

**24-4909**

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**United States Court of Appeals  
For the Ninth Circuit**

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CONSTRUCTION LABORERS PENSION TRUST OF GREATER ST. LOUIS, *et al.*

*Plaintiffs-Appellants,*

v.

FUNKO INC, *et al.*

*Defendants-Appellees,*

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On Appeal from the United States District Court for the  
Western District of Washington, No. 2:23-cv-00824 (JLR), Hon. James L. Robart

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**BRIEF FOR AMICUS CURIAE  
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION  
IN SUPPORT OF PETITION FOR REHEARING AND REHEARING EN  
BANC**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae, the Securities Industry and Financial Markets Association, certifies that it is a non-profit organization, it has no parent company, and no publicly-held corporation owns 10 percent or more of its stock.

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

The Securities Industry and Financial Markets Association (“SIFMA”) is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers. Its mission is to support a strong financial industry, while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in financial markets. SIFMA often appears as an amicus curiae before federal appellate courts over the proper scope of the federal securities laws. *See, e.g., Sundaram v. Freshworks, Inc.*, No. 25-3127 (9th Cir. 2025); *Goldman Sachs Grp., Inc. v. Arkansas Teacher Ret. Sys.*, 594 U.S. 113 (2021); *Arkansas Teacher Ret. System v. Goldman Sachs Group, Inc.*, 77 F.4th 74 (2d Cir. 2023). SIFMA has a substantial interest in the issues presented in this case because of their impact on the scope of private securities litigation, subject companies’ disclosure requirements, and investor opportunity.

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<sup>1</sup> No person other than Amicus Curiae, its members, and its counsel drafted or contributed money for preparing or submitting this brief.

## SUMMARY OF ARGUMENT

The Panel decision should be reversed because it vitiates two critical protections Congress and the SEC established for registrants and investors and substantially harms the securities industry.

*First*, the Panel decision abrogates the heightened pleading standard the Private Securities Litigation Reform Act (the “PSLRA”) imposes on private plaintiffs for claims under Section 10(b) of the Exchange Act. That standard requires plaintiffs to plead scienter “with particularity” and “with respect to each” statement alleged to be misleading. 15 U.S.C. § 78u-4(b)(2)(A). The Panel ignored this mandate by holding that particularized allegations somehow were *not* necessary where, under the “core operations” doctrine, the alleged misstatements concerned an issue of such “prominence” in a company that it would be “absurd” for management not to have known their falsity. *Constr. Laborers Pension Tr. v. Funko Inc*, 166 F.4th 805, 831 (9th Cir. 2026). As such, the Panel disregarded the statutory text and Congressional intent and sharply deviated from the law in other Circuits.

*Second*, the Panel decision misconstrues the SEC risk disclosure requirement that public companies *must* “concisely explain” in their public filings “material factors that make an investment in the [company] speculative or risky.” 17 C.F.R. 229.105 (Item 105). The Panel erred in holding that a company’s risk disclosures, though inherently *forward-looking*, could be misleading where they failed to discuss

*the present or past.* The Panel decision thus effectively creates for public companies a legal obligation to disclose as risk factors any and all material information when case law emphatically disclaims any such obligation. The Panel's standard cuts the legs out from under the statutory safe harbor for forward-looking statements and deepens a Circuit split. *See* 15 U.S.C. § 78u-5(c)(1)(A). It also threatens to require an over-inclusion of information in SEC filings, dumping on investors an overload of verbiage that impairs decisions based on the identifiable risks. Not only is this a harm the SEC specifically sought to avoid in amendments to Item 105, it also is a concern the SEC currently seeks to address in a review of required public company disclosures.

En banc review therefore is necessary to align the Ninth Circuit's standards concerning these two issues with the statutory text, Congressional and SEC intent, and other Circuits.

