No. 23-970

IN THE
Supreme Court of the United States

NVIDIA CORP. and JENSEN HUANG,
Petitioners,

v.

E. OHMAN J:OR FONDER AB and STICHTING PENSIOENFONDS PGB,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

JOHN C. DWYER
PATRICK E. GIBBS
SAMANTHA A. KIRBY
COOLEY LLP
3175 Hanover Street
Palo Alto, CA 94304
(650) 843-5000

KATHLEEN R. HARTNETT
COOLEY LLP
3 Embarcadero Center
20th Floor
San Francisco, CA 94111
(415) 693-2000

NEAL KUMAR KATYAL
Counsel of Record
KATHERINE B. WELLINGTON
WILLIAM E. HAVEMANN
REEDY C. SWANSON
KEENAN H. ROARTY
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioners

(Additional counsel listed on next page)

SARAH M. LIGHTDALE
PATRICK J. HAYDEN
COOLEY LLP
55 Hudson Yards
New York, NY 10001
(212) 479-6000

Counsel for Petitioners

RULE 29.6 DISCLOSURE STATEMENT

The disclosure statement made in Petitioners' opening brief remains accurate.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

No. 23-970

NVIDIA CORP. and JENSEN HUANG,
Petitioners,

v.

E. OHMAN J:OR FONDER AB AND STICHTING PENSIOENFONDS PGB,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

INTRODUCTION

The Ninth Circuit majority treated a hired expert's opinion as the backbone of its falsity and scienter analysis. It began by allowing Plaintiffs to allege falsity by relying "almost entirely" on that opinion. Pet. App. 67a (Sanchez, J., dissenting). Then, it held that Plaintiffs had established scienter by alleging that the CEO was generally hands-on and "would have" reviewed internal records, which in turn "would have shown" the same numbers as Plaintiffs' expert. Pet. App. 42a, 55a.

Adopting this approach would destroy the PSLRA's guardrails. It would allow well-financed securities plaintiffs to defeat motions to dismiss "simply by

producing an expert witness whose *post hoc* calculations diverge from a defendant's prior public statement." Pet. App. 75a (Sanchez, J., dissenting). And it would bless the "fraud by hindsight" pleading that Congress enacted the PSLRA to prevent. *Denny* v. *Barber*, 576 F.2d 465, 470 (2d Cir. 1978) (Friendly, J.).

Plaintiffs—and the Government—hardly defend the Ninth Circuit's analysis, and do not seriously dispute NVIDIA's articulation of the governing legal principles. Plaintiffs instead mischaracterize NVIDIA's position and try to turn this case into a fight on the facts. The Court should reject Plaintiffs' ploy.

First, Plaintiffs accuse NVIDIA of asking for a "bright-line rule" for scienter that categorically excludes certain allegations, but NVIDIA seeks nothing of the sort. Securities plaintiffs can allege scienter in myriad ways. But when a plaintiff *chooses* to base its scienter allegations on the theory that internal company reports contradicted an executive's public statements, plaintiffs cannot satisfy the PSLRA without pleading the relevant contents of those reports. Lower courts have applied this standard without difficulty for years and, contrary to Plaintiffs' warnings, other plaintiffs routinely satisfy it.

Plaintiffs flunk this standard. They spend the bulk of their briefing listing allegations that not even the Ninth Circuit found sufficient to support scienter. They primarily point to generalized allegations about the types of internal records NVIDIA maintained. And although they muster allegations about the general contents of a few records, they cannot provide *any*

link between those documents and NVIDIA's CEO. Most allegations merely assert that miners purchased GeForce chips in large quantities *before* the Crypto SKU launch, a point no one disputes—this was "the reason NVIDIA executives publicly expressed for launching the Crypto SKU in the first place." Pet. App. 76a (Sanchez, J., dissenting). Plaintiffs' conspiratorial theory that NVIDIA launched a crypto-specific product to mislead investors about the extent of its crypto-related revenues is illogical compared to the innocent inference that NVIDIA simply miscalculated third-party pricing decisions.

Second, Plaintiffs barely defend the Ninth Circuit's analysis of falsity, and the Government explicitly agrees that a "plaintiff cannot use an expert opinion to evade the PSLRA's particularity requirement." U.S. Br. 28. Although Plaintiffs and the Government deny that the panel allowed Plaintiffs to rely on an expert, the record refutes this revisionism. The panel "rel[ied] on the estimated numbers Prysm provided," and held that Huang's statements were false because they "failed to say" that sales to miners matched Prysm's calculations. Pet. App. 20a, 25a-29a.

As the U.S. Chamber and other business groups have explained, if the Court upholds the Ninth Circuit's "distortion" of the PSLRA, "plaintiffs will flood the courts armed solely with hired-gun experts offering little more than after-the-fact guesswork about what defendants' data 'would have' shown." Washington Legal Found. et al. Br. 3 ("WLF Br."). This Court should reverse.

