

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

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4
5 August Term, 2011

6
7 (Argued: April 17, 2012

8 Decided: May 25, 2012)

9 Docket No. 11-63-cv
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13 PANTHER PARTNERS INC., on Behalf of Itself and All Others Similarly Situated,

14
15 *Plaintiff-Appellant,*

16
17 v.

18
19 IKANOS COMMUNICATIONS, INC., RAJESH VASHIST, DANIEL K. ATLER, DANIAL FAIZULLABHOY,
20 MICHAEL L. GOGUEN, MICHAEL GULETT, PAUL G. HANSEN, GOPAL VENKATESH, CITIGROUP
21 GLOBAL MARKETS INC.,

22
23 *Defendants-Appellees,*

24
25 LEHMAN BROTHERS INC.,

26
27 *Defendant.**

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29 Before: JACOBS, *Chief Judge*, B.D. PARKER and HALL, *Circuit Judges*.
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33 Appeal from an order of the United States District Court for the Southern District of New
34 York (Crotty, *J.*) denying plaintiff leave to amend its complaint alleging violations of §§ 11,
35 12(a)(2), and 15 of the Securities Act of 1933, on the ground that plaintiff's proposed complaint
36 failed to state a claim. *See* 15 U.S.C. §§ 77k, 77l(a)(2), 77o. That complaint alleged that
37 defendants were required to disclose, in connection with Ikanos Communications Inc.'s
38 secondary securities offering, known defects in the company's semiconductor chips. We hold
39 that, because it plausibly alleged that the known defects constituted a known trend or uncertainty
40 that defendants reasonably expected would have a material unfavorable impact on revenues, *see*

* The Clerk of Court is directed to amend the official caption to read as shown above.

1 Item 303 of SEC Regulation S-K, 17 C.F.R. § 229.303(a)(3)(ii), the proposed complaint stated a
2 claim under §§ 11, 12(a)(2), and 15.
3

4 **VACATED and REMANDED.**
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11 Francisco, CA, Samuel H. Rudman, David A.
12 Rosenfeld, Robins Geller Rudman & Dowd LLP,
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14

15 JAMES N. KRAMER (Michael D. Torpey, *on the brief*),
16 Orrick, Herrington & Sutcliffe LLP, San Francisco,
17 CA, *for Defendants-Appellees Ikanos*
18 *Communications, Inc., Rajesh Vashist, Daniel K.*
19 *Atler, Danial Faizullahoy, Michael L. Goguen,*
20 *Michael Gulett, Paul G. Hansen and Gopal*
21 *Venkatesh*.
22

23 DANIEL J. TOAL (Daniel J. Kramer, Farrah R. Berse,
24 Aaron H. Crowell, *on the brief*), Paul, Weiss,
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26 *for Defendant-Appellee Citigroup Global Markets*
27 *Inc.*
28

29
30 BARRINGTON D. PARKER, *Circuit Judge*:

31 Plaintiff Panther Partners Inc. (“Panther”) appeals an order of the United States District
32 Court for the Southern District of New York (Crotty, *J.*), denying leave to amend its complaint
33 alleging violations of §§ 11, 12(a)(2), and 15 of the Securities Act of 1933. *See* 15 U.S.C. §§
34 77k, 77l(a)(2), 77o. The proposed complaint alleged that defendant Ikanos Communications Inc.
35 (“Ikanos” or the “Company”) was required to disclose, and failed adequately to disclose, in
36 connection with a March 2006 secondary offering of its securities (the “Secondary Offering”),

1 known defects in the Company’s semiconductor chips. We hold that the proposed complaint
2 stated a claim because it plausibly alleged that the defects constituted a known trend or
3 uncertainty that the Company reasonably expected would have a material unfavorable impact on
4 revenues. *See* Item 303 of SEC Regulation S-K, 17 C.F.R. § 229.303(a)(3)(ii). Accordingly, we
5 vacate the judgment of the district court and remand with instructions to permit the filing of the
6 amended complaint.

