No. 14-975

IN THE
Supreme Court of the United States

ROBERTO COHEN,

Petitioner,

v.

NVIDIA CORP., ET AL.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners sued NVIDIA alleging violations of § 10(b) of the Exchange Act and Rule 10b-5 based on the timing of certain public disclosures related to a possible defect in a high-tech microprocessor component. "To establish liability under § 10(b) and Rule 10b-5, a private plaintiff must prove that the defendant acted with scienter, a mental state embracing intent to deceive, manipulate, or defraud." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (internal quotation marks and citation omitted). The Ninth Circuit held Petitioners failed to plead facts that could support a finding that NVIDIA acted with scienter. Instead, the court concluded that the "most compelling inference that we can reasonably draw is that NVIDIA was first investigating the root cause, and then the scope, of the [component] Problem; once it determined that its liability would exceed its normal reserves, NVIDIA disclosed the problem to investors." Pet. App. 24.

The question presented is:

Did the Ninth Circuit correctly rule that Petitioners failed to allege sufficient facts establishing scienter?

CORPORATE DISCLOSURE STATEMENT

Respondents in this Court, defendants-appellees below, are NVIDIA Corporation and Jen-Hsun Huang. Jen-Hsun Huang is an individual. NVIDIA Corporation is a publicly traded company (NASDAQ: NVDA). No other publicly held company owns 10% or more of its stock.

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INTRODUCTION

Petitioners present a question that has no bearing on the outcome of this case. Petitioners ask whether Item 303 of Regulation S-K establishes a duty to disclose information that can provide the basis for an actionable material omission under § 10(b) or Rule 10b-5. But the district court dismissed Petitioners' complaint for reasons entirely unrelated to any Item 303 issue. The case was dismissed for failure to plead an inference of scienter "'at least as compelling' as 'plausible, nonculpable explanations.'" Pet. App. 70 (citations omitted). The Ninth Circuit affirmed on the same rationale. Pet. App. 43. Review is unwarranted where, as here, the question presented has no bearing on the outcome of a case.

Regarding the Item 303 issue, Petitioners describe a "conflict" that rests almost entirely on the Second Circuit's recent decision, *Stratte-McClure v. Stanley*, 776 F.3d 94, 103 (2d Cir. 2015). But there again, as in the decision below, the dispositive issue was the plaintiffs' failure to satisfy the scienter requirement. Moreover, the Second Circuit's comments about Item 303 are largely aligned with the Ninth Circuit's discussion. Petitioners highlight the Second Circuit's statement that the Ninth Circuit held "Item 303 violations are never actionable under 10b-5." But the Ninth Circuit's decision is at most ambiguous on this point. Among other things, the Ninth Circuit stated that an Item 303 violation is not "inevitably" actionable under § 10(b) or Rule 10b-5, suggesting that § 10(b) may require disclosure of some Item 303 information. Pet. App. 22. Insofar as any linguistic divergence among the two circuits exists,

these issues would benefit from further percolation in the courts of appeals.

Contrary to Petitioners' suggestion, none of the other circuit court decisions are in tension with the decision below. And there is no exigency requiring this Court to step in now: Companies in every circuit remain subject to uniform Item 303 disclosure requirements and must continue to comply with these requirements or risk SEC enforcement action.

Thus, review by this Court is not warranted, and the petition should be denied.

STATUTORY BACKGROUND

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, provides, in relevant part, that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange … (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

The SEC promulgated Rule 10b-5, 17 C.F.R. § 240.10b-5(b), to implement § 10(b). This rule makes it unlawful:

> for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, … (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

Item 303 of Regulation S-K, 17 C.F.R. § 229.303, directs companies to include certain information in the Management Discussion and Analysis sections of their annual and interim financial reports. Specifically it requires companies to:

> Describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations.

STATEMENT OF THE CASE

NVIDIA Designs Sophisticated Computer Chips

NVIDIA designs complex, state-of-the-art microprocessor components, and sells the components to computer manufacturers. These manufactures incorporate NVIDIA's components alongside other components to generate graphics and assist with computer performance.

