No. 15-17282

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MINEWORKERS' PENSION SCHEME and
BRITISH COAL STAFF SUPERANNUATION SCHEME,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

Appeal from an Order of the United States District Court for the District of Arizona
Hon. David G. Campbell (Case No. 12-00555-PHX-DGC)

PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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STATEMENT IN SUPPORT OF REHEARING

The panel's decision conflicts with multiple decisions of this Court and other courts of appeals and involves a question of exceptional importance:

Whether the "loss causation" requirement imposed by the Private Securities Litigation Reform Act of 1995 (Reform Act) requires securities-fraud plaintiffs in fraud-on-the-market cases to plead and prove that the market learned of the falsity of the defendant's alleged misrepresentation and that the revelation caused a significant decline in stock price, or whether plaintiffs instead need demonstrate only that the facts allegedly misrepresented were a substantial factor in causing a significant decline.

INTRODUCTION

This Court granted discretionary review under 28 U.S.C. § 1292(b) to review an intra-Circuit conflict perceived by the district court about the Reform Act's loss-causation requirement in fraud-on-the-market cases. That statutory requirement "expressly imposes on plaintiffs 'the burden of proving' that the defendant's misrepresentations 'caused the loss for which the plaintiff seeks to recover.'" *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346-47 (2005) (quoting 15 U.S.C. § 78u-4(b)(4)).

In a series of decisions, this Court has held that securities-fraud plaintiffs must satisfy a revelation-of-falsity test—they must plead and prove that they suffered losses because the market learned of the falsity of an earlier misrepresentation. This Court expressly "rejected th[e] assertion" that plaintiffs could instead show that "the market reacted to the purported 'impact' of the alleged fraud," rather than revelation of the fraud itself. *E.g., In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 392 (9th Cir. 2010). If those holdings were applied here, they would be dispositive: The district court concluded Plaintiffs' claims would fail. Nevertheless, the district court believed that other, conflicting decisions of this Court adopted the previously rejected test.

The panel has now embraced that test—without addressing (much less distinguishing) the binding precedent rejecting it. The panel held that to prove loss causation, securities-fraud plaintiffs need only trace their losses to "the very facts about which the defendant lied," even if the market never learned of the falsity. Op6. As for the revelation-of-falsity test—which this Court had previously held to be *the* test for assessing loss causation—the panel in sweeping language deemed it "simply one of the 'infinite variety' of causation theories a plaintiff might allege." Op7. While declaring that "our approval of one theory should not imply our rejection of others" (Op7-8), the panel created a direct conflict with the prior holdings expressly rejecting the "theory" the panel endorsed. In short, if there were no irreconcilable conflict before, there is now.

Left standing, the panel's decision will produce chaos. Neither future panels nor district courts in this jurisdiction may disregard the precedential decisions holding that securities-fraud plaintiffs must satisfy the revelation-of-falsity test. Much like the district court here, these courts will be unable to reconcile those holdings with the broad—and previously rejected—approach announced by this panel's equally precedential decision. Only the en banc court can resolve this conflict.

The panel's approach also is wrong. It is contrary to the text and purpose of the Reform Act's loss-causation requirement. Loss causation is a vital safeguard against meritless securities actions. The requirement ensures that defendants' alleged misrepresentations—rather than, for example, "changed economic circumstances, changed investor expectations, new industry-specific facts, conditions or other events"—actually caused investors' losses. *Dura*, 544 U.S. at 343. When the market has not learned of the falsity of a defendant's statement, any connection between the decline in stock price and a previous misrepresentation is speculative at best. The panel's "infinite variety" standard will encourage suits based on an "infinite variety" of theories seeking to tie any stock-price decline to purported misrepresentations, however attenuated. Such suits are precisely what the Reform Act sought to eliminate.

Rehearing or rehearing en banc should be granted.

STATEMENT

A. Statutory Background

Courts have long held that Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 provide an implied private right of action to challenge fraud in connection with the purchase or sale of a security. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 729-30 (1975). Courts have also long recognized that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Id.* at 739. Given the cost of securities-fraud litigation and the potentially enormous damage awards, plaintiffs with "largely groundless claim[s]" may bring suit based on a desire to secure *in terrorem* settlements "rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence." *Dura*, 544 U.S. at 347 (alteration in original, quoting *Blue Chip Stamps*, 421 U.S. at 741).

