction delays at Bloom.

The Court further finds that the timing of CW1's departure from Bloom does not undermine the basis for his knowledge for purposes of Plaintiffs' Section 11 claims in this case. As the Ninth Circuit has recognized, prior information may still "confirm what a defendant should have known during the class period." *Webb v. Solarcity Corp.*, 884 F.3d 844, 851, n.1 (9th Cir. 2018). Here, although CW1 left before the IPO, he indicated that Bloom's construction delays were "constant" and "on-going" during

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his time with the company. *See* SAC at ¶¶ 56-57. Thus, as of at least February 2018, Bloom was allegedly experiencing construction delays for Q3 2018, the sales cycle that was ongoing at the time of the IPO. *See* Dkt. No. at 5 (“[T]he process leading to acceptance is lengthy, running to 12 months or more.”); Dkt. 131-1, Ex. 1 at 33 (“Our sales cycle is typically 12 to 18 months.”). Plaintiffs have therefore established how CW1 had information about construction delays relevant to the IPO. But Defendants couched construction delays as possible risks rather than actual problems at the company. A reasonable investor could find this misleading. The Court understands that Defendants disagree with the accuracy of Plaintiffs’ allegations. But that is not the Court’s inquiry at this stage. The Court therefore **DENIES** the motion on this basis.

**v. Internal Control Weaknesses**

Lastly, Plaintiffs claim that Bloom misrepresented in the Registration Statement “that there were no ‘material weaknesses in internal control over financial reporting at December 31, 2017.’” *See* SAC at ¶ 94. Plaintiffs note that in its 2019 Form 10-K, Bloom recognized that the company “had ‘a material weakness in [its] internal control over financial reporting related to the accounting for complex or non-routine transactions.’” *Id.*

Defendants argue that Plaintiffs misstate Bloom’s representation about internal controls, and that in a risk disclosure the company stated that it had not “discover[ed] any material weaknesses” as of December 31, 2017. *See* Dkt. No. 130 at 22. Plaintiffs appear to concede that Defendants

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are correct as to the actual statement Bloom made about internal controls. *See* Dkt. No. 138 at 23-24. They argue, however, that they still represented to investors that they had adequately reviewed internal controls. But Plaintiffs do not plead any facts to support the contention that Bloom did not engage in the appropriate level of review. Plaintiffs have also failed to plead any facts to explain why possible financial reporting controls in 2019 or 2020 would implicate representations about financial controls in 2017. The Court therefore **GRANTS** the motion on this basis.

**B. PwC Motion**

PwC filed its own motion to dismiss the Section 11 claim that Plaintiffs assert against it. *See* Dkt. No. 127. Plaintiffs allege that PwC reviewed Bloom's financial statements in connection with the IPO. *See* SAC at ¶¶ 35, 115. Bloom's Registration Statement contained PwC's audit report, which stated that Bloom's 2016 and 2017 financial statements "present fairly, in all material respects, the financial position of the Company as of December 31, 2017 . . ." *See* Dkt. No. 131-1, Ex. 1 at 227. PwC argues that its audit report and the statements contained within it are opinions subject to the *Omnicare* framework. *See* Dkt. No. 127 at 6-7. They contend that Plaintiffs have failed to sufficiently allege that the audit report was objectively and subjectively false, and the Section 11 claim against them should thus be dismissed. *Id.*

In response, Plaintiffs clarify that it contends PwC is liable under Section 11 both for misstatements in the audit report and for the GAAP errors in the 2017 financial

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statements related to the treatment of the MSAs. *See* Dkt. No. 140 at 5-7, 9-10; *see also* Section III.A.i.b (discussing MSAs). Under Section 11, accountants are liable for errors in “any part of the registration statement” that they “prepared or certified.” *See* 15 U.S.C. § 77k(a)(4). Plaintiffs argue that PwC does not dispute that it (1) certified the financial statements; or that (2) the 2017 financial statements were false. Dkt. No. 140 at 6-7. Plaintiffs urge that PwC therefore concedes liability for them. *Id.* The Court is not persuaded. PwC contends that “PwC’s opinion was that there were no material errors in the 2016 and 2017 financial statements,” and that Plaintiffs fail to allege that the 2016 and 2017 financial statements were materially misstated. *See* Dkt. No. 127 at 1; *see also id.* at 11, n.3. The Court therefore considers PwC’s motion to dismiss the Section 11 claim as to the alleged misstatements in the audit report and the financial statements.

**i. *Omnicare***

As a threshold issue, the parties disagree on whether the audit report and the financial statements are opinions subject to *Omnicare*. Neither party cites to any Ninth Circuit authority resolving this issue. Instead, the parties note that there is a split in authority regarding whether such material should be considered opinion.

