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

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

The Private Securities Litigation Reform Act (PSLRA) imposes "[e]xacting pleading requirements" on plaintiffs who file securities fraud class actions. *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). To state a claim, plaintiffs must "state with particularity all facts" supporting their allegations of falsity and must also allege "facts giving rise to a strong inference" of the required mental state. 15 U.S.C § 78u-4(b)(1), (2)(A); *see also* Fed. R. Civ. P. 9(b). Plaintiffs frequently try to meet these requirements by claiming that internal company documents contradicted the company's public statements. This petition presents two questions that have divided the circuits about how the PSLRA's requirements apply in this common and recurring context:

1. Whether plaintiffs seeking to allege scienter under the PSLRA based on allegations about internal company documents must plead with particularity the contents of those documents.

2. Whether plaintiffs can satisfy the PSLRA's falsity requirement by relying on an expert opinion to substitute for particularized allegations of fact.

PARTIES TO THE PROCEEDING

Petitioners in this Court are NVIDIA Corporation and Jensen Huang. Respondents are E. Ohman J:Or Fonder AB and Stichting Pensioenfonds PGB.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner NVIDIA Corporation (NVIDIA) hereby states that NVIDIA has no parent corporations, and no publicly held company owns ten percent or more of NVIDIA. Petitioner Jensen Huang is an individual.

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BRIEF FOR PETITIONERS

INTRODUCTION

Congress adopted the Private Securities Litigation Reform Act of 1995 (PSLRA) to "deter or at least quickly dispose of" "nuisance" lawsuits that had become "rampant," resulting in "vexatious discovery requests" and "extortionate settlements." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 81-82 (2006). To achieve that goal, the PSLRA imposes "special burdens on plaintiffs seeking to bring federal securities fraud class actions" through "heightened pleading requirements." *Id.*

This case is about two of those requirements. First, plaintiffs must allege with "particularity" facts giving rise to a "strong inference" that the defendant acted with scienter. 15 U.S.C. § 78u-4(b)(2)(A). And second, plaintiffs must "state with particularity all facts on which" they base their belief that the challenged

statements are false. *Id.* § 78u-4(b)(1). In the decision below, the Ninth Circuit "significantly erode[d]" those requirements by allowing Plaintiffs to clear both hurdles simply by hiring an expert who manufactured data to fit their allegations. Pet. App. 74a (Sanchez, J., dissenting).

Plaintiffs' theory of fraud is that Jensen Huang, the CEO of NVIDIA, made public statements that contradicted internal NVIDIA reports. There is just one problem: Plaintiffs do not allege what any report allegedly reviewed by Huang actually said. Undeterred, Plaintiffs attempted a workaround: They hired an expert to create data and then filed a class action alleging that NVIDIA and its CEO committed securities fraud by failing to disclose the data invented by Plaintiffs' expert.

A sharply divided panel of the Ninth Circuit approved this gambit. The panel majority marched through figures supplied by the hired expert and held that Plaintiffs adequately alleged that Huang's challenged statements were false or misleading because they failed to match those guesses. The panel majority then relied on figures from the expert's opinion to bootstrap its way to scienter. The majority held that Plaintiffs had adequately alleged a strong inference of scienter because Huang was a hands-on CEO who "would have" reviewed internal records, which in turn "would have shown" numbers consistent with the expert's opinion. Pet. App. 42a, 55a.

For the reasons Judge Sanchez explained in his vigorous dissent, the panel's decision badly misunderstands the PSLRA and eviscerates the guardrails that Congress erected to protect the public from abusive securities litigation.

As to scienter, contrary to the panel's conclusion, allegations that a corporate officer purportedly reviewed internal documents do not give rise to a strong inference of scienter under the PSLRA unless plaintiffs allege with particularity the relevant *contents* of those documents. That legal rule is dispositive here. Plaintiffs' theory of scienter revolves around allegations that Huang would have reviewed internal documents contradicting his public statements—and thus would have known the statements were false or misleading—but the complaint does not include *any* particularized allegations about the contents of such documents. After years of speaking with former employees, Plaintiffs cannot cite a single document that actually contradicted anything Huang said. Other courts of appeals have easily rejected comparable allegations of scienter, making the Ninth Circuit an extreme outlier.

As to falsity, the panel impermissibly allowed Plaintiffs to rely on a hired expert's opinion to substitute for the particularized allegations of fact the PSLRA requires. Although an expert at the pleading stage may, for example, explain complex terminology or provide industry-specific context, the expert's opinion must rely on particularized facts to satisfy the PSLRA.

This Court should reject the Ninth Circuit's approach to both questions presented. Plaintiffs across the nation routinely seek to meet the PSLRA's requirements by alleging that a company's internal documents contradicted its public statements. The Ninth Circuit's opinion furnishes an easy-to-replicate "roadmap" for plaintiffs to sidestep the PSLRA in this recurring context. Former SEC Officials Br. 6. All a

plaintiff must do is (1) hire an expert to manufacture numbers that contradict a company's public statements; (2) allege that a company generally keeps detailed records and that executives track those records; and (3) argue that those records "would have" matched the hired expert's numbers. Pet. App. 42a, 55a; *see* Former SEC Officials Br. 17. As Judge Sanchez explained, the majority's reasoning would allow plaintiffs to satisfy the PSLRA "simply by producing an expert witness whose *post hoc* calculations diverge from a defendant's prior public statements, even when the complaint fails to allege any facts to establish that the expert's conclusions correspond to what a company's internal data or documents might have shown." Pet. App. 75a; *see* Washington Legal Found. et al. Br. 11-12.

Far from serving Congress's goal of guarding against fishing expeditions by vexatious litigants, the Ninth Circuit's opinion declares it open season so long as a plaintiff has funding to hire an expert. This result is particularly problematic given that private securities actions rest on a judicially implied right of action that Congress never adopted. "The implied Rule 10b-5 private cause of action is a relic of the heady days in which this Court assumed common-law powers to create causes of action." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 284-285 (2014) (Thomas, J., concurring in the judgment) (quotation marks omitted). This Court should not allow the Ninth Circuit to circumvent congressional intent and expand a judicially created private cause of action. The Ninth Circuit's judgment should be reversed.

OPINIONS BELOW

The Ninth Circuit's decision (Pet. App. 1a-88a) is reported at 81 F.4th 918. The Ninth Circuit's order denying NVIDIA's petition for rehearing en banc (Pet. App. 167a-168a) is not reported but is available at 2023 WL 7984780. The Ninth Circuit's order granting Petitioners' motion to stay the mandate (Pet. App. 165a-166a) is not reported.

The District Court's opinion dismissing Plaintiffs' amended complaint with prejudice (Pet. App. 89a-122a) is reported at 522 F. Supp. 3d 660. The District Court's opinion dismissing Plaintiffs' original complaint without prejudice (Pet. App. 123a-164a) is not reported but is available at 2020 WL 1244936.

JURISDICTION

The Ninth Circuit entered judgment on August 25, 2023. Pet. App. 1a-88a. The court denied rehearing on November 15, 2023. Pet. App. 167a-168a. On December 22, 2023, this Court extended Petitioners' certiorari deadline to March 4, 2024. On March 4, 2024, Petitioners filed a timely petition for certiorari, which the Court granted on June 17, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

The relevant provision of the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b), is reproduced at Pet. App. 169a-172a.

Federal Rule of Civil Procedure 9(b) is reproduced at Pet. App. 173a.

STATEMENT OF THE CASE

A. Legal Framework

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), as implemented through Rule 10b-5(b), 17 C.F.R. § 240.10b-5(b), prohibits making false or misleading statements in connection with securities transactions. The Exchange Act "does not by its terms provide an express civil remedy for" private parties. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 729 (1975). In the 1970s, however, this Court nevertheless recognized—"with virtually no discussion"—an implied right of action for private plaintiffs. *Id.* at 729-730.

From this "legislative acorn" grew "a judicial oak." *Id.* at 737. Abusive litigation became "rampant." *Merrill Lynch*, 547 U.S. at 81. Private plaintiffs were "targeting * * * deep-pocket defendants" with "nuisance filings," "vexatious discovery requests," and "extortionate settlements" that were "being used to injure the entire U.S. economy" while chilling the very disclosures the Exchange Act sought to promote. *Id.* at 81-82 (quotation marks omitted).

Congress enacted the PSLRA to "check * * * abusive litigation by private parties" under this implied right of action. *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 311, 313 (2007). One of the PSLRA's central reforms was to impose "[e]xacting pleading requirements," *id.*, "designed to discourage private securities actions lacking merit" and "fishing expeditions brought in the dim hope of discovering a fraud," *Pub. Emps.' Ret. Ass'n of Colo.* v. *Deloitte & Touche LLP*, 551 F.3d 305, 311 (4th Cir. 2009) (Wilkinson, J.); *see* S. Rep. No. 104-98, at 14 (1995) ("Senate Report")

("discovery in securities class actions resembles a fishing expedition").

This case concerns the PSLRA's special burdens for pleading the first two elements of a private claim under Section 10(b)—a false statement or misleading omission (commonly referred to as "falsity"), and scienter. *See Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc*., 552 U.S. 148, 157 (2008).

As to falsity, the PSLRA requires a complaint to "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1). As to scienter, the PSLRA requires a complaint to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Id.* § 78u-4(b)(2)(A). The "inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs*, 551 U.S. at 314.

The PSLRA's requirements work in tandem with Rule 9(b), which requires that "the circumstances constituting fraud" be "state[d] with particularity." Fed. R. Civ. P. 9(b). Thus, to survive a motion to dismiss, the PSLRA "requires plaintiffs to state with particularity both the facts constituting the alleged violation" and the facts giving rise to a "strong inference" of scienter. *Tellabs*, 551 U.S. at 313-314, 321.

