No. 23-970

IN THE
Supreme Court of the United States

NVIDIA CORPORATION, ET AL.,
Petitioners,
v.
E. OHMAN J:OR FONDER AB, ET AL.,
Respondents.

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

BRIEF OF THE DIGITAL CHAMBER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Digital Chamber ("TDC") is the longest-established trade association that promotes the digital asset and blockchain industry, representing more than 200 global members innovating in this field.[2] TDC's leadership team and Board of Advisors include policy and legal experts, industry pioneers, and former regulators, including a former Commissioner of the U.S. Securities and Exchange Commission ("SEC").

TDC has an interest in this matter because its members face grave risks from the potential proliferation of frivolous securities lawsuits based on nothing more than unfounded perceptions about the cryptocurrency industry and its high-growth business cycle. This industry is the next major wave of technological innovation, akin to the 1990s internet technology boom. Congress passed the Private Securities Litigation Reform Act of 1995 ("PSLRA") precisely to protect such critical, emerging technologies. This *amicus* brief provides the Court with essential context about this history of the PSLRA and explains how proper application of the PSLRA's strict pleading standards should protect the entire cryptocurrency industry. TDC has an interest in ensuring that the PSLRA, like other laws, is applied fairly to the cryptocurrency industry. And TDC supports that interest by filing *amicus* briefs in important cases throughout the country. *See, e.g.*, *Amicus Curiae* Br. of TDC in Supp. of Pls.'

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The digital asset and blockchain industry includes a wide range of participants and asset types and, for simplicity, is referred to as the "cryptocurrency" industry herein.

Mot. Summ. J., *LEJILEX v. SEC*, No. 4:24-cv-00168-O (N.D. Tex. July 12, 2024), ECF No. 59.

SUMMARY OF ARGUMENT

In enacting the PSLRA's strict scienter and falsity pleading requirements, Congress sought to protect emerging technology companies from their particular vulnerability to abusive securities litigation. That purpose is echoed throughout the legislative history. And though Congress was speaking at the time about early internet companies, its words apply with equal force to the high-growth technology companies of today—especially the cryptocurrency industry. The decision below, however, threatens to override the protections imposed by Congress and to undermine technological innovation and growth—and all the economic benefits they bring.

This case shows how allowing speculative expert opinion to substitute for particularized factual allegations of securities fraud creates the very problems Congress tried to solve with the PSRLA. Plaintiffs' expert opinion relied on unsupported assumptions and inferences about the cryptocurrency industry to concoct a theory of liability divorced from the actual facts and circumstances of NVIDIA Corporation's ("NVIDIA") business. The Ninth Circuit in turn ceded its gatekeeping function under the PSLRA, embracing, for example, the expert's supposition about "the notoriously volatile demand for cryptocurrency." Pet. App. 3a. Absent reversal, there is nothing to stop other plaintiffs from hiring other experts to do the same thing. The impact will be felt the greatest by the most cutting-edge companies, like many in the cryptocurrency industry, where the relative unknown

can be spun by opportunistic plaintiffs and their experts into fraud-by-hindsight allegations. The Court should put a stop to this and ensure that the PSLRA continues to do what Congress meant it to.

ARGUMENT

I. A KEY PURPOSE OF THE PSLRA'S STRICT SCIENTER PLEADING REQUIREMENT IS TO ENSURE FAIR AND EVEN APPLICATION OF THE SECURITIES LAWS TO EMERGING TECHNOLOGY COMPANIES.

Congress enacted the PSLRA to address "abuses of the class-action vehicle in litigation involving nationally traded securities"—abuses that were injuring "'the entire U.S. economy.'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (quoting H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.)). In particular, the PSLRA sought to protect high-growth, high-technology companies from such abuses. *See* H.R. Rep. No. 104-369, at 43 ("Technology companies—because of the volatility of their stock prices—are particularly vulnerable to securities fraud lawsuits when projections do not materialize."). Among the "control measures" in the PSLRA to serve as a "check against abusive litigation," Congress imposed "[e]xacting pleading requirements." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). These exacting pleading requirements apply to allegations of scienter, *see* 15 U.S.C. § 78u-4(b)(2)(A), and impose a "high bar" for plaintiffs to clear, *e.g.*, *Brophy v. Jiangbo Pharms., Inc.*, 781 F.3d 1296, 1307–08 (11th Cir. 2015). Congress established this high bar to shield high-growth, high-technology

businesses—given both their potential vulnerability and critical importance to innovation—from baseless securities strike suits. The Ninth Circuit's approach undermines Congress's goals and will yield the exact repercussions that the PSLRA sought to prevent.

