No. 21-15604

IN THE
United States Court of Appeals for the Ninth Circuit

E. OHMAN J:OR FONDER AB; STICHTING PENSIOENFONDS PGB,
Lead Plaintiffs,

Plaintiffs-Appellants,

and

IRON WORKERS LOCAL 580 JOINT FUNDS,

Plaintiff,

v.

NVIDIA CORPORATION; JENSEN HUANG; COLETTE KRESS; JEFF FISHER,

Defendants-Appellees.

and

OAKLAND COUNTY EMPLOYEES' RETIREMENT SYSTEM; OAKLAND COUNTY VOLUNTARY EMPLOYEES' BENEFIT ASSOCIATION TRUST; OAKLAND COUNTY EMPLOYEES' RETIREMENT SYSTEM TRUST,

Defendants.

On Appeal from the United States District Court
for the Northern District of California
No. 4:18-cv-07669-HSG, Hon. Haywood S. Gilliam, Jr.

BRIEF OF WASHINGTON LEGAL FOUNDATION AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING EN BANC

Daniel A. Rubens
Jodie C. Liu
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

James N. Kramer
ORRICK, HERRINGTON &
SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
(415) 773-5923

Counsel for Amici Curiae Washington Legal Foundation and the National Association of Manufacturers

DISCLOSURE STATEMENT

Under Rule 26.1 of the Federal Rules of Appellate Procedure, amici curiae Washington Legal Foundation (WLF) and the National Association of Manufacturers (NAM) make the following disclosures:

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INTEREST OF AMICI CURIAE*

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters nationwide. Founded in 1977, WLF promotes free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears as an amicus curiae in key cases presenting questions about the proper scope of the federal securities laws. *See, e.g.*, *Slack Techs., LLC v. Pirani*, 598 U.S. 759 (2023); *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951 (2021). Additionally, WLF's Legal Studies Division routinely publishes papers by outside experts on federal securities law. *See, e.g.*, Zachary Taylor, et al., Pirani v. Slack Techs., Inc., et al.*: Ninth Circuit Cuts Securities Plaintiffs Slack on Standing*, WLF Legal Backgrounder (Mar. 25, 2022).

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector.

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* No counsel for a party authored this brief in whole or in part. No party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief. All parties consented to the filing of this brief.

Manufacturing employs nearly 13 million men and women, contributes $2.91 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Like Judge Sanchez, amici are concerned that the panel majority creates a new rule that invites a flood of securities litigation based on unsubstantiated and unreliable "expert" opinion based entirely on hindsight-driven inferences from "generic market research" rather than actual company data. Panel Dissenting Opinion (Dissent) 64. The majority's holding contradicts the heightened statutory pleading standard and this Court's well-established precedents enforcing it. If left undisturbed, the majority's holding will invite a flood of meritless and costly securities-fraud litigation in this Circuit.

INTRODUCTION

If left to stand, the majority's holding will permit securities-fraud plaintiffs to circumvent the Private Securities Litigation Reform Act

(PSLRA) by substituting expert speculation for particularized factual allegations. The PSLRA's heightened pleading standard, which Congress enacted in response to "significant evidence of abuse in private securities lawsuits," H.R. Conf. Rep. No. 104-369, at 31 (1995), requires plaintiffs to "specify," among other things, "each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading." 15 U.S.C. § 78u-4(b)(1)(B). In holding that the plaintiffs met that burden, the majority relied mainly on an "expert analysis" conducted by Prysm Group, a third-party firm that plaintiffs retained for this litigation. Although Prysm claimed to offer conclusions about NVIDIA's cryptocurrency-related sales, its estimates were not based on any information that NVIDIA itself generated or possessed. Instead, Prysm relied on generic market data about worldwide cryptocurrency activities, which it purported to connect to NVIDIA's sales only through a series of unexplained and unreliable assumptions. *See* Petition for Rehearing En Banc (Pet.) 6, 12-13; Dissent 65-67.

As Judge Sanchez explained in dissent, this Court has "never before allowed an outside expert to serve as the primary source of falsity allegations under the PSLRA where the expert relies almost

exclusively on generic market research and without any personal knowledge of the facts on which [its] opinion is based." Dissent 64. The majority's opinion, if upheld, will provide a roadmap for future securities-fraud plaintiffs to survive motions to dismiss even when they lack particularized facts suggesting that the defendants made any false statement. An expert hired for litigation can almost always manipulate inputs and assumptions to reverse-engineer findings that reinforce plaintiffs' theories. Because courts may not delve into a rigorous assessment of an expert's methods at the pleadings stage, plaintiffs will routinely "evade the PSLRA's exacting pleading standards by merely citing an expert who makes assertions about falsity." *In re Nektar Therapeutics Sec. Litig.*, 34 F.4th 828, 837 (9th Cir. 2022).