7 **BACKGROUND**¹

8 In this putative securities class action, Panther alleges that Ikanos and various of its
9 officers, directors, and underwriters violated §§ 11, 12(a)(2), and 15 of the Securities Act by
10 failing to disclose known defects in the Company’s VDSL (very-high-bit-rate digital subscriber
11 line) Version Four chips. Ikanos is a publicly-traded company that develops and markets
12 programmable semiconductors. The semiconductors enable fiber-fast broadband services over
13 telephone companies’ existing copper lines. Ikanos’s customers are primarily large original
14 equipment manufacturers (“OEMs”) in the communications industry that incorporate Ikanos’s
15 products into their products, which are then sold to telecommunications carriers. All of Ikanos’s
16 revenues derive from the sale of semiconductor chip sets.

17 In 2005, Ikanos sold its VDSL Version Four chips to Sumitomo Electric and NEC, its
18 two largest customers and the source of 72% of its 2005 revenues. Sumitomo Electric and NEC

¹ Non-conclusory allegations, as set forth in this section, construed in the light most favorable to the plaintiff and assumed to be true, are drawn from Panther’s second proposed second amended complaint (“2PSAC”) and from SEC filings referenced therein. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009); *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 708 (2d Cir. 2011); *ATSI Commc’ns v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007).

1 then incorporated the chips into products that were in turn sold to NTT and installed in NTT's
2 network.

3 Ikanos learned in January 2006 that there were quality issues with the chips. In
4 particular, the chips had developed a problem called "Kirkendahl voiding,"² traceable to a third-
5 party assembling company in China to which Ikanos had switched the majority of its assembly
6 work during the third and fourth quarters of fiscal year 2005. In the weeks leading up to the
7 Secondary Offering, the defect issues became more pronounced as Ikanos received an increasing
8 number of complaints from Sumitomo Electric and NEC. The thrust of the complaints was that
9 the chips that had been installed in the NTT network were defective and were causing the
10 network to fail, and that end-users who had subscribed to NTT's television, Internet and
11 telephone services were losing signals and access to their subscribed services. According to
12 Ikanos's former Director of Quality and Reliability, the defects "were a substantial problem for
13 [Ikanos] to resolve in order to appease Sumitomo Electric and NEC and to retain them as
14 customers," in part because Ikanos knew it would be unable to determine which of the chip sets
15 it sold to these customers actually contained defective chips. J.A. at 52. Panther alleges that
16 Ikanos's Board of Directors met and discussed the defect issue at the time it arose, and Company
17 representatives regularly traveled to Japan to meet with Sumitomo and NEC representatives to
18 evaluate the problem and to discuss possible solutions.

² Kirkendahl voiding is caused by the mingling of alloys between a gold wire and aluminum pad, causing the connection between the components to fail over time through different temperature exposures.

1 Panther goes on to allege that Ikanos did not disclose the magnitude of the defect issue in
2 either the Registration Statement or the Prospectus for the Secondary Offering. Instead, the
3 Registration Statement simply cautioned in generalized terms that

4 [h]ighly complex products such as those that [Ikanos] offer[s] frequently
5 contain defects and bugs, particularly when they are first introduced or as
6 new versions are released. In the past we have experienced, and may in
7 the future experience, defects and bugs in our products. If any of our
8 products contains defects or bugs, or have reliability, quality or
9 compatibility problems, our reputation may be damaged and our OEM
10 customers may be reluctant to buy our products, which could harm our
11 ability to retain existing customers and attract new customers. In addition,
12 these defects or bugs could interrupt or delay sales or shipment of our
13 products to our customers.

14
15 *Id.* at 54-55, 168.

16 Some 5.75 million shares of Ikanos stock were sold in the Secondary Offering at \$20.75
17 per share, raising more than \$120 million. The individual defendants sold stock valued at \$7.3
18 million.

19 Ikanos ultimately determined that the chips had an “extremely high” failure rate of 25-
20 30%. *Id.* at 53. In June 2006, three months after the Secondary Offering, the Company reached
21 an agreement with Sumitomo Electric and NEC to replace at Ikanos’s expense all of the units
22 sold – not just the units containing observably defective chips. This recall resulted in the return
23 of hundreds of thousands of chip sets whose cost had to be written off.

