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Securities Litigation Alert

Second Circuit Confirms that Item 303 Disclosure Violations May Support Section 10(b) Liability in Reviving Claims Based on Failure to Disclose Risks from Harmful-Emission Regulation

April 4, 2023

In a recent decision, *Moab Partners, L.P. v. Macquarie Infrastructure Corporation*,[1] the U.S. Court of Appeals for the Second Circuit vacated a lower court's dismissal of claims under Section 10(b) of the Securities Exchange Act of 1934 based on an issuer's alleged failure to disclose the threat to its business posed by a regulation to reduce harmful sulfur oxide emissions from ships. The International Maritime Organization regulation, "IMO 2020," which cut the permissible upper limit on the sulphur content of ships' fuel oil from 3.5% to .5%, harmed a subsidiary's core business, storing "No. 6 fuel oil," which has a sulfur content of 3%. The Court held that the plaintiff adequately alleged that the business threat was a known trend or uncertainty that the issuer had a duty to disclose in its SEC filings under Item 303 of Regulation S-K. Reaffirming a prior Second Circuit holding, the Court confirmed that non-disclosure under Item 303 may constitute an actionable Section 10(b) omission, and, having also found scienter adequately pled, remanded the case for further proceedings.

Macquarie demonstrates that, in the Second Circuit, an issuer's failure to comply with Item 303 (and potentially other SEC disclosure rules) may create the risk of Section 10(b) liability—but (as we explain below) only if all other elements of a Section 10(b) claim are also established. Other circuits have been more skeptical of such claims, with the Ninth Circuit and others holding that Item 303 does *not* create a Section 10(b) duty to disclose. The divide is significant because of widespread agreement (including in the Second Circuit) that there is no private right of action under Item 303, leaving Section 10(b) as a primary mechanism for investors to seek recourse for Item 303 violations. Supreme Court guidance (or possibly contrary decisions by Second Circuit panels or a decision en banc) will be necessary to bring uniformity to the law.

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[1] No. 21-2524, 2022 WL 17815767 (2d Cir. Dec. 20, 2022).

Background

The judicially created private right of action under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder allows plaintiffs to recover losses resulting from material misstatements or omissions in connection with the purchase or sale of a security.[2] At the same time, a host of rules and regulations under the Exchange Act and Securities Act of 1933 impose a duty on issuers to disclose information in SEC filings. Item 303 of Regulation S-K, for example, requires issuers to identify "any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations."[3] Item 105 (formerly Item 503) also requires "a discussion of the material factors that make an investment in the registrant or offering speculative or risky."[4] If an issuer fails to disclose the information required under these rules, however, it is widely recognized that there is no private right of action under Item 303 or Item 105.[5] As a result, investors seeking recourse for non-disclosure under these rules must fit the violation within the framework of a recognized claim under the securities laws—in most instances, under Section 10(b) and Rule 10b-5.

The substantial challenges for plaintiffs to plead a viable claim notwithstanding an alleged Item 303 problem, and the robust defenses available for defendants, were evident in *Macquarie*. The case concerns Macquarie Infrastructure Corporation, then a publicly traded holding company that owned and operated various infrastructure-related businesses.[6] One of Macquarie's main subsidiaries, International-Matex Tank Terminals-Bayone, Inc. (IMTT), provided storage for "No. 6 fuel oil," a group of residual fuel oils remaining at the end of the petroleum refinement process, used mainly by large shipping vessels. As alleged, storing No. 6 fuel oil was IMTT's largest business segment, constituting over 40% of its storage capacity. No. 6 fuel oil, however, contains a relatively high sulfur content, resulting in the emission of harmful sulphur oxide (SOx) when used as fuel in ships. SOx emissions have been linked to stroke, asthma, lung cancer, cardiovascular and pulmonary

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2 *See* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 729–31 (1975).

3 17 C.F.R. § 229.303(b)(2)(ii).

4 17 C.F.R. § 229.105(a).

5 *See, e.g.*, *Carvelli v. Ocwen Fin. Corp.*, 934 F.3d 1307, 1330 (11th Cir. 2019) ("[N]o court of which we are aware has found a private right of action under Item 303, and the rule itself doesn't seem to contemplate one."); *In re NTL, Inc. Sec. Litig.*, 347 F. Supp. 2d 15, 37 ("[T]here is no private cause of action violation of Regulation S-K."); *Jaroslawicz v. M&T Bank Corp.*, 962 F.3d 701, 711 n.10 (3d Cir. 2020) (finding that neither the language of Item 105 nor the SEC's interpretive guidance suggests that there is a private cause of action under Item 105).

