No. 15-___

IN THE

Supreme Court of the United States

HARMAN INTERNATIONAL INDUSTRIES, INC., ET AL.,

Petitioners,

v.

ARKANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Private Securities Litigation Reform Act ("PSLRA") provides safe harbor for forward-looking statements that are accompanied by meaningful cautionary language. This petition presents two questions regarding the safe harbor:

1. Whether a purported misrepresentation is sufficient to preclude safe harbor protection?

2. Whether courts can consider an issuer's alleged knowledge to determine whether cautionary statements are "meaningful"?

In addition, this petition presents a separate question regarding the puffery doctrine, under which vague statements and self-congratulatory hyperbole are immaterial as a matter of law:

3. Whether a vague and immeasurable characterization of results, such as sales were "very strong," is immaterial puffery as a matter of law?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Defendants and Appellees in the courts below, are Harman International, Inc. (a Delaware corporation), the late Dr. Sidney Harman, Kevin Brown, Sandra B. Robinson, and Dinesh Paliwal. Respondent, who was Plaintiff and Appellant in the courts below, is the Arkansas Public Employees Retirement Systems.

Pursuant to this Court's Rule 29.6, Petitioner declares as follows:

Harman International, Inc. is a publicly held corporation that has no parent corporation and no publicly held company owns more than 10% of its stock.

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The court of appeals' opinion (Pet. App. 1a) is reported at 791 F.3d 90. The district court's opinion granting Petitioners' motion to dismiss (Pet. App. 41a) is reported at 27 F. Supp. 3d 26.

JURISDICTION

The court of appeals entered judgment on June 23, 2015, and denied rehearing *en banc* on August 26, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-5, provides in relevant part:

(c) Safe harbor

(1) In general — Except as provided in subsection (b) of this section, in any private action arising under this chapter that is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading, a person referred to in subsection (a) of this section shall not be liable with respect to any forward-looking statement, whether written or oral, if and to the extent that—

(A) the forward-looking statement is—

(i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or

(ii) immaterial; or

(B) the plaintiff fails to prove that the forward-looking statement—

(i) if made by a natural person, was made with actual knowledge by that person that the statement was false or misleading; or

(ii) if made by a business entity; was—

(I) made by or with the approval of an executive officer of that entity; and

(II) made or approved by such officer with actual knowledge by that officer that the statement was false or misleading.

…

(e) Dispositive motion. On any motion to dismiss based upon subsection (c)(1) of this section, the court shall consider any statement cited in the complaint and any cautionary statement accompanying the forward-looking statement, which are not subject to material dispute, cited by the defendant.

STATEMENT OF THE CASE

A. Harman And The Statements At Issue

This case is a consolidated securities class action in which the Arkansas Public Employees Retirement System ("APERS") seeks damages from Harman International, Inc. ("Harman"), the late Dr. Sidney Harman ("Dr. Harman"), Kevin Brown ("Brown"), Sandra B. Robinson ("Robinson"), and Dinesh Paliwal ("Paliwal") (collectively, Petitioners) for alleged securities fraud. The following facts are as alleged in the complaint. Petitioners assume their truth for purposes of this Petition only.

Harman is a leading manufacturer of high-quality automotive, consumer, and professional products, including information and entertainment systems for automobiles. Pet. App. 114a. This case concerns Harman's Portable Navigation Devices, or "PNDs," in particular its PND sales in Europe. PNDs provide Global Positioning System ("GPS") navigation, traffic information, video, and other audiovisual capabilities, and were at the time of the Complaint sold as after-market automotive parts. Pet. App. 114a, 133a–34a.

In 2006, Harman first started marketing PNDs in Europe, selling 35,000 in the first three months of the year, and an additional 95,000 by October 2006. Pet App. 133a–34a. Dr. Harman projected that Harman would sell "well over 500,000" PNDs during fiscal year 2007 ("FY2007"), which spanned from July 1, 2006, to June 30, 2007. Pet App. 133a. By December 2006, Harman sold an additional 130,000 PNDs and revised its FY2007 projected PND sales to over 650,000. *Id.*

On April 26, 2007, Harman conducted an earnings call to discuss its results for third quarter FY2007, which ended on March 31, 2007. Pet App. 136a–42a. The call's moderator warned that the speakers would make forward-looking statements about "[Harman's] beliefs and expectations as to future events and trends affecting the company's business [that] are subject to risks and uncertainties." Pet. App. 218a. The moderator directed attendees to review Harman's SEC filings to evaluate those risks and uncertainties. *Id.*

During the call, Dr. Harman made the following statement, which is at issue here:

> I had indicated in earlier conference calls that the PND environment in Europe was not as margin challenged as it is in the United States, but that we could surely anticipate it. There was reasonable foresight in that observation. In the recent quarter, the European PND market has become extremely competitive. We are working extraordinarily hard to increase sales and to maintain adequate margins in that environment. In our earnings call three months ago, it was noted that Harman Becker PND inventories in Europe had grown substantially. We said then that the inventory had been developed to support a vigorous sales effort and that we planned to reduce it to normal levels at year-end. The plan forecasts total unit sales of 618,000 units for the fiscal '07 year, and that plan is proceeding. Where March 31 inventory was $75 million, we expect April 30 inventory to be approximately $50 million, May 31 inventory to be approximately $30 million, and June 30 inventory to be approximately $15 million, that a very normal level.

Pet. App. 227a-28a.

On August 29, 2007, Harman filed its FY2007 annual report. Pet. App. 243a. In the report's opening section, Harman observed that the report "contains forward-looking statements . . . [that] are not guarantees of performance or results . . . [and] involve risks, uncertainties and assumptions." Pet. App. 245a. It also noted the numerous "[f]actors that may cause fluctuations in our operating results

and/or the price of our common stock," such as "competition in the automotive, consumer or professional markets in which [Harman] operate[s]." *Id.* at 246a, 248a. In the report's section on "Risk Factors," Harman disclosed specific risks to its business and share price. Pet. App. 251a–63a. For example: (i) "[t]he audio and video product markets that [Harman] serve[s] are fragmented, highly competitive, rapidly changing and characterized by intense price competition"; (ii) "[Harman's] products may not satisfy shifting consumer demand or compete successfully with competitors' products"; (iii) "[i]f [Harman] fail[s] to introduce new products, misinterpret[s] consumer preferences or fail[s] to respond to changes in the marketplace, consumer demand for [its] products could decrease"; and, (iv) "[Harman] may lose market share if [it is] unable to compete successfully against [its] current and future competitors." Pet. App. 252a–54a.