A. The PSLRA Imposes a High Bar for Plaintiffs to Allege That a Defendant Had the Required State of Mind to Commit Securities Fraud.

The PSLRA imposes the "most stringent pleading standard" for alleging scienter on would-be securities-litigation plaintiffs. *See* H.R. Rep. No. 104-369, at 41. Specifically, 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." 15 U.S.C. § 78u-4(b)(2)(A). These "facts" must do more than "plausibly" imply "the requisite state of mind"; rather, they must be sufficiently "cogent" and "at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs*, 551 U.S. at 314, 324.

The purpose of this exacting pleading requirement is to serve the PSLRA's "twin goals" of curbing "frivolous, lawyer-driven litigation" while preserving plaintiffs' ability to "recover on meritorious claims." *Id.* at 322. Securities fraud claims based on speculation, rather than facts, stifle economic vitality and growth, *see Merrill Lynch*, 547 U.S. at 81, with no benefit beyond letting opportunistic lawyers "line their own pockets by bringing abusive and meritless lawsuits," *see* H.R. Rep. No. 104-369, at 31–32.

B. The Legislative History Overwhelmingly Supports That the PSLRA's High Bar for Pleading Scienter Should Prevent Securities Strike Suits Against High-Growth, High-Technology Businesses.

The PSLRA's legislative history demonstrates that one of Congress's main concerns in enacting the law—and its heightened scienter requirement—was to protect the "particularly vulnerable" high-growth, high-technology sector from abusive securities litigation, especially given "volatility" in that sector making it an easy target for strike suits. *See* H.R. Rep. No. 104-369, at 43; *see also Tellabs*, 551 U.S. at 320 (looking to the PSLRA's legislative history to confirm "Congress' objectives when it enacted" the law).[3]

In the House, when the bill was introduced for debate on the floor, House Rules Committee Chairman Dreier opened by calling for "[s]ecurities litigation reform . . . to help create more high-quality private-sector jobs" and by voicing concern that the status quo "encourages meritless cases, destroys thousands of jobs, [and] undercuts economic growth." 141 Cong. Rec. 7112–13 (1995). The lead sponsor of the bill, Representative Bliley, called attention to how Congress had been "petitioned repeatedly over the last

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[3] Granted, legislative history "can never defeat unambiguous statutory text," *Bostock v. Clayton Cnty.*, 590 U.S. 644, 674 (2020), but this Court still looks to it to "confirm[]" the meaning and purpose of statutes, *e.g.*, *Sturgeon v. Frost*, 587 U.S. 28, 54 (2019); *accord Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 398 (2023); *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 595 U.S. 178, 187 (2022); *Digital Realty Tr., Inc. v. Somers*, 583 U.S. 149, 155, 162, 166 (2018).

few years by executives of some of America's fastest growing high tech companies" to fix the "broken" securities-litigation system, noting that "62 percent of responding entrepreneurial companies that went public in 1986 had been sued by 1993." *Id.* 7118, 7123. Representative Oxley, one of the co-sponsors of the bill, focused especially on how the law would protect "companies that are just starting out, entrepreneurial companies particularly, [that] are highly vulnerable" to securities "strike suits." *Id.* 7116. Representative Tauzin, another co-sponsor, discussed the need for the law to "end th[e] business of frivolous shakedown lawsuits . . . threatening to cripple many small businesses just trying to get going." *Id.* 7120. And another co-sponsor, Representative Cox, talked about the "tax levied" by securities-fraud "strike suit lawyers" and noted that the tax fell "most heavily" on "high-tech companies." *Id.* 7126.