Like many complex, interconnected technologies, microprocessors carry an inherent risk of failure. Pet. App. 6. To protect shareholders from this risk, NVIDIA does at least two things. "NVIDIA includes in its SEC forms a statement claiming that '[its] products may contain defects or flaws' and warning investors that '[it] may be required to reimburse customers for costs to repair or replace the affected products.'" *Id.* at 25. And "NVIDIA automatically records a reduction to revenue as a cash reserve to cover costs relating to the inevitable product failures." *Id.*

The "Material Set" Problem

Computer processors contain two main parts—the chip, or "die," and the circuit board, or "substrate" that connects the chip to the motherboard. *Id.* at 6. NVIDIA connects the chip to the circuit board through "bumps" of solder—a mixture of lead and tin—that transfer electrical signals between the chip and the computer. *Id.* This connection mechanism is called the "Material Set." *Id.*

In September 2006, according to the complaint, the solder on certain NVIDIA chips experienced cracking when subjected to excessive pressure during product testing. *Id.* at 7. NVIDIA allegedly suspected that its use of a "eutectic solder"—a solder with a low lead content—might be causing the solder to crack when subjected to excessive pressure. *Id.* NVIDIA began substituting some high-lead solders in place of some eutectic solders. *Id.*

Sometime in 2007, Hewlett-Packard ("HP") discovered cracks in the solder bumps inside certain NVIDIA chips. Pet. App. 26. The cause of the problem at this time was far from clear. NVIDIA believed "customer-induced damage or [computer] design issues" were to blame. *Id.* at 8. In November 2007, HP believed that computer temperature fluctuations caused the chip problems. *Id.* at 8, 30. With NVIDIA's help, HP issued a software patch in December 2007 to reduce temperature fluctuations by enabling its computers' fans to run continuously. *Id.* at 27-28 & n.11.

From January to March 2008, HP conducted extensive testing to determine the root cause of the solder bump cracks. *Id.* at 31. After 13 continuous weeks of testing induced no chip failures, HP determined that temperature fluctuations were not to blame. *Id.* The cause and the culprit of the cracking remained unknown. In mid-2008, HP finally concluded that the chip failures were actually caused by chip operation within a narrow temperature range. *Id.* HP then notified NVIDIA that it was making a claim for reimbursement for the problem.

NVIDIA Discloses The Problem To Investors

In its May 22, 2008 quarterly report, NVIDIA promptly disclosed that one of its customers asserted claims for costs associated with a Material Set defect. *Id.* at 10. NVIDIA disclosed that "the product was included in a significant number of the customer's computer products and had been shipped to other customers in significant quantities." *Id.* "NVIDIA explained that it was 'evaluating the potential scope' of the problem and 'cause of the alleged defect and the merits of the customer's claim.'" *Id.* NVIDIA indicated that it could not estimate whether the cost would exceed its product warranty reserve at that time. *Id.*

After intensive further study of the chip problem, on July 2, 2008, NVIDIA informed investors that it "would be taking 'a $150 to $200 million charge to cover warranty, repair, return, replacement, and other costs 'arising from a weak die/packaging material set in certain versions of [its] previous [chips] used in notebook systems.'" *Id.* at 10-11. NVIDIA noted it had "not been able to determine a root cause for these failures." *Id.* at 11 n.4.

Petitioners Sue

Petitioners filed this securities class action contending that NVIDIA violated § 10(b) of the Exchange Act and Rule 10b-5 by failing to disclose the chip problem sooner. Petitioners contended that the delay made certain statements about NVIDIA's financial outlook materially misleading. *Id.* at 52-55. Petitioners also contended that NVIDIA violated § 10(b) by failing to disclose the risk that the materi-

al set problem could lead to a substantial charge against the company. In their view, Item 303 required NVIDIA to disclose this information, and NVIDIA violated § 10(b) by failing to do so. *Id.* at 52.