6 After the consolidated complaint in this case was filed, Macquarie announced on October 31, 2019 its intention to sell all of its operating businesses. In the following three years, Macquarie completed sales of all of its operating businesses—including the sale of IMTT in December 2020—concluding with the sale of its final remaining business and delisting of Macquarie units from the New York Stock Exchange on July 21, 2022. *See* *MIC Announces Completion of Merger with Argo*, MACQUARIE INFRASTRUCTURE HOLDINGS, LLC (July 21, 2022).

diseases, as well as acid rain and ocean acidification, causing harm to crops, forests, and aquatic species.

In an effort to reduce worldwide SOx emissions, in 2008, the International Maritime Organization, a United Nations agency charged with regulating global shipping, adopted "IMO 2020," which sought to ban the use of fuels with a sulfur content of .5% or greater by 2020. In 2016, the International Maritime Organization publicly reaffirmed its intention to implement the regulation by 2020. On its face, IMO 2020 would have stopped all use in global shipping of No. 6 fuel oil, which has a sulfur content of approximately 3%. At the time of the 2016 announcement, however, some believed that shippers might be able to bypass the regulation by installing abatement technology, such as scrubbers, to remove sulfur content in excess of the threshold. As a result, the precise effect of IMO 2020 on the use of No. 6 fuel oil was not certain at the time.

After the announcement, Macquarie did not publicly acknowledge that it faced a threat from the adoption of IMO 2020. Meanwhile, the company's market capitalization and stock price remained high from a historical perspective, hovering around approximately $5.5 billion and $70 per share, respectively, over the next year and a half. On February 21, 2018, however, Macquarie announced that IMTT's utilization—the amount of storage tank capacity contracted for use by its customers—had dropped by 5%, and it had missed its financial projections. The next day, on an earnings call, Macquarie's CEO pinned the downturn on a "structural decline in the 6 oil market," and revealed that, in December 2017 and January 2018, many IMTT customers terminated their contracts for No. 6 oil and exited the industry. The CEO called the change in fortunes "a surprise." The same day, Macquarie's stock price dropped by 41%.

Shareholder litigation followed, with multiple Macquarie investors filing putative class actions in the Southern District of New York. In January 2019, the District Court (Hon. Vernon S. Broderick) appointed Moab Partners, L.P., an institutional investor, as lead plaintiff, and Moab soon filed a consolidated amended complaint alleging violations of the securities laws, including Section 10(b) of the Exchange Act and Sections 11 and 12(a)(2) of the Securities Act, by Macquarie and its executives. Plaintiff alleged that, from 2016 until the February 2018 earnings call, defendants were aware of the "cataclysmic" impact that implementation of IMO 2020 would have on IMTT's business, but concealed that assessment from investors. With respect to Section 10(b), plaintiff theorized that defendants' non-disclosure gave rise to liability, both because it violated disclosure requirements under Items 303 and 105 of Regulation S-K, and it rendered affirmative statements about the company's base of customers misleading. The District Court disagreed. In the District Court's view, plaintiff failed to adequately plead that defendants knew of the precise risks during the class period, or that any of the company's "milquetoast" statements about its customer base or

risks it faced were materially misleading.[7] Plaintiff appealed the District Court's dismissal order to the Second Circuit.

The Second Circuit's Decision

A Second Circuit panel, comprised of Circuit Judges Pierre N. Leval, Reena Raggi, and Myrna Pérez, issued a summary order vacating the dismissal order and remanding the case for further proceedings.[8] First, the Court held that plaintiff adequately alleged material omissions to support its claims based on defendants' failure to identify a known trend or uncertainty as required by Item 303. The Court explained that "[t]he failure to make a material disclosure required by Item 303 can serve as the basis for claims under Sections 11 and 12(a)(2), and for a claim under Section 10(b) if the other elements have been sufficiently pleaded."[9] The Court looked to SEC interpretive guidance on Item 303, which advises that an issuer must "assum[e]" that a trend or uncertainty "will come to fruition" and disclose it "*unless* management determines that a material effect on the registrant's financial condition or results of operations is not reasonably likely to occur."[10] Crediting plaintiff's allegations as true, the Court concluded that, even if defendants were not certain of IMO 2020's impact, "it would not have been 'objectively reasonable' for [d]efendants to determine that IMO 2020 would not likely have a material effect on [Macquarie's] financial condition or operations."[11] Disclosure of the threat, therefore, was required.