This theme was a recurring refrain in the House floor debate on the need for the law. *See, e.g.*, *id.* 7118 (Rep. Harman) (mentioning the harms from the status quo that had befallen companies "on the leading edge of technology and research" in the "fastest growing sectors of our economy" from "meritless lawsuits" based on stock-price volatility); *id.* 7126 (Rep. Eshoo) (discussing how "[m]eritless" securities-fraud lawsuits were "crippling our high-technology industry"); *id.* (Rep. Gillmor) (referencing the harms to "American high technology and manufacturing companies"); *id.* 7127 (Rep. Schaefer) (noting how the "system is broken for businesses, especially the startup high-tech firms"); *id.* 7128 (Rep. Blute) (discussing harms to "[e]ntrepreneurial high-tech companies" from securities strike suits based on "volatile" stock value); *id.*

7129 (Rep. Moran) (discussing securities-litigation "abuse" targeting "high-technology," high-growth firms); *id.* 7268 (Rep. Mineta) ("Technology companies are prime targets for this type of senseless litigation because of the nature of the technology industry."); *id.* 7269 (Rep. Fields) (noting that "high-tech companies" were a "disproportionate target of securities suits"); *id.* 7270 (Rep. Farr) (criticizing "the 'fraud-by-hindsight' lawsuits that are crippling our high-technology industries"); *id.* 7287 (Rep. Baker) ("[H]igh-growth, high-technology firms which are volatile by nature. . . . are often victimized by frivolous securities litigation."); *id.* 7288 (Rep. DeLay) ("[H]igh-tech companies . . . are frequently the targets of these securities strike suits."); *id.* (Rep. Bilbray) (discussing how the "American Dream" had "turned into a nightmare" for startups because of securities strike suits targeting "small, fast-growing high-technology and biotech companies"); *id.* 7337 (Rep. Lofgren) ("[E]specially for high technology companies, there is a problem of strike lawsuits that requires remedy.").

A similar story played out in the Senate. Speaking for the bipartisan coalition of Senators who introduced the companion bill in that chamber, Senator Domenici explained the need for reform by noting that the "list of companies that have been hit with frivolous securities suits reads like the who's who of high growth, high-technology businesses" constituting "the foundation of our ability to compete in the new global marketplace." *Id.* 1530.

And in the floor debates in the Senate, just as in the House, a wide array of Senators called attention to this critical need for the law. *See, e.g.*, *id.* 16935

(Sen. D'Amato) (noting that most of the companies targeted by abusive securities lawsuits were "startup or high-technology businesses" sued because of innocuous "stock price fluctuation"); *id.* 16937 (Sen. Dodd) ("We are all counting on our high-technology firms to fuel our economy into the 21st century. . . . Those are the same firms that are most hamstrung . . . by a securities litigation system that, frankly, works for no one, save plaintiffs' attorneys."); *id.* 16963 (Sen. Moseley-Braun) (noting that the costs of abusive securities litigation "fall particularly heavy on the entrepreneurial and high-tech companies on which our future economy depends"); *id.* 17143 (Sen. Hatch) ("When most of our major high-technology firms have been the target of a securities fraud class action lawsuit . . . we have to take a long hard look at this and ask ourselves . . . is this system encouraging litigation when there is no evidence of any wrongdoing whatsoever on the part of the defendant?"); *id.* 17145 (Sen. Murray) (supporting the law because "[h]igh-technology companies waste their time and resources on legal fees . . . instead of giving us a cutting technological edge that will bring us into the 21st century"); *id.* 17289 (Sen. Mikulski) ("[H]igh-technology companies are hit the most by this problem."); *id.* 17428 (Sen. Kerry) ("[F]rivolous strike suits have a truly chilling effect on start-up high-technology, bio-technology, and other growth businesses.").

Unsurprisingly, both the Report of the Senate Committee on Banking, Housing and Urban Affairs, as well as the bicameral Conference Report, reiterate this driving purpose of the law. *See* S. Rep. No. 104-98, at 9, 16 (1995) ("Smaller start-up companies bear the brunt of abusive securities fraud lawsuits. Many

of these companies are high-technology companies which, by their very nature, have unpredictable business prospects and, consequently, volatile stock prices. . . . Small, high-growth businesses—because of the volatility of their stock prices—are particularly vulnerable to securities fraud lawsuits . . . ."); H.R. Rep. No. 104-369, at 43 ("Technology companies—because of the volatility of their stock prices—are particularly vulnerable to securities fraud lawsuits when projections do not materialize.").