As part of its discussion of net sales, Harman disclosed its overall sales results, including its sales in the automotive business segment. Pet. App. 264a. Thereafter, it stated that "[s]ales of aftermarket products, particularly PNDs, were very strong during fiscal 2007." Pet. App. 265a. That statement is at issue here.

On September 27, 2007, Harman conducted an analyst and investor call after a previously-announced merger was abandoned. Pet. App. 268a. The moderator stated that the call would include forward-looking statements that were "subject to risks and uncertainties." Pet. App. 269a. The moderator encouraged listeners to review Harman's SEC filings regarding those risks and uncertainties. *Id.*

CFO Brown stated during the call that Harman had forecast first quarter FY2008 sales to be $950 million, up 15 percent compared to the first quarter of FY2007. When an analyst observed that "the $950 million of revenue expectation is the highest number [Harman had] ever achieved" and asked whether "that observation [is] correct" and "to what degree did the spillover of [Mercedes Benz] C Class revenues influence that number," Pet. App. 282a, Brown gave the following response, which is at issue here:

> Yes, Peter, you are correct that that is a very strong first quarter on the top line for us, reflecting getting fully up the ramp curve on Mercedes C Class but also reflecting the fact that we are bringing additional business on-stream at Chrysler as we ramp up our Missouri plant and in the PND business, where we continue the growth and expansion of that business primarily in Europe.

Id.

On September 30, 2007, Harman disclosed its actual first quarter FY2008 results. Pet. App. 305a. As Brown predicted, net sales were approximately $947 million, an increase of approximately 15% compared to first quarter FY2007. *See* Pet. App. 308a.

On January 14, 2008, Harman issued a press release revising its overall guidance for FY2008. Pet. App. 314a. In the release, Harman stated that "[t]he change in guidance was prompted primarily by a major shift in the market for Portable Navigation Devices (PNDs)," and that "[i]n recent months this sector has experienced significant pricing pressure affecting the entire industry." *Id.* Harman also stated that it would be "launching a record number of automotive

infotainment platforms in 2008" and that the company was "not happy with the [associated] higher than planned R&D engineering and material costs." Pet. App. 175a. Harman's share price dropped that day from $68.97 to $43.00. Pet. App. 183a.

On February 5, 2008, Harman released its actual financial results for the FY2008 second quarter (October through December 2007). Pet. App. 317a. Harman stated that "[a]lthough [the company] continue[d] to increase sales across all divisions, [its] automotive earnings [were] under pressure due to portable navigation devices (PND), product mix, and higher engineering and material costs during a period of record launch activity." Pet. App. 318a. The company also explained that "PND sales and margins decreased due to aggressive price reductions by competitors, the delay of new products, and the sale of older products at substantial discounts." Pet. App. 321a. Harman's share price fell from $45.73 to $38.70. Pet. App. 177a.

B. APERS' Complaint

On May 2, 2008, APERS commenced this consolidated securities class action on behalf of individuals who purchased Harman common stock between April 26, 2007, and February 5, 2008 (the "Class Period").

As is relevant here, [1] APERS claims that the following three statements were false and misleading: (i) Dr. Harman's forward-looking April 26, 2007, statement that "[t]he plan forecasts total unit sales of

[1] APERS identified a large number of statements, covering a variety of issues, as false or misleading in its Complaint. Pet. App. 114a–20a. On appeal, APERS narrowed its claims to the three statements at issue here.

618,000 units for the fiscal '07 year, and that plan is proceeding," Pet. App. 138a; (ii) Harman's August 29, 2007 statement in its FY2007 Annual Report that "[s]ales of aftermarket products, particularly PNDs, were very strong during fiscal 2007," Pet. App. 157a; and, (iii) CFO Brown's forward-looking September 27, 2007 statement that the first quarter reflected "the fact that we are bringing additional business on stream at Chrysler as we ramp up our Missouri plant and in the PND business, where we continue the growth and expansion of that business primarily in Europe." Pet. App. 170a.

According to APERS, at the time of the April statement, Harman had made a modification that "rendered all of the older-generation units in inventory obsolete." Pet. App. 147a. In addition, APERS alleged that Harman's 2006 PND sales had been lower than anticipated, which purportedly resulted in Harman storing PNDs in a warehouse. *Id.* APERS also alleged that Harman had released five different PND versions between March 2006 and July 2007, but at the time of the first conference call, it had not sold "a significant number." *Id.* The Complaint alleges that by early 2007, a sales engineer had conversations with a sales representatives regarding the need to lower PND prices. Pet. App. 134a. In addition, according to the complaint, by June 2007, Harman had agreed to sell 100,000 PNDs for $110 less than their sticker price. Pet. App. 135a. APERS alleges that a former Harman accounting manager indicated that "the Company had on hand hundreds of millions of dollars worth of obsolete Generation 2 PNDs which were being superseded by newer Generation 3 PNDs in August 2007." Pet. App. 159a.

C. Procedural History

On July 3, 2008, Petitioners filed a motion to dismiss, arguing in relevant part that Dr. Harman's April 26, 2007 statement and Brown's September 27, 2007 statement fell within the statutory safe harbor for forward-looking statements that are "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." 15 U.S.C. § 78u-5(c). In addition, Harman argued that its FY2007 Annual Report statement that its "[s]ales of aftermarket products, particularly PNDs, were very strong during fiscal 2007" was immaterial puffery. Pet. App. 157a.

On January 17, 2014, the district court granted Harman's motion. The district court acknowledged that the parties were "not in dispute as to whether any particular statement is 'forward-looking." Pet. App. 60a.

