No. 15-694

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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Harman's cautionary language, which failed to disclose historical facts regarding Harman's stockpiles of obsolete inventory of certain devices, was sufficient to grant safe harbor protection under the Private Securities Litigation Reform Act ("PSLRA") to Defendants' positive forward-looking statements regarding those devices.

Whether Harman's statement that Harman's sales of certain devices in fiscal year 2007 had been "very strong," where it had previously touted those devices' sales prospects for that fiscal year to investors, and where it never disclosed actual sales figures for those devices for that fiscal year, is inactionable "puffery."

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JURISDICTION

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

STATEMENT OF THE CASE

This case concerns three alleged false and misleading statements made over the course of six months in 2007 by Harman International Industries, Inc. ("Harman") regarding the sales results and outlook for one of its then-newer product lines in the European market, personal navigation devices ("PND"), which had experienced accelerating sales since being introduced in 2006.

The first statement was made in April 2007, during an earnings call for the third quarter of fiscal year 2007 ("FY2007").[1] On that call, then-CEO Dr. Sidney Harman ("Dr. Harman") referred to a plan to sell off accumulating PND inventory that Dr. Harman said "had been developed to support a vigorous sales effort." Pet. App. 138a. In particular, Dr. Harman told investors that the "plan forecasts

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[1] Harman's fiscal year runs from July 1 to June 30.

total unit sales of 618,000 units for the fiscal '07 year, and that plan is proceeding." *Id.* In response to a question as to whether Harman "still think[s] [it] can do over 600,000 for the fiscal year" even though sales over the preceding nine months were approximately 300,000, Dr. Harman was steadfast: "We do, and we said so." Pet. App. 139a-140a.

The second statement was made in August 2007, in Harman's FY2007 annual report (Form 10-K). There, Harman stated that "[s]ales of aftermarket products, particularly PNDs, were very strong during fiscal 2007." Pet. App. 157a.

The third was made in September 2007, during an earnings call for the first quarter of fiscal year 2008 ("FY2008"). On that call, then-CFO Kevin Brown ("Brown") explained that it was "a very strong first quarter on the top line for us," in part because of "the PND business, where we continue the growth and expansion of that business primarily in Europe." Pet. App. 170a.

As the complaint alleges, however, at the time the statements were made, not only had Harman's PND inventories ballooned, but much of that inventory had become obsolete and thus unsalable, in large part due to modifications made by Harman itself. Pet. App. 134a-136a, 146a-147a, 159a. Indeed, Harman had missed internal PND sales projections for FY2007 by approximately 200,000 units, or $85 million below target. Pet. App. 135a-136a, 159a.

None of this was disclosed to investors. Only six months later, in February 2008, in announcing

disappointing financial results for the second quarter of FY2008, did Harman finally reveal the truth—that its PND business was suffering, in large part because it had been forced to sell "older [PND] products at substantial discounts," resulting in "inventory clearance of prior generation models at a loss." Pet. App. 176a-177a.

In the proceedings below, Defendants[2] argued that the April and September statements, regarding Harman's plan to sell over 600,000 PND units by the end of FY2007, and regarding the "growth and expansion" of Harman's PND business, were "forward-looking statements" within the meaning of the PSLRA, 15 U.S.C. § 78u-5(c).

Defendants further argued that both statements were accompanied by "meaningful cautionary statements" about the difficulties of the PND business, thus rendering them inactionable under the "safe harbor" provision of the PSLRA.

The district court agreed, but the D.C. Circuit reversed. In a thorough and unanimous opinion that drew on the PSLRA's text, legislative history, and on the decisions of several other circuits, the D.C. Circuit found that the cautionary statements cited by Defendants were insufficient for several reasons, including because they misstated historical facts by failing to warn of actual obsolescence that had already manifested itself, about which Harman

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[2] Defendants are Harman, the estate of Dr. Harman, Brown, and Harman's CEO as of July 1, 2007, Dinesh Paliwal ("Paliwal").

conceded warning was required to gain safe harbor protection. *See* Pet. App. 22a.