The scienter pleading requirement was seen as a critical component to advance this purpose. Senator D'Amato explained that the PSLRA's pleading standard would "help to weed out frivolous complaints" and thus protect "[s]mall, startup, and high-technology companies" that had "become sitting ducks for securities fraud lawsuits." 141 Cong. Rec. 16935–36. Representative Fields emphasized that the pleading standards were imperative to deter frivolous stock-drop lawsuits, particularly against "small and medium-sized companies," that were the main target of the law. *See id.* 7279. Representative Cox observed that the pleading requirements were the "centerpiece" of the law that would allow it to stop "the abusive kind of litigation" at issue. *Id.* 7278. Senator Domenici highlighted how the "pleading reform" effectuated by the law would, "by weeding out frivolous cases," allow "[h]igh-technology companies' executives" to "focus on running their companies and growing their businesses." *Id.* 17437. And Senator Dodd likewise noted how the law's pleading standard would deter the "frivolous litigation" that had bedeviled "high-technology and bio-technology industries" companies. *Id.* 17549.

Thus, in adopting "the most stringent pleading standard" that had developed in the caselaw to date, *see* H.R. Rep. No. 104-369, at 41, Congress plainly sought to protect companies—particularly emerging, high-technology companies—from groundless securities strike suits.[4]

C. The Ninth Circuit's Approach to Pleading Scienter—Blessing Speculation in Lieu of Well-Pleaded Allegations—Will Yield the Exact Negative Repercussions That the PSLRA Was Enacted to Prevent.

If allowed to stand, the Ninth Circuit's approach to the PSLRA's scienter pleading requirement—finding speculative, "would have known" allegations enough, Pet. App. 34a–41a—will frustrate the core purpose of the PSLRA to prevent frivolous securities lawsuits from stifling the American economy.

This case illustrates the problem. NVIDIA is being sued, in essence, because a significant portion of its sales was allegedly driven by the use of NVIDIA's graphics processing units ("GPUs") in cryptocurrency mining, *see* Pet. Br. 8, and Petitioners did not perfectly foresee subsequent volatility in the cryptocurrency industry affecting NVIDIA's sales. *See* Pet. App. 7a–9a. Suits like this against publicly listed companies with sales merely affected by ebbs and flows in the cryptocurrency industry could have a

[4] Reinforcing this special solicitude for such companies embodied in the PSLRA, the PSLRA's "strong inference" pleading standard appears in just one other federal statute, one designed to curtail litigation over Y2K computer problems that would have inevitably targeted high-growth, high-technology companies at the time. *See* Pet. Br. 27 n.2 (citing 15 U.S.C. § 6607(d)).

chilling effect on the market's perception of the cryptocurrency industry and result in potential prejudice against doing business with industry participants.

Beyond that, if inadequate foresight about periods of volatility is enough to plead securities fraud, it will simply exacerbate the current trend of companies being deterred from going public. *See also* H.R. Rep. No. 104-50, at 20 (1995) ("Fear of litigation keeps companies out of capital markets."); S. Rep. No. 104-98, at 9 (noting the "in terrorem effect" of frivolous securities lawsuits on businesses). And even if companies decide that the risk of baseless litigation is outweighed by the benefits of going public, they could face challenges acquiring and retaining talent to help advise and run the company. *See, e.g.*, *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994) ("[E]xcessive [securities] litigation can have ripple effects. For example, newer and smaller companies may find it difficult to obtain advice from professionals. A professional may fear that a newer or smaller company may not survive and that business failure would generate securities litigation against the professional, among others."); *Merrill Lynch*, 547 U.S. at 81 ("Proponents of the [PSLRA] argued that [frivolous lawsuits] . . . deterred qualified individuals from serving on boards of directors.").

II. ALLOWING EXPERT OPINION TO REPLACE PARTICULARIZED ALLEGATIONS OF FALSITY WILL HAVE DIRE, FAR-REACHING CONSEQUENCES FOR SECURITIES LITIGATION.

The PSLRA's strict pleading standard also applies to allegations of falsity. The PSLRA requires that a

complaint "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). This requires "plaintiffs to state with particularity both the facts constituting the alleged violation, and the facts evidencing scienter." *Tellabs*, 551 U.S. at 313. There is no question that the requirement to "state with particularity" "imposes [a] heightened pleading requirement[]" on plaintiffs seeking to bring federal securities fraud class actions. *Merrill Lynch*, 547 U.S. at 81–82.