B. Factual Background

NVIDIA sells graphics processing units (GPUs), devices capable of taking a complex computational problem and splitting it into thousands or millions of tasks that it tackles simultaneously, enhancing computational efficiency. *See* Pet. App. 7a. NVIDIA's "GeForce" branded GPUs are designed and marketed for video gaming, where users value high-speed graphics processing. Pet. App. 9a-10a. NVIDIA generally does not sell its GPUs directly to end users, instead selling to device manufacturers, who incorporate NVIDIA's GPUs into their products, such as personal computers and game systems. Pet. App. 9a. Device manufacturers then sell those products to distributors, who in turn sell them to end users. *Id.* NVIDIA reports revenue from GeForce GPU sales in its "Gaming" segment, consistent with how those products are designed and marketed. Pet. App. 10a.

GPUs can be used for purposes other than gaming. Pet. App. 7a. In early 2017, as some cryptocurrency prices surged, some users began to deploy GPUs from NVIDIA and other companies for cryptocurrency "mining"—using computing power to solve complicated math problems and acquire cryptocurrency. Pet. App. 8a, 10a-11a. This presented a challenge for NVIDIA: how to meet this new and highly unpredictable mining demand without disrupting GeForce GPU pricing and supply for its core gaming market. One of NVIDIA's competitors, Advanced Micro Devices (AMD), had struggled to navigate a similar issue a few years earlier; when the price of Bitcoin surged, cryptocurrency miners bought large amounts of AMD's GPUs—driving up prices—only to dump the GPUs

back onto the market at a deep discount when Bitcoin's price fell. *See* Pet. App. 8a-9a.

To address this challenge and protect the supply of GeForce GPUs for gaming, in May 2017 NVIDIA launched a new GPU designed and marketed specifically for mining known as the Cryptocurrency Microprocessor (the "Crypto SKU"). Pet. App. 11a. The Crypto SKU could be purchased in bulk and used for mining but *not* for gaming, as it lacked video functionality. Pet. App. 60a (Sanchez, J., dissenting). Because it was neither designed nor marketed for gaming, NVIDIA reported revenues from the Crypto SKU in a separate segment referred to as "OEM & IP." Pet. App. 11a; Pet. App. 60a (Sanchez, J., dissenting).

After introducing the Crypto SKU, NVIDIA's executives made clear to investors that they believed cryptocurrency miners were buying *both* GeForce GPUs and Crypto SKUs, while cautioning that it was difficult to track the proportion of GeForce sales driven by miners. Pet. App. 59a-60a, 63a-65a, 82a (Sanchez, J., dissenting); *see* J.A. 391 ("Keep in mind, that[] [it's] very difficult for us to quantify down to the end customer."). NVIDIA's executives likewise made clear to investors that a purchaser could use any given GeForce GPU both for gaming and mining. *See* Pet. App. 64a, 66a (Sanchez, J., dissenting).

In August 2017, NVIDIA disclosed that the Crypto SKU generated $150 million in revenue in the first quarter after its launch. J.A. 37-38 (¶ 73). NVIDIA's executives informed investors that they believed demand from miners was primarily being met by the Crypto SKU. *Id.*; Pet. App. 63a-64a (Sanchez, J., dissenting). However, they also explained that miners

had "probably also increased the demand" for GeForce GPUs during that quarter as well. J.A. 379.

The next quarter, during the company's November 2017 earnings call, executives reiterated that "GPU sales also benefited from continued cryptocurrency mining," and the company "met some of this demand with [the Crypto SKU] and a portion with GeForce [GPUs], though it's difficult to quantify." J.A. 382; *see* Pet. App. 64a (Sanchez, J., dissenting). Executives also reminded investors that NVIDIA could not "visibly count" cryptocurrency-related purchases. J.A. 387.

In late 2017 and early 2018, the prices of certain cryptocurrencies rocketed even higher. Pet. App. 10a; Pet. App. 64a (Sanchez, J., dissenting). During a February 2018 earnings call, NVIDIA's executives informed investors that there was "[s]trong demand in the cryptocurrency market," and that "*some was met with our gaming GPUs*"—enough that there was "lower than historical channel inventory" for GeForce GPUs. J.A. 389 (emphasis added). NVIDIA's Form 10-K filed with the SEC in February 2018 likewise noted that increased "GPU business revenue," including for "GeForce gaming GPUs," was "driven by growth associated with," among other things, "*cryptocurrency mining*." J.A. 393 (emphasis added).

The historically low supply of GeForce GPUs in the channel drove GeForce prices up for end users "at the retail level," leaving some gamers unable to access or afford GeForce GPUs. Pet. App. 64a-65a (Sanchez, J., dissenting). To address this price inflation and gamers' "pent-up demand," Huang explained that the company planned to increase the supply of GeForce GPUs into the sales channel. Pet. App. 65a.

In the ensuing quarters, cryptocurrency prices fell, but NVIDIA continued to sell record volumes of GeForce GPUs. *See* Pet. App. 10a-13a; Pet. App. 65a-66a, 88a (Sanchez, J., dissenting). During this period, NVIDIA's executives repeatedly disclosed that increased GeForce GPU sales were attributable in part to mining demand. In May 2018, Huang told investors that "miners bought a lot of our [GeForce] GPUs during the quarter, and it drove prices up." J.A. 395; *see also* J.A. 396-398. NVIDIA's executives likewise reiterated their strategy for addressing the higher prices resulting from increased demand for GeForce GPUs, explaining that NVIDIA would "work as hard as we can to get supply out into the marketplace." J.A. 395-396; *see* Pet. App. 65a-66a (Sanchez, J., dissenting).

In an August 2018 earnings call, NVIDIA's executives again told investors that miners were also purchasing GeForce GPUs. Huang explained that "it's ambiguous and hard to predict" how much of the GeForce business was being driven by mining, including because it's "hard to say" whether GeForce users "buy [a GPU] for mining or * * * buy it for gaming." J.A. 409. On that same call, NVIDIA also discussed its next-generation GeForce GPUs, which it described as "our most important innovation" in a decade that would "reinvent computer graphics." J.A. 401, 405, 408.

On November 15, 2018, NVIDIA disclosed that its revenue for the most recent quarter was about 2% less than expected. J.A. 87 (¶ 160). Executives attributed this shortfall to excess supply of GeForce GPUs in the sales channel. Pet. App. 13a. During a call with investors, executives explained that "channel inventory

took longer than expected to sell through," as "Gaming [GPU] prices, which were elevated following the sharp crypto falloff, took longer than expected to normalize." Pet. App. 13a; J.A. 87 (¶ 161). Huang explained that he had expected "the pricing in the marketplace" for GeForce GPUs to decline after cryptocurrency prices dropped, allowing gamers back into the market. J.A. 414. But GPU prices "declined slower than we expected * * * and the volume increase took longer than we expected." *Id.* NVIDIA's stock price temporarily dropped after the announcement, before increasing to become one of the highest performing stocks in recent years. *See* Pet. App. 13a.

C. Plaintiffs' Allegations

After NVIDIA's stock price dropped, shareholder plaintiffs filed this putative class action under Section 10(b) and Rule 10b-5(b). Plaintiffs contended that Huang concealed the extent to which NVIDIA's Gaming segment revenues were driven by sales of GeForce GPUs to cryptocurrency miners, as opposed to gamers. Pet. App. 17a. Plaintiffs further contended that NVIDIA reported Crypto SKU revenue in the OEM segment because executives wished to create a misimpression that NVIDIA was "insulated from cryptocurrency volatility," while knowing that cryptocurrency markets would "inevitabl[y] bust." Pet. App. 87a (Sanchez, J., dissenting).

Plaintiffs alleged that a number of public statements made by NVIDIA executives in 2017 and 2018 were knowingly false or misleading. Pet. App. 17a-18a. For example, Plaintiffs challenged Huang's November 2017 response to the question whether "cryptocurrency is driving all of your success." J.A. 102 (¶ 196). Huang opined that for NVIDIA, crypto was "small but

not zero * * * . It's large for somebody else. But it is small for us." *Id*. Plaintiffs also challenged a statement Huang made in a March 2018 interview after being asked whether, "if people think [cryptocurrency] is that important, they're gonna miss the bigger picture"; Huang responded "Absolutely" and discussed core growth drivers for NVIDIA, including gaming. J.A. 107-108 (¶ 213). While the complaint included allegations about NVIDIA executives other than Huang, the Ninth Circuit ruled that Plaintiffs failed to state a claim as to those executives. Pet. App. 34a, 43a, 56a. Plaintiffs did not seek review of that holding; accordingly, only the allegations regarding Huang's statements remain at issue.

Plaintiffs claimed that contemporaneous, internal NVIDIA records regarding GPU sales contradicted Huang's public statements. Plaintiffs did not, however, allege the contents of a single internal NVIDIA report reviewed by Huang, at any point in time, showing the proportion of GeForce GPUs ultimately sold to cryptocurrency miners rather than gamers.

Lacking such facts, Plaintiffs attempted to plead falsity by paying an expert firm, the Prysm Group, to supply an opinion purporting to estimate the amount by which NVIDIA's quarterly "Gaming" revenues for the period in question were driven by cryptocurrency miners, rather than gamers. Pet. App. 18a-19a. Plaintiffs claimed that every one of the challenged statements was false or misleading because it was (in Plaintiffs' view) inconsistent with the quarterly revenue estimates generated by Prysm years after the fact. J.A. 73-83 (¶¶ 143-154).

Prysm's "estimates" rested on "a series of assumptions drawn from generic market research." Pet. App.