Second, the Court held that plaintiff adequately alleged that defendants' non-disclosure rendered statements made about IMTT's customers materially misleading.[12] The Court explained that, once defendants "chose[] to speak about their base of customers," they had "a duty to speak accurately, giving all material facts in addressing those issues to permit investors to evaluate the potential

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[7] *City of Riviera Beach Gen. Emps. Ret. Sys. v. Macquarie Infrastructure Corp.*, No. 18-CV-3608 (VSB), 2021 WL 4084572, at *7 (S.D.N.Y. Sept. 7, 2021).

[8] Under Second Circuit internal procedures, a panel may rule by summary order "[w]hen a decision in a case is unanimous and each panel judge believes that no jurisprudential purpose is served by an opinion (i.e., a ruling having precedential effect)." IOP 32.1.1.

[9] *Macquarie*, 2022 WL 17815767, at *2 (citing *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 120–22 (2d Cir. 2012) (Sections 11 and 12(a)(2) claims), and *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 101–04 (2d Cir. 2015) (Section 10(b) and Rule 10b-5 claim)).

[10] *Id.* at *2–3 (citing Management's Discussion & Analysis of Financial Condition & Results of Operations, Exchange Act Release No. 6835, 43 S.E.C. Docket 1330, 1989 WL 1092885, at *6 (May 18, 1989) [hereinafter SEC Interpretive Release]) (emphasis added)).

[11] *Id.* at *3 (citations omitted). Since the District Court had dismissed plaintiff's Item 105 claim without discussion, the Second Circuit assumed that the dismissal was for the same erroneous reasons as the dismissal of the Item 303 claim, and thus also vacated the dismissal of the Item 105 claim. *Id.* at *3 n.2.

[12] For example, on a February 23, 2016 earnings call, Macquarie's then CEO said that IMTT's business "has some sensitivity to end-user demand, but least in the petroleum segment of its operations," which includes the storage of No. 6 fuel oil. *See* Consolidated Class Action Complaint for Violations of the Federal Securities Laws, ¶ 232, *City of Riviera Beach Gen. Emps. Ret. Sys. v. Macquarie Infrastructure Corp.*, No. 18-CV-3608 (VSB) (S.D.N.Y. Feb. 20, 2019).

risks."[13] The Court also concluded that the company's risk disclosures—*e.g.*, warning of potential "changes in government regulations" and "capital expenditures" related to repurposing tanks—did not cure the deficiency. In the Court's view, these "generic" disclosures did not reveal sufficient information "for the investing public to make a proper assessment of the alleged risks."[14]

Finally, the Court held that plaintiff adequately alleged facts creating a "strong inference" of scienter, as required under the Private Securities Litigation Reform Act of 1995, to plead a Section 10(b) claim. The Court found sufficient circumstantial evidence of conscious misbehavior or recklessness: as the Court observed, Macquarie's executives were "each in the unique position of knowing that IMTT had a significant portion of its storage reserved for No. 6 fuel oil" and that customers "would be undergoing a significant shift in the time leading up to IMO 2020's enforcement."[15] The Court also found it plausible that Macquarie pursued an acquisition of an operator of storage terminals focused on jet fuels in 2017 to diversify its portfolio amid risks posed by IMTT's reliance on No. 6 fuel oil, and to divert attention away from its declining performance.[16]

Implications

Confirmation that, in the Second Circuit, Failure to Disclose a Known Trend or Uncertainty under Item 303 May Constitute an Actionable Section 10(b) Omission

- The *Macquarie* Court held that plaintiff adequately alleged a material omission to support its claims based on defendants' alleged failure to identify "IMO 2020's significant restriction of No. 6 fuel oil use" as "reasonably likely to have material effects on MIC's financial condition or results of operation" under Item 303 of Regulation S-K.[17] In so holding, the Court followed its 2015 decision *Stratte-McClure v. Morgan Stanley*, which held that "Item 303's affirmative duty to disclose in Form 10-Qs can serve as the basis for a securities fraud claim under Section 10(b)."[18] There, the Court reasoned that a duty to disclose under Section 10(b) may arise when there is a "statute or regulation requiring disclosure," or a corporate statement that would otherwise be "inaccurate, incomplete, or misleading," and the omission of an item required to be disclosed on a Form 10-Q filing with the SEC, including a known trend or uncertainty, "can render that financial statement misleading."[19]

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[13] *Macquarie*, 2022 WL 17815767, at *4 (citation omitted).

