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 QUANTITATIVE EXPERTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are leading scholars on economics, accounting, statistics, data science, and forensic analysis who have served as consultants and experts for a variety of clients, including the U.S. Department of Justice and the Securities and Exchange Commission (SEC), as well as both defense- and plaintiff-side law firms. They have each participated in expert analysis that has helped inform the filing of complaints, for example, on issues of stock price movements, industry pricing, market manipulation, insider trading, accounting fraud, and the results of pharmaceutical drug trials. They respectfully offer their professional views about the useful role that data science, and analysis of data-intensive and data-complex topics, can play at the complaint stage, as well as their practical experiences having served as experts themselves. *Amici curiae* are:

- David Madigan: Provost and Senior Vice President of Academic Affairs at Northeastern University, as well as Professor in the College of Computer Sciences. He has written over 200 publications in areas such as Bayesian statistics, text mining, Monte Carlo methods, and probabilistic graphical models. For several years, he counseled the Food and Drug Administration as part of their Drug Safety and Risk Management Advisory Committee. Previously, he served as the Chair of the Department of Statistics at Columbia

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici* or its counsel made such a contribution.

University – as well as the Dean of Physical and Mathematical Sciences at Rutgers University.

- Joshua Mitts: David J. Greenwald Professor of Law at Columbia Law School. His research uses advanced data science, statistical analysis, and machine learning to analyze informed trading in capital markets (e.g., cybersecurity breaches, insider trading on corporate disclosures, short selling, spoofing, market manipulation). He has also consulted for the U.S. Department of Justice and the SEC. He also holds a Ph.D. in finance and economics.
- Daniel Taylor: Arthur Andersen Chaired Professor at The Wharton School, and Director of the Wharton Forensic Analytics Lab. He has conducted extensive research on corporate disclosure, insider trading, and fraud prediction. Additionally, he regularly consults for the U.S. Department of Justice, both defense- and plaintiff-side law firms, and a Big Four accounting firm.[2]

Amici respectfully submit their views about the real-world practice and importance of experts in the context of both securities law and other types of cases—namely by analyzing and interpreting data, not providing original facts—and the ways in which that analysis can serve the interests of the judiciary in promoting well-pled complaints and improving judicial efficiency.

[2] The views expressed by *amici* do not necessarily reflect the views of the institutions with which they are or were associated, whose names are included solely for identification purposes.

SUMMARY OF ARGUMENT

The second Question Presented, as framed by Petitioners, presupposes that plaintiffs rely on expert opinions to "*substitute* for particularized allegations of fact." (emphasis added). That core assumption about the role of experts is fundamentally mistaken and does not reflect the practices of experts and data scientists in a range of securities law cases.

In reality, experts can and do play a vital and appropriate role in cases at the pre-filing stage by analyzing data to inform, supplement, and corroborate – but not to substitute for – particularized allegations, including through quantitative analysis. Quantitative experts (like *amici*) can apply statistics and data science to distill complex and/or voluminous data for plaintiffs and courts alike. Quantitative experts play a key role in securities law cases by, for example, assessing whether a stock price drop was statistically significant, whether a given share was traceable to a registration statement, or whether stock option backdating or market manipulation have occurred.

More broadly, the involvement of pre-trial experts can promote judicial efficiency by ensuring that complaints are well-pled, well-vetted, and as detailed as possible. For instance, explaining the complex nuances of drug trial results, engineering concepts, Generally Accepted Accounting Principles, and various other technical standards that lawyers lack necessary training and expertise to understand. As numerous scholars and courts have recognized, encouraging the parties to consult with experts early in litigation incentivizes more thorough evaluation and preparation of claims before filing a complaint. Involving quantitative experts in these ways is fully consistent with – and, indeed, encouraged by – the judicial policy of vigorous, early evaluation of claims

under the Private Securities Litigation Reform Act (PSLRA).

Finally, two of Petitioners' *amici* appear to misunderstand the common functions of experts and therefore propose an unusually limited role for them in securities law cases. One *amicus* brief from the Chamber of Commerce suggests that experts should not be allowed to use publicly available information and should only rely on internal company documents. But that argument cannot be right: plaintiffs (and investors) rely on public data all the time (and courts regularly take judicial notice of such information). A contrary rule could incentivize the theft or leaking of corporate information. A second *amicus* brief from the Atlantic Legal Foundation argues that courts must apply Federal Rule of Evidence 702 at the complaint stage to assess the reliability of experts involved. The Rules of Evidence govern the admissibility of evidence at trial and in certain evidentiary hearings, not all proceedings or pleadings. Moreover, neither the Rules of Evidence nor the Federal Rules of Civil Procedure provide any support for requiring some new form of a *Daubert* hearing at the pleading stage.