Plaintiffs here subvert this heightened requirement. Contrary to the PSLRA and *Tellabs*, Plaintiffs purport to plead falsity by relying on expert opinion—drawn from "generic market research and unreliable or undisclosed assumptions," *see* Pet. App. 58a (Sanchez, J., dissenting)—that NVIDIA underreported its GeForce GPU sales to cryptocurrency miners in its gaming division. Plaintiffs do not identify a specific document, presentation, testimony, or any internal material that matches or even supports this contention. The only alleged evidence in the operative complaint ("FAC") to support Plaintiffs' belief is conclusory expert opinion. App. 73–83 ¶¶ 143–54.

In overlooking these flaws, the Ninth Circuit effectively lowered the bar for falsity in all future cases. This case alone demonstrates the harm of easing the PSLRA's pleading standard, and there is no question that the long-term consequences of such a reversal will wreak the very havoc that the PSLRA was

designed to remedy. And again, those negative repercussions would hit emerging technology industries particularly hard.

A. The Ninth Circuit's Low Bar for Falsity Is Facially Absurd.

The unsound and speculative nature of Plaintiffs' falsity allegations cannot be understated. In a circumstance where particularity is required, the Ninth Circuit endorsed an amended complaint that fails to provide even the minimum connection to particularized facts supporting falsity. For example, despite presenting a chart that labels the expert's opinion as "actual cryptocurrency-related revenues," App. 83 ¶ 154, Plaintiffs' expert relies solely on publicly available, general data. That is, Plaintiffs' expert cites to zero revenue data, internal materials or testimony or explains how its opinion represents "actual" revenues of any sort. *See* App. 74–83 ¶¶ 147–54.

Even more concerning, Plaintiffs' expert relies on multiple layers of assumptions and inferences that are not particularized and lack even the probability of reliability. Specifically, Plaintiffs' expert made inferences regarding GPU purchases based on an alleged increase in hashrates and corresponding computing power and NVIDIA's purported share of that increased computing power and the GPU market. App. 74 ¶ 147. But the expert admits that it has no data regarding—and thus, did not consider—GPUs already in the market, previously underutilized GPUs, or whether GPUs may have been purchased to replace obsolete equipment. App. 76 ¶ 149, n.9; *see also* Pet. Br. 45–47.

Plaintiffs' expert opinion is also lacking on a number of additional fronts. Plaintiffs' expert opinion:

- relies on allegedly increased hashrates for three cryptocurrencies, but fails to explain the relevance of these three cryptocurrencies, how these cryptocurrencies fit within the cryptocurrency mining market as a whole, or why its analysis regarding only these cryptocurrencies is not under-representative, App. 74–75 ¶ 148;

- presumes that increased hashrates have a direct correlation to increased GPU computing power, but fails to present allegations supporting that assumption or to address any other potential causes for increased hashrates, App. 76-77 ¶ 150;

- relies on a general assumption that cryptocurrency miners "prefer[]" certain GeForce GPU models, confirmed only by general references to "coincentral.com and other industry sources" but without any particularized market data or NVIDIA material, App. 76 ¶ 150, n.10; and

- relies on a single report that "retail markup for GPUs is less than 10%," but fails to identify the report, provide any allegations regarding the basis for this assumption, or provide any evidence of NVIDIA's actual sale or markup practices, App. 78 ¶ 151, n.12.

These fundamental deficiencies were largely overlooked by the Ninth Circuit. *See* Pet. App. 20a–23a. Despite repeatedly acknowledging that Plaintiffs'

expert opinion can provide only "estimates," the Ninth Circuit fundamentally misconstrues the expert inferences and assumptions as "detailed," Pet. App. 20a–21a, and relies on other generalized allegations as corroboration.

