

No. 24A-___

In the Supreme Court of the United States

BDO USA, LLP,

Applicant,

v.

NEW ENGLAND CARPENTERS GUARANTEED ANNUITY AND PENSION FUNDS; STANLEY
NEWMARK; IRVING LIGHTMAN REVOCABLE LIVING TRUST; JUPITER CAPITAL MANAGE-
MENT; JOHN SACHETTI, individually and on behalf of all others similarly situated;
and JOEL RUBEL, individually and on behalf of all others similarly situated,

Respondents.

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH
TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

TO THE HONORABLE SONIA M. SOTOMAYOR, ASSOCIATE JUSTICE AND CIRCUIT JUSTICE
FOR THE SECOND CIRCUIT:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, appli-
cant BDO USA, P.C. (formerly BDO USA, LLP) respectfully requests a 30-day exten-
sion of time, to and including May 7, 2025, within which to file a petition for a writ of
certiorari to review the judgment of the United States Court of Appeals for the Second
Circuit in this case.

The Second Circuit issued its amended opinion on October 31, 2024 and denied
a timely petition for rehearing and rehearing en banc on January 7, 2025. Unless
extended, the time to file a petition for a writ of certiorari will expire on April 7, 2025.
The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). A copy of the
lower court's decision and order denying rehearing en banc are attached.

1. BDO was engaged to audit the 2013-2015 financial statements of AmTrust Financial Services, Inc., a publicly traded insurance company. Slip Op. 45. In its audit report for AmTrust's 2013 financial statements, BDO issued an unqualified opinion that AmTrust's financial statements were fairly presented. *Id.* at 47. BDO also stated that it had conducted its audit in accordance with standards promulgated by the Public Company Accounting Oversight Board ("PCAOB"). *Ibid.* When AmTrust released its 2016 financial statements, however, it restated its income in several prior years, including 2013, citing accounting errors. *Id.* at 10.

Respondents, investors in AmTrust, allege that BDO's statement that it complied with PCAOB standards when performing its audit was false. Specifically, they contend that BDO failed to complete certain procedures mandated by the PCAOB, including journal entry testing, internal controls testing, and material account balancing. Slip Op. 45, 47-48. Respondents also allege, however, that after BDO discovered the missing procedures, it quickly completed the audit and concluded that the substance of its audit opinion was unaffected, and there was thus no need to issue a public correction under AU 390. In other words, the information communicated to investors about the state of AmTrust's finances was unaffected by its alleged failure to adhere to PCAOB standards.

Respondents sued BDO under Section 10(b) of the Securities Exchange Act (15 U.S.C. § 78j(b)) and SEC Rule 10b-5 (17 C.F.R. § 240.10b-5(b)). BDO moved to dismiss. It argued, among other things, that its statement of compliance with PCAOB procedures, even if initially false as alleged, was immaterial because the information it communicated to investors was unaffected by the alleged noncompliance, and Respondents had alleged no link between the false statement and errors in AmTrust's

financial statements. See, e.g., *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (for an omitted fact to be material “there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available”).

The district court agreed with BDO’s argument and dismissed the Section 10 count against BDO. Initially, the Second Circuit affirmed. On panel rehearing, however, at the urging of the SEC as *amicus*, the Second Circuit reversed itself, holding that Respondents “were not required to allege a link between BDO’s false certification and specific errors in AmTrust’s financial statements to establish that BDO’s false audit certification was material.” Slip Op. 50. The court reasoned that “BDO’s certification that the audit was conducted in accordance with PCAOB standards succinctly conveyed to investors that AmTrust’s audited financial statements were reliable” and “[t]he absence of BDO’s certification would have been significant, for without it, BDO could not have issued an unqualified opinion, which then would have alerted investors to potential problems in the company’s financial reports.” *Id.* at 49-50 (citation omitted).

In other words, the court of appeals held that an auditor’s false statement of adherence to professional auditing standards is *per se* material, even if it has no impact on the substantive information communicated to investors about the company’s finances and lacks any link to errors in the audited financial statements.

2. The petition in this case will demonstrate that this Court’s review is warranted to resolve a split opened by the decision below regarding the materiality of auditor statements of adherence to professional auditing standards. In the decision

below, the **Second Circuit** applied a *per se* rule of materiality to such statements, holding that there is no need for a plaintiff to show that the statement bears any link to substantive errors in the underlying financial statements, even when the allegations show that the alleged failure to adhere to professional standards caused no difference in the information communicated to investors.

The **Sixth Circuit**, by contrast, has rejected that approach, holding that an auditor's statement of adherence to professional auditing standards is material only if, "given all the financial information, there was a substantial risk that the actual value of assets or profits were substantially less" than what the audit reflected. *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 432 (6th Cir. 1980).