ARGUMENT

I. PLAINTIFFS FAIL TO ALLEGE A STRONG INFERENCE OF SCIENTER.

A. Under The PSLRA, Plaintiffs Cannot Plead Scienter Based On Generalized Allegations About Internal Records.

The PSLRA requires private securities plaintiffs to "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)(A). The "required state of mind" requires Plaintiffs to allege that the defendant engaged in a form of "intentional or knowing misconduct." U.S. Br. 16 n.2 (quotation marks omitted).

This case asks the Court to apply this accepted principle to one particular, but frequently recurring, context—where plaintiffs base their scienter allegations on internal company records. Where plaintiffs rely on internal documents and data to satisfy this requirement, they must allege the relevant contents. Otherwise, plaintiffs satisfy neither the particularity requirement—because they have not alleged the critical factual detail for their claim—nor the strong inference requirement—because a court cannot effectively evaluate whether the plaintiffs' preferred inference is at least as compelling as any competing inference. The contrary approach adopted below would be a roadmap for plaintiffs to evade the PSLRA by speculating about what internal reports might say and alleging that a detail-oriented company executive would have reviewed them. *See* SEC Officials Br. 6.

Plaintiffs and the Government struggle to find any disagreement with NVIDIA's view of what the law requires. As the Government puts it, particularity is not satisfied where a plaintiff "omits or obscures a particular detail that is necessary to determine how the allegation supports scienter." U.S. Br. 18 (citing *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 311, 325-326 (2007)); *see* Resp. Br. 29 (citing the same definition of particularity as NVIDIA).[1]

Plaintiffs and their *amici* largely direct their legal arguments at a straw man. Plaintiffs claim (at 27-28) that NVIDIA seeks a "bright-line" rule that would prevent courts from evaluating securities fraud complaints holistically. That is wrong. As NVIDIA's opening brief explained (at 40), securities plaintiffs have numerous ways to plead scienter, including by citing suspicious public trading activity or particularized information from any number of other sources. *See, e.g.*, *Stevelman* v. *Alias Rsch. Inc.*, 174 F.3d 79, 85-86 (2d Cir. 1999); *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 70-71, 73 (2d Cir. 2001). The factual allegations sufficient to raise a strong inference of scienter will depend on the theory the plaintiff chooses to advance. But where a plaintiff "seeks to establish scienter by relying on allegations that internal

---

[1] *Amici* civil procedure scholars (at 5) go further than Plaintiffs and argue that particularity is satisfied anytime a defendant receives "the notice required to defend against the accusations." But that does not even describe *normal* plausibility pleading standards under Rule 8, much less the PSLRA's more exacting standards. *See Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 n.3 (2007).

company documents contradicted public statements, the plaintiff must allege the contents of those documents." Opening Br. 19.

Plaintiffs suggest (at 34-35) that NVIDIA's question presented distinguishes "documents" from other sources of "data." Rest assured: NVIDIA's argument applies equally to a Word document, a database, or any other source of internal corporate information. No matter the format, when a plaintiff's case relies on internal company information, the plaintiff must allege the relevant contents with particularity.

Plaintiffs cite a series of administrability concerns (at 34-38), but a majority of lower courts have applied NVIDIA's approach without difficulty for years. *See* Pet. 16-20; WLF Br. 15-18 (collecting cases). Plaintiffs recognized as much at the certiorari stage, admitting that lower courts "uniformly hold that 'generalized assertions' about what internal data showed are insufficiently particularized to support an inference of scienter." BIO 18-19. Plaintiffs now claim (at 35) that "[n]o court has ever adopted NVIDIA's rule." Plaintiffs were right the first time, and provide no explanation for their change in position.

The task of sorting out which allegations "give rise to" a strong inference of scienter is required by the PSLRA's plain text, 15 U.S.C. § 78u-4(b)(1), and echoes the familiar judicial task of assessing whether the facts alleged are "sufficient" to state a claim, *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009), and whether evidence "has any tendency to make a [material] fact more or less probable," Fed. R. Evid. 401(a). And Plaintiffs have proven themselves up to the task of

sorting out which allegations supposedly support scienter: The chart attached to their complaint contains a column specifically isolating the facts they believe give rise to a strong inference of scienter. *See* J.A. 134-376.

Plaintiffs' hypotheticals (at 35-36) all demonstrate the workability of NVIDIA's rule. *Each* involves allegations that a CEO had received corporate records that contradicted his public statements, and each also includes allegations from someone who personally reviewed the records and described the relevant contents with particularity. The same is true of the Government's hypothetical CEO who announces the contents of internal company documents to his subordinates. *See* U.S. Br. 21. These hypotheticals all confirm that NVIDIA's legal rule is workable. Plaintiffs' problem is that they lack precisely these kinds of allegations.

