Reviving a Rule 10b-5 Private Action for MD&A Violations After *Macquarie*

By Antonio R. Partida[*]

I. Introduction

This article makes the argument that the retention of a private right of action under § 10(b) of the Securities Exchange Act[1] and Rule 10b-5[2] for violations of the Management's Discussion and Analysis (MD&A) disclosure requirements contained in Item 303 of Regulation S-K[3] is an essential component of the robust investor protections that the federal securities laws envision[4] and that the Securities and Exchange Commission aims to provide.[5]

Item 303 serves a critical function with regard to mandatory disclosure of forward-looking information.[6] According to commentators, "the MD&A has become a major, if not the major, item of narrative disclosure that is studied, together with the financial statements, for investment decisions and analysis purposes."[7] As such, proper construction of the connection between Item 303's disclosure requirements and the remedial provisions of the securities laws, especially § 10(b) and Rule 10b-5 promulgated thereunder, is paramount to securing necessary protections for investors. This article considers recent developments in Item 303 jurisprudence, and makes recommendations for balanced improvements which would increase clarity and commercial certainty while facilitating proper investor protection.

Considering the Supreme Court's recent decision in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*,[8] which in its holding proscribed any private right of action under Rule 10b-5(b) for "pure omissions"[9] in the MD&A, this article addresses topics that are uniquely timely and of critical importance.

This article proceeds as follows: First, the applicable statutory and regulatory framework under Item 303, § 10(b), and Rule 10b-5 will be discussed in Section II. Next, Section III will frame the circuit split on Item 303's compatibility with private actions under § 10(b) and Rule 10b-5. Thereafter, Section IV will address the Supreme Court's holding in *Macquarie*, and will demonstrate fundamental problems in that case's reasoning, as well as implications of its holding for private securities fraud claims

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[*]Corporate & securities associate at Jackson Walker LLP. All opinions expressed herein, and any errors, are the author's alone and do not reflect the views of his employer or any others.

under § 10(b) and Rule 10b-5. Lastly, Section V will provide balanced recommendations to revive the § 10(b) private right of action for MD&A violations in the wake of *Macquarie*. The article then concludes. Even in light of recent restrictions by the Supreme Court, practicable courses of action remain whereby private litigants and the SEC can remedy present problems—while at once balancing investor protection, commercial certainty, and market efficiency.

II. Background: Item 303, Section 10(b), and Rule 10b-5

The following subsections provide background on MD&A disclosure requirements pursuant to Item 303 of Regulation S-K and the antifraud provisions of the securities laws found in § 10(b) of the Securities Exchange Act and Rule 10b-5.

A. ITEM 303 OF REGULATION S-K: MD&A DISCLOSURES

Promulgated as part of the SEC's 1982 adoption of the integrated disclosure framework,[10] Item 303 of Regulation S-K requires disclosure, *inter alia*, of "material information relevant to an assessment of the financial condition and results of operations of the registrant."[11] Interpretive guidance promulgated by the SEC further requires that "where a trend, demand, commitment, event or uncertainty is both presently known to management and reasonably likely to have material effects on the registrant's financial condition or results of operation," a duty to disclose exists under Item 303.[12] When such a trend, demand, commitment, or uncertainty is *known*, management must engage in two assessments:

(1) Is the known trend, demand, commitment, event or uncertainty likely to come to fruition? If management determines that it is not reasonably likely to occur, no disclosure is required.[13]

(2) If management cannot make that determination, it must evaluate objectively the consequences of the known trend, demand, commitment, event or uncertainty, 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.[14]

Management's determination whether to disclose such information pursuant to Item 303 is subject to an objective standard of reasonableness.[15] However, MD&A disclosures are often prohibitively lengthy, and Item 303's materiality standard can be difficult to apply in practice.[16]

B. SECTION 10(B) AND RULE 10B-5

Section 10(b)[17] of the Securities Exchange Act and Rule 10b-5[18] promulgated thereunder constitute a critical cornerstone of the federal securities laws' antifraud provisions. Section 10(b) was

designed with broad applicability in mind, and is a "catch-all"[19] provision to prevent manipulative or deceptive devices in connection with the purchase or sale of any security subject to the jurisdiction of the federal securities laws.[20] Rule 10b-5 broadly prohibits, in connection with the purchase or sale of any security, any person, directly or indirectly, to:

(a) [] employ any device, scheme, or artifice to defraud,

(b) [] make any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading, or

(c) [] engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person[.][21]

While a private cause of action for damages under § 10(b) is not expressly mentioned in the statutory text or Rule 10b-5, courts have implied the existence of such a right for decades, with the Supreme Court noting that "the existence of this implied remedy is simply beyond peradventure."[22]

In order to successfully bring a private claim under § 10(b) and Rule 10b-5, plaintiffs must satisfy the following elements:

(1) requisite jurisdictional means;[23]
(2) plaintiff as purchaser or seller;[24]
(3) manipulative or deceptive practice;[25]
(4) materiality;[26]
(5) defendant's scienter;[27]
(6) plaintiff's reliance;[28]
(7) loss causation;[29]
(8) "in connection with" the purchase or sale of a security;[30]
(9) omission liability (where liability is based on silence);[31] and
(10) damages.[32]

Section 10(b) private actions are subject to a two-year statute of limitations and a five-year statute of repose, after which time no action can be brought by a private plaintiff.[33] Further, § 10(b) claimants must satisfy certain heightened pleading requirements pursuant to the Private Securities Litigation Reform Act (PSLRA),[34] whereby they must plead fraud with particularity and establish a "strong inference" of scienter.[35]

C. SEC ENFORCEMENT OF MD&A VIOLATIONS

While the Commission's stance on enforcing proper MD&A disclosure has been described as "vigorous" by some commentators,[36] in reality the SEC's efforts to uphold Item 303's requirements have been inconsistent.[37] The two most well-known examples of SEC enforcement are the *Caterpillar* and *Under*

Armour enforcement actions.[38] *Caterpillar* dealt with Caterpillar's failure to disclose the impact of Brazilian hyperinflation on its subsidiary, Caterpillar Brasil, S.A., which accounted for twenty-three percent of Caterpillar's 1989 net profits.[39] *Under Armour* stemmed from the company's egregious use of pull-forwards to inflate its annual revenues.[40] Ultimately, these represent extreme cases, and if such blatant violations are necessary to spur the SEC to action, then the lion's share of MD&A violations must be held to account by the private bar.

Practical considerations ultimately limit the SEC's enforcement authority on this key issue,[41] and as a result the participation of the private bar is integral to securing proper protections for investors and adequate disclosure by reporting companies. The section that follows will address private claims under § 10(b) arising from Item 303 violations, the varying stances taken by the circuit courts that have considered the issue, and the Supreme Court's holding in *Macquarie*, which significantly modified the landscape of private claims under Rule 10b-5(b).

III. Framing the Circuit Split: Division on Duty, Materiality, and Compatibility

The nuanced and intricate interplay between Item 303's disclosure requirements and § 10(b) has led to conflicting interpretations among the circuit courts. Proper resolution of these conflicts and proper consideration of this issue is critical to accomplishing the securities laws' objective of investor protection. As noted by one commentator, "holding that a material disclosure deficiency in the MD&A may not be material for Section 10(b) and other antifraud provisions signifies that allegedly aggrieved purchasers or sellers of the subject company's securities may have no right of action for damages caused by such misrepresentations."[42]

The first federal appellate court to address the compatibility of Item 303's disclosure mandate with the § 10(b) private right of action was the Ninth Circuit in *In re VeriFone Securities Litigation*.[43] In *VeriFone*, the Ninth Circuit held that Item 303 did not create a duty to disclose a number of negative outlooks on future growth,[44] even when such trends were presently known to management at the time of VeriFone's IPO[45] and VeriFone's stock price fell by more than seventy percent after its initial offering.[46] The *VeriFone* court's holding implied that there could be no private § 10(b) and Rule 10b-5 cause of action for MD&A violations in that circuit, since without a duty to disclose, silence (a "pure omission," to use the terminology of the *Macquarie* Court)[47] cannot sustain a private § 10(b) claim.[48]

After *Verifone*, four landmark circuit court cases addressed the issue of whether an Item 303 MD&A violation could sustain a

private § 10(b) claim: *Oran v. Stafford*,[49] *In re NVIDIA Corporation Securities Litigation*,[50] *Stratte-McClure v. Morgan Stanley*,[51] and *Carvelli v. Ocwen Financial Corporation*.[52] Each circuit addressed the matter differently, with the exception of the Eleventh, which relied heavily on the Third Circuit's *Oran* opinion[53] and the Ninth Circuit's rationale in *NVIDIA*,[54] and each case will be addressed in turn.

A. *ORAN V. STAFFORD*

The Third Circuit's opinion in *Oran v. Stafford*, which held that there was no private cause of action under Item 303 itself,[55] that Item 303 did not establish a duty to disclose which would render omissions actionable under § 10(b),[56] and that MD&A violations did not *automatically* give rise to a private claim under § 10(b),[57] left open the question of whether a private § 10(b) claim could be premised on a disclosure deficiency in the MD&A—a question which would have significant downstream effects, and a decision which largely precipitated the present circuit split on the applicability of Item 303 to private antifraud actions under § 10(b).[58]

The dispute in *Oran* centered on the failure of American Home Products (AHP) to disclose heart valve and other cardiac problems revealed by clinical studies of two weight-loss drugs, Pondimin and Redux.[59] However, once this information was made public and AHP took appropriate remedial action,[60] the reaction of the capital markets was minimal.[61]

Plaintiffs alleged that AHP's failure to disclose this information for over three years was a violation of, *inter alia*, Item 303's MD&A requirements, and sued under §§ 10(b) and 20(a) of the Securities Exchange Act and Rule 10b-5.[62] The district court dismissed plaintiff's claims, and on appeal the Third Circuit divided its opinion as regards the alleged Item 303 disclosure deficiencies between three issues: (1) whether there was an independent private right of action under Item 303 (a question left open from prior cases in that circuit);[63] (2) whether Item 303 created a duty to disclose for purposes of a private § 10(b) action;[64] and (3) whether a violation of Item 303's MD&A requirements could support a private claim under § 10(b).[65] The *Oran* court answered the first two questions with a clear "no,"[66] but left the third issue open for future consideration.[67]

The court quickly dispensed with the notion that Item 303 carried its own private cause of action, noting that "[n]either the language of the regulation nor the SEC's interpretative releases construing it suggest that it was intended to establish a private cause of action, and courts construing the provision have unanimously held that it does not do so."[68] The court's consider-

ation of whether Item 303's disclosure mandate created a duty to disclose which was actionable under Rule 10b-5 centered on the materiality standards applicable to each provision. The Third Circuit reasoned that because Item 303's materiality test "varies considerably from the general test for securities fraud materiality set out by the Supreme Court in *Basic Inc. v. Levinson*,"[69] disclosure deficiencies in the MD&A did not create a duty to disclose in a § 10(b) private action. In support of this holding, the *Oran* court cited the SEC's 1989 concept release on the MD&A, which advised that "[t]he probability/magnitude test for materiality approved by the Supreme Court in *Basic* . . . is inapposite to Item 303 disclosure."[70]

Careful to limit the reach of their holding, the *Oran* court did not foreclose the 10b-5 route for all violations of Item 303's MD&A disclosure requirements. Instead, the court reasoned that the "demonstration of a violation of the disclosure requirements of Item 303 does not lead inevitably to the conclusion that such disclosure would be required under Rule 10b-5. Such a duty to disclose must be separately shown,"[71] and therefore held that "a violation of [Item 303]'s reporting requirements does not *automatically* give rise to a material omission under Rule 10b-5."[72]

Had the *Oran* court wished to cabin its holding further, it could have limited its analysis of plaintiffs' claims to materiality,[73] which is a necessary element of any private § 10(b) claim, especially given the markets' meager reaction to AHP's corrective disclosures.[74] Ultimately, however, the court chose not to do so, and as a result differing interpretations of *Oran*'s central Item 303 holding spawned further division among the circuit courts on this critical issue.

B. *IN RE NVIDIA*

Fourteen years after the *Oran* court left the door open for the possibility of a private § 10(b) claim for MD&A violations, the *NVIDIA* court utterly foreclosed that avenue in the Ninth Circuit. In that case, NVIDIA became aware of a problem with weak solder points in its graphics processing unit (GPU) and media and communication processor (MCP) chips,[75] but did not disclose this information to the public for nearly two years—omitting the issue from its periodic reports in the meantime.[76] When the issue with NVIDIA's weak solders was released in a 2008 Form 8-K, NVIDIA's leadership estimated that the total loss would be in the range of $150-200 million.[77] The market reaction to this disclosure was quick and significant, and NVIDIA's market capitalization declined by over $3 billion—a corrective reaction of thirty-one percent.[78] Allegedly injured shareholders brought suit under § 10(b) and Rule 10b-5 for NVIDIA's failure to disclose the solder problem in its MD&A once it became known to management,[79]

and the Ninth Circuit on appeal had once more to consider the interplay between Item 303's MD&A disclosure mandate and § 10(b)'s antifraud remedy in a private action.