These concerns (among others) motivated passage of the Reform Act. *Id.* The statute imposes on private securities-fraud plaintiffs "the burden of proving that the act or omission of the defendant alleged to violate [the statute] caused the loss for which the plaintiff seeks to recover damages." 15 U.S.C. § 78u-4(b)(4). In what is often called the "bounce-back" provision, Congress limited plaintiffs' recoverable damages to the difference between the purchase price of the stock and "the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market." *Id.* § 78u-4(e)(1). Through these provisions, Congress sought to ensure that securities actions are not merely "partial downside insurance polic[ies]" that investors may invoke whenever a stock's value falls. *Dura*, 544 U.S. at 347-48.

B. Factual Background

First Solar is one of the world's largest manufacturers of photovoltaic solar modules. Plaintiffs represent a class that purchased First Solar stock, which trades on the New York Stock Exchange, between April 2008 and February 2012. Op3. Over this four-year period, First Solar's stock performance closely tracked that of the solar industry, declining sharply along with the rest of the industry. ER209; ER218.

Plaintiffs allege that First Solar and the individual defendants made a series of false statements about two supposed product defects. ER4-7. To demonstrate loss causation, Plaintiffs point to five declines in the price of First Solar stock, each of which was preceded by a press release or conference call that Plaintiffs label a "corrective disclosure." In these "disclosures," First Solar revealed financial results, updates to its revenue and earnings guidance, and certain warranty and other charges. ER153; ER160; ER163; ER174; ER185-88. The market never learned from First Solar, government officials, analysts, or anyone else that any financial statement, SEC filing, or earnings release contained any inaccuracies.

C. Procedural Background

1. District court proceedings

On cross-motions for summary judgment, the district court concluded that Plaintiffs had satisfied their loss-causation burden sufficient to proceed to trial. ER31-32. The district court recognized that its conclusion contravened this Court's precedent requiring plaintiffs to plead and prove both: (1) the falsity of the defendant's misrepresentation was revealed to the market, and (2) the revelation caused a significant stock-price decline. ER15-17 (citing *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049 (9th Cir. 2008); *Oracle*, 627 F.3d 376; *Loos* *v. Immersion Corp.*, 762 F.3d 880 (9th Cir. 2014); and *Or. Pub. Emps. Ret. Fund v. Apollo Grp., Inc.*, 744 F.3d 598 (9th Cir. 2014)). These decisions expressly held insufficient a "'showing that the market reacted to the purported 'impact' of the alleged fraud.'" ER16 (quoting *Oracle*, 627 F.3d at 392). Under these holdings, the district court concluded, summary judgment should be entered for First Solar "in full." ER19.

The district court did not follow this binding precedent. It found these cases inconsistent with other authority from this Court, which the district court read as holding that plaintiffs need show only: (1) the stock price fell in response to "the company's poor financial health," and (2) the poor financial health "was caused by the 'very facts' that defendant misrepresented or concealed." ER17 (citing *In re Daou Sys., Inc. Sec. Litig.*, 411 F.3d 1006 (9th Cir. 2005); *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982 (9th Cir. 2008); and *Nuveen Mun. High Income Opportunity Fund v. City of Alameda*, 730 F.3d 1111 (9th Cir. 2013)). The district court explained that it followed these decisions because *Daou* was decided "before any of the other cases," and it believed *Daou* set forth the better rule. ER17-19.

Nevertheless, perceiving a conflict in this Court's decisions, the district court certified its order under Section 1292(b). ER19. This Court granted First Solar's petition for review. Dkt. 1.

2. *The panel decision*

In a published, per curiam opinion, the panel held that "a general proximate cause test—the test ultimately applied by the district court—is the proper test." Op3. Thus, a "plaintiff need only show a causal connection between the fraud and the loss by tracing the loss back to the very facts about which the defendant lied." Op6 (citations omitted).