Plaintiffs argue (at 31) that it will sometimes be difficult for parties to learn the contents of "[c]onfidential company documents" before discovery. But in circuits that already employ NVIDIA's rule, plaintiffs routinely satisfy this burden. *See, e.g.*, *Southland Secs. Corp.* v. *INSpire Ins. Sols., Inc.*, 365 F.3d 353, 385 (5th Cir. 2004); *ABC Arbitrage Plaintiffs Grp.* v. *Tchuruk*, 291 F.3d 336, 358-359 (5th Cir. 2002); *In re Scholastic*, 252 F.3d at 72-73. And one of the PSLRA's primary aims was to put an end to burdensome fishing expeditions, which create enormous pressures to settle. *See* Opening Br. 6-7. This Court has recognized that "[a]ny heightened pleading rule * * * could have the effect of preventing a plaintiff from getting discovery

on a claim that might have gone to a jury"—and Congress here chose a uniquely stringent standard. *Tellabs*, 551 U.S. at 327 n.9.

Plaintiffs suggest (at 40) it would be sufficient for them to allege "recklessness." But the Ninth Circuit applies a "deliberate recklessness" standard requiring "intentional or knowing misconduct." *Zucco Partners, LLC* v. *Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009) (quotation marks omitted). Plaintiffs have not asked the Court to revisit that standard, and they do not attempt to explain how they could satisfy it without particularized allegations regarding the contents of documents that Huang—the only individual defendant left in the case—intentionally or knowingly disregarded. While Plaintiffs (at 6) invoke *Novak* v. *Kasaks*, 216 F.3d 300 (2d Cir. 2000), to suggest that alleging "access" to contrary documents might satisfy the PSLRA, they have not explained how that is consistent with the "deliberate recklessness" standard applicable here. *See* Pet. App. 43a (noting allegations about "access * * * standing alone" are "insufficient"). In any event, *Novak* hurts Plaintiffs, as it makes clear that plaintiffs at a minimum "must specifically identify the reports or statements containing" the supposedly contradictory "information." 216 F.3d at 309.

B. Plaintiffs Do Not Defend The Ninth Circuit's Reasoning And Cannot Identify Any Other Allegations That Create The Necessary Strong Inference Of Scienter.

The Ninth Circuit concluded that Plaintiffs adequately alleged the existence of internal documents,

and then assumed these documents "would have shown" the results manufactured by Plaintiffs' expert, Prysm. Pet. App. 42a, 55a. Neither Plaintiffs nor the Government defend that reasoning. They do not argue that Prysm's conclusions support scienter, and the Government agrees that "[t]reating an expert's unsubstantiated opinion" as a basis to infer scienter is "inconsistent with the PSLRA." U.S. Br. 11.

Having correctly abandoned the Ninth Circuit's rationale, Plaintiffs instead argue (at 4) that a barrage of allegations in the complaint *apart* from Prysm's opinions raise a strong inference that Huang "really knew" about "NVIDIA's heavy reliance on crypto." But the complaint "does not allege with particularity the contents of any internal report or data source that would have put NVIDIA's executives on notice that their public statements were false or misleading when made." Pet. App. 59a (Sanchez, J., dissenting). Nor have Plaintiffs identified any scienter allegations that do not depend on internal NVIDIA records.[2] There is a massive gulf between the description of the complaint in Plaintiffs' brief and what the complaint actually alleges.

---

[2] Because Plaintiffs' scienter allegations rely on NVIDIA's internal records, this case does not turn on whether courts may consider *non*-particularized allegations in combination with other, particularized allegations supporting scienter. *Cf.* U.S. Br. 18 n.3. In any event, Justice Alito's *Tellabs* concurrence correctly explains that the PSLRA's plain text requires "particulari[zed]" allegations sufficient to "giv[e] rise to a strong inference" of scienter. 551 U.S. at 334 (quoting 15 U.S.C. § 78u-4(b)(2)(A)).

Internal Sales Database: Plaintiffs largely rest their hopes on a single sentence in their 263-paragraph complaint (reformulated throughout their brief for the appearance of variation) alleging that NVIDIA's internal sales database "reflected" that "60% to 70%" of GeForce GPU revenue in China "throughout 2017" came from sales to miners. J.A. 44 (¶ 86). That figure cannot support scienter.

This allegation runs into an immediate threshold problem: It depends on FE-1, an account manager in China *five levels removed* from Huang. J.A. 20 (¶ 33). There is no allegation that FE-1 ever saw the database allegedly available to Huang, or that FE-1 had any reason to know its contents. On the contrary, as both Judge Sanchez and the District Court concluded, "Plaintiffs' allegations concerning FE 1 do not meet the requirements for particularity and reliability" because the complaint "does not allege that FE 1 ever personally accessed the global sales database or had any reliable basis to know its contents." Pet. App. 81a-82a (Sanchez, J., dissenting); *see* Pet. App. 112a-113a n.3.