Plaintiffs first highlight the district court’s order in *Special Situations Fund III QP, L.P. v. Marrone Bio Innovations, Inc.*, 243 F. Supp. 3d 1109, 1116-118 (E.D. Cal. 2017), which explicitly rejected the application of *Omnicare* to auditors. The court reasoned that “audit opinions are not

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of the same substance as those discussed in *Omnicare*,” which referenced a hypothetical CEO opining that the company’s TVs had “the highest resolution available on the market.” *Id.* (quoting *Omnicare*, 575 U.S. at 183). The court in *Marrone* said this hypothetical is “qualitatively different from an auditor’s professional opinion about the soundness of a company’s financial statements.” *Id.* This Court respectfully disagrees. The Court sees no meaningful distinction between the professional knowledge that a CEO has and the opinions he offers about a company’s technology and the professional knowledge that an auditor has and the opinions it offers about a company’s financial statements. The Supreme Court did not recognize any “auditor” exception to its holding, and the Court finds no basis for creating such an exception. *Accord Querub v. Moore Stephens Hong Kong*, 649 F. App’x 55, 58 (2d Cir. 2016) (Summary Order); *Johnson v. CBD Energy Ltd.*, No. CV H-15-1668, 2016 WL 3654657, at \*10 (S.D. Tex. July 6, 2016) (collecting cases).

Rather, the Supreme Court in *Omnicare* defined an opinion broadly as “a belief[,] a view, or a sentiment which the mind forms of persons or things.” *Omnicare*, 575 U.S. at 183 (quotation omitted) (alteration in original). Therefore, the critical difference between a fact and an opinion is that “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.” *Id.* The Court further emphasized that Section 11 “does not allow investors to second guess inherently subjective and uncertain assessments.” *Id.* It thus matters under *Omnicare* that PwC’s audit report and statements in

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the Registration Statement were explicitly identified as opinions. *Accord Querub*, 649 F. App'x at 58 (“Audit reports, labeled ‘opinions’ and involving considerable subjective judgment, are statements of opinion subject to the *Omnicare* standard for Section 11 claims.”); *see also Buttonwood Tree Value Partners, LP v. Sweeney*, 2012 WL 2086607, at \*2 (C.D. Cal. June 7, 2012) (finding “both GAAS and GAAP are a collection of broad standards that are couched in rather general and in some cases inherently subjective terms . . . to which reasonable professionals planning or conducting an audit reasonably and frequently could disagree.”).

Here, in the Registration Statement PwC identified its “*Opinion on the Financial Statements*” for 2016 and 2017. *See* Dkt. No. 131-1, Ex. 1 at 227 (emphasis added). PwC stated:

*In our opinion*, the consolidated financial statements present fairly, in all material respects, the financial position of the Company as of December 31, 2017 and December 31, 2016, and the results of its operations and its cash flows for each of the two years in the period ended December 31, 2017 in conformity with accounting principles generally accepted in the United States of America.

*Id.* (emphasis added). PwC further explained that although the “financial statements are the responsibility of the Company’s management,” PwC’s “responsibility is to *express an opinion* on the Company’s consolidated

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financial statements based on [its] audits.” *Id.* (emphasis added). They therefore conducted the audit “to obtain reasonable assurance about whether the consolidated financial statements [were] free of material misstatement, whether due to error or fraud.” *Id.* As the Supreme Court confirmed, 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.” *Omnicare*, 575 U.S. at 187. Moreover, as discussed in more detail in Section III.A.i.b above, the GAAP provisions regarding sale-leaseback transactions like the MSAs are complex and may require the exercise of considerable judgment.

Plaintiffs further contend that apart from the audit report itself, PwC also “certified” Bloom’s 2017 financial statements so as to be liable under 15 U.S.C. § 77k(a)(4). *See* Dkt. No. 140 at 5-7. Section 11(a)(4) provides a cause of action against a professional “who has with his consent been named as having prepared or certified any part of the registration statement.” 15 U.S.C. § 77k(a)(4). Plaintiffs suggest that “certified” in this context means PwC guaranteed that there were no material misstatements in Bloom Energy’s 2017 financial statements. The Court disagrees that there is a meaningful distinction between any “certification” of the 2017 financial statements and PwC’s audit report. *Accord Johnson*, 2016 WL 3654657, at \*10-11. PwC explicitly stated that it was providing an opinion based on its audit of these financial statements. This is consistent with the SEC’s definition that “[t]he term certified, when used in regard to financial statements, means examined and reported upon with an

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opinion expressed by an independent public or certified public accountant.” 17 C.F.R. § 230.405. The Court therefore finds that the *Omnicare* framework applies to PwC’s statements in its audit report and the 2017 financial statements.

