

# Securities Law Alert

## KEY DEVELOPMENT IN SHAREHOLDER LITIGATION

### Ninth Circuit: Disclaiming Fraud Does Not Waive a Section 12(a)(2) Misstatement Claim

August 8, 2025

On June 10, 2025, the Ninth Circuit reversed the dismissal of a putative securities fraud class action alleging that defendants<sup>1</sup> violated Section 12(a)(2)<sup>2</sup> of the Securities Act by making misstatements in their real estate investment offering materials, particularly on social media. *Pino v. Cardone Cap., LLC*, 2025 U.S. App. LEXIS 14214 (9th Cir. 2025) (McKeown, J.). Disagreeing with the lower court's interpretation of *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175 (2015), the Ninth Circuit concluded that the “district court incorrectly held [that plaintiff] waived subjective falsity by disclaiming fraud in her complaint and also erred in finding that she failed to plausibly allege subjective and objective falsity.”

#### Background and Procedural History

Defendants offer real estate investments to unaccredited investors that they promoted on social media with posts telling would-be investors that they could double their money and earn a 15% annualized return. After investing with defendants, plaintiff filed suit under Section 12(a)(2) alleging that defendants made misleading opinion statements as to the projected internal rate of return (“IRR”) and disbursements. The district court granted defendants’ Rule 12(b)(6) motion to dismiss.

#### Disclaiming Fraud Does Not Waive a Section 12(a)(2) Misstatement Claim

The Ninth Circuit began by noting that plaintiff’s claim under Section 12(a)(2) based on the IRR and the distribution projections requires both subjective and objective falsity. The Ninth Circuit explained that “[s]ubjective falsity means that the speaker did not hold the belief he professed and objective falsity requires that the belief is objectively untrue.” The Ninth Circuit held that the “district court incorrectly held [that plaintiff] waived subjective falsity by disclaiming fraud in her complaint[.]” The Ninth Circuit noted that the district court, citing *Omnicare*, concluded that plaintiff could not proceed with her misstatement claim because she disclaimed any and all allegations of fraud. Taking issue with this, the Ninth Circuit stated that “[a] careful reading of

<sup>1</sup> Defendants include a real estate entrepreneur, the real estate syndicator he founded, and two equity funds managed by the syndicator.

<sup>2</sup> Section 12(a)(2) provides a cause of action for securities offered or sold using prospectuses or oral communications that contain material misstatements or omissions. 15 U.S.C. § 77l(a)(2).

*Omnicare* does not support this analysis.” The Ninth Circuit explained that in *Omnicare* although the Supreme Court referenced a fraud waiver, the reference merely underscored that plaintiffs did not argue subjective disbelief at all, and instead argued defendant’s sincerely held opinion proved wrong. The Ninth Circuit concluded that the “Court’s decision in *Omnicare* makes clear that it is the absence of claims of subjective disbelief, rather than the absence of *fraud* claims specifically, that doomed plaintiffs’ claims.” The Ninth Circuit then stated that “[f]raud is not an element of a § 12(a)(2) claim, and a fair reading of *Omnicare* is consistent with [plaintiff’s] argument that disclaiming fraud alone does not foreclose an entirely separate § 12(a)(2) misstatement cause of action.” The Ninth Circuit further pointed out that the *Omnicare* waiver<sup>3</sup> was “far broader” than the waiver in this case, which was limited to “any allegation in the complaint that could be construed as alleging fraud.”

### **Plaintiff Sufficiently Alleged Subjective and Objective Falsity**

Disagreeing with the district court’s conclusion that plaintiff failed to allege either that defendants subjectively disbelieved the IRR and distribution projections or that the projections were objectively untrue, the Ninth Circuit concluded that plaintiff’s allegations were sufficient. The Ninth Circuit found that the allegation of defendants’ subjective disbelief was “both strong and reasonable” noting the projection of 15% IRR and relatedly high distributions in the initial offering circular. The Ninth Circuit pointed out that the SEC reviewed the offer and stated in a letter to defendants that the projections lacked backing and should be removed. The Ninth Circuit observed that defendants “pushed back on other criticisms from the SEC, but not this one, suggesting that [defendants] did not truly believe its own projections and lacked evidence to rebut the SEC.” The Ninth Circuit noted that despite this, defendants continued to repeat the IRR and distribution projections to would-be investors on social media.

The Ninth Circuit also disagreed with the district court’s conclusion that plaintiff failed to allege objective falsity and could not because the relevant SEC Form 1-K filings purportedly projected performance in line with the 15% IRR projection, concluding that the district court’s “approach elevates [defendants’] self-serving statements over other evidence.” The Ninth Circuit stated that the filings did not resolve the factual dispute between the parties, noting that the projections lacked a basis, that no prior funds had performed to this level, and that the real estate properties had not yet been purchased.

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<sup>3</sup> The *Omnicare* waiver encompassed “any allegation that could be construed as alleging fraud or *intentional or reckless misconduct*.”

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