Even assuming this figure appeared somewhere, sometime in the global database, Plaintiffs cannot support the inference that Huang would have seen it. The allegation that Huang glanced at the database in a *company training video* produced at some unknown time before the class period does not support scienter. *See* Pet. App. 83a (Sanchez, J., dissenting). And FE-1's vague allegation that the executive team (not Huang specifically) was "obsessed" with sales data adds nothing. *See* J.A. 44 (¶ 86).

The alleged sales figure itself does not support an inference of scienter. NVIDIA did not introduce the Crypto SKU until May 2017. That miners purchased GeForce GPUs in 2017 "does not reveal fraud—it is the reason NVIDIA executives publicly expressed for launching the Crypto SKU." Pet. App. 76a (Sanchez, J., dissenting). Plaintiffs' carefully crafted allegation does not answer the critical question of what proportion of miners in China (let alone globally) *continued* to buy GeForce GPUs *after* the Crypto SKU launched.

On that question, Plaintiffs' own allegations suggest that sales of GeForce to miners declined precipitously after the launch. A presentation allegedly drafted by an NVIDIA team in China showed that by June 2017, "GeForce GPUs accounted for 64% of sales to miners in China, and by July, its proportion of sales had decreased to just 27%." Pet. App. 62a (Sanchez, J. dissenting); *see* J.A. 62 (¶ 121 Fig. F). This study "*supports* [NVIDIA's] statements that most of the cryptocurrency demand" after May 2017 "was serviced by a new product designed specifically for cryptocurrency miners." Pet. App. 59a (Sanchez, J., dissenting). Plaintiffs attempt to spin this study in their favor (at 17, 20, 42), by focusing on the study's statement that 1.5 million GeForce GPUs were sold to Chinese miners "in the first eight months of 2017," but most of that eight-month period occurred *before* the Crypto SKU launched. And of course, Plaintiffs do not allege that Huang saw or knew about this study.

Quarterly Meetings, Weekly Emails, and GeForce Experience: The complaint cites other internal company records—including accounts from quarterly

meetings, weekly emails, and data from GeForce Experience software—but fails altogether to allege their contents. J.A. 45-53 (¶¶ 87-106). Plaintiffs paper over the omission by claiming (at 16, 20, 38-39) that the quarterly meetings "discussed" "sales data on GeForce sales to crypto-miners"; that emails "presented" "mining-related sales data"; and that the software could tell if GPUs were used for mining. But no allegations describe, in any way, what this data actually showed. J.A. 45-53 (¶¶ 87-106). The allegations suggest only that there were discussions about something NVIDIA repeatedly disclosed and acted upon: Miners were buying some GeForce GPUs.

Plaintiffs attempt to revive (at 14-16, 20, 38-42) allegations about FE-5. But after the operative complaint was filed, FE-5 signed a declaration swearing that he had not "made a number of specific statements" attributed to FE-5, and the Ninth Circuit thus did "not rely on" FE-5's allegations. Pet. App. 36a n.2. Plaintiffs' brief in opposition *explicitly represented* that Plaintiffs "are not relying on allegations from FE-5." BIO 14 n.6. NVIDIA's opening brief relied on Plaintiffs' disclaimer, and Plaintiffs cannot renege on that certiorari-stage concession now. *See OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27, 37-38 (2015).

In any event, the complaint claims that FE-5 said GeForce Experience software showed that "over 60% of GeForce GPU sales during the Class Period were to miners," and that some weekly emails addressed shortages of GeForce GPUs caused by sales to miners.

J.A. 50-51, 53 (¶¶ 98, 105-106).[3] As FE-5's subsequent declaration explained, the former allegation "doesn't make sense," because GeForce Experience relates "only to gaming" and does not reveal anything about "mining." D. Ct. Dkt. 154-2 at 3-4. And both allegations lack temporal specificity—that something allegedly occurred "during the Class Period" does not support any inference about Huang's knowledge *at the time* of his challenged statements.

Additional Insufficient Allegations: Taking a kitchen-sink approach, Plaintiffs invoke additional allegations that do not contribute to a strong inference of scienter.

First, Plaintiffs point to internal records that the complaint does not allege Huang ever saw. Plaintiffs mention a pre-class-period internal presentation (at 16) where FE-1 allegedly discussed miners "driving GeForce revenues in China"; an internal projection (at 10, 40) that GeForce GPU sales would increase 60% in China in 2018 because of mining; and reports (at 41-42) of GeForce sales to miners in Russia and India. But Plaintiffs do not allege that Huang knew about any of these materials or that these regional figures were representative of global sales.

Second, Plaintiffs cite (at 39-40) allegations of "bulk purchas[es]" of NVIDIA chips for mining, claiming that they were "common knowledge." But Plaintiffs do not allege such purchases occurred after the Crypto

[3] Plaintiffs' brief (at 16) incorrectly attributes the statement about chip shortages to FE-2.