The Ninth Circuit's reasoning relied heavily on *Oran*'s pronouncement that "[b]ecause the materiality standards for Rule 10b-5 and [Item 303] differ significantly, the 'demonstration of a violation of the disclosure requirements of Item 303 does not lead inevitably to the conclusion that such disclosure would be required under Rule 10b-5. Such a duty to disclose must be separately shown.' "[80] Accordingly, and in line with the court's prior decision in *Verifone*, the *NVIDIA* court held that Item 303's MD&A requirements "do[] not create a duty to disclose for purposes of Section 10(b) and Rule 10b-5."[81] Given this holding, it is unsurprising that the Ninth Circuit affirmed the district court's dismissal.[82] And without an enforceable duty to disclose, it follows that there can be no § 10(b) cause of action for omissions of most, if not all, information required by Item 303.[83]

C. *STRATTE-MCCLURE*

Shortly after the Ninth Circuit's restrictive holding in *NVIDIA*, the Second Circuit released its opinion in *Stratte-McClure v. Morgan Stanley*, which openly opposed the Ninth Circuit's construction of the relationship between Item 303's MD&A disclosure requirement and Rule 10b-5 private actions.[84] In *Stratte-McClure*, plaintiffs brought a putative securities fraud class action against Morgan Stanley and certain of its officers and former agents, alleging among other claims that defendants' failure to disclose Morgan Stanley's exposure to and losses from its positions in the subprime mortgage market[85] was a violation of Item 303's MD&A disclosure mandate which was actionable under § 10(b) and Rule 10b-5.[86]

In *Stratte-McClure*, Morgan Stanley took two positions in the subprime mortgage market as of late 2006: a $2 billion short position on Credit Default Swaps on debt backed by subprime mortgage-backed securities (asset-backed securities or ABS), and a $13.5 billion long position to sell higher-rated CDOs.[87] This position reflected, to simplify, a bet that the subprime mortgage market would go bust, but that the lower-risk CDOs would not be impaired by the crash.[88] Ultimately, the firm underestimated the impact of the subprime mortgage crash on the market at large, and by Q3 2007 the long position had lost $4.4 billion.[89] Neither the long position nor the losses stemming therefrom were disclosed in Morgan Stanley's periodic reports during the class period.[90]

The Second Circuit was quick to point out the logical error of its sister court in *NVIDIA*.[91] While the Third Circuit in *Oran* had

stated that an Item 303 violation does not "lead inevitably" to an actionable omission under § 10(b) and Rule 10b-5,[92] to reason that it *cannot* is logically inconsistent.[93] Instead, the *Stratte-McClure* court elucidated that when a premise does not *inevitably* lead to a conclusion, it may still do so in *some* circumstances under the right conditions (here, a demonstration that the omission was material under § 10(b)'s higher standard, and satisfactory establishment of the other necessary elements for a private § 10(b) claim).[94]

Therefore, the Second Circuit held that "a failure to make a required disclosure under Item 303 of Regulation S-K, 17 C.F.R. § 229.303(a)(3)(ii), in a 10-Q filing is an omission that can serve as the basis for a Section 10(b) securities fraud claim, if the omission satisfies the materiality requirements outlined in Basic . . ." and provided that "all of the other requirements to sustain an action under Section 10(b) are fulfilled."[95]

D. *CARVELLI*

The most recent federal appellate court to take up the compatibility of Item 303 MD&A omissions and the private § 10(b) antifraud action was the Eleventh Circuit in *Carvelli*.[96] In *Carvelli*, investors filed a putative securities fraud class action against Ocwen Financial, a corporation which handled mortgage services and foreclosures, alleging among other claims that Ocwen's failure to disclose systemic failures regarding its loan servicing program[97] amounted to a violation of Item 303's disclosure mandate which was actionable under § 10(b).[98] As a result of regulatory action arising from problems with Ocwen's loan servicing program, Ocwen's stock price fell by 53.9 percent.[99]

In an issue of first impression in the Eleventh Circuit, the *Carvelli* court relied heavily on the *Oran* and *NVIDIA* courts' rationales to hold that Item 303 does not create an actionable duty to disclose for purposes of a § 10(b) and Rule 10b-5 private action.[100] First, the *Carvelli* court was quick to deny any private right of action under Item 303.[101] The court then went on to distinguish Item 303's disclosure mandate from the requisite duty to disclose under § 10(b) and Rule 10b-5, emphasizing the differences in materiality between the two. Finally, the *Carvelli* court held that "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."[102]

The Supreme Court granted certiorari once before in an attempt to resolve this discrepancy, but the case settled before a decision was finalized.[103] But the circuit split on Item 303's connection to § 10(b) private actions came before the Court again in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*,[104] a case

with significant ramifications for federal securities law jurisprudence.[105]

IV. *Macquarie*'s Restrictive Holding and Resulting Uncertainty

A. FACTUAL AND PROCEDURAL BACKGROUND

Defendant Macquarie is a publicly-traded holding company, incorporated in Delaware, which owns and operates a panoply of infrastructure-related enterprises.[106] Moab Partners, as lead plaintiff, represents a class of shareholders who allege that they were damaged by Macquarie failure to disclose material information required by item 303, which omission made information provided to shareholders misleading and which allegedly caused plaintiffs' loss.[107]

The case arose out of Macquarie's failure to disclose an International Maritime Organization regulation restricting the use of No. 6 fuel (IMO 2020).[108] No. 6 fuel was a commodity central to the business operations of one of Macquarie highest-performing subsidiaries, but Macquarie declined to disclose the potential impacts of IMO 2020 when it was initially promulgated in 2016, nor did they disclose for approximately two years thereafter.[109] When the impact of IMO 2020 on Macquarie subsidiary was disclosed in a 2018 earnings call, Macquarie share price fell approximately forty-one percent—signifying an extreme correction.[110]

Plaintiff shareholders brought suit, alleging violations of various antifraud provisions of the federal securities laws as a result of Macquarie failure to disclose the potential impacts of IMO 2020, in violation of Item 303's disclosure mandate.[111] The Southern District of New York initially dismissed plaintiffs' claims,[112] but on appeal, the Second Circuit reversed, holding that Macquarie Item 303 violations could support certain of plaintiffs' § 10(b) claims.[113] In so holding, the Second Circuit stated that "as pleaded, it would not have been 'objectively reasonable' for Defendants to determine that IMO 2020 would not likely have a material effect on [Macquarie]'s financial condition or operations."[114]

B. THE SUPREME COURT'S NARROW ISSUE AND RESTRICTIVE HOLDING

The Supreme Court granted certiorari to address the narrow issue of "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*."[115]

While much of the dispute at the circuit court level had centered around whether Item 303 created a duty to disclose and the compatibility of Item 303's broader materiality standard with

the standard of materiality in a § 10(b) claim,[116] materiality and duty were far from the focus at oral argument (or, indeed, in the Court's opinion).[117] Instead, much of the contention before the Court was over textual analysis of Rule 10b-5(b)'s scope[118] and whether it captured "pure" omissions[119] or whether an affirmative statement must be alleged that was rendered misleading. Justice Jackson was the first to bring up the distinction in language between § 11 of the Securities Act and Rule 10b-5(b),[120] noting that the former includes the phrase "required to be stated therein" before its additional language regarding omissions which make a statement misleading.[121]

The Court was also wary of any construction of § 10(b) which could be seen as an expansion of the judicially created private right of action under that statute.[122] In light of the questions raised at oral argument, many commentators expressed concerns that the Supreme Court would curtail the § 10(b) private right of action.[123] Their concerns appear to have been justified. Ultimately, the Court in *Macquarie* held that pure omissions are not actionable under Rule 10b-5(b).[124]

C. Deficiencies in *Macquarie*'s Analysis of the Statutory Text, Applicable Precedent, and Comparison of Section 10(b) with Section 11

The Court's holding is concerning to say the least, and remarkable for its brevity.[125] *Macquarie*'s reasoning is deficient in several key aspects, and its standard could be markedly difficult to apply in practice.[126]

For example, to distinguish between pure omissions (which are no longer actionable under Rule 10b-5(b)) and half-truths (which are):

> A pure omission occurs when a speaker says nothing, in circumstances that do not give any particular meaning to that silence. Take the simplest example. *If a company fails entirely to file an MD&A*, then the omission of particular information required in the MD&A has no special significance because no information was disclosed.[127]

A half-truth, by contrast, is a "representation[] that state[s] the truth only so far as it goes, while omitting critical qualifying information."[128] So, under this line of reasoning, if an issuer fails entirely to file an MD&A, even if that omission is undertaken with the requisite state of mind and the other elements of a § 10(b) claim are present—that omission would be inactionable by private plaintiffs under Rule 10b-5(b) as a matter of law. Given the MD&A's importance to investors,[129] this presents a significant practical problem, and creates a clear loophole for companies to avoid private liability under Rule 10b-5(b).[130] Notably, a different

question is presented as regards Rule 10b-5(a) and (c), which the *Macquarie* Court did not speak to and which this paper will address in a later section.[131]

The Court's opinion in *Macquarie* is problematic not only for its holding, which removed pure omissions entirely from the ambit of Rule 10b-5(b), limiting private claims under that subsection of the Rule to half-truths only, but for its rationale, which in a number of ways is fundamentally deficient.

An immediate problem presented by the Court's opinion is its pronouncement that "Rule 10b-5 . . . makes it unlawful for *issuers of registered securities* 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.' "[132] Read literally, this limits the scope of Rule 10b-5 to only those securities that are registered, and imposes liability only upon the issuers of those securities. In fairness, while the Supreme Court likely did not intend this decision to reach that far, the fact that a colorable argument now exists for the foreclosure of the § 10(b) remedy to a wide swath of potentially meritorious plaintiffs is troubling to say the least. To state that Rule 10b-5 applies only to issuers of registered securities indicates inattentive drafting at best, and a radical restriction of the § 10(b) remedy at worst. Further, this pronouncement is fundamentally inconsistent with prior Supreme Court jurisprudence on the § 10(b) private right of action,[133] the underlying intent of § 10(b) and Rule 10b-5,[134] and the plain text of the rule itself.[135]

Additionally, later in its analysis, the court considers plain language definitions of "statement," from the relevant editions of the Oxford English Dictionary and Webster's New International Dictionary, positing that these definitions support its holding.[136] But neither of these definitions speaks in any way to the requisite length or specificity of a "statement."[137] Indeed, on the very definitions provided by the court, the government's argument that the applicable statement in this case is the MD&A itself still holds.[138] Put simply, a "statement" can be as long or as short, as complex or as simple, as general or as specific, as the maker of the statement wishes it to be.[139] Therefore, because the filing of the MD&A is likely a statement under the definitions used by the Court, the question becomes whether there are any assertions in the MD&A that are materially misleading or constitute half-truths due to omitted information.[140]

And even the textual discrepancy between § 11 and Rule 10b-5(b)'s omissions language—arguably the most convincing rationale for the Court's holding due to existence of the Canon Against Surplusage—is not without significant flaws.[141] Among these is

the fact that these provisions stem from different statutes and are not analogs of each other.[142] Section 11 pertains only to deficiencies in registration statements,[143] where certain information is "required to be stated" pursuant to applicable law and regulation. Its focus on disclosure alone is clear, since it is a strict liability provision.[144] By contrast, § 10(b) and Rule 10b-5 were enacted to cover a wide range of securities transactions,[145] where there may not be specific informational requirements (but, as in the case of the MD&A, there often are). Rule 10b-5's focus on fraudulent conduct is further clarified by the inclusion of certain necessary elements in its cause of action, such as scienter and reliance—it is clearly not a strict liability provision focused solely on disclosure.[146] As such, holding that Rule 10b-5 captures pure omissions would not have rendered § 11's language superfluous, since there are significant contextual differences between the two provisions. Nor would it have unduly shifted Rule 10b-5's focus from fraud to disclosure.

As a final note on the focus of § 10(b) and Rule 10b-5, the *Macquarie* court makes repeated reference to the statement in *Chiarella* that "Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud."[147] On its face, that appears to be a persuasive precedent for limiting the scope of Rule 10b-5(b) to misstatements and excluding pure omissions. But the Court neglects to include in its reasoning the very next sentence of the *Chiarella* opinion, which expressly states that a securities fraud claim under § 10(b) can be premised on nondisclosure: "*When an allegation of fraud is based upon nondisclosure*, there can be no fraud absent a duty to speak."[148]

D. IMPLICATIONS OF *MACQUARIE* FOR ENFORCEMENT OF SECTION 10(B)

Macquarie's holding, while in and of itself restrictive of private claims under Rule 10b-5(b), could have a wider-ranging impact than even its drafters intended, due largely to the Court's puzzling pronouncements and unclear rationale. Indeed, as of this writing, two federal appellate courts have already misconstrued *Macquarie* to foreclose claims for pure omissions under *any* subsection of Rule 10b-5,[149] something that the Supreme Court was very careful to avoid saying in its holding.[150]

The First Circuit also appears to have followed the lead of the Seventh in holding that omissions liability is precluded under any subsection of Rule 10b-5, contrary to the express holding of the Supreme Court in Macquarie. See *Zhou v. Desktop Metal, Inc.*, 120 F.4th 278, 292 (1st Cir. 2024) ("[S]ection 10(b) and Rule 10b-5 only prohibit omissions that engender 'half-truths.' . . . An omission, even if material, is actionable only if it 'renders affir-

mative statements made misleading.'") (citing *Macquarie*, 601 U.S. at 263, 265; *Matrixx*, 563 U.S. at 44; *In re Bos. Sci. Corp. Sec. Litig.*, 686 F.3d 21, 27 (1st Cir. 2012)). This apparent trend in the appellate courts as of this writing represents a concerning expansion of *Macquarie's* limitations on the 10(b) private right of action, without direction to that end from either Congress or the Court.