Plaintiffs argue that even if PwC’s statements are considered opinions, they have pled a claim based on “embedded statements of fact” under *Omnicare*. See Dkt. No. 140 at 11 (citing *In re Petrobras Sec. Litig.*, 14-cv-9662 (JSR), 2016 WL 1533553 (S.D.N.Y. Feb. 19, 2016)). Plaintiffs urge that “the facts of Bloom’s financial statements violating GAAP” are embedded in PwC’s audit opinion. *Id.* The Court rejects Plaintiffs’ attempt to cast any alleged errors in the financial statements as embedded statements of fact. The court in *Johnson v. CBD Energy Ltd.* addressed this precise argument and found it premised on a misinterpretation of *Omnicare*. 2016 WL 3654657, at \*12. The Court finds the reasoning in *Johnson* persuasive and adopts it here.

**ii. Subjective Falsity**

To plead falsity for opinion statements under a material misstatement theory of liability, Plaintiffs must allege “both objective and subjective falsity.” *Align*, 856 F.3d at 615 (citing *Omnicare*, 575 U.S. at 183-86). Plaintiffs appear to concede that they have not alleged subjective falsity as required under *Omnicare*. And the Court finds that they have failed to plead any facts suggesting that PwC did not sincerely believe that the “financial statements present fairly, in all material respects, the

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financial position of the Company as of December 31, 2017 . . . .” *See* Dkt. No. 131-1, Ex. 1 at 227. The complaint hardly mentions PwC or its audit report at all, stating simply that PwC “purportedly conducted an adequate and reasonable investigation into the business, operations, financial statements, and accounting of Bloom Energy.” *See* SAC at ¶ 116. The Court therefore **GRANTS** PwC’s motion to dismiss.

**C. Section 10(b) Motion**

Under Section 10(b) of the Exchange Act, Plaintiffs seek to hold Defendants Bloom, Sridhar, and Furr liable for issuing false and misleading statements either intentionally or with deliberate recklessness to induce investors to purchase Bloom’s common stock. *See* SAC at ¶¶ 134-508. “To plead a claim under section 10(b) and Rule 10b-5, the Plaintiffs must allege: (1) a material misrepresentation or omission; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation.” *Align*, 856 F.3d at 613 (quotation omitted). Plaintiffs acknowledge that their Section 10(b) claims are subject to a heightened pleading standard under Rule 9(b). *See* Dkt. No. 139 at 4; *see also* SAC at ¶ 135 (“Plaintiffs’ claims under the Exchange Act sound in fraud.”).

Plaintiffs’ Section 10(b) and Section 11 claims are based on largely overlapping statements involving (1) Bloom’s financial statements, including improper accounting as to the maintenance service agreements and MSAs;

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(2) the life cycle of the fuel cells in the Energy Servers; (3) the efficiency and emissions of the Energy Servers; (4) construction delays; and (5) weaknesses in Bloom’s internal controls. *See* SAC at ¶¶ 134-508. Under Section 10(b), the challenged statements include those in the Registration Statement, as well as others that Plaintiffs allege occurred after the IPO and throughout the class period. The Section 10(b) Defendants move to dismiss the claims against them, arguing that Plaintiffs have failed to sufficiently plead falsity, scienter, and economic loss. *See* Dkt. No. 129. The Section 10(b) Defendants also explicitly incorporate by reference the arguments in the Section 11 Defendants’ motion. *See* Dkt. No. 129 at 1. For the reasons detailed in Section III.A above, the Court agrees that Plaintiffs have failed to adequately plead falsity as to the statements regarding accounting errors, fuel cell life, emissions, and internal controls. The Court therefore **GRANTS IN PART** the Section 10(b) Defendants’ motion on that basis. Accordingly, the Court only addresses the Section 10(b) Defendants’ separate arguments that Plaintiffs failed to plead scienter and loss causation.

**i. Scienter**

Under the PSLRA, whenever intent is an element of a claim, the complaint must “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2). “The PSLRA’s strong inference requirement has teeth,” and “is an exacting pleading obligation.” *Nguyen v. Endologix, Inc.*, 962 F.3d 405, 414 (9th Cir. 2020) (quotation omitted) (citing *Zucco*, 552 F.3d at 990). “The inference

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of scienter must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.” *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 314 (2007). The required state of mind is one of at least “deliberate recklessness.” *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 974 (9th Cir. 1999), *as amended* (Aug. 4, 1999). “[R]ecklessness only satisfies scienter under § 10(b) to the extent that it reflects some degree of intentional or conscious misconduct.” *Id.* at 977.