SKU's launch, and FE-2—the primary source cited—left NVIDIA before the launch. *See* J.A. 65-67 (¶¶ 127-130).

Third, Plaintiffs (at 10) point to a change in NVIDIA's GeForce driver software license—but this at most suggests NVIDIA knew that *some* GeForce GPUs could be used for mining, and NVIDIA repeatedly disclosed during the class period that miners purchased GeForce GPUs even after the Crypto SKU's launch. *See* Opening Br. 9-11.

Fourth, Plaintiffs (at 13) rely on statements that NVIDIA "monitor[ed] the inventory in the channel continuously" and "monitor[ed] sellout in the channel literally every day," but those statements were made years before the class period and do not suggest NVIDIA could track the identity of any (let alone all) users. The first statement was made a full decade before the class period by former NVIDIA CFO Marv Burkett, not (as Plaintiffs erroneously assert) Huang. *See* D. Ct. Dkt. 153-31 at 4-5; Pet. App. 103a.

Fifth, Plaintiffs likewise badly distort (at 1, 18, 32) Huang's statement after the class period ended that a "crypto hangover" caused the eventual decline in revenue. Huang had always acknowledged—and acted upon—his belief that crypto demand was keeping GeForce prices high and pricing out gamers. As Huang explained, the problem was not the drop in crypto prices, but the fact that retailers kept GeForce GPU prices high afterward—which "froze the market" and ballooned supply. J.A. 415. This comment is not proof of scienter. It is Huang's contemporaneous and innocent explanation.

Finally, many other "allegations" are just quotes from the complaint's introduction and similar attorney-written spin. *See, e.g.,* Resp. Br. 10 (Crypto SKU "had not absorbed anywhere close to a majority of crypto miners' demand"); *id.* at 38 (Huang "personally monitored, analyzed, and exploited * * * cryptocurrency-driven GeForce demand"); *id.* at 40 (Huang "not only knew about, but *encouraged* large-scale cryptomining with GeForce GPUs"). That lawyer speak is not the kind of particularized allegation the PSLRA demands.

SEC Consent Decree: Plaintiffs try to rely on the SEC consent decree, which the parties did not enter into until years after the amended complaint and which Plaintiffs did not even raise before the Ninth Circuit. Notably, the Government does not rely on it, no doubt because it undermines rather than bolsters any inference of scienter. The SEC had access to the actual internal records that Plaintiffs claim provide evidence of fraud. And yet the SEC brought no fraud claim and alleged no scienter. Rather, it negotiated a settlement, which noted that NVIDIA fixed any disclosure problems in the middle of the class period when it explicitly "identif[ied] cryptomining as a significant factor in year-over-year growth in Gaming revenue" in its 10-K. *In re NVIDIA Corp.*, Securities Act of 1933 Release No. 11060, 2022 WL 1442621, at *4 (May 6, 2022). Huang was not mentioned and no liability was admitted.

C. Plaintiffs' Theory Of Scienter "Does Not Make A Whole Lot Of Sense."

Plaintiffs agree (at 28) that the PSLRA contemplates an "inherently comparative" inquiry that asks whether the inference of scienter is "cogent and at least as compelling as any opposing inference." *Tellabs*, 551 U.S. at 323-324. Plaintiffs never seriously attempt that requisite comparison.

As Judge Sanchez recognized, Plaintiffs' "theory of fraud does not make a whole lot of sense." Pet. App. 87a (Sanchez, J., dissenting) (quotation marks omitted). "Why would Defendants launch the Crypto SKU to conceal the extent to which the company's GeForce GPU revenues were dependent on cryptocurrency mining volatility if the crash in demand was 'inevitable?'" *Id.* And why would Huang repeatedly declare that NVIDIA would "work as hard as we can" to get GeForce supply into the marketplace, if he knew demand would inevitably collapse? J.A. 395-396.

Plaintiffs offer no answer. Although the Government posits (at 26) that Huang may have hoped he "would think of something" before the reckoning, Huang had no incentive to tell a lie that was sure to be imminently revealed. Plaintiffs do not allege that Huang reaped any financial benefit from these alleged falsehoods, and NVIDIA *repurchased* $1.77 billion of its stock during this period. *See* D. Ct. Dkts. 153-3 at 21; 153-28 at 19. As the Government recognizes (at 26), "[t]he absence of a motive" for the alleged fraud is "relevant" to scienter. *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 48 (2011).