Overall, *amici* respectfully stress that it is important to clarify that the central assumption of the second Question Presented does not accurately capture the practice of experts in a range of securities law cases. Furthermore, this Court should be careful to resolve the case at bar in a way that does not inadvertently limit this important and widespread practice.

ARGUMENT

I. EXPERTS CAN HELP INFORM AND BOLSTER A WELL-PLED COMPLAINT, WHICH IS NORMAL, APPROPRIATE, AND BENEFICIAL TO THE JUDICIARY.

A. Experts do not "substitute" their opinions for particularized factual allegations.

Amici have experienced first-hand the practical, and sometimes essential roles, that experts can and do play at the pleading stage. In so doing, *amici* have not "substituted" their opinions[3] for the views of the parties whom they assist. To the contrary, such expert assistance can and often does bolster complaints by analyzing or explaining complex technical standards or large amounts of data, including in the PSLRA context.

Expert involvement can take several different forms, depending on the types of claims involved, the specific

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[3] In fact, the notion of "substituting" an expert opinion appears nowhere in the Ninth Circuit's decision – including the dissent. Petitioners seem to conjure that language in their cert. petition, drawing primarily from dicta in other circuits. Pet. 5. *See also Arkansas Pub. Emps.' Ret. Sys. v. Bristol-Myers Squibb Co.*, 28 F.4th 343, 354 (2d Cir. 2022) (emphasis added) ("[a]lthough it is permissible for a plaintiff to bolster a complaint by including a nonconclusory opinion to which an expert may potentially testify," such "'opinions cannot substitute for facts under the PSLRA.'") (quoting *Financial Acquisition Partners, LP v. Blackwell*, 440 F.3d 278, 286 (5th Cir. 2006) (emphasis added)). The underlying Fifth Circuit opinion (*Blackwell*) mentioned the verb "substitute" only once and noted that "the district court refused to consider the expert's conclusions (opinions), [but] it did consider the affidavit's 'nonconclusory, factual portions.'" *Id.* at 285 (citing the district court opinion).

facts alleged, and the relevant data involved.[4] Typically, experts play a consulting role at the complaint stage, meaning that they analyze data and help the parties, but do not generate a freestanding report that is submitted to the court and are not directly quoted in the complaint.

In particular, experts often play a valuable role in analyzing data-intensive subjects, and can help distill quantitative or technical information into something that courts can readily understand and utilize. It is increasingly useful (and in some instances, effectively necessary) to involve an expert at the pleading stage in order to analyze the voluminous amounts of data generated daily across different industries and transactions,[5] or to understand highly technical material.

Towards that end, the "Second Circuit and district courts in [that] circuit routinely rely on expert and statistical analyses contained in pleadings." *In re Platinum & Palladium Antitrust Litig.*, No. 1:14-CV-9391-GHW, 2017 WL 1169626, at *13 n.9 (S.D.N.Y.

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[4] *See, e.g.*, Dani Alexis Ryskamp, *Keys for Working With Non-Testifying Experts*, Expert Institute (June 25, 2020), https://www.expertinstitute.com/resources/insights/keys-for-working-with-non-testifying-experts/ ("Hiring an expert to consult with your legal team adds a potentially vital perspective to the case as a whole. Often non-testifying experts are hired for tasks like damage assessments or technical review of prior art in a patent case. They may be asked to provide technical evaluations of allegedly defective products in a product liability case, or of allegedly dangerous conditions in a premises liability claim.").

[5] *See generally* Statista, *Media Usage in an Internet Minute as of April 2022* (2023); B. Marr, *How Much Data Do We Create Every Day?* Forbes, May 21, 2018, https://www.supremecourt.gov/opinions/URLs_Cited/OT2022/21-1496/21-1496-4.pdf (as cited in *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 480 (2023)).