In support, the panel relied on a decision issued after the district court's order, *Lloyd v. CVB Financial Corp.*, 811 F.3d 1200 (9th Cir. 2016). The panel emphasized that *Lloyd* described "'loss causation [a]s simply a variant of proximate cause.'" Op7 (quoting *Lloyd*, 811 F.3d at 1210). As the panel acknowledged (Op7), *Lloyd* made that statement in the course of applying the revelation-of-falsity test. 811 F.3d at 1210. Nevertheless, the panel believed that *Lloyd* thereby demonstrated that proving revelation of the falsity was not the "only way to satisfy loss causation." Op7.

As for this Court's decisions holding that revelation of the falsity is *the* test, the panel observed only that "our approval of one theory should not imply our rejection of others." Op7. It asserted that "[r]evelation of fraud in the marketplace is simply one of the 'infinite variety' of causation theories a plaintiff might allege to satisfy proximate cause." Op7. Accordingly, "[a] plaintiff may also prove loss causation by showing that the stock price fell upon the revelation of an earnings miss, even if the market was unaware at the time that fraud had concealed the miss." Op8. The panel did not confront the precedential decisions expressly rejecting that very contention. *E.g.*, *Oracle*, 627 F.3d at 392.

REASONS REHEARING SHOULD BE GRANTED

A. The Panel's Standard Cannot Be Reconciled With This Court's Precedent And That Of Other Circuits

Whether or not the district court correctly perceived a conflict in this Court's precedent, its decision was prophetic: The panel's decision now cements that very conflict. Before the decision here, this Court had expressly adopted the revelation-of-falsity test, and it had expressly rejected the test adopted by the panel. *See* Op6-8. The panel could not, of course, overrule those decisions. *Miller v. Gamie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc). District courts and future panels of this Court will thus be in an untenable position. They cannot disregard this Court's express holdings that proving a disclosure revealing the falsity of the defendant's statements is *the* way to satisfy the loss-causation requirement. *E.g.*, *Loos*, 762 F.3d at 887; *Oracle*, 627 F.3d at 392. But neither can they ignore the panel's holding that the revelation-of-falsity test is merely one of an "'infinite variety' of causation theories a plaintiff might allege to satisfy proximate cause." Op7. Such an "irreconcilable conflict" can be resolved only by the en banc Court. *United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc).

1. This Court has expressly rejected the panel's test

The panel asserted that "approval of one theory should not imply our rejection of others." Op7-8. But this Court had already rejected the very "theory" the panel accepted. Three decisions in particular—none addressed by the panel—demonstrate the conflict.

First, in *Oracle*, this Court expressly rejected the proposition accepted by the panel. The *Oracle* plaintiffs challenged two sets of purportedly misleading statements: the defendant's artificial inflation of earnings results through improper accounting practices, and its concealment of certain product defects. 627 F.3d at 383, 391-94. Because the market had never learned of the falsity of these statements, the plaintiffs attempted to demonstrate loss causation by relying on the later disclosure of disappointing earnings. *Id.* at 392, 394. As a factual matter, the plaintiffs contended these earnings were caused by the very facts—the accounting practices and product defects—underlying the fraud. *Id.* As a legal matter, the plaintiffs argued they "should be able to prove loss causation by showing that the market reacted to the purported 'impact' of the alleged fraud—the earnings miss—rather than to the fraudulent acts themselves." *Id.* at 392.

The *Oracle* Court's response to the legal contention was clear: "We reject that assertion." *Id.* *Oracle* thus held that a plaintiff cannot show loss causation by proving that the market reacted negatively to the disclosure of financial results that were themselves affected by the facts allegedly misrepresented or concealed. *Id.* Rather, "[l]oss causation is established if the market learns of a defendant's fraudulent act or practice, the market reacts to the fraudulent act or practice, and a plaintiff suffers a loss as a result of the market's reaction." *Id.* (citing *Metzler*, 540 F.3d at 1063). Applying that test, *Oracle* held that the plaintiffs could not prove loss causation: While the disclosed earnings results might have been affected by the supposed product defects and accounting fraud, the disclosure did not reveal the falsity of the defendant's earlier statements to the market. *Id.* at 393-94.