70a (Sanchez, J., dissenting). Prysm first used data from two websites to estimate how much processing power was added to several major blockchain networks during each quarter of the putative class period, worldwide. Pet. App. 21a. Prysm assumed that 100% of that new processing power came from new GPUs sold during the same time period. *See* Pet. App. 19a-22a. Next, Prysm estimated the number of new GPUs that would be needed to yield that much processing power. Pet. App. 21a; Pet. App. 70a (Sanchez, J., dissenting). Prysm then estimated what percentage of those GPUs would have been manufactured by NVIDIA using estimates of NVIDIA's market share. Pet. App. 21a-22a; Pet. App. 70a-71a (Sanchez, J., dissenting). Finally, Prysm provided its "best guess about" how much revenue those GPUs would have generated for NVIDIA during each quarter of the class period. Pet App. 70a (Sanchez, J., dissenting); *see* Pet. App. 22a-23a.

Based on this chain of inferences, Prysm purported to estimate the amount of Gaming revenue NVIDIA made from the downstream sale of GeForce GPUs to miners rather than gamers during each quarter of the class period. Pet. App. 19a. These quarterly estimates added up to $1.126 billion in additional cryptocurrency-related sales.

To plead scienter, Plaintiffs alleged that NVIDIA maintained data on GPU sales and usage, as purportedly described to Plaintiffs by a handful of anonymous former employees. These former employees ranged from an account manager in China who was at least three levels removed from any individual defendant (FE-1), to a products director who left the company the same month the class period began (FE-2), to a social

media manager in Russia who never interacted with Huang (FE-4), to a former employee who later signed a declaration swearing that he had not actually "made a number of specific statements" that Plaintiffs attributed to him (FE-5). J.A. 20-22 (¶¶ 33-37); *see* Pet. App. 36a n.2; Pet. App. 75a-76a (Sanchez, J., dissenting).[1]

Critically, however, no former employee described the *contents* of any data sources that Huang allegedly reviewed before he spoke. Pet. App. 80a-86a (Sanchez, J., dissenting). For example, former employees described a "sales database" that allegedly identified GeForce sales to miners. Pet. App. 80a (Sanchez, J., dissenting); *see* J.A. 40-45 (¶¶ 78-86). But Plaintiffs did not allege anything about what that database showed at the time of any of Huang's allegedly misleading statements, much less that Huang reviewed any facts in the database contradicting his public statements during the class period. Pet. App. 82a-83a (Sanchez, J., dissenting).

Two employees also purported to describe meetings attended by Huang at which mining-related sales were discussed. But neither employee actually attended such a meeting during the class period or identified any data conveyed to Huang. Pet. App. 84a-85a (Sanchez, J., dissenting); *see* J.A. 45-48 (¶¶ 87-93). The amended complaint further alleged that Huang received weekly "Top 5" emails, but did not describe the contents of any such emails. Pet. App. 85a (Sanchez, J., dissenting); *see* J.A. 49 (¶ 96). Plaintiffs

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[1] The Ninth Circuit did not rely on FE-5's alleged statements, Pet. App. 36a n.2, and Plaintiffs disavowed any reliance on allegations from FE-5 in their brief in opposition to certiorari, BIO 14 n.6.

also alleged that NVIDIA has software purportedly capable of monitoring how GeForce GPUs were used—again without alleging any information that Huang purportedly received from related reports. Pet. App. 85a-86a (Sanchez, J., dissenting); *see* J.A. 48-54 (¶¶ 99-108).

D. Procedural History

Petitioners moved to dismiss the complaint, and the District Court granted the motion on the ground that Plaintiffs failed to plead falsity or scienter under the PSLRA.

The District Court explained that Plaintiffs' falsity allegations "rel[ied] entirely on an expert opinion" lacking the "particularity" the PSLRA requires. Pet. App. 143a-147a. As to scienter, the District Court held that the complaint depended on statements from former employees that were largely unreliable and "fail[ed] to plausibly establish that any particular statement by any Individual Defendant was knowingly or recklessly false or misleading when made." Pet. App. 148a-152a.

Plaintiffs filed an amended complaint, which the District Court dismissed, this time with prejudice. The court held that Plaintiffs again failed to adequately allege scienter "largely because [they] [did] not adequately tie the specific contents of any * * * data sources to particular statements" by NVIDIA executives. Pet. App. 112a, 118a. Having found that Plaintiffs failed to plead scienter "with the specificity the PSLRA requires," the District Court did not consider falsity. Pet. App. 118a, 122a & n.6.

A divided panel of the Ninth Circuit reversed with respect to Huang and NVIDIA. Relying on Prysm's expert opinion, the panel majority held that Plaintiffs

sufficiently alleged falsity to survive a motion to dismiss. Pet. App. 18a-25a. The panel majority followed a simple formula: It (1) reproduced a table of figures supplied by Prysm, Pet. App. 19a, (2) "rel[ied] on the estimated numbers [the expert] provided in the table reproduced," Pet. App. 20a, and (3) held that each challenged statement was false or misleading because it "failed to say" precisely the figures in the expert's table, Pet. App. 26a-29a; *see* Pet. App. 68a (Sanchez, J., dissenting).

The panel majority then held that Plaintiffs had established the necessary strong inference of scienter because internal NVIDIA documents "would have" reflected the data that Plaintiffs' expert created through *post hoc* calculations, and Huang "would have" known about those internal documents because he is "detail-oriented" and "meticulous." Pet. App. 41a-42a. Citing Prysm's opinion that NVIDIA underreported its crypto revenues by $1.126 billion, the panel majority remarked that "[a] CEO who does not know the source of $1.126 billion * * * is unlikely to exist." Pet. App. 55a.

Judge Sanchez dissented, explaining that "[t]he majority's approach significantly erodes" the PSLRA's "heightened pleading requirements." Pet. App. 74a. With respect to falsity, the dissent observed that the "majority essentially concludes that Plaintiffs have adequately alleged falsity merely by showing that Defendants' statements concerning cryptocurrency-related revenues diverged from Prysm's *post hoc* revenue estimates." Pet. App. 68a. He explained that the PSLRA provides no support for "allow[ing] an outside expert to serve as the primary source of falsity allegations," Pet. App. 58a, and that "the majority's

reasoning" would allow plaintiffs to clear the PSLRA's heightened pleading bar "simply by producing an expert witness whose *post hoc* calculations diverge from a defendant's prior public statements," Pet. App. 75a. Judge Sanchez also explained that allegations that "cryptocurrency miners purchased gaming GPUs in 2016 and 2017" do not establish falsity because that was the very reason "NVIDIA executives publicly expressed for launching the Crypto SKU." Pet. App. 76a.

Regarding scienter, the dissent explained that the amended complaint did 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, much less any internal source that corroborated Prysm's revenue estimates." Pet. App. 59a; *see* Pet. App. 79a-86a.

Taking a step back and viewing the allegations holistically, *see Tellabs*, 551 U.S. at 323-324, the dissent concluded that "Plaintiffs' scienter allegations suffer from an immediate first-level problem: their theory of fraud does not make a whole lot of sense." Pet. App. 87a (quotation marks omitted). Contrary to Plaintiffs' allegations that NVIDIA attempted to conceal sales to miners despite knowing that a cryptocurrency crash was "inevitable," "[i]t is far more plausible that NVIDIA executives introduced the Crypto SKU and adjusted channel inventory to address" demand for its products. *Id.* at 87a-88a. Judge Sanchez explained that even if NVIDIA "miscalculat[ed]" due to several factors that were "difficult for the company to quantify," that "does not create a claim for securities fraud." *Id*.

Over Judge Sanchez's dissent, the Ninth Circuit denied NVIDIA's petition for rehearing en banc, but the court agreed to stay its mandate pending this Court's review. Pet. App. 165a-168a. This Court granted certiorari.

SUMMARY OF ARGUMENT

I. The PSLRA imposed two heightened pleading standards relevant here. First, it expanded the particularity requirement to include all facts alleged on information and belief and all facts that a plaintiff relies on to allege the defendant's state of mind. 15 U.S.C. § 78u-4(b)(1), (2)(A). Second, Congress insisted on a "strong inference" of scienter—more than mere plausibility. *Id.* § 78u-4(b)(2)(A). Congress required plaintiffs to satisfy both standards before discovery by imposing a mandatory, automatic stay of discovery while a Rule 12 motion to dismiss is litigated.

II. Plaintiffs' scienter allegations do not satisfy the PSLRA. Where, as here, a plaintiff seeks to establish scienter by relying on allegations that internal company documents contradicted public statements, the plaintiff must allege the contents of those documents. Otherwise, the allegations are insufficiently particularized, because they do not describe what the documents said. *See* 5A Charles Alan Wright, Arthur R. Miller & A. Benjamin Spencer ("Wright & Miller"), Federal Practice and Procedure: Civil § 1296 (4th ed. June 2024 update). Moreover, a court cannot reliably assess, based on such generalized allegations, whether the plaintiff's preferred inference to be drawn from such documents is "cogent" and "at least as compelling as any opposing inference," as required to give rise to a strong inference of scienter. *Tellabs*, 551 U.S. at 324.

Plaintiffs' scienter allegations flunk this test. Plaintiffs do not allege the contents of a single document that Huang allegedly reviewed describing what proportion of NVIDIA's GeForce revenue was driven by cryptocurrency mining during the class period. Yet Plaintiffs' whole theory revolves around the claim that Huang reviewed internal documents contradicting his public statements. Under these circumstances, the far more plausible inference is that—faced with imperfect information—Huang and NVIDIA tried to address increased demand from cryptocurrency miners by offering a new crypto-specific product and then increasing the overall supply of GeForce GPUs.

Although Plaintiffs have offered a smattering of other allegations in an effort to patch this critical hole in their complaint, nothing qualifies as a particularized allegation that Huang would have seen internal company documents contradicting his later public statements.