Mar. 28, 2017) (collecting cases), on reconsideration, 449 F. Supp. 3d 290 (S.D.N.Y. 2020), aff'd in part, vacated in part, rev'd in part, 61 F.4th 242 (2d Cir. 2023). *See*, *e.g.*, *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC.*, 750 F.3d 227, 234 n.8 (2d Cir. 2014) (relying on, *inter alia*, plaintiff's expert economic analysis showing loss causation); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 716-17 (S.D.N.Y. 2013) (accepting plaintiffs' proffered expert data analyses comparing LIBOR rates to other data), vacated and remanded sub nom. on other grounds by *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759 (2d Cir. 2016); *Dover v. British Airways, PLC (UK)*, No. 12-cv-5567, 2014 WL 317845, at *2 (E.D.N.Y. Jan. 24, 2014) (noting that plaintiff's statistical analysis of prices "is a factual allegation that the Court must credit"); *Fed. Hous. Fin. Agency v. UBS Americas, Inc.*, 858 F. Supp. 2d 306, 332 (S.D.N.Y. 2012), aff'd, 712 F.3d 136 (2d Cir. 2013) (addressing plaintiffs' internal review of a sampled subset of loan files and valuation models at the motion to dismiss stage). The same is true in other circuits. *Infra* p. 11 n.7.

In appropriate cases under federal securities law, experts are frequently used to help analyze large amounts of trading data before a case is ever brought.

For instance, in many modern cases analyzing a stock drop, an expert (often an economist) is involved in assessing whether a change in price is statistically significant. "Courts often turn to economic experts to determine whether a particular announcement had an appreciable effect on the stock price." *United States v. Schiff*, 602 F.3d 152, 172 (3d Cir. 2010) (citation and internal quotations omitted). *See also Unger v. Amedisys Inc.,* 401 F.3d 316, 325 (5th Cir. 2005) ("Many variables have the potential to and do affect a stock price—the daily market average; national, local

and industry-specific economic news; competitors' activities; and on and on. . . . To this end, expert testimony may be helpful because of the utility of statistical event analysis for this inquiry."); Jesse Jensen and Aasiya Glover, *Loss Causation Ruling Departs From Usual Securities Cases*, Law 360 (July 17, 2024) (addressing how loss causation "frequently requires sophisticated expert analyses based on fact-finding and methodologies involving well-studied economic principles and other academic research."); Allen Ferrell, *Hidden History of Securities Damages*, 1 U. Chi. Bus. L. Rev. 97, 105 (2022) ("An event study is a widely used and generally accepted statistical framework for testing whether there was, in fact, a stock price movement associated with the disclosure of new value-relevant public information, such as a corrective disclosure, versus the stock price movement being a function of market and industry factors or random volatility.").

Moreover, in cases brought under Section 11 of the Securities Act of 1933, experts often play a key role in assessing traceability of shares to a registration statement. As a group of law and business professors —including one of the undersigned *amici* as a signatory (Prof. Taylor) and one as an author (Prof. Mitts)—detailed for this Court just last Term, ownership of shares can be traced in modern securities markets through analyzing trading data to see how a share moves between brokers and custodians. *See* Brief for *Amici Curiae* Law and Business Professors in Support of Respondent at 6-16, *Slack v. Pirani*, 2023 WL 2439655 (2023). That *amicus* brief specifically urged this Court to remand the *Slack* case to obtain and analyze evidence of tracing using "accounting methods" and "modern computing technology," *id.* at 20-22, which this Court unanimously did in *Slack*

Technologies, LLC v. Pirani, 598 U.S. 759, 770 (2023). Having remanded for just this sort of expert analysis, this Court would presumably also want to allow plaintiffs to engage in the same sort of analysis earlier in a case (if need be).

Expert analysis also played a central role in a series of decisions about stock option backdating circa 2007-2010. *See generally* SEC, *Spotlight on Stock Options Backdating* (modified July 19, 2010), https://www.sec.gov/spotlight/optionsbackdating.htm (collecting enforcement actions, *e.g.*, involving United Health Group, Broadcom, and Comverse Technology). In particular, a published paper by a finance professor first showed that only backdating could explain most abnormal patterns of returns involving executive stock option grants. That expert analysis, in turn, was featured in the *Wall Street Journal* and helped spur a wider series of investigations and corrective measures around backdating. *See* Erik Lie, *On the timing of CEO stock option awards*, Management Science 51, 802–812 (2005); Charles Forelle and James Bandler, *The Perfect Payday: Some CEOs Reap Millions by Landing Stock Options When They Are Most Valuable,* Wall St. J., Mar. 18, 2006, at A1.

