No. 12-1457

In the Supreme Court of the United States

AMAG Pharmaceuticals, Inc.; Brian J.G. Pereira, M.D.; David A. Arkowitz; Joseph V. Bonventre, M.D.; Michael Narachi; Robert J. Perez; Lesley Russell, M.D.; Davey S. Scoon; Ron Zwanziger; Morgan Stanley & Co. Incorporated; J.P. Morgan Securities LLC; Goldman, Sachs & Co.; Leerink Swann LLC; Robert W. Baird & Co. Incorporated; Canaccord Genuity Inc.,

Petitioners,

v.

Silverstrand Investments; Briarwood Investments, Inc.; Safron Capital Corporation, on behalf of themselves and all others similarly situated,

Respondents.

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

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INTRODUCTION

The First Circuit held below that the materiality standard articulated by this Court in *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988), and *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1318 (2011), is inapposite in Section 11 cases premised on the alleged omission from a registration statement of information required under Item 303 of Regulation S-K. That holding ignores the plain language of Section 11, which imposes liability only where the allegedly omitted information was both "required to be stated" and "material" to investors. It also exacerbates a split among the Circuits, with five Circuits uniformly holding that the *Basic*/*Matrixx* materiality standard applies in Section 11 cases (including in cases premised on Item 303 of Regulation S-K), while the First and Ninth Circuits have reached precisely the opposite conclusion. In opposing certiorari, Respondents misconstrue the First Circuit's decision and those of its sister Circuits and inexplicably argue that the decision comports with *Matrixx* notwithstanding its express rejection of the *Basic*/*Matrixx* materiality standard. The Court should grant review to resolve this significant conflict among the Circuits, establish uniform pleading requirements under Section 11 and ensure that *Matrixx* is properly interpreted and applied.

ARGUMENT

I. THE CIRCUITS ARE SQUARELY DIVIDED ON THE QUESTION PRESENTED

The question presented for review is:

> To survive a motion to dismiss, must a plaintiff asserting a Section 11 claim premised on an alleged violation of SEC regulations plead facts establishing that the allegedly omitted information is material under the standard enunciated in *Basic* and *Matrixx*?

As amply demonstrated in the Petition, five Circuits – the Second, Third, Fifth, Eighth and Eleventh – answer this question in the affirmative. They hold that a duty to disclose and materiality under *Basic*/*Matrixx* are separate elements, both of which must be satisfied before Section 11 liability will attach. By sharp contrast, the First and Ninth Circuits have concluded that a Section 11 plaintiff will state a claim so long as the complaint adequately pleads a violation of Item 303 of Regulation S-K and, accordingly, that no *Basic*/*Matrixx* materiality analysis is appropriate or required in such cases. Contrary to Respondents' assertion, the conflict among these Circuits and the concomitant need for review by this Court are readily apparent.

A. Five Circuits Require Both a Duty To Disclose and Materiality Under *Basic/Matrixx*, Including in Section 11 Omissions Cases Premised on Item 303

1. The Second Circuit

Respondents do not dispute that the Second Circuit has consistently applied the *Basic / Matrixx* materiality standard in assessing whether Section 11 claims predicated on alleged violations of Item 303 have been adequately pleaded. (*See* Petition at 24–26 (citing cases).) For instance, in *Litwin v. Blackstone Group, L.P.*, the Second Circuit held in no uncertain terms that "it is only when there is both materiality [under *Basic*] and a duty to disclose [under Item 303] that a company may be held liable for omitting information from a registration statement . . . [under Section 11]." 634 F.3d 706, 723 (2d Cir. 2011) (emphasis added). Similarly, in *Arfa v. Mecox Lane Ltd.*, the Second Circuit found that data omitted from defendant's registration statement constituted a known trend or uncertainty required to be stated under Item 303, but nevertheless affirmed dismissal of plaintiffs' Section 11 claim as the allegedly omitted data was "not material" under *Basic*. 504 F. App'x 14, 16 (2d Cir. 2012) (finding that the omitted third and fourth quarter data "would not [have] alter[ed] the 'total mix' of available information" insofar as the trends evinced by that data were otherwise adequately disclosed in the registration statement).[1] These decisions make clear that, in the

[1] Contrary to Respondents' assertion, the *Arfa* court affirmed the dismissal of the plaintiff's Section 11 claim not "because there was

Second Circuit, the duty-to-disclose and materiality elements are distinct, and a failure to plead facts satisfying both elements is grounds for dismissal of a Section 11 claim premised on Item 303.

