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Securities Litigation Alert

"Half-Truths," Not "Pure Omissions": Supreme Court Limits Section 10(b) Claims Based on Item 303 Nondisclosure to Omissions That Render Affirmative Statements Misleading

April 22, 2024

On April 12, 2024, a unanimous U.S. Supreme Court issued an opinion in *Macquarie Infrastructure Corp. v. Moab Partners, L. P.*,[1] vacating a judgment of the U.S. Court of Appeals for the Second Circuit that had reinstated claims under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder based on an issuer's alleged failure to disclose business risks posed by an environmental regulation. The Supreme Court held that the Second Circuit erred in following its near-decade-old rule that violation of Item 303 of Regulation S-K, which requires disclosure in certain SEC filings of known trends or uncertainties that may materially impact results, may serve as the basis for a Rule 10b-5 claim, if all other elements of the claim are satisfied. The Court reasoned that Rule 10b-5(b) does not prohibit "pure omissions," including information required to be disclosed in Item 303. Rather, Rule 10b-5(b) prohibits false statements and lies, as well as "half-truths," *i.e.*, affirmative statements that are misleading due to the omission of a material fact. In either case, an issuer must actually make a false or misleading "statement" to face liability.

Macquarie marks a tightening of standards in the Second Circuit, which for almost a decade has stood alone among circuits in sustaining Rule 10b-5 claims based on nondisclosure under Item 303 and other SEC regulations, absent an affirmatively misleading statement. As such, the decision is likely to reduce forum shopping and the uneven distribution of Item 303-related litigation tilted toward the Second Circuit. On the other hand, *Macquarie* will not eliminate Item 303-based claims under Rule 10b-5: even outside the Second Circuit, these claims have persisted where a plaintiff alleges that the Item 303 nondisclosure rendered affirmative "statements made" misleading, and *Macquarie* confirms that claims under such a theory will remain available. Nonetheless, as *Macquarie* focused solely on the text of subsection (b) of Rule 10b-5, and did not opine on the scope of subsections (a) and (c) (prohibiting any fraudulent "scheme, "artifice," "act" or "practice"),

[1] -- S.Ct. -- , No. 22-1165, 2024 WL 1588706 (U.S. Apr. 12, 2024).

questions will remain as to whether *Macquarie* is truly the last word on Item 303-based Section 10(b) liability.

I. Background

A. Section 10(b), Rule 10b-5, and Item 303

The judicially created private right of action under Section 10(b) and Rule 10b-5 allows plaintiffs to recover losses resulting from material misstatements or omissions in connection with the purchase or sale of a security.[2] Specifically, Rule 10b-5 makes it unlawful, in connection with the purchase or sale of a security, (a) to "employ any device, scheme, or artifice to defraud," (b) to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading," and (c) to "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."[3]

Drawing on the common-law action of deceit, the Supreme Court has identified six elements that a plaintiff must plead and prove to recover damages under Section 10(b) and Rule 10b-5: (1) a material misrepresentation or omission; (2) scienter (intent to deceive); (3) a connection between the misrepresentation or omission and purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.[4] However, the Court also has recognized that not all "omissions" are actionable. In particular, Rule 10b-5(b) does "not create an affirmative duty to disclose any and all material information."[5] Disclosure is required "only when necessary 'to make . . . statements made, in the light of the circumstances under which they were made, not misleading.'"[6]

At the same time, a host of rules and regulations under the Securities Exchange Act and Securities Act of 1933 impose a duty on issuers to disclose information in SEC filings, such as registration statements and periodic reports. 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."[7] Item 105 (formerly Item 503) also requires "a discussion of the material factors that

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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. § 240.10b-5.

[4] *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014).

[5] *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011).

[6] *Id.* (quoting 17 C.F.R. § 240.10b-5(b)).

[7] 17 C.F.R. § 229.303(b)(2)(ii).

make an investment in the registrant or offering speculative or risky."[8] 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.[9] 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.

B. Allegations in *Macquarie*

The *Macquarie* case concerned Macquarie Infrastructure Corporation, then a publicly-traded holding company that owned and operated various infrastructure-related businesses.[10] 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, contained a relatively high sulfur content, resulting in the emission of harmful sulfur oxide (SOx) when used as fuel in ships. SOx emissions have been linked to stroke, asthma, lung cancer, cardiovascular and pulmonary 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.