Similarly, in market manipulation cases brought under Section 10b-5(a) and (c) of the '34 Act, it is often essential to use experts to undertake a technical analysis of market data to assess whether the trading was manipulative. Courts have recognized that in such market manipulation cases, the relevant market information is held exclusively by the defendant companies,[6] so the ability to utilize experts is essential.

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[6] *See, e.g.*, *Set Cap. LLC v. Credit Suisse Grp. AG*, 996 F.3d 64, 76 (2d Cir. 2021) (because manipulation "can involve facts solely

Similarly, in securities cases based on fraud in the pharmaceutical drug industry, experts also help plaintiffs by analyzing public databases about drug safety or public registries about clinical trials. *See generally* FDA, FDA Adverse Event Reporting System (FAERS) Public Dashboard, https://www.fda.gov/drugs/questions-and-answers-fdas-adverse-event-reporting-system-faers/fda-adverse-event-reporting-system-faers-public-dashboard; U.S. Department of Health and Human Services et al., ClinicalTrials.gov.

Other securities law cases also have taken into account the analysis of experts at the complaint stage, even if the early use of experts did not result in a published opinion directly analyzing this topic. *See, e.g.*, *Indiana Public Retirement System v. Pluralsight, Inc.*, 45 F.4th 1236, 1264-1267 (10th Cir. 2022) (acknowledging expert analysis on 10b5-1 plans and overturning the district court's dismissal of scienter regarding a claim involving a 10b5-1 plan). Additionally, courts often allow plaintiffs to rely upon expert analysis to establish falsity by examining industry practices and customs.[7]

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within the defendant's knowledge . . . the plaintiff need not plead manipulation to the same degree of specificity as a plain misrepresentation claim."); *Harrington Global Opportunity Fund., Limited.*, 585 F. Supp. 3d, 405, 418 (S.D.N.Y. 2022) (same); *Nanopierce Techs., Inc. v. Southridge Cap. Mgmt., LLC*, No. 02-cv-0767-LBS, 2002 WL 31819207, at *5 (S.D.N.Y. Oct. 10, 2002) (plaintiff need only "lay out the nature, purpose, and effect of the fraudulent conduct and the roles of the defendant without requiring specific instances of the conduct.").

[7] *See Barrie v. Intervoice-Brite, Inc.*, 397 F.3d 249, 257-58 (5th Cir. 2005), modified on other grounds, 409 F.3d 653 (5th Cir. 2005) (holding that plaintiffs' allegations of violations of PSLRA based on accounting improprieties were "adequately supported by expert opinion," quoting the expert's opinion that the defendants' accounting practice "did not comply with GAAP"); *Fla. State Bd.*

At bottom, despite Petitioners' efforts to portray what the experts did in this case as exceptional and problematic, it is actually quite normal, appropriate and useful – both in the context of the PSLRA and more generally. The use of experts to help supplement complaints, *e.g.*, through data analysis and explanation of industry standards and protocols, should not be summarily discarded because of hazy assertions that they are biased or that the experts were compensated.

Moreover, complaints regularly quote, use, or rely upon other sources to inform and bolster the factual allegations, such as news articles and published reports. It would be peculiar to treat expert input or quantitative analysis as categorically different when it

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of Admin. v. Green Tree Fin. Corp., 270 F.3d 645, 666 (8th Cir. 2001) ("[N]either the district court, nor we, can conduct a battle of experts on a motion to dismiss. Rather, we must assume the truth of the allegations pleaded with particularity in the complaint. The strong-inference [of scienter] pleading standard [of the PSLRA] does not license us to resolve disputed facts at this stage of the case."); *In re Mannkind Securities Actions*, 835 F. Supp. 2d 797, 811, 821 (C.D. Cal., Dec. 16, 2011) (holding, in a PSLRA action, that plaintiffs successfully pleaded falsity based in part on an expert report regarding FDA practices and adequacy of defendants' studies, also noting that "plaintiffs' expert report *buttresses* . . . inferences [of scienter]") (emphasis added); *In re Resource America Securities Litigation*, 2000 WL 1053861, at *4 (E.D. Pa., July 26, 2000) (in a PSLRA fraud-on-the-market case, denying dismissal of the complaint in part on the basis of "affidavits by two of plaintiffs' financial experts who state that in their opinion [the defendant's] public disclosures were 'improper' and 'subject to misinterpretation by shareholders[]'")); *In re CommVault Sys., Sec. Litig.*, 2016 WL 5745100, at *4 (D.N.J. Sept. 30, 2016) (expert declarations by former SEC Chairman and an accountant that defendants' practices violated GAAP were "proper at the pleading stage," especially because they were "adequately incorporated into the [c]omplaint, and as such, serve to *supplement* the factual basis alleged") (emphasis added).

also serves to bolster a complaint in a materially similar fashion. *Amici* respectfully urge this Court not to resolve this case in a way that might inadvertently limit this significant and common practice.

