No. 18-164

IN THE

Supreme Court of the United States

FIRST SOLAR, INC., MICHAEL J. AHEARN, ROBERT J. GILLETTE, MARK R. WIDMAR, JENS MEYERHOFF, JAMES ZHU, BRUCE SOHN, AND DAVID EAGLESHAM,

Petitioners,

v.

MINEWORKERS' PENSION SCHEME AND BRITISH COAL STAFF SUPERANNUATION SCHEME,

Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

Whether the "causal connection between the material misrepresentation and the loss" in securities fraud actions must conform to a particular pattern or may be dependent on fact-specific context.

RULE 29.6 STATEMENT

Mineworkers' Pension Scheme and British Coal Staff Superannuation Scheme are not corporations, and therefore no statement pursuant to Rule 29.6 is required.

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INTRODUCTION

This case presents a straightforward application of the familiar loss causation standard in securities fraud cases to a well-developed set of facts decided on summary judgment. In both the district court and the court of appeals, Respondents were required to prove this Court's standard for loss causation: a "traditional" "proximate[]" "causal connection between the material misrepresentation and the loss." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005). The district court—in fact findings that were undisturbed on appeal—concluded that Respondents had made the necessary factual showing to surmount summary judgment and to create triable issues of fact.

Petitioners seek to cobble together a circuit split by taking isolated language used in various context-specific and fact-bound applications of proximate causation analysis to concoct limiting standards that must be applied in every case. In fact, properly read, the cases Petitioners identify as supposedly in conflict all faithfully apply the "traditional" proximate cause standard from *Dura*, albeit in the context of the unique facts alleged and/or proved in those cases. In so doing, although Petitioners seek to "cluster" different circuits in their supposed categorization of conflicting standards, several of the circuit decisions themselves quote from a circuit that Petitioners elsewhere claim represents a different viewpoint in their alleged split. For example, the language Petitioners cite from the Third Circuit—which they claim joins the Ninth Circuit as adopting the "least demanding" standard (Pet. 14)—is actually the Third Circuit quoting the Seventh Circuit, which Petitioners put into their first cluster of circuits that they claim apply the most rigorous standard. *See McCabe v. Ernst & Young, LLP*, 494 F.3d 418, 431 (3d Cir. 2007) (quoting *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 648 (7th Cir. 1997)). There are not different standards—only different context-specific applications of proximate cause.

Lower courts have decades of experience in analyzing and applying proximate cause. This Court's intervention is not necessary to further define that common law concept—particularly in this interlocutory appeal where record evidence amply demonstrates loss causation under any standard other than an outright admission of fraud by defendants.

STATEMENT OF THE CASE

A. Factual Background

1. *The Fraud*

Petitioners, who were defendants in the lower courts, ran a solar panel company that made panels that lost power quickly and degraded in the sun. Evidence has established triable issues of fact that they concealed first the existence and then the extent of the low power module ("LPM") and heat degradation problems from investors throughout the Class Period (April 30, 2008 – February 28, 2012).

For example, Petitioners internally described the LPM problem as "a rather serious quality problem" that "looks real," is one of "the biggest smoking gun[s] we have at the company," and is "[b]ad, bad, bad, bad, bad." Pet. App. 57a; C.A.SER153 (first alteration in original). But one week after the last of these internal admissions, VP of Technology Eaglesham falsely told investors "our track [record] of field performance and our knowledge of field performance allows us to have fairly high confidence that our product is delivering in the field." First Solar, Inc. June 24, 2009 Conf. Call Tr. of Analyst/Investor Meeting at 25, attached as Ex. 355 to Pls.' Opp. to Defs.' Mot. for Summ. J. (D.C. ECF#372-3, at 25, 50).

Internal documents reveal that Petitioners intentionally planned to conceal the problem. Preparing for a conference call with investors, President Sohn confirmed: "As far as the public is concerned, [LPM] does not exist." Pet. App. 57a. And in discussing the decision that customers would not be informed of the LPM defect because it would "not be detectable," CEO Ahearn responded: "We'll have to keep our fingers crossed." *Id.*

When Petitioners finally acknowledged the LPM problem at least a year later, after recognizing that "analyst[s] and investors are picking up on this issue," C.A.SER439, they falsely told investors the problem was small and contained—that it affected "less than 4% of the total product manufactured within the period" and that the replacement cost would be $29.5 million, Pet. App. 15a-16a. Petitioners' internal estimate of the financial impact in that same month was $131.2 million. C.A.SER541. Publicly, Petitioners told investors the LPM remediation efforts were "well under way, and in some cases complete." Pet. App. 40a. Internally, an Executive VP reported to CEO Gillette that the "LPM story continues to unfold . . . we don't yet have sight of 'the bottom'. I listened to our story . . . listened to the customer experience . . . they don't match." C.A.SER528 (ellipses in original).

Regarding the hot climate degradation issue, Petitioners internally knew that the problem was a "catastrophe, mayhem, all hell breaks loose," C.A.SER166, and that "a large financial impact was imminent," Pet. App. 69a. Yet, publicly, Petitioners told investors nothing about the problem: "too bad, can't tell customer about hot climate." C.A.SER566.

Meanwhile, CEO Ahearn sold more than three million shares, totaling 96% of his holdings. Pet. App. 18a. Petitioners Eaglesham, Meyerhoff, Sohn, and Zhu sold 94%, 80%, 75%, and 50% of their shares, respectively. *Id.* They sold at prices they had caused to be artificially inflated—for more than $468 million. C.A.SER150.