"The far more plausible inference is what NVIDIA executives disclosed to investors throughout the class period." Pet. App. 87a (Sanchez, J., dissenting). Huang believed that miners were contributing to demand for GeForce GPUs, and he introduced the Crypto SKU to provide "greater visibility" into revenues from cryptocurrency demand and minimize "the likelihood that when cryptocurrency prices fell, miners would dump these GPUs onto a secondary market." Pet. App. 60a-61a. But NVIDIA repeatedly informed the public that some mining demand still existed for GeForce GPUs, though it was difficult to track and quantify. *See, e.g.*, J.A. 395 ("miners bought a lot of our [GeForce] GPUs during the quarter, and it drove prices up"); Opening Br. 9-11. Indeed, in the middle of the class period, NVIDIA's Form 10-K acknowledged that its GeForce revenue was "driven by growth associated with," among other things, "cryptocurrency mining." J.A. 393. Executives also informed investors that cryptocurrency demand during the class period was "volatile." J.A. 382, 389. These statements powerfully refute Plaintiffs' assertions of fraud.

Even after introducing the Crypto SKU, Huang expressed concern about the effect of crypto demand on NVIDIA's core gaming market. He explained that crypto demand for gaming chips contributed to prices that were "higher than where they should be," and that "our job is to make sure that we work as hard as we can to get supply out into the marketplace" so that "pricing will normalize" and "gamers can buy into their favorite graphics card." J.A. 395-396.

Plaintiffs and the Government cite as evidence of fraud the drop in NVIDIA's revenue projections at the end of the class period when crypto prices again fell. These arguments ignore the far more compelling innocent inference. Huang believed that when crypto prices fell, third-party distributors would respond by lowering GeForce prices, making GeForce chips affordable for gamers again. *E.g.*, J.A. 395. A loss in GeForce sales to miners could be offset by a gain in sales to gamers. But when crypto prices fell, GeForce inventory "took longer than expected to sell through," because GeForce prices "took longer than expected to normalize." Pet. App. 67a (Sanchez, J. dissenting). An incorrect prediction about retailers' pricing decisions does not give rise to a strong inference of scienter.

Contrary to Plaintiffs' assertion (at 7), this is nothing like the "exceedingly unlikely" innocent explanation the Seventh Circuit found on remand in *Tellabs*. *Makor Issues & Rights, Ltd.* v. *Tellabs Inc.*, 513 F.3d 702, 706-707, 709 (7th Cir. 2008). Plaintiffs' convoluted theory that NVIDIA launched the Crypto SKU to "mislead investors about the true extent of cryptocurrency revenues earned in its Gaming segment," even as executives repeatedly disclosed that miners continued to buy GeForce GPUs, "does not present a cogent or compelling inference of scienter." Pet. App. 59a (Sanchez, J., dissenting).

II. PLAINTIFFS CANNOT USE AN EXPERT OPINION AS A SUBSTITUTE FOR PARTICULARIZED ALLEGATIONS OF FACT TO PLEAD FALSITY.

Plaintiffs have no factual allegations showing falsity—so they enlisted an expert firm to create some. This Court should reject that end-run around the PSLRA.

A. The PSLRA Requires Plaintiffs To Plead Facts—Not Expert Opinions.

Plaintiffs are wrong (at 2, 43-44) that NVIDIA seeks a "rule" that would "categorically bar the use of factual allegations informed by expert analysis" to plead falsity. NVIDIA simply asks this Court to hold—as the Second and Fifth Circuits have held—that expert opinions "cannot *substitute* for facts under the PSLRA." *Arkansas Pub. Emps. Ret. Sys.* v. *Bristol-Myers Squibb Co.*, 28 F.4th 343, 354 (2d Cir. 2022) (emphasis added and quotation marks omitted). The Government agrees, explaining that "plaintiffs may not substitute an unsubstantiated expert opinion for particularized allegations of fact." U.S. Br. 14.

Plaintiffs do not argue for a contrary rule. Instead, they (at 43-44) attempt to convince the Court that their expert's opinions are actually fact. The Court should reject that sleight of hand. As both the majority and dissent below recognized, Prysm created "estimates" and provided its "guess" as to NVIDIA's gaming-related revenue. Pet. App. 70a (Sanchez, J., dissenting); *see* Pet. App. 20a. This "guess" is not a particularized fact; it is a speculative opinion based on a

long chain of "unreliable or undisclosed assumptions." Pet. App. 58 (Sanchez, J., dissenting).

Contrary to Plaintiffs' assertions (at 45-46), NVIDIA does not ask the Court to hold that "identical factual allegations" should be treated differently when attributed to an expert rather than the plaintiff. Quite the contrary: It is NVIDIA's position that *all* allegations of fact must be evaluated under the same scrutiny mandated by the PSLRA. The Government agrees that an "allegation that would otherwise lack particularity cannot pass muster merely because it appears in an expert report." U.S. Br. 29-30. Plaintiffs thus cannot immunize otherwise inadequate factual allegations by putting them into the mouth of an expert.