[14] *Id.* (citing *Meyer v. JinkoSolar Holdings Co.*, 761 F.3d 245, 251 (2d Cir. 2014)).

[15] *Id.*

[16] *Id.* The Second Circuit subsequently denied defendants' petition for rehearing by an en banc Second Circuit. Order, *Macquarie*, No. 21-2524 (2d Cir. Jan. 27, 2023).

[17] *Macquarie*, 2022 WL 17815767, at *3.

[18] *Stratte-McClure*, 776 F.3d at 101.

[19] *Id.* at 101–02.

- The *Stratte-McClure* Court, however, made clear that adequately alleging an Item 303 violation is only part of the equation. To plead a Section 10(b) claim based on an Item 303 violation, a plaintiff also must adequately allege all other Section 10(b) elements—*i.e.*, that the omission is "material" (important to a reasonable investor), that the defendant acted with scienter (an intent to deceive), that there is a connection between the omission in the purchase or sale of a security, that plaintiff relied on the omission, and that it suffered economic loss as a result of its reliance.[20]

Potential (But Non-Binding) Guidance on Pleading an Item 303 Violation

- *Macquarie* is also notable for its analysis of whether the complaint pled an Item 303 violation. In assessing the sufficiency of plaintiff's allegations, the Court looked to SEC interpretive guidance issued in 1989. Under that guidance, once a trend or uncertainty becomes "known" to management, it must ask, first, if "the known trend . . . [is] likely to come to fruition[.] If management determines that it is not reasonably likely to occur, no disclosure is required."[21] If management cannot determine that the trend "is not reasonably likely to occur," however, "it must evaluate objectively the consequences of the known trend . . . on the assumption that it will come to fruition. Disclosure is then required unless management determines that a material effect on the registrant's financial condition or results of operations is not reasonably likely to occur."[22] Each of management's determinations, moreover, "must be objectively reasonable, viewed as of the time the determination is made."[23]
- The crux of the *Macquarie* Court's decision was its conclusion that, crediting plaintiff's allegations as true, it was not "objectively reasonable" for management to determine that IMO 2020 "would not likely have a material effect on [the company's] financial condition or operations."[24] To reach that conclusion, the Court applied a fact-intensive "reasonableness" standard to defendants' conduct, while accepting plaintiff's allegations on a motion to dismiss. That made matters especially difficult for defendants seeking to dismiss the claims on the pleadings, prior to discovery, without the opportunity to introduce evidence extrinsic to the complaint to justify the processes they deployed and the basis for their determinations. In this respect, however, the *Macquarie* Court's analysis may be viewed as limited to its facts, as the decision was not designated for publication.

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[20] *Id.* at 103.

[21] *Macquarie*, 2022 WL 17815767, at *2 (quoting SEC Interpretive Release, at *6).

[22] *Id.* (quoting SEC Interpretive Release, at *6).

[23] *Id.* at *3 (quoting SEC Interpretive Release, at *6).

[24] *Id.* (citing *Stratte-McClure*, 776 F.3d at 102–03).

Less Receptivity in Other Circuits to Section 10(b) Claims Based on Item 303 Violations