The Court first turns to the specific alleged misstatements and Plaintiffs’ allegations of scienter as they relate to these statements. The Court then makes a holistic assessment of the factual allegations.

**a. Accounting Errors**

Plaintiffs first contend that Defendants knew, or were deliberately reckless in not knowing, that Bloom was incorrectly accounting for its maintenance service agreements and MSAs. *See* Dkt. No. 139 at 9-16; *see also* SAC at ¶¶ 461-71. Plaintiffs suggest that scienter may be inferred from the accounting errors alone because the alleged GAAP violations were so “significant,” and the GAAP provisions themselves so “basic” and straightforward to apply. *See* Dkt. No. 139 at 9-10. Plaintiffs argue, for example, that “determining the correct accounting for the MSAs was as simple as reviewing the default terms of the MSAs.” *See id.* at 10 (citing SAC at ¶ 400). As the Court detailed in Section III.A.i above, however, the application of GAAP to Bloom’s maintenance service agreements and MSAs involved

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a complex inquiry. As the district court in *Oklahoma Firefighters Pension & Ret. Sys. v. IXIA* explained:

A plaintiff . . . cannot merely point to a GAAP principle and contend that a correct interpretation was simple or obvious. At the very least, the plaintiff must present facts demonstrating that the defendant was aware of the relevant GAAP principle and that this defendant knew how that [principle] was being interpreted. The plaintiff must then plead facts explaining how the defendant's incorrect interpretation was so unreasonable or obviously wrong that it should give rise to an inference of deliberate wrongdoing.

50 F. Supp. 3d 1328, 1361 (C.D. Cal. 2014) (quotation omitted). Plaintiffs have not alleged any facts that demonstrates that Messrs. Sridhar or Furr knew of the relevant GAAP provisions or knew that Bloom's interpretation and application of them was unreasonable under the circumstances. The Court simply disagrees that as alleged these errors "were readily apparent" and "indicative of scienter." *See* Dkt. No. 139 at 13.

**b. Fuel Cell Life**

Next Plaintiffs contend that Defendants knew, or were deliberately reckless in not knowing, that Bloom's fuel cells could not last five years. *See* Dkt. No. 139 at 18-19. Plaintiffs state that "Bloom's fuel cells were a core part of Bloom's business," and it would therefore be "absurd" for

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Defendants not to know that they had never reached an average life of five years. *Id.* But the challenged statement was simply a projection about future performance based on the company's technological advances. *See* SAC at ¶ 184. And Plaintiffs have not alleged sufficient facts about what either Mr. Sridhar or Mr. Furr actually knew about fuel cell life estimates.

**c. Efficiency and Emissions**

Plaintiffs similarly contend that scienter can be assumed based on the centrality to Bloom's business and marketing strategy that its Energy Servers provide "clean energy." *See* Dkt. No. 139 at 19-20 (citing SAC at ¶¶ 179, 194, 288, 328). Plaintiffs contend that both Messrs. Sridhar and Furr promoted the Energy Servers as providing "clean energy." *Id.* However, the Ninth Circuit has cautioned that it is "not easy" to allege scienter based on a "core operations theory," *i.e.*, that "corporate officers have knowledge of the critical core operation of their companies." *See Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.*, 759 F.3d, 1051, 1062 (9th Cir. 2014). Here, Plaintiffs offer no allegations about Messrs. Sridhar and Furr's "detailed involvement in the minutia of [the] company's operations, such as data monitoring" or "witness accounts demonstrating that [the] executives had actual involvement in creating false reports." *Id.* Nor are there any allegations about Bloom's technological advancements over time.

*Appendix B***d. Construction Delays**

Plaintiffs contend that Defendants' statements regarding Bloom's ongoing construction delays were made with scienter. Plaintiffs again rely on CW1 to establish that Messrs. Sridhar and Furr had knowledge of the *existing* construction delays. *See* SAC at ¶ 144. Plaintiffs allege that CW1 "indicated that upper management, all the way up to Sridhar, typically became aware right away" of such construction delays. *See id.* In their opposition brief, Plaintiffs also contend that "CW1 would have direct knowledge of who was informed of the delays." Dkt. No. 139 at 18. But the complaint offers no basis for CW1's purported knowledge about what Messrs. Sridhar and Furr did or did not know. CW1 does not explain how he knows "upper management" was informed of the construction delays. In fact, the complaint does not allege that CW1 ever even interacted with Messrs. Sridhar or Furr.