The majority's reasoning also contravenes this Court's precedent, which has emphasized the need for internal company data to corroborate facts hypothesized by experts. *See Nursing Home Pension Fund, Loc. 144 v. Oracle Corp.*, 380 F.3d 1226, 1233 (9th Cir. 2004) (PSLRA requires allegations that experts are "in a position to know" what the company's internal accounting data reflected). This Court and district courts in this Circuit have consistently applied that rule to

disregard expert conclusions based on generic market research. Those holdings cannot be squared with the majority's approach, which would reopen the floodgates to the same litigation abuses that led Congress to enact the heighted PSLRA standard in the first place.

For these reasons and those stated in the petition, this Court should grant rehearing en banc and reverse the majority's decision.

ARGUMENT

I. The Majority Opinion Paves The Way For Securities-Fraud Plaintiffs To Use Experts To Bypass The PSLRA's Stringent Pleading Requirements.

For decades, the PSLRA has helped stem baseless securities-fraud cases by imposing a stringent standard for pleading fraud with particularity. The majority opinion, however, lays out a clear roadmap for securities-fraud plaintiffs to circumvent the PSLRA's heightened pleading standard through reliance on a purported expert's made-for-litigation analysis. Under the majority's reasoning, plaintiffs can routinely survive motions to dismiss by hiring experts that manipulate generic market analysis to bolster hindsight-driven fraud theories, all without any grounding in company-specific data. Expert "analysis" of

this sort is no substitute for the particularized allegations of fraud, based on plaintiffs' actual knowledge, that the PSLRA requires.

A. The PSLRA Imposes Stringent Requirements On The Use Of Experts To Plead Fraud.

"Congress enacted the PSLRA to put an end to the practice of pleading fraud by hindsight," *In re Daou Sys. Inc. Sec. Litig.*, 411 F.3d 1006, 1021 (9th Cir. 2005), and to "eliminate abusive securities litigation," *In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1084 (9th Cir. 2002). To that end, the PSLRA imposed "formidable pleading requirements," *Metzler Inv. GmbH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1055, 1061 (9th Cir. 2008), under which securities fraud plaintiffs must "*state with particularity all facts*" underlying the belief on which they predicate allegations of falsity, 15 U.S.C. § 78u-4(b)(1)(B) (emphasis added); *see also Glazer Cap. Mgmt., L.P. v. Forescout Techs., Inc.*, 63 F.4th 747, 765 (9th Cir. 2023). "By requiring specificity," the PSLRA "prevents a plaintiff from skirting dismissal by filing a complaint laden with vague allegations of deception unaccompanied by a particularized explanation stating why the defendant's alleged statements or omissions are deceitful." *Metzler*, 540 F.3d at 1061.

That stringent pleading standard naturally carries implications for the use of expert witnesses in alleging the elements of securities fraud, as this Court has recognized. Under the PSLRA, when plaintiffs rely on expert witnesses (or confidential witnesses) to plead fraud, the complaint must "describe[] the witnesses with sufficient particularly to establish that they [are] in a position to know" the basis for their opinion. *Oracle*, 380 F.3d at 1233; *see also id.* (witnesses "relied upon in a complaint should be described in the complaint with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged" (internal quotation marks omitted)); Pet. 2, 9-10. In other words, *Oracle* correctly understood the PSLRA as requiring that when plaintiffs rely primarily on expert opinion to allege fraud, they must provide sufficiently particularized allegations that experts referenced in the complaint are basing their opinions on the company's internal information or otherwise identify particular internal data that would corroborate its conclusions. *See id.* This Court has likewise recognized that "[p]laintiffs cannot evade the PSLRA's exacting pleading standards by merely citing an expert who makes assertions … based on questionable

assumptions and unexplained reasoning." *Nektar*, 34 F.4th at 837; *see also* Pet. 2, 9-10.