- The Second Circuit stands alone among the circuits in holding that an Item 303 omission, without any misleading affirmative statement, may give rise to Section 10(b) liability. In a much-cited decision, *Oran v. Stafford*, the Third Circuit previously explained that the test for securities fraud materiality set out by the Supreme Court in *Basic Inc. v. Levinson*, which premises forward-looking disclosure "upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity," "differ[s] significantly" from the standards governing disclosure under Item 303, as set forth in the SEC's guidance.[25] On that basis, the Third Circuit held that "a violation of SK-303's reporting requirements does not automatically give rise to a material omission under Rule 10b-5."[26]
- In *In re NVIDIA Corp. Securities Litigation*, moreover, the Ninth Circuit rejected outright the view that Item 303 gives rise to an independent duty of disclosure for the purposes of a Section 10(b) claim. The Ninth Circuit pointed to the Supreme Court cases of *Basic*, where the Supreme Court explained that "[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5," and *Matrixx Initiatives*, where the Court stated that "[d]isclosure is required . . . only when necessary 'to make . . . statements made, in the [] light of the circumstances under which they were made, not misleading.'"[27] In the Ninth Circuit's view, "Item 303 does not create a duty to disclose for purposes of Section 10(b) and Rule 10b-5,"[28] and "[s]uch a duty to disclose must be separately shown according to the principles set forth by the Supreme Court in *Basic* and *Matrixx Initiatives*," *i.e.*, by showing that the omission caused an affirmative statement to be materially misleading.[29]
- The difference in standards is meaningful. In the Second Circuit, to plead a Section 10(b) claim based on an Item 303 violation, a plaintiff must show (1) a plausible Item 303 violation, (2) materiality, (3) scienter, (4) purchase/sale of a security, (5) reliance, and (6) resulting economic loss. Under the Ninth Circuit's approach, by contrast, a plaintiff must adequately allege all the same elements, *plus* show that defendants' non-disclosure in violation of Item 303 made an affirmative statement materially misleading. That increased burden likely will prompt

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[25] *Oran v. Stafford*, 226 F.3d 275, 288 (3d Cir. 2000) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988)).

[26] *Id.*

[27] *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1054 (9th Cir. 2014) (quoting *Basic*, 485 U.S. at 239 n.17 and *Matrixx Intiatives, Inc. v. Siracusano*, 563 U.S. 27, 44–45 (2011)).

[28] *Id.* at 1056.

[29] *Id.* The Eleventh Circuit has expressed its agreement with both the Third and Ninth Circuits because "[o]n its face, Item 303 imposes a more sweeping disclosure obligation than Rule 10b-5, such that a violation of the former does not *ipso facto* indicate a violation of the latter." *Carvelli v. Ocwen Fin. Corp.*, 934 F.3d 1307, 1331 (11th Cir. 2019); *see also Mun. Employees' Ret. Sys. of Michigan v. Pier 1 Imports, Inc.*, 935 F.3d 424, 436 (5th Cir. 2019) ("We have never held that Item 303 creates a duty to disclose under the Securities Exchange Act[.]").

plaintiffs, when possible, to try their hand at Item 303-based Section 10(b) claims in the Second Circuit and steer away from the Ninth Circuit and those that follow it.

No Apparent Dispute among the Circuits that Item 303 Violations May Support Claims under Sections 11 and 12(a)(2) of the Securities Act

- *Macquarie* also recognized that "[t]he failure to make a material disclosure required by Item 303 can serve as the basis for claims under Sections 11 and 12(a)(2)" of the Securities Act, which impose liability on certain participants in a registered securities offering when the registration statement or prospectus contains material misstatements or omissions.[30] However, the additional pleading requirements are not as intensive for these claims. Unlike Section 10(b), scienter, reliance, and loss causation are not elements of Section 11 and 12(a)(2) claims.[31]
- Unlike Section 10(b), there appears to be no dispute among the circuits that an Item 303 violation may support claims under Sections 11 and 12(a)(2) of the Securities Act. As the Ninth Circuit recognized in *NVIDIA*, "Section 10(b) of the Exchange Act . . . differs significantly from Sections 11 and 12(a)(2) of the Securities Act."[32] Unlike Section 10(b), "[l]iability under Sections 11 and 12(a)(2) of the Securities Act may arise from 'omitt[ing] to state a material fact required to be stated,'" including "an omission in contravention of an affirmative legal disclosure obligation."[33] "There is no such requirement under Section 10(b) or Rule 10b-5."[34] Thus, in the Ninth Circuit's view, an Item 303 violation—even absent an affirmative misleading statement—may give rise to liability under Section 11 or 12(a)(2).