## ARGUMENT

### I. THE PANEL’S CONSTRUCTION OF THE “CORE OPERATIONS” DOCTRINE VIOLATES THE PSLRA’S SCIENTER PLEADING REQUIREMENTS.

#### A. The Panel Ignored the Plain Language of the PSLRA.

To establish liability under Section 10(b) and Rule 10b-5, a plaintiff must prove that the defendant acted with scienter, “a mental state embracing intent to deceive, manipulate, or defraud.” *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 319 (2007) (citation omitted). The PSLRA requires private plaintiffs to plead scienter “with particularity,” setting out “facts giving rise to a strong inference that the defendant acted with the required state of mind” “with respect to each act or omission alleged to violate this chapter.” 15 U.S.C. § 78u-4(b)(2)(A). Congress thereby intended to “raise the bar for pleading scienter” and to “promote greater uniformity among the Circuits.” *Tellabs*, 551 U.S. at 321 (citing H.R. Rep. No. 104-369, at 41 (1995) (Conf. Rep.)). “[M]erely reasonable or permissible” inferences are insufficient. *Id.* at 324 (quotation marks omitted). Where, as here, the statements are “forward-looking,” plaintiffs must establish that defendants had “actual knowledge” that the statements in question were “false or misleading.” *No. 84 Emp.-Teamster Joint Council Pension Tr. Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 931 (9th Cir. 2003) (citation modified).

The Panel cast aside the PSLRA’s requirement to plead scienter “with particularity” by creating an exception found nowhere in the statutory text.

Extending the so-called “core operations” doctrine beyond reasonable limits, the Panel found this to be a “rare circumstance” in which scienter could be pled with allegations that are “*not particularized.*” *Constr. Laborers Pension Tr.*, 166 F.4th at 831 (emphasis added). The Court reasoned that it would be “absurd” for Funko’s executives to have been unaware of its inventory failures, and thus no facts establishing knowledge were necessary. But while courts may “infer[] that facts critical to a business’s ‘core operations’ or an important transaction are known to a company’s key officers,” *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1063 (9th Cir. 2014) (citation omitted), bare allegations regarding the defendants’ position or general knowledge of operations—such as those here—vitiates the PSLRA’s core requirement of particularized allegations of scienter.

There are compelling reasons for this requirement, particularly as applied to senior executives overseeing a rapidly growing global company, who are far removed from, and thus not presumed to know, the day-to-day logistical failures of a warehouse transition. As the district court correctly recognized, the inventory issues were “granular details” that may not have been readily apparent to the CEO or CFO. *Constr. Laborers Pension Tr.*, 166 F.4th at 833. The specific operational failures alleged—such as misplaced products (*id.* at 816), conveyor belts that were too tall for employees (*id.* at 815), and workers resorting to Excel spreadsheets because the software system lacked proper user permissions (*id.* at 816)—are

precisely the types of localized, granular issues that do not automatically reach the C-suite. *See S. Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 785 (9th Cir. 2008) (requiring “[a]llegations regarding management’s role in a corporate structure and the importance of the corporate information about which management made false or misleading statements” to be made “in conjunction with detailed and specific allegations about management’s exposure to factual information within the company”).

To bridge the gap between the warehouse floor and the C-suite, the Panel improperly relied on a series of speculative assumptions rather than specific facts. The Panel posited that, because the COO spent time at the warehouse and “walk[ed] the floor,” he must have grasped the full scale of the problems. *Constr. Laborers Pension Tr.*, 166 F.4th at 833. The Panel then layered on a second speculative assumption: that the COO “would have shared information about the issues he had seen first-hand with CEO Perlmutter and CFO Jung at these bi-weekly technology transition meetings.” *Id.* at 834. Such conjecture, premised on assumptions and what the COO “would have” known and shared with the CEO and CFO, falls far short of the PSLRA’s requirement of particularized allegations establishing the defendants’ awareness of the inventory failures.

The Panel’s decision also fails under *Tellabs*, the key Supreme Court authority clarifying the PSLRA pleading standard. *Tellabs* requires courts to “assess all the

allegations holistically” to determine whether the inference of scienter is “cogent and compelling.” 551 U.S. at 324, 326. Because plaintiffs “must plead facts rendering an inference of scienter *at least as likely as* any plausible opposing inference” *id.* at 328 (emphasis in original), courts under *Tellabs* must consider opposing inferences rather than accept conclusory pleadings at face-value.