The contrast between *Oracle* and the decision here is stark. While the panel held that plaintiffs need only "trac[e] the loss back to the very facts about which the defendant lied" (Op6), *Oracle* held that "the market must learn of and react to the[] particular [fraudulent] practices themselves." 627 F.3d at 393. And while the panel held plaintiffs may "prove loss causation by showing that the stock price fell upon the revelation of an earnings miss" (Op8), *Oracle* rejected that very same proposition: "[A]n earnings miss alone is insufficient to establish loss causation." 627 F.3d at 394 (citing *Metzler*, 540 F.3d at 1063).

Second, in *Loos*, this Court again held that securities-fraud plaintiffs must plead and prove the "defendant's fraud was '*revealed* to the market and *caused* the resulting losses.'" 762 F.3d at 887 (emphasis by Court). The *Loos* plaintiff claimed that the defendant company fraudulently overstated its profits by recognizing revenue earlier than permitted. *Id.* at 885-86. The company's stock then fell when the company (1) released a series of disappointing earnings results and (2) announced an internal investigation into its prior accounting practices. *Id.* at 887.

Relying on *Oracle* and similar decisions, this Court held that neither of these sets of disclosures satisfied the loss-causation requirement. As it explained, the disappointing earnings results were "merely indicative of poor financial health" and did "not tend to suggest that the company had engaged in fraudulent accounting practices." *Id.* at 888. Likewise, the announcement of the internal investigation, by itself, did not "reveal fraudulent practices to the market," but merely "put[] investors on notice of a *potential* future disclosure of fraudulent conduct." *Id.* at 890 (emphasis by Court). That result would have been different under the panel's approach here: The plaintiff's loss could have been "trac[ed] … back to 'the very facts about which the defendant lied'" (Op6) because the alleged misrepresentations had precipitated the investigation that caused the stock-price decline. *Loos*, 762 F.3d at 885-86.

Third, relying on *Loos*, this Court confirmed the revelation-of-falsity requirement in its most recent loss-causation decision before the decision here. *Curry v. Yelp*, 875 F.3d 1219 (9th Cir. 2017). The *Curry* plaintiffs alleged that defendant Yelp manipulated the reviews of businesses on its website while falsely claiming they were "'authentic.'" *Id.* at 1222. The plaintiffs further alleged Yelp's stock price declined significantly when the Federal Trade Commission disclosed thousands of complaints from businesses claiming Yelp manipulated reviews. *Id.*

This Court held these allegations could not establish loss causation. *Id.* at 1228. It explained that, like the investigation disclosed in *Loos*, the disclosure of the complaints revealed only "'the mere risk or potential for fraud.'" *Id.* at 1225. This Court thus affirmed dismissal. *Id.* Notably, it held that any amendment would be "futile" given this Court's "precedent" establishing that loss causation turns on whether "subsequent public disclosures revealed or at least suggested the truth." *Id.* at 1228. Had *Curry* instead adopted the present panel's standard, it would have reached the opposite conclusion: The review-manipulation Yelp allegedly concealed caused the customer complaints, and the disclosure of those complaints caused the plaintiffs' losses. *Id.* at 1222. Yet *Curry* held such allegations "insufficient." *Id.* at 1225.

Any one of these decisions rejecting the panel's rule would be enough to warrant rehearing. *Hardesty*, 977 F.2d at 1348. And, as the district court recognized (ER15-16), there are others. *See Metzler*, 540 F.3d at 1063 ("the complaint must allege that the practices that the plaintiff contends are fraudulent were revealed to the market and caused the resulting losses"); *Apollo*, 774 F.3d at

608 (challenged statements must be "made untrue" by "subsequent public disclosures").

2. **Lloyd** ***did not overrule past precedent***

Instead of confronting these contrary decisions, the panel relied almost entirely on this Court's decision in *Lloyd*. Op6-8. Had *Lloyd* adopted the standard the panel did here, en banc review would still be necessary: That panel was no more empowered to overrule Circuit precedent than the present one. *Miller*, 335 F.3d at 899.