24 In July 2006, the Company reported a net loss of \$2.2 million for the second quarter,
25 causing the price of its shares to drop over 25% from \$13.85 to \$10.24. Three months later, in
26 October 2006, it reduced its expected third-quarter revenues from \$40-\$43 million to \$36-37
27 million, citing “product delays and manufacturing constraints” involving its fourth- and fifth-

1 generation chip sets. *Id.* at 56. The share price dropped almost 30%, from \$10.94 to \$7.76, on
2 the news, and analysts lowered their fourth-quarter revenue projections from \$45 million to \$25
3 million. Three weeks later, Chief Executive Officer and Board Chairman Rajesh Vashist
4 resigned. Two days later, Ikanos announced third-quarter revenues of \$36.7 million and revised
5 revenue estimates for the fourth quarter down further to \$21-24 million. Shortly thereafter,
6 plaintiff filed its initial complaint, alleging, among other things, that in contravention of Item
7 303 of SEC Regulation S-K, defendants failed to disclose the “known . . . uncertaint[y]” that the
8 VDSL Version Four chips were defective and were causing system failures where they were
9 deployed. *See* 17 C.F.R. § 229.303(a)(3)(ii).

10 The operative complaint on this appeal, from which the facts above are drawn, is the third
11 to have been considered by the district court in this case. The First Amended Complaint
12 (“1AC”) alleged merely that Ikanos learned in January 2006 that its VDSL Version Four chips
13 were failing and causing NTT’s customers to lose access to their subscribed services; that, some
14 time later, Ikanos was forced to ship replacement products to Sumitomo Electric and NEC at
15 Ikanos’s expense; and that, at some point, Ikanos determined that the chips had a failure rate of
16 25-30%. The district court dismissed the 1AC for failure to state a claim, concluding that “[n]o
17 plausibly pleaded fact suggests that Ikanos knew or should have known of the scope or
18 magnitude of the defect problem at the time of the Secondary Offering.” *Panther Partners, Inc.*
19 *v. Ikanos Commc’ns, Inc.*, 538 F. Supp. 2d 662, 673 (S.D.N.Y. 2008) (“*Panther Partners I*”).

20 Panther moved for reconsideration, providing the court with a proposed amended
21 complaint (the “First Proposed Second Amended Complaint” or “1PSAC”). The 1PSAC added
22 allegations that the defect issue was becoming “more pronounced” in the weeks leading up to the

1 Secondary Offering, when Ikanos was receiving “an increasing number of calls” from Sumitomo
2 Electric and NEC; that the defect problems were “a substantial problem” for the Company to
3 resolve; and that the Board of Directors was discussing the issue at the time it arose. 1PSAC at
4 7, 8. The district court denied the motion for reconsideration and for leave to replead, reasoning
5 that plaintiff’s filing of the 1PSAC would be futile because its new “vague” allegations were –
6 like the 1AC’s allegations –

7 “silent about the rate at which chips were being returned . . . or the volume
8 of the defect [in the weeks leading up to the Secondary Offering]
9 Nor do the allegations specify that Ikanos knew exactly what the
10 particular defect was at that time. It is no secret that chips are subject to
11 some percentage of failure (and here there is no pleading as to what a
12 ‘normal’ defect rate is), so the allegation that ‘there were defects’ is
13 meaningless without more. . . . The [p]laintiff must tell the Court what
14 was going on when – and how much the defect experienced actually
15 differed from the norm.”

16
17 *Panther Partners, Inc. v. Ikanos Commc’ns, Inc.*, No. 06 Civ. 12967, 2008 WL 2414047, at *3
18 (S.D.N.Y. June 12, 2008) (“*Panther Partners II*”) (quoting *Panther Partners I*, 538 F. Supp. 2d
19 at 673). The court reiterated its view that no plausibly pleaded fact suggested that Ikanos knew
20 or should have known the magnitude of the defect problem at the time of the Secondary
21 Offering.

22 Ikanos appealed both decisions. By summary order, we first affirmed the district court’s
23 dismissal of Panther’s 1AC. We further held that, while the 1PSAC’s new allegations “nudged
24 plaintiff’s claims closer to the line from conceivable to plausible, they were not enough to push
25 the proposed second amended complaint across that line.” *Panther Partners Inc. v. Ikanos*
26 *Commc’ns, Inc.*, 347 F. App’x 617, 621 (2d Cir. 2009) (“*Panther Partners III*”) (quotation marks
27 and brackets omitted). Specifically, we held, the 1PSAC “failed to allege plausibly that [Ikanos]