*Tellabs* therefore requires courts to credit the plausible inference that executives were not privy to the “granular details” or that they viewed the operational transition as experiencing typical, temporary, albeit frustrating, growing pains, rather than catastrophic failures requiring immediate public disclosure. The Panel’s analysis did not consider these opposing inferences and thus cannot co-exist with *Tellabs*.

Simply put, the Panel’s core business function approach will be the exception that swallows the PSLRA’s exacting pleading standard.

**B. The Panel’s Decision Conflicts with Other Circuits and Incentivizes Forum Shopping.**

No other Circuit has embraced the Ninth Circuit’s permissive pleading standard in this context. While other Circuits recognize that the core operations doctrine may *contribute* to a finding of scienter, those Circuits have held that the doctrine cannot *alone* satisfy the standard and must be accompanied by particularized allegations demonstrating that defendants had actual knowledge of specific information related to the alleged fraud.

This is precisely the limitation the Fourth Circuit required when finding that the “‘core operations’ theory” can be “relevant to the court’s holistic analysis of scienter.” *KBC Asset Mgmt. NV v. DXC Tech. Co.*, 19 F.4th 601, 612 (4th Cir. 2021) (citation omitted). Unlike the Panel below, the Fourth Circuit squarely **rejected** that “bare allegations that officers have knowledge of key facts because of their positions or because such knowledge relates to the business’s core operations [can be] enough, standing alone, to support a strong inference of scienter” to satisfy the PSLRA. *Id.* (citation modified). “Without particularized allegations regarding Defendants’ knowledge,” the Court explained, it effectively would need to “assume scienter.” *Id.* This is precisely what Congress sought to avoid in enacting the PSLRA.

The First Circuit has taken a similar approach. In *Metzler Asset Mgmt. GmbH v. Kingsley*, the First Circuit **rejected** the argument that “when facts critical to a business’s core operations or an important transaction generally are so apparent[,] knowledge [of those facts] may be attributed to the company and its key officers, even if those officers did not, in actuality, know the critical information.” 928 F.3d 151, 165 (1st Cir. 2019). Reiterating the requirement of particularized allegations, the First Circuit held: “corporate management’s general awareness of the day-to-day workings of the company’s business does not establish scienter—at least absent some additional allegation of specific information conveyed to management and

related to the fraud or other allegations supporting scienter.” *Id.* (citing *Metzler Inv. GmbH v. Corinthian Colls., Inc.*, 534 F.3d 1068, 1087 (9th Cir. 2008)).<sup>2</sup>

The Panel’s marked divergence from these Circuits incentivizes forum shopping, which Congress expressly sought to eradicate with the PSLRA. Indeed, “[s]etting a uniform pleading standard for § 10(b) actions was among Congress’ objectives when it enacted the PSLRA.” *Tellabs*, 551 U.S. at 320.

### **C. Lax Pleading Standards Fuel Event-Driven Litigation and Baseless Settlements.**

Congress also enacted the PSLRA’s heightened pleading standard “to curb perceived abuses of the § 10(b) private action.” *Tellabs*, 551 U.S. at 320-21. Legislators sought to “deter strike suits wherein opportunistic private plaintiffs file securities fraud claims of dubious merit in order to exact large settlement recoveries.” *Novak v. Kasaks*, 216 F.3d 300, 306 (2d Cir. 2000); *see also* H.R. Conf. Rep. No. 104–369, at 31 (1995) (noting “significant evidence of abuse in private securities lawsuits,” including “the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer’s stock price, without regard to any underlying culpability of the issuer”), *reprinted in* 1995

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<sup>2</sup> The Second Circuit likewise has “not . . . clearly affirmed the validity of the core-operations doctrine following the passage of the PSLRA, although [the Court has] suggested that the doctrine can provide supplemental support for allegations of scienter, even if they cannot establish scienter independently.” *Gimpel v. The Hain Celestial Grp., Inc.*, 156 F.4th 121, 148 (2d Cir. 2025) (cleaned up).

U.S.C.C.A.N. 730, 730. The PSLRA’s stringent procedural requirements sought to “curtail the filing of meritless lawsuits.” *See id.* at 41.