2. *The Disclosures*

During the Class Period, First Solar's stock fell from nearly $300 per share to nearly $50 per share. Pet. App. 3a. Expert testimony, First Solar's own documents, and contemporaneous analyst commentary established fraud-specific loss as the truth leaked out over six separate events. C.A.SER727-70. The district court held that evidence as to five of those events was sufficient to withstand summary judgment—unless loss cannot be caused until defendants admit their own fraud.

July 2010: On July 29, 2010, Petitioners disclosed the LPM manufacturing defect for the first time and announced disappointing earnings—internally admitting First Solar would have achieved analyst expectations "[e]xcluding [the LPM defect]." Pet. App. 42a (second alteration in original). First Solar also reduced its revenue guidance by $100 million. *Id.* at 40a. The district court found that, internally, "First Solar [had] estimated that the LPM would negatively impact its revenues by $99 million." *Id.* at 42a. First Solar's stock price dropped 7.4% the next day. *Id.* Analysts contemporaneously explained that the market responded to First Solar's prior concealment of the problem; according to TheStreet.com, "[m]any analysts thought the warranty issue—in particular since First Solar took almost a year to reveal it—was the reason for the post-earnings selloff." C.A.SER643.

February 2011: On February 24, 2011, First Solar beat earnings estimates, but missed revenue estimates and acknowledged that it had accrued another $8.5 million in expenses related to the LPM defect. Pet. App. 42a-43a. First Solar's stock price dropped 5.4% the next day. *Id.* at 43a. CEO Gillette admitted that First Solar's revenues were "impacted by our decision to divert some volumes to expedite the module replacement program." *Id.*

May 2011: On May 3, 2011, First Solar reduced guidance for both operating income and cash flow, while maintaining revenue and earnings guidance for the fiscal year. Pet. App. 44a. First Solar's stock price dropped 6.2% the next day. *Id.* Internal, but concealed, First Solar documents specifically itemized and valued the impact of the still-concealed heat degradation issue on First Solar's published guidance. C.A.SER634 (hot climate stabilization impact: "$30-$60M in 2011 (de-rating)"); C.A.SER665 ("$23.66M impact"); C.A.SER681 ("Cost of Unsellable Watts ($M) . . . $21.16" for Q2-Q4 2011). At summary judgment, Petitioners admitted that "[t]he estimated financial impact of [two hot climate mitigation strategies] was fully incorporated into First Solar's updated financial guidance to investors issued on May 3, 2011." Defs.' Mot. for Summ. J. at 28 (D.C. ECF#311) ("MSJ").

October 2011: On October 25, 2011, First Solar announced Gillette's departure as CEO. Pet. App. 45a-46a. First Solar's stock price dropped 25% that day, but later partially rebounded. *Id.* at 46a-47a. Analysts contemporaneously reported that the departure was "clearly negative" and "an unanticipated event." *Id.* at 46a.

December 2011: On December 14, 2011, First Solar reduced both revenue and earnings guidance for 2012. Pet. App. 48a. First Solar's stock price dropped 21.4% immediately. *Id.* First Solar documents connect a portion of the earnings guidance reduction to the financial impact of the still-concealed hot climate defect. *Compare* C.A.SER716 *with* C.A.SER724.

February 2012: On February 28, 2012, Petitioners admitted the then-current extent of the cost of the LPM defect and finally disclosed the concealed heat degradation problem. Pet. App. 49a-53a. Petitioners revealed that the total warranty cost for LPM stood at $215.7 million with additional potential costs of $44 million—totaling nearly 10 times the $29.5 million figure initially disclosed in July 2010. *Id.* at 50a. In connection with First Solar's first-ever disclosure that its modules degraded rapidly in high temperatures, the company took another $37.8 million charge and increased its warranty accrual "to account for potential returns going forward"—a change that would continue to impact First Solar's profits long after the Class Period. *Id.* at 51a. First Solar's stock price dropped 11.26% that day and 5.8% the next. *Id.* at 53a. Analysts contemporaneously called out Petitioners' credibility: "[I]nvestors should be wary of additional future warranty accruals, especially considering First Solar had previously stated that it believed that [the] bulk of warranty risk was behind it." *Id.* at 52a. Credit Suisse added that "credibility and brand concerns . . . now likely exist with investors and customer partners" as a result of the repeatedly increasing costs attributed to the

LPM defect. *Id.* Axiom concurred: "they told us that this problem was . . . fixed. And it is not fixed. . . . The company will not talk to us." *Id.* at 53a.

B. Procedural Background

1. *District Court*

The complaint in this case was originally filed in March 2012. The district court appointed Respondents Mineworkers and British Coal Staff as lead plaintiffs in July 2012, selecting them from amongst several other plaintiffs that had applied to lead a class action regarding this securities fraud. C.A.ER465.

The district court found that Respondents had satisfied the extremely demanding pleading requirements of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 ("PSLRA"), and accordingly denied Petitioners' motion to dismiss Mineworkers' amended complaint in December 2012. C.A.ER465, 467.