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[8] 17 C.F.R. § 229.105(a).

[9] *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).

[10] 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).

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%.

C. District Court Proceedings

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. Defendants moved to dismiss.

The District Court granted the motion to dismiss in full.[11] The Court viewed the crux of plaintiff's case to be that Macquarie hid from investors that No. 6 Fuel Oil, which faced a "near-cataclysmic ban," was IMTT's largest product, constituting 40% of its overall capacity, and that there was a risk to that business via regulation. The Court concluded, however, that Macquarie had no duty to disclose that fact to investors. Citing pre-*Macquarie* Second Circuit case law, the Court observed that Section 10(b) imposed no duty to disclose except for "half-truths" (*i.e.*, statements that are literally true, but create a misleading impression) or if a "statute or regulation require[s] disclosure."[12] The District Court concluded that there was no half-truth here, because defendants made no statement as to IMTT's reliance on No. 6 fuel oil. Nor was disclosure required under any statute or regulation, including Item 303, because plaintiff did not allege that defendants "actually" knew uncertainties surrounding IMO 2020 rose to a level requiring disclosure. The District Court

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

[12] *Id.* at *7 (quoting *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 101 (2d Cir. 2015)).

also held that plaintiff failed to adequately allege scienter as to all defendants, and dismissed all of plaintiff's claims.

D. Second Circuit Decision

On appeal, a Second Circuit panel, comprised of Circuit Judges Pierre N. Leval, Reena Raggi, and Myrna Pérez, vacated the dismissal order and reinstated plaintiff's claims. 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."[13] 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."[14] 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."[15]

Second, the Court held that plaintiff adequately alleged that defendants' non-disclosure rendered statements made about IMTT's customers materially misleading.[16] 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 risks."[17] 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

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[13] *Moab Partners L.P. v. Macquarie Infrastructure Corp.*, 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*, 776 F.3d at 101–04 (Section 10(b) and Rule 10b-5 claim)).

[14] *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)).

[15] *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.

[16] 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, ECF No. 56, *City of Riviera Beach Gen. Emps. Ret. Sys. v. Macquarie Infrastructure Corp.*, No. 18-CV-3608 (VSB) (S.D.N.Y. Feb. 20, 2019).

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

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."[18]

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."[19] 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.[20]

Following the Second Circuit's decision, defendants filed a petition for writ of certiorari with the Supreme Court, contending that there was a split among the circuits on whether nondisclosure under Item 303 can support a Section 10(b) claim, "even in the absence of an otherwise-misleading statement." The Court granted certiorari on September 29, 2023.[21]

II. The Supreme Court's Opinion

In an April 12, 2024 unanimous opinion authored by Justice Sotomayor, the Supreme Court framed the question presented as "whether the failure to disclose information required by Item 303 can support a private action under Rule 10b-5(b), even if the failure does not render any 'statements made' misleading."[22] The Court's answer was no: "Pure omissions are not actionable under Rule 10b-5(b)."[23] Therefore, nondisclosure under Item 303 can only support a Rule 10b-5(b) claim "if the omission renders affirmative statements made misleading."[24]

The Court rooted its decision in the language of Rule 10b-5(b), which makes it unlawful "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading."[25] That encompasses two distinct prohibited acts: (1) an

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

[19] *Id.*

[20] *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).

[21] *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 144 S. Ct. 479 (2023).

[22] *Macquarie*, 2024 WL 1588706, at *2.

[23] *Id.*

[24] *Id.* at *5.

[25] 17 C.F.R. § 240.10b–5(b).