The Court was quick to note that the SEC retains its enforcement authority to prosecute violators of its regulations, including Item 303's disclosure mandate.[151] But, as the government plainly stated at oral argument, the Commission is not presently up to the task.[152] Shifting the onus of enforcement for pure omissions entirely to the SEC will almost certainly result in a greater number of violators slipping through the cracks, and will likely have a chilling effect on the amount of information disclosed in the MD&A, since Exchange Act reporting companies can now avoid private liability under 10b-5(b) for MD&A violations by simply refusing to speak to an issue[153] (even in the face of an SEC disclosure mandate).[154]

However, actionable steps remain whereby private plaintiffs, together with the Commission, can remedy *Macquarie*'s faults. These steps will be discussed in the following section.

V. The Roadmap Forward: Necessary Actions to Secure Effective Investor Protection

While the Supreme Court's holding in *Macquarie* may well create a "roadmap for fraud," as counsel for Moab argued,[155] *Macquarie*'s succinct opinion also provides a roadmap for the ultimate resolution of the dispute and the realization of proper investor protection in the context of the MD&A.[156] In this section, two avenues will be presented which would provide for a private § 10(b) claim in the event of a disclosure deficiency in the MD&A—provided, that is, that the other elements of the § 10(b) cause of action are adequately alleged. First, it will be argued that subsections (a) and (c) of Rule 10b-5 provide protection from MD&A disclosure deficiencies for injured investors, since their language is broader than that of Rule 10b-5(b), which is now limited only to misrepresentations and half-truths.[157] Second, this article will recommend that the SEC amend Item 303 pursuant to its statutory authority,[158] strengthening that provision by introducing language which expressly addresses pure omissions and which synchronizes Item 303's materiality standard with that of § 10(b).

An additional option exists which is worth note but which this article will not address in depth: Amending Rule 10b-5(b) such that its omissions language is harmonized with § 11's.[159] While

this would strengthen Rule 10b-5(b)'s ability to "catch all" fraudulent conduct in the securities exchange context, amending the Rule would likely be impractical and difficult—especially since the text of Rule 10b-5 has not been altered in nearly eight decades,[160] and accordingly a number of significant cases could be abrogated by this change.[161] Nonetheless, given the textual analysis presented by the Court, it would solve the problem.[162] And, while this change would be significant, it is not entirely without precedent—the SEC has vitiated Supreme Court opinions via regulation before, most notably in the short-form merger/going private context with Rule 13e-3.[163] However, because of the potentially prohibitive practical challenges of pursuing this option, the recommendations below represent realistic avenues whereby the problem can be effectively addressed—by operating within the existing framework of Rule 10b-5 in the case of the first, and in the case of the second by modifying Item 303's disclosure framework, which can be more easily accomplished.

A. RULES 10B-5(A) AND (C) SUPPORT CLAIMS BASED ON PURE OMISSIONS

The logic behind a Rule 10b-5 action for MD&A disclosure deficiencies is simple, and this article is not the first to articulate it:[164] While a private claim under § 10(b) ordinarily cannot be premised on silence, where there is a duty to speak, one must speak truthfully or be subject to the potential for liability.[165] Item 303 creates a duty to disclose;[166] therefore, misleading statements and omissions in the MD&A are actionable under § 10(b) and rule 10b-5.[167]

This logic still holds, with one significant modification: because *Macquarie* proscribes private claims under Rule 10b-5(b) for pure omissions, Item 303 disclosure deficiencies cannot be actionable under that subsection of the Rule. But the Supreme Court was careful to limit its holding to subsection (b) only.[168] Accordingly, this subsection will demonstrate that scheme liability precedent can, and does, capture "pure" omissions of the sort described in *Macquarie*.

1. *Scheme Liability Precedent Captures Pure Omissions*

Unlike Rule 10b-5(b), subsections (a) and (c) of the Rule broadly prohibit any person "[t]o employ any device, scheme, or artifice to defraud" or "[t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."[169] These prohibitions are not accompanied by "statements made" qualifiers, and as such can capture pure omissions in addition to affirmative misstatements,[170] even under *Macquarie*'s rationale.[171]

Generally, a "Scheme" under Rule 10b-5 is " 'a plan or program of something to be done; an enterprise; a project; as, a business scheme, or a crafty, unethical project.' "[172] The scheme liability subsections of Rule 10b-5, as one court notes, proscribe "activities designed to affect the price of a security artificially by simulating market activity that does not reflect genuine investor demand."[173] The focus of the inquiry in a private claim alleging a scheme to defraud is on the *conduct* of the defendants, rather than specific deceptive statements.[174] As such, provided that defendants engaged in a scheme to omit material information from an item of narrative disclosure like the MD&A, private plaintiffs may bring suit under Rule 10b-5(a) and (c).

The Supreme Court's scheme liability precedent strongly supports this approach. For example, in *Affiliated Ute Citizens of Utah v. United States*,[175] the Supreme Court found liability under a fiduciary duty theory for violations of subsections (a) and (c) where bank representatives defrauded a group of Native Americans and their representatives by failing to disclose that the bank and its employees would gain financially from the transaction, since the subject shares were selling for a higher price on the non-Indian market.[176] In holding that defendants were liable under Rule 10b-5(a) and (c), the Court reasoned that because defendants "devised a plan and induced" the shareholders to sell "without disclosing to them material facts" that could have impacted that decision, the defendants had engaged in a scheme to defraud.[177] And while the appellate court below had reasoned that Rule 10b-5 did not apply because there were no affirmative misstatements of fact in the record, the Supreme Court correctly reversed, noting that restrictive constructions of Rule 10b-5 are inappropriate:[178]

> To be sure, the second subparagraph of the rule specifies the making of an untrue statement of a material fact and the omission to state a material fact. The first and third subparagraphs are not so restricted. These defendants' activities, outlined above, disclose, within the very language of one or the other of those subparagraphs, a "course of business" or a "device, scheme, or artifice" that operated as a fraud upon the Indian sellers.[179]

In its rationale, the *Affiliated Ute* Court further stated that it was "no answer to urge that, as to some of the petitioners, these defendants may have made no positive representation or recommendation."[180] It is clear on this holding that pure omissions of material information can form the basis of a scheme liability claim.

A more recent case, *SEC v. Zandford*,[181] reiterates this position. In *Zandford*, the Supreme Court found a securities broker liable under subsections (a) and (c) of Rule 10b-5 for misappropriating

the proceeds of sales in his customers' investment account,[182] reversing the Fourth Circuit's holding below.[183] While much of the Court's analysis focused on whether the omissions at issue were "in connection with" the purchase of a security, the *Zandford* court also addressed the scope of scheme liability under Rule 10b-5.[184] The court reasoned that liability was appropriate because "[r]espondent was only able to carry out his fraudulent scheme without making an affirmative misrepresentation" due to a preexisting relationship of trust and confidence with his clients.[185] In the context of a broker-client relationship where there is a discretionary account, which implicates fiduciary duties of care and loyalty due to the broker's control of investment decisions, fraud of omission may represent "an even greater threat to investor confidence in the securities industry" than an affirmative misstatement.[186] In its holding, the *Zandford* Court further emphasized that "any distinction between omissions and misrepresentations is illusory in the context of a broker who has a fiduciary duty to her clients."[187]

Similarly to the broker-dealer context in the case of discretionary accounts, the management of an Exchange Act reporting company owes fiduciary duties of care and loyalty to their shareholders.[188] Under *Zandford*, for purposes of scheme liability under Rule 10b-5(a) and (c), any distinction between omissions and misrepresentations is therefore also illusory.[189] Both the plain text of Rule 10b-5's scheme liability provisions and applicable Supreme Court precedent clearly convey that MD&A disclosure deficiencies that stem from a scheme to defraud are actionable by private plaintiffs.

2. *Practical and Policy Considerations*

In addition to precedent supporting liability for pure omissions under Rule 10b-5(a) and (c), several key practical and policy considerations further underscore the necessity of preserving this cause of action and confirm that it would by no means unduly expand the universe of claims available under § 10(b). First, removing pure omissions from private enforcement unduly places the onus entirely on the SEC. While the Supreme Court's decision to remove pure omissions from accountability by private parties under Rule 10b-5(b) facially shifts the onus for enforcement under that provision entirely to an overburdened SEC,[190] the case's restrictions on liability for MD&A violations could go farther than even that. As noted by one reputable law firm in the wake of the *Macquarie* decision, the case could be read as limiting the enforcement authority of the SEC itself.[191] While a restriction on private actions is certainly problematic, should this second possibility come to fruition, it would represent a significant weakening of the SEC's ability to make up for private

plaintiffs' inability to pursue actions under Rule 10b-5(b) for pure omissions. Thus, including pure omissions within the ambit of scheme liability precedent is not only a practical safeguard from further retrenchment in the context of private actions, it is a necessity to ensure that the Commission retains proper regulatory authority.

Next, other statutory and regulatory protections protect certain MD&A disclosures from private action. As noted by commentators, "Item 303's duty to disclose is a sword, but the statute also offers companies a shield. To reduce trepidation and litigation costs, several safe harbors are available."[192] Because of the balanced disclosure and liability frameworks which exist under the securities laws, the Supreme Court's characterization of the inclusion of pure omissions within the ambit of Rule 10b-5(b) as an expansion of the § 10(b) private right of action is inaccurate, and concerns about overbroad applicability are allayed.

As an initial matter, while Item 303's disclosure requirement for forward-looking information is unique among the securities laws' narrative disclosure mandates, any disclosure made in the MD&A is subject to the safe harbors for forward-looking statements contained in Rule 175, Rule 3b-6 and the PSLRA. Rule 175 and Rule 3b-6 protect forward-looking statements from securities fraud claims when such statements are disclosed with a reasonable basis or in good faith.[193] And while Rule 175's applicability is limited to specified definitions of "forward-looking statement," among these is "[a] statement of future economic performance contained in management's discussion and analysis of financial condition and results of operations included pursuant to Item 303 of Regulation S-K."[194] An additional safe harbor for certain MD&A disclosures[195] exists under the PSLRA, which protects forward-looking information that is immaterial, disclosed with meaningful cautionary language, or where plaintiff cannot prove that defendant had actual knowledge of the falsity of the forward-looking information.[196]

Additionally, any private claims alleging misleading statements or omissions in the MD&A would be subject to the PSLRA's heightened pleading requirements.[197] As a result, fraud must be pleaded with particularity and a strong inference of scienter must be established by any plaintiff who wishes to have success on the merits of their claim.[198] And, in conjunction with the above safeguards against "vexatious" litigation, liability in a § 10(b) private action for a disclosure deficiency in the MD&A would require plaintiffs to establish all of the requisite elements of that cause of action—far from an easy task.[199]

Further, argument by analogy to other Items contained in Regulation S-K, which in appropriate circumstances can support

a § 10(b) and Rule 10b-5 action, lends credence to this position.[200] For example, Item 105, Regulation S-K's risk factor disclosure requirement,[201] has been used to support a Section 10(b) claim: "Item [105] creates liability where 'the registrant knew, as of the time of an offering, that (1) a risk factor existed; (2) the risk factor could adversely affect the registrant's present or future business expectations; and (3) the offering documents failed to disclose the risk factor.' "[202]

In sum and to oversimplify, a "catch-all" fraud provision should be able to catch *all* fraud, not just half-truths and misrepresentations. Accordingly, the retention of a private right of action for pure omissions under Rule 10b-5(a) and (c) is necessary. As the Supreme Court clearly stated in *Huddleston*, "[A] Section 10(b) action can be brought by a purchaser or seller of '*any* security' against '*any* person' who has used '*any* manipulative or deceptive device or contrivance' in connection with the purchase or sale of a security."[203]

B. MODIFICATIONS TO ITEM 303

While the existing framework of Rule 10b-5's scheme liability provisions may be sufficient to remedy the ails of private plaintiffs in the wake of *Macquarie*, further action by the Commission is necessary to ensure that investors are properly insulated from the possibility of future restriction. As such, two proposed modifications to Item 303 will be here proffered, which would strengthen accountability for violations of the MD&A while balancing the important interests of investor protection and commercial certainty.

1. *Item 303 Should be Amended to Include Language for Actionable Omissions*

First, Item 303's language should be modified to include language for actionable omissions. Sample language for the amended regulation follows:

> [x] The omission of any item required to be stated herein will make the MD&A materially misleading to a reasonable investor, and shall be a violation of Regulation S-K. This violation shall be actionable under the requisite sections of the Securities Exchange Act, including without limitation §§ 10(b) and 20(a) thereof.