The District Court Holds That Petitioners Failed To Plead Scienter

The district court dismissed the complaint. Pet. App. 70. To establish a claim under § 10(b) or Rule 10b-5, plaintiffs must, among other things, plead with particularity facts establishing that the defendants acted with scienter, "a mental state embracing intent to deceive, manipulate, or defraud." *Tellabs Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (citation omitted). The district court held that Petitioners' allegations failed to establish a compelling inference of scienter. Petitioners provided no "basis to infer that [NVIDIA] appreciated the severity of the problem or recognized during the class period that any extraordinary liability was likely to result," Pet. App. 62, that "would exceed the company's normal reserve," *id.* at 69. Accordingly, the court found a "more reasonable, competing inference is that the company was investigating the scope of the issue" and waiting to determine whether it would incur unexpected liability before making a disclosure. *Id.* at 70.

The Court Of Appeals Holds That Petitioners Failed To Plead Scienter

The court of appeals affirmed. Pet. App. 5.

Carefully evaluating the factual allegations pled in the complaint, the court concluded that the com-

plaint failed to "state with particularity," Fed. R. Civ. P. 9(b), a compelling inference that NVIDIA "intentionally misled investors, or [was] at least deliberately reckless, by not disclosing NVIDIA's liability for chip failures prior to July 2008." Pet. App. 25.

In agreeing that Petitioners failed to adequately plead a plausible intent by NVIDIA to mislead investors, the court relied on the following: (1) "product flaws are very common in the semiconductor industry," *id.* at 43, (2) NVIDIA regularly "warns investors of this possibility and sets aside a reserve to account for costs related to those flaws," *id.* at 43, (3) Petitioners failed to allege that NVIDIA knew "prior to July 2008[] that NVIDIA's liability would exceed its normal reserve set aside for costs associated with product failures," *id.* at 29, and (4) Petitioners "provide[d] no factual basis to discount" NVIDIA's contention that "in May 2008 (and even July 2008) that it had not yet determined the root cause of the product failures," *id.* at 43.

Accordingly, the Ninth Circuit concluded the "most compelling inference that we can reasonably draw is that NVIDIA was first investigating the root cause, and then the scope, of the [component] Problem; once it determined that its liability would exceed its normal reserves, NVIDIA disclosed the problem to investors." *Id.* at 24.

The Ninth Circuit also rejected Petitioners' claim that the district court's scienter analysis failed to account for their Item 303 argument by focusing on whether NVIDIA knew it would incur unexpected liability. Petitioners contended that it was immaterial whether NVIDIA knew "that the 'scope of the

problem' will result in 'extraordinary liability' that 'would exceed its normal reserve,'" Appellants' Op. Br. at 20, because "[u]nder Item 303, the likelihood of 'extraordinary liability' is not the test for a duty to disclose," *id.* at 26. In Petitioners' view, "[o]nce Defendants knew of—but withheld—facts that they had a duty to disclose [under Item 303], they acted with scienter." *Id.* at 20.

The court rejected Petitioners' argument "that the district court's analysis should have focused on whether NVIDIA acted with scienter *in failing to make the Item 303 disclosure*." Pet. App. 18 (emphasis added). The court explained that "the 'demonstration of a violation of the disclosure requirements of Item 303 does not lead inevitably to the conclusion that such disclosure would be required under Rule 10b-5.'" *Id.* at 22 (quoting *Oran v. Stafford*, 226 F.3d 275, 278 (3d Cir. 2000). Rather, "[s]uch a duty to disclose must be separately shown according to the principles set forth by the Supreme Court in *Basic* [*v. Levinson*, 485 U.S. 224 (1988)] and *Matrixx Initiatives* [*v. Siracusano*, 131 S. Ct. 1309 (2011)]." *Id.* at 23.

REASONS TO DENY CERTIORARI

The petition should be denied because (I) the judgment below rests on an adequate independent ground unchallenged here, and (II) it is at best premature for this Court to consider whether or when Item 303 can form the basis for a material omission under § 10(b).

I. The Alleged Conflict Has No Bearing On The Outcome Of This Case.

Petitioners' focus on whether Item 303 always establishes a duty to disclose information is misplaced. This question does not implicate the Ninth Circuit's dispositive holding that Petitioners failed to plead a compelling inference of scienter.