As for the August statement that "[s]ales of aftermarket products, particularly PNDs, were very strong during fiscal 2007," Defendants argued that that statement was inactionable under the "puffery" doctrine. Again, although the district court agreed, the D.C. Circuit reversed, noting that "given the context in which it was made, … [the statement] is plausibly understood as a description of historical fact rather than unbridled corporate optimism, *i.e.*, immaterial puffery." Pet. App. 34a. Part of the "context" considered by the D.C. Circuit included the fact that Harman itself had emphasized the strength of its PND business throughout FY2007, *id.*, and that actual PND sales figures for FY2007 were never disclosed to investors. Pet. App. 36a.

As a result, the D.C. Circuit unanimously reversed and remanded the district court's dismissal of the three statements. Defendants then filed a petition for rehearing or rehearing *en banc*. On August 26, 2015, the petition was rejected, with no votes in favor of *en banc* rehearing. The D.C. Circuit then issued its mandate to the district court, which entered a case management order. Pursuant to that order, the parties have begun to engage in discovery, including by exchanging initial disclosures, issuing and responding to document requests, and meeting and conferring about those requests.

During discovery, Defendants filed the instant petition for writ of *certiorari* ("Petition"). Simultaneously, Defendants filed a motion to stay

the district court proceedings pending this Court's disposition of the Petition. The district court denied that request, ruling that this eight-year-old case should proceed to the merits.

REASONS FOR DENYING THE PETITION

The Petition should be denied because, despite Defendants' convoluted attempts to argue otherwise, there is no circuit split with regard to any aspect of the D.C. Circuit's decision. Rather, the D.C. Circuit's decision is wholly consistent with—and even *relies on*—the decisions cited by Defendants as allegedly conflicting. The Court should not grant *certiorari* on the basis of circuit splits that exist only in Defendants' imagination (and that Defendants have conjured up for the first time here).

Defendants claim there are three distinct conflicts created by the D.C. Circuit's decision. All three, however, are illusory. The first only exists by misreading the allegedly conflicting decisions for propositions or holdings they do not support. The second only exists if one concludes that when the D.C. Circuit said it did not consider Harman's state of mind in reaching its decision, it was either lying or incompetent. And the third is only a "conflict" if the puffery doctrine categorically bars certain specific words from ever being actionable, which it does not.

I. THE D.C. CIRCUIT'S RULING THAT HARMAN'S CAUTIONARY LANGUAGE WAS INSUFFICIENT DOES NOT PRESENT A CIRCUIT SPLIT

The D.C. Circuit held that Harman's cautionary language was not "meaningful," and thus did not warrant safe-harbor protection, because it did not adequately warn of PND obsolescence, which it noted Harman conceded was an "important factor" about which warning was required under the PSLRA. *See* Pet. App. 22a ("The Company does not dispute that PND obsolescence was 'an important factor[] that could cause actual results to differ materially from those in the forward-looking statement,' 15 U.S.C. § 78u-5(c)(1)(A)(i), and thus that it was required to alert investors to the risk of obsolescence in order to gain safe harbor protection.").

Instead, as the D.C. Circuit pointed out, Harman's argument was not that it did not have to warn of PND obsolescence to gain safe-harbor protection, but that "it *did* warn of obsolescence 'many times.'" *Id.* (emphasis in original).

The D.C. Circuit disagreed. It noted that several of the cautionary statements cited by Defendants were "boilerplate." Pet. App. 23a. As for other statements that Harman claimed were tailored to PNDs specifically, including "[r]eferences to amassed [PND] inventory," the D.C. Circuit found those inadequate as well, because they "did not convey that inventory was obsolete, as opposed to stocked with the latest, cutting-edge models," and "[e]ven if viewed as implicitly raising the specter of

obsolescence," they "were insufficient for at least the reason that they did not warn of actual obsolescence that had already manifested itself." *Id.* Thus, the D.C. Circuit concluded that "the purportedly cautionary statements were not meaningful because they were [themselves] misleading in light of historical fact." *Id.*

Given that Defendants conceded that obsolescence was an important risk factor about which warning was required to gain safe-harbor protection, it is hardly controversial that Harman's failure to "warn of actual obsolescence that had already manifested itself" would render its cautionary statements inadequate.

