

No. 23A_____

IN THE
Supreme Court of the United States

NVIDIA CORP. and JENSEN HUANG,
Applicants,

v.

E. OHMAN J:OR FONDER AB, *et al.*,
Respondents.

**APPLICATION FOR AN EXTENSION OF TIME TO FILE A
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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CORPORATE DISCLOSURE STATEMENT

Applicant NVIDIA Corporation has no parent corporations, and no publicly held company owns ten percent or more of NVIDIA Corporation. Applicant Jensen Huang is an individual.

APPLICATION

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), Applicants NVIDIA Corp. and Jensen Huang (collectively, “NVIDIA”), respectfully request a 20-day extension of time, to and including March 4, 2024, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

1. The Ninth Circuit entered judgment on August 25, 2023. *See E. Ohman J:or Fonder AB v. NVIDIA Corp.*, 81 F.4th 918 (9th Cir. 2023), App. 1a-81a. The court denied Applicants’ petition for rehearing en banc on November 15, 2023. *See App. 82a-83a.* Unless extended, the time to file a petition for a writ of certiorari will expire on February 13, 2024. This application is being filed more than ten days before a petition is currently due. *See Sup. Ct. R. 13.5.* The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

2. The Private Securities Litigation Reform Act (PSLRA) was enacted to curb “abuses of the class-action vehicle” in securities litigation, and therefore “placed special burdens on plaintiffs seeking to bring federal securities fraud class actions.” *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81-82 (2006). To survive a motion to dismiss, the PSLRA therefore “requires plaintiffs to state with particularity * * * the facts constituting the alleged violation” as well as “facts giving rise to a strong inference that the defendant acted with the requisite state of mind.’”

Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 313-314 (2007) (quoting 15 U.S.C. § 78u-4(b)(2)).

3. This case presents an important question about the PSLRA’s pleading requirements on which the circuits are divided: whether plaintiffs can satisfy the PSLRA’s heightened pleading standards as to falsity and scienter by relying on a hired-gun expert who prepares a report without any basis to know what the relevant internal company data actually reflected. In the decision below, a sharply divided panel of the Ninth Circuit answered yes, putting it in conflict with other Circuits. App. 17a-23a, 38a-40a. The position of the Ninth Circuit—and others aligned with it—cannot be reconciled with the PSLRA’s text or this Court’s precedents and creates a clear roadmap for plaintiffs to perform an end-run around the guardrails that Congress enacted to curb abusive litigation.

4. Defendant NVIDIA designs and sells graphics processing units (GPUs), which can be used for different purposes but generally enhance a computer’s performance. App. 7a. NVIDIA does not sell GPUs directly to end users, but to distribution partners that ultimately sell to end users. App. 9a.

5. NVIDIA’s “GeForce” branded GPUs are designed and marketed for gaming, but in 2017, users started buying and using GeForce GPUs for cryptocurrency “mining”—essentially, solving highly complicated math problems to acquire cryptocurrency. App. 9a-10a. To address this demand while preserving supply for gamers, NVIDIA introduced a new GPU specifically marketed to cryptocurrency miners, known as the “Crypto SKU.” App. 10a.

6. For 2017 and most of 2018, GeForce sales remained strong despite volatile cryptocurrency demand. By November 2018, however, NVIDIA recognized and promptly disclosed a temporary oversupply of GeForce GPUs and projected a decline in revenue. App. 12a. NVIDIA's stock price dropped after the announcement. *Id.*

7. After the stock price dropped, Plaintiffs filed this lawsuit alleging that NVIDIA's CEO, Jensen Huang, knowingly misrepresented the extent to which NVIDIA's revenues for its GeForce GPUs were driven by sales to cryptocurrency miners. App. 16a. Plaintiffs claim that NVIDIA's oversupply resulted from miners constituting a more significant portion of GeForce sales than NVIDIA disclosed in public statements during the period. *See id.*

8. Plaintiffs did not have any direct evidence, in the form of NVIDIA documents or other sources, to support their claims. Instead, they relied on an opinion drafted by a paid expert witness firm called Prysm. App. 17a-19a. The Prysm report relied on "generic market research" to calculate the total amount of computing power added to three blockchain networks in each quarter during the class period, and then made a series of assumptions to conclude that miners purchased more of NVIDIA's GPUs than NVIDIA had disclosed. App. 65a-66a. Plaintiffs also cited statements from a handful of former NVIDIA employees that NVIDIA kept detailed reports and data about the sales and use of its products, but none of those former employees reported having knowledge of the contents of those reports or data during

the class period, much less knowledge of the contents of any reports or data that Huang actually viewed before making any challenged statements. App. 70a-71a.