"untrue statement" and (2) an omission of a fact necessary to make "statements made . . . not misleading." Both require a "statement" to be made, either, under prong one, a false statement or lie, or, under prong two, "affirmative assertions (*i.e.*, 'statements made')" as to which "other facts are needed to make those statements 'not misleading.'"[26] Rule 10b-5(b) prohibits "half-truths"—representations that state the truth only so far as it goes, while omitting critical qualifying information"[27]—not "pure omissions." The difference, the Court noted, is similar to "the difference between a child not telling his parents he ate a whole cake and telling them he had dessert."[28]

The Court bolstered its analysis by comparing Rule 10b-5(b) with Section 11(a) of the Securities Act of 1933, which creates liability for material misstatements and omissions in registration statements in connection with public offerings. Unlike Rule 10b-5(b), Section 11(a) prohibits any registration statement that "contain[s] an untrue statement of a material fact or *omit[s] to state a material fact required to be stated therein* or necessary to make the statements therein not misleading."[29] Thus, Section 11(a) expressly includes within its ambit SEC disclosure requirements, including those required under Item 303. The absence of that language in Rule 10b-5(b), the Court observed, is "telling" and indicative of an intention not to incorporate comparable requirements into Rule 10b-5(b).[30]

The Court also rejected two arguments advanced in support of a broader reading of Rule 10b-5(b). First, plaintiff (joined by the U.S. Solicitor General) argued that the omission of required Item 303 information automatically renders a filing misleading, because a reasonable investor would expect the information to be contained in the filing. The Court disagreed, viewing this argument as impermissibly reading the words "statements made" out of Rule 10b-5(b) and shifting the focus of the rule from "fraud" to "disclosure."[31] Second, plaintiff argued that the Court's ruling would create "broad immunity" any time an issuer omits information which Congress and the SEC require it to disclose. Not so, opined the Court, noting that plaintiffs could still bring claims based on Item 303 violations that create "misleading half-truths," and, in any event, the SEC retains authority to prosecute violations of its own regulations, including Item 303.[32]

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[26] *Macquarie*, 2024 WL 1588706, at *5.

[27] *Id.* at *4 (quoting *Universal Health Servs, Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 188 (2016).

[28] *Macquarie*, 2024 WL 1588706, at *4.

[29] 15 U.S.C. § 77k(a) (emphasis added).

[30] *Macquarie*, 2024 WL 1588706, at *5.

[31] *Id.*

[32] *Id.*

Ultimately, the Court reaffirmed the decades-old principle that "[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5."[33] Reiterating that "[p]ure omissions are not actionable under Rule 10b-5(b)," the Court vacated the Second Circuit's judgment and remanded the case for further proceedings.[34]

III. Implications

- **Tightened standards for Item 303-related Section 10(b) claims in the Second Circuit.** Since its 2015 decision *Stratte-McClure v. Morgan Stanley*, the Second Circuit has stood alone among circuits in holding that failure to make a disclosure required under Item 303 "can serve as the basis" for a Section 10(b) claim, even absent an affirmative misleading statement.[35] The oft-repeated Second Circuit rule since then has been that a Section 10(b) duty to disclose arises not only when a statement otherwise would be "inaccurate, incomplete, or misleading," but also when a "statute or regulation"—including Item 303—"requir[es] disclosure."[36] The Third, Ninth, and Eleventh Circuits, by contrast, have held that Item 303 and other SEC disclosure requirements do not create an independent "duty to disclose," such that a violation in and of itself can support a Section 10(b) claim.[37] For these courts, a Section 10(b) duty to disclose an omitted fact only exists "when necessary 'to make . . . statements made, in the [sic] light of the circumstances under which they were made, not misleading.'"[38] With *Macquarie*, that approach now has decisively won the day, establishing a nationwide rule that *only* Item 303 violations that render affirmative statements misleading can support Section 10(b) liability.
- **Possible reduction in forum shopping and imbalance among Circuits for Item 303-related claims.** One might expect that the less demanding pleading standard for Item 303 claims in the Second Circuit (*i.e.*, permitting claims in the absence of a misleading statement) to attract more Item 303-related litigation to the Second Circuit than elsewhere. The statistics appear to bear this expectation out. According to figures presented by defendants, in 2014, the year before *Stratte-McClure*, 25.0% of all Item 303-related claims were brought in the Second Circuit, as compared to 16.7% of such claims brought in the Ninth. There has been a

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[33] *Id.* (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988)).

[34] *Id.* at *6.

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

[36] *Id.* (quoting *Glazer v. Formica Corp.*, 964 F.2d 149, 157 (2d Cir. 1992)).