The inclusion of this language into Item 303 is within the SEC's congressionally sanctioned rulemaking authority, as it is both in the public interest and necessary for investor protection.[204] And while including a liability provision within Item 303 would be unique among the narrative disclosure obligations of Regulation S-K, this is justified because Item 303's disclosure mandate for specific forward-looking information is already unique among the securities laws as a whole.[205]

2. *Item 303's Materiality Test Should be Corrected*

Second, *Macquarie* and the circuit split on Item 303 which preceded it makes clear that Item 303's materiality standard must be revisited and revised. The SEC's 1989 release is largely to blame for the circuit split described above,[206] and its looser standard for materiality in the context of Item 303's disclosure mandate is notoriously difficult to apply—for Exchange Act reporting companies preparing their disclosures, for investors reading those disclosures, and for courts analyzing potential violations of those disclosures.[207]

Accordingly, Item 303's materiality standard must be made consistent with the prevailing definition of materiality as articulated in *Basic*. The time is ripe for an SEC release to set the record straight. Sample language follows:

> If any information described in Item 303 is reasonably likely to be important to a reasonable investor, or reasonably likely to alter the 'total mix' of information, then it is material for the purposes of this Regulation and must be disclosed. For the avoidance of doubt, parties shall apply the materiality standard articulated in U.S. Supreme Court decisions to evaluate whether any information required to be stated pursuant to this Item 303 is material and thereby required to be disclosed.

Harmonization of Item 303's materiality standard would accomplish several important objectives. First, it would clarify to reporting companies that "material" means "material," and thereby reporting companies would have consistent standards that would enable easier compliance with Item 303's mandate.[208] Second, while heightened materiality for Item 303 disclosure would likely result in fewer trends or uncertainties being disclosed to the SEC and to the markets, this could be a significant positive change which enhances the efficiency of our capitalist system. The MD&A is often prohibitively long (for example, AT&T's most recent MD&A as of this writing was over eighteen pages)[209] and resultingly inaccessible to ordinary retail investors. Shortening the MD&A would at once reduce the burdens of compliance for reporting companies while increasing the digestibility of disclosures for investors. And it would increase commercial certainty, because both reporting companies and their investors would know that every disclosure contained in the MD&A was material and could be actionable. By reducing power and information asymmetries between parties, this would result in a more efficient market overall.

Not only would modification of Item 303's materiality standard buttress investor protection and market efficiency, it would also be consistent with other disclosure provisions contained in Regulation S-K. For example, in the Commission's release adopt-

ing amendments to Item 105's risk factor disclosure mandate, the SEC intentionally changed the standard for risk factor disclosures from the "most significant" factors to "material" risk factors, and clearly stated that the materiality standard to be utilized for the purposes of Item 105 was the prevailing test under *Basic*.[210] And because Regulation S-K (including Item 303) is frequently amended in the regular course,[211] this avenue would realistically and practicably remedy many of *Macquarie*'s errors.

VI. Conclusion

Macquarie has the potential to vitiate decades of securities law jurisprudence and leave worthy investors outside of the congressionally sanctioned protections of § 10(b).[212] Not only that, but its holding carries the real likelihood to not only curtail the enforcement abilities of the private bar, but even of the SEC to hold fraudsters to account.[213] But while *Macquarie*'s holding and rationale are at best questionable, the Supreme Court was careful to leave open some avenues whereby meritorious plaintiffs could seek the relief they deserve.[214]

This article has made the argument that a private right of action for pure omissions in a company's MD&A exists within the ambit of Rule 10b-5(a) and (c).[215] But that right is far from guaranteed, and the SEC can and should take action to abrogate *Macquarie*'s restrictive holding.

Pursuant to its statutory authority, the SEC should modify Item 303 to include language for actionable omissions, as it has done with other narrative disclosure mandates under Regulation S-K.[216] Beyond that, the materiality standards of Item 303 and § 10(b) must be harmonized to ensure that the integrated disclosure framework, which has upheld efficient and fair capital markets for over four decades, remains truly integrated.[217]

To justify its puzzling decision in *Macquarie*, the Supreme Court posed a hypothetical: "[T]he difference between a pure omission and a half-truth is the difference between a child not telling his parents he ate a whole cake and telling them he had dessert."[218]

This analogy fails at the outset: What parent or guardian would not treat the child the same in each case? And if we raise our children from youth with an understanding of the reality that lies of omission are simply lies, why would we not hold reporting companies accountable to the same simple truth?

The "purity" of the alleged omission should not matter. Any omission undertaken with an intent to deceive is, in and of itself, impure. And it must be held to account if investors, and the integrity of our securities markets, are to be accorded the protections that they deserve.

NOTES:

[1]15 U.S.C.A. § 78j (prohibiting the use or employment "in connection with the purchase or sale of any security" subject to the jurisdiction of the federal securities laws, "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors").

[2]17 C.F.R. § 240.10b-5.

[3]Item 303 of Regulation S-K, 17 C.F.R. § 229.303; see also Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, 54 Fed. Reg. 22427-01 (noting that Item 303's MD&A disclosure requirement is "intended to provide, in one section of a filing," requisite information for investors "to assess the financial condition and results of operations of the registrant, with particular emphasis on the registrant's prospects for the future").

[4]See Marc I. Steinberg, Rethinking Securities Law 42 n.148 (Oxford Univ. Press 2021); *accord. Our Goals*, U.S. Sec. & Exch. Comm'n (Apr. 6, 2023), https://sec.gov/our-goals.

[5]According to a number of sources, investor protection is the chief aim of the U.S. securities regulation regime. *See, e.g.*, Park, Reassessing the Distinction Between Corporate and Securities Law, 64 UCLA L. Rev. 116, 119 (2017) ("[A] primary goal of the federal securities laws is investor protection"); Steinberg, supra note 4, at 42 n.148 (emphasizing the unique role of the Commission in protecting investors); accord. *Our Goals*, U.S. Sec. & Exch. Comm'n (Apr. 6, 2023), https://sec.gov/our-goals.

[6]To many investors, Item 303 is "[o]ften the most important textual disclosure item in Regulation S-K." II Louis Loss et al., Securities Regulation 294 (6th ed. 2019).

[7]Schneider, MD&A Disclosure, 22 Rev. Sec. & Commodities Reg. 149, 150 (1989), accord. Marc I. Steinberg, Understanding Securities Law 210 (8th ed. 2023); Loss et al., supra note 6, at 294; Hazen, Law of Securities Regulation § 125 (8th ed.) (describing MD&A as "particularly important").

[8]*Macquarie Infrastructure Corporation v. Moab Partners, L. P.*, 601 U.S. 257, 260, 144 S. Ct. 885, 218 L. Ed. 2d 214, Fed. Sec. L. Rep. (CCH) P 101845 (2024).

[9]*Id*. at 263 ("A pure omission occurs when a speaker says nothing, in circumstances that do not give any particular meaning to that silence."). Note that the Court retained private liability under Rule 10b-5(b) for half-truths. See *Id*. (defining "half-truth" for purposes of a private action under Rule 10b-5(b) as " 'representations that state the truth only so far as it goes, while omitting critical qualifying information.' ") (quoting *Universal Health Services, Inc. v. U.S.*, 579 U.S. 176, 188, 136 S. Ct. 1989, 195 L. Ed. 2d 348, 41 I.E.R. Cas. (BNA) 709 (2016), and citing *Omnicare, Inc. v. Laborers Dist. Council Const. Industry Pension Fund*, 575 U.S. 175, 192, 135 S. Ct. 1318, 191 L. Ed. 2d 253, Fed. Sec. L. Rep. (CCH) P 98411 (2015) ("[L]iteral accuracy is not enough: An issuer must as well desist from misleading investors by saying one thing and holding back another")).

[10]See Proposed Comprehensive Revision to System for Regulation of Securities Offerings, Release No. 6235 (S.E.C. Release No. 6235, 1980) ("Integration, as a concept involves a conclusion as to equivalency between transactional (Securities Act) and periodic (Exchange Act) reporting. If a subject matter is material information . . . then it will be material both in the distribution of securi-

ties and to the trading markets."). The SEC's release on the integrated disclosure framework further stated that "requirements governing the description of such subject matters should be the same" for purposes of required disclosures under the Securities Act and the Exchange Act, and that Regulation S-K was intended to "state in one place *uniform requirements*" for disclosure. *Id*.

[11]17 C.F.R. § 229.303. Item 303 provides further guidance to management:

> The discussion and analysis must focus specifically on material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. This includes descriptions and amounts of matters that have had a material impact on reported operations, as well as matters that are reasonably likely based on management's assessment to have a material impact on future operations.

Id. This is notably the only situation where the federal securities laws mandate the disclosure of forward-looking information. See *id*.; Marc I. Steinberg, Securities Regulation: Liabilities and Remedies § 2.03 (2022) (noting that while "there is no general affirmative duty to disclose material information," "affirmative disclosure obligations may arise in a number of specific circumstances . . . Perhaps most significantly, such an affirmative disclosure obligation arises pursuant to SEC mandates, including . . . the Management Discussion and Analysis (MD&A) disclosure required in SEC filings, including Forms 10-K and 10-Q").

[12]Management Discussion & Analysis of Fin. Condition & Results of Operations, Release No. 6835 (S.E.C. Release No. 6835, May 18, 1989); Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, 54 Fed. Reg. 22427-01.

[13]Management Discussion & Analysis of Fin. Condition & Results of Operations, Release No. 6835 (S.E.C. Release No. 6835, May 18, 1989); Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, 54 Fed. Reg. 22427-01.

[14]Management Discussion & Analysis of Fin. Condition & Results of Operations, Release No. 6835 (S.E.C. Release No. 6835, May 18, 1989); Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, 54 Fed. Reg. 22427-01.

[15]Management Discussion & Analysis of Fin. Condition & Results of Operations, Release No. 6835 (S.E.C. Release No. 6835, May 18, 1989) (noting further that reasonableness is viewed as of the time that the determination was made).

[16]Crawford & Galaro, A Rule 10b-5 Private Right of Action for MD&A Violations?, 44 Sec. Reg. L.J. 245, 245 (2015) ("MD&A disclosures are inherently tricky, straddling the line between protected projections and vulnerable facts . . . And the test set out by the Commission for assessing MD&A disclosures has been poorly worded and incongruous for twenty-six years.") (internal citations omitted).

[17]15 U.S.C.A. § 78j.

[18]17 C.F.R. § 240.10b-5 (broadly prohibiting fraudulent conduct in connection with the purchase or sale of any security subject to the jurisdiction of the federal securities laws).

[19]Indeed, in a congressional hearing regarding enactment of the Securities Exchange Act, Tommy "the Cork" Corcoran, one of the drafters of the statute, summarized § 10(b) as follows: "Thou shall not use any other cunning devices." See Stock Exchange Regulation: Hearings on H.R. 7852 and H.R. 8720Before

the House Committee on Interstate and Foreign Commerce, 73d Cong. 115 (1934); accord. Steinberg, supra note 7, at 325.

[20]See Steinberg, supra note 7, at 325; Jay B. Kasner et al., *An In-Depth Analysis of Private Federal Securities Litigation*, Westlaw Prac. L. (July 17, 2023), https://www.westlaw.com/5-575-6608?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0.

[21]17 C.F.R. § 240.10b-5.

[22]*Herman & MacLean v. Huddleston*, 459 U.S. 375, 380, 103 S. Ct. 683, 74 L. Ed. 2d 548, Fed. Sec. L. Rep. (CCH) P 99058 (1983) (noting also that "a private right of action under Section 10(b) of the 1934 Act and Rule 10b-5 has been consistently recognized for more than 35 years"); see also *Superintendent of Ins. of State of N. Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9, 92 S. Ct. 165, 30 L. Ed. 2d 128, Fed. Sec. L. Rep. (CCH) P 93262 (1971) ("It is now established that a private right of action is implied under s[ection] 10(b)."); cf. *Tcherepnin v. Knight*, 389 U.S. 332, 88 S. Ct. 548, 19 L. Ed. 2d 564 (1967).

[23]Plaintiffs must plead the use of a means of interstate commerce in order to secure the jurisdiction of the federal securities laws. Commentators and courts note that this requirement is typically met without difficulty; e.g., by proof of intrastate telephone calls or electronic messages. See *Loveridge v. Dreagoux*, 678 F.2d 870, 874, Fed. Sec. L. Rep. (CCH) P 98680 (10th Cir. 1982) (addressing jurisdictional requirements); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 136 S. Ct. 1562, 1566, 194 L. Ed. 2d 671, Blue Sky L. Rep. (CCH) P 75138, Fed. Sec. L. Rep. (CCH) P 99089 (2016) (holding that "the jurisdictional test established by [§ 27 of the Exchange Act] is the same as the one used to decide if a case 'arises under' a federal law [pursuant to 28 U.S.C.A. § 1331]").

[24]Under § 10(b) and Rule 10b-5, a plaintiff must demonstrate that they are an actual purchaser or seller of securities. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 742–43, 95 S. Ct. 1917, 44 L. Ed. 2d 539, Fed. Sec. L. Rep. (CCH) P 95200, 1975-1 Trade Cas. (CCH) ¶ 60351 (1975) (requiring a plaintiff to be a purchaser or seller of the subject securities in order to bring a private damages action under § 10(b) and Rule 10b-5); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 79–80, 126 S. Ct. 1503, 164 L. Ed. 2d 179, Blue Sky L. Rep. (CCH) P 74569, Fed. Sec. L. Rep. (CCH) P 93723 (2006) ("[O]ne asserting a claim for damages based on the violation of Rule 10b-5 must be either a purchaser or seller of securities."); see generally Am. Jur. 2d, Securities Regulation—Federal § 1332 ("only purchasers or sellers have standing to maintain an implied civil action under § 10(b) of the Exchange Act or SEC Rule 10b-5").