Indeed, Defendants' Petition is not based on the argument that Harman's cautionary statements should have been deemed adequate despite failing to warn of PND obsolescence, or that Harman was not required to make such warnings to gain safe-harbor protection for the forward-looking statements at issue.

Instead, Defendants' primary argument in seeking *certiorari* takes issue with the rule articulated by the D.C. Circuit that cautionary statements cannot be "meaningful" under the PSLRA if those statements are themselves misleading in light of historical facts. This rule appears to have first been embraced by the Second Circuit in *Slayton v. American Express Co.*, 604 F.3d 758, 770 (2d Cir. 2010) ("We agree with the SEC and the parties that cautionary language that is

misleading in light of historical fact cannot be meaningful.").

However, Defendants do not even meaningfully argue that this rule is incorrect, insofar as they never directly assert that cautionary statements that are themselves misleading in light of historical fact can nonetheless suffice to afford protection under the PSLRA. Instead, Defendants present a convoluted argument that this rule somehow presents a circuit split with the Third, Seventh, and Eleventh Circuits.

To be sure, Defendants do claim (without citation) that these circuits "have held that a cautionary statement is *not* outside the meaningful cautionary statement safe harbor merely because it is misleading." Pet. Br. at 12 (emphasis added). If that were true, perhaps the conflict with the D.C. Circuit's decision would be more readily apparent. However, Defendants' own Petition reveals that it is simply *not* true. Indeed, in the section of Defendants' Petition that contains the actual, substantive discussion of the alleged split, where Defendants actually provide citations, they make a much vaguer and weaker claim. Specifically, in presenting the alleged split, Defendants assert that "[i]n contrast" to the D.C. Circuit, "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." Pet. Br. at 16 (citing *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); and *Institutional*

Inv'rs Grp. v. Avaya, Inc., 564 F.3d 242, 256 n.23 (3d Cir. 2009)).

How *this* rule conflicts with the D.C. Circuit's holding (and what it even means) is not readily apparent, and never articulated by Defendants. Nevertheless, a cursory examination of the allegedly conflicting cases reveals that every one of the cases cited by Defendants is wholly consistent with the D.C. Circuit's decision, and presents no conflict whatsoever.

Defendants first cite *Asher*, in which the Seventh Circuit wrote the following *dicta* regarding what the safe harbor's "meaningful cautionary statement" provision requires:

> It rules out a caution such as: "This is a forward-looking statement: caveat emptor." But it does not rule in any particular caution, which always may be challenged as not sufficiently "meaningful" or not pinning down the "important factors that could cause actual results to differ materially"—for if it *had* identified all of those factors, it would not be possible to describe the forward-looking statement itself as materially misleading. 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.

Defendants quote the second half of this passage in support of their argument that a conflict exists, without ever explaining how or why. But, as is clear from the entire passage, all the *Asher* court meant here was that the mere fact that the warnings accompanying a forward-looking statement failed to "pin down" the factors that render that statement false and misleading cannot preclude application of the safe harbor. Plainly, that is an uncontroversial statement of the law that the D.C. Circuit *itself* recognized in noting that "cautionary language need not necessarily 'mention *the* factor that ultimately belies a forward-looking statement.'" Pet. App. 20a (quoting *Harris v. Ivax Corp.*, 182 F.3d 799, 807 (11th Cir. 1999)) (emphasis in original). Contrary to the implication raised by Defendants' reliance on *Asher*, the *Asher* court simply did *not* say that cautionary statements that are misleading in light of historical facts can nonetheless be meaningful.

Defendants next cite the Third Circuit's decision in *Avaya*, which cited the foregoing passage from *Asher*. But, as with *Asher* itself, *Avaya* simply does not contradict the rule that cautionary statements that are misleading in light of historical facts are not meaningful.

In *Avaya*, one of the plaintiff's arguments was that the precipitous fall of the defendant company's share price upon the announcement of financial results was "proof that the cautionary language provided insufficient warning." 564 F.3d at 256 n.23. Citing the language from *Asher* quoted above, the Third Circuit found that argument unavailing. It explained that "if the Safe Harbor were automatically inapplicable whenever a firm's disclosures actually misled investors, then the Safe Harbor would be superfluous." *Id.* Again, this plainly does not conflict with the D.C. Circuit's decision, which in no way renders the cautionary-statement safe harbor "automatically inapplicable" simply because a projection *turns out* to have been misleading. Rather, all the D.C. Circuit held was that cautionary statements which are *themselves* misleading in light of historical fact, *i.e.*, when they are made, are insufficient. Nothing in *Avaya* is to the contrary.