The district court determined that all the relevant requirements of Federal Rule of Civil Procedure 23 were satisfied and certified a class of plaintiffs to pursue this securities fraud action in October 2013. C.A.ER472. The court's ruling followed discovery and briefing on certification issues. *Id.*

Following additional extensive discovery on the merits, Petitioners moved for summary judgment—which the district court largely denied on August 11, 2015. Pet. App. 9a-79a. The court reviewed the body of evidence presented and found that Respondents "presented sufficient evidence for a reasonable jury to conclude that Defendants (1) had a duty to disclose the LPM defect to investors and failed to do so in order to mislead investors; (2) concealed the scope of the LPM defect with the intent to mislead investors; (3) had a duty to disclose the hot climate degradation to investors and failed to do so in order to mislead investors; and (4) engaged in accounting fraud with respect to both defects with intent to mislead investors." *Id.* at 74a. The court found sufficient evidence to support a finding that Petitioners concealed the LPM problem from investors throughout the Class Period by manipulating accounting metrics and misrepresenting the true scope of the defect. *Id.* at 17a-18a, 73a-74a. The court concluded a "reasonable jury could also find that Defendants should have disclosed the hot climate problem sooner and that Defendants concealed the problem from customers to avoid disclosure [to investors]." *Id.* at 70a.

On loss causation, the district court engaged in a lengthy analysis of pertinent loss causation cases and distilled the legal standard to govern as follows: "In summary, as the Court reads *Daou*, *Berson*, and *Nuveen*, proof of loss causation is not confined to a particular kind of market disclosure. The question is whether the facts misrepresented or concealed by the defendant led to the plaintiff's loss. If they did, then the defendant's misrepresentation or omission has a causal connection to the plaintiff's loss as required by *Dura*." *Id.* at 29a (citing *In re Daou Sys. Inc.*, 411 F.3d 1006 (9th Cir. 2005); *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982 (9th Cir. 2008); *Nuveen Mun. High Income Opportunity Fund v. City of Alameda*, 730 F.3d 1111 (9th Cir. 2013)). The court went on to analyze other Ninth Circuit cases that the court believed stood for a different principle—that the market had to learn of, and respond to, the defendant's fraud to support loss causation. *Id.* at 30a-32a. The court then explained why the standard that it applied was grounded in Supreme Court and Ninth Circuit precedent. *Id*. at 34a-35a.

Petitioners did not appeal the district court's determination that Respondents had presented sufficient evidence for a reasonable jury to find they had made material false and misleading statements with a fraudulent state of mind. *Id.* at 54a-74a. Petitioners sought interlocutory review only on the issue of loss causation.

2. *Court of Appeals*

The Ninth Circuit accepted review and denied Petitioners' appeal in a *per curiam* order. The court of appeals affirmed that the district court had applied the correct test for loss causation and had appropriately found that Respondents presented sufficient evidence for a reasonable jury to find that Petitioners' fraud caused their loss. Pet. App. 1a-8a. As the court of appeals explained:

> Our most recent decision on loss causation, *Lloyd* [*v. CVB Fin. Corp.*, 811 F.3d 1200 (9th Cir. 2016)], was published after the district court's order and clarifies the applicable rule. In *Lloyd*, the plaintiffs pleaded loss causation by alleging that defendant CVB's fraudulent conduct led to a subpoena, and that when the market learned of the subpoena, the stock price dropped as a market reaction. 811 F.3d at 1210-11. We explained that "loss causation is a 'context-dependent' inquiry as there are an 'infinite variety' of ways for a tort to cause a loss." *Id*. at 1210 (citing *Assoc'd Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 536, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983)) (internal citation omitted). "Because loss causation is simply a variant of proximate cause, the ultimate issue is

> whether the defendant's misstatement, as opposed to some other fact, foreseeably caused the plaintiff's loss." *Id.* (citing *Dura*, 544 U.S. at 343-46, 125 S.Ct. 1627) (internal citation omitted).

Id. at 6a. The court of appeals then explained that "[t]he cases that the district court cites for the proposition of a more restrictive test should be understood as fact specific variants of the basic proximate cause test, as clarified by *Lloyd*. Revelation of fraud in the marketplace is simply one of the 'infinite variety' of causation theories a plaintiff might allege to satisfy proximate cause." *Id.* at 6a-7a. The court of appeals then accepted the district court's fact-findings as to the sufficiency of proof in creating triable issues of fact with respect to five of the six alleged stock declines. *Id.* at 8a. Petitioners' petition for panel rehearing and rehearing *en banc* was denied, with no judge voting in favor of *en banc* review. *Id.* at 80a.

REASONS FOR DENYING THE PETITION

I. THE STANDARD OF LOSS CAUSATION IS NOW WELL SETTLED FROM THIS COURT'S DECISION IN *DURA*

The Ninth Circuit applied this Court's guidance that "'loss causation is a "context-dependent" inquiry as there are an "infinite variety" of ways for a tort to cause a loss.'" Pet. App. 6a (quoting *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1210 (9th Cir. 2016), quoting in turn, in part, *Assoc'd Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 536 (1983)). This Court has already defined loss causation in the securities fraud context as proof "that the defendant's misrepresentation (or other fraudulent conduct) proximately caused the plaintiff's economic loss." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346 (2005). This Court instructs that plaintiffs' burden is to "allege and prove the traditional elements of causation and loss," meaning proving that "a misrepresentation" "proximately cause[s] an[] economic loss." *Id.* Referencing the "common-law roots of the securities fraud action," the Court cited to the "judicial consensus" in the Restatement (Second) of Torts (1977) ("Restatement") that "a person who 'misrepresents the financial condition of a corporation in order to sell its stock' becomes liable to a relying purchaser 'for the loss' the purchaser sustains 'when the facts . . . become generally known' and 'as a result' share value 'depreciate[s].'" *Dura*, 544 U.S. at 344 (quoting Restatement § 548A cmt. b) (alterations in original). Analyzing the PSLRA, this Court has already identified "Congress' intent to permit private securities fraud actions for recovery where, but only where, plaintiffs adequately allege and prove the traditional elements of causation and loss." *Id.* at 346.