The court rejected APERS' argument that Harman's alleged knowledge of facts undermining its statements removed them from the safe harbor. Pet. App. 60a–69a. The court acknowledged that "the circuits are split as to whether there is room to consider the issuer's state of mind in determining whether cautionary language is sufficiently 'meaningful'" under the safe harbor. Pet. App. 63a. The "Sixth, Ninth, and Eleventh Circuits have all held that the issuer's state of mind is irrelevant to whether his cautionary language is meaningful," but the Seventh Circuit requires issuers to "disclose the major risks the issuer objectively faced at the time of its forward-looking statement," which could include those known

to the defendant. Pet. App. 63–64a. The district court joined the majority, reasoning that the relevant safe harbor made "no explicit reference to the consideration of the issuer's state of mind" and that the legislative history provided that "[c]ourts *should not* examine the state of mind of the person making the statement." Pet. App. 66a (internal quotation marks and citation omitted).

The court also rejected APERS' claim that the forward-looking statements were not accompanied by sufficient warnings. Citing Dr. Harman's specific statements about Harman's large PND inventory and the extremely competitive European market, the court found that Harman was warning "not merely . . . about general market risks, but . . . [making cautionary statements] specific to the European PND market of which Plaintiffs complain." Pet. App. 74a. "A reasonable investor would know that 'extreme' price pressure could substantially affect sales, margins, or both." *Id.*

With respect to the statement that Harman's PND sales were "very strong," the district court held that the statement was immaterial puffery. The statement "provide[d] no standard against which a comparison can be drawn." Pet. App. 84a. "Indeed, the description of Harman's PND sales as 'strong' could have signified a truthful comparison to sales of the products in earlier quarters." Pet. App. 85a.

The D.C. Circuit reversed. In its view, Harman's cautionary statements "were not meaningful because they were misleading in light of historical fact." Pet. App. 23a. According to the court, Harman was required to warn "of actual obsolescence that had al-

ready manifested itself." *Id.* The court further held that it "need not reach the parties' arguments regarding the role of actual knowledge under the safe harbor" given the statements' purportedly misleading nature. *Id.* Nonetheless, for support, the court cited allegations concerning internal-only Harman discussions and documents that allegedly reflected Harman's knowledge. *Id.*

In addition, the D.C. Circuit reversed the district court's puffery decision, reasoning that the "critical inquiry is whether the statement could have misled a reasonable investor." Pet. App. 34a (internal citation and quotation marks omitted). "[G]iven the context in which it was made," the court held that "the 'very strong' statement in the FY 2007 Annual Report is plausibly understood as a description of historical fact rather than unbridled corporate optimism, i.e., immaterial puffery." *Id.*

On August 26, 2015, the court denied rehearing and rehearing *en banc*, and this petition timely followed. Pet. App. 109a–112a.

REASONS FOR GRANTING THE PETITION

Congress passed the PSLRA to stem a growing tide of abusive strike suits involving meritless securities fraud claims. S. Rep. No. 104-98, at 4 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 683. In Congress's view, the judicial system was being "undermined by those who seek to line their own pockets by bringing abusive and meritless suits" whenever an issuer's stock price drops. H.R. Rep. No. 104-369, at 31 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 730. Part and parcel of that abuse was "the abuse of the discovery process to impose costs so burdensome that it is

often economical for the victimized party to settle." *Id.* Part of Congress's solution was to create, at the pleadings stage, a "safe harbor for forward looking statements, to encourage issuers to disseminate relevant information to the market without fear of open-ended liability." *Id.* at 32, 1995 U.S.C.C.A.N at 731.

This case is an opportunity to fulfill Congress's goal of weeding out meritless securities actions at the pleadings stage, while resolving divisions among the federal appellate courts on three exceptionally important questions.

First, the Court should decide the role of alleged misleading statements in the safe harbor analysis. The Third, Seventh and Eleventh Circuits have held that a cautionary statement is not outside the meaningful cautionary statement safe harbor merely because it is misleading. The Second Circuit, and now the D.C. Circuit, have held the opposite. According to the D.C. Circuit, Harman's cautionary statements were insufficient because they were allegedly misleading. This holding is in direct conflict with those of the Third, Seventh and Eleventh Circuits.

The D.C. Circuit's approach effectively guts the safe harbor. Plaintiffs must allege a falsity or misrepresentation to plead an element of a securities fraud claim, and the existence of a falsity or misrepresentation is presumed by the meaningful cautionary statement safe harbor. If alleging an element or threshold requirement can bar the safe harbor, it is meaningless.

Second, the Court should resolve the role of alleged issuer knowledge in the safe harbor analysis. The Fifth, Sixth, Ninth, and Eleventh Circuits have

held knowledge irrelevant to whether cautionary statements are meaningful. While the D.C. Circuit disclaimed any reliance on Harman's alleged knowledge, it could not have avoided the issue. The court could have concluded that Harman had a duty to disclose alleged obsolescence only if it found that Harman had new information in its possession establishing obsolescence; thus, the obsolescence allegations are all based on Harman's asserted knowledge.

The D.C. Circuit's approach threatens to moot the safe harbor. Since knowledge must be affirmatively pled to avoid a different safe harbor (and is inevitably subject to a dispute of fact), the meaningful cautionary statement safe harbor would provide no protection against costly discovery or litigation if knowledge allegations could preclude its application.

In all events by examining alleged historical facts and knowledge, the court departed from the majority's evidentiary approach. The Fifth, Sixth, Ninth, and Eleventh Circuits have all held that courts can examine only the statements at issue to determine whether the cautionary statements were meaningful.

Third, the Court should resolve a direct conflict over the puffery doctrine's scope. The D.C. Circuit held that a self-congratulatory statement, incapable of being objectively measured, regarding "very strong" sales was material. The Third and Fifth Circuits, however, have held that the term "strong" is well recognized puffery in the investment community. In addition, the Second, Sixth, Ninth, and Tenth Circuits have held more generally that rosy prognostications are too vague and too subjective to be actionable. Here, too, the court erred. Because there is no way to

measure Harman's "very strong" characterization, a reasonable investor would not rely on it.

On each of these issues, the D.C. Circuit departed from the majority of federal appellate courts, and on each, it erred. The Court should resolve these conflicts now in light of the safe harbor's and puffery doctrine's importance to issuers.