Oracle itself well demonstrates the prerequisites for expert testimony to satisfy the PSLRA's pleading standard. *See* Pet. 9. In that case, Oracle challenged the plaintiff's attempt to use a financial expert to support its allegations that Oracle improperly adjusted its revenue by more than $200 million. 380 F.3d at 1232-34. In evaluating that challenge, the Court stressed that for the expert's allegations to help satisfy the plaintiff's pleading burden, the complaint had to describe the expert "with sufficient particularity" to demonstrate that the expert was "in a position to know Oracle's accounting practices." *Id.* at 1233 (quoting *Novak v. Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000)). The Court ultimately considered the expert's allegations because the complaint described how the expert had reviewed the billing and payment histories of some of Oracle's customers, had spoken with Oracle employees about customer payments, and had provided detailed reporting of the Oracle employees' statements. *See id.* at 1233. Even "more importantly," this Court emphasized that "the documents

[reviewed by the expert] *themselves* appear[ed] to establish improper revenue adjustment." *Id.* (emphasis added).

Thus, *Oracle*'s clear teaching is that a plaintiff relying on expert opinions to plead securities fraud must explain how that expert possesses, has access to, or has some basis to draw conclusions about the company's internal information. After all, that is what Congress meant when it insisted through the PSLRA that securities complaints be grounded in plaintiffs' "actual knowledge" as of the time the suit is filed. *Medhekar v. U.S. Dist. Ct.*, 99 F.3d 325, 328 (9th Cir. 1996).

B. The Majority's New Standard For Using Experts To Plead Securities Fraud Departs From The PSLRA And Precedent.

Contrary to *Oracle*, its progeny, and the PSLRA's express dictates, the majority crafted a new standard that would allow securities-fraud plaintiffs to satisfy their pleading burden by retaining experts that purport to reconstruct internal company data based on generic market research. The majority weakens the pleading standard in at least three critical ways:

First, the majority disregarded *Oracle*'s focus on whether the expert had access to the company's internal information or could

otherwise speak to what facts were known by the company and its employees. The majority instead found it sufficient that the expert report was authored by "knowledgeable and competent professionals" who described the report's "methodology." Panel Majority Opinion (Op.) 19 (reciting the "detailed analysis" that Prysm took to approximate NVIDIA's cryptocurrency-driven gaming revenues). But the fact that the Prysm report included a description of its method does not establish that the method can support allegations of falsity or scienter. As Judge Sanchez explained, Prysm "relies on a series of assumptions drawn from generic market research," rather than "information provided by any current or former NVIDIA employee or any internal report or data source." Dissent 65; *see also* Pet. 12-13. Making matters worse, the report fails to establish the reliability of critical assumptions, including NVIDIA's cryptocurrency market share. Dissent 66-68; *see also* Pet. 12-13. As a result, "the amended complaint does not plead with particularity facts establishing that the Prysm report's authors were 'in a position to know' what NVIDIA's own internal revenue reporting showed." Dissent 68 (quoting *Oracle*, 380 F.3d at 1233). When an expert—like Prysm here—relies entirely on generic market data, *Oracle*

and the PSLRA's pleading standard demand rigorous analysis of the expert's conclusions, not just a description of the method.

Second, the majority's new standard encourages securities-fraud plaintiffs to mask the deficiencies of one expert report by bootstrapping other similarly deficient reports and third-party analyses. For instance, in attempting to buttress the Prysm report with other allegations in the complaint, the majority pointed to the complaint's citation of a report by the Royal Bank of Canada that, according to the majority, is "almost identical" to the Prysm report. Op. 42. But the Royal Bank of Canada report suffers from the same defects as the Prysm analysis: The complaint fails to specify with particularity any of the underlying assumptions or sources of information for *either* report's estimations of NVIDIA's cryptocurrency metrics. *See id.*; Dissent 67. Similarly, the majority credited Prysm's reliance on another research firm's estimate of NVIDIA's cryptocurrency market share, Op. 20, even though the complaint failed to disclose how that other firm went about determining that market share estimate, *see* Dissent 66-67. As Judge Sanchez recognized, "[w]ithout knowing the basis for this input, one cannot ascertain the reliability of the output." *Id.* at 67.