But *Lloyd* provides no support for the panel's holding. *Lloyd* applied the revelation-of-falsity test. In *Lloyd*, the plaintiff alleged that the defendant company falsely denied it had "serious doubts" regarding its largest borrower's ability to repay a loan. 811 F.3d at 1208-09. The truth regarding this misrepresentation was revealed to the market in two steps: first, when the defendant company disclosed an SEC subpoena regarding its loan practices; second, when it announced the borrower was unable to repay on schedule. *Id.* at 1204-05, 1209. This Court concluded that, given the additional circumstances alleged, the disclosure of the SEC investigation provided the market with notice of the falsity of the defendant's "serious doubts" denial. *Id.* at 1210. That is, *Lloyd* reasoned these facts provided sufficient basis to infer that the market understood the investigation announcement as "a partial disclosure of the *inaccuracy* of the previous 'no serious doubts' statements." *Id.* (emphasis added).

The narrowness of *Lloyd* is confirmed by the principal authority on which it relied: the Fifth Circuit's decision in *Public Employees' Retirement System of Mississippi v. Amedisys, Inc.*, 769 F.3d 313 (5th Cir. 2014). In *Amedisys*, the Fifth Circuit explained that the revelation-of-falsity test can be satisfied in a number of ways besides a defendant's admission of falsity or similar disclosure: "a corrective disclosure can come from any source, and can take any form from which the market can absorb the information and react." *Id.* at 322. What is required is that the disclosure "reveal[] to the market the *falsity* of the prior misstatements." *Id.* (emphasis added). Thus, the panel here was wrong in concluding that *Lloyd* established that there are an "infinite variety of causation *theories* a plaintiff might allege" to satisfy loss causation. Op7 (emphasis added). Rather, in relying on *Amedisys*, *Lloyd* at most made clear that there may be a variety of ways to satisfy the *single* theory of loss causation this Court has held embodied in the Reform Act: The public disclosure must reveal the falsity of the defendant's misrepresentation and cause the plaintiff's loss. 811 F.3d at 1210-11.

3. Other circuits apply revelation-of-falsity as the sole test

The panel's decision also conflicts with decisions of other courts. The Fifth Circuit has held that "to establish loss causation th[e] disclosed information must reflect part of the 'relevant truth'—the truth obscured by the fraudulent statements." *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 230 (5th Cir. 2009). Like this Court, the Fifth Circuit has rejected the argument that "loss causation may result when the 'true financial condition' of a company becomes known," even if that "true financial condition is a consequence of the fraud." *Id.*

In addition to the Fifth Circuit, other circuits have consistently applied the revelation-of-falsity test as the sole test for loss causation. *Mass. Ret. Sys. v. CVS Caremark Corp.*, 716 F.3d 229, 237-38 (1st Cir. 2013); *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1311-12 (11th Cir. 2011). Other courts of appeals, however, have adopted a materialization-of-the-risk test that is inconsistent with this Court's *Oracle*, *Loos*, and *Curry* line of decisions. *See, e.g.*, *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 173 (2d Cir. 2005).

B. The Panel's Standard Is Inconsistent With The Reform Act

In addition to conflicting with this Court's precedent and that of other courts, the panel's decision contravenes the text and purpose of the Reform Act. The panel made no effort to ground its broad causation standard in the statute. Instead, aside from decisions such as *Lloyd*, the panel cited a law review article. Op8. That article *predated* the Supreme Court's ruling on the loss-causation requirement in *Dura*, and it advocated the approach that this Court has since repeatedly rejected.

J. Eisenhofer et al., *Securities Fraud, Stock Price Valuation, and Loss Causation*, 59 BUS. LAW. 1419, 1444-45 (2004).

In the statute, Congress expressly required plaintiffs to prove that the statutory violation—the falsity—"cause[d] the loss for which the plaintiff seeks to recover damages," 15 U.S.C. § 78u-4(b)(4), and it linked that requirement to disclosures that reveal the falsity of the defendant's misrepresentation, *id.* § 78u-4(e)(1). Specifically, the Reform Act's bounce-back provision ties plaintiffs' recoverable damages to the stock price during the 90-day period beginning when "the information *correcting the misstatement or omission* that is the basis for the action is *disseminated to the market*." *Id.* (emphases added). Read together, as they must be, these provisions require plaintiffs in fraud-on-the-market cases to establish the market learned of the falsity.