9. The District Court dismissed the complaint with prejudice for failure to adequately allege scienter, after giving Plaintiffs one opportunity to amend. App. 6a. A divided panel of the Ninth Circuit reversed. As to falsity, the panel majority held that the Prysm report constituted a particularized allegation that the identified NVIDIA statements about sales to cryptocurrency miners were false. App. 17a-23a. Regarding scienter, the majority concluded that plaintiffs had established the necessary strong inference of scienter based on the assumption that internal sales reports viewed by Huang “would have” reflected the contents of the *post hoc* calculations in the Prysm report. App. 38a-40a.

10. Judge Sanchez dissented, explaining that the majority’s opinion “significantly erodes the heightened pleading requirements for alleging securities fraud under the PSLRA.” App. 69a. He pointed out that “the majority’s reasoning” would allow plaintiffs to clear the PSLRA’s pleading bar simply “by producing an expert witness whose *post hoc* calculations diverge from a defendant’s prior public statements.” *Id.*

11. NVIDIA sought rehearing en banc, which the Ninth Circuit denied. App. 82a-83a. Judge Sanchez again noted his dissent. *Id.* The Court then granted NVIDIA’s motion to stay the mandate pending NVIDIA’s forthcoming certiorari petition. App. 84a. The Court stated that if NVIDIA filed its petition within 90 days

from the date of its stay order—that is, by March 4, 2024—the mandate would remain stayed until this Court ruled on NVIDIA’s certiorari petition. *Id.*

12. The Ninth Circuit’s holding that an after-the-fact expert report can be used to satisfy the heightened pleading standards of the PSLRA and Federal Rule of Civil Procedure 9(b) splits from holdings in other circuits. As to falsity, at least two circuits have held, contrary to the panel’s holding here, that such an expert report “cannot rescue” falsity allegations “unless that opinion was based on particularized facts sufficient to state a claim for fraud.” *Arkansas Pub. Emps. Ret. Sys. v. Bristol-Myers Squibb Co.*, 28 F.4th 343, 354 (2d Cir. 2022); *see also Financial Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 286 (5th Cir. 2006). As to scienter, at least four circuits have held that Plaintiffs must specifically allege the contents of internal reports that executives are alleged to have viewed. *See Anderson v. Spirit Aerosystems Holdings, Inc.*, 827 F.3d 1229, 1241 (10th Cir. 2016); *California Pub. Emps.’ Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 147-148 (3d Cir. 2004); *Southland Sec. Corp. v. INSpire Ins. Sols. Inc.*, 365 F.3d 353, 370-371 (5th Cir. 2004); *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 72-73 (2d Cir. 2001). In contrast, at least one other circuit—the First Circuit—agrees with the Ninth Circuit’s holding that a plaintiff can satisfy the PSLRA’s burden as to scienter when the court could “infer” what internal documents would have said, even where “the contents of the reports are not described.” *In re Stone & Webster, Inc., Sec. Litig.*, 414 F.3d 187, 211 (1st Cir. 2005); *accord* App. 39a (Ninth Circuit panel majority allowing Plaintiffs to proceed based on inference that internal reports “would have shown”).

13. The issues in this case are exceptionally important, and the Ninth Circuit is on the wrong side of the circuit splits described above. If all a would-be class action plaintiff must do to survive a motion to dismiss under the PSLRA is hire an expert, then the statute would be effectively neutralized as a bulwark against abusive litigation. App. 69a. This Court's review is necessary to restore uniformity and ensure that the PSLRA remains capable of serving the purpose for which Congress enacted it.

14. Good cause exists for a 20-day extension of the time to file a certiorari petition. The Ninth Circuit has agreed to stay its mandate until March 4, 2024, to allow NVIDIA time to file a certiorari petition. App. 84a. This extension request would simply align the time to file in this Court with the existing Ninth Circuit order. Additionally, counsel have a number upcoming argument and briefing deadlines, including: (1) a reply in support of certiorari in *Boresky v. Graber*, No. 23-384 (U.S.), to be filed Dec. 27, 2023; (2) a response brief in *Krahling v. Merck & Co. Inc.*, No. 23-2553 (3d Cir.), due January 16, 2024; (3) a petition for certiorari in *Bassett v. Arizona*, No. 23A4785 (U.S.) due January 31, 2024; (4) a petition for certiorari in *Caswell v. Colorado*, No. 23A447 (U.S.), due January 31, 2024; (5) a response brief on the merits in *Nat. Rifle Ass'n v. Vullo*, No. 22-842 (U.S.), due February 20, 2024; and (6) post-trial briefing in *Epic Games, Inc. v. Google LLC*, No. 3:20-cv-05671-JD (N.D. Cal.). The requested extension will ensure that counsel have time to fully brief the important issues in this case.

15. For all these reasons, Applicants NVIDIA and Jensen Huang respectfully request that the Court extend the time to file a certiorari petition to and including March 4, 2023.

Respectfully Submitted,

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