[37] *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1054 (9th Cir. 2014); *accord Oran v. Stafford*, 226 F.3d 275, 288 (3d Cir. 2000) (Item 303 "does not automatically give rise to a material omission under Rule 10b-5"); *Carvelli*, 934 F.3d at 1331 ("On 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.").

[38] *In re NVIDIA*, 768 F.3d at 1054 (quoting *Matrixx Initiatives*, 131 S Ct. at 1321-22).

substantial divide in Item 303-related claims between the Second and Ninth Circuits ever since:[39]

Year	2d Cir.	9th Cir.
2015	25.0%	4.0%
2016	18.2%	3.6%
2017	10.5%	4.9%
2018	21.4%	5.4%
2019	25.8%	4.9%
2020	16.3%	7.4%
2021	19.2%	12.0%
2022	20.7%	6.3%

A possible aftereffect of *Macquarie* could be an evening out in the incidence of Item 303 claims among the Circuits, given that the Second Circuit no longer offers the advantage of a plaintiff-friendly rule allowing claims based on the Item 303 violation alone. Time will tell.

- **Impact on ultimate Section 10(b) liability less clear.** The issue addressed in *Macquarie*—whether nondisclosure under Item 303, without an affirmative misleading statement, can support a claim—is only a small piece of the Section 10(b)/Rule 10b-5 puzzle. Prior to *Macquarie*, even the Second Circuit agreed that an Item 303 violation could not support a Section 10(b) claim unless "the omission satisfies the material requirements" outlined in Supreme Court precedent "and if all the other requirements to sustain an action under Section 10(b)"—*e.g.*, scienter, economic loss, and loss causation—"are fulfilled."[40] Although the Second Circuit's more permissive pleading standard on Item 303 claims may have incentivized more Item 303-related filings, it is not clear how often the ability to rely on Item 303 was the saving grace amid the many obstacles which a Section 10(b) claim faces. Moreover, in the years following *Stratte-McClure*, plaintiffs asserting claims in the Second Circuit have paired claims based on pure Item 303 omissions with alternative theories alleging affirmative misleading statements, the latter of which will continue to be viable post-*Macquarie*. Thus, *Macquarie* will only be outcome-determinative where plaintiffs can plead and prove an Item 303 violation, as well as all other Section 10(b) elements, but are unable to identify an affirmatively misleading statement tied to the Item 303 nondisclosure. Such cases may be quite rare.
- **The *Macquarie* action may not be over.** *Macquarie* is an example of a case where both a "pure omissions" and an alternative "misleading statement" theory of liability was pled. There,

[39] Reply Br. for Petitioners, No. 22-1165, at 5 (Aug. 28, 2023).

[40] *Stratte-McClure*, 776 F.3d at 107-08.

the Second Circuit revived plaintiff's Rule 10b-5 claims not only based on the alleged Item 303 violation, but also because, in its view, defendants' nondisclosure as to the risks from IMTT's reliance on No. 6 fuel oil rendered affirmative statements made about IMTT's customers materially misleading. The Second Circuit 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 risks."[41] Notably, in vacating the Second Circuit's judgment, the Supreme Court did not address this aspect of the Second Circuit's reasoning, explicitly stating that it granted certiorari "to address the Second Circuit's pure omission analysis, not its half-truth analysis."[42] Thus, on remand, it is not out of the question that the Second Circuit ultimately resuscitates plaintiff's Section 10(b) claim on the theory that the omitted Item 303 information "create[d] misleading half-truths."[43]