The panel did not even attempt to reconcile its rule with this statutory language. Its decision would not require plaintiffs to prove that any information "correcting" the challenged misstatement or omission was ever disseminated to the market. Rather, it would require only that the market reacted to information somehow affected by the underlying misrepresented facts. Op6. As a result, in cases where plaintiffs satisfy only the panel's test, the designated date for commencing the statutory bounce-back period will be either divorced from the date of the plaintiff's actual loss or entirely absent. The Reform Act should be interpreted to avoid such inconsistencies, not to create them. *See United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

Notably, the Supreme Court has articulated the loss-causation requirement as requiring revelation of the falsity to the market. In *Halliburton*, the Supreme Court quoted the Fifth Circuit's test (with which this Court previously has agreed) as "the loss causation requirement as we have described it": "EPJ Fund needed to prove that the decline in Halliburton's stock was 'because of the correction to a prior misleading statement' and 'that the subsequent loss could not otherwise be explained by some additional factors revealed then to the market.'" *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 811-12 (2011) (internal citation omitted).

By not requiring that the market learn of the falsity, the panel's standard will undermine the basic purpose of the loss-causation requirement: ensuring that "private securities action[s]" are not merely "partial downside insurance polic[ies]" for investors. *Dura*, 544 U.S. at 347-48. In *Dura*, the Supreme Court rejected this Court's former rule requiring that plaintiffs plead only that a security's purchase price was fraudulently "inflated." *Id.* at 340. The Supreme Court explained that this approach failed to distinguish between losses caused by the misrepresentation and losses caused by the "tangle of factors affecting price," emphasizing that "[t]o 'touch upon' a loss is not to *cause* a loss." *Id.* at 342-43 (emphasis by Court).

The panel's standard "would effectively resurrect what *Dura* discredited." *Metzler*, 540 F.3d at 1064. Almost any financial disappointment—and thus virtually any stock-price decline—could, in theory, be attributed to a purportedly concealed "fraud," whether or not other confounding factors were responsible. Even if a securities-fraud defendant might sometimes prevail at summary judgment, plaintiffs would have little difficulty alleging a link between a disclosure and the supposed fraud, allowing them to survive a dismissal motion. In enabling securities-fraud plaintiffs to meet their loss-causation burden through an "infinite variety" of theories *not* tied to any revelation of the falsity of the challenged misrepresentation, the panel's decision would effectively remove the loss-causation requirement as a protection from costly securities litigation. Additionally, by replacing a single, bright-line test with an amorphous standard that may be satisfied in an "infinite variety" of ways (Op7), the panel's decision leaves defendants at the whim of individual judges and juries, magnifying the uncertainties of such litigation.

The panel's decision will thus "bring about harm of the very sort the [securities] statutes seek to avoid." *Dura*, 544 U.S. at 347. If left standing, it will encourage plaintiffs to bring "largely groundless claim[s]" to extract the sort of *in terrorem* settlements the Reform Act sought to eliminate. *Dura*, 544 U.S. at 347;

see H.R. Conf. Rep. No. 104-369, at 31 (1995). This Court should reject that result—as it has previously.

CONCLUSION

Rehearing or rehearing en banc should be granted.

Dated: March 16, 2018

Respectfully submitted,

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ADDENDUM

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MINEWORKERS' PENSION SCHEME; BRITISH COAL STAFF SUPERANNUATION SCHEME, *Plaintiffs-Appellees*,	No. 15-17282
v.	D.C. No. 2:12-cv-00555-DGC
FIRST SOLAR INCORPORATED; MICHAEL J. AHEARN; ROBERT J. GILLETTE; MARK R. WIDMAR; JENS MEYERHOFF; JAMES ZHU; BRUCE SOHN; DAVID EAGLESHAM, *Defendants-Appellants*.	OPINION

Appeal from the United States District Court
for the District of Arizona
David G. Campbell, District Judge, Presiding

Argued and Submitted October 18, 2017
San Francisco, California

Filed January 31, 2018

Before: Sidney R. Thomas, Chief Judge, and J. Clifford Wallace and Consuelo M. Callahan, Circuit Judges.

