No. 23-970

In The

SUPREME COURT OF THE UNITED STATES

NVIDIA CORPORATION, *et al.*,

Petitioners,

v.

E. OHMAN J:OR FONDER AB, *et al.*,

Respondents.

Amicus Brief in Support of Respondent Affirmance Warranted

(Though Reliance Seems Rebutted by Respondents' Own Expert)

Thomas Fuller Ogden, Esq.
1108 W. Valley Blvd. 6-862
Alhambra, CA 91803
Thomas@Ogden.Law
Tel. (626) 592-3165

Interests of Amicus Curiae, Thomas Fuller Ogden

I am a member of this Court's bar and, since 2014, recognized by the California bar as one of less than 200 lawyers designated as a Certified Appellate Law Specialist. I have been involved in numerous federal appellate matters. I file to point out expert reports contain safeguards unique to the PSLRA. The papers seem to miss discussing those safeguards.[1]

Summary of Argument

A plaintiff takes risk using an expert report built on external information. In a fraud on the market claim if the stock price reflects the falsity, then reliance is rebutted. An expert report, built on externalities, tacitly admits the relevant market price reflects the falsity. If plaintiff's expert figures out falsity from externalities, then the market did too.

Yet, there shouldn't be a categorical bar to facts that can be pled to court. The use of an expert's report should be determined on a PSLRA case-by-case basis. For instance, if plaintiff plausibly alleges an expert's report was proprietary then the complaint should proceed. As to abusive use —perhaps those implausibly alleging proprietary facts or omitting the market's knowledge— seeking early dismissal should not be affected given either the expert's inherent admission rebutting presumed reliance or defendant proactively invoking R.11 against plaintiff for nefarious use of the report.

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from Thomas Fuller Ogden, made any monetary contribution intended to fund the preparation or submission of this brief.

The PSLRA also provides an explicit safeguard. Upon final adjudication a mandatory assessment of all pleadings and dispositive motions under R.11 is triggered. The expert's report in the complaint would be assessed. If plaintiff frivolously ignored its expert's facts weren't proprietary, or intentionally omitted a market basis of the expert's facts, then sanctions should flow to defendant. 15 USC s.78u-4(c)(1) & (2).

Argument

Plaintiff must cautiously use an expert report as it suggests reliance is rebutted. R.11 also protects against frivolous use of an expert report.

Respondents' theory is fraud on the market with reliance presumed. Jt. App'x 123-24, FAC para. 241-43. The theory is "plaintiff … was induced to trade stock not by any particular representations made…but by the artificial stock price set [by the falsity and] … other material public information." *In re Apple Computer Securities Litigation*, 886 F. 2d 1109, 1114 (9th Cir. 1989). *In re Apple,* at 1114, observes a market's price discovery occurs because:

> Where [two] facts are transmitted to the market with roughly equal intensity and credibility, the market will receive complete and accurate information. Informed investors will invest in light of an accurate appreciation of the relevant risks. [Optimistic investors may] overvalue… [pessimists] may undervalue … [securities law] assumes partially-informed investors will cancel each other out and… price will accurately reflect all relevant information.

Based on traditional legal notions of price discovery reliance is hard to establish as "the market, and any individual who relies only on the price established by the market, will not be misled." *Id*. Fraud on the market, however, allows presumed reliance. *Basic Inc. v. Levinson*, 485 US 224 (1988), sanctioned it as "all members of the putative class were entitled to a presumption that they relied on the stock price established by the market, which in turn reflected the alleged misstatements." *In re Apple*, at 1115. But the presumption is rebuttable:

> [The Supreme Court] stressed that the presumption of reliance could be rebutted by a showing that information sufficient to correct the defendants' alleged misstatements was transmitted through market price in the same fashion as the misstatements themselves. The Court stated:
>
> > For example, if petitioners could show that the "market makers" were privy to the truth about the merger discussions ... and thus that the market price would not have been affected by their misrepresentations, the causal connection could be broken: the basis for finding that the fraud had been transmitted through market price would be gone. Similarly, if, despite petitioners' allegedly fraudulent attempt to manipulate market price, news of the merger discussions credibly entered the market and dissipated the effects of the misstatements, those who traded Basic shares after the corrective statements would have no direct or indirect

connection with the fraud. [*In Re Apple,* at 1115*,* citing to *Basic*, 485 US 248-49]

Prysm Group uses the hashrate increase as its foundation. Despite the spin, the hashrate increase is a particularized fact reflecting the open and immutable nature of a blockchain. It is a real-time fact easily available to anyone.[2] Hashrate increase data forms a fundamental basis for crypto investing.[3] Stated simply, relevant real-time hashrate data was available to the market during the class period.