"To establish liability under § 10(b) and Rule 10b-5, a private plaintiff must prove that the defendant acted with scienter, a mental state embracing intent to deceive, manipulate, or defraud." *Tellabs, Inc.*, 551 U.S. at 319 (internal quotation marks omitted). A complaint adequately pleads scienter "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Id.* at 324.

Both the district court and the Ninth Circuit correctly held that Petitioners' allegations failed to satisfy that standard. "Plaintiffs never allege[d] that … NVIDIA knew at … any time prior to July 2008[] that NVIDIA's liability would exceed its normal reserve set aside for costs associated with product failures." Pet. App. 29. Accordingly, the court correctly

concluded that "a more compelling inference is that NVIDIA did not disclose because it was investigating the extent of the problem, whether it was responsible for it, and if so, whether it would exhaust the reserve." *Id.* at 43.

Nevertheless, Petitioners contend this case presents the question: "Whether Item 303 of Regulation S-K forms the basis for a duty to disclose otherwise material information for purposes of an omission actionable under § 10(b) … and Rule 10b-5." Pet. i. But the answer to that question has no bearing on whether Petitioners adequately pled scienter. The Ninth Circuit's unchallenged scienter analysis applies equally to alleged omissions under Item 303. *Id.* at 56. If NVIDIA did not act with an intent to deceive investors about material information in failing to disclose the chip problem sooner, then it could not have acted with an intent to deceive in failing to disclose information concerning these same "trends and uncertainties" under Item 303. Regardless of whether Item 303 creates a duty to disclose under § 10(b), NVIDIA would have the same knowledge of the material set problem and its potential effect on the company, and it would have the same mental state with respect to disclosure to investors.[1]

Petitioners wait until page 34 of their petition to discuss how a duty to disclose under Item 303 can

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[1] One district court in the Ninth Circuit has accordingly already held that the opinion "focused on whether plaintiffs' allegations were sufficient to create a strong inference of scienter" and is "inapposite" to § 10(b)'s other elements. *In re Intuitive Surgical Secs. Litig.*, No. 5:13-cv-01920-EJD, 2014 WL 7146215, at *3 (N.D. Cal. Dec. 15, 2014).

establish scienter. What they say makes plain that Petitioners' question presented has no bearing on the outcome of this case: "Defendants' knowledge necessary to establish a violation of Item 303 is *an independent inquiry* distinct from whether defendants acted with scienter for the purposes of a § 10(b) claim." Pet. 34 (emphasis added). In other words, regardless of the answer to the question presented by Petitioners, their complaint would still fail to allege scienter. The Item 303 issue is entirely beside the point. The complaint was properly dismissed for failure to plead a compelling inference of scienter.

Because the court of appeal's decision rests on an independent basis not challenged here, this Court should deny the petition. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution [of a conflict] can await a day when the issue is posed less abstractly.").

II. The Alleged Conflict Rests On Dicta That Interprets Ambiguous Comments In The Decision Below.

Petitioners contend that the "circuits are now sharply split as to whether a failure to disclose otherwise material information required to be disclosed by Item 303 can constitute an actionable material omission for the purpose of a claim under §10(b)." Pet. 4. Petitioners' lead case is the Second Circuit's recent decision in *Stratte-McClure v. Stanley*, 776 F.3d 94, 103 (2d Cir. 2015). But *Stratte-McClure*

does not establish any meaningful conflict with the decision below and neither do any of the other cases cited by Petitioners.

First, *Stratte-McClure*'s discussion of Item 303's duty to disclose is dicta. As Petitioners recognize (at 23 n.3), the Second Circuit dismissed the plaintiffs' complaint in *Stratte-McClure* for the same reason the Ninth Circuit dismissed the complaint below: The plaintiffs failed to establish a compelling inference of scienter. *Stratte-McClure*, 776 F.3d at 107. Like the Ninth Circuit, the Second Circuit held the "'most cogent inference' from the[] allegations" was "that [the company] delayed releasing information … to carefully review all of the relevant evidence and was at worst negligent as to the effect of the delay on investors." *Id.*; *accord* Pet. App. 43. Because the Second Circuit dismissed the complaint for failure to plead scienter, any discussion of the other elements of a § 10(b) claim was unnecessary to the result. The court's separate discussion of Item 303's duty to disclose is dicta. *See Cal. Pub. Emps. Ret. Sys. v. Worldcom, Inc.*, 368 F.3d 86, 106 n.19 (2d Cir. 2004) (characterizing as dicta statement in earlier opinion "unnecessary to the decision in the case").