Third, the majority further diluted the pleading standard by crediting vague confidential-witness allegations marked by the same deficiencies as Prysm's analysis. Former-employee statements that NVIDIA's CEO (Huang) was a "meticulous manager who closely monitored sales data," Op. 39, fail to suggest that NVIDIA's sales data matched Prysm's speculative conclusions, let alone that Huang knew of that specific information. And the majority fares no better in pointing to generic statements by former employees about "crypto miners purchasing GeForce GPUs in high volumes" to corroborate the Prysm report. *Id.* at 42; *see also, e.g.*, *id.* at 22 (former employee "recounted that … [crypto-]mining enterprises placed huge orders for GeForce GPUs"). Broad-brush statements about high sales volumes or large orders cannot substitute for the requisite "specific reference to the contents" of internal reports. *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1036 (9th Cir. 2002). Much less do the former-employee statements explain how the Prysm report arrived at its conclusion that NVIDIA misrepresented its cryptocurrency-related sales during the relevant time periods, especially when the statements had to do with

different timeframes and were made by employees who never interacted with Huang.

Both separately and altogether, these aspects of the majority's reasoning directly contravene the PSLRA's pleading standard and give future securities fraud plaintiffs an easy strategy to replicate. First, start with an "expert" analysis produced after the fact for the purpose of litigation, using generic market research and simple estimation techniques to conclude that a company knowingly misstated financial metrics. Then, plug any holes in the analysis by referring to other analyses and estimates in the public record, even if they involve different or undisclosed assumption and methods. Finally, for good measure, find some former employees to make indeterminate statements about vaguely similar subject matter, and label that as supposedly insider proof of the experts' specific conclusions. In short, if plaintiffs' lawyers can procure an expert to produce made-for-litigation opinions based on generic information and with the benefit of hindsight, a PSLRA complaint need not be tethered to particular company-specific facts that give rise to a claim of fraud. The PSLRA sought to stamp out,

not encourage, this practice of "pleading fraud by hindsight." *Daou*, 411 F.3d at 1021.

II. The Majority Opinion Marks A Significant Change In Circuit Law That The En Banc Court Should Correct.

The majority's new standard carries implications far beyond the facts of this case. Besides conflicting with this Court's precedents on falsity and scienter, *see* Pet. 2-3, the majority opinion will be seized upon by plaintiffs responding to stock price declines in various contexts and industries. The majority's new standard would also upend a significant body of this Circuit's case law, particularly as the district courts have applied it.

For years, district courts in this Circuit have correctly applied the *Oracle* standard to reject plaintiffs' attempts to rely on expert reports that cannot satisfy the PSLRA's heightened pleading standards. These courts have consistently recognized that, although securities fraud plaintiffs may sometimes rely on expert opinions to support allegations of falsity, such expert analyses must stand on something more concrete than generic market data. *See, e.g.*, *In re Silicon Storage Tech., Inc. Sec. Litig.*, No. C-05-0295, 2007 WL 760535, at *30 (N.D. Cal. Mar. 9, 2007) (citing *Oracle*, 380 F.3d at 1233); *see also, e.g.*, *Sgarlata v. PayPal*

Holdings, Inc., 409 F. Supp. 3d 846, 859 (N.D. Cal. 2019), *aff'd sub nom. Eckert v. PayPal Holdings, Inc.*, 831 F. App'x 366 (9th Cir. 2020); *In re OmniVision Techs., Inc. Sec. Litig.*, 937 F. Supp. 2d 1090, 1107 (N.D. Cal. 2013); *In re Textainer P'ship Sec. Litig.*, No. C-05-0969 MMC, 2006 WL 1328851, at *5 (N.D. Cal. May 15, 2006). That means, as in *Oracle*, that a complaint must contain sufficiently particularized allegations that an expert had access to the defendant's internal information or had some sound basis for offering a hypothesis about what the internal data would have shown.

In *Silicon Storage*, for instance, a Northern District of California court held that plaintiffs plainly failed the *Oracle* standard when they invoked a market-research expert's report to support their claim that the defendant shipping companies fraudulently misstated prices and other financial metrics. 2007 WL 760535, at *30. The complaint there alleged that the expert had looked to "generic market data" and the company's public filings to calculate financial metrics that purportedly revealed a significant gap between actual metrics and what the defendant reported at the time. *Id.* at *10-12. The complaint did not, however, claim that the expert "had any specific data on [the

company's] prices or costs—just that [the firm] based its conclusions on broad categories of data like 'average selling price.'" *Id.* at *14.

In dismissing the complaint, the *Silicon Storage* court considered plaintiffs' reliance on the expert such a "serious problem" that it ruled out even the possibility of amendment. *Id.* at *30. The complaint's incurable defect, the court explained, was "plaintiffs' reliance on generic data from [the expert] as the source of their 'facts' regarding the alleged falsity of defendants' statements regarding … prices and inventory valuations." *Id.* That pleading approach plainly failed the *Oracle* standard, *id.* at *30-32, and the court found "no persuasive authority in support of [plaintiffs'] argument that courts have allowed 'expert' opinion in the form of generic market data—without more—as factual support for claims of securities fraud brought under the PSLRA," *id.* at *31.