Several circuits analyzing the same theory of liability have conducted their analysis of material falsity in a manner consistent with the Sixth Circuit's approach and irreconcilable with the Second Circuit's *per se* rule. These courts include the **First Circuit**, which has held that an auditor's statement of adherence to professional auditing standards is materially false only when the auditor's failure to abide by GAAS led to its "failure to discover * * * deviations from GAAP in the accounting" of the audited company (*In re Stone & Webster, Inc.* 414 F.3d 187, 214 (1st Cir. 2005)); the **Third Circuit**, which has analyzed the material falsity of auditor statements of adherence to professional standards by assessing whether a correctly conducted audit "would have uncovered material information" about the company's finances that was "materially misstated" (*Bradford-White Corp. v. Ernst & Whitney*, 872 F.2d 1153, 1158 (3d Cir. 1989)); the **Fifth Circuit**, which has analyzed the materiality of a false statement of adherence to professional auditing standards by assessing the substantive impact on investment-relevant information communicated to investors (see

Sioux, Ltd. v. Coopers & Lybrand, 914 F.2d 61, 66 (5th Cir. 1990)); the **Ninth Circuit**, which has assessed the material falsity of an auditor’s statement of adherence to professional standards based on whether those violations led to the “erroneous reporting of various specific accounts contained in the financial statement and incomplete descriptions of certain accounts” (*United States v. Weiner*, 578 F.2d 757, 779 (9th Cir. 1978)); and the **Tenth Circuit**, which has held that an auditor’s statement of adherence to professional auditing standards was not materially false or misleading where there were no allegations regarding how errors in the underlying financial statements “were the result of [the auditor’s] conduct” (*Deephaven Priv. Placement Trading, Ltd. v. Grant Thornton & Co.*, 454 F.3d 1168, 1176 n.9 (10th Cir. 2006)).

This distinction was dispositive below. Indeed, the panel below originally affirmed the dismissal of Respondents’ Section 10(b) count against BDO on materiality grounds because Respondents had alleged no link between BDO’s allegedly false statement of adherence to PCAOB standards and any errors in the audited financial statements. In reversing itself, the panel adopted the opposite view of materiality, holding that Respondents “were not required to allege” such a link. Slip Op. 50.

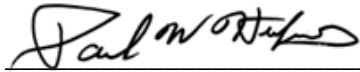
3. Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case. Undersigned counsel has, and has had, several other matters with proximate due dates, including: a reply brief in support of writ of mandate in *Mitchell v. Superior Court*, No. B344068 (Cal. Ct. App. 2d Dist.), filed March 13, 2025; a brief on remedies in *Vanda Pharmaceuticals Inc. v. Food & Drug Administration*, No. 24-cv-351 (D.D.C.), filed March 13, 2025; a reply brief in *Institutional Shareholder Services, Inc. v. SEC*, No. 24-5105 (D.C. Cir.), filed March 13, 2025; an oral argument in *World Shipping Council v. Federal Maritime Commission*, No. 24-1088

(D.C. Cir.), on March 13, 2025; an oral argument in *Sam's West, Inc. v. County of Cook*, No. 1-24-229 (Ill. Ct. App. 1st Dist.), on March 31, 2025; a response brief in *Ellis v. Yasenchack*, No. 24-3892 (6th Cir.), due April 2, 2025; a brief in opposition to certiorari in *Moylan v. Guerrero*, No. 24-701 (U.S.), due April 2, 2025; a brief in opposition to certiorari in *Chambers-Smith v. Ayres*, No. 24-584 (U.S.), due April 7, 2025; a brief opposing a motion to dismiss in *HMH Hospitals Corporation v. Becerra*, No. 24-cv-1901 (D.D.C.), due April 11, 2025; an oral argument in *Alnylam Pharmaceuticals, Inc. v. Moderna, Inc.*, No. 23-2357 (Fed. Cir.), on April 11, 2025; an opening brief in *Vanda Pharmaceuticals Inc. v. United States*, No. 25-1434 (Fed. Cir.), due April 16, 2025; a reply brief in *Vanda Pharmaceuticals Inc. v. Food & Drug Administration*, No. 24-cv-351 (D.D.C.), due April 17, 2025; a response brief in *Vann v. City of Rochester*, No. 24-3186 (2d Cir.), due April 17, 2025; and an oral argument in *Vanda Pharmaceuticals Inc. v. Food & Drug Administration*, No. 24-cv-351 (D.D.C.), on April 21, 2025.

For the foregoing reasons, the application for a 30-day extension of time, to and including May 7, 2025, within which to file a petition for a writ of certiorari in this case should be granted.

March 21, 2025

Respectfully submitted.

A handwritten signature in black ink, appearing to read "Paul W. Hughes", written over a horizontal line.

PAUL W. HUGHES
Counsel of Record
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com