Finally,[3] Defendants assert that the Eleventh Circuit's opinion in *Ehlert v. Singer*, 245 F.3d 1313

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[3] Defendants also cite another Eleventh Circuit case, *Edward J. Goodman Life*, 594 F.3d at 795, for the proposition that "allowing an allegation of knowledge of falsity to prevent safe harbor would also produce a counterintuitive result." *Id.*; Pet. Br. at 16. The relevance of that proposition to the question of whether cautionary statements that are misleading in light of historical fact can be meaningful, and whether there is a circuit split, is even less apparent than Defendants' discussion of *Asher*, *Avaya*, and *Ehlert*. Moreover, in that case, the plaintiffs *did not even argue that the relevant cautionary language was not meaningful. See Edward J. Goodman Life*, 594 F.3d at 794 ("The shareholders do not contend on appeal

(11th Cir. 2001), conflicts with the D.C. Circuit's decision. Again, however, even a cursory reading of the case shows otherwise.

In *Ehlert*, the plaintiff claimed that the defendants had failed to adequately warn that they had decided to not provide free upgrades to "Version 8 [of a particular software program] to make it Year 2000 compliant." 245 F.3d at 1318. The Eleventh Circuit disagreed. It noted that there were numerous warnings in defendants' prospectus about, among other things, the need to upgrade to Version 9 to become Year 2000 compliant, and the risks of continued use of Version 8, which the prospectus made clear was non-compliant, as well as statements that encouraged users to upgrade to Version 9 as a result. *Id.* at 1319. In light of these statements and warnings, "and absent any allegation that it was the industry-wide norm for companies to provide free support and upgrade services to non-Year 2000 compliant software," the Eleventh Circuit concluded that, contrary to plaintiff's claims, "there *was* meaningful cautionary language to warn investors that there were risks to MMC's existing products created by the Year 2000 problem and that MMC would not provide free Year 2000 compliant upgrades to Version 8 users." *Id.*

Again, this is perfectly consistent with the D.C. Circuit's decision. The only difference is that, unlike the *Ehlert* defendants, Harman's cautionary language was completely silent on the risk that its

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that the risk factors Jabil enumerated were not meaningfully cautionary within the meaning of the statute.").

PNDs were unsalable due to obsolescence, including self-inflicted obsolescence. That the D.C. Circuit found Harman's cautionary language insufficient on these facts, while the Eleventh Circuit reached a different conclusion about the defendants there on different facts, hardly creates a circuit split requiring this Court's intervention. And, there is certainly no discussion in *Ehlert* of whether misleading cautionary language can nevertheless be meaningful.

As the foregoing demonstrates, the alleged circuit splits upon which Defendants primarily rely are wholly illusory.[4] Put simply, no circuit court (or district court for that matter, it would seem) has *ever* held that cautionary statements that are misleading in light of historical facts can nonetheless be meaningful under the PSLRA. If a circuit court *does* reach that conclusion in one of the many hundreds of securities cases decided each year, a compelling

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[4] Indeed, Defendants do not argue that, given the same facts, the outcome would have been different under *Asher*, *Avaya*, or *Ehlert*. That further supports the conclusion that there is no genuine conflict for the Court to resolve, and that the Petition should be denied. *See*, *e.g.,* Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. App. Prac. & Process 91, 96 (2006) ("But attorneys often present cases that involve not actual divides among the lower courts, but merely different verbal formulations of the same underlying legal rule. And we are not particularly interested in ironing out minor linguistic discrepancies among the lower courts because those discrepancies are not outcome determinative.")

argument might be made that the Supreme Court should hear *that* case. But this is not that case.[5]

II. THE D.C. CIRCUIT DID NOT CONSIDER HARMAN'S KNOWLEDGE

Defendants claim there is a second, independent reason the D.C. Circuit's decision creates a circuit split, namely that the D.C. Circuit considered Harman's knowledge in evaluating Harman's cautionary statements, while other circuits have held consideration of knowledge impermissible. Defendants made the same argument in their failed petition for rehearing *en banc*.