The hashrate increase, here, unequivocally indicates a significant event caused GPU crypto mining to increase. Outside PSLRA sophistry before the Court, it's obvious NVIDIA's GPUs caused most of the increase, but that's beside the point.[4] As Judge Fletcher notes, Prysm Group's report was part of a grouping of highly particularized allegations providing context. Prysm Group's report seems superfluous as respondents have a plethora of

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[2] Link, Blockchain.com | Charts - Total Hash Rate (TH/s). Or https://www.blockchain.com/explorer/charts/hash-rate

[3] Link, What Is Hash Rate? | Binance Academy; https://academy.binance.com/en/articles/what-is-hash-rate ("the profitability of a miner… is directly linked to the hash rate.")

[4] Until recently, Wall Street's institutions could not invest directly into crypto. (Link, The First Bitcoin ETF Could Revolutionize The Blockchain Space (forbes.com); or, https://www.forbes.com/sites/digital-assets/2024/01/10/the-first-bitcoin-etf-could-revolutionize-the-blockchain-space/ Jan. 2024). It seems to get around regulatory shackles, Wall Street needed a correlated crypto lawful asset. NVIDIA was the obvious choice. NVIDIA fed plausible deniability to regulation bound institutions regarding GPUs. Institutions ate up those representations, many likely with deliberate ignorance, to tangentially and legally participate in crypto profits.

particularized facts from elsewhere. NVIDIA, nonetheless, elevates the expert report to make it seem it was the sole basis of falsity.

Prysm Group's report rebuts, according to *Basic*, the presumption of fraud. The situation here illustrates the inherent risk PSLRA plaintiffs take when using an expert. If the hashrate increase was available to Prysm Group, then it was available to the market. NVIDIA's stock price already accounted for the class period's hashrate increase according to securities law. In other words, NVIDIA's alleged falsities were already reflected in the class period's market price so that reliance is rebutted.

Petitioners, however, never raised this argument which is why the undersigned technically supports affirming. In fact, petitioners' argument—that the cause of hashrate increase is uncertain—bolsters respondents as it suggests the market wasn't able to price in the hashrate increase. It would have been more effective for petitioner to concur with Prysm Group, but then argue the reliance fails as the hashrate increase was widely known.[5]

This brief's purpose isn't to Monday morning quarterback petitioners. Instead, it is to show the Court, using the facts here, that there is an implicit

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[5] RBC Capital Market's Jan. 2019, report did not make the record as the district court did not take judicial notice of it. App'x p. 139a. I took liberty and looked at it. RBC also uses the hashrate increase as its factual basis. That further suggests Prysm Group's report negates the presumption of reliance as use of the hashrate increase seems common to the market. See Dist. Ct. Dkt. #125, at 6, for RBC's rpt. If affirmance occurs, the rebuttal of reliance is still alive whether by MJP or MSJ. (NVIDIA can thank me later if it plays out this way.)

protection to use of an expert report. It is pointed out to caution the Court that just because petitioners didn't raise the reliance rebuttal does not mean such protection isn't inherent when an expert report is used. A blanket rule against expert reports is ill-advised. Also, this is not the best fact pattern to bar expert reports as a stronger threshold issue was missed. The better case would be grey allegations regarding an expert report's proprietary nature.

Finally, the Court should factor into its consideration that the PSLRA contains a mandatory R.11 review upon adjudication. If expert reports are allowed in pleadings, then those reports will still have an ultimate day of reckoning under R.11. If somehow an abusive expert report is the reason a meritless complaint proceeded, then the defendant will have a remedy under R.11. 15 USC s.78u-4(c)(1) & (2).

Conclusion

The Court should keep alive, on a case-by-case basis, the ability to use an expert report. Use of an expert's report is controlled by two mechanisms. First, a plaintiff will exercise extreme caution before using the expert's report as it risks rebutting reliance. Second, the PSLRA contains a mandatory R.11 review process that should remedy expert report abuse.

Respectfully Submitted,

Thomas Ogden

Thomas Ogden, Esq.