I. THIS COURT SHOULD RESOLVE THE CONFLICTS IMPLICATED BY THE D.C. CIRCUIT'S DECISION REGARDING THE MEANINGFUL CAUTIONARY STATEMENT SAFE HARBOR.

No matter how one reads it, the D.C. Circuit's decision implicates a division among the federal appellate courts. The D.C. Circuit held that Harman's cautionary statements were not meaningful because they were purportedly misleading in light of alleged "historical facts." This holding directly conflicts with Third, Seventh and Eleventh Circuit decisions holding that the alleged misleading nature of a cautionary statement cannot preclude the safe harbor's application.

In all events, the D.C. Circuit necessarily imported Harman's alleged knowledge into its analysis, because Harman's statement could be misleading only if it had a duty to disclose. This case does not involve an affirmative misstatement of historical fact, but an omission. Here, Harman would have a duty to disclose obsolescence only if it knew of it. The court's conclusion was thus necessarily motivated by Harman's alleged knowledge, and its decision implicated a growing split regarding knowledge's role in evaluating cautionary statements. Accordingly, the D.C.

Circuit departed from the majority approach and erred.

A. The D.C. Circuit's Decision Deepens A Conflict In The Federal Appellate Courts Over The Safe Harbor.

While the D.C. Circuit attempted to avoid resolving the conflict over actual knowledge's role under the safe harbor, its opinion either deepened a conflict on a different issue or implicated the conflict it was trying to avoid

1. The D.C. Circuit's safe harbor decision deepens a conflict between the Second Circuit and the Third, Seventh and Eleventh Circuits.

By relying only on the supposedly "misleading" nature of Harman's cautionary statements to preclude safe harbor, the D.C. Circuit deepened an existing conflict between the Second Circuit and the Sixth, Seventh and Eleventh Circuits over the role of falsity in the safe harbor analysis.

The D.C. Circuit's ultimate conclusion was that "the purportedly cautionary statements were not meaningful *because they were misleading* in light of historical fact." Pet. App. 23a (emphasis supplied). For support, the D.C. Circuit cited (Pet. App. 20a) the Second Circuit's decision in *Rombach v. Chang*, 355 F.3d 164 (2d Cir. 2004), in which the court held that "[c]autionary words about future risk cannot insulate from liability the failure to disclose that the risk has transpired." *Id.* at 173; *see also Meyer v. JinkoSolar Holdings Co.*, 761 F.3d 245, 251 (2d Cir. 2014) ("One cannot, for example, disclose in a securities offering a business's peculiar risk of fire, the installation of a

comprehensive sprinkler system to reduce fire danger, and omit the fact that the system has been found to be inoperable, without misleading investors.").

In contrast, the Third, Seventh and Eleventh Circuits have held that a false or misleadingly incomplete statement is assumed for safe harbor protection and cannot preclude its application. *See Asher v. Baxter Int'l Inc.*, 377 F.3d 727, 729 (7th Cir. 2004); *Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc.*, 594 F.3d 783, 795 (11th Cir. 2010) ("*Goodman Life*"); *Institutional Investors Grp. v. Avaya, Inc.*, 564 F.3d 242, 256 n.23 (3d Cir. 2009). As the Seventh Circuit has explained:

> A safe harbor matters only when the firm's disclosures (including the accompanying cautionary statements) are false or misleadingly incomplete; yet whenever that condition is satisfied, one can complain that the cautionary statement must have been inadequate. The safe harbor loses its function. Yet it would be unsound to read the statute so that the safe harbor never works; then one might as well treat § 77z-2 and § 78u-5 as defunct.

Asher, 377 F.3d at 729; *see also Goodman Life*, 594 F.3d at 795 ("[A]llowing an allegation of knowledge of falsity to prevent safe harbor would also produce a counterintuitive result.").

The Third Circuit has expressly adopted this aspect of *Asher*, holding that "the *Asher* court acknowledged the intuitive appeal of [s]hareholders' position," but that "such a view would divest the [s]afe [h]arbor of any function, since there is no potential liability—and thus no need for [s]afe [h]arbor protection—where there is nothing false or misleading about a

firm's statements." *Avaya*, 564 F.3d at 256 n.23. "In other words, if the [s]afe [h]arbor were automatically inapplicable whenever a firm's disclosures actually misled investors, then the [s]afe [h]arbor would be superfluous." *Id.*

The Eleventh Circuit has adopted the same analysis in a case where the "[p]laintiffs' primary claim [wa]s that the challenged statements were misleading because [the defendant] failed to warn investors that [it] had decided not to provide free upgrades to Version 8 to make it Year 2000 compliant." *See Ehlert v. Singer*, 245 F.3d 1313, 1318 (11th Cir. 2001). That is, the fact of "no free upgrades" was established at the time of its statements, allegedly rendering them misleading. The Third Circuit held that "a material and misleading omission can fall within the forward-looking safe-harbor," so long as the requisite cautionary statements are present, and concluded that the "challenged statements were forward-looking and were accompanied by meaningful cautionary statements." *Id.*

The D.C. and Second Circuits' approach is flatly inconsistent with these holdings.

2. The D.C. Circuit departed from the majority approach to knowledge under the safe harbor.

Despite the D.C. Circuit's claim that it was relying solely on the purportedly misleading nature of the cautionary statements, not Harman's asserted knowledge, the court's reasoning necessarily depends on Harman's alleged knowledge. Thus, notwithstanding its disclaimer, the D.C. Circuit effectively departed from the majority view that knowledge is

irrelevant to the meaningful cautionary statement safe harbor.