III. Plaintiffs likewise fail to allege falsity under the PSLRA. Because Plaintiffs allege falsity only on information and belief, they are required to allege particularized "facts" supporting their allegation. 15 U.S.C. § 78u-4(b)(1). An expert opinion does not qualify as an allegation of fact. *See Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 183 (2015). Accordingly, at the pleading stage, expert "opinions cannot substitute for facts under the PSLRA" "unless [the] opinion was based on particularized facts sufficient to state a claim for fraud." *Arkansas Pub. Emps. Ret. Sys.* v. *Bristol-Myers Squibb Co.*, 28 F.4th 343, 354 (2d Cir. 2022) (quotation marks omitted).

Plaintiffs' expert opinion is not based on particularized allegations of fact, but instead rests on generic market research and unexplained or unjustified assumptions. Nothing else in Plaintiffs' complaint supplies those missing allegations. By accepting the Plaintiffs' expert opinion, the Ninth Circuit created a roadmap for securities plaintiffs to bypass the PSLRA's heightened pleading requirements merely by hiring an expert. This Court should reverse.

ARGUMENT

The Ninth Circuit committed two separate errors in concluding that Plaintiffs satisfied the PSLRA's heightened pleading requirements.

First, the court concluded that Plaintiffs adequately alleged scienter by relying on internal NVIDIA documents, even though Plaintiffs failed to allege the contents of a single internal document, reviewed by Huang, contradicting his subsequent statements. That omission should have been fatal: Allegations that a CEO reviewed documents are not "particularized" if they do not allege what those documents said. Such allegations also cannot support a "strong inference" of scienter because they do not support a "cogent and compelling" inference that the defendant had the requisite state of mind. *Tellabs*, 551 U.S. at 323-324.

Second, the Ninth Circuit permitted Plaintiffs to rely on the opinion of a hired expert—not particularized allegations of fact—to satisfy the PSLRA's particularity requirement for pleading falsity.

Each error is independently sufficient to reverse the judgment below. And they are particularly dangerous in combination. If a plaintiff may simply hire an expert to create data that contradicts a company's public statements, and then assert that internal records

"would have" reflected the expert's data, the PSLRA's heightened pleading standards will be easy for any plaintiff to surmount merely by paying an expert.

I. THE PSLRA IMPOSES HEIGHTENED PLEADING REQUIREMENTS ON PRIVATE SECURITIES PLAINTIFFS.

Congress has recognized that private securities litigation creates a special "danger of vexatious litigation" that "is a social cost rather than a benefit." *Blue Chip Stamps*, 421 U.S. at 740-741. Even "groundless" lawsuits threaten "extensive discovery and disruption of normal business activities." *Id.* at 742-743. To "deter or at least quickly dispose of those suits whose nuisance value outweighs their merits," Congress "placed special burdens on plaintiffs seeking to bring federal securities fraud class actions." *Merrill Lynch*, 547 U.S. at 82.

Two of those burdens are relevant here. The first, which applies when the court evaluates both falsity and scienter, requires plaintiffs to plead facts alleged on information and belief with "particularity." 15 U.S.C. § 78u-4(b)(1). The second, which applies to scienter allegations, requires particularized factual allegations to "giv[e] rise to a *strong inference* that the defendant acted with the required state of mind." *Id.* § 78u-4(b)(2)(A) (emphasis added). A plaintiff must meet both requirements before they can unlock the "extensive discovery" that can occur in securities cases. *Blue Chip Stamps*, 421 U.S. at 742-743.

A. The PSLRA Incorporated And Expanded On The Common-Law Particularity Requirement.

The bedrock requirement to plead fraud with particularity goes back at least to the Founding. *See State* v. *Johnson*, 1 D. Chip. 129, 130 (Vt. 1797) (per curiam) ("Frauds are indictable, but the particular acts must be set forth * * * ."). Justice Joseph Story, summarizing early American and English common law, wrote that plaintiffs alleging fraud may not "make such charge in general terms," but must make them "pointed, and state particular acts of fraud." Joseph Story, *Commentaries on Equity Pleadings* § 251 (1838). English and American courts applied this particularity requirement for centuries, *e.g.*, *Stearns* v. *Page*, 48 U.S. (7 How.) 819, 829 (1849), and the obligation to plead fraud with particularity was "well-established" by the time it was codified in the Federal Rules of Civil Procedure in 1937. *Pardee & Curtin Lumber Co.* v. *Rose*, 105 S.E. 792, 796 (W. Va. 1921).

This particularity requirement has long served several purposes. Fraud claims are historically disfavored. Charles E. Clark, *Code Pleading* 311 (2d ed. 1947); 5A Wright & Miller, Federal Practice and Procedure: Civil § 1296. "Charges of fraud are easily made," and the "lapse of time necessarily obscures the truth and destroys the evidence of past transactions." *Stearns*, 48 U.S. (7 How.) at 829. The particularity requirement therefore protects "defendants from the reputational harm that results from frivolous allegations of fraudulent conduct." *Cozzarelli* v. *Inspire Pharms. Inc.*, 549 F.3d 618, 629 (4th Cir. 2008) (Wilkinson, J.). In the securities context, judges also recognized long before the PSLRA the dangers of

groundless claims that pled "fraud by hindsight" in an effort to reach discovery and thereby force *in terrorem* settlements. *Denny* v. *Barber*, 576 F.2d 465, 470 (2d Cir. 1978) (Friendly, J.).

Particularity requires detail. Thus, at common law, complaints had to "specify" with "distinct averments" "how, when, and in what manner" fraud "was perpetrated." *Stearns*, 48 U.S. (7 How.) at 829. Facts had to be alleged with "definiteness and reasonable certainty," resulting in charges that were "definite and reasonably certain, capable of proof and clearly proved." *Chamberlain Mach. Works* v. *United States*, 270 U.S. 347, 349 (1926); *see Stearns*, 48 U.S. (7 How.) at 829. A plaintiff's duty was to "distinctly allege facts that would enable the court—assuming such facts to be true"—to find fraud. *Fogg* v. *Blair*, 139 U.S. 118, 127 (1891); *see Upman* v. *Thomey*, 125 A. 860, 863 (Md. 1924); *Forbes* v. *Ft. Lauderdale Mercantile Co.*, 90 So. 821, 823 (Fla. 1922). This meant that a plaintiff's "inferences and conclusions" could not "be substituted for allegations of fact which if proved constitute fraud." *Thompson* v. *Beck*, 21 P.2d 712, 713 (Colo. 1933); *see Fogg*, 139 U.S. at 127 (a court may not "assume" the "essential, ultimate facts upon which" a fraud claim rests).

Rule 9(b), adopted in 1937, requires parties "alleging fraud" to "state with particularity the circumstances constituting fraud or mistake," while allowing malice, intent, and knowledge to be "alleged generally." Fed. R. Civ. P. 9(b). This requirement reflected the common-law rule courts had long applied. *See Stokeling* v. *United States*, 586 U.S. 73, 80 (2019) ("[I]f a word is obviously transplanted from another legal source, * * * it brings the old soil with it." (citation

omitted)). Indeed, the reporter to the 1937 Advisory Committee elsewhere remarked that the rule "states only what courts would do anyhow." Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 463-464 (1943).

Courts regularly applied Rule 9(b) in securities fraud cases before the PSLRA's enactment, requiring critical details be alleged specifically. *See, e.g.*, *New England Data Servs., Inc.* v. *Becher*, 829 F.2d 286, 288 (1st Cir. 1987) (Rule 9(b) is applied "strictly" in securities context and complaint must "set[] forth the facts on which the belief is founded"); *DiLeo* v. *Ernst & Young*, 901 F.2d 624, 627-629 (7th Cir. 1990) (Easterbrook, J.) (plaintiffs must point to "facts suggesting * * * fraud").

A widely-applied formulation for particularity emerged from one of these pre-PSLRA cases: As Judge Easterbrook explained, particularity means at a minimum stating the "who, what, when, where, and how." 5A Wright & Miller, Federal Practice and Procedure: Civil § 1297 (quoting *DiLeo*, 901 F.2d at 627); *see, e.g.*, *ABC Arbitrage Plaintiffs Grp.* v. *Tchuruk*, 291 F.3d 336, 350 (5th Cir. 2002); *Republic Bank & Tr. Co.* v. *Bear Stearns & Co.*, 683 F.3d 239, 255-256 (6th Cir. 2012); *In re Target Corp. Sec. Litig.*, 955 F.3d 738, 742 (8th Cir. 2020); *Weston Fam. P'ship LLLP* v. *Twitter, Inc.*, 29 F.4th 611, 619 (9th Cir. 2022); *Mizzaro* v. *Home Depot, Inc.*, 544 F.3d 1230, 1237 (11th Cir. 2008) (all employing this formulation of the particularity requirement). That formation also aligns with dictionary definitions and the ordinary meaning of "particularity." *See, e.g.*, *Particularity*, Black's Law Dictionary (6th ed. 1991) ("the detailed statement of particulars," meaning "[t]he details of a claim"); *Particularity*, American Heritage College Dictionary (3d

ed. 1993) ("[e]xactitude of detail, esp. in description"; "[a]ttention to or concern with detail; fastidiousness"); *Particularity*, Webster's II New Riverside University Dictionary (1994) (same).

Nevertheless, Rule 9(b) did "not prevent[] abuse of the securities laws by private litigants," and complaints regularly survived with "only faint hope that the discovery process might lead eventually to some plausible cause of action." H.R. Rep. No. 104-369, at 31, 41 (1995) ("Conference Report").