Undeterred, Respondents cite *Panther Partners Inc. v. Ikanos Communications, Inc.*, 681 F.3d 114 (2d Cir. 2012), for the proposition that the Second Circuit "can and does find Section 11 liability premised on a violation of Item 303 without performing a separate analysis under *Basic*." (BIO at 22.) *Panther* stands for no such thing.

The issue in *Panther* was whether the district court erred in denying plaintiff leave to file an amended complaint. The proposed amended complaint alleged that defendant Ikanos knew but failed to disclose in its registration statement that there were significant defects in the semiconductor chips sold to its two largest customers which might require return of all of the chips sold to those customers. 681 F.3d at 121.[2] The district court concluded that these allegations failed to adequately plead a violation of Item 303 and declined leave to amend solely on that basis. On appeal, the Second Circuit vacated and remanded with instructions to grant leave. The court held that the

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no omission" (BIO at 25), but because the third and fourth quarter data allegedly omitted was immaterial as a matter of law under *Basic*. 504 F. App'x at 16.

[2] Rather than disclosing these known defects, the registration statement provided only a "generic" warning that Ikanos's products "frequently contain[ed] defects and bugs." *Panther*, 681 F.3d at 122.

amended pleading "plausibly allege[d] that the defect issue, and its potential impact on Ikanos's business, constituted a known trend or uncertainty" for purposes of Item 303, and that the district court had erred in reaching the opposite conclusion. *Id.* Notably, the court did not conclude, as Respondents assert, that plaintiff had adequately pleaded a Section 11 claim or that such a determination could be made absent a *Basic*/*Matrixx* materiality analysis. The materiality element was not contested or at issue on appeal. Moreover, *Panther* cites *Litwin* with approval, *id.* at 120, and *Litwin* expressly holds that "both materiality [under *Basic*] and a duty to disclose [under Item 303]" are required to plead a viable Section 11 claim. *Litwin*, 634 F.3d at 723 (emphasis added). Thus, Respondents' assertion that "the Second Circuit does not require a separate analysis of materiality under *Basic*" (BIO at 23) finds no support in *Panther* and cannot be reconciled with *Arfa* or *Litwin*.

2. The Eleventh Circuit

The Eleventh Circuit's decision in *Oxford Asset Management, Ltd. v. Jaharis*, 297 F.3d 1182 (11th Cir. 2002), also demonstrates the two-part inquiry required by Section 11 and rejected by the First Circuit below. There, plaintiff alleged that the defendant issuer should have disclosed in its registration statement prescription volume data generated in the six weeks following FDA approval of the company's drug. *Id.* at 1189–90. The court began by explaining that a duty to disclose and materiality are distinct elements: "To avoid dismissal . . . , plaintiffs must properly allege: 1) the prospectus contained an omission; 2) the omission was material; 3) defendants were under a duty to

disclose the omitted material information; and 4) that such information existed at the time the prospectus became effective." *Id.* at 1189. The court then went on to consider the elements separately. It first applied the "well known" test of materiality under *Basic*, concluding that the "immateriality of the six weeks of prescription information is arguably not so plain that reasonable minds could not differ about it." *Id.* at 1190. Accordingly, the court assumed for purposes of the motion to dismiss that the omitted prescription volume information was material. *Id.* However, the court nevertheless affirmed dismissal of the complaint on the ground that plaintiff had failed to plead facts establishing a duty to disclose that information. *Id.* at 1192. The court found that there was no general duty of disclosure, the information was not required under Item 303, and omission of the data did not render any other statements in the prospectus materially misleading. *Id.* at 1190–92. Thus, like the Second Circuit, the Eleventh Circuit analyzes materiality and duty to disclose separately and applies the *Basic*/*Matrixx* standard in assessing whether a plaintiff has adequately pleaded the materiality element of a Section 11 claim.

3. The Third, Fifth and Eighth Circuits

The Petition cites numerous cases from the Third, Fifth and Eighth Circuits holding that materiality is an essential element of any Section 11 claim and applying the *Basic*/*Matrixx* standard in assessing whether that element has been satisfied. *See, e.g.*, *Kapps v. Torch Offshore, Inc.*, 379 F.3d 207, 215 (5th Cir. 2004) (applying *Basic*/*Matrixx* materiality standard to Section 11 claim premised on defendant's alleged

violation of Item 303). (*See also* Petition 27–28 (citing additional cases).) Respondents do not explain – because they cannot – how these cases can be reconciled with the First Circuit's holding below that the *Basic* / *Matrixx* materiality standard is "inapposite" in Section 11 cases premised on Item 303. (App. 24 n.9.)