Second Circuit's Approach to Section 10(b) Claims May Rest on a Faulty Premise—that an SEC Disclosure Regulation, by Itself, Creates a Section 10(b) Duty to Disclose

- The logic of *Stratte-McClure*, in holding that Item 303 gives rise to a duty to disclose for the purpose of Section 10(b), is that "a duty to disclose under Section 10(b) can derive from statutes or regulations that obligate a party to speak."[35] Accepting that premise, Item 303 (and, presumably, other SEC disclosure rules) would qualify, as it is a component of a set of SEC disclosure rules set out in Regulation S-K. But is the premise correct? Can a "statute or

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[30] 15 U.S.C. §§ 77k, 77l(a)(2). Section 11 imposes strict liability on issuers and signatories, and negligence liability on underwriters, "[i]n case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). Section 12(a)(2) imposes liability under similar circumstances for misstatements or omissions in a prospectus. *See id.* § 77l(a)(2).

[31] *See Panther Partners*, 681 F.3d at 120.

[32] *NVIDIA*, 768 F.3d at 1055.

[33] *Id.* at 1055–56 (quoting *Panther Partners*, 681 F.3d at 120).

[34] *NVIDIA*, 768 F.3d at 1056.

[35] *Stratte-McClure*, 776 F.3d at 102.

regulation" alone, absent an affirmatively misleading statement elsewhere, independently create a duty to disclose under Section 10(b)?

- In support of the proposition that a "statute or regulation" may create an actionable Section 10(b) duty to disclose, the *Stratte-McClure* Court cited the Second Circuit's 1992 decision in *Glazer v. Formica Corp.*[36] and the First Circuit's 1990 decision in *Backman v. Polaroid Corp.*[37] But that portion of *Glazer* merely quoted *Backman* describing an earlier First Circuit decision which *rejected* the proposition that "a corporation has an affirmative duty to disclose all material information even if there is no insider trading, no statute or regulation requiring disclosure, and no inaccurate, incomplete, or misleading prior disclosures."[38] Rejecting a proposition is not the same as holding that the converse—that there is a Section 10(b) disclosure duty solely by virtue of a statute or regulation requiring disclosure—is true. And citing a decision which cites an out-of-circuit decision for the proposition is even more questionable. Yet the *Stratte-McClure* Court did just that in stating that a "statute or regulation requiring disclosure" may create a Section 10(b) disclosure duty—now accepted as the law in the Second Circuit.[39]

Potential Grounds for En Banc Second Circuit/Supreme Court Review

- The conflict between the circuits goes to a fundamental matter of Section 10(b) jurisprudence: What is the precise scope of the duty to disclose under Section 10(b)? Does a duty arise "when there is 'a corporate insider trad[ing] on confidential information,' a 'statute or regulation requiring disclosure,' or a corporate statement that would otherwise be 'inaccurate, incomplete, or misleading,'" as the Second Circuit held in *Stratte-McClure*?[40] Or does a duty *only* arise in the circumstances articulated in *Basic* and *Matrixx Initiatives*, which explained that "[d]isclosure is required . . . only when necessary 'to make . . . statements made, in the [] light of the circumstances under which they were made, not misleading'"?[41] That is a threshold question in a Section 10(b)/Rule 10b-5 case, and uncertainty over the answer has created differing standards and imbalances in incentives for plaintiffs to bring Item 303-based claims in the different circuits. Although the *Macquarie* plaintiffs did not raise the issue in their action (where their petition for rehearing by an en banc Second Circuit was denied), the question is likely to

[36] 964 F.2d 149, 157 (2d Cir. 1992).

[37] 910 F.2d 10, 12 (1st Cir. 1990).

[38] *Glazer*, 964 F.2d at 157 (quoting *Backman*, 910 F.2d at 12 (quoting *Roeder v. Alpha Industries, Inc.,* 814 F.2d 22, 27 (1st Cir. 1987))).

[39] *See, e.g., In re Synchrony Fin. Sec. Litig.*, 988 F.3d 157, 167 (2d Cir. 2021) (citing *Stratte-McClure* for the proposition that "an omission is actionable under the securities laws only when the corporation is subject to a duty to disclose," including when "a statute or regulation requir[es] disclosure").

[40] *Stratte-McClure*, 776 F.3d at 101 (citations omitted).

[41] *In re NVIDIA*, 768 F.3d at 1054 (quoting *Matrixx Intiatives, Inc.*, 563 U.S. at 44–45).

arise again. When it does, reconsideration of *Stratte-McClure* may be warranted, and if the split among the circuits persists, Supreme Court review may be appropriate.

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