Petitioners inaccurately assert that "[t]his Court has made clear that such plaintiffs may establish loss causation only 'to th[e] extent' that a decline is caused by 'the revelation of a misrepresentation' to the market." Pet. 2 (quoting *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 812-13 (2011)) (second alteration in original). *Halliburton* does not so hold. In the language quoted by Petitioners, this Court is describing the Fifth Circuit's definition of *reliance*—and explicitly distinguishing it from loss causation. *Halliburton*, 563 U.S. at 812. This Court actually describes loss causation two paragraphs later: "Loss causation, by contrast, requires a plaintiff to show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss." *Id.* This Court did not and has not announced a limited version of proximate causation under which securities fraud loss can be caused only by a "revelation of a misrepresentation."

II. THERE IS NO CIRCUIT SPLIT—LOWER COURTS UNIFORMLY APPLY THE "FAMILIAR" PROXIMATE CAUSE TEST PURSUANT TO THIS COURT'S GUIDANCE

Despite this Court's guidance in *Dura* that loss causation is proved by evidence that facts "become generally known" in a manner consistent with "the traditional elements of causation and loss," 544 U.S. at 344, 346, Petitioners attempt to isolate language from lower court opinions to wedge them into categories. But, while losses are caused by a variety of different kinds of fraud and courts analyze proximate causation in a variety of factual settings based on a range of disclosures, all circuits agree that "proximate causation" is the standard and are well versed in applying it. There is no need for this Court's intervention. Petitioners seek to concoct a circuit split by taking stray sentences from opinions—often far out of context. When understood properly, those courts' holdings would not yield a different result if this case had been decided in any other circuit.

A. The Circuits in Petitioners' First Cluster (the First, Fourth, Seventh, and Eleventh) Each Analyze Loss Causation Using a General, Fact-Bound, "Proximate Cause," Relatedness Standard

The circuits in Petitioners' first alleged "cluster" expressly do not limit proof of loss causation to proof that loss was caused by revelation of "the fraudulent nature of the defendant's conduct," as Petitioners erroneously assert. Pet. 9. For example, the First Circuit holds that a "corrective disclosure need not be a 'mirror-image' disclosure—a direct admission that a previous statement is untrue"—but "must relate to the same subject matter as the alleged misrepresentation." *Mass. Ret. Sys. v. CVS Caremark Corp.*, 716 F.3d 229, 240 (1st Cir. 2013). The Fourth Circuit holds open the possibility that plaintiffs could prove loss causation without "identify[ing] a public disclosure that corrected the previous, misleading disclosure" if they produced evidence that "a previously concealed risk materialized," in which case "news of the materialized risk would itself be the revelation of fraud that caused plaintiffs' loss." *Teachers' Ret. Sys. of La. v. Hunter*, 477 F.3d 162, 187 n.3 (4th Cir. 2007).

The Seventh Circuit's decision in *Glickenhaus & Co. v. Household International, Inc.*, 787 F.3d 408 (7th Cir. 2015), is even more instructive. As in the instant case, that court was analyzing evidence rather than simply allegations. Reviewing "14 separate disclosure events," the Seventh Circuit looked at both a "specific-disclosure model" as well as a "leakage model" generated by experts. *Id.* at 416. Actually applying proximate causation to evidence, the Seventh Circuit held that "what the plaintiffs had to prove is that the defendants' false statements caused the stock price to remain higher than it would have been had the statements been truthful." *Id* at 419. The expert's "models calculated the effect of the truth, once it was fully revealed, and the jury found that the defendants concealed the truth through false statements." *Id.* According to the Seventh Circuit, "[t]hat is enough." *Id.* After analyzing the body of disclosure evidence and applying proximate causation principles, the Seventh Circuit affirmed the trial court's decision to allow the jury to consider both interim partial disclosures as well as general leakage in between those disclosures (excluding firm-specific, non-fraud factors)—all of which preceded full revelation of the truth. *Id.* at 419, 422. Petitioners' assertion that the Seventh Circuit limits proximate causation to specific revelation of "the fraudulent nature of the defendant's conduct" is incorrect.

Petitioners' citation to the Seventh Circuit's earlier application of proximate causation to allegations in *Tricontinental Industries, Ltd. v. Pricewaterhouse-Coopers, LLP*, 475 F.3d 824 (7th Cir. 2007), does no more to support their theory of a circuit split on a general rule. *Tricontinental* simply held that revelation of facts about accounting irregularities in a firm's 1998 and 1999 financial statements was not proximately related to alleged fraud in its 1997 financial statements. *Id.* at 842. *Tricontinental* only demonstrates that lower courts are well versed in applying proximate causation.