The problem then, as now, is that the D.C. Circuit *explicitly rejected consideration of Harman's knowledge*, stating that in light of its holding, it "need not reach the parties' arguments regarding the role of actual knowledge under the safe harbor." Pet. App. 23a.

Nevertheless, Defendants press on, claiming that despite this disclaimer, the D.C. Circuit's "reasoning necessarily depends on Harman's alleged knowledge." Pet. Br. at 17. Specifically, Defendants

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[5] The fact that no court has ever perceived this alleged split, which Defendants claim was created by the Second Circuit's decision in *Slayton*, which was decided more than five years ago, is also strong evidence that no such split exists. So too is the fact that the D.C. Circuit, which cited both *Asher* and *Avaya* in its decision, *see* Pet. App. 17a, 19a, 20a, 21a, 29a (citing *Asher*); 18a (citing *Avaya*), did not perceive a conflict. So too is the fact that no such conflict was mentioned in Defendants' own petition for rehearing *en banc*.

argue that, although the D.C. Circuit "did not take issue with" various circuit court decisions taking opposing views on whether a defendant's knowledge was relevant to the adequacy of the defendant's cautionary statements, it "necessarily relied on Harman's alleged knowledge to conclude that Harman had a duty to 'convey that inventory was obsolete.'" Pet. Br. at 19 (quoting Pet. App. 23a). This is so, Defendants argue, because "Harman would have a duty to disclose obsolescence only if it had knowledge of obsolescence." Pet. Br. at 20 (citing *Phila. Fin. Mgmt. of S.F., LLC v. DJSP Enters., Inc.*, 572 F. App'x 713, 716 (11th Cir. 2014)).

As an initial matter, the D.C. Circuit did *not* "conclude that Harman had a duty to convey that inventory was obsolete," and the word "duty" does not appear once in its opinion. The duty to disclose relates to whether omissions are actionable under the securities laws. The D.C. Circuit did not address that question, because no such arguments were made below. Rather, the D.C. Circuit's opinion was focused on whether Harman's cautionary language could be said to be "meaningful" despite omitting facts about obsolescence that Harman conceded were "important." This has nothing to do with whether the cautionary statements themselves, or the related omissions, are actionable. Thus, Defendants' arguments and cases regarding the duty to disclose are irrelevant. *See generally* Pet. Br. at 22-23.[6]

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[6] Defendants also make a convoluted argument regarding cases that *do* allegedly "decid[e] the role of issuer knowledge under the safe harbor." Pet. Br. at 20. Those cases, they claim, "usually involve omissions of 'historical fact' that

More fundamentally, in their quest to manufacture a circuit split, Defendants persist in erroneously and illogically equating consideration of historical facts that happen to be within Harman's knowledge, with consideration of Harman's knowledge itself. The two, however, are analytically distinct. That a large inventory of older-generation PNDs were being stored in a warehouse, and that PNDs were made obsolete by modifications made within Harman, are realities that existed whether Harman had corporate knowledge of those realities or not. Thus, it is not the case, as Defendants claim, that the D.C. Circuit held that Harman's warnings

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allegedly render cautionary statements misleading." *Id.* (citing *Edward J. Goodman Life*, 594 F.3d at 795 (alleging that forecasts were false when made); *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1107 (9th Cir. 2010) (alleging inadequate disclosure of actual, current problems with sales staff that disproved projections); *Miller v. Champion Enters., Inc.*, 346 F.3d 660, 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)) (parentheticals in Defendants' Petition). What Defendants appear to be arguing, based on the parentheticals and the cases themselves, is not that these cases *actually* involved "omissions of 'historical fact' that allegedly render cautionary statements misleading," but that they *could be framed to* implicate such omissions. Given that no arguments even remotely resembling such a framing were made in *any* of those cases, however, it is difficult to conceive how those decisions could be said to conflict with the D.C. Circuit's decision here. And, given that these cases contain no analysis whatsoever of the interplay between cautionary statements and related historical facts, and how that interplay affects the adequacy of the cautionary statement, they are a thin reed indeed upon which to rest a grant of *certiorari* for the instant decision, and would undoubtedly result in extremely convoluted briefing.