The PSLRA thus "impose[d] another layer of factual particularity to allegations of securities fraud." *California Pub. Emps.' Ret. Sys.* v. *Chubb Corp.*, 394 F.3d 126, 144 (3d Cir. 2004) (quotation marks omitted). It provided that plaintiffs must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, * * * state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1). The PSLRA thus made explicit that plaintiffs must "explain with particularity '*why* the statements were fraudulent.'" *Arkansas Pub. Emps. Ret. Sys.*, 28 F.4th at 353 (citation omitted). It also directed that *any* allegation "regarding" a misleading statement or omission made on information and belief must be pled with particularity. 15 U.S.C. § 78u-4(b)(1). And finally, while Rule 9 permitted scienter to be pled "generally," Fed. R. Civ. P. 9(b), the PSLRA required facts supporting the "required state of mind" to be pled "with particularity," too. 15 U.S.C. § 78u-4(b)(2)(A).

B. The PSLRA Requires A Strong Inference Of Scienter.

Congress imposed an especially high bar for scienter. Ordinarily, a plaintiff must merely allege sufficient factual matter "to state a claim to relief that is plausible on its face." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007). The PSLRA imposes a more demanding standard, requiring plaintiffs to plead a "strong inference" of scienter. 15 U.S.C. § 78u-4(b)(2)(A). That standard requires allegations that are "more than merely plausible or reasonable," *Tellabs*, 551 U.S. at 314, and is nearly unique in federal law.[2]

That language was chosen to "strengthen" "existing pleading requirements." Conference Report 41. Before the PSLRA, the Second Circuit had long applied this formulation in describing a private plaintiff's burden in securities cases. *See, e.g.*, *Ross* v. *A.H. Robins Co.*, 607 F.2d 545, 558 (1979). Although other circuits employed different formulations, Congress chose the Second Circuit's language because it was "the most stringent." *Tellabs*, 551 U.S. at 320; Conference Report 41. This Court has thus recognized that Congress "unequivocally raised the bar for pleading scienter." *Tellabs*, 551 U.S. at 321 (quotation marks and alteration omitted).

In *Tellabs*, this Court explained how courts should assess whether plaintiffs have met the strong inference standard. The Court described the "inquiry" as "inherently comparative": Rather than consider the

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[2] Congress adopted the same standard in one other context: a statute designed to curtail litigation over Y2K computer problems. *See* 15 U.S.C. §§ 6601(a)(3), 6607(d).

allegations in isolation, a "court must take into account plausible opposing inferences." *Id.* at 323. "A complaint will survive * * * only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Id.* at 324. Applying this standard, in combination with the particularity requirement, "omissions and ambiguities count against inferring scienter." *Id.* at 326.

C. These Pleading Standards Were Designed To Prevent Meritless Suits From Reaching Discovery.

Congress imposed these heightened pleading requirements to discourage strike suits and burdensome "fishing expeditions brought in the dim hope of discovering a fraud." *Pub. Emps.' Ret. Ass'n of Colo.*, 551 F.3d at 311. The legislative reports recounted representative testimony from a corporate executive explaining that "once [a] suit is filed, the plaintiff's law firm proceeds to search through all of the company's documents and take endless depositions for * * * any shred of evidence that the company knew a downturn was coming." Senate Report 14; Conference Report 37 (quotation marks omitted). These fishing expeditions subverted the fundamental purpose of the Exchange Act—increasing information available to investors—because "[f]ear that inaccurate projections will trigger the filing of securities class action lawsuit[s] ha[d] muzzled corporate management." Conference Report 43.

Congress's purpose is reflected in the PSLRA's automatic, mandatory stay on discovery. The Act specifies that where a defendant files a motion to dismiss under Rule 12, "all discovery and other proceedings shall be

stayed" automatically. 15 U.S.C. § 78u-4(b)(3)(B). Congress authorized a single exception for circumstances where the court finds that "particularized discovery is necessary to preserve evidence or to prevent undue prejudice," *id.*, "clearly" reflecting Congress's understanding that private securities complaints "should stand or fall based on the actual knowledge of the plaintiffs rather than information produced by the defendants after the action has been filed," *Medhekar* v. *U.S. Dist. Ct.*, 99 F.3d 325, 328 (9th Cir. 1996) (per curiam). Congress recognized that these heightened pleading requirements may "have the effect of preventing a plaintiff from getting discovery on a claim that might have gone to a jury, had discovery occurred." *Tellabs*, 551 U.S. at 327 n.9.

Because private securities litigation "is a judicial construct that Congress did not enact in the text of the relevant statutes," reading the PSLRA in light of these policy concerns is especially "appropriate." *Stoneridge*, 552 U.S. at 164, 166; *accord Blue Chip Stamps*, 421 U.S. at 737 ("It is therefore proper that we consider * * * what may be described as policy considerations when we come to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance."). In considering whether the Ninth Circuit properly applied the PSLRA's pleading requirements, this Court should accordingly consider Congress's "goals" in arriving at "a workable construction" of the statutory text. *Tellabs*, 551 U.S. at 322.

II. PLAINTIFFS FAILED TO ALLEGE WITH PARTICULARITY A STRONG INFERENCE OF SCIENTER.

As the court below recognized, the "most direct" way to allege scienter in a securities fraud case is to claim that company executives reviewed internal documents contradicting their public statements. Pet. App. 42a. For that reason, vigilant enforcement of the PSLRA's pleading requirements is particularly important in the context of such allegations.

A plaintiff who chooses to rely on this method of proving scienter cannot satisfy the PSLRA without alleging the contents of the internal documents in question. Otherwise, the allegations are not particularized because they lack an essential element of particularity: *what* the documents say. Put simply, allegations that a defendant reviewed certain documents cannot support an inference of scienter unless the contents of those documents contradicted the defendant's subsequent statements. Moreover, to evaluate scienter, the court must perform the comparative analysis required by *Tellabs* and analyze whether the inference of scienter plaintiffs attempt to draw is at least as compelling as any innocent inference—a task that is impractical (if not impossible) where the complaint does not allege relevant facts about what the documents actually said.

These principles are fatal to Plaintiffs' complaint. Plaintiffs did not allege the contents of any relevant documents that Huang reviewed before making the challenged statements, and it is therefore no surprise that the Ninth Circuit never engaged in *Tellabs*' comparative assessment. Instead, the Ninth Circuit purported to divine what NVIDIA's documents "would

have" shown based largely on an expert opinion prepared for litigation. Pet. App. 42a, 55a.

A. The PSLRA Does Not Permit Plaintiffs To Rely On Allegations About Internal Company Documents Without Alleging The Relevant Contents Of Those Documents.

Allegations that an executive knew about internal documents contradicting the company's public statements trigger the PSLRA's "[e]xacting pleading requirements" for scienter. *Tellabs*, 551 U.S. at 313. The "facts" relevant to scienter must be alleged "with particularity," and they must also give "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 heart of the particularity requirement is the who, when, where, how, and—most pivotally for this case—*what* a party alleges. 5A Wright & Miller, Federal Practice and Procedure: Civil § 1297; *supra* p. 25. Where plaintiffs fail to allege what a document actually said—and thus how it supports the inference plaintiffs ask the court to draw—they have failed to satisfy the particularity requirement. Indeed, in their brief opposing certiorari, Plaintiffs *agreed* with this legal conclusion. BIO 18-19 ("The circuit courts uniformly hold that 'generalized assertions' about what internal data showed are insufficiently particularized to support an inference of scienter.").

Plaintiffs' concession accords with the statutory text and common sense. As *Tellabs* explains, "omissions and ambiguities count against inferring scienter." 551 U.S. at 326. Where a plaintiff omits the most critical aspect of an allegation about a company's internal documents—the contents of those documents that support the plaintiff's claim—the allegation cannot be

characterized as "particularized." *See Anderson* v. *Spirit Aerosystems Holdings, Inc.*, 827 F.3d 1229, 1241 (10th Cir. 2016) ("To create an inference of scienter based on [internal] cost reports, the plaintiffs must adequately describe the content of the reports * * * ."). Just as it would not satisfy the particularity requirement to allege that the defendant made a "statement" to the media without alleging what the defendant said, it is not sufficient to allege that internal documents existed without describing what those documents contained.

Allegations about the contents of internal documents are critically important to the comparative analysis required by *Tellabs*. If the plaintiff has not alleged what a document said, a court cannot meaningfully assess whether the plaintiff's preferred inference—that the document supports an inference that the speaker acted with an intent to deceive—is "at least as compelling as" the "opposing inference." *Tellabs*, 884 U.S. at 324. Indeed, when a plaintiff fails to plead the contents of internal company documents, a court may not even be able to pinpoint what inference the plaintiff is asking the court to draw.

The Ninth Circuit's lax interpretation renders the PSLRA toothless. Because "every sophisticated corporation uses some kind of internal reporting system," "allowing a plaintiff to go forward with a case based on general allegations" about such reports "would expose all those companies to securities litigation whenever their stock prices dropped." *In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1087-88 (9th Cir. 2002) (quotation marks omitted); *see also Meitav Dash Provident Funds* v. *Spirit Aerosystems*, 79 F.4th 1209, 1217 (10th Cir. 2023). This Court should reject the panel's

misunderstanding of the PSLRA—as the majority of lower courts have done, *see* Pet. 16-20—and hold that plaintiffs cannot satisfy the Act's strong inference requirement by relying on allegations about internal documents that lack particularized detail regarding what those documents actually said.

B. Plaintiffs' Complaint Fails Because It Relies On Inadequate Allegations Regarding Internal NVIDIA Documents.

Plaintiffs' scienter argument hinges entirely on their allegations about internal NVIDIA documents and data. Plaintiffs contend that Huang "had detailed sale reports prepared for him," but they did not allege what any such report actually said. Pet. App. 42a. Plaintiffs also allege that Huang had "access to [other] detailed data," *id.*, but they did not allege "with particularity the contents of *any* internal report or data source that would have put [Huang] on notice that [his] public statements were false or misleading when made," Pet. App. 59a (Sanchez, J., dissenting).