Like the First, Fourth, and Seventh Circuits, the Eleventh Circuit also does not have the limiting rule Petitioners suggest. To the contrary, the Eleventh Circuit describes loss causation as "the logical link between the inflated share purchase price and any later economic loss" and expressly holds that a "corrective disclosure can come from any source, and can take any form from which the market can absorb [the information] and react, so long as it reveal[s] to the market the falsity of the prior misstatements." *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1311 & n.28 (11th Cir. 2011) (citation omitted; alterations in original). Clarifying that no particular disclosure language is required, the Eleventh Circuit explains that, "[t]o be corrective, the disclosure need not precisely mirror the earlier misrepresentation, but [its subject matter] must at least relate back to the misrepresentation and not to some other negative information about the company." *Id.* (second alteration in original). Quoting a Seventh Circuit opinion, the Eleventh Circuit explains that "loss causation" is "simply 'an exotic name' for 'the standard common law fraud rule' requiring the plaintiff to prove both factual and legal causation." *Id.* at 1309 (quoting *Bastian v. Petren Res. Corp.*, 892 F.2d 680, 683, 685 (7th Cir. 1990); citing 4 Thomas Lee Hazen, *Law of Securities Regulation* § 12.91 (6th ed. 2009) ("Causation in securities law involves the same analysis of cause in fact and legal cause that was developed under the common law.")).

B. The Circuits in Petitioners' Second Cluster (Second, Fifth, Sixth, and Tenth) Also Do Not Stand for a Rigid "Revelation of the Facts Concealed by a Misrepresentation" Rule

Petitioners next incorrectly assert that a second group of cases rigidly requires a revelation of the facts concealed. Pet. 12-14. Rather, the Second Circuit holds that "[l]oss causation 'is the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff.' . . . Put another way, a misstatement or omission is the 'proximate cause' of an investment loss if the risk that caused the loss was within the zone of risk *concealed* by the misrepresentations and omissions alleged by a disappointed investor. . . . Loss causation is a fact-based inquiry." *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 172-73, 174 (2d Cir. 2005).

The Second Circuit recently reiterated its loss causation test in a post-trial evidentiary context. In *In re Vivendi, S.A. Securities Litigation*, 838 F.3d 223

(2d Cir. 2016), the court repeated the standard it articulated in *Lentell* and summarized that, "[p]ut more simply, proof of loss causation requires demonstrating that the *subject* of the fraudulent statement or omission was the cause of the actual loss suffered." *Id.* at 261. "If 'the relationship between the plaintiff's investment loss and the information misstated or concealed by the defendant . . . is sufficiently direct, loss causation is established.'" *Id.* (quoting *Lentell*, 396 F.3d at 174) (ellipsis in original). "'[B]ut if the connection is attenuated, or if the plaintiff fails to "demonstrate a causal connection between the content of the alleged misstatements or omissions and the harm actually suffered," a fraud claim will not lie.'" *Id.* (quoting *Emergent Capital Inv. Mgmt., LLC v. Stonepath Grp., Inc.*, 343 F.3d 189, 199 (2d Cir. 2003)) (alteration in original). "Whether the truth comes out by way of a corrective disclosure describing the precise fraud inherent in the alleged misstatements, or through events constructively disclosing the fraud, does not alter the basic loss-causation calculus." *Id.* at 262. Thus, where Vivendi had made alleged false statements about its liquidity risk, the Second Circuit found sufficient evidence to support the jury's verdict on loss causation where the plaintiff's expert testified that Vivendi's sale of 55 million treasury shares "indicated to the market that Vivendi 'need[ed] cash badly,' and that 'academic economic literature . . . inform[ed] [this] view.'" *Id.* at 263 (alterations in original).

The Fifth Circuit similarly follows the context-specific proximate causation test described by this Court and applied by the Ninth Circuit in the decision at issue here. The Fifth Circuit rejects a "fact-for-fact disclosure" requirement because, if that were the standard, "a defendant could defeat liability by refusing to admit the falsity of its prior misstatements." *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 230 (5th Cir. 2009) (*per curiam*). "And if a complete corrective disclosure were required, defendants could immunize themselves with a protracted series of partial disclosures." *Id.* Yet, hewing to fundamental proximate causation principles, the Fifth Circuit also holds that "[o]nly information known to the market can cause a loss." *Id.* Thus, "to establish loss causation this disclosed information must reflect part of the 'relevant truth'—the truth obscured by the fraudulent statements." *Id.*

Applying those articulated loss causation principles to evidence, the Fifth Circuit considered a district court's holding that loss causation was not proved where "the reductions in July . . . and September 2002 . . . of the FY2002 earnings guidance did not reveal the 'relevant truth' concerning the inaccuracy of the October 2001 FY2002 earnings projection," and held that the district court "must have reasoned that the July and September 2002 statements need not have simply reduced Flowserve's earnings-per-share guidance, but had directly to reveal that the October 2001 guidance was fraudulent." *Id.* at 231. As Petitioners acknowledge (Pet. 14), the Fifth Circuit held that that direct revelation was "not required" and, instead, the court applied a proximate causation test: "it was enough that the market learned that the October 2001 guidance was wrong and that other negative information unrelated to the reduced FY2002 guidance did not cause the decline in Flowserve's share price." 572 F.3d at 231.

Similarly, in *Public Employees' Retirement System of Mississippi v. Amedisys, Inc.*, 769 F.3d 313 (5th Cir. 2014), the Fifth Circuit analyzed loss causation in connection with a series of five partial disclosures. Quoting this Court, the Fifth Circuit held that, "[t]o establish proximate causation, the plaintiff must allege that when the 'relevant truth' about the fraud began to leak out or otherwise make its way into the marketplace, it caused the price of the stock to depreciate and, thereby, proximately caused the plaintiff's economic harm." *Id.* at 320. Quoting *FindWhat* from the Eleventh Circuit (which Petitioners put into their first cluster of circuits), the Fifth Circuit held that "[l]oss causation in fraud-on-the-market cases can be demonstrated circumstantially by '(1) identifying a "corrective disclosure" (a release of information that reveals to the market the pertinent truth that was previously concealed or obscured by the company's fraud); (2) showing that the stock price dropped soon after the corrective disclosure; and (3) eliminating other possible explanations for this price drop, so that the factfinder can infer that it is *more probable than not* that it was the corrective disclosure—as opposed to other possible depressive factors—that caused at least a "substantial" amount of price drop.'" *Id.* at 320-21 (quoting *FindWhat*, 658 F.3d at 1311-12) (emphasis added by *Amedisys*).