Second, the comments in *Stratte-McClure* regarding Item 303 are largely aligned with the Ninth Circuit's opinion below. Both circuits agree that the "failure to make a required disclosure under Item 303 … is not by itself sufficient to state a claim for securities fraud under Section 10(b)." 776 F.3d at 102; *accord* Pet. App. 21. Both circuits appreciated that "[m]anagement's duty to disclose under Item 303 is much broader than what is required under the standard pronounced in *Basic*." Pet. App. 21; *accord*

Stratte-McClure, 776 F.3d at 102. And both courts recognized that any "violation of Item 303's disclosure requirements can only sustain a claim under Section 10(b) and Rule 10b-5 if the allegedly omitted information satisfies *Basic*[]." *Stratte-McClure*, 776 F.3d at 103; *accord* Pet. App. 23.

Third, it is far from clear that the Ninth Circuit and Second Circuit will ultimately reach divergent results in similar cases concerning Item 303 disclosures. To be sure, the Second Circuit's statement in dicta that Item 303 creates "a duty to disclose" is in tension with the Ninth Circuit's statement that "Item 303 does not create a duty to disclose for purposes of Section 10(b)." But the Ninth Circuit's opinion does not answer the meaningful questions of whether and when Item 303 violations may ever be cognizable under § 10(b), perhaps because scienter was the only dispositive issue.

The Ninth Circuit left the door open for some Item 303 violations to give rise to actionable omissions under Rule 10(b). The court repeatedly emphasized that what must be disclosed under Item 303 "*is not necessarily* required" under § 10(b), suggesting that § 10(b) may require disclosure of some Item 303 information. Pet. App 21; *see also id.* at 22 ("violation of the disclosure requirements of Item 303 *does not lead inevitably* to the conclusion that such disclosure would be required under Rule 10b-5" (quoting *Oran*, 226 F.3d at 288) (emphasis added)); *id.* at 23 ("plaintiffs *may not rely solely* upon Item 303 to prove that defendants failed to disclose material information as a matter of law" (emphasis added) (internal quota-

tion marks and citation omitted)).[2] The Second Circuit's suggestion that the Ninth Circuit ruled that "Item 303 violations are never actionable under 10b-5," *Stratte-McClure*, 776 F.3d at 103, does not square with the Ninth Circuit's actual statements. Indeed, Petitioners elsewhere acknowledge that such qualified language—*e.g.*, "does not lead inevitably"—"indicate[s] that in certain circumstances a failure to disclose otherwise material information in violation of Item 303 could give rise to an actionable omission under § 10(b)." Pet. 5-6.

Nor does the decision below conflict with the Second Circuit's decision in *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 70-74 (2d Cir. 2001). As the Second Circuit recognized in *Stratte-McClure*, that case "involved affirmatively misleading statements," 776 F.3d at 101 n.4, so the duty to disclose arose from Rule 10b-5's requirement to disclose information necessary to make statements made not misleading. *See Matrixx*, 131 S. Ct. at 1321-22. Additionally, no party raised the issue whether Item 303 gave rise to a duty to disclose under Rule 10b-5, and the court did not address it.

Similarly, none of the other circuit cases discussed by Petitioners help show any conflict. The

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[2] Moreover, after stating that Item 303 did not create a categorical duty to disclose, the Ninth Circuit then stated that "[s]uch a duty to disclose must be separately shown according to the principles set forth by the Supreme Court in *Basic* and *Matrixx Initiatives*." Pet. App. 23. If the court had concluded that Item 303 violations could *never* constitute § 10(b) violations, it would have had no reason to suggest that a duty to disclose Item 303 information could be separately shown.