Plaintiffs contend (at 46) it is "unworkable" for courts to distinguish between fact and opinion. This Court in *Omnicare* disagreed, explaining that a fact is "a thing done or existing," and an opinion is "a belief" or "view." *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 183 (2015) (quotation marks omitted); Grundfest Br. 20-25. [4] Plaintiffs' unworkability contentions are particularly puzzling given that the federal rules are replete with provisions distinguishing the two. *See, e.g.*, Fed. R. Evid. 701 (governing lay "testimony in the form of an

[4] Plaintiffs (at 43-44) misrepresent *Matrixx*, which does not support Plaintiffs' contention that they may plead falsity based on expert opinion. The *Matrixx* plaintiffs alleged falsity based on contemporaneous reports actually received by the defendants regarding how patients reacted to a cold medicine. 563 U.S. at 45.

opinion"); Fed. R. Evid. 705 (allowing experts to "state an opinion" without "the underlying facts or data"); Fed. R. Civ. P. 26(a)(2)(B)(i)-(ii) (requiring expert reports to disclose "opinions" and underlying "facts or data").

Lower federal courts are equally comfortable distinguishing between fact and opinion. In *Financial Acquisition Partners LP* v. *Blackwell*, the Fifth Circuit explained that the district court properly considered the "nonconclusory, factual portions" of an accounting expert's report, but not "the expert's conclusions (opinions)." 440 F.3d 278, 285-286, 290 (5th Cir. 2006) (quotation marks omitted). And in *Arkansas Public Employees Retirement System*, the Second Circuit similarly held that the district court properly considered the "particularized facts" contained in an expert opinion, but not the expert's ultimate opinion. 28 F.4th at 354.

An opinion may include "embedded statements of fact." *Omnicare*, 575 U.S. at 185. But Plaintiffs forthrightly concede (at 44) that they seek to establish falsity based on Prysm's "ultimate conclusion," which is plainly an opinion.

Plaintiffs also concede (at 44) that a party's ability to rely on an expert's opinion turns on "the soundness" of the underlying "assumptions and data" on which the expert relied. The Government agrees that defendants may generally "challenge an expert's reliance on 'conclusory' or 'speculative' premises at the pleading stage." U.S. Br. 33-34. Despite these concessions, neither Plaintiffs nor the Government make any meaningful attempt to defend the assumptions or

underlying facts on which Prysm relied. Plaintiffs focus (at 48) on the complaint's description of Prysm's methodology, but they do not explain how Prysm's farfetched chain of inferences results in anything other than speculation. *See* Opening Br. 45-48; Grundfest Br. 20-25. Indeed, the Prysm opinion *itself* relies on "a different third-party market analyst" who "uses 'proprietary analytic models'" that were never disclosed, "meaning there is no way to know" how the crucial estimate of NVIDIA's market share that Prysm relied on was created. Pet. App. 71a-72a (Sanchez, J., dissenting).

If Plaintiffs had directly alleged the same "generic market research and unreliable or undisclosed assumptions," Pet. App. 58a (Sanchez, J., dissenting), their complaint would fail to state a claim. Plaintiffs thus enlisted an expert to add a patina of legitimacy to what is nothing more than "a series of educated guesses." Pet. App. 73a. Because those educated guesses came from credentialed "professionals," the Ninth Circuit treated them as particularized allegations of fact. Pet. App. 20a. But "[c]onclusory allegations and speculation carry no additional weight merely because a plaintiff placed them within the affidavit of a retained expert." *DeMarco* v. *DepoTech Corp.*, 149 F. Supp. 2d 1212, 1222 (S.D. Cal. 2001); *see* U.S. Br. 30 ("an allegation that would be rejected" is not adequate "simply because an expert has endorsed it").

Plaintiffs (at 45) and the Government (at 14) note that the PSLRA allows plaintiffs to plead falsity based on "information and belief." But this simply requires

plaintiffs to have a basis of knowledge for their allegations, even if it is not firsthand. *See Information and Belief*, Black's Law Dictionary (6th ed. 1990). The PSLRA compels Plaintiffs to spell out "with particularity *all facts* on which [a] belief is formed." 15 U.S.C. § 78u-4(b)(1) (emphasis added). Thus, the statutory text *requires* sifting allegations of "fact" from "belief."

Prohibiting plaintiffs from substituting opinion for fact will not, as Plaintiffs suggest (at 45), require parties to "plead evidence or prove their case at the outset." The PSLRA has *always* required securities plaintiffs to plead particularized facts raising a plausible inference of falsity. 15 U.S.C. § 78u-4(b)(1); *see Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008). What is unique about this case is the workaround Plaintiffs concocted—which would allow plaintiffs to survive a motion to dismiss by relying on expert opinion rather than particularized allegations of fact.