The Ninth Circuit's reasons for allowing the expert opinion to replace particularized factual allegations of falsity are wanting. Specifically, the Ninth Circuit attempts to bolster Plaintiffs' expert opinion by relying on former employee statements in the First Amended Complaint ("FAC"), claiming that their testimony is consistent with the expert's opinions. Pet. App. 23a–24a. But Plaintiffs' confidential former employee witnesses do not provide any specific allegations of falsity; do not discuss any records that would corroborate or support Plaintiffs' expert opinion; and, in fact, did not work at NVIDIA during most of the Class Period. Pet. App. 37a, 40a; *see* Pet. Br. 49–50. The Ninth Circuit also points to corroboration from other external reports. The fact that another report—which, similarly, did not consider internal documents or NVIDIA materials or testimony—suggested that NVIDIA understated cryptocurrency-related revenue (albeit in a lesser amount than Plaintiffs claim) cannot substitute for particularized pleadings. Pet. App. 24a; *see* Pet. Br. 50–51. And the Ninth Circuit's final attempt to justify the expert opinion—its assertion that a dip in NVIDIA's stock price purportedly confirm the "essential correctness" of Plaintiffs' position, Pet. App. 24a–25a—reveals the transparently circular nature of its ruling. *See* Pet. Br. 51.

At bottom, Plaintiffs' purported expert opinion is a *post hoc* attempt to engineer falsity where no

particularized factual allegations exist. Plaintiffs have alleged no particularized evidence to support their securities claims and have instead relied on expert opinion to manufacture some discrepancy that NVIDIA's executives ostensibly must have known about. This cannot be enough to assert a claim under the strict requirements of PSLRA, and the Ninth Circuit's allowance of such rampant speculation must be reversed.

B. The Record Demonstrates the Harm of Allowing Expert Opinion Instead of Specific Factual Allegations of Falsity.

The Court need go no further than the record below to see the immediate harms of the Ninth Circuit's decision. Not only is the low bar for falsity employed by the Ninth Circuit antithetical to the very language of the PSLRA, but it is subject to manipulation and encourages overstatement and inflation of any intra-business information.

Consider Plaintiffs' former employee witness 5 ("FE 5"). Plaintiffs added multiple allegations regarding FE 5 to the FAC, crediting FE 5 as the source of direct evidence that cryptocurrency miners were purchasing NVIDIA GPUs and that such purchases were being counted in the NVIDIA Gaming division. *See, e.g.*, App. 42–43, 46–47, 110–14 ¶¶ 82, 89–91, 220, 222, 224. In the District Court, however, FE 5 signed a declaration disavowing key statements attributed to him in the FAC. *See* Ex. A to Defs.' Mot. to Strike, *In re NVIDIA Corp. Sec. Litig.*, No. 4:18-cv-07669-HSG (N.D. Cal. June 29, 2020), ECF No. 154-2. In his declaration, FE 5 specifically stated that several of the statements attributed to him were "untrue and

inaccurate" and that he "certainly did not make them." *Id.* ¶ 5. It is unclear how such statements made their way into the FAC, but FE 5 attested that he would have corrected such statements if given the opportunity before the FAC was filed. *Id.* ¶¶ 12–13; *see* Pet. App. 105a–107a.[5]

Should the Ninth Circuit be affirmed, these circumstances will repeat themselves. Under the Ninth Circuit's weakened standard for falsity, supportive—or even merely not inconsistent—witness statements take on new importance. Indeed, like the present case, indirect witness statements regarding the general existence of certain information can serve to bolster expert opinions based on generalized market data, allowing otherwise insufficient allegations regarding falsity to persist.

The Ninth Circuit's lowered pleading standard also creates a circumstance where an otherwise dismissible complaint may go forward based on incorrect data and false information. Specifically, if affirmed, more complaints would be allowed to proceed based on so-called "expert" assumptions that are based merely on generalized, publicly available data. These assumptions are less likely to be correct, as they are not tied to internal documents, witness statements, or particularized evidence of falsity. In such circumstances, a defendant has very limited options to

[5] The District Court declined to strike allegations regarding FE 5 from the FAC but reserved consideration of the truth of the statements. Pet. App. 106a–107a. For its part, the Ninth Circuit stated that it did not rely on any alleged statements by FE 5. Pet. App. 36a, n.2.

correct the record without opening the floodgates of discovery.