Third Circuit in *Oran* reached the same conclusion as the Ninth Circuit, holding that the "demonstration of a violation of the disclosure requirements of Item 303 does not lead inevitably to the conclusion that such disclosure would be required under Rule 10b-5. *Such a duty to disclose must be separately shown*." 226 F.3d at 278 (emphasis added and citation omitted). If this language seems familiar, it's because the Ninth Circuit relied on it. Pet. App. 22. Petitioners are therefore incorrect that the "Ninth Circuit ignored … *Oran's* actual holding that 'a violation of SK-303's reporting requirements does not automatically give rise to a material omission.'" Pet. 31.[3]

Petitioners also suggest (at 13-22) that the Ninth Circuit's decision conflicts with decisions of other circuits that recognize that a regulation may give rise to a duty to disclose under § 10(b). But most of the cited decisions involved no regulation requiring disclosure. *See Glazer v. Formica Corp.*, 964 F.2d 149, 157 (2d Cir. 1992); *In re K-Tel Int'l Sec. Litig.*, 300 F.3d 881, 897 (8th Cir. 2002); *Oran*, 226 F.3d at 285 & n.6; *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22 (1st Cir. 1987). And, in any event, the Ninth Circuit nowhere discussed, let alone held, that regulations may *never* establish an actionable omission under § 10(b).

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[3] Petitioners also incorrectly suggest that the Sixth Circuit recognized that Item 303 could create an independent disclosure duty under § 10(b). Pet. 31. Petitioners quote the court's characterization of the plaintiffs' theory and ignore that the court "d[id] not find the argument persuasive." *Murphy v. Sofamor Danek Grp.*, 123 F.3d 394, 403 (6th Cir. 1997).

Petitioners also suggest (at 26-30) that the decision below is inconsistent with decisions under §§ 11 and 12(a)(2) of the Securities Act because "[t]here is no rational basis to treat the duty to disclose the same material information differently under the Exchange Act from its treatment under the Securities Act." Pet. 29. But those provisions are distinct from § 10(b). Sections 11 and 12(a)(2) govern public offerings, a context in which, unlike § 10(b), "there is a strong affirmative duty of disclosure," *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1202 (1st Cir. 1996), "a stringent standard of liability," and "a relatively minimal burden on a plaintiff," *Herman & Maclean v. Huddleston*, 459 U.S. 375, 381-382 (1983). Moreover, unlike § 10(b), § 11 expressly makes actionable a failure to "state a material fact required to be stated" in a registration statement. 15 U.S.C. § 77k(a). And §§ 11 and 12 lack both the scienter and heightened pleading requirements of § 10(b). Pet. App. 22.

There is no meaningful circuit conflict on the issue presented.

III. Companies Remain Subject To Uniform And Enforceable Disclosure Obligations.

Petitioners contend that the decision below "effectively nullifies" Item 303, authorizes companies to "conceal with impunity material adverse information," and "creates serious confusion among issuers as to what their disclosure obligations are and chaos in the capital markets." Pet. 39. None of this hyperbole is true.

The Ninth Circuit said nothing about the contours of Item 303's disclosure obligations. Companies

in the Ninth Circuit remain subject to the exact same disclosure obligations under Item 303 as companies in all other circuits. All companies violate Item 303 at their on-going peril, as the SEC frequently exercises its power to bring enforcement actions and administrative proceedings predicated on Item 303 violations. *See, e.g.*, *In re Matter of Global Crossing Ltd., Thomas J. Casey, Dan J. Cohrs & Joseph P. Perrone*, Exchange Act Release No. 51,517, 2005 WL 831350 (S.E.C. Apr. 11, 2005); *In re Matter of Kahler Corp., Harold W. Milner & Steven R. Stenhaug*, Exchange Act Release No. 32,916, 1993 WL 375869 (S.E.C. Sept. 17, 1993); *In the Matter of Presidential Life Corp.*, Exchange Act Release No. 31,934, 1993 WL 65652 (S.E.C. Mar. 1, 1993); *In re Matter of Caterpillar Inc.*, Exchange Act Release No. 30,532, 1992 WL 71907 (S.E.C. Mar. 31, 1992).

There is no practical urgency for this Court to determine whether Item 303 creates a duty to disclose actionable under § 10(b).

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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