The Sixth Circuit is no different. Following *Dura*, that court holds that loss causation "partakes of the traditional elements of loss and proximate causation." *Ohio Pub. Emps. Ret. Sys. v. Fed. Home Loan Mortg. Corp.*, 830 F.3d 376, 384 (6th Cir. 2016) (citing *Dura*, 544 U.S. at 346). Following the Second Circuit, the Sixth Circuit holds that loss in securities fraud cases is generally caused by the "'underlying circumstance that is concealed or misstated.'" *Id.* (quoting *Lentell*, 396 F.3d at 173). The court explains that loss causation may be shown by a "corrective disclosure" or—as agreed upon by "[a] decisive majority of circuits"—by "the alternative theory of materialization of the risk, whereby a plaintiff may allege 'proximate cause on the ground that negative investor inferences,' drawn from a particular event or disclosure, 'caused the loss and were a foreseeable materialization of the risk concealed by the fraudulent statement.'" *Id.* at 384-85 (quoting *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 511 (2d Cir. 2010); citing *In re Harman Int'l Indus., Inc. Sec. Litig.*, 791 F.3d 90, 110 (D.C. Cir. 2015); *McCabe v. Ernst & Young, LLP*, 494 F.3d 418, 428-29 (3d Cir. 2007); *Hunter*, 477 F.3d at 187-88; *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 258 (5th Cir. 2009); *Ray v. Citigroup Glob. Mkts., Inc.*, 482 F.3d 991, 995 (7th Cir. 2007); *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 550 (8th Cir. 2008); *Nuveen Mun. High Income Opportunity Fund v. City of Alameda*, 730 F.3d 1111, 1120 (9th Cir. 2013); *Nakkhumpun v. Taylor*, 782 F.3d 1142, 1156 (10th Cir. 2015)).*

The Tenth Circuit holds that, "[t]o be corrective, the disclosure need not precisely mirror the earlier misrepresentation, but it must at least relate back to the misrepresentation and not to some other negative information about the company." *In re Williams Sec. Litig.—WCG Subclass*, 558 F.3d 1130, 1140

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* Petitioners characterize the materialization of the risk theory for proving loss causation as related to "how" rather than "what" relevant truth is revealed to the market. Pet. 9 n.2. But materialization of the risk is plainly a "what"—a description of the nature of information that can reveal enough of the truth about a defendant's prior fraud or its impact to proximately cause loss.

(10th Cir. 2009). The Ninth Circuit and several other circuits quote *Williams* on this point. *E.g.*, *Lloyd*, 811 F.3d at 1210 (noting its alignment with the Fifth and Tenth Circuits).

C. Like the Ninth Circuit, the Third Circuit Is No Outlier

Finally, the Third Circuit—which Petitioners claim the Ninth Circuit has joined in stating the "least demanding" rule for loss causation—only applies the same proximate causation test as every other circuit. *See McCabe*, 494 F.3d at 430-31. Quoting the Second Circuit (which Petitioners put into their second cluster of circuits), the Third Circuit holds that the "'loss causation inquiry typically examines how directly the subject of the fraudulent statement caused the loss, and whether the resulting loss was a foreseeable outcome of the fraudulent statement.'" *Id.* (quoting *Suez Equity Inv'rs, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 96 (2d Cir. 2001)). Moreover, the language that Petitioners quote from *McCabe*—"that it was the very facts about which the defendant lied which caused its injuries" (Pet. 15)—is actually the Third Circuit quoting the Seventh Circuit (which Petitioners put into their first cluster of circuits). *See McCabe*, 494 F.3d at 431 (quoting *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 648 (7th Cir. 1997)). The actual loss causation holding of *McCabe* was an application of *Dura*—that transaction causation and loss causation are separate matters of proof. *Id.* at 431-32.

There is no difference in the legal standard for loss causation throughout the federal circuits. Securities frauds unfold in different ways. Courts apply time-tested proximate causation analysis to determine which losses are sufficiently connected to a defendant's fraud and which are not. The circuits have wisely eschewed a rigid test that would limit the types of fraud that become actionable and create a roadmap for fraudsters.

D. The Ninth Circuit's Opinion Is Entirely Consistent with the General Principles of Loss Causation Applied Throughout the Federal Circuits

The Ninth Circuit's decision aligns with circuits across the country and did not carve out any new ground. Indeed, the court essentially followed its own earlier decision in *Lloyd*, from which no petition for a writ of certiorari was taken.

Here, the record evidence is sufficient to withstand summary judgment in all federal circuits. There is no rule-of-law reason to assume that the result would have been different in any other circuit. All circuits apply a time-honored proximate causation test. Indeed, circuits in each of the clusters Petitioners attempt to create have applied a proximate cause test to facts in a way that strongly suggests summary judgment would have been denied in this case in any circuit around the country. Petitioners' forum-shopping argument is unsupported.