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. Br. at 21 (emphasis added) (quoting Pet. App. 147a). Rather, the D.C. Circuit held that Harman's warnings were misleading because such a modification *had* been made, had undisputedly rendered inventory obsolete, and none of Harman's warnings came close to putting investors on notice of the accompanying risks. Nothing in the D.C. Circuit's opinion suggests that if Harman had been ignorant of these facts, its cautionary statements would have been more meaningful.[7,8] Put another way, the D.C. Circuit's analysis had nothing to do with Harman's state of mind—just as the D.C. Circuit stated.[9]

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[7] If Harman truly lacked knowledge of such facts, Defendants could have argued for dismissal of the forward-looking PND statements under the "actual knowledge" prong of the safe harbor. 15 U.S.C. § 78u-5(c)(1)(B). They did not.

[8] Indeed, adopting Defendants' argument would seemingly have required the D.C. Circuit to ignore all facts relating to obsolescence on the grounds that those facts were within Harman's knowledge, lest anything related to Harman's knowledge affect the analysis of whether Harman's warnings were meaningful. Under this view, defendants could avoid liability by acquiring knowledge of as many facts as possible and then hiding them from investors when issuing warnings, because courts could not delve into anything even remotely related to what they knew in assessing whether their warnings were meaningful. The Court should not grant *certiorari* on the basis of such an illogical reading of the safe harbor.

[9] Defendants also seem to suggest that other circuits have held that courts must blind themselves to all facts not contained within the "four corners" of the cautionary

III. THE D.C. CIRCUIT'S PUFFERY HOLDING DOES NOT MERIT SUPREME COURT REVIEW

Defendants argue that the D.C. Circuit's puffery ruling requires review because (1) the result it reached "conflicts directly" with Third and Fifth Circuit decisions; and (2) the D.C. Circuit employed a unique "analytical approach" to achieve the result that it did. Defendants are wrong on both counts. The D.C. Circuit's decision is simply the result of applying the same puffery doctrine to different facts. That the facts here yielded a result different from

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statements in assessing meaningfulness. *See* Pet. Br. at 22 (asserting that "by going outside the four corners of the cautionary statements to analyze alleged historical facts," the D.C. Circuit's decision conflicted with those of other circuits that have held that "courts must examine '*only* the cautionary statement accompanying the forward-looking statement' to determine the safe harbor's applicability") (quoting *Edward J. Goodman Life*, 594 F.3d at 795) (Defendants' emphasis) (also citing *Miller*, 346 F.3d at 672, 677-78; *Harris*, 182 F.3d at 807; *In re Cutera*, 610 F.3d at 1112). However, *nowhere* in these decisions do the Fifth, Sixth, Ninth, or Eleventh Circuits say that courts may not examine anything outside the "four corners" of the statements themselves to assess the meaningfulness of cautionary language. All they say is that courts may not examine a defendant's state of mind in doing so—which the D.C. Circuit did not do.

Indeed, to require courts to blind themselves to facts not contained within the cautionary statements themselves makes no sense. The only way to find a cautionary statement inadequate is to find that it is missing something. If a court could not consider whether anything is missing—and by definition not contained within the "four corners" of the statement—it could never find the statement inadequate. It is no wonder then that, contrary to Defendants' suggestion, no circuit has ever so held.

those reached on different facts in other cases hardly amounts to a circuit split.