According to some courts, this "Purchaser-Seller Rule" limits standing in a § 10(b) private action to purchaser or seller of the securities of the company about which a misstatement was made. See *Menora Mivtachim Insurance Ltd. v. Frutarom Industries Ltd.*, 54 F.4th 82, 84 (2d Cir. 2022). For an in-depth consideration of the Purchaser-Seller Rule for § 10(b) standing, *see* Steinberg & Partida, Undue Limitations in the Section 10(b) Purchaser-Seller Requirement, 99 Tul. L. Rev. __ (forthcoming 2024). Irrespective of whether a strict or inclusive approach to the Purchaser-Seller Rule is ultimately adopted, satisfaction of the standing requirement is a necessary element of any successful private action under § 10(b).

[25]Plaintiff must show that the primary participant bears the responsibility for a manipulative or deceptive practice. *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37–38, 131 S. Ct. 1309, 179 L. Ed. 2d 398, Fed. Sec. L. Rep. (CCH) P 96249, 62 A.L.R. Fed. 2d 737 (2011). "Mere" breach of fiduciary duty alone is

not sufficient to satisfy this element; it must be accompanied by a material disclosure deficiency in order to be actionable. See *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 474, 97 S. Ct. 1292, 51 L. Ed. 2d 480, Fed. Sec. L. Rep. (CCH) P 95914 (1977) (holding that the challenged transaction "was neither deceptive nor manipulative and therefore did not violate § 10(b) of the [Exchange] Act or Rule 10b-5"); see also Marc I. Steinberg, The Federalization of Corporate Governance 136–40 (Oxford Univ. Press 2018) (discussing the failed attempt to federalize corporate governance by means of expanding the reach of § 10(b) and Rule 10b-5); Ferrara & Steinberg, A Reappraisal of Santa Fe: Rule 10b-5 and the New Federalism, 129 U. Pa. L. Rev. 263 (1980) (addressing the Supreme Court's decision in Santa Fe and its ramifications).

[26]Plaintiff must demonstrate that the misstatement or omission was material; i.e., that a reasonable investor would consider such information important in making an investment decision. *Matrixx*, 563 U.S. at 37–38 (citations omitted); *Basic Inc. v. Levinson*, 485 U.S. 224, 232, 108 S. Ct. 978, 99 L. Ed. 2d 194, Fed. Sec. L. Rep. (CCH) P 93645, 24 Fed. R. Evid. Serv. 961, 10 Fed. R. Serv. 3d 308 (1988); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S. Ct. 2126, 48 L. Ed. 2d 757, Fed. Sec. L. Rep. (CCH) P 95615 (1976).

[27]Plaintiff must further establish that defendant acted with scienter. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208–10, 96 S. Ct. 1375, 47 L. Ed. 2d 668, Fed. Sec. L. Rep. (CCH) P 95479 (1976). For purposes of a § 10(b) and Rule 10b-5 cause of action, lower courts have held that reckless behavior (highly unreasonable behavior or actions that represent an extreme departure from the standards of ordinary care, to the extent that the danger of such actions was either known to defendant or so obvious that the defendant must have been aware of it) is sufficient to satisfy this element. *In re Ikon Office Solutions, Inc. Securities Litigation*, 277 F.3d 658, 667 (3d Cir. 2002); *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1569, Fed. Sec. L. Rep. (CCH) P 95500 (9th Cir. 1990) (en banc); *Sanders v. John Nuveen & Co., Inc.*, 554 F.2d 790, 793, Fed. Sec. L. Rep. (CCH) P 96030 (7th Cir. 1977). The element of scienter is necessary in SEC enforcement actions as well as private claims. See *Aaron v. Securities and Exchange Commission*, 446 U.S. 680, 681, 100 S. Ct. 1945, 64 L. Ed. 2d 611, Fed. Sec. L. Rep. (CCH) P 97511 (1980).

[28]Plaintiff must demonstrate that they relied upon the material misstatement or omission—such reliance must be both justifiable and present. See *Affiliated Ute Citizens of Utah v. U. S.*, 406 U.S. 128, 153–54, 92 S. Ct. 1456, 31 L. Ed. 2d 741, Fed. Sec. L. Rep. (CCH) P 93443 (1972). Reliance is presumed where the subject securities trade in an efficient market, but this presumption may be rebutted by a defendant. See *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 268, 134 S. Ct. 2398, 189 L. Ed. 2d 339, Fed. Sec. L. Rep. (CCH) P 98003, 88 Fed. R. Serv. 3d 1472 (2014); *Basic*, 485 U.S. at 244–47 (1988).

[29]In a § 10(b) and Rule 10b-5 claim, plaintiffs must show that the alleged fraud caused the financial loss. *Matrixx*, 563 U.S. 37–38. The clearest and most expeditious way to demonstrate this, in accordance with the Fraud on the Market Theory, is to show that when the fraud was revealed, a corrective price shift in the subject securities occurred. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346, 125 S. Ct. 1627, 161 L. Ed. 2d 577, Blue Sky L. Rep. (CCH) P 74529, Fed. Sec. L. Rep. (CCH) P 93218 (2005); see also Fry, Pleading and Proving Loss Causation in Fraud-on-the-Market-Based Securities Suits Post-Dura Pharmaceuticals, 36 Sec. Reg. L.J. 31, 64–71 (2008); Kaufman, Loss Causation Revisited, 32 Sec. Reg. L.J. 357, 366; Mustokoff & Mazzeo, Loss Causation on Trial in Rule 10b-5 Litigation A Decade After Dura, 70 Rutgers U.L. Rev. 175 (2017).

[30]Further, a plaintiff must show that they purchased the security in connection with the fraudulent practice. *Matrixx*, 563 U.S. 37–38 (citations omitted). Here, requisite connection is shown when a sale of securities coincided with an alleged scheme to defraud. See also *S.E.C. v. Zandford*, 535 U.S. 813, 824, 122 S. Ct. 1899, 153 L. Ed. 2d 1, Fed. Sec. L. Rep. (CCH) P 91795 (2002) ("[T]he SEC complaint describes a fraudulent scheme in which the securities transactions and breaches of fiduciary duty coincide. Those breaches were therefore 'in connection with' securities sales within the meaning of § 10(b).").

[31]Where a § 10(b) and Rule 10b-5 claim is premised on defendant's omission of material information, plaintiffs must establish that such information was omitted in violation of a duty to disclose. *Chiarella v. U. S.*, 445 U.S. 222, 235, 100 S. Ct. 1108, 63 L. Ed. 2d 348, Fed. Sec. L. Rep. (CCH) P 97309 (1980).

[32]Out-of-pocket loss is the traditional measure of damages in a Rule 10b-5 claim. *Hackbart v. Holmes*, 675 F.2d 1114, 1121, Fed. Sec. L. Rep. (CCH) P 98639 (10th Cir. 1982) (abrogated by, Anixter v. Home-Stake Production Co., 939 F.2d 1420, Fed. Sec. L. Rep. (CCH) P 96128 (10th Cir. 1991)); *see also* Kaufman, No Foul No Harm: The Real Measure of Damages Under Rule 10b-5, 39 Cath. U. L. Rev. 29, 31 (1989) (describing out-of-pocket damages as "the difference between the fair value of all that the [plaintiff] received and the fair value of what he would have received had there been no fraudulent conduct."); Michael J. Kaufman, 26A Sec. Lit. Damages § 13:1 ("The [U.S. Supreme] Court . . . has implicitly addressed the propriety of each of the four overarching theories of recovery: (1) a benefit of the bargain measure of damages, (2) an out-of-pocket measure of damages, (3) a rescissionary measure of damages, and (4) disgorgement in calculating recovery under the rule.").

[33]See 28 U.S.C.A. § 1658(b); see also Olson, Publicly Traded Corporations Handbook, Elements of a claim under Rule 10b-5 § 11:1 (2023-2 ed.).

[34]See Private Securities Litigation Reform Act Of 1995, Pub. L. No. 104-67, 109 Stat. 737 (Dec. 22, 1995) ("[T]he complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.") (amending pleading requirements for securities fraud class actions).

[35]See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S. Ct. 2499, 168 L. Ed. 2d 179, Fed. Sec. L. Rep. (CCH) P 94335 (2007); Steinberg, supra note 7, at 328 ("Pursuant to the Private Securities Litigation Reform Act of 1995 . . . Section 21(D)(b) of the Securities Exchange Act generally requires that a plaintiff: must specifically plead each alleged misrepresentation or nondisclosure and why such is misleading; and must allege specific facts as to each such disclosure deficiency supporting a 'strong inference' that the subject defendant knew that the misstatement or omission was false.").

[36]See Hazen, 2 Law Sec. Reg. § 9:52.

[37]See Crawford & Galaro, supra note 16, at 249 ("Enforcement of Item 303 has been spotty at best. So far, the SEC has mostly gone after egregious examples of companies ignoring Item 303, amplifying Item 303's significance for forward-looking information.") (citing Seligman, The SEC's Unfinished Soft Information Revolution, 63 Fordham L. Rev. 1953, 1970–72 (1995)).

[38]*Matter of Caterpillar Inc.*, 50 S.E.C. 903, Release No. 34, 30532, Release No. 363, Release No. 30532, Release No. AE — 363, 51 S.E.C. Docket 147, 1992 WL 71907 (S.E.C. Release No. 1992); *IN THE MATTER OF UNDER ARMOUR, INC., RESPONDENT.*, Release No. 33, 10940, Release No. 34, 91741, Release

No. 4220, Release No. 10940, Release No. 91741, Release No. AE — 4220, 2021 WL 1737508 (S.E.C. Release No. 2021).

[39]*Caterpillar*, Exch. Act Release No. 34-30532.

[40]*Under Armour*, Exch. Act Release No. 34-91741.

[41]See, e.g., Transcript of Oral Argument at 65, *Macquarie Infrastructure Corporation v. Moab Partners, L.P.*, 144 S. Ct. 479, 216 L. Ed. 2d 1312 (2023) (No. 22-1165) (Counsel for the United States as amicus curiae stated that "the SEC's resources in this area [MD&A enforcement] are . . . limited. This Court has repeatedly said that private litigation under Rule 10b-5 is an essential supplement to SEC enforcement actions. And that applies with full force here."); see also Section IV.D, V.A.2 infra (describing practical limitations on SEC enforcement of MD&A violations, such as the sheer volume of disclosure provided by Exchange Act reporting companies relative to the amount of SEC enforcement personnel).

[42]Steinberg, *supra* note 4, at 27 (citations omitted).

[43]*In re VeriFone Securities Litigation*, 11 F.3d 865, Fed. Sec. L. Rep. (CCH) P 97820 (9th Cir. 1993).

[44]*Id*. at 869–870 (stating that only "known trends or uncertainties" must be disclosed, whereas "forward-looking information need not be disclosed.") (citing *In re Lyondell Petrochemical Co. Securities Litigation*, 984 F.2d 1050, 1053, Fed. Sec. L. Rep. (CCH) P 97335 (9th Cir. 1993) (distinguishing between mandatory disclosure of "known" events and optional disclosure of forward-looking information)).

[45]*Id*. at 869. For example, it was alleged that at the time of VeriFone's IPO, VeriFone and its underwriters learned that "[s]ales growth to VeriFone's core market segment . . . had slowed substantially"; "[u]nit sales . . . had materially declined"; and "VeriFone's Petroleum/Convenience market was saturated, and . . . VeriFone's sales to this market segment would plummet unless VeriFone was able to convince customers in this market to upgrade to more complex and costly systems . . ." *Id*.

[46]*In re VeriFone*, 11 F.3d at 866 (noting that VeriFone common stock was trading at $25.25 on July 11, 1990, and fell to $7.625 by September 20, 1990).

[47]See *Macquarie*, 601 U.S. at 263 (defining "pure omissions" for purposes of a private action under Rule 10b-5(b) and distinguishing pure omissions from half-truths, which are actionable under current law). Note, however, that the Supreme Court in *Macquarie* did state that Item 303 creates a duty to disclose which may be actionable. *Id*. at 265 ("Even a duty to disclose, however, does not *automatically* render silence misleading under Rule 10b-5(b).") (emphasis added).

[48]*In re VeriFone*, 11 F.3d at 870.

[49]*Oran v. Stafford*, 226 F.3d 275, Fed. Sec. L. Rep. (CCH) P 91205, 55 Fed. R. Evid. Serv. 872 (3d Cir. 2000).

[50]*In re NVIDIA Corp. Securities Litigation*, 768 F.3d 1046, Fed. Sec. L. Rep. (CCH) P 98212 (9th Cir. 2014).

[51]*Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, Fed. Sec. L. Rep. (CCH) P 98340 (2d Cir. 2015), for additional opinion, see, 598 Fed. Appx. 25, Fed. Sec. L. Rep. (CCH) P 98341 (2d Cir. 2015) and (abrogated by, Macquarie Infrastructure Corporation v. Moab Partners, L. P., 601 U.S. 257, 144 S. Ct. 885, 218 L. Ed. 2d 214, Fed. Sec. L. Rep. (CCH) P 101845 (2024)), *abrogated by* Macquarie Infrastructure Corporation v. Moab Partners, L. P., 601 U.S. 257, 144 S. Ct. 885,

218 L. Ed. 2d 214, Fed. Sec. L. Rep. (CCH) P 101845 (2024).

[52]*Carvelli v. Ocwen Financial Corporation*, 934 F.3d 1307, Fed. Sec. L. Rep. (CCH) P 100539 (11th Cir. 2019).