The majority of federal appellate courts—namely, the Fifth, Sixth, Ninth, and Eleventh Circuits—have held that an issuer's state of mind is irrelevant to whether its cautionary statements are meaningful. *See In re Cutera Sec. Litig.*, 610 F.3d 1103, 1112 (9th Cir. 2010) ("Under subsection (A)(i), . . . if a forward-looking statement is identified as such and accompanied by meaningful cautionary statements, then the state of mind of the individual making the statement is irrelevant, and the statement is not actionable regardless of the plaintiff's showing of scienter."); *Goodman Life*, 594 F.3d at 795 ("So long as the language accompanying the projections is meaningfully cautionary, the law requires us to be unconcerned with the speaker's state of mind at the time he makes the projections"); *Miller v. Champion Enters., Inc.*, 346 F.3d 660, 678 (6th Cir. 2003) ("[S]ince we conclude that the statements . . . were accompanied by meaningful cautionary language, the statements are subject to the safe harbor provisions of the PSLRA and are therefore not actionable. No investigation of defendant's state of mind is required."); *Southland Sec. Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 371 (5th Cir. 2004) ("The safe harbor has two independent prongs: one focusing on the defendant's cautionary statements and the other on the defendant's state of mind. "); *Harris v. Ivax Corp.*, 182 F.3d 799, 803 (11th Cir. 1999) ("[I]f a [forward-looking] statement is accompanied by 'meaningful cautionary language,' the defendants' state of mind is irrelevant.").

The Seventh Circuit has taken a different approach. *See Asher*, 377 F.3d at 734. It has held that

meaningful cautionary statements must, at a minimum, disclose "the major risks [the issuer] *objectively* faced" and has held that discovery is required to determine those risks. *Id.* (emphasis supplied); *see also id.* ("[I]f after discovery Baxter establishes that the cautions did not reveal what were, *ex ante*, the major risks, the safe harbor may yet carry the day.").

While not deciding the issue, the Second Circuit has noted a tension between Congress's intent that courts evaluate whether language is meaningfully cautionary and the court's need to examine what the defendants knew "in order to determine what risks the defendants faced." *Slayton v. American Express*, 604 F.3d 758, 771-72 (2d Cir. 2010). In *dicta*, the Second Circuit has expressed its view that:

> We think that the most sensible reference is the major factors that the defendants faced at the time the statement was made. But this requires an inquiry into what the defendants knew because in order to determine what risks the defendants faced, we must ask of what risks were they aware.

Id. at 772. The Third Circuit, likewise, had noted the same tension but avoided the issue. *See Institutional Investors Grp.*, 564 F.3d at 258–59.

The D.C. Circuit did not take issue with these decisions. It attempted to avoid them by holding that "the purportedly cautionary statements were not meaningful because they were misleading in light of historical fact." Pet. App. 23a. But the court necessarily relied on Harman's alleged knowledge to conclude that Harman had a duty to "convey that inventory was obsolete." *Id.*

There is no misstatement of historical fact at issue here. There is no claim that Harman affirmatively misstated its inventory or claimed that its inventory contained only the latest models. As the D.C. Circuit recognized, "[APERS] did not characterize the two statements at issue as pertaining to current or historical facts." Pet. App. 14a.

Rather, the D.C. Circuit held that Harman's cautionary statements were misleading because they omitted information about alleged obsolescence. Pet. App. 23a. But, here, Harman would have a duty to disclose obsolescence only if it had knowledge of obsolescence. *See Phila. Fin. Mgmt. of S.F., LLC v. DJSP Enters., Inc.*, 572 F. App'x 713, 716 (11th Cir. 2014) (per curiam) ("[A] defendant's omission to state a material fact is proscribed only when the defendant has a duty to disclose. Some of the factors that we consider in determining whether a duty to disclose exists include the extent of the defendant's knowledge . . . .") (internal quotation marks and citation omitted); *Ansfield v. Omnicare, Inc.*, 769 F.3d 455, 471 (6th Cir. 2014) (observing that an actionable omission arises "when a person or corporation comes *into possession of*" new information) (emphasis supplied); *see also Basic Inc. v. Levinson*, 485 U.S. 224 , 239 n.17 (1988) ("Silence, absent a duty to disclose, is not misleading under Rule 10b-5.").

Thus, those cases deciding the role of issuer knowledge under the safe harbor usually involve omissions of "historical fact" that allegedly render cautionary statements misleading. *See Goodman Life*, 594 F.3d at 795 (alleging that forecasts were false when made); *In re Cutera*, 610 F.3d at 1107 (alleging inadequate disclosure of actual, current prob-

lems with sales staff that disproved projections); *Miller*, 346 F.3d at 667-68 (alleging actual over inventory of homes that issuer failed to disclose in cautionary statements); *Ehlert*, 245 F.3d at 1318 (alleging statements misleading in light of current decision to charge for upgrades).

But unlike the D.C. Circuit, the courts in those cases did not begin and end their analysis citing the omission of "historical facts" from the cautionary statement. They held that determining whether the cautionary statements were meaningful in light of those alleged facts required impermissibly delving into the issuer's state of mind.

For example, in *Miller*, the court held that the issuer's failure to disclose an actual and known over inventory of homes, which the issuer later cited as causing it to miss its forecasted results, did not preclude the safe harbor's application. 346 F.3d at 677-78. In the court's view, the issuer's knowledge of that fact was irrelevant to the safe harbor. *See id.* And general disclosures regarding the risk of over inventory provided the requisite caution. *Id.* at 678.

Here, too, the allegation is not that Harman misstated a historical fact, such as by misstating its inventory levels or characterizing the inventory as containing only new generation PNDs. The D.C. Circuit held that Harman's cautionary statements were misleading because Harman failed to disclose what it allegedly knew, that a 2007 modification "rendered all of the older-generation units in inventory obsolete." Pet. App. 147a.

In addition, the allegations on which the court relied were all derived from Harman's purported

knowledge. APERS' obsolescence allegations were supposedly based on non-public inventory, sales, and pricing information, and confidential discussions between employees. Pet. App. 146a–47a; *see id.* at 23a–24a. There is no way to ascertain the supposed "historical facts" without resort to discovery into Harman's internal records—the company's knowledge.

In all events by going outside the four corners of the cautionary statements to analyze alleged historical facts and Harman's purported knowledge, the D.C. Circuit directly conflicted with the evidentiary approach of the Fifth, Sixth, Ninth, and Eleventh Circuits. In their view, courts must examine "*only* the cautionary statement accompanying the forward-looking statement" to determine the safe harbor's applicability. *Goodman Life*, 594 F.3d at 795 (emphasis supplied); *see also Miller*, 346 F.3d at 672 ("[I]f the statement qualifies as 'forward-looking' and is accompanied by sufficient cautionary language, a defendant's statement is protected."); *id.* at 677-78 (examining only statements); *Harris*, 182 F.3d at 807 (same); *In re Cutera*, 610 F.3d at 1112 (same).