B. The involvement of experts at the pleading stage promotes judicial efficiency and thorough preparation by the parties.

In addition to being routine and appropriate, the involvement of experts in these ways also advances the interests of judicial efficiency.

As this Court has recognized, federal courts depend upon and require complaints that are well-pled and thought-through from the onset. *See*, *e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). This promotes judicial efficiency, since well-pled and detailed complaints help jurists make informed decisions earlier in the life-cycle of a case. *See*, *e.g.*, A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 Mich L. Rev. 1, 23-25 (2009) ("the Supreme Court in *Twombly* seems to have determined that efficiency is the priority"); *id.* at 36 (concluding that the pleading standard now embodies a view toward "efficient judicial administration"). It also helps spare judges and the parties alike from vague, implausible allegations or endless additions to the complaint. By contrast, under Petitioners' proposed rule, courts might have to review complaints line-by-line, separating out expert analysis and factual allegations – which would not be terribly efficient, among other things.

Additionally, encouraging the parties to consult with experts early in litigation incentivizes the parties to vet prospective claims thoroughly and file well-pled complaints. As a session of the American Bar

Association highlighted, "[i]t is imperative to hire your experts early. . . . Early-retained experts can provide attorneys with input and advice to help shape case strategy and discovery plans, and may assist in resolving early issues arising during the development of the case." P. John Brady et al., *A Primer on Working with Experts* at 1, Program Materials for 'Be an Expert on Experts,' American Bar Association, Section Annual Conference (May 3-5, 2017).[8]

For these reasons and others, courts and scholars frequently have recognized the important role played by experts *before* trial. "[T]here is a[n] important interest in allowing counsel to obtain the expert advice they need in order properly to evaluate and present their clients' positions without fear that every consultation with an expert may yield grist for the adversary's mill." *Rubel v. Eli Lilly & Co.*, 160 F.R.D. 458, 460 (S.D.N.Y. 1995). *Accord Moore U.S.A. Inc. v. Standard Reg. Co.*, 206 F.R.D. 72, 75 (W.D.N.Y. 2001) (quoting *Rubel*).[9] District courts throughout the country have often addressed questions about when an opposing party can call an early expert to testify or can discover their work product. In response, courts regularly stress the "important interest in allowing counsel to obtain the expert advice they need in order properly to evaluate and present their clients' position." *Greater Hall Temple Church of God in*

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[8] https://www.americanbar.org/content/dam/aba/publications/litigation_committees/commercial/materials/1_be_an_expert_on_experts.pdf.

[9] *See also Dibel v. Jenny Craig, Inc.*, No. 06 CV 2533 GEN AJB, 2007 WL 2220987, at *3 (S.D. Cal. Aug. 1, 2007) (citing *Moore*); *H/S Wilson Outparcels, LLC v. Kroger Ltd. P'ship I*, No. 5:15-CV-591-RJ, 2018 WL 1528187, at *2 (E.D.N.C. Mar. 28, 2018) (citing *Moore*); *Carroll v. Praxair, Inc.*, No. 05-0307, 2007 WL 437697, at *3 (W.D. La. Feb. 7, 2007) (citing *Rubel*).

Christ, Inc. v. S. Mut. Church Ins. Co., No. 2:17-CV-111, 2021 WL 8533939, at *5 (S.D. Ga. Apr. 1, 2021) (noting courts' general recognition of four interests weighing against allowing an opposing party to call a consultative, non-testifying expert witness to testify at trial).[10]

Leading treatises also underscore the unique and significant role that pre-trial experts can play. "[A] party should not be penalized for having sought expert assistance early in the litigation, and its opponent should not benefit from the party's diligence." Ann. Manual Complex Lit. § 23.342, *Discovery of Nontestifying Experts* (4th ed.). By contrast, "[a]llowing routine discovery as to [nontestifying experts] would tend to deter thorough preparation of the case and reward those whose adversaries were most enterprising." 8A Wright & Miller, Federal Practice and Procedure, Civil § 2032 (3d ed.) (citing *Moore*, *supra*).[11]