B. The Court Should Reject Plaintiffs' Belated Attempt To Distance Their Allegations From The Prysm Opinion.

Plaintiffs cannot win on the law, so they attempt to reframe the case—claiming (at 25, 49) that "the falsity allegations in this case do not depend" (after all) on their "expert analysis." But the complaint lists Prysm's revenue estimates as the leading "reason why" every challenged statement by NVIDIA executives was allegedly false or misleading. 15 U.S.C. § 78u-4(b)(1); *see* J.A. 96-109. The Ninth Circuit in

turn explicitly "rel[ied] on the estimated numbers Prysm provided" to find falsity, holding that the challenged statements were false or misleading *because* they "failed to say" that NVIDIA's sales to miners matched the expert's calculations. Pet. App. 20a, 25a-29a. As the dissent observed, the complaint's "central contention" that executives "falsely underreported cryptocurrency-related sales * * * is based entirely on a post hoc analysis by the Prysm Group." Pet. App. 58a (Sanchez, J., dissenting).

While Plaintiffs now seek to distance themselves from Prysm's opinion, that opinion provides the *only* quarterly analysis of NVIDIA's GeForce GPU revenue allegedly attributable to mining. Opening Br. 48-49. That analysis is essential because Plaintiffs challenge a wide array of statements over a volatile 18-month period, and must allege contemporaneous facts that establish each statement was false *at the time it was made*. *See Omnicare*, 575 U.S. at 189-190, 196. Generalized allegations about what happened "during the class period" and "throughout 2017," J.A. 44, 53 (¶¶ 86, 106), cannot satisfy this burden. *See, e.g.*, *Glazer Cap. Mgmt., L.P.* v. *Forescout Techs., Inc*., 63 F.4th 747, 776 (9th Cir. 2023) (no falsity where allegations were "unclear as to the actual timeline"). It is thus no surprise that when Plaintiffs insist (at 47-48) that their allegations "easily clear the PSLRA's bar," the only source they cite is Prysm.

C. None Of Plaintiffs' Other Allegations Plead Falsity With Particularity.

Plaintiffs claim (at 47, 49) that allegations other than Prysm's opinions sufficiently allege falsity. But

the Ninth Circuit found falsity based on the "combination" of Prysm's opinion with other allegations, Pet. App. 25a, which means that other allegations standing alone are *not* sufficient.

Plaintiffs first claim (at 47) that NVIDIA's sales database shows that most "GeForce sales during the relevant period were to crypto-miners." But Plaintiffs alleged no such thing in the complaint. They instead alleged that "*throughout 2017*," data in a sales database "reflected" that 60-70% of GeForce sales in *China* were to crypto-miners. J.A. 44 (¶ 86) (emphasis added). As explained, that allegation does not show *when* (if ever) the database reflected the 60-70% figure and thus does not render any challenged statement false *when made*. Moreover, the data was limited to China—which, according to Plaintiffs, was not representative of NVIDIA's global GPU business. *See* Opening Br. 46 n.5.

Plaintiffs also claim (at 47) that "GeForce Experience data" establishes falsity. But that data monitors how *existing* GPUs were used; it does not analyze how *new* GPUs would ultimately be used once acquired by downstream users weeks or months later. *See* Opening Br. 37, 46. Plaintiffs reference (at 14-15, 20) FE-5's statement that the GeForce Experience data showed that "over 60% of GeForce GPU sales during the Class Period were to miners." J.A. 53 (¶ 106). But FE-5 is not in this case, *see supra* p. 12, and this figure fails to allege falsity anyway because it does not make clear *when* it applied. The complaint does not say whether this percentage was an average or a constant throughout the class period, or at a time that

corresponded to any challenged statement. Given Plaintiffs' own allegations about the swings in mining demand for GPUs, J.A. 4-5, 30, it would make no sense to infer that this figure would have remained consistent throughout the class period.

Plaintiffs also reference (at 47) the RBC report, which they claim "[backs] up" their allegations. In fact, Plaintiffs now cite the RBC report more than Prysm, retreating from their complaint's principal theory of falsity. But the RBC report is just another *post hoc* third-party opinion—and even more problematic than Prysm's opinion because the complaint provides hardly any information about RBC's methodology. The "former employee reports" (at 47, 49) and the reduction in earnings that NVIDIA announced in November 2018 (at 49) are likewise not pled as reasons for falsity, nor would they suffice to plead it. *See* Opening Br. 49-51.

CONCLUSION

For the foregoing reasons, and those in the opening brief, the Ninth Circuit's decision should be reversed.

Respectfully submitted,

JOHN C. DWYER
PATRICK E. GIBBS
SAMANTHA A. KIRBY
COOLEY LLP
3175 Hanover Street
Palo Alto, CA 94304
(650) 843-5000

KATHLEEN R. HARTNETT
COOLEY LLP
3 Embarcadero Center
20th Floor
San Francisco, CA 94111
(415) 693-2000

NEAL KUMAR KATYAL
Counsel of Record
KATHERINE B. WELLINGTON
WILLIAM E. HAVEMANN
REEDY C. SWANSON
KEENAN ROARTY
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

SARAH M. LIGHTDALE
PATRICK J. HAYDEN
COOLEY LLP
55 Hudson Yards
New York, NY 10001
(212) 479-6000

Counsel for Petitioners

OCTOBER 2024