Such was the case here. The Ninth Circuit acknowledged that "NVIDIA generally does not sell its GPUs directly to end users, but rather to device manufacturers, referred to as 'partners.'" Pet. App. 9a. Thus, it is highly unlikely that NVIDIA has end-user data for its products, as most of its GPUs are sold directly to distributors. Indeed, the record reflects as much. *See, e.g.*, App. 391 ("Keep in mind, that[] [it's] very difficult for us to quantify down to the end customer."). And the FAC provides no particularized allegations that an NVIDIA sales report would have shown which GPU sales went to cryptocurrency miners. *See* Pet. App. 82a (Sanchez, J., dissenting). Plaintiffs, nonetheless, relied on an expert opinion to quantify the overall percentage of GPUs sold to cryptocurrency miners, as opposed to other purchasers. The assumptions underpinning this conclusion are not particularized and are, in fact, entirely divorced from the record, which shows that NVIDIA does not have access to the alleged information. Simply put, a complaint brought under the PSLRA should fail if an expert's assumptions and opinion conflict with a company's actual, internal reporting processes and knowledge.

C. The Ninth Circuit's Rule Undermines the PSLRA's Pleading Standard for Falsity and Unleashes the Same Unsupportable and Expensive Litigation That the PSLRA Was Designed to Control.

Allowing expert opinion to substitute for particularized allegations of falsity creates a dangerous

loophole to the PSLRA's stringent pleading standards. As discussed above, one of the key reasons for adopting heightened pleading standards in the PSLRA was to prevent frivolous lawsuits and expensive, fishing-expedition discovery, particularly for emerging startup or high-technology businesses. If affirmed, the Ninth Circuit's approach would provide an unrestricted path around those requirements for disappointed investors to seek damages and broad discovery against any company that suffers a market downturn. In short, the Ninth Circuit effectively has created a per se rule that, in the event of a market downturn, "assume that counter-evidence exists and the relevant company executives knew." *See* Pet. Br. 21–22, 48; Pet. Cert. 26 (Ninth Circuit opinion assumes "obvious" the very things the PSLRA requires plaintiffs to plead with particularity).

Indeed, there are very few cases where some inventive plaintiff could not employ a counter-factual expert opinion to avoid dismissal and pursue expensive discovery. This risk is particularly significant in emerging technology fields, such as cryptocurrency, because they are not yet well understood in the larger market and, thus, can be subject to more distortive expert speculation. Additionally, courts are especially likely to defer to experts in areas of emerging technology to explain unfamiliar issues and concepts, heightening the danger of distortion created by the Ninth Circuit's allowance. *See* Pet. Br. 43 ("The problem of junk science in the courtroom is real and well documented." (citations omitted)).

As here, such an expert would not need access to any internal data, witness statements, or company

documents, and could instead rely only on general, publicly available data to opine that certain data exists. Using the FAC as a model, such experts need not even be knowledgeable about the particular subject matter at issue or analyze alternative explanations for their assumptions. Provided the plaintiff could present an expert to opine on what ***may be*** in a company's books and records, a lawsuit may proceed based on the assumption that the "bad" market event must have been anticipated internally. To date, besides the Ninth Circuit in the opinion under review, such a radical position has been taken only by the First Circuit. *See In re Stone & Webster, Inc., Sec. Litig.*, 414 F.3d 187, 211 (1st Cir. 2005) ("Although the contents of the reports are not described, we can fairly infer that they described what they purported to describe—the Company's current financial condition. According to the allegations of the Complaint, the condition that would have been reflected in those internal reports was becoming desperate . . . .").

Allowing expert circumvention of the heightened pleading standard for falsity would allow a wide variety of harmful and unfounded cases to persist, subjecting companies—particularly in emerging, high-technology industries—to expensive and far-reaching discovery. *First*, if affirmed, the less restrictive pleading standard adopted below would allow a plaintiff to substitute an expert's opinion for particularized facts at the motion-to-dismiss phase. To date, such a substitution has been attempted and roundly rejected. *See Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 286 (5th Cir. 2006) ("Even if non-opinion portions of an expert's affidavit constitute an instrument pursuant to Rule 10, opinions cannot substitute

for facts under the PSLRA."); *Ark. Pub. Emps. Ret. Sys. v. Bristol-Myers Squibb Co.*, 28 F.4th 343, 354 (2d Cir. 2022) (citing *Fin. Acquisition*, 440 F.3d at 286). But that is precisely what the Ninth Circuit allowed. *See* Pet. App. 68a (Sanchez, J., dissenting). And, in allowing opinion to substitute for particularized facts, there is no limit on what manner of speculation or so-called expert opinion may be viewed as sufficient for purposes of a motion to dismiss, particularly for an emerging technology. *See, e.g.*, *Lerner v. N.W. Biotherapeutics*, 273 F. Supp. 3d 573, 589–90 (D. Md. 2017) (addressing allegations that defendant statements "regarding . . . interim analysis" were false or misleading because plaintiffs' expert found that "there is absolutely no reason why an interim analysis could not be completed within a few weeks").