**e. Internal Control Weaknesses**

Plaintiffs also challenge the statements that Messrs. Sridhar and Furr made in their Sarbanes-Oxley certifications that they had evaluated internal controls and concluded that those controls were "effective to provide reasonable assurance" that the company disclosed the required information under the Exchange Act. *See* SAC at ¶¶ 208, 253, 284. The Ninth Circuit has found that such "[b]oilerplate language in a corporation's 10-K form, or required certifications under Sarbanes-Oxley section 302(a), . . . add[s] nothing substantial to the scienter

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calculus.” *Zucco*, 552 F.3d at 1003-04. In their opposition brief, Plaintiffs nevertheless contend that “[i]f the Court finds that Sridhar and Furr acted with scienter” with regard to the alleged accounting errors, “it stands to reason that Sridhar and Furr acted with scienter by indicating there was [*sic*] no internal weaknesses in internal controls and certifying its financial statements despite Bloom’s improper accounting.” *See* Dkt. No. 139 at 21. However, the Court has found that Plaintiffs have *not* sufficiently alleged that the individual Defendants acted with scienter with regard to the maintenance service contracts or MSAs. *See* Section III.C.i.a. In short, Plaintiffs have not pled any facts suggesting that Messrs. Sridhar or Furr knew at any point during the purported class period of any defect in internal controls.

**f. Defendants’ Motive**

Plaintiffs also cite several other general allegations about Defendants’ financial incentives to support their claim that they have adequately pled scienter. “Motive and opportunity [are] not enough to create a strong inference of scienter.” *Rubke v. Capitol Bancorp Ltd*, 551 F.3d 1156, 1166 (9th Cir. 2009); *see also Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1038 (9th Cir. 2002) (“If scienter could be pleaded merely by alleging that officers and directors possess motive and opportunity to enhance a company’s business prospects, virtually every company in the United States that experiences a downturn in stock price could be forced to defend securities fraud actions.”) (quotation omitted).

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**Incentive Compensation.** Plaintiffs contend that Messrs. Sridhar and Furr were financially motivated to inflate Bloom’s stock price because they profited from the IPO. *See* SAC at ¶¶ 442-46. Plaintiffs allege that while Mr. Sridhar received an annual salary of \$524,039 in 2017 and \$607,500 in 2018, *id.* at ¶ 444, he also received a cash and equity bonus for taking Bloom public totaling \$2,000,000 in cash and \$44,259,315 in vested RSUs, *id.* at ¶ 443. Plaintiffs further allege that Mr. Furr’s salary for 2018 was \$407,154, but that because of the IPO, Mr. Furr was granted \$11,276,283 in vested RSUs. *Id.* at ¶ 445. Plaintiffs urge that these bonuses were unreasonable for “a company that was pre-profit.” *See id.* at ¶ 446. Yet Plaintiffs have not alleged that Messrs. Sridhar and Furr were responsible for setting the amount of their bonuses and compensation.

As Plaintiffs point out, the Ninth Circuit has stated that “[a] strong correlation between financial results and stock options or cash bonuses for individual defendants may occasionally be compelling enough to support an inference of scienter.” *Zucco*, 552 F.3d at 1004. However, the Ninth Circuit has also cautioned that “it is common for executive compensation, including stock options and bonuses, to be based partly on the executive’s success in achieving key corporate goals.” *In re Rigel Pharms., Inc. Sec. Litig.*, 697 F.3d 869, 884 (9th Cir. 2012). The Supreme Court has therefore cautioned against “conclud[ing] that there is fraudulent intent merely because a defendant’s compensation was based in part on [] successes” in achieving corporate goals. *Rigel*, 697 F.3d at 884. Specifically with respect to IPOs, the Ninth Circuit

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has concluded that “allegations regarding Defendants-Appellees’ motive to boost the company’s profitability and stock prices in the months surrounding the company’s IPO are not ‘specific’ or ‘particularized,’ as our precedents require.” *Webb v. Solarcity Corp.*, 884 F.3d 844, 856 (9th Cir. 2018).

Here, Plaintiffs offer a conclusory statement that the bonus structure was unreasonable. SAC at ¶ 446. But Plaintiffs do not provide any detailed allegations about how the bonus structure worked or what the milestones were that the individual Defendants had to achieve in order to receive their bonuses. *See id.* at ¶¶ 441-46. Plaintiffs suggest, for example, that the inflated share price was critical to ensure Bloom could satisfy its debt obligations. *See id.* at ¶ 453. But Plaintiffs do not allege that Mr. Sridhar’s or Mr. Furr’s compensation was tied to the share price in the IPO. The Court finds that Plaintiffs have not pled a sufficiently strong correlation between Bloom’s financial performance and Messrs. Sridhar and Furr’s stock and cash bonuses to support a finding of scienter in light of the work involved in helping the company through its IPO.