[53]*Carvelli*, 934 F.3d at 1331 ("[B]oth the Third and the Ninth Circuits have rejected the very argument . . . that a violation of Item 303 automatically gives rise to 10b-5 liability.").

[54]*Id*. at 1331 ("The Ninth Circuit has likewise held that an Item 303 violation doesn't necessarily give rise to Rule 10b-5 liability . . . We agree.") (adopting reasoning from *In re NVIDIA* to proscribe § 10(b) private actions for MD&A violations) (citing *NVIDIA*, 768 F.3d at 1054).

[55]*Oran*, 226 F.3d at 287.

[56]*Id*. at 288.

[57]*Id*.

[58]Compare *id*. (stating that MD&A violations "do not *automatically* give rise to a material omission under Rule 10b-5") *with In re NVIDIA*, 768 F.3d at 1055–56 (holding that "Item 303 does not create a duty to disclose for purposes of Section 10(b) and Rule 10b-5" and thereby proscribing private § 10(b) claims based on the omission of material information in the MD&A) (citing *Oran*, 226 F.3d at 288), *and Stratte-McClure* 776 F.3d at 104 ("Contrary to the Ninth Circuit's implication that *Oran* compels a conclusion that Item 303 violations are never actionable under 10b-5, *Oran* actually suggested, without deciding, that in certain instances a violation of Item 303 could give rise to a material 10b-5 omission.").

[59]*Oran*, 226 F.3d at 279–281 (detailing studies by a Belgian cardiologist, adverse reaction reports by patients, and research by the Mayo Clinic and MeritCare Health Systems which confirmed adverse cardiac effects of weight-loss drugs). According to the allegations pleaded in the complaint, AHP was aware of these problems for years before the information was disclosed to the public. See *id*. at 281 ("[O]n March 27, 1997, AHP issued its Annual Report, which contained a statement that 'Redux, the first prescription weight-loss drug to be cleared by the FDA in more than 20 years, was one of the most successful drug launches ever.' . . . The report contained no reference to either the European or the Mayo data.").

[60]*Id*. at 280 (describing withdrawal of Pondimin and Redux from the market and the effects thereof on AHP's stock price).

[61]See *Oran*, 226 F.3d at 283 (noting that when the Mayo data was disclosed, there was "no appreciable negative effect on the company's stock price; in fact, AHP's share price rose by $3.00 during the four days after the Mayo disclosure.").

[62]*Id*. at 281.

[63]*Id*.

[64]*Oran*, 226 F.3d at 287.

[65]*Id*. at 287–88.

[66]*Id*. at 288.

[67]*Oran*, 226 F.3d at 287–88.

[68]*Id*. at 289 (citing *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 402, Fed. Sec. L. Rep. (CCH) P 99510, 1997 Fed. App. 0244P (6th Cir. 1997); *In re Boston Technology, Inc. Securities Litigation*, 8 F. Supp. 2d 43, 67, Fed. Sec. L. Rep. (CCH) P 90174 (D. Mass. 1998); *In re Canandaigua Securities Litigation*, 944 F.

Supp. 1202, 1209 n.4, Fed. Sec. L. Rep. (CCH) P 99355 (S.D. N.Y. 1996); *In re F & M Distributors, Inc. Securities Litigation*, 937 F. Supp. 647, 654, Fed. Sec. L. Rep. (CCH) P 99, 211 (E.D. Mich. 1996)**;** *Kriendler v. Chemical Waste Management, Inc.*, 877 F. Supp. 1140, 1157, Fed. Sec. L. Rep. (CCH) P 98, 641, 32 Fed. R. Serv. 3d 242 (N.D. Ill. 1995)).

[69]*Oran*, 226 F.3d at 288 (citing *Basic*, 485 U.S. at 237).

[70]*Id*. at 288 (citing Exch. Act Release No. 34-26831, 54 Fed. Reg. 22430 n.27). Notably, the SEC's 1989 concept release on MD&A, cited in *Oran*, only stated that *Basic*'s test was inapposite to *disclosure* under Item 303. It did not deny the existence of a duty to disclose for purposes of Rule 10b-5 liability—indeed, it should be apparent that if *more* information is material for Item 303 disclosure, then *some* of that information will be material under § 10(b).

[71]*Id*. (citing *Alfus v. Pyramid Technology Corp.*, 764 F. Supp. 598, 608, Fed. Sec. L. Rep. (CCH) P 96254 (N.D. Cal. 1991); *Sofamor*, 123 F.3d at 402 *In re Quintel Entertainment Inc. Securities Litigation*, 72 F. Supp. 2d 283, 293, Fed. Sec. L. Rep. (CCH) P 90700 (S.D. N.Y. 1999); *Wilensky v. Digital Equipment Corp.*, 903 F. Supp. 173, 181 n.10, Fed. Sec. L. Rep. (CCH) P 98969 (D. Mass. 1995), aff'd in part, rev'd in part, 82 F.3d 1194, Fed. Sec. L. Rep. (CCH) P 99217, 35 Fed. R. Serv. 3d 55 (1st Cir. 1996); Kriendler, 877 F. Supp. at 1157).

[72]*Oran*, 226 F.3d at 288 (emphasis added).

[73]See sources cited note 26 supra.

[74]*Oran*, 226 F.3d at 282 ("When a stock is traded in an efficient market, the materiality of disclosed information may be measured post hoc by looking to the movement, in the period immediately following disclosure, of the price of the firm's stock."). Here, for example, the July 8 disclosure had no negative effect on AHP's stock price. *Id*. at 283.

[75]*In re NVIDIA*, 768 F.3d at 1048–51.

[76]*Id*. at 1050 ("Between November 8, 2007, and May 22, 2008, NVIDIA filed several forms with the SEC, as required by law. According to Plaintiffs, those forms contained materially false and misleading statements, principally because they omitted information regarding the Material Set Problem."). For instance, NVIDIA's November 2007 Form 8-K claimed that its core business would continue to grow due to the centrality of GPUs, without reporting GPU issues of which NVIDIA was aware. *Id*.

[77]*In re NVIDIA*, 768 F.3d at 1050.

[78]*Id*.

[79]See *id*. ("Plaintiffs argue that these statements and others made in NVIDIA's March 21, 2008, Form 10-K and May 8, 2008, Form 8-K are materially false and misleading because NVIDIA failed to disclose reported defects in its products as well.").

[80]*In re NVIDIA*, 768 F.3d at 1055 (citing *Oran*, 226 F.3d at 288).

[81]*Id*. at 1056 (noting further that private § 10(b) plaintiffs must demonstrate defendant's violation of "a duty to disclose . . . according to the principles set forth by the Supreme Court in *Basic* and *Matrixx Initiatives*" in order to establish a claim). This restrictive holding significantly limits the efficacy of item 303's disclosure mandate, which is widely regarded as the most important item of narrative disclosure in the entire integrated disclosure framework. See, e.g., sources cited note 7 supra and accompanying text.

[82]*In re NVIDIA*, 768 F.3d at 1065.

[83]Accord. Crawford & Galaro, supra note 16, at 251.

[84]*Stratte-McClure*, 776 F.3d at 101 ("We note that our conclusion is at odds with the Ninth Circuit's recent opinion in [*NV*IDIA]").

[85]*Id*. at 97.

[86]*Id*. at 98.

[87]*Id*. at 96–98.

[88]*Stratte-McClure*, 776 F.3d at 97.

[89]*Id*.

[90]See *id*. ("Plaintiffs also allege that Defendants made material omissions in their 10-Q filings by failing to disclose the existence of the Long Position, that Morgan Stanley had sustained losses on that position in the second and third quarters of 2007, and that the company was likely to incur additional significant losses on the position in the future.").

[91]*Stratte-McClure*, 776 F.3d at 103 ("Contrary to the Ninth Circuit's implication that *Oran compels* a conclusion that Item 303 violations are never actionable under 10b-5, *Oran* actually suggested, without deciding, that in certain instances a violation of Item 303 could give rise to a material 10b-5 omission.") (emphasis in original).

[92]See *id*. (citing *Oran*, 226 F.3d at 275).

[93]To state concisely the problem with the Ninth Circuit's construction of *Oran*, the *NVIDIA* court confused a necessary condition with one that is sufficient. For example, in the conditional statement $A \supset B$ ("If A, then B"), it would be incorrect to determine $\tilde{}A, \therefore \tilde{}B$ ("Not A, therefore Not B"). It remains possible for B to occur without A; A does not "lead inevitably" to B, but neither does it foreclose its existence. The conclusion $A \supset B; \tilde{}B, \therefore \tilde{}A$ would logically follow, however. Thus, B could be true without A, but A could not be true without B. See Kieth Devlin, Sets, Functions and Logic: An Introduction to Abstract Mathematics 22–23 (3d ed. 2004).

The statement that "a violation of Item 303 'does not automatically give rise to a material omission under Rule 10b-5' " implies a very similar set of conditions, and should lead to the conclusion that a violation of Item 303 *may* give rise to a material omission under Rule 10b-5. See *Stratte-McClure*, 776 F.3d at 103 (citing Oran, 226 F.3d at 275).

[94]*Id*.

[95]*Id*. at 107–108.

[96]*Carvelli*, 934 F.3d 1307 (adopting Ninth Circuit approach to private liability under § 10(b) for Item 303 MD&A disclosure violations).

[97]Ocwen's loan servicing program, REALSERVICING, "didn't really work"—it recorded incorrect information for ninety percent of loans in its system and precipitated regulatory action by the Consumer Financial Protection Board. *Id*. at 1314. Nonetheless, Ocwen made public statements during the class period claiming that it had "invested heavily in compliance and risk management," that the firm's "operations [were] now mature and delivering improved controls and results," and that it "expect[ed] the next round of results from the National Mortgage Settlement monitor to show that [it] ha[d] made progress in improving [its] internal testing and compliance monitoring." *Id*.

[98]*Id*. at 1330.

[99]*Carvelli*, 934 F.3d at 1316 (describing how, the day that the CFPB filed a complaint against Ocwen, its stock price plummeted).

[100]*Carvelli*, 934 F.3d at 1331.

[101]*Id*. No court to date has held that Item 303 confers its own private right of action, nor does this article argue that it does so. See, e.g., *id*.; *Oran v. Stafford*, 226 F.3d 275, Fed. Sec. L. Rep. (CCH) P 91205, 55 Fed. R. Evid. Serv. 872 (3d Cir. 2000); *In re NVIDIA Corp. Securities Litigation*, 768 F.3d 1046, Fed. Sec. L. Rep. (CCH) P 98212 (9th Cir. 2014); *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, Fed. Sec. L. Rep. (CCH) P 98340 (2d Cir. 2015), for additional opinion, see, 598 Fed. Appx. 25, Fed. Sec. L. Rep. (CCH) P 98341 (2d Cir. 2015) and (abrogated by, Macquarie Infrastructure Corporation v. Moab Partners, L. P., 601 U.S. 257, 144 S. Ct. 885, 218 L. Ed. 2d 214, Fed. Sec. L. Rep. (CCH) P 101845 (2024)).

[102]*Carvelli*, 934 F.3d at 1331.

[103]*Indiana Public Retirement System v. SAIC, Inc.*, 818 F.3d 85, 94, Fed. Sec. L. Rep. (CCH) P 99048 (2d Cir. 2016).

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

[105]Oral argument was completed in *Macquarie* on January 16, 2024, and the Court rendered its decision on April 12. See *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, Cornell L. Sch. Legal Info. Inst., https://www.law.cornell.edu/supct/cert/22-1165 (last visited Apr. 17, 2024); *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, SCOTUSblog, https://www.scotusblog.com/case-files/cases/macquarie-infrastructure-corp-v-moab-partners-l-p/ (last visited Apr. 17, 2024) (summarizing docket and procedural status of the case).

[106]144 S. Ct. 479 *City of Riviera Beach General Employees Retirement System v. Macquarie Infrastructure Corporation*, Fed. Sec. L. Rep. (CCH) P 101226, 2021 WL 4084572 *1, (S.D. N.Y. 2021), vacated and remanded, Fed. Sec. L. Rep. (CCH) P 101824, 2022 WL 17815767 (2d Cir. 2022), cert. granted, 144 S. Ct. 479, 216 L. Ed. 2d 1312 (2023) and vacated and remanded, 601 U.S. 257, 144 S. Ct. 885, 218 L. Ed. 2d 214, Fed. Sec. L. Rep. (CCH) P 101845 (2024) and aff'd in part, vacated in part, remanded, 2024 WL 3867669 (2d Cir. 2024) and aff'd in part, vacated in part, remanded, 2024 WL 4356386 (2d Cir. 2024).

[107]*Moab Partners, L.P. v. Macquarie Infrastructure Corporation*, Fed. Sec. L. Rep. (CCH) P 101824, 2022 WL 17815767 *1 (2d Cir. 2022), cert. granted, 144 S. Ct. 479, 216 L. Ed. 2d 1312 (2023) and vacated and remanded, 601 U.S. 257, 144 S. Ct. 885, 218 L. Ed. 2d 214, Fed. Sec. L. Rep. (CCH) P 101845 (2024).