1 knew of abnormally high and potentially problematic defect rates before Ikanos published the
2 registration statement,” and therefore failed to state a claim. *Id.* at 622. Notwithstanding this
3 holding, we vacated the district court’s judgment denying Panther’s motion for reconsideration
4 and for leave to replead for futility because “it seems to us possible that [Panther] could allege
5 additional facts that Ikanos knew the defect rate was above average before filing the registration
6 statement.” *Id.* We urged the court on remand to “consider all possible amendments” – not just
7 “proposed amendments” – in reassessing futility. *Id.*

8 On remand, Panther moved for leave to file the 2PSAC, adding the allegations that
9 Sumitomo Electric and NEC were Ikanos’s two largest customers and that they accounted for
10 72% of Ikanos’s revenues in 2005. Panther further alleged that, weeks before the Secondary
11 Offering – when Ikanos was receiving an increasing volume of complaints from these customers
12 – Ikanos knew it would be unable to determine which of the chip sets it sold them contained
13 defective chips. In November 2010, the district court denied Panther’s motion, again on the
14 grounds of futility, finding that the 2PSAC failed to allege ““additional facts that Ikanos knew
15 the defect rate was above average before filing the registration statement.”” Special App. at 4, 5
16 (“*Panther Partners IV*”) (quoting *Panther Partners III*, 347 F. App’x at 622). Panther’s new
17 allegations regarding Sumitomo Electric and NEC, the district court reasoned,

18 have no logical connection to the issue of when Ikanos knew that the
19 defect rate was above average. Although these customer demographics
20 might shed light on whether any defect might potentially be problematic
21 *assuming the defect rate turned out to be above average*, this does not
22 satisfy the Second Circuit’s road map – it is simply a detour.

23
24 *Id.* at 4.

1 Panther appeals again, arguing that the district court erred by considering in isolation
2 only those allegations in the 2PSAC that supplemented the 1PSAC and by applying the wrong
3 standard in assessing whether the 2PSAC adequately alleged a failure to comply with Item 303.
4 Specifically, Panther argues that the issue before the district court was not whether Ikanos knew
5 the defect rate was “above average” before filing the Registration Statement. *Id.* at 4, 5
6 (quotation marks omitted). Rather, the district court should have addressed the question of
7 whether, in failing to disclose the scope of the defect issue with which Ikanos was then
8 grappling, defendants concealed a “known trend[] or uncertaint[y] . . . that [Ikanos] reasonably
9 expect[ed] w[ould] have a material . . . unfavorable impact on . . . revenues or income from
10 continuing operations,” 17 C.F.R. § 229.303(a)(3)(ii).

11 STANDARD OF REVIEW

12 We review a district court’s denial of leave to amend for abuse of discretion, unless the
13 denial was based on an interpretation of law, such as futility, in which case we review the legal
14 conclusion *de novo*. *Starr v. Sony BMG Music Entm’t*, 592 F.3d 314, 321 (2d Cir. 2010).
15 Futility is a determination, as a matter of law, that proposed amendments would fail to cure prior
16 deficiencies or to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See*
17 *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 50 (2d Cir. 1991). In assessing whether
18 the proposed complaint states a claim, we consider “the proposed amendment[s] . . . along with
19 the remainder of the complaint,” *Sony BMG*, 592 F.3d at 323 n.3, accept as true all non-
20 conclusory factual allegations therein, and draw all reasonable inferences in plaintiff’s favor to
21 determine whether the allegations plausibly give rise to an entitlement to relief. *Iqbal*, 556 U.S.
22 at 678-80.