Had this case been brought in what Petitioners identify as the first cluster of circuits (First, Fourth, Seventh, and Eleventh), Respondents presented sufficient evidence to survive summary judgment on loss causation. As noted above, the specific expression of proximate causation applied by the district court and approved by the Ninth Circuit was "that the very facts misrepresented or omitted by the defendant were a substantial factor in causing the plaintiff's economic loss." Pet. App. 5a. The Seventh Circuit has articulated proximate causation in the securities fraud context with almost identical words: "To plead loss causation, the plaintiff must allege that it was the very facts about which the defendant lied which caused its injuries." *Caremark*, 113 F.3d at 648. Applying that standard to evidence, the Seventh Circuit approved a district court's decision to send evidence to a jury regarding interim partial disclosures and leakage, recognizing that proximate causation is fact-bound and adequate instruction about linkage can guide a fact-finder. *Glickenhaus*, 787 F.3d at 419, 422.

Similarly, had this case been brought in what Petitioners identify as the second cluster of circuits (Second, Fifth, Sixth, and Tenth), Respondents again presented sufficient evidence to survive summary judgment on loss causation. The Second Circuit allowed a jury to consider evidence about a company's sale of 55 million treasury shares to determine whether that sale was sufficiently proximate to alleged false statements about the company's liquidity risk to cause loss by revealing to the market, as the expert concluded it did, that the company "need[ed] cash badly." *Vivendi*, 838 F.3d at 263 (alteration in original). Even closer to the facts here, the Fifth Circuit reversed a district court's holding that particular earnings guidance reductions could not have caused loss because they did not explicitly "reveal that the [earlier] guidance was fraudulent." *Flowserve*, 572 F.3d at 231.

In short, Petitioners' assertion, *see* MSJ at 36 (D.C. ECF#311), is that a jury should never be able to consider internal documents—such as First Solar's here (C.A.SER634, 665, 681)—that specifically itemize and value the impact of a still-concealed product issue on published financial guidance. Likewise, even

Petitioners' admission that the "estimated financial impact" of heat degradation was incorporated into guidance that led directly to First Solar's May 2011 stock price decline, MSJ at 28 (D.C. ECF#311), is, in their view, insufficient to create a triable issue of fact as to loss causation. Nor, under Petitioners' construct, does the revelation of a fraudulently concealed product defect (July 2010 (LPM), February 2012 (heat)) or disclosure to investors that the problem was far greater than previously represented (February 2011 and February 2012) satisfy Respondents' burden—notwithstanding the undisputed finding that Respondents have raised a triable issue of fact that Petitioners fraudulently concealed the existence of the LPM defect and then its scope "with the intent to mislead investors," abrogated their duty to disclose the hot climate degradation "in order to mislead investors," and "engaged in accounting fraud with respect to both defects with intent to mislead investors." Pet. App. 74a.

To Petitioners, as long as they are able to conceal that the "very facts" alleged to be fraudulent actually caused economic harm, they should be able to avoid liability. That is not the state of the law—nor should it be. Allowing defendants to leak the economic loss related to a fraud and then, once there will be no further economic impact, admit the underlying problem is simply a license for fraud.

Importantly, proximate causation is not easy to demonstrate. Here, the Ninth Circuit's affirmance of a decision concluding that news of CEO Gillette's abrupt departure was not sufficiently linked to the alleged fraud underscores how able lower courts are to apply the analysis—and how demanding it can be. Respondents had proffered evidence showing that several analysts at the time did see a linkage, noting "the abruptness of the announcement and the terse wording of the release" as indications of possible "accounting" and "profitability" issues. *Id.* at 46a. The district court's conclusion, affirmed by the Ninth Circuit, that the linkage was too attenuated emphasizes the rigor involved in the "context-dependent inquiry" of loss causation. *Id.* at 6a. The conclusion also demonstrably responds to Petitioners' tired refrain that securities laws are not intended as investor insurance. Pet. 19. As the district court explained, analyzing loss causation as proximate causation does not convert the securities laws into "a form of investor insurance"; "[t]he only losses for which a plaintiff can recover are those caused by 'the very facts' that were misrepresented or omitted." Pet. App. 29a.

The Fifth Circuit, sitting with retired Justice O'Conner by designation, reached the same conclusion. *See Flowserve*, 572 F.3d at 231 (citing *Dura*, 544 U.S. at 345). The court rejected a similar "investor insurance" argument, holding that it "ignore[d] the Exchange Act's scienter requirement." *Id.* at 232. "Flowserve was free to be wrong in its October 2001 earnings guidance and even for such error to cause investors loss when it was revealed in July and September 2002—so long as Flowserve did not commit fraud. Only if Flowserve's October 2001 guidance (or another alleged misstatement) was fraudulent would any loss it caused [plaintiff] be actionable." *Id.* "The Exchange Act is not investor insurance, but neither is the possibility of recovery for fraud tantamount to insurance." *Id.*

III. THIS INTERLOCUTORY APPEAL IS A POOR VEHICLE FOR REVIEW BECAUSE TRIABLE ISSUES OF LOSS CAUSATION REMAIN REGARDLESS OF THE OUTCOME HERE

This case is a poor vehicle for considering in the abstract how courts should articulate the loss causation legal standard. The facts here plainly satisfy any reasonable test: Petitioners concealed product defects and the economic impact of those defects, ultimately admitting both the defects and their causal linkage to the economic impact.