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[10] *See also Spirit Master Funding, LLC v. Pike Nurseries Acquisition, LLC*, 287 F.R.D. 680, 686 n.3 (N.D. Ga. 2012) (same); *Caribbean I Owners' Ass'n, Inc. v. Great Am. Ins. Co. of New York*, No. CIV.A. 07-00829-KD-B, 2009 WL 499500, at *2 (S.D. Ala. Feb. 20, 2009) (same); *Rebarber-Ocasio v. Feliciano-Munoz*, No. 3:16-CV-02719-JAW, 2022 WL 2004606, at *4 (D.P.R. June 6, 2022) (same); *Quest Diagnostics Inc. v. Factory Mut. Ins. Co.*, No. CV 07-3877, 2009 WL 10680098, at *4 (E.D. La. Mar. 11, 2009) (same).

[11] *See also* 8A Fed. Prac. & Proc. Civ. § 2032, *Expert Witnesses—Discovery as to Specially–Retained Experts Who Will Not Be Called* (3d ed.) ("[A]s a collaborator in the development of pretrial strategy, a non–testifying expert may become a unique repository of insights into counsel's opinion. . . ."). *Accord* O'Connor's Federal Rules * Civil Trials Ch. 6-D § 4, *Consulting experts* (2024 ed.) ("The reasons for not allowing discovery of information from consulting-only experts include the following: (1) parties should be allowed to obtain expert advice to properly evaluate and

In the securities law arena too, if the judiciary seeks to reasonably 'police' complaints brought under the PSLRA, then it should countenance the input of experts to help plaintiffs vet claims and supplement their particularized factual allegations.

II. PETITIONERS' *AMICI* ARE MISTAKEN IN THEIR CHARACTERIZATION OF AND PROPOSED ROLE FOR EXPERTS.

In support of Petitioners' novel theory on the second Question Presented, their *amici* make a hodgepodge of arguments about the proposed role of experts in securities law cases. Two of the *amicus* briefs merit a brief response.

First, the Washington Legal Foundation, Chamber of Commerce, *et al.*, suggest that experts can only help support particularized factual allegations when their opinions are based on "the company's actual information or otherwise identify specific data about the company that would corroborate the expert's conclusions." *See* Brief of the Washington Legal Foundation, the Chamber of Commerce of the United States of America, et al. as *Amici Curiae* in Support of Petitioners at 10 ("Chamber of Commerce Brief"). To the extent that the Chamber of Commerce means that expert opinions must be based on information that specifically relates to a company, that should be uncontroversial – since a vague expert opinion about the general state of an industry would not be

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present their positions without fear, (2) each party should prepare its own case at its own expense, (3) it would be unfair to these experts to compel their testimony and they might become unwilling to provide advice if they suspect their testimony would be compelled, and (4) the party who retained the expert might be prejudiced merely by retaining the expert.").

sufficiently particularized under the PSLRA. (Data can obviously be company-specific without being proprietary, for example trading data or other publicly available information.)

But to the extent that the Chamber of Commerce means that expert opinions must only be demonstrably based on *internal* company data or knowledge (i.e., *not* public information), that is misguided and quite problematic. *Compare with* Chamber of Commerce Br. At 11 ("the Ninth Circuit ignored whether the expert in question had access to the company's data or could otherwise speak to what facts were known by the company and its employee").

It is quite routine for plaintiffs to use publicly available data about publicly traded companies in their pleadings. Moreover, investors rely every day on publicly available data to price and trade stocks – and the overarching integrity of public equities markets depends on such data. *See* H.R. Rep. No. 100-910 (1988) ("The investing public has a legitimate expectation that the prices of actively traded securities reflect publicly available information about the issuer of such securities . . . ."). *Accord Basic Inc. v. Levinson*, 485 U.S. 224, 247 (1988) (stressing the central premise that "most publicly available information is reflected in market price" and adopting the fraud-on-the-market theory).