1 **DISCUSSION**

2 Sections 11 and 12(a)(2) of the Securities Act impose liability on certain participants in a
3 registered securities offering when the registration statement or prospectus contains material
4 misstatements or omissions. 15 U.S.C. §§ 77k, 77l(a)(2). The provisions are “notable both for
5 the limitations on their scope as well as the *interrorem* nature of the liability they create.” *In re*
6 *Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 359 (2d Cir. 2010). Section 11 imposes
7 strict liability on issuers and signatories, and negligence liability on underwriters, “[i]n case any
8 part of the registration statement, when such part became effective, contained an untrue
9 statement of a material fact or omitted to state a material fact required to be stated therein or
10 necessary to make the statements therein not misleading.” 15 U.S.C. § 77k(a). Section 12(a)(2)
11 imposes liability under similar circumstances for misstatements or omissions in a prospectus.
12 *See id.* § 77l(a)(2). And § 15 imposes liability on individuals or entities that “control[] any
13 person liable” under §§ 11 or 12. *Id.* § 77o. Neither scienter, reliance, nor loss causation is an
14 element of § 11 or § 12(a)(2) claims which – unless they are premised on allegations of fraud –
15 need not satisfy the heightened particularity requirements of Rule 9(b) of the Federal Rules of
16 Civil Procedure. *See Morgan Stanley Info. Fund*, 592 F.3d at 359; *Rombach v. Chang*, 355 F.3d
17 164, 171 (2d Cir. 2004). Nor do the heightened pleading standards of the Private Securities
18 Litigation Reform Act apply to such non-fraud claims. *See* 15 U.S.C. § 78u-4(b)(1)-(2). Thus,
19 the provisions “place[] a relatively minimal burden on a plaintiff.” *Litwin*, 634 F.3d at 716
20 (quotation marks omitted); *see also id.* at 715 (observing that §§ 11 and 12(a)(2) claims not
21 premised on allegations of fraud are “ordinary notice pleading case[s], subject only to the ‘short
22 and plain statement’ requirements of Federal Rule of Civil Procedure 8(a)”); *Morgan Stanley*

1 *Info. Fund*, 592 F.3d at 360 (observing that §§ 11 and 12(a)(2) “apply more narrowly but give
2 rise to liability more readily” than § 10(b) of the Securities Exchange Act of 1934).

3 One of the potential bases for liability under §§ 11 and 12(a)(2) is an omission in
4 contravention of an affirmative legal disclosure obligation. *Id.* In this case, Item 303 of SEC
5 Regulation S-K provides the basis for Ikanos’s alleged disclosure obligation. The Regulation, as
6 we have seen, requires registrants to “[d]escribe any known trends or uncertainties . . . that the
7 registrant reasonably expects will have a material . . . unfavorable impact on . . . revenues or
8 income from continuing operations.” Instruction 3 to paragraph 303(a) provides that “[t]he
9 discussion and analysis shall focus specifically on material events and uncertainties known to
10 management that would cause reported financial information not to be necessarily indicative of
11 future operating results or of future financial condition.” 17 C.F.R. § 229.303(a) instruction 3.
12 According to the SEC’s interpretive release regarding Item 303, the Regulation imposes a
13 disclosure duty “where a trend, demand, commitment, event or uncertainty is both [1] presently
14 known to management and [2] reasonably likely to have material effects on the registrant’s
15 financial condition or results of operations.” Management’s Discussion and Analysis of
16 Financial Condition and Results of Operations, Securities Act Release No. 6835, Exchange Act
17 Release No. 26,831, Investment Company Act Release No. 16,961, 43 SEC Docket 1330 (May
18 18, 1989). We believe that, viewed in the context of Item 303’s disclosure obligations, the
19 defect rate, in a vacuum, is not what is at issue. Rather, it is the manner in which uncertainty
20 surrounding that defect rate, generated by an increasing flow of highly negative information
21 from key customers, might reasonably be expected to have a material impact on future revenues.

1 *Litwin v. Blackstone Group, L.P.*, decided after the district court denied Panther leave to
2 file the 2PSAC, is instructive on this point. There, investors sued Blackstone, an asset
3 management company, under §§ 11 and 12(a)(2) for omitting from a registration statement and
4 prospectus information regarding negative trends in the real estate market. Blackstone’s real
5 estate investments accounted for approximately 22.6% of its assets under management.
6 Reversing the district court’s dismissal of the complaint, we held that plaintiffs adequately
7 alleged that Blackstone was required by Item 303 to disclose the trend, “already known and
8 existing at the time of the IPO,” because it “was reasonably likely to have a material impact on
9 Blackstone’s financial condition.” 634 F.3d at 716. In so holding, we emphasized that

10 the key information that plaintiffs assert should have been disclosed is
11 whether, and to what extent, the particular known trend, event, or
12 uncertainty might have been reasonably expected to materially affect
13 Blackstone’s investments. . . . Again, the focus of plaintiffs’ claims is the
14 required disclosures under Item 303 – plaintiffs are not seeking the
15 disclosure of the . . . downward trend in the real estate market
16 Rather, plaintiffs claim that Blackstone was required to disclose the
17 manner in which th[at] then-known trend[], event[], or uncertaint[y] might
18 reasonably be expected to materially impact Blackstone’s future revenues.