But the Panel’s relaxed and expanded pleading requirement will only encourage event-driven strike suits. *See* Emily Strauss, *Is Everything Securities Fraud?*, 12 UC Irvine L. Rev. 1331, 1334 (2022) (“[E]mpirical analysis supports the notion that event-driven securities class actions are big-ticket cases; substantial money and resources are tied up in securities lawsuits where the primary victim is not a shareholder.”). “[E]vent-driven cases are generally lacking in merit but create the opportunity for plaintiffs’ lawyers to extract large settlements that are increasingly threatening to firms.” *Id.* at 1341; *see also* Peter Feltman, *U.S. Chamber Seeks Regulatory Review of ‘Event-Driven’ Securities Lawsuits*, CQ Roll Call (Feb. 26, 2019), 2019 WL 925526 (“Legal experts are skeptical about the merits of these securities claims . . . [b]ut they are powerful weapons for coercing settlements because of the costs of defense and the reputational harm from ongoing litigation focused on such adverse events.”). The pressure to settle such claims is even greater because “the application of 10b-5 jurisprudence in event-driven cases has been inconsistent, leading to great uncertainty for defendants.” Strauss, 12 U.C. Irvine L. Rev. at 1351.

## **II. THE PANEL’S RULING ON RISK DISCLOSURES CONTRADICTS THEIR PROSPECTIVE NATURE AND HARMS COMPANIES AND INVESTORS.**

### **A. Risk Disclosures Are Inherently Forward-Looking.**

Despite the SEC having never required companies to disclose all past or present events as part of risk disclosures, the Panel held that Funko should have disclosed their ongoing inventory and technological issues as risk factors. This permits plaintiffs to proceed on the theory that Funko’s forward-looking risk disclosures were misleading because they created the impression that the warned-of risks had not yet begun to materialize. This decision contravenes statutory and regulatory authority and will have troubling practical consequences for both companies and investors.

The SEC requires public companies to “concisely explain” in their public filings “material factors that make an investment in the [company] speculative or risky.” 17 C.F.R. 229.105 (Item 105). By its plain text, Item 105 requires companies to address only those factors that may harm the company in the future. It imposes no affirmative obligation to disclose past or ongoing incidents. *See Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 601 U.S. 257, 264 (2024) (citation omitted) (securities laws “do not create an affirmative duty to disclose any and all material information”).

Rather, companies must disclose information “only when necessary ‘to make . . . statements made, in light of the circumstances under which they were made, not

misleading.” *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011). (quoting 17 CFR § 240.10b–5(b)). The risk factors section of SEC filings serves to “warn an investor of what harms may come to their investment.” *Bondali v. Yum! Brands, Inc.*, 620 F. App’x 483, 491 (6th Cir. 2015). Risk disclosures therefore are “inherently prospective in nature” and are “not meant to educate investors on what harms are currently affecting the company.” *Id.* This interpretation stems from the ordinary meaning of “risk,” which is the “possibility of loss, injury, disadvantage, or destruction.” *Id.* (quoting Webster’s Third New Int’l Dictionary 1961 (1986)). The securities laws acknowledge the distinction between forward-looking statements about future risk and statements about past or ongoing events. *See generally Slayton v. American Express Co.*, 604 F.3d 758, 765-66 (2d Cir. 2010) (discussing the PSLRA “statutory safe-harbor for forward-looking statements”); *Julianello v. K-V Pharm. Co.*, 791 F.3d 915, 921 (8th Cir. 2015) (statements were forward-looking, in part, because “the veracity of the statements could only be determined after they were made”); *Raab v. General Physics Corp.*, 4 F.3d 286, 289 (4th Cir. 1993) (distinguishing between a company’s “accurate reporting of its past results” and “predictions . . . about future growth”); *In re Convergent Technologies Sec. Litig.*, 948 F.2d 507, 513–14 (9th Cir. 1991) (rejecting plaintiffs’ argument that accurate reporting of past results “misled investors by implying that [the company] expected the upward first quarter trend to continue throughout the year”). There is simply no

requirement that a company discuss past and current events as part of its risk disclosures.