As the Eleventh Circuit has explained, "Congress contemplated that [courts] would consider the cautionary language accompanying forward-looking statements at the pleadings stage." *Goodman Life*, 594 F.3d at 795. And, "[s]o long as the language accompanying the projections is meaningfully cautionary," the safe harbor applies. *Id.*

B. The D.C. Circuit's Decision Is Erroneous With Respect To The Safe Harbor.

The D.C. Circuit decided both issues incorrectly.

1. The Allegedly False or Misleading Nature Of A Cautionary Statement Cannot Preclude Safe Harbor.

The D.C. Circuit erred by holding that a cautionary statement cannot be meaningful if it is allegedly misleading.

A false or misleading statement is an element of a § 10(b) claim. Under § 10(b) it is unlawful:

> (a) To employ any device, scheme, or artifice to defraud,
>
> (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 . . . not misleading,* or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (emphasis supplied); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 318 (2007). Thus, to avoid dismissal for failure to plead an element, the plaintiff must plead a misrepresentation or falsity.

In addition, the safe harbor applies only to an action "that is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading." 15 U.S.C. § 78u-5(c)(1). Thus, a false or misleading statement is a prerequisite to safe harbor.

If, as the D.C. Circuit held, allegations of a misrepresentation were sufficient to defeat the meaningful cautionary statements safe harbor, it would serve no function. The elements of the § 10(b) claim and the

safe harbor's own threshold requirements would preclude the safe harbor's application. A court, however, "should not construe the statute in a manner that . . . would render a statutory term superfluous." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476-77 (2003) (citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992), and *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 258 (1993)).

2. The Issuer's Knowledge Is Irrelevant To The Safe Harbor.

The court separately erred by importing issuer knowledge into its analysis. The text, structure and history of the PSLRA all demonstrate that actual knowledge is irrelevant to whether cautionary statements are meaningful. The PSLRA's forward-looking statement safe harbor provides that no liability can attach to a forward-looking statement where:

> (A) the forward-looking statement is—
>
> (i) identified as a forward-looking statement, and accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or . . ."
>
> (ii) immaterial . . .

15 U.S.C. § 78u-5(c)(1).

By its terms, the statute contemplates an examination of only the cautionary statement's language. The court is directed to examine whether the statements, themselves, "identify[] important factors." *Id.* The safe harbor fails to identify any other factor, such as the speaker's mental state or the speaker's purported knowledge as relevant to the analysis.

The PSLRA's structure confirms this interpretation. Immediately after the above-quoted provision, the PSLRA continues:

> ***or***
>
> (B) the plaintiff fails to prove that the forward-looking statement—
>
> (i) if made by a natural person, was made with actual knowledge by that person that the statement was false or misleading; or
>
> (ii) if made by a business entity; was—
>
> (I) made by or with the approval of an executive officer of that entity; and
>
> (II) made or approved by such officer with actual knowledge by that officer that the statement was false or misleading.

15 U.S.C. § 78u-5(c)(1) (emphasis supplied). By using the disjunctive "or" between separately numbered provisions, the PSLRA creates separate safe harbors: where the forward-looking statement is accompanied by meaningful cautionary language, *or* it is immaterial, *or* the plaintiff fails to prove (or plead) that the issuer had actual knowledge that the statement was false or misleading when made. *See United States v. Garcia*, 718 F.2d 1528 (11th Cir. 1983), *aff'd* 469 U.S. 70 (1984).

The presence of a separate safe harbor specifically relating to the defendant's state of mind is significant. It shows both that Congress knew how to integrate knowledge into the safe harbors and that it failed to do so in the provision requiring meaningful cautionary statements. And, "[w]here Congress includes particular language in one section of a statute

but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (internal quotation marks and citation omitted); *see also Custis v. United States*, 511 U.S. 485, 492 (1994) (same).

In addition, the separate safe harbor for the absence of actual knowledge would deprive the meaningful cautionary statements safe harbor of meaning if actual knowledge were relevant to the latter. The plaintiff must allege knowledge of a statement's falsity to prevent the defendant from invoking the subsection (B) safe harbor. *See* Pet. App. 66a–67a. If the same allegations blocked the (A)(i) safe harbor for meaningful cautionary statements, the provision would have no independent function. *See Goodman Life*, 594 F.3d at 796.

In all events, the D.C. Circuit erred by going outside the four corners of the relevant statements to determine whether they were meaningful. The PSLRA's text and structure demonstrate that Congress intended courts to stay within the four corners of the statements. The meaningful cautionary statements safe harbor contemplates examination of only the language of the cautionary statement.

Section 78u-5's special procedure for motions to dismiss confirms this reading of the text. It provides that on "any motion to dismiss based upon subsection (c)(1) of this section"—the safe harbor—a district court "shall consider any statement cited in the complaint and any cautionary statement accompanying the forward-looking statement, which are not subject

to material dispute, cited by the defendant." 15 U.S.C. § 78u-5(e). That rule alters Rule 12(b)(6)'s usual evidentiary limits to allow courts to resolve questions regarding the safe harbor at the pleadings stage.

The legislative history confirms this interpretation. It states: "[t]he first prong of the safe harbor requires courts to examine *only* the cautionary statement accompanying the forward-looking statement." H.R. Rep. No. 104-369, at 43-44, 1995 U.S.C.C.A.N. at 742 (emphasis supplied). No statement of Congressional intent could be clearer.

3. Harman's forward-looking statements were accompanied by meaningful cautionary statements.

Finally, Harman's forward looking statements were accompanied by meaningful cautionary statements. In connection with Dr. Harman's statement that "[t]he plan forecasts total unit sales of 618,000 units for the fiscal '07 year, and that plan is proceeding," Dr. Harman expressly stated that Harman had to work "extraordinarily hard" to increase sales and maintain its projected margins. Pet. App. 227a. He observed that "PND inventories in Europe had grown substantially," that "the European PND market ha[d] become extremely competitive," and that "because of higher competition, [the company was] seeing pricing pressure." Pet. App. 227a, 228a, 238a. He also disclosed that the company had a PND inventory of approximately $50 million. Pet. App. 228a.