**Stock Sales.** Plaintiffs further contend that Messrs. Sridhar and Furr’s stock sales support a finding of scienter. *See* SAC at ¶¶ 455-60. Plaintiffs allege that after PwC identified problems with the accounting of the MSAs, but before the company published its restatement in March 2020, Messrs. Sridhar and Furr sold a substantial amount of stock. *See id.* Plaintiffs allege that prior to these sales, Mr. Sridhar had never sold stock in the open

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market and Mr. Furr had only done so once. *See id.* at ¶ 459. Plaintiffs allege that by selling when they did, Messrs. Sridhar and Furr prevented losses of \$1,927,811, and \$317,063, respectively. *See id.* at ¶ 455.

The Ninth Circuit has stated that “[u]nusual’ or ‘suspicious’ stock sales by corporate insiders may constitute circumstantial evidence of scienter . . . .” *In re Quality Sys., Inc. Sec. Litig.*, 865 F.3d 1130, 1146 (9th Cir. 2017) (quotation omitted). Courts may consider factors such as “(1) the amount and percentage of shares sold; (2) timing of the sales; and (3) consistency with prior trading history.” *Id.* (quotation omitted). Although Plaintiffs have alleged that the sales are not consistent with the individual Defendants’ trading history, Bloom’s IPO was not until July 25, 2018. Defendants therefore only had, at most, less than a year and a half in which to sell stock. Plaintiffs also do not discuss whether there was any waiting period after the IPO during which Defendants were prevented from selling their stock. Plaintiffs have also not provided any information about what portion of their total holdings Messrs. Sridhar and Furr sold in December 2019 and January 2020. Without more information, the Court does not find that these stocks sales are sufficient, on their own, to establish scienter.

**Corporate Scienter.** Plaintiffs contend that Bloom had its own financial incentives to inflate the share price in order to cover its debts. *See SAC* at ¶¶ 451-53. The Ninth Circuit has held that the theory of corporate or collective scienter is available, at most, in narrow circumstances in which the challenged statements are “so dramatically

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false . . . [as] to create an inference of scienter that at least some corporate officials knew of falsity upon publication.” *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1063 (9th Cir. 2014) (rejecting corporate scienter allegations) (quotation omitted). Plaintiffs do not meet this standard. And in the complaint, Plaintiffs state only that Bloom is liable for the actions of Messrs. Sridhar, Furr and all other employees under principles of *respondeat superior*. See SAC at ¶¶ 478-79. Because the Court finds that Plaintiffs have not alleged scienter as to Messrs. Sridhar and Furr, Plaintiffs have also not established scienter as to Bloom.

\* \* \*

Even when Plaintiffs’ allegations are considered in their entirety, the Court finds that the inference of scienter is weak, and certainly not as strong as the inference that Defendants had a non-fraudulent intent. See *Tellabs*, 551 U.S. at 310 (“To determine whether the plaintiff has alleged facts giving rise to the requisite ‘strong inference,’ a court must consider plausible, nonculpable explanations for the defendant’s conduct, as well as inferences favoring the plaintiff.”). The Court therefore **GRANTS** the motion to dismiss on this basis.

## ii. Loss Causation

Lastly, Defendants contend that Plaintiffs have failed to allege loss causation regarding fuel cell life. “[T]o satisfy the loss causation requirement, the plaintiff must show that the revelation of that misrepresentation or omission was a substantial factor in causing a decline in

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the security's price, thus creating an actual economic loss for the plaintiff." *Nuveen Mun. High Income Opportunity Fund v. City of Alameda, Cal.*, 730 F.3d 1111, 1119 (9th Cir. 2013) (quoting *McCabe v. Ernst & Young, LLP*, 494 F.3d 418, 425-26 (3d Cir. 2007)). This "burden of pleading loss causation is typically satisfied by allegations that the defendant revealed the truth through 'corrective disclosures' which 'caused the company's stock price to drop and investors to lose money.'" *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1209 (9th Cir. 2016) (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 264 (2014)). However, this is not the only way to meet the pleading burden. Instead, "loss causation is simply a variant of proximate cause," and "the ultimate issue is whether the defendant's misstatement, as opposed to some other fact, foreseeably caused the plaintiff's loss." *Id.* at 1210.

