

## **BFA FILES SUPREME COURT AMICUS CURIAE BRIEF IN *NVIDIA v. E. OHMAN J: OR FONDER AB ET AL.***

October 25, 2024

### **I. OVERVIEW**

There is an important securities class action pending before the U.S. Supreme Court styled, *NVIDIA v. E. Ohman J: or Fonder AB et al.* (“*NVIDIA*”). In *NVIDIA*, the Supreme Court is set to address the fundamental requirements for pleading securities fraud claims under the Private Securities Litigation Reform Act of 1995 (“PSLRA”). Namely, what facts must investors allege in their complaint, prior to the commencement of any discovery, to satisfy the necessary elements of falsity and scienter under the PSLRA?

On October 2, 2024, Bleichmar Fonti & Auld LLP’s Javier Bleichmar and Joseph Fonti filed an amicus brief in *NVIDIA* on behalf of renowned Professor Brian T. Fitzpatrick, the Milton R. Underwood Chair in Free Enterprise at Vanderbilt Law School. This “friend of the court” brief strongly supports investors’ position and explains why the Supreme Court should reject *NVIDIA*’s attempts to escalate the already well-established pleading requirements under the PSLRA.

Articulating the critical role that institutional investors play in prosecuting securities fraud litigation and fostering corporate transparency, the U.S. Department of Justice and Securities and Exchange Commission also submitted an amicus brief in support of investors, emphasizing that “[m]eritorious private actions are an essential supplement to criminal prosecutions and civil enforcement actions brought by the Department of Justice and the Securities and Exchange Commission.”

### **II. BACKGROUND**

In *NVIDIA*, plaintiffs alleged that the chip-maker committed securities fraud by misrepresenting the extent to which its revenues depended on crypto mining. In support of their claim, plaintiffs alleged, through information obtained from former *NVIDIA* employees and internal company documents, that the CEO knew that the company generated a substantial portion of its revenue from crypto mining. To further support the claims, the plaintiffs relied on an analysis from a third-party expert that derived the amount of *NVIDIA*’s revenue attributable to the practice.

The District Court dismissed plaintiffs’ complaint, finding that: (i) allegations based on internal company documents were insufficient to establish scienter because the specific contents of the documents were not pled; and (ii) plaintiffs could not rely on the expert’s analysis to plead falsity.

In a split panel ruling, the Ninth Circuit Court of Appeals reversed the dismissal, in part, finding that plaintiffs sufficiently alleged the CEO’s knowledge through the company’s internal reports, and that the expert’s analysis was sufficiently detailed such that it could be considered at the

pleading stage. NVIDIA then petitioned the Supreme Court for review, and the Supreme Court agreed to consider the case.

### **III. SUMMARY OF THE AMICUS BRIEF**

The brief BFA submitted with Professor Fitzpatrick focuses on the text of the PSLRA and urges the Supreme Court to side with investors and affirm the Ninth Circuit’s decision. It explains that the PSLRA specifically does not foreclose plaintiffs from relying on internal company documents even if their specific contents are not pled, as the statute’s neighboring text specifically allows for pleading based on “on information and belief.” The amicus brief also discusses how the PSLRA specifically allows investors to plead scienter based on “inference,” an explicit acknowledgement that allegations of scienter may be pled circumstantially. To force plaintiffs to recount the exact contents of internal company documents, the brief continues, would “read out” and conflict with the actual text of the PSLRA. Of course, “that’s not how we should read statutes.” It would also conflict with common sense, as forbidding plaintiffs to plead based on information and belief and inference would essentially force investors “at the time you file suit to have a taped confession from a corporate executive saying ‘Yes, I knew the numbers were fake!’”

The amicus brief also details the practical difficulties of requiring plaintiffs to plead the precise contents of internal company documents at the pleading stage, before any discovery has taken place, when the documents are in the possession of defendants, not plaintiffs.

BFA further advocated that the PSLRA does not foreclose the use of expert analyses to plead facts; rather, reliance on an expert is permissible so long as the facts underlying the basis of the expert’s belief are stated with sufficient particularity. And in the case of *NVIDIA*, BFA advocated that the complaint alleged “copious facts” underlying the expert’s report which made defendants aware of from where the expert’s analyses came.

### **IV. CONCLUSION**

BFA is proud to be at the forefront of the legal battle protecting the integrity of the securities markets and investors from corporate fraud.

Oral argument in *NVIDIA* is scheduled for November 13, 2024.