Per Curiam Opinion

SUMMARY*

Securities Fraud

The panel affirmed the district court's denial in part of defendants' motion for summary judgment in an action under the Securities Exchange Act of 1934.

The panel held that a general proximate cause test is the correct test for loss causation under the Act, and there is no requirement that the defendant's fraud have been revealed to the market.

COUNSEL

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

OPINION

PER CURIAM:

We consider the question certified by the district court for interlocutory appeal under 28 U.S.C. § 1292(b)[1] as to the correct test for loss causation under the Securities Exchange Act of 1934. We conclude that a general proximate cause test—the test ultimately applied by the district court—is the proper test.

I

First Solar, Inc., is one of the world's largest producers of photovoltaic solar panel modules. The Plaintiffs represent purchasers of First Solar, Inc.'s publicly traded securities between April 30, 2008 and February 28, 2012 ("the Class Period"). Plaintiffs allege that, during the Class Period, First Solar discovered a manufacturing defect causing field power loss and a design defect causing faster power loss in hot climates. Plaintiffs allege that First Solar wrongfully concealed these defects, misrepresented the cost and scope of

[1] "A non-final order may be certified for interlocutory appeal where it 'involves a controlling question of law as to which there is substantial ground for difference of opinion' and where 'an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 687–88 (9th Cir.2011) (quoting 28 U.S.C. § 1292(b)). "A substantial ground for difference of opinion exists where reasonable jurists might disagree on an issue's resolution . . . ." *Id.* at 688. Given these standards and the posture of the case, we are satisfied that the district court and the motions panel of this court properly determined that certification was appropriate in this case.

the defects, and reported false information on their financial statements.

During the Class Period, First Solar's stock fell from nearly $300 per share to nearly $50 per share. The individually named Defendants, who are First Solar officers and executives, purchased or sold First Solar stock during the Class Period. Steep declines in First Solar's stock, beginning on July 29, 2010, followed the release of quarterly financial disclosures reporting the defects and associated costs, the departure of First Solar's CEO, and disappointing financial results.

Plaintiffs sued First Solar and its officers, alleging violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 and Securities Exchange Commission Rule 10b-5. They allege that Defendants engaged in several acts of fraud, including wrongfully concealing product defects, misrepresenting the cost and scope of the defects, and reporting false information on financial statements. Plaintiffs allege that when First Solar later disclosed product defects and attendant financial liabilities to the market, First Solar's stock price fell, resulting in Plaintiffs' economic loss.

Defendants filed a motion for summary judgment on all claims. The district court granted Defendants' motion in part and denied in larger part, holding that Plaintiffs advanced triable issues of material fact on several claims. However, the district court stayed the action because it perceived two competing lines of case law in the Ninth Circuit regarding loss causation.

According to the district court, one line of cases represents the rule that "drawing a causal connection between the *facts* misrepresented and the plaintiff's loss will satisfy loss causation." These cases are *Nuveen Municipal High Income Opportunity Fund v. City of Alameda*, 730 F.3d 1111 (9th Cir. 2013); *Berson v. Applied Signal Technology, Inc.*, 527 F.3d 982 (9th Cir. 2008); and *In re Daou Systems Inc.*, 411 F.3d 1006 (9th Cir. 2005). The court interpreted a second group of cases to adopt a "more restrictive view," in which "[s]ecurities fraud plaintiffs can recover only if the market learns of the defendants' fraudulent practices. It is not enough that plaintiffs are injured by the consequences of those practices." These cases are *Oregon Public Employees Retirement Fund v. Apollo Group Inc.*, 774 F.3d 598 (9th Cir. 2014); *Loos v. Immersion Corp.*, 762 F.3d 880 (9th Cir. 2014); *In re Oracle Corp. Securities Litigation*, 627 F.3d 376 (9th Cir. 2010); and *Metzler Investment GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049 (9th Cir. 2008).