Because the Court has found that Plaintiffs have not alleged scienter, the Court need not reach this issue. Nevertheless, to streamline the amendment process and any subsequent motion to dismiss, the Court addresses the parties' arguments. Defendants contend that the Hindenburg report did not constitute a corrective disclosure because it is based on publicly available information. *See* Dkt. No. 127 at 22-23. Plaintiffs allege that the falsity of Bloom's statements about fuel cell life was revealed to investors on September 17, 2019, when the Hindenburg authors issued their report concluding that Bloom's fuel cell life was less than three years. *See* SAC at ¶ 486. Defendants point out, however, that the Hindenburg report explicitly states that "all information [in the report]

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has been obtained from public sources.” *See* Hindenburg Report at 59. Specifically, much of the Hindenburg report appears based on public utility data from California and New York. This Court has previously explained that “the mere repackaging of already-public information by an analyst or short-seller is simply insufficient to constitute a corrective disclosure.” *In re Nektar Therapeutics*, No. 18-CV-06607-HSG, 2020 WL 3962004, at \*18 (N.D. Cal. July 13, 2020) (quoting *Meyer v. Greene*, 710 F.3d 1189, 1199 (11th Cir. 2013)). “If every analyst or short-seller’s opinion based on already-public information could form the basis for a corrective disclosure, then every investor who suffers a loss in the financial markets could sue under § 10(b) using an analyst’s negative analysis of public filings as a corrective disclosure. That cannot be—nor is it—the law.” *Id.* (quoting *Meyer*, 710 F.3d at 1199). The Court therefore GRANTS the motion on this basis.

Nevertheless, the Court notes that that the Ninth Circuit has at least considered the possibility that some materials may still constitute corrective disclosures if they “provid[e] additional or more authoritative [] information that deflated the stock price.” *See In re Apollo Grp., Inc. Sec. Litig.*, No. 08-16971, 2010 WL 5927988, at \*1 (9th Cir. June 23, 2010).<sup>7</sup> Still, at least as currently alleged, Plaintiffs do not explain why the Hindenburg authors had the necessary background or expertise to interpret or aggregate the public utility data in a manner that added something to the factual record such that their report

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7. As an unpublished Ninth Circuit decision, *In re Apollo* is not precedent, but may be considered for its persuasive value. *See* Fed. R. App. P. 32.1; CTA9 Rule 36-3.

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could still be considered a corrective disclosure under *Apollo*.

**IV. CONCLUSION**

Accordingly, the Court **GRANTS IN PART** and **DENIES IN PART** the motions to dismiss.

- The Court **GRANTS IN PART** the Section 11 Defendants' motion to dismiss, Dkt. No. 130, **WITH LEAVE TO AMEND** as to Plaintiffs' claims based on accounting errors, fuel cell life, emissions, and internal controls. The Court otherwise **DENIES** the motion.
- The Court **GRANTS** PwC's motion to dismiss, Dkt. No. 127, **WITH LEAVE TO AMEND**.
- The Court **GRANTS** the Section 10(b) Defendants' motion to dismiss, Dkt. No. 129, **WITH LEAVE TO AMEND**.

Any amended complaint must be filed within twenty-one (21) days of the date of this order.

When preparing an amended complaint, Plaintiffs are further ordered to prepare a statement-by-statement chart of the information required by 15 U.S.C. § 78u-4(b) (1) and (2) that specifically identifies: (A) each statement or action alleged to have been false or misleading, (B) the

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reasons the statement or action was false, misleading, or deceptive when made, and (C) if an allegation regarding the statement or omission is made on information and belief, all facts on which the belief is formed. The chart should clearly identify which statements or omissions are attributable to which defendants, and include a detailed statement of the facts giving rise to a strong inference that each defendant acted with the required state of mind. Plaintiffs should also summarize their allegations regarding what each defendant knew with regard to the statement or omission, and when they knew it. Such a chart should be included within any amended complaint or attached to any amended complaint. For guidance on the format for such a chart, the Court directs Plaintiffs to review *In re NVIDIA Corp. Sec. Litig.*, 18-cv-07669-HSG, Dkt. No. 149-2.

The Court further SETS a telephonic case management conference on October 26, 2021, at 2:00 p.m. The parties should be prepared to discuss how to move this case forward efficiently. All counsel shall use the following dial-in information to access the call:

Dial-In: 888-808-6929;  
Passcode: 6064255

For call clarity, parties shall NOT use speaker phone or earpieces for these calls, and where at all possible, parties shall use landlines. The joint case management statement is due October 19, 2021.