Plaintiffs' complaint thus lacks the particularized allegations of scienter necessary to survive a motion to dismiss. Without alleging the contents of internal company documents that Huang actually reviewed before speaking—and that support Plaintiffs' scienter allegations—Plaintiffs cannot show that the inference of scienter is "cogent," much less "at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs*, 551 U.S. at 314.

"The far more plausible inference," as Judge Sanchez recognized, "is what NVIDIA executives disclosed to investors throughout the class period": that "NVIDIA designed and introduced the Crypto SKU to address cryptocurrency-mining demand while seeking

to protect supplies of GeForce GPUs for its gaming end users." Pet. App. 87a-88a (Sanchez, J., dissenting). "Separating these product lines gave investors and the company greater visibility into cryptocurrency-related revenues, not less." *Id.* (Sanchez, J., dissenting). Thus, when the price of a certain cryptocurrency "surged in late 2017, Defendants acknowledged that mining demand continued to drive sales in both GeForce GPUs and Crypto SKUs, though it was difficult for the company to quantify the impact on GeForce GPU sales." *Id.* (Sanchez, J., dissenting). This "[s]urging demand also raised the price and limited the availability of GeForce GPUs for downstream gamers, and NVIDIA responded by increasing the supply of GeForce GPUs." *Id.* (Sanchez, J., dissenting).

The inference that NVIDIA acted in good faith while navigating uncertain waters is "far more plausible" than the inference "that Defendants took elaborate steps to disguise the extent to which NVIDIA's Gaming segment revenues were dependent on cryptocurrency-mining demand, knowing that a crash was 'inevitable.'" *Id*. at 88a (Sanchez, J., dissenting). That NVIDIA might have miscalculated the combined effects of cryptocurrency demand, the amount of pent-up demand from gamers for current-generation GPUs, and the pricing strategies of downstream GPU sellers "does not create a claim for securities fraud." *Id.* (Sanchez, J., dissenting).

Plaintiffs' competing inference—that Huang must have known from internal company records that more GeForce GPUs were being sold downstream to miners than NVIDIA reported, and then lied about it—is paper-thin by comparison. The fact that NVIDIA kept

records, and Huang as CEO would have been familiar with them, *see* Pet. App. 42a, is not enough. That's true for every public company. *See Meitav*, 79 F.4th at 1217. What is missing are particularized allegations that those documents in fact showed that GeForce sales to cryptocurrency miners were significantly higher than Huang's public comments suggested, and that Huang intentionally lied about it.

As Judge Sanchez put it, Plaintiffs' preferred inference "does not make a whole lot of sense." Pet. App. 87a (Sanchez, J., dissenting) (quotation marks omitted). Huang had no clear motive to act as Plaintiffs have alleged. Plaintiffs assert that NVIDIA tried to hide the demand for its products for cryptocurrency mining because it knew a cryptocurrency crash was "inevitable," J.A. 5 (¶ 6), having witnessed one of its competitor's experiences when Bitcoin prices tanked just a few years earlier, J.A. 30-31 (¶¶ 57-58). But if, as Plaintiffs insist, Huang knew that demand for NVIDIA's products would drop when cryptocurrency prices crashed, then *why* would Huang have continued to "work as hard as we can to get supply out into the marketplace," J.A. 395-396, even as cryptocurrency prices were dropping? *See* Pet. App. 64a, 66a. Plaintiffs offer no answer. Their preferred inference is simply not "cogent," and it is certainly not as "compelling" as the innocent inference of an honest miscalculation of how markets would react to a complex situation. *Tellabs*, 551 U.S. at 324. As both the District Court and Judge Sanchez correctly concluded, Plaintiffs have not overcome the PSLRA's high bar for pleading scienter, and their complaint was appropriately dismissed.

C. Nothing In The Majority Opinion Or The Complaint Rescues Plaintiffs' Scienter Allegations.

The Ninth Circuit described anonymized accounts from former NVIDIA employees to establish the *kinds* of records that NVIDIA allegedly keeps and then asserted those records "would have shown" numbers consistent with Prysm's after-the-fact opinion. *See* Pet. App. 17a-25a, 42a, 55a. But estimates manufactured after the fact by third parties—who did not have access to NVIDIA's actual records—cannot support a "strong inference" about what NVIDIA's contemporaneous records actually reflected. Without those critical allegations, the Ninth Circuit did not even attempt to engage in *Tellabs*' comparison of the parties' competing inferences—even though this Court has described the required analysis as "inherently comparative." 551 U.S. at 323.

In opposing certiorari, Plaintiffs tried to substantiate the Ninth Circuit's scienter analysis by referencing various other alleged internal documents and communications at NVIDIA. None of those allegations included particularized facts showing that Huang made any of the challenged statements after reviewing internal data that contradicted his public statements.

For example, Plaintiffs allege that Huang attended quarterly meetings and reviewed weekly "Top 5" emails that allegedly discussed sales figures. *See* BIO 12, 21; J.A. 45-49 (¶¶ 87-88, 92-93, 96). However, Plaintiffs do not allege the contents of *any* of these emails or conversations during the class period, other than to discuss in the most general terms the subjects that they covered. J.A. 20-21, 45-49 (¶¶ 34, 87-88, 92-

93, 96); *accord* Pet. App. 84a-85a (Sanchez, J., dissenting). Moreover, Plaintiffs do not allege that the former employees cited in the complaint actually attended such meetings with Huang during the class period or had personal knowledge of any Top 5 emails Huang actually reviewed before making any challenged statement. J.A. 20-21, 45-49 (¶¶ 34, 87-88, 92-93, 96); *accord* Pet. App. 84a-85a (Sanchez, J., dissenting).

Plaintiffs also allege that Huang as CEO had "access to" data from NVIDIA's GeForce Experience software, which allegedly showed how GeForce GPUs were used. J.A. 51-53 (¶¶ 99-104); BIO 13. Again, the complaint does not describe what data from that software actually showed at any point during the class period. J.A. 51-53 (¶¶ 99-104). Plaintiffs also do not explain how data that monitors *usage* could shed light on GPU *sales*—knowing how a GPU is being used tells you nothing about when that GPU was sold, what the purchaser's intended use was, or when NVIDIA recognized any related revenue.

In any event, Plaintiffs allege that Huang had "access" to such data, without alleging that he in fact reviewed it. *Accord* Pet. App. 86a (Sanchez, J., dissenting). But "[i]f access alone were enough, a strong inference of scienter would exist for high-level executives *whenever* they make a public statement contradicting something in the company's files." *Meitav*, 79 F.4th at 1217 (emphasis added).

Likewise, Plaintiffs allege that Huang had "access to" a purported "centralized sales database." J.A. 41-45 (¶¶ 79-81, 83-86); BIO 13. This allegation is based on statements from an individual in China several layers removed from Huang who reported that

"throughout 2017" sales data reflected that "60% to 70% of NVIDIA's GeForce revenue [for the China market] came from sales to crypto-miners." J.A. 44-45 (¶ 86) (emphasis omitted). Plaintiffs do not adequately allege what "throughout 2017" refers to—a constant, an average, or something else entirely? Moreover, this figure elides the pronounced trend in the China team's presentation showing that cryptocurrency miners in China appeared to be quickly shifting to the Crypto SKU after it launched in spring 2017—just as NVIDIA intended. *See* Pet. App. 61a-62a (Sanchez, J., dissenting). With respect to Huang's "access" to this data, Plaintiffs fail to allege when, if ever, this figure actually appeared in the database or that Huang reviewed it before making any challenged statement. *Accord* Pet. App. 83a (Sanchez, J., dissenting).[3]

Plaintiffs also cite Huang's supposed awareness of anecdotal reports of in-person miner purchases before the class period began and before the Crypto SKU launched. *See* BIO 12; J.A. 66-67 (¶¶ 129-130). Needless to say, these do not contribute to an inference about Huang's knowledge of what cryptocurrency miners were purchasing during the class period, after NVIDIA introduced the Crypto SKU *precisely because* NVIDIA was concerned about preserving the supply of GeForce GPUs for its core gaming market.

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[3] Plaintiffs allege that Huang can be seen looking at the centralized sales database in a company training video produced years before the class period. J.A. 43-44 (¶ 85). That is too thin a reed on which to rest the inference that Huang in fact accessed the relevant sales data before he made any of the challenged statements.

Finally, Plaintiffs point to "a September 2017 study, commissioned by NVIDIA Executive Vice President Jeff Fisher" allegedly showing "that NVIDIA had captured 70% of the [mining-related] market in China." BIO 13; J.A. 59-65 (¶¶ 119-126). But Plaintiffs do not allege that Huang reviewed this document or even knew of its existence. Pet. App. 63a (Sanchez, J., dissenting). Whatever that study might have said, it cannot support a "strong inference" that Huang acted with scienter. Moreover, as Judge Sanchez explains, the presentation's limited data *supports* the proposition that cryptocurrency miners quickly shifted the majority of their demand to NVIDIA's new Crypto SKU. *See* Pet. App. 61a-63a. According to the study, within *three months* of launch, the Crypto SKU had already captured "73% of estimated mining demand in China." Pet. App. 62a (Sanchez, J., dissenting).[4]

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[4] Plaintiffs' brief in opposition also suggested that an SEC consent order supported their allegations. In fact, the opposite is true. With access to NVIDIA's internal documents and testimony from NVIDIA's executives, the SEC did not file a complaint, and instead entered into a settlement in which NVIDIA admitted no wrongdoing. *See In re NVIDIA Corp.*, Securities Act of 1933 Release No. 11060, 2022 WL 1442621 (May 6, 2022). The order was released prior to oral argument in the Ninth Circuit, but Plaintiffs did not bring it to the Ninth Circuit's attention or claim that it supported their position, and their belated invocation of the order is mistaken. The order did not involve a claim under Section 10(b) or Rule 10b-5; did not find that NVIDIA or any of its executives committed fraud or acted with scienter; relates to just two of NVIDIA's quarterly reports filed in August and November 2017; and does not mention Huang at all. *See id.* at *5. The order also recognized that NVIDIA "identif[ied] cryptomining as a significant factor in year-over-year growth in Gaming revenue" in its Form 10-K "filed on February 28, 2018," in the middle of the class period. *Id.* at *4.