In its 2006 and 2007 Annual Reports, Harman warned against its potential failure to "satisfy shifting consumer demand or compete successfully with

competitors' products" and that "[d]elays or defects in new product introduction may result in loss of sales or delays in market acceptance." Pet. App. 210a, 255a. It also warned that its markets were "highly competitive, rapidly changing and characterized by intense price competition." Pet. App. 212a, 254a. Harman explained that to increase sales and market share, it had to "improve existing products, while successfully developing new products" and constantly "respond to technological developments and changing consumer preferences." *Id.* at 213a.

As the district court correctly found, Dr. Harman's and the report's warnings were meaningful because they "are not merely statements about general market risks, but are specific to the European PND market of which [APERS] complain[s]." Pet. App. 74a. "A reasonable investor would know that 'extreme' price pressure could substantially affect sales, margins, or both." *Id.*

II. THE D.C. CIRCUIT'S PUFFERY DECISION INDEPENDENTLY MERITS REVIEW.

Separate from its analysis of the meaningful cautionary statements safe harbor, the D.C. Circuit considered the scope of the puffery doctrine and erroneously held Harman's characterization of its sales as "very strong" was material, not puffery. This result conflicts directly with Third and Fifth Circuit decisions, and the D.C. Circuit's analysis departed from the analytical approach of the majority of federal appellate courts with respect to puffery.

A. The D.C. Circuit's Puffery Decision Departs From The Majority Of Appellate Courts In Result And Analytical Approach.

The D.C. Circuit rejected the district court's conclusion that Harman's use of "very strong" was "subjective and provide[d] no standard against which a comparison can be drawn." Pet. App. 84a. In the D.C. Circuit's view, "the 'very strong' statement in the FY2007 Annual Report is plausibly understood as a description of historical fact rather than unbridled corporate optimism, *i.e.*, immaterial puffery." Pet. App. 34a (internal citation and quotation marks omitted).

The D.C. Circuit rejected the argument that no investor would make an investment decision on Harman's vague characterization of its results. In its view, the "statement was specific about product and time period." Pet. App. 34a. It rejected the argument that the statement was too subjective to be measurable, reasoning that a statement is not puffery if it lacks "its own metric." Pet. App. 36a.

In contrast, the Third Circuit has held that vague hyperbole accompanying factual recitations of past earnings—such as statements regarding the issuer's "dramatic . . . growth, strong performance, and unique business model"—are "mere 'puffery,' insufficient to sustain a Rule 10b-5 claim." *Galati v. Commerce Bancorp, Inc.*, 220 F. App'x 97, 102 (3d Cir. 2007) (internal quotation marks omitted). Those are just "general optimistic statements" that investors expect and disregard. *See id.*

Similarly, the Fifth Circuit has held that using "strong" to characterize results is "obviously immaterial puffery." *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 869-70 (5th Cir. 2003). There, the court analyzed whether the following statements were puffery: "Our fundamentals are strong," and "[t]he pipeline of private transactions and announced public tenders that we are pursuing remains strong." *Id.* The court found the statements so "obviously immaterial" as to require no analysis. *Id.* at 869. For support it cited *Raab v. General Physics Corp.*, 4 F.3d 286 (4th Cir. 1993), which held that those kinds of statements are immaterial, because "[a]nalysts and arbitrageurs rely on facts in determining the value of a security, not mere expressions of optimism from a company spokesman." *Id.* at 290. [2]

The D.C. Circuit's holding conflicts directly with those of the Third and Fifth Circuits. According to the latter two courts, the characterization of results as "strong" is not anything upon which a reasonable investor would rely, regardless of the context. Indeed, in *Rosenzweig*, the plaintiffs argued, as they do here,

[2] *See also Ley v. Visteon Corp.*, 543 F.3d 801, 811 (6th Cir. 2008) (issuer's statement in January 2003 that company "had a solid year in 2002" was non-actionable "corporate optimism"), *abrogated on other grounds by Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011); *In re Cutera*, 610 F.3d at 1111(holding statement that "we believe our employee relations are good," when "many employees were already on their way out the door" immaterial puffery, because "investors do not rely on vague statements of optimism like 'good,' 'well-regarded,' or other feel good monikers "); *Next Century Commc'ns Corp. v. Ellis*, 318 F.3d 1023, 1028 (11th Cir. 2003) (per curiam) (interpreting Georgia's puffery doctrine and holding that, under it, "the characterization of a company's performance as 'strong' constitutes mere puffery.").

"that the optimistic representations were 'specific material assurances of strength, ability and future, the accuracy of which was subject to quantitative verification.'" 332 F.3d at 868-69. The Fifth Circuit held these arguments beside the point, "because analysts 'rely on facts in determining the price of a security,'" not an issuer's calling results "strong." *Id.* at 869. Even where the term "strong" is linked to a specific product or business, the term itself is "certainly not specific enough to perpetrate a fraud on the market." *Id.*

In addition to this direct conflict, the D.C. Circuit's overarching analysis significantly departs from the analytical path marked by the majority of courts. To the D.C. Circuit, the inherently ambiguous and self-congratulatory nature of the term "strong" was insufficient to render it puffery. The fact that there was no "metric" by which to evaluate the word "strong" was of no moment to the court. Because PND sales were allegedly important to the company's automotive division (but not the company's "total portfolio"), the court held that an investor would rely on the statement. Pet. App. 34a.

But as the Sixth Circuit has explained, it is the generality and obvious hyperbole, itself, that renders statements puffery, because a "reasonable investor would not rely" on "vague, soft, puffing statements or obvious hyperbole." *Pub. Sch. Teachers' Pension & Ret. Fund of Chicago v. Ford Motor Co.*, 381 F.3d 563, 570 (6th Cir. 2004) (internal quotation marks omitted).