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**IT IS SO ORDERED.**

Dated: September 29, 2021

/s/ Haywood S. Gilliam, Jr.  
Haywood S. Gilliam, Jr.  
United States District Judge

**APPENDIX C — JUDGMENT OF THE UNITED  
STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF CALIFORNIA, FILED MAY 7, 2024**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Case No. 4:19-cv-02935-HSG

ELISSA M. ROBERTS, INDIVIDUALLY AND  
ON BEHALF OF ALL OTHERS SIMILARLY  
SITUATED,

*Plaintiff,*

v.

BLOOM ENERGY CORPORATION, KR SRIDHAR,  
RANDY FURR, L. JOHN DOERR, SCOTT  
SANDELL, EDDY ZERVIGON, PETER TETI,  
MARY K. BUSH, KELLY A. AYOTTE, J.P. MORGAN  
SECURITIES LLC, MORGAN STANLEY & CO.  
LLC, CREDIT SUISSE SECURITIES (USA)  
LLC, KEYBANC CAPITAL MARKETS INC.,  
MERRILL LYNCH, PIERCE, FENNER & SMITH  
IN CORPORATED, ROBERT W. BAIRD & CO.,  
INCORPORATED, COWEN AND COMPANY, LLC,  
HSBC SECURITIES (USA) INC., OPPENHEIMER  
& CO. INC., RAYMOND JAMES & ASSOCIATES,  
INC., and PRICEWATERHOUSECOOPERS LLP,

*Defendants.*

Filed May 7, 2024

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*Appendix C*

**JUDGMENT AS MODIFIED  
REGARDING DEFENDANT  
PRICewaterhouseCOOPERS LLP**

In accordance with this Court's Order dated September 29, 2021, Granting in Part and Denying in Part the Motions to Dismiss, dismissing all claims alleged by Plaintiffs against Defendant PricewaterhouseCoopers LLP (ECF 157), and judgment being entered on all other claims alleged against all other Defendants in this action, the Court hereby directs entry of this final judgment solely as to the claims against Defendant PricewaterhouseCoopers LLP pursuant to Federal Rule of Civil Procedure 54(b).

IT IS ORDERED, ADJUDGED, AND DECREED that all claims alleged against Defendant PricewaterhouseCoopers LLP are hereby dismissed.

DATED: May 7, 2024

/s/ Haywood S. Gilliam, Jr.  
Honorable Haywood S. Gilliam, Jr.  
United States District Judge

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**APPENDIX D — ORDER OF THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOR THE NINTH CIRCUIT,  
FILED DECEMBER 18, 2025**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 24-3568

JAMES EVERETT HUNT; *et al.*,

*Plaintiffs-Appellants,*

v.

PRICEWATERHOUSECOOPERS LLP (PWC),

*Defendant-Appellee,*

and

BLOOM ENERGY CORPORATION; *et al.*,

*Defendants.*

Filed December 18, 2025

**ORDER**

D.C. No. 4:19-cv-02935-HSG  
Northern District of California, Oakland

*Appendix D*

Before: M. SMITH and N.R. SMITH, Circuit Judges, and RAYES, District Judge.\*

The panel has voted to deny the petition for panel rehearing. Judge M. Smith has voted to deny the petition for rehearing en banc, and Judge N.R. Smith and Judge Rayes have so recommended.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

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\* The Honorable Douglas L. Rayes, United States District Judge for the District of Arizona, sitting by designation.

**APPENDIX E — 15 U.S.C.A. § 77K**

15 U.S.C.A. § 77k  
Alternatively cites as Securities Act § 11

§ 77k. Civil liabilities on account  
of false registration statement

**(a) Persons possessing cause of action; persons liable**

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

- (1) every person who signed the registration statement;
- (2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;
- (3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;
- (4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a

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statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

**(b) Persons exempt from liability upon proof of issues**

Notwithstanding the provisions of subsection (a) no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign

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from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation,

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reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration

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statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

**(c) Standard of reasonableness**

In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

**(d) Effective date of registration statement with regard to underwriters**

If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

**(e) Measure of damages; undertaking for payment of costs**

The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been

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disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided*, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an

*Appendix E*

amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

**(f) Joint and several liability; liability of outside director**

(1) Except as provided in paragraph (2), all or any one or more of the persons specified in subsection (a) shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(2)(A) The liability of an outside director under subsection (e) shall be determined in accordance with section 78u-4(f) of this title.

(B) For purposes of this paragraph, the term “outside director” shall have the meaning given such term by rule or regulation of the Commission.

**(g) Offering price to public as maximum amount recoverable**

In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.