We submit that Judge Bumatay’s dissenting opinion in *In re Facebook, Inc. Sec. Litig.*, 87 F.4th 934, 958 (9th Cir. 2023), provides an appropriate framework for assessing the disclosure of possible future events. There, Judge Bumatay found that Facebook’s risk factor disclosures concerning an ongoing data breach accurately warned about future “harm to its reputation and business that may come to light if the public or the government learns about improper access to its data.” *Id.* at 959. As Judge Bumatay reasoned, because the statements advised that “improper access to data could harm Facebook’s reputation and business” and did “not represent that Facebook was free from significant breaches at the time of the filing,” the statements were neither false nor misleading. *Id.*

The Sixth Circuit has taken a similar approach. In *Bondali*, plaintiffs contended that a company’s risk disclosures about food safety issues “created a misleading impression: that it was only *possible* for food safety issues to harm investment in [the company] when, in fact, food safety issues had already come to pass and were presently harming investment.” 620 F. App’x at 490 (emphasis in original). The Sixth Circuit disagreed, holding that “cautionary statements are not actionable to the extent plaintiffs contend defendants should have disclosed risk factors are affecting financial results rather than may affect financial results.” *Id.* at

491 (citation modified). The court reasoned that “a reasonable investor would be unlikely to infer anything regarding the current state of a corporation’s compliance, safety, or other operations from a statement intended to educate the investor on future harms.” *Id.*

Funko’s risk disclosure statements comport with these applications of the law. Funko’s statements set out the material risks facing the company in the future and made no misleading statements about the current state of the company’s operations. “[W]hether a statement is misleading depends on the perspective of a reasonable investor” who “understands a statement . . . in its full context.” *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 186 (2015) (internal quotation marks omitted). For risk factor disclosures, that “context” is provided by Item 105, which requires a public company to “concisely” explain to investors “in plain English” the “material factors” making an investment in the company “speculative or risky”—i.e., future events that might harm the company. 17 C.F.R. 229.105. Funko’s disclosures thus complied with Item 105, and comport with Judge Bumatay’s opinion in *Facebook*, by accurately putting investors on notice of future risks the company faces, while making no affirmative statements that would lead a reasonable investor to believe that Funko was not currently burdened by these problems. The Panel’s conclusion that Funko’s risk disclosures

were misleading because they did not fully and truthfully disclose the current state of the company imposes a requirement not found in SEC regulations.

**B. The Panel’s Decision Leaves Companies with a Catch-22.**

As a practical matter, the Panel’s decision puts companies between the proverbial rock and a hard place. On the one hand, under the Panel’s version of the standard, a company’s failure to include a comprehensive accounting of the historical reasons for, or the status of, material risk factors could expose the company to Section 10(b) liability if there is a credible argument that a risk had already begun to materialize. That is so, under the Panel’s application of the “core operations” doctrine, even if the company’s executives had no actual knowledge of the details and full scope of the risk that had arisen.

On the other hand, if a company takes an overinclusive approach to its risk factor disclosures, which the Panel decision incentivizes, it may forfeit protections of the statutory safe harbor for forward-looking statements. The safe harbor applies only to forward-looking statements “accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement.” *Glazer Cap. Mgmt., L.P. v. Forescout Techs., Inc.*, 63 F.4th 747, 767 (9th Cir. 2023) (quoting 15 U.S.C. § 78u-5(c)(1)(A)). To comply with the Panel’s decision, companies may feel compelled to include discussions of present or past conditions in their risk factor disclosures. But

such statements are not “forward-looking” and therefore fall outside the scope of the safe harbor. Indeed, broad statements that do not “meaningful[ly] acknowledge[] . . . the known risks . . . do[] not suffice to invoke the safe harbor provision.” *Facebook*, 87 F.4th at 951.

Judge Bumatay’s dissenting opinion in *Facebook* tacitly recognizes the difficult position the Panel’s standard places companies in: The Ninth Circuit’s standard should not “transform every risk statement into a false or misleading statement if a risk later comes to fruition” or “**create a new requirement that a company disclose every bad thing that ever happened to it.**” *Id.* at 960 (emphasis added). The Panel’s decision, however, wrongly puts companies in this position.