In light of the Ninth Circuit's conclusion that the district court's perceived dichotomy had been clarified before the appeal in this case even had been perfected, Pet. App. 6a, it is illusory to think the district court's either/or standard still applies. That is doubly true in light of Petitioners' own change in position. At the time the district court ruled in 2015, Petitioners were still pressing for a "revelation of fraud" standard—which would have required that not only falsity but also Petitioners' fraudulent state of mind be contemporaneously revealed to the market before any "loss" could be "caused." MSJ at 31, 38 (D.C. ECF#311). (To be clear, the district court never held that a "revelation of falsity" or "revelation of a misrepresentation" standard—to which Petitioners pivoted on appeal in the Ninth Circuit—would result in summary judgment for Petitioners.) The district court acknowledged the snippets of language on which Petitioners relied, characterized them as "misreading[s]" of earlier proximate cause jurisprudence, and expressed frustration at a perceived lack of clarity in guidance from Ninth Circuit decisions. Pet. App. 30a-32a. In response, the Ninth Circuit harmonized the language that Petitioners had been exploiting and reiterated the "proximate cause" standard that the district court applied—and that is uniform throughout the federal circuits.

Indeed, the district court's fact findings confirm that Respondents can survive summary judgment under any loss causation test that has been articulated by this Court or any of the circuit courts. The fraud alleged is that Petitioners concealed the existence and extent of two product defects—the LPM and heat degradation problems. *Id.* at 12a-18a. After concealing the existence of the LPM defect for a year, Petitioners acknowledged it on July 29, 2010 (although still concealing the full extent of the problem)—and the market immediately responded by dropping its valuation of First Solar overnight. *Id.* at 40a. Through a series of interim partial disclosures, Petitioners gradually revealed more and more of the (previously concealed) extent of the LPM defect—and the market immediately responded each time. *Id.* at 42a-49a. At the same time, the market also responded to negative financial results that Petitioners admit were caused by the ongoing, but concealed, heat degradation defect—a defect that Petitioners also eventually expressly disclosed. *Id.* at 49a-53a. Again, the market responded significantly and immediately. *Id.* at 53a-54a.

Specifically, on July 29, 2010, Petitioners "disclosed the LPM defect for the first time," internally "estimated that the LPM would negatively impact [First Solar's] revenues by $99 million," and externally "reduced [First Solar's] revenue guidance by $100 million." *Id.* at 40a. Remarkably, Petitioners did admit they had known about the defect and associated expenses for more than a year before acknowledging it to the market—as close to an admission of fraud as is realistically imaginable. Following that disclosure, First Solar's stock price dropped significantly and immediately. *Id.* at 42a. Analysts expressly linked the LPM defect to the company's financial results and questioned why First Solar had not disclosed the problem sooner—again introducing contemporaneous information about Petitioners' fraudulent state of mind into the market (*id.* at 41a), satisfying even the rigid and overstated test espoused by Petitioners.

Similarly, in the three interim disclosures (leaving aside the disclosure of CEO Gillette's abrupt departure), substantial evidence supports linkage between what Petitioners said and the alleged fraud. On February 24, 2011, Petitioners acknowledged additional LPM expenses (*id.* at 43a), CEO Gillette admitted the "module replacement program" "impacted" fourth quarter results (*id.*), internal documents showed the LPM issue caused the company's guidance reduction (C.A.SER646-63), analysts opined that the negative financial news was a result of the "potentially faulty modules" (Pet. App. 43a), and the loss causation expert echoed a linkage between the disclosure and an immediate stock price drop (*id.*). On May 3, 2011, Petitioners announced disappointing financial guidance; documents revealed Petitioners' internal admissions that the disappointing guidance was caused by the concealed heat degradation defect, which the expert therefore agreed "had a negative impact on First Solar's stock price." *Id.* at 44a-45a. On December 14, 2011, Petitioners reduced revenue and earnings guidance, which internal documents directly connected to the still-concealed heat degradation defect. *Id.* at 48a-49a; *compare* C.A.SER716 *with* C.A.SER724.

At the end of the Class Period, on February 28, 2012, Petitioners finally acknowledged the extent of the LPM defect and the existence of the hot climate degradation defect. Pet. App. 49a-52a. First Solar's stock price fell for two days. *Id.* at 53a-54a. Analysts immediately "expressed . . . concern over the LPM defect and hot climate degradation issues, noting that investors should be wary of additional future warranty accruals, especially considering First Solar had previously stated that it believed that [the] bulk of warranty risk was behind it," as well as noting "'credibility and brand concerns that now likely exist with investors and customer partners' as a result of the ever-increasing costs attributed to the LPM defect," *id.* at 51a-53a—again making this the unusual case where evidence of Petitioners' fraudulent state of mind was contemporaneously revealed to the market.

No court requires that defendants admit their fraud in order for plaintiffs to prove that loss was caused. Here, the district court's factual findings show that an actual admission of fraud by Petitioners is all that was missing. Petitioners did (1) acknowledge they had concealed the LPM defect for one year (*id.* at 40a); (2) acknowledge that the costs of remediating the LPM problem were actually nearly 10 times greater than the estimated cost Petitioners had told investors would resolve all of the LPM remediation (*id.* at 41a, 50a); and (3) eventually acknowledge the heat degradation defect (*id.* at 51a). Each time, the market immediately responded to Petitioners' statements by reducing its valuation of First Solar. *Id.* at 42a, 53a-54a.

Finally, the interlocutory posture of this case counsels against certiorari. If they lose at trial, Petitioners presumably will renew any objection they have to how loss causation was addressed, along with any other perceived errors in the district court proceedings that have not been waived. Any consideration of this issue at that time by this Court will benefit from the development of a full trial record and appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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