After considering circuit law, the district court applied the following loss causation test: "A plaintiff can satisfy loss causation by showing that the defendant misrepresented or omitted the *very facts* that were a substantial factor in causing the plaintiff's economic loss." *Nuveen*, 730 F.3d at 1120 (internal quotation marks omitted). The court certified the following question for interlocutory appeal under 28 U.S.C. § 1292(b):

> [W]hat is the correct test for loss causation in the Ninth Circuit? Can a plaintiff prove loss causation by showing that the very facts misrepresented or omitted by the defendant were a substantial factor in causing the plaintiff's economic loss, even if the fraud itself was not revealed to the market (*Nuveen*, 730 F.3d at 1120), or must the market actually

learn that the defendant engaged in fraud and react to the fraud itself (*Oracle*, 627 F.3d at 392)?

II

The Securities Exchange Act of 1934, codified at 15 U.S.C. § 78a *et seq.*, imposes statutory requirements on a judicially-implied private damages action rooted in common law tort actions for deceit and misrepresentation. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005). The Act defines "loss causation" as the plaintiff's "burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages." 15 U.S.C. § 78u-4(b)(4). This inquiry requires no more than the familiar test for proximate cause. *Dura*, 544 U.S. at 346; *accord Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1210 (9th Cir. 2016); *Loos*, 762 F.3d at 887; *Oracle*, 627 F.3d at 394; *Daou*, 411 F.3d at 1025. To prove loss causation, plaintiffs need only show a "causal connection" between the fraud and the loss, *Nuveen*, 730 F.3d at 1119; *Daou*, 441 F.3d at 1025, by tracing the loss back to "the very facts about which the defendant lied," *Nuveen*, 730 F.3d at 1120. "Disclosure of the fraud is not a sine qua non of loss causation, which may be shown even where the alleged fraud is not necessarily revealed prior to the economic loss." *Id.*

Our most recent decision on loss causation, *Lloyd*, 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 (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) (internal citation omitted). In *Lloyd*, though the plaintiffs pleaded that the market understood the subpoena to be a revelation of fraud, *id.* at 1210–11, we did not suggest that this path is the only way to satisfy loss causation. Indeed, we affirmed the opposite: the plaintiffs simply "adequately pleaded 'a causal connection between the material misrepresentation and the loss.'" *Id.* at 1211 (quoting *Dura*, 544 U.S. at 342).

The 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 1210. When plaintiffs plead a causation theory based on market revelation of the fraud, this court naturally evaluates whether plaintiffs have pleaded or proved the facts relevant to their theory. *E.g.*, *Metzler*, 540 F.3d at 1059, 1063 (holding that plaintiffs failed to plead loss causation where plaintiffs' theory was that "Corinthian's fraud was revealed to the market, causing Metzler's losses" but "[t]he TAC does not allege that the June 24 and August 2 announcements disclosed—or even suggested—[the fraudulent activities] to the market"). But our approval of one theory should not imply our rejection of others. A plaintiff may also prove loss causation by showing that the stock price fell upon the revelation of an earnings miss, even if the market was unaware at the time that fraud had concealed the miss. *See Berson*, 527 F.3d at 989–90; *Daou*, 411 F.3d at 1026. That a stock price drop comes immediately *after* the revelation of fraud can help to rule out alternative causes. *See Dura*, 544 U.S. at 342–43. But that sequence is not a condition of loss causation. *Nuveen*, 730 F.3d at 1120.

This rule makes sense because it is the underlying facts concealed by fraud that affect the stock price. *See* Jay W. Eisenhofer et al., *Securities Fraud, Stock Price Valuation, and Loss Causation*, 59 BUS. LAW. 1419, 1444 (2004). Fraud simply causes a delay in the revelation of those facts. The "ultimate issue" under either theory "is whether the defendant's misstatement, as opposed to some other fact, foreseeably caused the plaintiff's loss." *Lloyd*, 811 F.3d at 1210.

III

The district court held that the evidence, if accepted by the jury, could satisfy the proximate cause loss causation test with respect to five of the six alleged stock price declines. We conclude that the district court applied the correct test in making that determination. We need not, and do not, reach any other issue presented by this case.

AFFIRMED.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 16, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 16, 2018

s/ Deanne E. Maynard

CERTIFICATE OF COMPLIANCE WITH NINTH CIRCUIT RULE 40-1

I certify that pursuant to Circuit Rule 35-4 or 40-1, that the attached petition for rehearing contains 4,200 words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

Dated: March 16, 2018

s/ Deanne E. Maynard

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