B. The First and Ninth Circuits Reject Application of the *Basic*/*Matrixx* Materiality Standard in Section 11 Cases Premised on Item 303

The First Circuit's decision exacerbates a preexisting Circuit split resulting from the Ninth Circuit's opinion in *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998). The issue in *Steckman* was whether the district court properly dismissed plaintiff's Section 11 claim, which was premised on allegations that defendants failed to disclose a slowdown in revenues constituting a known trend under Item 303. Before considering whether plaintiff had adequately pleaded that the undisclosed financial information constituted an Item 303 trend, the Ninth Circuit first dispensed with defendants' "threshold" argument that materiality under *Basic* is a necessary element of a Section 11 claim in cases predicated on Item 303, concluding that it is not. *Id.* ("[a]llegations which state a claim under Item 303(a) of Regulation S-K also sufficiently state a claim under Section[] 11.") That is, the *Steckman* court held that allegations establishing an omission of information required to be stated under Item 303 will give rise to Section 11 liability irrespective of whether a reasonable investor would view the omitted information as

significantly altering the total mix of information available about the company. *Id.* That holding is directly at odds with the decisions of the Second, Third, Fifth, Eighth and Eleventh Circuits cited above.

So, too, is the First Circuit's holding below. Respondents concede, as they must, that the First Circuit "did not rely" on *Basic* or *Matrixx* in considering whether the complaint adequately stated a Section 11 claim. (BIO at 2, 3.) However, that concession is only the half of it. The First Circuit went out of its way to explain that the *Basic*/*Matrixx* materiality standard does not apply in Section 11 omissions cases premised on Items 303 and 503. (App. 24 n.9) Accordingly, the court confined its analysis to the question whether the 23 SAEs evinced a known trend or uncertainty that AMAG's management should reasonably have expected would have a material unfavorable impact on net sales or revenues (*i.e.*, whether AMAG had a duty of disclosure under Item 303). (App. 16–25.) The court did not consider, as Respondents misleadingly suggest, whether disclosure of the 23 SAEs would have been viewed by a reasonable investor as significantly altering the total mix of information (*i.e.*, whether disclosure of the 23 SAEs would have been material to shareholders' investment decisions).[3] To the contrary, like the Ninth Circuit's decision in *Steckman*, and contrary to the plain language of Section 11 and the decisions of five sister Circuits, the First Circuit's

[3] The notion that the First Circuit went to the trouble of rejecting the *Basic*/*Matrixx* materiality standard, only to surreptitiously apply it, as Respondents suggest (BIO at 2–4, 28–29), is illogical and finds no support in the text of the decision.

decision simply writes the materiality element out of Section 11.

II. THE OUTCOME BELOW TURNS ON THE ANSWER TO THE QUESTION PRESENTED

Unable to refute the existence of a significant Circuit split, Respondents assert that the Court should nevertheless deny review on the ground that the result below does not depend on resolution of the question presented. Respondents are wrong. Application of the *Basic* / *Matrixx* materiality standard would necessitate affirmance of the district court's order of dismissal because disclosure of the 23 SAEs would not have altered *Feraheme's* safety profile, significantly or otherwise. To the contrary, the 23 SAEs Respondents assert should have been disclosed (even accepting all of Respondents' allegations as to their nature and frequency) were of the same nature and occurred at a much lower rate than the SAEs observed during clinical trials and publicly disclosed by AMAG both before the Offering and in the Offering Documents. (*See* Petition at 5–9, 12 & n.8, 14 n.10.) Moreover, AMAG also disclosed how these SAEs might negatively affect its revenues and future prospects. (*Id.* at 6–8.) As a result, disclosure of the 23 SAEs would not have significantly altered the total mix of information available, and their omission from AMAG's registration statement does not give rise to Section 11 liability under the appropriate standards. *See Arfa*, 504 F. App'x at 16 (finding that omitted financial data revealed an Item 303 trend or uncertainty, but nevertheless affirming dismissal of Section 11 claim as the trend had otherwise been thoroughly disclosed by the company).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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