Other district courts have likewise correctly understood that, under *Oracle*, plaintiffs may not rely on experts to allege fraud when the expert had no foundation to opine about the company's internal information. In *Sgarlata*, for instance, the court rejected the plaintiff's reliance on an expert's opinion because the complaint contained "no

allegation that [the expert] was familiar with, much less had knowledge of, the specific security architecture of Defendants' privacy network." 409 F. Supp. 3d at 860. And "[u]nlike the expert in [*Oracle*]," the expert in *Sgarlata* "did not actually talk to employees at [Defendants' companies], nor did he review documents that—in and of themselves—demonstrate inconsistencies." *Id.*

Likewise in *OmniVision*, the court rejected an attempt by plaintiffs to use an expert (Expert A) to allege that the defendant semiconductor company fraudulently concealed the loss of an Apple contract in the leadup to production of the iPhone 4S. 937 F. Supp. 2d at 1107. The "problem" under *Oracle* and the PSLRA, the court explained, was that "Expert A [was] not alleged to have ever worked with Apple, much less on the iPhone 4S," and thus "plaintiffs have provided no factual basis supporting Expert A's ability to speak about Apple and the iPhone 4S," which was "the issue in the instant action." *Id.* at 1107-08.

In all these cases, the district courts considered it dispositive under *Oracle* that the plaintiffs failed to describe "with sufficient particularity" how the experts they relied on to allege fraud could

satisfy the PSLRA's particularity requirement. *Oracle*, 380 F.3d at 1233. Without that particularity and factual grounding, an expert's "opinions cannot substitute for facts under the PSLRA." *Yuan v. Facebook, Inc.*, No. 5:18-CV-01725-EJD, 2021 WL 4503105, at *3 (N.D. Cal. Sept. 30, 2021) (quoting *Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 286 (5th Cir. 2006)); *see also City of Royal Oak Ret. Sys. v. Juniper Networks, Inc.*, No. 5:11-CV-04003-LHK, 2013 WL 2156358, at *7 (N.D. Cal. May 17, 2013) (same); *Hershewe v. JOYY Inc.*, No. 2:20-CV-10611-SB-AFM, 2022 WL 1123208, at *3 (C.D. Cal. Mar. 9, 2022) ("Courts require more than … generic affirmations from experts to show falsity."), *aff'd*, No. 22-55377, 2023 WL 3316328 (9th Cir. May 9, 2023). Yet, under the majority's contrary standard here, those decisions would have come out differently: The majority specifically rejected any notion that plaintiffs relying on experts to allege fraud must show how those experts are privy to "internal data" or "witness statements," and then credited the Prysm report's findings despite their lack of grounding in any internal data. Op. 43.

The majority's erosion of the PSLRA's "formidable pleading requirements," *Glazer*, 63 F.4th at 765 (citation omitted), would have

significant and adverse public policy consequences. In enacting the PSLRA, Congress sought to curtail the abuses imposed on the courts and businesses by meritless fishing expeditions disguised as securities litigation. "Congress clearly intended that complaints in these securities actions 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*, 99 F.3d at 328, let alone made-for-litigation expert speculation about what defendants might have known.

As Congress recognized in enacting the PSLRA, "even meritless securities fraud lawsuits impose an exorbitant cost on companies." *In re BofI Holding, Inc. Sec. Litig.*, 977 F.3d 781, 799 (9th Cir. 2020) (Lee, J., concurring in part and dissenting in part); *see also Medhekar*, 99 F.3d at 328 (PSLRA meant "to prevent practice of filing premature or baseless lawsuits in hopes of obtaining grounds through discovery process"); H.R. Conf. Rep. No. 104-369, at 31-32 (noting "significant evidence of abuse in private securities lawsuits," including "the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer"). If left in place, the majority

opinion will undoubtedly invite the very type of exploitation and abuse that the PSLRA attempted to eradicate.

CONCLUSION

The Court should grant the petition for rehearing en banc.

October 20, 2023

Respectfully submitted,

/s/ James N. Kramer

James N. Kramer
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
(415) 773-5923

Daniel A. Rubens
Jodie C. Liu
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Counsel for Amici Curiae Washington Legal Foundation and the National Association of Manufacturers

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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