### **C. The Panel’s Rule Encourages Information Overload, Which Harms Investors.**

The Panel’s decision also has problematic consequences for investors. By incentivizing companies to include past and current events in their risk disclosures, the Panel encourages “information overload” and “overwarning,” which only impedes investors’ decision-making process. The SEC has expressly sought to avoid this result through regulatory action and, right now, through a comprehensive review of the public company disclosure regime.<sup>3</sup>

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<sup>3</sup> Prompting that review is SEC Chairman Paul S. Atkins’s concern that Regulation S-K, governing public company filings, “elicits both material and a plethora of undisputably immaterial information,” and that “burying shareholders in an avalanche of immaterial information is a result that neither protects investors nor

First, in 2016, the SEC reviewed its disclosure framework and issued a release that highlighted a series of concerns about the growing length of risk factor disclosures, including that repetitive and generic risk disclosures can “obscure relevant information or render it difficult to evaluate the importance of the information.” Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,916, 23,955 (Apr. 22, 2016). A 2019 study found that “registrants increased the length of risk factor disclosures from 2006 to 2014 by more than 50 percent in terms of word count . . . and that this increase in risk factor word count may not be associated with better disclosure.” Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63,726, 63,743 n.198 (Oct. 8, 2020) (citing Anne Beatty et al., *Are Risk Factor Disclosures Still Relevant? Evidence from Market Reactions to Risk Factor Disclosures Before and After the Financial Crisis*, 36 *Contemp. Acct. Res.*, 805 (2019)).

Second, in 2020, because of these growing concerns and citing the 2019 study, the SEC amended the risk disclosure requirements “to address the lengthy and generic nature of the risk factor disclosure presented by many registrants.” *Id.* at

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facilitates capital formation.” Paul S. Atkins, *Statement on Reforming Regulation S-K*, United States Securities and Exchange Commission (Jan. 13, 2026), [https://www.sec.gov/newsroom/speeches-statements/atkins-statement-reforming-regulation-s-k-011326#\\_edn1](https://www.sec.gov/newsroom/speeches-statements/atkins-statement-reforming-regulation-s-k-011326#_edn1) (last visited April 2, 2026) (citing *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 448-449 (1976)). Chairman Atkins encouraged amending Regulation S-K to promote “disclosure of material information and avoid compelling the disclosure of immaterial information.” *Id.*

63,742. Relevant here, the 2020 amendments to Item 105 added a requirement that if a company’s risk disclosure section was greater than 15 pages, the company must provide a bulleted summary in two pages or less. The amendments also modified the standard for disclosure from the “most significant” risks to “material” risks. These amendments sought to tailor risk disclosures “to the particular facts and circumstances of each registrant, which should reduce the disclosure of generic risk factors and potentially shorten the length of the risk factor discussion, to the benefit of both investors and registrants.” 2020 Amendments Release at 63,744.

The Panel’s decision undermines these SEC amendments by encouraging companies to over-disclose information about their businesses whether material or not to the risk of future harm. By “bring[ing] an overabundance of information within its reach,” the Panel’s standard would require companies to “bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decision making.” *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (quoting *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 488 (1976)) (cleaned up). Studies show that “information overload” is problematic for investors. “[A]t some point, people become overloaded with information and make worse decisions than if less information were made available to them.” Troy A. Paredes, *Blinded by the Light: Information Overload and its Consequences for Securities Regulation*, 81 Wash. U. L. Q. 417, 419 (2003). “[T]he more information there is, the more each

bit of it is diluted. The immediate and salient crowds out the less attention-grabbing.” Donald C. Langevoort, *Toward More Effective Risk Disclosure for Technology-Enhanced Investing*, 75 Wash. U. L. Q. 753, 759 (1997).

Public company risk factor disclosures should be limited to forward-looking statements, as the SEC intended. As the Supreme Court of California has counseled in a different context, “[t]o warn of all potential dangers would warn of nothing.” *O’Neil v. Crane Co.*, 266 P.3d 987, 1006 (Cal. 2012) (quotation marks omitted).

### CONCLUSION

For the above stated reasons, Funko’s petition for rehearing and rehearing en banc should be granted.

Dated: New York, NY  
April 10, 2026

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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