[108]*IMO 2020—Cutting Sulphur Oxide Emissions*, Int'l Maritime Org., https://www.imo.org/en/MediaCentre/HotTopics/Pages/Sulphur-2020.aspx (last visited Mar. 8, 2024).

[109]*City of Riviera Beach Gen. Emps. Ret. Sys., No. 18-CV-3608 (VSB)*, 2021 WL 4084572, at *4.

[110]*Id*. ("On February 22, 2018, MIC held an earnings call in which its new CEO . . . said that MIC's financial downturn was in large part due to the 'structural decline in the 6 oil market.' [Macquarie CEO] said that '[i]n December [2017] and early January [2018],' many of IMTT's customers 'terminated contracts for a significant amount of 6 oil capacity' " . . . "and even 'shut down their operations and exited the industry.' . . . That same day, MIC's stock price fell around 41%, from a price of $63.62 per share the previous day to $37.41.").

[111]*City of Riviera Beach Gen. Emps. Ret. Sys., No. 18-CV-3608 (VSB)*, 2021 WL 4084572, *6.

[112]*Id*. at *1.

[113]*Macquarie Infrastructure Corp., No. 21-2524*, 2022 WL 17815767, at *1.

[114]*Moab Partners, L.P. v. Macquarie Infrastructure Corporation*, Fed. Sec. L.

Rep. (CCH) P 101824, 2022 WL 17815767 *3 (2d Cir. 2022), cert. granted, 144 S. Ct. 479, 216 L. Ed. 2d 1312 (2023) and vacated and remanded, 601 U.S. 257, 144 S. Ct. 885, 218 L. Ed. 2d 214, Fed. Sec. L. Rep. (CCH) P 101845 (2024).

[115]*Macquarie*, 601 U.S. at 259–260 (emphasis added).

[116]See Section III supra (detailing circuit court division over, *inter alia*, whether Item 303 imposes a duty to disclose for purposes of a Rule 10b-5 claim and the compatibility of Item 303's materiality standard with Rule 10b-5's).

[117]Transcript of Oral Argument at 49, *Macquarie Infrastructure Corporation v. Moab Partners, L.P.*, 144 S. Ct. 479, 216 L. Ed. 2d 1312 (2023) (No. 22-1165) (explaining that the meaning of "material" for the purpose of Item 303 disclosure is distinct from the *Basic* materiality analysis which must be performed to determine whether an omission is actionable under § 10(b) and Rule 10b-5); see also Macquarie, 601 U.S. at 265 (duty and materiality were not dispositive in the Court's analysis).

[118]See, e.g., Transcript of Oral Argument at 4, 9–10, 20, *Macquarie Infrastructure Corporation v. Moab Partners, L.P.*, 144 S. Ct. 479, 216 L. Ed. 2d 1312 (2023) (No. 22-1165).

[119]See, e.g., *id*. at 28 (noting concerns regarding potential overbreadth of liability for pure omissions under Rule 10b-5(b)). Notably, at oral argument, counsel for Macquarie made no fewer than 10 separate appeals to the text of Rule 10b-5(b) and its statement requirement. See generally *id*.

[120]Compare Securities Act § 11, 15 U.S.C.A. § 77k (establishing strict liability for registration statements "contain[ing] an untrue statement of a material fact or omitt[ing] to state a material fact required to be stated therein *or* necessary to make the statements therein not misleading") (emphasis added) *with* 17 C.F.R. § 240.10b-5 (prohibiting any "untrue statement of a material fact or [omission of] a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading"). Given this case's focus on textual comparison, this line of reasoning was evidently persuasive. But see *Zandford*, 535 U.S. at 819 (reasoning that § 10(b) must not be construed "technically and restrictively, but flexibly to effectuate its remedial purposes").

[121]Transcript of Oral Argument at 43, *Macquarie Infrastructure Corporation v. Moab Partners, L.P.*, 144 S. Ct. 479, 216 L. Ed. 2d 1312 (2023) (No. 22-1165) ("[W]hy is there a difference in 10(b) and . . . Section 11 then? . . . When you're required to state something and you don't state it, Section 11 says there's liability? We have different language in 10b-5. So how do you account for that?").

[122]Transcript of Oral Argument at 60, *Macquarie Infrastructure Corporation v. Moab Partners, L.P.*, 144 S. Ct. 479, 216 L. Ed. 2d 1312 (2023) (No. 22-1165).

[123]See *id*. (noting reluctance to broadly construe the judicially created implied right of action under § 10(b) to capture pure omissions of information required to be disclosed by Item 303); see also Kimberly Strawbridge Robinson, *Supreme Court Signals Narrow Ruling on Securities Liability*, Bloomberg L. (Jan. 16, 2024, 1:06 PM), https://news.bloomberglaw.com/us-law-week/supreme-court-signals-narrow-ruling-on-securities-liability (observing that oral argument in *Macquarie* lends credence to the belief that a narrow ruling on § 10(b) omissions liability for Item 303 MD&A violations is forthcoming).

[124]Macquarie, 601 U.S. at 259.

[125]For such a factually and conceptually detailed dispute, the Court's opinion weighed in at less than eight full pages. See generally *id*.

[126]Accord. Transcript of Oral Argument at 7, *Macquarie Infrastructure Corporation v. Moab Partners, L.P.*, 144 S. Ct. 479, 216 L. Ed. 2d 1312 (2023)

(No. 22-1165) (At oral argument, Chief Justice Roberts even observed in an exchange with counsel for Macquarie that "the distinction you draw between sort of half-truths and omissions strikes me as one that might be hard to apply in practice."). Nonetheless, this is the standard which the Court adopted. See generally Macquarie, 601 U.S. 263–265.

[127]*Macquarie*, 601 U.S. at 263 (emphasis added).

[128]*Id*. (citing *Universal Health Services, Inc. v. U.S.*, 579 U.S. 176, 188, 136 S. Ct. 1989, 195 L. Ed. 2d 348, 41 I.E.R. Cas. (BNA) 709 (2016); *Omnicare, Inc. v. Laborers Dist. Council Const. Industry Pension Fund*, 575 U.S. 175, 192, 135 S. Ct. 1318, 191 L. Ed. 2d 253, Fed. Sec. L. Rep. (CCH) P 98411 (2015) ("[L]iteral accuracy is not enough: An issuer must as well desist from misleading investors by saying one thing and holding back another")).

[129]Schneider, supra note 7, at 150; Steinberg, supra note 7, at 210; Loss et al., supra note 6, at 294; Hazen, supra note 7, at 125.

[130]Further, it is facially contrary to the purpose of Rule 10b-5(b), which was enacted to close these types of loopholes. See, e.g., Stock Exchange Regulation: Hearings on H.R. 7852 and H.R. 8720 Before the House Committee on Interstate and Foreign Commerce, 73d Cong. 115 (1934).

[131]*Macquarie*, 601 U.S. at 263 n.2 ("The Court does not opine on issues that are either tangential to the question presented or were not passed upon below, including what constitutes 'statements made,' when a statement is misleading as a half-truth, or whether Rules 10b-5(a) and 10b-5(c) support liability for pure omissions."); see Section V.A infra.

[132]*Macquarie*, 601 U.S. at 260 (emphasis added); but see 15 U.S.C.A. § 78j (prohibiting "any person . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange *or any security not so registered, or any securities-based swap agreement* any manipulative or deceptive device or contrivance") (emphasis added); 17 C.F.R. § 240.10b-5 (applying to "the purchase or sale of *any s*ecurity") (emphasis added).

[133]See, e.g., *Huddleston*, 459 U.S. at 382.

[134]See, e.g., Stock Exchange Regulation: Hearings on H.R. 7852 and H.R. 8720 Before the House Committee on Interstate and Foreign Commerce, 73d Cong. 115 (1934).

[135]See 15 U.S.C.A. § 78j (prohibiting "any person . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange *or any security not so registered, or any securities-based swap agreement* any manipulative or deceptive device or contrivance") (emphasis added); 17 C.F.R. § 240.10b-5 (applying to "the purchase or sale of *any security*") (emphasis added).

[136]Macquarie, 601 U.S. at 264 (citing 6 Oxford English Dictionary 857 (1933) (def. 3) (defining "statement" as a "written or oral communication setting forth facts, arguments, demands, or the like"); Webster's New International Dictionary 2461 (2d ed. 1942) (defining "statement" as the "[a]ct of stating, reciting, or presenting, orally or on paper")).

[137]See *id*.

[138]See, e.g., 6 Oxford English Dictionary 857 (1933) (def. 3); Webster's New International Dictionary 2461 (2d ed. 1942) (defining statement without speaking to the length, specificity, or complexity thereof).

An intriguing present-day corollary to the court's definitional analysis is that the current first definition of "statement" provided by Webster's Dictionary is "something stated: such as . . . *a report of facts or opinions*." See *Statement:*

Definition and Meaning, Merriam-Webster, https://www.merriam-webster.com/dictionary/statement (last visited Apr. 19, 2024). While not dispositive of proper statutory interpretation in this specific context, the present-day definition is entirely consistent with the definition of "statement" in Webster's 1942 dictionary.

[139]As a somewhat pointed example, this article itself, as a whole, is a "statement:" It is a statement that, with all due respect to the Court, *Macquarie*'s holding is flawed and its rationale is inconsistent. Accord. 6 Oxford English Dictionary 857 (1933) (def. 3); Webster's New International Dictionary 2461 (2d ed. 1942).

[140]See *Universal Health Services, Inc. v. U.S.*, 579 U.S. 176, 188, 136 S. Ct. 1989, 195 L. Ed. 2d 348, 41 I.E.R. Cas. (BNA) 709 (2016) (noting that actionable half-truths under Rule 10b-5(b) are "representations that state the truth only so far as it goes, while omitting critical qualifying information").

[141]The Canon Against Surplusage states that "[i]f possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." See, e.g., Bryan A. Garner & Antonin Scalia, *A Dozen Canons of Statutory and Constitutional Text Construction*, 99:2 Lastly (2015), *available at* https://judicature.duke.edu/articles/a-dozen-canons-of-statutory-and-constitutional-text-construction/.

[142]Compare 15 U.S.C.A. § 77k (applying specifically to registration statements) *with* 17 C.F.R. § 240.10b-5 (applying to "the purchase or sale of *any security*") (emphasis added).

[143]15 U.S.C.A. § 77k.

[144]*Id*. (premising liability solely upon the presence of a disclosure deficiency and not any party's state of mind).

[145]17 C.F.R. § 240.10b-5; 15 U.S.C.A. § 78j (applying to "any person, directly or indirectly").

[146]See Section II.B. supra (describing necessary elements for a private claim under § 10(b)).

[147]Macquarie, 601 U.S. at 265 (citing *Chiarella*, 445 U.S. at 234–35).

[148]*Chiarella*, 445 U.S. at 235.

[149]See, e.g., *Appvion, Inc. Retirement Savings and Employee Stock Ownership Plan by and through Lyon v. Buth*, 99 F.4th 928 (7th Cir. 2024). In *Appvion*, the Seventh Circuit dismissed plaintiff's securities fraud claims under Rule 10b-5 for misleading information contained in defendant's periodic reports, which allegedly misrepresented Appvion, Inc.'s value. In support of its holding, the court misconstrued *Macquarie* as standing for the proposition that "pure omissions are insufficient to show a violation of SEC Rule 10b-5, which prohibits fraud." *Id*. at 942; *but see Macquarie*, 601 U.S. at 266 n.2 (declining to rule on whether pure omissions are actionable under Rule 10b-5(a) or (c), and clarifying that the Court's holding was limited only to Rule 10b-5(b)).

See also *Alcarez v. Akorn, Inc.*, 99 F.4th 368, 373 (7th Cir. 2024), cert. denied, 220 L. Ed. 2d 142, 2024 WL 4486385 (U.S. 2024) ("nondisclosure does not violate Rule 10b-5") (citing *Macquarie*, 601 U.S. 257). While the *Alcarez* court did not rule on 10b-5 but cited *Macquarie* in an argument by analogy in the context of mootness fees, this interpretation of *Macquarie* exceeds the scope of the Court's ruling and is detrimental to securities fraud plaintiffs and the very integrity of the integrated disclosure framework. See *id*.

[150]*Macquarie*, 601 U.S. at 266 n.2 ("The Court does not opine on issues that are either tangential to the question presented or were not passed upon below, including what constitutes 'statements made,' when a statement is misleading as a half-truth, or whether Rules 10b-5(a) and 10b-5(c) support liability for pure omissions.").

[151]*Macquarie*, 601 U.S. at 266.

[152]Transcript of Oral Argument at 26–27, *Macquarie Infrastructure Corporation v. Moab Partners, L.P.*, 144 S. Ct. 479, 216 L. Ed. 2d 1312 (2023) (No. 22-1165) ("The SEC has a few hundred employees that are tasked with reviewing tens of thousands of forms from registered companies each year, and it's simply not realistic to think that those employees will be able to routinely detect, investigate, and penalize the many disclosure violations that are taking place.").

[153]See *Macquarie*, 601 U.S. at 263.

[154]See *id*. at 265 ("Even a duty to disclose, however, does not automatically render silence misleading under Rule 10b-5(b).").