19
20 *Id.* at 718-19.

21 We hold that the 2PSAC plausibly alleges that the defect issue, and its potential impact
22 on Ikanos’s business, constituted a known trend or uncertainty that Ikanos reasonably expected
23 would have a material unfavorable impact on revenues or income from continuing operations.
24 Like the 1PSAC, the 2PSAC alleges that, before the Secondary Offering, Ikanos was receiving
25 an increasing number of calls from Sumitomo Electric and NEC alerting Ikanos to the fact that
26 its chips were defective and were causing network failures. The 2PSAC also alleges that the
27 “defect issues,” which were becoming “more pronounced,” were a “substantial problem for

1 [Ikanos] to resolve” – so much so that members of Ikanos’s Board of Directors were discussing
2 the issue, and representatives from the Company were flying to Japan to meet with Sumitomo
3 Electric and NEC. J.A. at 51-52. However, the 2PSAC adds the critical allegations (1) that
4 these customers accounted for 72% of Ikanos’s revenues in 2005 and (2) that Ikanos knew at the
5 time it was receiving an increasing number of calls from these customers that it would be unable
6 to determine which chip sets contained defective chips. The 2PSAC then articulates the
7 plausible inference to be drawn from these facts: that Ikanos “knew that . . . the chips that it had
8 sold to . . . its largest customers and the largest source of its revenues[] were defective, . . . and
9 that it [may] therefore have to accept returns of *all* of the chips that it had sold to these two
10 important customers.” *Id.* at 52 (emphasis added).

11 The reasonable and plausible inferences from these allegations are not simply that
12 Ikanos quite possibly would have to replace and write off a large volume of chip sets, but also
13 that it had jeopardized its relationship with clients who at that time accounted for the vast
14 majority of its revenues. It is true that, as alleged, Ikanos did not recall and undertake to replace
15 all the chip sets until June 2006. Nor was the precise 25-30% chip failure rate determined until
16 after the Secondary Offering. But neither of these facts undermines the plausible inference that,
17 at a time when it was receiving an increasing number of calls from these customers and its Board
18 of Directors was discussing the issue, Ikanos was aware of the “uncertainty” that it might have to
19 accept returns of a substantial volume, if not all, of the chips it had delivered to its major
20 customers. It goes without saying that such “known uncertainties” could materially impact
21 revenues. *See Litwin*, 634 F.3d at 722.

1 In light of these allegations, the Registration Statement’s generic cautionary language
2 that “[h]ighly complex products such as those that [Ikanos] offer[s] frequently contain defects
3 and bugs” was incomplete and, consequently, did not fulfill Ikanos’s duty to inform the investing
4 public of the particular, factually-based uncertainties of which it was aware in the weeks leading
5 up to the Secondary Offering.

6 In focusing on whether plaintiff alleged that Ikanos knew the defect rate was “above
7 average” before the Secondary Offering, the district court construed the proposed complaint and
8 our remand order too narrowly. *See Panther Partners III*, 347 F. App’x at 622. Item 303’s
9 disclosure obligations, like materiality under the federal securities laws’ anti-fraud provisions, do
10 not turn on restrictive mechanical or quantitative inquiries. *See Matrixx Initiatives, Inc. v.*
11 *Siracusano*, 131 S. Ct. 1309, 1318-19 (2011) (explaining that the problem with “bright-line” and
12 “categorical” rules is that they “would artificially exclude information that would otherwise be
13 considered significant to the trading decision of a reasonable investor” (brackets and quotation
14 marks omitted)). If nothing else, the allegations pertaining to Sumitomo Electric and NEC
15 altered the relevant inquiry, rendering a narrow focus on defect rates inappropriate. Under the
16 new allegations in the 2PSAC, the defect rate was, in essence, 100% for all chips sold to clients
17 representing 72% of revenues. These circumstances were not simply “potentially problematic”
18 for the Company; they were very bad. *Panther Partners III*, 347 F. App’x at 622. We have little
19 difficulty concluding that Panther has adequately alleged that the disclosures concerning a
20 problem of this magnitude were inadequate and failed to comply with Item 303.

CONCLUSION

1

2

The judgment of the district court is vacated, and the case remanded with instructions to grant Panther leave to file the 2PSAC.

3