As this Court has held, a plaintiff's allegations should be considered "holistically." *Tellabs*, 551 U.S. at 326. Thus, Petitioners do not argue for a "bright-line rule" that securities plaintiffs must *always* allege the contents of internal company documents to plead scienter. *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 49 (2011). Plaintiffs may seek to allege scienter in numerous other ways, such as by citing suspicious public trading activity, *see, e.g.*, *Stevelman* v. *Alias Rsch. Inc.*, 174 F.3d 79, 85-86 (2d Cir. 1999), or suspicious executive departures from the company, *see, e.g.*, *Zucco Partners, LLC* v. *Digimarc Corp*., 552 F.3d 981, 1002 (9th Cir. 2009). A plaintiff may also obtain particularized information from other sources, such as a company's business partners. *See, e.g.*, *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 70-71, 73 (2d Cir. 2001) (discussing "figures from [the defendant's] retailers").

Here, however, Plaintiffs built their entire scienter case around NVIDIA's internal documents and data. By choosing this route, Plaintiffs were required by the PSLRA's pleading standards to allege with particularity what those documents and sources said and how they supported Plaintiffs' preferred inference of scienter. The allegations in this case—considered both individually and holistically—do not satisfy that requirement. Instead, the far more compelling inference is that NVIDIA tried to solve as best it could, with the limited data available, for the problem of demand for NVIDIA's products from both cryptocurrency miners and gamers, and it miscalculated. Because Plaintiffs' preferred inference of scienter is far less "cogent and compelling," *Tellabs*, 551 U.S. at 324, this Court should reverse the Ninth Circuit's judgment.

III. PLAINTIFFS FAILED TO ALLEGE FALSITY WITH PARTICULARIZED ALLEGATIONS OF FACT.

The District Court declined to rule on falsity because it found Plaintiffs did not adequately allege scienter. Pet. App. 122a & n.6. This Court can take that same path, or it may also consider the PSLRA's mutually reinforcing requirement to plead falsity with particularity. Should the Court reach falsity, the answer is equally clear: The PSLRA's mandate that plaintiffs plead particularized facts to show falsity cannot be circumvented by hiring an expert, *post hoc*, to make up "facts" based on questionable assumptions and generic market research. 15 U.S.C. § 78u-4(b)(1); *see* Grundfest Br. 13.

In this case, the only effort by Plaintiffs to quantify NVIDIA's quarterly revenue from GeForce GPU sales to cryptocurrency miners is Prysm's speculation. Prysm's opinion does not itself rest on particularized allegations of fact, but instead on generic market research and an increasingly implausible series of assumptions. Because nothing else in Plaintiffs' complaint fills the gap, Plaintiffs fail to meet the PSLRA's requirements for alleging falsity.

A. Expert Opinion Cannot Substitute For Particularized Allegations Of Fact.

Rule 9(b) and the PSLRA require plaintiffs to plead with particularity "the reason or reasons why [a] statement is misleading." 15 U.S.C. § 78u-4(b)(1); *see also* Fed. R. Civ. P. 9(b) (plaintiffs must plead the "circumstances constituting fraud" "with particularity"). The PSLRA further specifies that if those reasons rest on the plaintiffs' information and belief (rather than their personal knowledge), they must "state with

particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1). This "'all facts' requirement" "determine[s] the legal sufficiency of the complaint under Rule 12(b)(6)." *Teachers' Ret. Sys. of La.* v. *Hunter*, 477 F.3d 162, 173 (4th Cir. 2007).

A court's job when analyzing the sufficiency of a securities fraud complaint that relies on an expert opinion to establish falsity is therefore straightforward. The court must strip the complaint of the expert's *opinions*, and taking all remaining allegations of fact and reasonable inferences drawn from those facts, determine whether the claim pleads "with particularity" sufficient "facts" to state a plausible claim. *Arkansas Pub. Emps. Ret. Sys.*, 28 F.4th at 354; *Fin. Acquisition Partners LP* v. *Blackwell*, 440 F.3d 278, 286 (5th Cir. 2006).

An expert's opinion—that is, the expert's ultimate conclusion—is not an allegation of fact. A fact is "[s]omething that has really occurred or is actually the case * * * as opposed to what is merely inferred, or to a conjecture or fiction." *Fact*, Oxford English Dictionary (2d ed. 1989). An opinion, by contrast, is a "judgement resting on grounds insufficient for complete demonstration" or a "belief of something as probable * * * though not certain or established." *Opinion*, Oxford English Dictionary (2d ed. 1989). Thus, "a statement of fact ('the coffee is hot') expresses certainty about a thing, whereas a statement of opinion ('I think the coffee is hot') does not." *Omnicare*, 575 U.S. at 183. The distinction between fact and opinion is commonplace in federal procedure. *See, e.g.*, Fed. R. Evid. 701 (imposing limitations on lay witness opinion testimony); Fed. R. Evid. 705 (allowing experts to state opinions before underlying facts and

data); Fed. R. Civ. P. 26(a)(2)(B) (requiring expert reports to list both opinions and underlying facts or data).

A hired expert's opinions—divorced from the factual allegations that they are based upon—are not enough to state a claim for securities fraud. The PSLRA requires particularized "facts," not opinions. 15 U.S.C. § 78u-4(b)(1). "The problem of junk science in the courtroom is real and well documented," *Diaz* v. *United States*, 144 S. Ct. 1727, 1743 (2024) (Gorsuch, J., dissenting), and "[e]xpert evidence can be both powerful and quite misleading," *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993) (quotation marks omitted). Our judicial system deals with the problem of dubious expert opinion through a rigorous gatekeeping requirement imposed on federal judges to ensure expert testimony is reliable and relevant. *Id.* at 589; *see also Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 141 (1999). This gatekeeping function allows courts to distinguish between "admissible opinion and inadmissible speculation." *Tamraz* v. *Lincoln Elec. Co.*, 620 F.3d 665, 667 (6th Cir. 2010) (Sutton, J.).

The use of expert opinion at the pleading stage circumvents the guardrails that courts impose on parties seeking to rely on experts. "[A]llowing plaintiffs to rely on an expert's opinion in order to state securities claims requires a court to confront a myriad of complex evidentiary issues not generally capable of resolution at the pleading stage." *Blackwell*, 440 F.3d at 285-286 (quotation marks omitted). Given the one-sided nature of pleading practice, courts do not have the benefit of a competing expert at the pleading stage to assess the reliability of the expert's methods under

a *Daubert*-style analysis. And pleading-stage experts are very differently situated from expert witnesses at summary judgment or trial as they do not have access to the fact discovery that ultimately forms the basis of a reliable expert opinion later in litigation. *Cf.* Fed. R. Evid. 702(b) (noting expert opinion must be "based on sufficient facts or data").

The dangers of allowing opinion to substitute for fact are particularly acute in private securities cases, where Congress requires particularized allegations of fact *before* a plaintiff is allowed to conduct discovery, and *before* expert testimony is typically introduced to analyze the documents and testimony produced in discovery. *See* 15 U.S.C. § 78u-4(b)(3)(B). Allowing expert opinion to satisfy the demand of particularized facts—and thus allow a case to go into discovery—would defeat the very concerns the PSLRA sought to redress.

B. Prysm's Opinion Does Not Provide Sufficient Particularized Allegations Of Fact.

An opinion satisfies the PSLRA only if it "was based on particularized facts sufficient to state a claim for fraud." *Arkansas Pub. Emps. Ret. Sys.*, 28 F.4th at 354. The Prysm opinion was not. To paraphrase this Court's opinion in *Omnicare*, Plaintiffs allege at most that Prysm "*thinks* the coffee is hot." 575 U.S. at 183. In other words, Prysm *believes* that a larger percentage of NVIDIA's GeForce revenue was driven by cryptocurrency mining than NVIDIA publicly disclosed. But that opinion is not an allegation of "fact" because Prysm has no access to NVIDIA's internal records or any other reliable basis to opine about NVIDIA's sales attributable to cryptocurrency miners. Pet. App. 70a (Sanchez, J., dissenting).

Instead, Prysm constructed a complex series of inferences "that relied on generic market research and unreliable or undisclosed assumptions to reach its revenue estimates." Pet. App. 58 (Sanchez, J., dissenting). This chain of inferences is not a particularized fact that can serve as the basis of a securities fraud claim. Even before the PSLRA, particularity has long been understood to mean that unsubstantiated "inferences and conclusions of the petitioners cannot be substituted for allegations of fact which if proved constitute fraud." *Thompson*, 21 P.2d at 713. Considering just a few of the defects in Prysm's opinion underscores the general problem when plaintiffs try to use an expert opinion to surmount the PSLRA's requirements.

First, Prysm assumes that 100% of the processing power added each quarter comes from newly sold GPUs, but that's just an assumption. Plaintiffs do not cite any particularized allegations of fact to support it—nor could they. *Cf. Ashcroft* v. *Iqbal*, 556 U.S. 662, 679 (2009) ("Determining whether a complaint states a plausible claim for relief will * * * require[] the reviewing court to draw on its judicial experience and common sense."). Processing power can be created in many ways, including when a user purchases an older GPU, repurposes an existing GPU, or mines cryptocurrency with another technology. In fact, NVIDIA executives publicly discussed that the same GPU could be used for multiple purposes. Pet. App. 64a, 66a (Sanchez, J., dissenting). Prysm's assumption that *all* new processing power comes from newly sold GPUs is a hypothesis that forms part of its opinion; it is not a particularized allegation of fact.