A. The D.C. Circuit's Holding Does Not "Conflict Directly" With the Results Reached by Other Circuit Courts.

In its opinion, the D.C. Circuit, citing the law of three other circuits, framed its analysis of puffery in terms of materiality, observing that "[f]or a statement to be actionable under Section 10(b) and Rule 10b-5, it must be 'material' in the sense that it would have 'been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available" to the market. Pet. App. 32a-33a (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2413 (2014) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988))). Conversely, the D.C. Circuit observed that "'statements [that] are too general to cause a reasonable investor to rely upon them' are immaterial and inactionable." Pet. App. 33a (quoting *ECA & Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009)). Thus, the D.C. Circuit defined "puffery" as "the sort of 'generalized statements of optimism that are not capable of objective verification.'" *Id.* (quoting *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997)). "Statements that constitute puffery," the Court held, "are 'too squishy, too untethered to anything measurable, to communicate anything that a reasonable person would deem important to a securities investment decision.'" *Id.* (quoting *City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 671 (6th Cir. 2005)). The "critical inquiry," the Court held, "is whether the statement could

'have misled a reasonable investor.'" Pet. App. 34a (quoting *San Leandro Emergency Med. Grp. Profit Sharing Plan v. Philip Morris Cos., Inc.*, 75 F.3d 801, 811 (2d Cir. 1996)). This, it said, was the relevant holding of the Sixth Circuit in *City of Monroe*, not whether the statement "contain[ed] its own metric," as Defendants urged. Pet. App. 36a.

Given these standards, the D.C. Circuit engaged in a highly context-specific analysis and held that Harman's statement in its FY2007 Annual Report, namely that "[s]ales of aftermarket products, particularly PNDs, were very strong during fiscal 2007," was not puffery because it was "specific about product and time period," and thus would have misled a reasonable investor. Pet. App. 34a; *see also* Pet. App. 35a ("very strong" statement was "tied to a product and a time period and it was not too vague to be material").[10]

Defendants complain that the Third Circuit's decision in *Galati v. Commerce Bancorp, Inc.*, 220 F. App'x 97, 102 (3d Cir. 2007)—an unpublished, non-precedential opinion—is to the contrary. Pet. Br. at 29. Not so. In *Galati*, the Third Circuit dismissed as puffery the statement that "The strong performance of [Commerce Capital Markets] was led by the public

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[10] Defendants' assertion that investors "would not know whether 'very strong' [was] 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 that it is therefore "'impossible to know' what very strong was meant to connote," Pet. Br. at 33-34 (quoting Pet. App. 85a), ignores that the statement was highly specific as to both product and time period.

finance division." 220 F. App'x at 101. This statement, however, was tied to neither product nor time period, and, in fact, described an entire corporate entity. It was clearly "too vague to be material," Pet. App. 35a, and is readily distinguishable from the statement at issue here.

Likewise, Defendants complain that the Fifth Circuit's decision in *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 869-70 (5th Cir. 2003), conflicts with the D.C. Circuit's decision. Defendants highlight two statements that the Fifth Circuit held to be inactionable, namely (1) "Our fundamentals are strong"; and (2) "The pipeline of private transactions and announced public tenders that we are pursuing remains strong." Pet. Br. at 30. Defendants, however, ignore the inherently vague and generalized nature of both of these statements; indeed, Defendants omit the second half of the latter statement, namely the company's qualification that "the timing of certain transactions [was] unpredictable." *Rosenzwieg*, 332 F.3d at 860. This qualification greatly diminished the likelihood that the statement would mislead investors and, indeed, warned investors of the very risk that subsequently transpired.

Here, by contrast, Harman's statement that PND sales were "very strong" during FY2007 is far more specific, as to both product and time period, than the statements at issue before the Third and Fifth Circuits, and conveyed facts that would have misled a reasonable investor. Additionally, the D.C. Circuit analyzed the statement before it in the context of circumstances that were not present in the

cases before the Third and Fifth Circuits. In short, the D.C. Circuit's holding does not conflict with the holdings of the other circuits, much less amount to a split that requires Supreme Court resolution.

B. That the D.C. Circuit Employed a Different "Analytical Approach" Than Other Circuit Courts, Even If True, Is Irrelevant.

Defendants further criticize the D.C. Circuit because they say its "overarching analysis significantly departs from the analytical path" of other courts. Pet. Br. at 31. This is not only incorrect, but is entirely irrelevant to whether this Court should grant *certiorari*.