- **Clarity on Item 303-related claims under Section 11 and Section 12(a)(2) of the Securities Act.** *Macquarie* leaves no doubt that an Item 303 violation, even absent an affirmative misleading statement, may serve as the basis for a claim under Section 11(a) of the Securities Act of 1933, which prohibits misstatements in registration statements, given the language prohibiting any registration statement that "omit[s] to state a material fact required to be stated therein."[44] The absence of that language in Rule 10b-5(b) was key to the Court's holding that Rule 10b-5(b) imports no comparable affirmative duty to disclose. Conversely, the Court's conclusions about the limits of Rule 10b-5(b) likely apply equally to Section 12(a)(2) of the Securities Act, which prohibits prospectuses or oral communications that include, like Rule 10b-5(b), "an untrue statement of a material fact or omit[] to state a material fact necessary in order to make the statements . . . not misleading."[45] Given the nearly identical language to Rule 10b-5(b), and the lack of language importing SEC disclosure requirements in Section 12(a)(2), an affirmative misleading statement is likely necessary for Section 12(a)(2) liability based on an Item 303 violation, as well. If so, this would abrogate existing Second Circuit law, which holds that a basis for liability under Section 12(a)(2) "is an omission in contravention of an affirmative legal disclosure obligation," such as Item 303.[46]
- **No change to substantive requirements of Item 303.** The Second Circuit's decision was notable for its analysis of whether the complaint pled an Item 303 violation to support a Section 10(b) claim. 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

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

[42] *Macquarie*, 2024 WL 1588706, at *5 n.2.

[43] *Id.* at *5.

[44] 15 U.S.C. § 77*k*(a).

[45] 15 U.S.C. § 77*l*(a)(2).

[46] *E.g.*, *Panther Partners*, 681 F.3d at 120.

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."[47] 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."[48] Each of management's determinations, moreover, "must be objectively reasonable, viewed as of the time the determination is made."[49] The crux of the Second Circuit'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."[50] The Supreme Court, however, did not weigh in on this analysis, or otherwise opine on what is required to plead and prove an Item 303 violation. Item 303 compliance still matters post-*Macquarie*, including because "the SEC retains authority to prosecute violations of its own regulations."[51]

- **Is *Macquarie* the final word on Rule 10b-5 and Item 303?** *Macquarie* clearly rules out "Rule 10b-5(b)" claims based on Item 303 violations, absent an affirmative misleading statement. However, the opinion explicitly notes that it "does not opine on . . . whether Rules 10b-5(a) and 10b-5(c) support liability for pure omissions."[52] Does that mean that the possibility of Item 303 claims under subsections (a) or (c) survives after *Macquarie*? Rule 10b-5(a) makes it unlawful to "employ any device, scheme, or artifice to defraud," and 10b-5(c) makes it unlawful to "engage in a[n] act, practice, or course of business" that "operates . . . as a fraud or deceit." Further, the Supreme Court has recognized that subsections (a) and (c) "capture a wide range of conduct" and embody "expansive language."[53] Nonetheless, it is perhaps unlikely that subsections (a) or (c) would be deemed to extend to nondisclosure under Item 303. Courts generally require "deceptive conduct"[54] to impose liability under Rule 10b-5(a) and (c), and reject claims where the "sole basis" is "alleged misrepresentations or omissions."[55] On the other hand, *Macquarie* teaches that the holdings of lower courts are not

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

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

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

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

[51] *Id.* at *5.

[52] *Id.* at *5 n.2.

[53] *Lorenzo v. Sec. & Exch. Comm'n*, 587 U.S. 71, 79, 81 (2019).

[54] *See, e.g.*, *Plumber & Steamfitters Local 773 Pension Fund v. Danske Bank A/S*, 11 F.4th 90, 105 (2d Cir. 2021) ("[U]nlike the better-known subsection (b), these subsections do not require the defendant to make a misstatement or omission; they require only deceptive conduct.").

[55] *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005); *see also IBEW Local 595 Pension & Money Purchase Pension Plans v. ADT Corp.*, 660 Fed. App'x 850, 858 (11th Cir. 2016) ("A [Rule 10b-5(a) or (c)] claim is different and

necessarily absolute or permanent, and seemingly established precedent can rise or fall at the Supreme Court's command. Thus, the ultimate fate of Rule 10b-5 and its subsections, (a), (b), and (c), remains to be seen.

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separate from a nondisclosure claim . . . . Misleading statements and omissions only create [Rule 10b-5(a) or (c)] liability in conjunction with conduct beyond those misrepresentations or omissions."); *Benzon v. Morgan Stanley Distributors, Inc.*, 420 F.3d 598, 610 (6th Cir. 2005) ("Rules 10b-5(a) and (c) encompass conduct beyond disclosure violations.").