Second, Prysm assumes that any increased processing power in a quarter results from GPU sales during that same quarter. Again, that is just an assumption Prysm relies on to reach a back-of-the-envelope calculation, and the assumption is implausible. Plaintiffs do not cite any particularized allegations of fact to support it—nor could they. Given the complexity of the sales channel, it takes weeks or months for NVIDIA's GPUs to reach end users after distribution by resellers. *See* J.A. 24 (¶ 42) (describing complex sales channel).

Third, Prysm concludes that NVIDIA's market share in the cryptocurrency mining market is 69%, based largely on estimates it borrowed from other third parties without explaining their methodology at all. J.A. 78-81 (¶ 152).[5] Prysm then assumes that this purported market share would remain consistent across the entire class period (despite the fact that one of the estimates only analyzed two quarters in 2017) and applied equally to each of the three blockchain networks Prysm included in its analysis. *Id.*; *see* Pet.

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[5] Plaintiffs also cited a presentation prepared around September 2017 by a team in China that they allege showed a "more than 70% [share] of mining-driven GPU sales in China." J.A. 81 (¶ 152). Here, Plaintiffs refer to a footer on one slide of the presentation, which related to a period (April through July 2017) that, in part, preceded the introduction of the Crypto SKU—so even if it were correct, it is distorted. J.A. 61-62 (¶ 121). The figure also covered less than three months of the class period, and Plaintiffs did not "describe what sources of information or analyses the study relied upon." Pet. App. 63a (Sanchez, J., dissenting). Nor did Plaintiffs allege that China was representative of NVIDIA's mining share globally. Quite the opposite: Plaintiffs previously alleged that mining activity was "heavily concentrated" in China, Pet. App. 147a, and that mining systems purchased in China were "also shipped to overseas," J.A. 62 (¶ 123).

App. 70a-72a (Sanchez, J., dissenting). Plaintiffs cite no particularized facts to support those assumptions, yet again demonstrating that Prysm's report is simply opinion, not particularized fact.

In short, Prysm's "opinion contains not just one speculation but a string of them: A suggests by analogy the possibility of B, which might also apply to C, which, if we speculate about D, could eventually trigger E, so perhaps that happened here." *Tamraz*, 620 F.3d at 672 (Sutton, J.). A string of speculation that results in an expert opinion is not particularized fact sufficient to overcome a motion to dismiss. As Judge Sutton put it, "[a]t some point, the train becomes too long to pull and the couplings too weak to hold the cars together." *Id.*

When deciding to credit Prysm's opinion, the Ninth Circuit relied heavily on the fact that Prysm's staff were credentialed and explained their methodology at least in broad strokes. Pet. App. 20a-23a. But the fact that an expert holds a particular degree or explains their reasoning does not transform the expert's opinion into particularized fact. *Cf. Graves* v. *Mazda Motor Corp.*, 405 F. App'x 296, 299 (10th Cir. 2010) (Gorsuch, J.) (it is "axiomatic that an expert, no matter how good his credentials[,] is not permitted to speculate") (quotation marks omitted).

Because Prysm's opinion is not a particularized factual allegation, it cannot establish falsity. Even if the Court considers Prysm's allegations, however, it cannot accept those assertions as true without subjecting them to the plausibility standard that governs all pleading stage inferences. *See Twombly*, 550 U.S. at 570. An expert opinion cannot be deemed sufficiently plausible to survive a motion to dismiss—particularly

in the private securities context—merely because it spells out (some of) its reasons. That is the beginning, not the end, of the analysis that a court must perform before crediting an opinion as plausible. And, for all the reasons outlined above, Prysm's unjustified assumptions and inferences render its opinion entirely implausible. *Supra* pp. 45-47.

None of this is to say that expert opinions are categorically forbidden at the pleading stage. Expert opinions may help provide context when they are based on "particularized facts sufficient to state a claim for fraud." *Arkansas Pub. Emps. Ret. Sys.*, 28 F.4th at 354. For example, an expert may explain complex accounting terminology or how a particular product is made. But Plaintiffs may not evade the PSLRA's "[e]xacting pleading requirements" by laundering implausible assumptions and speculation through a paid expert. *Tellabs*, 551 U.S. at 313. Otherwise, well-heeled plaintiffs armed with hired-gun experts will be able to buy their way around the PSLRA's barriers and engage in exactly the kind of speculative fishing expedition that the PSLRA was specifically crafted to avoid. *See supra* pp. 28-29.

C. None Of Plaintiffs' Other Falsity Allegations Satisfy The Particularity Requirement.

The Ninth Circuit relied "almost entirely on an expert report" to prove falsity. Pet. App. 67a-68a (Sanchez, J., dissenting); *see* Pet. App. 17a-23a, 26a-27a (holding each challenged statement false or misleading because it "failed to say" precisely what Prysm estimated). Prysm's opinion provides the *only* quarterly analysis of NVIDIA's GeForce GPU revenue allegedly attributable to cryptocurrency mining in the

complaint. Although the Ninth Circuit invoked other allegations to buttress its conclusion, none comes close to the particularity required by the PSLRA.

The majority cited statements from three former NVIDIA employees, Pet. App. 23a-24a, but none of those employees alleged that they knew the percentage of NVIDIA's worldwide revenue generated from GeForce GPU sales to miners. One employee, FE-2, stopped working at NVIDIA at the very beginning of the class period, and could only allege that *before* the Crypto SKU launched, GeForce GPUs "were the clear favorite among crypto-miners." J.A. 66 (¶¶ 128-129). But that does not support Plaintiffs' theory of the case—on the contrary, "it is the reason NVIDIA executives publicly expressed for launching the Crypto SKU in the first place." Pet. App. 76a (Sanchez, J., dissenting).

The two remaining employees offered country-specific allegations, but neither provides particularized allegations about NVIDIA's worldwide GeForce revenue during the class period. FE-4—a "Community Manager" in Russia whose job involved social media—mentions anecdotal estimations about demand for GeForce GPUs in Russia, but does not even provide an overall proportion of sales for Russia for the entire class period, much less figures indicative of worldwide sales. J.A. 67 (¶ 131). These allegations lack any indicia of reliability or context that would make them useful to Plaintiffs' falsity case. *See* Pet. App. 111a, 152a; *accord Anderson*, 827 F.3d at 1241-43 (no particularity where known data was only a small subset of overall data); *Meitav*, 79 F.4th at 1220 (same).

FE-1 alleged that there were large bulk purchases by miners in China "beginning in 2016 and continuing

through 2017." Pet. App. 24a (quoting J.A. 65 (¶ 127)). Plaintiffs further alleged China was NVIDIA's largest market, providing 40-50% of the worldwide revenue for GeForce GPU sales. J.A. 41 (¶ 79 & n.5). But FE-1 conspicuously fails to mention whether FE-1 saw these results *during* the portions of 2017 within the class period. Instead, the complaint "seems to have carefully avoided making any allegation" as to the specific time period, "and to have supposed that the court, in the absence of averment or proof to the contrary, would assume that it was" within it. *Fogg*, 139 U.S. at 127. That is not how particularity works. *See Tellabs*, 551 U.S. at 326 (noting that "ambiguities count against" a party where particularity is required). Even if the purchases were made during the class period, FE-1 does not explain what proportion of GeForce GPU sales in China (let alone globally) were attributable to these bulk sales. Further, FE-1 left NVIDIA in December 2017, meaning he had no personal knowledge for approximately 60% of the class period. J.A. 20 (¶ 33); *see Novak* v. *Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000) (a complaint must allege facts "with sufficient particularity to support the probability that a [confidential witness] would possess the information alleged").

The majority also looked to a report from RBC Capital Markets—another after-the-fact third party opinion—for corroboration. Pet. App. 18a-19a. The RBC report opined that NVIDIA had "understated crypto-related revenue by $1.35 billion" from February 2017 to July 2018. J.A. 14 (¶ 20). RBC's opinion is even less helpful to Plaintiffs than Prysm's. Plaintiffs fail to describe in any meaningful detail the methodology RBC used or how it reached its estimates. Pet. App. 72a-73a (Sanchez, J., dissenting). If particularity

means anything, such conclusory allegations are insufficient. *See Chamberlain Mach. Works*, 270 U.S. at 349; 2 *Moore's Federal Practice* § 9.03 (2024); *Twombly*, 550 U.S. at 557.

Finally, the majority believed that "the essential correctness of Prysm's analysis is confirmed by events in the market"—in other words, that NVIDIA's public statements must have been false because GeForce GPU revenue declined around the time cryptocurrency demand also declined. Pet. App. 24a-25a. But that reasoning is circular: The fact that there was a temporary oversupply of GeForce GPUs does not establish that NVIDIA's public statements were false when they were made, nor does it illuminate the *cause* of the oversupply. Here, the plausible inference is that NVIDIA simply miscalculated the demand for its products. *See supra* pp. 33-35. The particularity requirement is designed to ward away this kind of "fraud by hindsight" rationale. *Denny*, 576 F.2d at 470 (Friendly, J.).

In sum, Plaintiffs lacked a factual basis to claim that NVIDIA's statements were false, so they hired an expert to manufacture the facts they needed. That is precisely the kind of fishing expedition that the PSLRA was supposed to stop. Affirming the decision below would create an easy roadmap for any future plaintiffs to implement, threatening to take the nation back to the pre-PSLRA era when "nuisance filings" were "rampant." *Merrill Lynch*, 547 U.S. at 81. This Court should reject Plaintiffs' effort to substitute implausible opinion for particularized allegations of fact and reverse.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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