It is entirely appropriate and logical for experts also to be able to rely upon publicly available data in helping bolster certain aspects of a complaint. Moreover, courts regularly allow defendants to submit factual data – such as stock prices or SEC filings – in their motions to dismiss, because it is seen as so routine that judges can take judicial notice of the information (even if it is not within the four corners of the complaint). *See*, *e.g.*, *Acticon AG v. China N.E.*

Petrol. Holdings Ltd., 692 F. 3d 34, 37 n.1 (2d Cir. 2012) (taking judicial notice of "well publicized stock prices"); *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 167 & n.1 (2d Cir. 2000) (same); *In re IPO Sec. Litig.*, 383 F. Supp. 2d 566, 583-86 (S.D.N.Y. 2005) (same); *LCM XXII Ltd. v. Serta Simmons Bedding, LLC*, No. 21 Civ. 3987 (KPF), 2022 WL 953109, at *1 (S.D.N.Y. Mar. 29, 2022) (loan pricing data from information services provider Markit); *Set Cap. LLC v. Credit Suisse Grp. AG*, No. 18 Civ. No. 2268 (AT) SN), 2019 WL 3940641, at *7 & n.2 (S.D.N.Y. Aug. 16, 2019) (taking judicial notice of publicly available pricing data for a futures index).

Moreover, if the Chamber of Commerce really wants experts to exclusively use internal company data, then that would be befuddling – since such a requirement would plainly incentivize the use of internal corporate information that is potentially leaked, stolen, or otherwise made available before the formal discovery process or through news media. *See generally* Brief of Former SEC Officials as *Amici Curiae* in Support of Respondents at 5, 16, 18 (discussing Petitioners' rule requiring internal company documents). It would be surprising for large public companies to bless such a practice and this Court should not do so either.

Second, the Atlantic Legal Foundation suggests that if an expert opinion is utilized to support a claim of falsity under the PSLRA, it must meet the criteria for reliability that are established by the Federal Rule of Evidence 702. *See* Brief of the Atlantic Legal Foundation as *Amici Curiae* in Support of Petitioners at 5-7, 11-2. These reliability criteria include:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Fed. R. Evid. 702.

But this is a blatant attempt to transplant the requirements of the Federal Rules of Evidence (aimed at trial) into the Federal Rules of Civil Procedure (for the pleading stage). Neither set of rules allow as much. Indeed, the Rules of Evidence generally are not applied at the pleading stage. *See*, *e.g.*, *In re Arris Cable Modem Consumer Litig.*, No. 17-CV-01834-LHK, 2018 WL 288085, at *11 (N.D. Cal. Jan. 4, 2018) (defendant's "arguments based on Rule 702 and *Daubert* are misplaced at this stage of the proceedings. 'The allegations in the complaint are not evidence, and need not meet any evidentiary standard.'") (citing *Remington v. Mathson*, No. 17-cv-2007-JST, 2017 WL 2670747, at *6 (N.D. Cal. June 21, 2017); *Cabrega v. Campbell Soup Co.*, No. 18-CV-3827(SJF)(ARL), 2019 WL 13215191, at *6 (E.D.N.Y. Nov. 18, 2019) ("Contrary to defendant's contention, consideration of the allegations specifically referring to statements in the expert's declaration does not 'deprive the court of its statutorily-prescribed "gatekeeper" function' under Rule 702 [], which is a rule of evidence; not a rule or standard of pleading. Defendant is free to challenge the reliability and admissibility of the expert's opinions on a motion for summary judgment or a *Daubert* motion; but not . . . at the pleadings stage.") (citation omitted). It would be inapposite to apply Rule 702 here, since there is no need to shield a factfinder

from certain expert testimony at such an early juncture in the case.

To the extent that this Court is concerned about a flood of meritless securities litigation based on unscientific or otherwise unreliable expert opinions, Rule 11 of the Federal Rules of Civil Procedure provides a straightforward remedy. If plaintiffs lack evidentiary support for the factual allegations in a complaint or it is not likely that plaintiffs will have evidentiary support after a reasonable opportunity for further investigation or discovery, courts may impose sanctions on plaintiffs and plaintiffs' counsel. While the bar for Rule 11 sanctions is high, the threat of sanctions provides an appropriate deterrent against plaintiffs making factual allegations premised on an expert opinion lacking any scientific or factual basis.

Additionally, the PSLRA itself does not mandate that a complaint contain detailed *evidence* of falsity. Rather, the PSLRA allows plaintiffs to plead falsity based on "information and belief," 15 U.S.C. § 78u-4(b)(1)(B), which necessarily encompasses information that might (or could) not be introduced as evidence later at trial.

In sum, both of Petitioners' key *amicus* briefs seem to misunderstand what pre-trial experts actually do and should be able to do. This Court should decline the invitation by Petitioners' *amici* to impose significant new restrictions upon experts at the pleading stage, particularly when such arguments are premised on misconceptions.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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