Notably, other avenues remain, such as Rules 10b-5(a) and (c), which address omission and scheme liability. 17 C.F.R. § 240.10b-5(a), (c); see also Section V.A infra. Further, the SEC retains the ability to enforce violations of the reporting obligations of § 13 of the Exchange Act, as well as § 17(a)(2) of the Securities Act—and negligence is a sufficient mental state for culpability under these provisions, rather than § 10(b)'s scienter standard. See generally 15 U.S.C.A. § 78m; 15 U.S.C.A. § 77q. However, because Rule 10b-5 actions allow for greater penalties, they are likely a more effective deterrent to violators.

[155]Transcript of Oral Argument at 26–27, *Macquarie Infrastructure Corporation v. Moab Partners, L.P.*, 144 S. Ct. 479, 216 L. Ed. 2d 1312 (2023) (No. 22-1165) ("If accepted, Petitioners' argument would create a roadmap for fraud." Counsel further argued that Macquarie "knew they were about to lose a substantial part of their business but kept their stock price artificially inflated by deliberately withholding information about their readiness to comply with an important rule change. When the truth emerged, their stock price fell by more than 40 percent in one day.").

[156]See *Macquarie*, 601 U.S. at 266 n.2. The Court's reluctance to extend further limitations on the Rule 10b-5 private action is telling, although *Macquarie*'s holding can (and has) been read as having broader implications. See, e.g., *Appvion*, 99 F.4th at 942; Alcarez, 99 F.4th at 373.

[157]See Section V.A infra.

[158]See Section V.B.1-2 infra.

[159]This short modification would thus render subsection (b)'s text to read: "To make any untrue statement of a material fact or to omit to state a material fact [either required to be stated therein or] necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . ." See 17 C.F.R. § 240.10b-5; *Macquarie*, 601 U.S. at 264, 265 (construing § 11's "required to be stated" language as covering pure omissions).

[160]See 13 Fed. Reg. 8177-01 (1948). The most recent amendment to Rule 10b-5 came in 1952, which changed on the Rule's caption and thereby clarified its broad applicability. See 16 Fed. Reg. 7928-01 (1952) (removing "by any purchaser of a security" from the caption of Rule 10b-5 to clarify its broad scope).

[161]See generally *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 128 S. Ct. 761, 169 L. Ed. 2d 627, Fed. Sec. L. Rep. (CCH) P 94556

(2008); *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135, 131 S. Ct. 2296, 180 L. Ed. 2d 166, Fed. Sec. L. Rep. (CCH) P 96327 (2011).

[162]See *Macquarie*, 601 U.S. at 265 (noting concerns about rendering "required to be stated" language in § 11 superfluous).

[163]By way of example, in response to the Supreme Court's decision in *Santa Fe Industries, Inc. v. Green*, which held that substantive fairness was a tangential concern to the federal framework, the SEC adopted Rule 13e-3, which mandates that a subject party disclose whether it reasonably believes that a short-form merger or going private transaction is fair or unfair to its shareholders, as well as the material factors upon which the transaction is based. See *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 97 S. Ct. 1292, 51 L. Ed. 2d 480, Fed. Sec. L. Rep. (CCH) P 95914 (1977); 17 C.F.R. § 240.13e-3. In essence, the SEC mandated substantive fairness in the going-private context under the guise of disclosure—if management lied about the fairness of the transaction, then aggrieved shareholders and the SEC now have a cause of action. 17 C.F.R. § 240.13e-3; see, e.g., *Howing Co. v. Nationwide Corp.*, 826 F.2d 1470, Fed. Sec. L. Rep. (CCH) P 93340 (6th Cir. 1987) (holding that failure to adequately describe fairness of going private transaction in proxy statement did not comply with Rule 13e-3's disclosure mandate).

[164]See Crawford & Galaro, *supra* note 16, at 256 ("First, Item 303 creates a duty to disclose, the breach of which—even considering the safe harbor protections—can be a material omission under Rule 10b-5. Second, the rift between courts over materiality standards is unnecessary because the two available tests are not mutually exclusive. Third, allowing private Rule 10b-5 claims based on an Item 303 omission is in line with the policies that underlie Rule 10b-5.").

[165]*Basic*, 485 U.S. at 239 n.17 ("Silence, *absent a duty to disclose*, is not misleading under Rule 10b-5.") (emphasis added).

[166]Interestingly, in its holding that pure omissions in the MD&A were not actionable under Rule 10b-5(b), the Supreme Court implied that Item 303 *does* create a duty to disclose (although it states that more is required for an actionable omission under the subsection (b)). *Macquarie*, 601 U.S. at 265 ("Even a duty to disclose, however, does not automatically render silence misleading under Rule 10b-5(b).").

[167]Accord. Crawford & Galaro, *supra* note 16, at 256.

[168]*Macquarie*, 601 U.S. at 265, 266 n.2 (holding that Rule 10b-5(b)'s language does not capture pure omissions, but specifically stating that no ruling was being made as to whether subsections (a) or (c) did). Because these subsections do not have the same qualifying language as 10b-5(b), it is probable that, even under *Macquarie*, omission liability remains for certain private actions under § 10(b). See *id*.

[169]17 C.F.R. § 240.10b-5(a), (c).

[170]See *Lorenzo v. Securities and Exchange Commission*, 587 U.S. 71, 139 S. Ct. 1094, 203 L. Ed. 2d 484, Fed. Sec. L. Rep. (CCH) P 100382 (2019) (holding that scheme liability subsections of Rule 10b-5 contemplate dissemination of affirmative misstatements).

[171]*Macquarie*, 601 U.S. at 264 ("Rule 10b-5(b) does not proscribe pure omissions. The Rule prohibits omitting material facts necessary to make the 'statements made . . . not misleading.' Put differently, it requires disclosure of information necessary to ensure that statements already made are clear and complete.") (quoting 17 C.F.R. § 240.10b-5(b)).

[172]*S.E.C. v. Familant*, 910 F. Supp. 2d 83, 94, Fed. Sec. L. Rep. (CCH) P

97243 (D.D.C. 2012) (quoting *Aaron*, 446 U.S. at 696 n.13 (1980) (citing Webster's International Dictionary (2d ed. 1934)) (cleaned up); Olson, Publicly Traded Corporations Handbook, Scheme Liability § 16:18 (2023-2 ed.).

[173]*Desai v. Deutsche Bank Securities Ltd.*, 573 F.3d 931, 940–941, Fed. Sec. L. Rep. (CCH) P 95300 (9th Cir. 2009).

[174]Olson, supra note 171, at § 16:18 (citations omitted).

[175]*Affiliated Ute Citizens of Utah v. U. S.*, 406 U.S. 128, 92 S. Ct. 1456, 31 L. Ed. 2d 741, Fed. Sec. L. Rep. (CCH) P 93443 (1972).

[176]*Affiliated Ute*, 406 U.S. at 152–154.

[177]*Id*. at 152.

[178]*Id*. ("We do not read Rule 10b-5 so restrictively.").

[179]*Affiliated Ute*, 406 U.S. at 153.

[180]*Id*.

[181]*S.E.C. v. Zandford*, 535 U.S. 813, 122 S. Ct. 1899, 153 L. Ed. 2d 1, Fed. Sec. L. Rep. (CCH) P 91795 (2002).

[182]*Id*. at 815–16.

[183]*S.E.C. v. Zandford*, 238 F.3d 559, Fed. Sec. L. Rep. (CCH) P 91311 (4th Cir. 2001), rev'd, 535 U.S. 813, 122 S. Ct. 1899, 153 L. Ed. 2d 1, Fed. Sec. L. Rep. (CCH) P 91795 (2002).

[184]*Zandford*, 535 U.S. at 822–23.

[185]*Id*. at 822.

[186]*Id*.

[187]*Id*. at 823.

[188]*See generally* Am. Jur. 2d, Corporations § 1431 ("[O]fficers who participate in the management of the corporation and directors are considered fiduciaries of the corporation and its shareholders. Stated another way, corporate officers and directors stand in a fiduciary relationship with the corporation and shareholders, and they owe a fiduciary duty . . . to the shareholders and corporation which is in the nature of a trust relationship requiring a high degree of care.") (internal citations omitted).

[189]*Accord. Zandford*, 535 U.S. at 823; *Chiarella*, 445 U.S. at 230 (noting that "silence in connection with the purchase or sale of securities may operate as a fraud actionable under § 10(b)" when there is "a duty to disclose arising from a relationship of trust and confidence between parties to a transaction"); *Affiliated Ute*, 406 U.S. at 153.

[190]*Macquarie*, 601 U.S. at 266.

[191]Patrick Fuster et al., *Supreme Court Holds That Pure Omissions Cannot Support A Cause Of Action Under Rule 10b-5(b)*, Gibson Dunn (Apr. 12, 2024), https://www.gibsondunn.com/supreme-court-holds-that-pure-omissions-cannot-support-cause-of-action-under-rule-10b-5b/ ("Although the Court framed the question presented in terms of "private" rights of action, the Court's interpretation of Rule 10b-5(b) does not appear to be limited to that context. Accordingly, the Court's decision likely means that the SEC itself also will not be able to bring enforcement actions alleging fraud under Rule 10b-5(b) based on a pure omission theory. The Court did make clear, however, that the SEC retains authority to prosecute violations of Item 303 and the SEC's other regulations that mandate what disclosures must be made in public filings.").

[192]Crawford & Galaro, supra note 16, at 257 (citing *Disclosure in Management's Discussion and Analysis About the Application of Critical*

Accounting Policies, Exchange Act Release No. 34-45907, 2002 WL 970847, *47 (May 10, 2002)) (noting that forward-looking statements made in the MD&A are within the PSLRA's safe harbor from private liability under specific conditions).

[193]17 C.F.R. § 230.175; 17 C.F.R. § 240.3b-6.

[194]*Id*. § 230.175(c)(3).

[195]C.F.R. § 229.303(c) (applying the PSLRA's safe harbor to off-balance sheet arrangements and tabular disclosures of contractual obligations).

[196]§ 78u-5(c)(1)(A)–(B) (2012).

[197]See Section II.B supra (discussing the rigors of proving necessary elements in a private § 10(b) claim).

[198]*Id*.

[199]See *id*.

[200]See Hazen, supra note 36, § 12:70 (considering Regulation S-K's risk factor disclosure requirements and collecting cases so stating).

[201]17 C.F.R. § 229.105.

[202]*Yan v. ReWalk Robotics Ltd.*, 973 F.3d 22, 33, Fed. Sec. L. Rep. (CCH) P 100891, 107 Fed. R. Serv. 3d 1250 (1st Cir. 2020) (quoting *Silverstrand Investments v. AMAG Pharmaceuticals, Inc.*, 707 F.3d 95, 103, Fed. Sec. L. Rep. (CCH) P 97279 (1st Cir. 2013)).

[203]*Huddleston*, 459 U.S. at 382 (emphasis in original) (quoting § 10(b) of the Securities Exchange Act, 15 U.S.C.A. § 78j(b)).

[204]15 U.S.C.A. § 78j (enabling promulgation of "such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors"); 15 U.S.C.A. § 78t (providing for liability for persons who control any party that violates "any provision of [the Exchange Act] or [] any rule or regulation thereunder").

[205]See Steinberg, supra note 7 (noting that Item 303's mandate to disclose forward-looking information is singular among the securities laws' narrative disclosure obligations).

[206]Accord. Crawford & Galaro, *supra* note 16, at 250 (noting that the materiality standards of the 1989 release are not "not particularly clear, and much of the nuances of Item 303 are still foggy").

[207]Accord. J. Anthony Terrell, Materiality in Review—Probability, Magnitude, and The Reasonable Investor 1 (Bracewell 2021) (describing practical difficulties of navigating multiple different standards of materiality); Crawford & Galaro, *supra* note 16, at 247, 250.

[208]This consistency would be a boon to practitioners and the organizations that they represent. See generally Terrell, supra note 206, at 1.

[209]*See* Form 10-K, AT&T Inc. 19–37, *available at* https://www.sec.gov/Archives/edgar/data/732717/000073271724000009/t-20231231.htm#i0d1299523118453887937316 6b6a2300_70.

[210]See SEC Release Nos. 33-10825; 34-89670 at 71.

[211]See generally Valerie Jacob et al., *New Wave of Regulation S-K Amendments*, Harv. L. Sch. F. on Corp. Gov. (Dec. 22, 2020), https://corpgov.law.harvard.edu/2020/12/22/new-wave-of-regulation-s-k-amendments/ (describing new amendments to Regulation S-K adopted with the intent of streamlining and modernizing Regulation S-K's disclosure requirements, as well as ensuring greater consistency within the integrated disclosure framework).

[212]See Coffee, When Do Omissions Create Private Liability? The Supreme Court Ponders, N.Y. L.J. (Jan. 17, 2024), https://www.law.com/newyorklawjournal/2024/01/17/when-do-omissions-create-private-liability-the-supreme-court-ponders/ (stating that *Macquarie* "is an attack on private enforcement, itself," and has the potential to "overrule cases going back to *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). Much then is at stake.").

[213]See Fuster et al., supra note 191.

[214]*Macquarie*, 601 U.S. at 266 n.2 (leaving open the possibility of private actions for pure omissions under Rule 10b-5's scheme liability subsections).

[215]See Section V.A supra.

[216]See Section V.B.1 supra.

[217]See Section V.B.2 supra.

[218]*Macquarie*, 601 U.S. at 264.