Before analyzing the facts at issue here, the D.C. Circuit engaged in a thorough review of the case law of other Circuits, defining "puffery" as "generalized … optimism" that is "not capable of objective verification," that does not "communicate anything that a reasonable person would deem important," and that would not "have misled a reasonable investor." Pet. App. 33a-34a. Defendants criticize the D.C. Circuit for failing to follow the same "analytical path" articulated by the Sixth and Tenth Circuits, Pet. Br. at 31, but the standards from those circuits that Defendants cite align with the D.C. Circuit's standard *almost verbatim*. *See id.* (quoting *Pub. Sch. Teachers' Pension & Ret. Fund of Chicago v. Ford Motor Co.*, 381 F.3d 563, 570 (6th Cir. 2004) ("reasonable investor would not rely" on "vague, soft, puffing statements or obvious hyperbole"); *In re Level 3 Commc'ns Sec. Litig.*, 667 F.3d 1331, 1340 (10th Cir. 2012) (puffery is "vague

(if not meaningless) management-speak upon which no reasonable investor would base a trading decision")).[11] Thus the D.C. Circuit's "analytical path" is hardly unique.

Even if the D.C. Circuit did employ a different "analytical approach" to arrive at its puffery decision, however (and it did not), Defendants have cited no authority supporting the astounding notion that it is this Court's role to ensure that all federal courts employ the same reasoning to reach the results that they do. If it were this Court's role to conform the thought processes of every federal judge, as opposed to ensuring that courts apply the law consistently to achieve consistent results, this would constitute a remarkable shift in Supreme Court jurisprudence. Indeed, the broad rule Defendants urge—that the term "strong" be inactionable as a matter of law—is not susceptible to uniform application as Defendants propose. As outlined above, the puffery analysis is highly dependent on context, and it would make no sense to create a broad rule to govern something that depends so heavily on case-by-case analysis.[12]

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[11] Defendants also cite cases from the Second and Ninth Circuits to support the unremarkable principle that a statement's falsity does not alter the analysis of whether it is puffery. Pet. Br. at 32 (citing *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014); *Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.*, 759 F.3d 1051, 1060 (9th Cir. 2014)). While true, this is entirely irrelevant to the D.C. Circuit's decision and to this appeal, and Defendants cite nothing to demonstrate otherwise.

[12] Given the context-specific application of the puffery doctrine, it is unsurprising that other courts have, like the D.C.

IV. THIS CASE IS A POOR VEHICLE FOR SUPREME COURT REVIEW

Lead Plaintiff does not disagree that the federal securities laws are, as a general matter, important. However, even if certain issues raised by the Petition, or by the D.C. Circuit's holding, have the potential to develop into issues deserving of Supreme Court consideration, this case is simply the wrong vehicle to consider any such issues. Certain of the main arguments made in the Petition have never been briefed before in this litigation, and are making their first appearance here. Indeed, the principal alleged circuit split upon which Defendants base their Petition has never been identified by any court before, much less been discussed in this litigation, despite Defendants' claim that it has existed since at least 2010, the year of the Second Circuit's decision in *Slayton*. The D.C. Circuit itself certainly did not perceive such a split when it cited the Seventh Circuit's decision in *Asher* and the Third Circuit's decision in *Avaya*, the two main cases with which its decision allegedly conflicts, according to Defendants.

Circuit, found the word "strong" to be actionable. *See, e.g. Dura Pharm., Inc. Sec. Litig.*, 452 F. Supp. 2d 1005, 1033 (S. D. Cal. 2006) (finding the statement that "sales and demand for Ceclor CD were 'strong'" was actionable and not puffery); *In re Lucent Techs., Inc. Sec. Litig.*, 217 F. Supp. 2d 529, 559 (D.N.J. 2002) (finding the statement that there was "strong customer acceptance" was not puffery); *In re Computer Assocs. Class Action Sec. Litig.*, 75 F. Supp. 2d 68, 73 (E.D.N.Y. 1999) (finding the statements that "business is stronger than ever," that there was a "strong worldwide demand," and that "business fundamentals are strong" were "all actionable").

The thinness of the record on this issue is reason enough to deny the Petition.

Further, as Defendants themselves note, cases involving the safe harbor for forward-looking statements and the puffery doctrine abound in the federal courts. *See* Pet. Br. at 36. Thus, there is virtually no risk that by denying *certiorari* here, the Supreme Court will be deprived of the opportunity to consider these issues for an undue amount of time.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be denied.

Respectfully submitted.

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