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VIA ECF

The Honorable Analisa Torres
United States District Judge
U.S. District Court for the Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *In re Tower Group International Ltd. Securities Litigation*, No. 13-cv-5852

Dear Judge Torres:

We represent Lead Plaintiffs in the above-referenced action. We write to address Defendants' misplaced reliance on the recent decision by the United States Supreme Court in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015) ("*Omnicare*").[1] For the reasons set forth herein, we believe that *Omnicare* supports the arguments made in Lead Plaintiffs' opposition briefs and in no way warrants dismissal of Lead Plaintiffs' claims.[2]

In *Omnicare*, the Supreme Court was faced with the question of what standard should be applied in evaluating whether a ***statement of opinion*** should create liability under Section 11 of the Securities Act of 1933. *Omnicare*, 135 S. Ct. at 1324. The Supreme Court "provided a roadmap for evaluation of the issue[]" of when a statement of opinion or belief is actionable, and identified "several circumstances" where "opinion statements are not wholly immune from liability." *See In re Bioscrip, Inc. Sec. Litig.*, 2015 WL 1501620, at *11 (S.D.N.Y. Mar. 31, 2015) (quoting *Omnicare*, 135 S. Ct. at 1321). While the Supreme Court acknowledged that objective falsity together with subjective disbelief is one way to allege a misleading opinion, the Supreme Court also provided a second path to allege a misleading opinion, *e.g.*, where a reasonable investor may "understand an opinion statement to convey facts about how the speaker has formed the

[1] *Omnicare* was decided on March 24, 2015, nearly three weeks after Lead Plaintiffs' March 6, 2015 briefs in opposition to Defendants' motions to dismiss were filed. *See* ECF No. 130 ("Tower Opp.") and ECF No. 128 ("PWC Opp.").

[2] Capitalized terms have the definitions used in the Tower Opp.

opinion." *Omnicare*, 135 S. Ct. at 1328. "Thus, if a parties' [sic] statement of opinion 'omits material facts about the [party's] inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself,' liability may accrue." *Bioscrip*, 2015 WL 1501620, at *11 (quoting *Omnicare*, 135 S. Ct. at 1329). The Supreme Court further noted that "literal accuracy is not enough: An issuer must as well desist from misleading investors by saying one thing and holding back another." *Omnicare*, 135 S. Ct. at 1331. Thus, the Tower Defendants are wrong in claiming that "*Omnicare* holds that an opinion is false *only* if 'the speaker [did not] actually hold[] the stated belief" – *i.e.*, if the speaker's opinion 'falsely describe[s] her own state of mind'" (ECF No. 136, at 36-37 (emphasis added)).

Lead Plaintiffs allege, *inter alia*, that Defendants violated Section 10(b) of the Securities Exchange Act of 1934 by making materially false and misleading statements and omissions concerning, *inter alia*, Tower's loss reserving practices, its reported loss reserves, the effectiveness of its internal controls,[3] and PWC's audit process and conclusions. *See, e.g.*, ¶¶191-257, 319-21. In their opening brief, the Tower Defendants relied principally and without effect on an inapposite Second Circuit decision, *Delta Holdings, Inc. v. Nat'l Distillers & Chem. Corp.*, 945 F.2d 1226 (2d Cir. 1991), to support their argument that Tower's grossly misstated loss reserves were pure statements of "opinion" requiring allegations of subjective disbelief to be actionable. *See* Tower Opp. at 28-29, 45, 51, 53, 59. Similarly, PWC argued that their statements were purely opinions. *See* PWC Opp. at 16-18. Defendants now try to marshal *Omnicare* in support of the same flawed arguments.

First, as argued in Lead Plaintiffs' opposition briefs, Defendants' statements at issue should not be considered opinions. *See* Tower Opp. at 4, 27-29; PWC Opp. at 13-18. *Omnicare* does not alter this conclusion, and the Supreme Court did not even directly address whether loss reserves or audit statements are rightfully considered opinions. Indeed, the disclosures at issue in *Omnicare* related to legal compliance with Medicare and other regulations. *Omnicare,* 135 S. Ct. at 1323-24. Tower's radically understated loss reserves and disclosures concerning its reserving process were misleading statements of fact because Defendants (i) calculated Tower's reserves using objectively false figures resulting from the manipulated reconciliation of loss reserves and premiums by line of business; and (ii) instituted a concealed mandate to intentionally suppress reserves. *See, e.g.*, ¶¶88-113; Tower Opp. at 21, 42-43. Since Defendants' alleged misstatements were fact-based and not judgment-based, they are not opinions, and the Court need not turn to the "roadmap" provided by the Supreme Court in *Omnicare*.

Second, even if the statements concerning Tower's reserves and reserving process are deemed opinions under *Omnicare*, the Supreme Court's decision only strengthens Lead Plaintiffs' argument that opinions made in the face of omitted facts undermining those opinions are actionable. Indeed, because a reasonable investor would "understand an opinion" about loss

[3] The Tower Defendants have not challenged falsity or scienter concerning the internal control allegations. *See* Tower Opp. at 35.

reserves "to convey facts about how the speaker has formed the opinion" (*Omnicare*, 135 S. Ct. at 1328), Defendants' reliance on *Omnicare* is unavailing. The facts conveyed in the challenged disclosures here – that loss reserves were calculated by reasonable and objective means – are belied by Defendants' (i) failure to verify objective data relating to categorization of premiums and (ii) intentional understating of reserves to boost their financial condition. Defendants' misrepresentations have nothing to do with subjective judgments.

Defendants also mischaracterize *Omnicare* to support their claim that mere subjective judgment and opinion are at issue here. *See* Tower Reply Brief (ECF No. 136) at 36-37 (claiming *Omnicare* requires subjective disbelief to prove the falsity of Tower's loss reserves); *see also* PWC Reply Brief (ECF No. 135) at 18 ("for a statement of opinion to be a misrepresentation [under *Omnicare*], a plaintiff must allege subjective falsity"). As discussed above, *Omnicare* explicitly rejected Defendants' claim that objective falsity and subjective disbelief are required.

Finally, Lead Plaintiffs allege that PWC ignored multiple "red flags" that should have alerted it to Tower's problems. ¶289. Furthermore, Lead Plaintiffs allege that PWC acted with scienter in issuing its conclusions that Tower's financial statements complied with GAAP (¶¶275-80), and in representing that its audits were conducted in accordance with GAAS (¶¶281-93). Lead Plaintiffs allege that PWC conducted "no audit at all" and a reasonable investor would understand that loss reserves are based on accurate classifications of business lines and an honest attempt to estimate future losses, and that an auditor would comply with the regulations governing its audit process. *Cf. Omnicare*, 135 S. Ct. at 1329 (if omitted facts "conflict with what a reasonable investor would take from the statement itself,' liability may accrue.")

Accordingly, for the reasons set forth above and in Lead Plaintiffs' oppositions to Defendants' motions to dismiss, Lead Plaintiffs respectfully submit that Defendants' motions to dismiss should be denied in their entirety.

Respectfully submitted,

James A. Harrod

cc: Counsel of Record (by ECF)