Thus, in contrast to the D.C. Ciruit, in *In re Level 3 Communications, Inc. Securities Litigation*, which in-

volved alleged misstatements regarding the integration of acquired companies, the Tenth Circuit held that "[t]he importance of integration to Level 3 and its investors does not, however, mean that everything defendants said on the topic was material." 667 F.3d 1331, 1340 (10th Cir. 2012). Regardless of the importance of the subject to investors, statements that were "nothing more than puffery" were not material. *Id.* They are "vague (if not meaningless) management-speak upon which no reasonable investor would base a trading decision." *Id.*

And unlike the D.C. Circuit, the Second and Ninth Circuits have held that whether "statements were knowingly and verifiably false when made" does not preclude application of the puffery doctrine. *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014). Falsity "does not cure their generality, which is what prevents them from rising to the level of materiality required to form the basis for assessing a potential investment. *Id.*; *see also Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.*, 759 F.3d 1051, 1060 (9th Cir. 2014) (holding statement that "the opportunity for system placement at hospitals 'is still very, very large'" was puffery despite the fact that it was "objectively verifiable"). "[P]rofessional investors, and most amateur investors as well, know how to devalue the optimism of corporate executives." *Intuitive Surgical*, 759 F.3d at 1060 (internal quotation marks and citation omitted).

B. The D.C. Circuit's Puffery Decision Was Erroneous.

The D.C. Circuit's decision is also incorrect. Puffery is a "vague statement[] of optimism like 'good,' 'well-regarded,' or other feel good monikers." *Intuitive Surgical*, 759 F.3d at 1060 (internal citation and quotation marks omitted). Puffery's hallmark is the lack of "a standard against which a reasonable investor could expect them to be pegged." *City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 671 (6th Cir. 2005). "[I]t is inherently a label expressive of, and generated by, opinion." *Next Century Commc'ns Corp. v. Ellis*, 318 F.3d 1023, 1028 (11th Cir. 2003) (per curiam).

Harman's statement that "sales of aftermarket products, particularly PNDs, were very strong during fiscal 2007" is classic puffery. Pet. App. 84a. In that portion of its Annual Report, Harman provided the actual net sales figures for its automotive division—none of which are alleged to be false—and made the "very strong" comment. Read in this context, the comment is the kind of opinion-based, self-congratulatory hyperbole that investors regularly disregard. The statement is so vague, an investor would not know whether "very strong" is relative to Harman's historical sales, Harman's expectations, Harman's budget, competitors' sales over the period, competitors' historical sales, or something different entirely. And, as the district court held, if Harman meant to compare its PND sales to previous quarters, its statement was true. Pet. App. 85a.

Thus, the district court correctly concluded that Harman's "use of the chest-beating adjective 'strong'

is subjective and provides no standard against which a comparison can be drawn." Pet. App. 84a. The term was used in such a vague manner, "it is impossible to know" what very strong was meant to connote. Pet. App. 85a.

III. THE PETITION CONCERNS ISSUES OF EXCEPTIONAL IMPORTANCE.

The questions presented are of such exceptional importance that the Court should resolve the conflicts now. As a general matter, any question regarding the meaning of the securities laws is important given the numerous cases those questions impact. Thus the Court has repeatedly granted *certiorari* to resolve conflicts in the courts of appeals regarding the scope of § 10(b)(5) liability.[3]

Indeed, the Court regularly grants interlocutory review in securities class actions, because there is, realistically, no alternative. *See, e.g.*, *Tellabs*, 551 U.S. at 316 (granting certiorari to review reversal of order granting a motion to dismiss); *Stoneridge Inv. Part-*

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[3] *See, e.g.*, *Tellabs*, 551 U.S. at 317–18 & n.2 (granting certiorari "to resolve the disagreement among the Circuits on whether, and to what extent, a court must consider competing inferences in determining whether a securities fraud complaint gives rise to a 'strong inference' of scienter," as required by the PSLRA); *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2299 (2011) (granting certiorari to resolve "whether Janus Capital Management LLC (JCM), a mutual fund investment adviser, can be held liable in a private action under Securities and Exchange Commission (SEC) Rule 10b-5 for false statements included in its client mutual funds' prospectuses"); *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 250-51 (2010) (deciding whether § 10(b) "provides a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges").

ners, LLC v. Scientific-Alaska, Inc., 552 U.S. 148, 155–56 (2008) (same); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 77 (2006) (same); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 340 (2005) (same). As the Court has observed, "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Investment Partners*, 552 U.S. at 163. Many cases that proceed to discovery, therefore, go no further—defendants elect to settle rather than enduring the expense and disruption of discovery. *See Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civ. Rules, to Hon. Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure (May 11, 1999)*, 192 F.R.D. 354, 357 (2000) (reporting that discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed).

The meaningful cautionary statements safe harbor is an important tool for eliminating costly, unnecessary discovery. As explained, the PSLRA contains a special provision that expands the materials that may be considered on a motion to dismiss in order for courts to resolve the safe harbor's applicability at the pleadings stage. *See* 15 U.S.C. § 78u-5(e). This creates a special need to review safe harbor cases arising from a motion to dismiss, as this one does.

Similarly, under the puffery doctrine courts can eliminate specious § 10(b) claims at the pleadings stage by holding statements immaterial as a matter of law. *See In re Level 3 Commc'ns, Inc. Sec. Litig.*, 667 F.3d at 1340 (holding alleged misstatements "as a matter of law, nothing more than puffery"); *Next Century Commc'ns Corp.*, 318 F.3d at 1027-28 (hold-

ing that statement regarding "Company's strong performance" non-actionable puffery as a matter of law). Here, too, this advances the PSLRA's goals by eliminating costly discovery.

Finally, the safe harbor's and the puffery doctrine's scope, meaning and application have nationwide importance given their frequent use in litigation. The meaningful cautionary statements safe harbor has been cited in over 1,000 federal court opinions, over 500 of which are published, and over 100 of which were issued by the courts of appeals.[4] In the last six months alone, its meaning has been the subject of dozens of cases.

The puffery doctrine has been at issue in over 700 federal cases, over 70 of which were issued by the courts of appeals.[5] As of the date of this petition, in 2015, the doctrine was at issue in over 50 cases. The scope of both is therefore of incredible significance to courts and litigants nationwide.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[4] These figures count all cases that cite 15 U.S.C. §78u-5 ("Application of safe harbor for forward-looking statements").

[5] This statistic was derived searching the terms: "10(b)" & securities & puffery.

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NOVEMBER 2015