Second, the Ninth Circuit's less restrictive pleading standard would allow cases to proceed to discovery on allegations regarding the contents of a prior version, or only a portion, of an alleged report or executive briefing. This is precisely the scenario presented in *Anderson v. Spirit Aerosystems Holdings, Inc.*, 827 F.3d 1229 (10th Cir. 2016). There, the Tenth Circuit addressed a complaint asserting that loss information was available to company executives because certain cost information, which was considered for purposes of evaluating loss, was compiled from separate employees for inclusion in quarterly reports. Although the Tenth Circuit found such allegations insufficient—because "plaintiffs ha[d] not identified the content of the quarterly cost reports," *Anderson*, 827 F.3d at 1241—similar allegations were accepted by the Ninth Circuit. *See* App. 41–42 ¶¶ 79–81 (discussing NVIDIA order sheets). Such allowance would

open the proverbial floodgates of discovery, turning small edits or contributions to an executive report into litigation fodder.

Third, if affirmed, this case also opens the door to suits based on the mere allegation that an incriminating memorandum exists. *Southland Sec. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353, 370 (5th Cir. 2004) (addressing "general claim of the existence of company reports reflecting contrary information"). Here, the Ninth Circuit credited expert opinion that certain executive statements were untrue based on generalized, public data. There is minimal difference between the present allegations and a future expert opinion that a certain incriminating memo was written, *see Cal. Pub. Emps.' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 147 (3d Cir. 2004), or that incriminating information should have been included as good business practice in a particular regular report, *ABC Arbitrage Pls. Grp. v. Tchuruk*, 291 F.3d 336, 358 (5th Cir. 2002).

Indeed, if affirmed, such complaints that "merely allege[] fraud by hindsight" will become commonplace. *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 887 (S.D. Tex. 2001). Plaintiffs have already attempted such cases and, with a new pathway opened, there is no doubt that imaginative experts will opine that "Defendants must have known [a stock price drop] would occur beforehand" based on "their executive positions," "their involvement in day-to-day management of its business, their access to internal corporate documents, their conversations with corporate officers and employees, and their attendance at management and Board meetings." *Id.*

Finally, if affirmed, the Ninth Circuit's allowance of expert economic opinion regarding the intricacies of cryptocurrency mining and GPU computing power invites speculation from unqualified experts with no specialized knowledge or understanding of the relevant field. Unqualified experts abound in litigation, but their appearance in securities cases involving complicated technical data is particularly prevalent and troubling. *See, e.g.*, *Hershewe v. JOYY Inc.*, No. 2:20-CV-10611-SB-AFM, 2021 WL 6536670, at *5 (C.D. Cal. Nov. 5, 2021) ("Whatever proficiency Muddy Waters might have as an investigator of corporate malfeasance does not qualify Muddy Waters as an expert in computers or internet forensics, let alone collecting, synthesizing, and analyzing data on hundreds of millions of transactions."); *In re Omnivision Techs., Inc. Sec. Litig.*, 937 F. Supp. 2d 1090, 1107–08 (N.D. Cal. 2013) ("[E]ven assuming the allegations of Expert A's experience and qualifications are sufficient to support general assertions about product development cycles in the industry, lead plaintiffs have provided no factual basis supporting Expert A's ability to speak about Apple and the iPhone 4S, and that is the issue in the instant action."). As these cases make clear, emerging startup and high-technology businesses are highly susceptible to unqualified expert speculation and are most likely to be harmed if an expert opinion can be substituted for particularized factual allegations. It is thus imperative that the Court continue to maintain the heightened pleading standard that the PSLRA requires.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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August 20, 2024

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