APPENDIX

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APPENDIX A

21-2524
City of Riviera Beach General Employees Retirement System et al. v. Macquarie Infrastructure Corporation et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of December, two thousand twenty-two.

PRESENT:

PIERRE N. LEVAL,
REENA RAGGI,
MYRNA PÉREZ,
Circuit Judges.

Moab Partners, L.P.,

Lead Plaintiff-Appellant,

City of Riviera Beach General Employees Retirement System, *on behalf of itself and all others similarly situated*,

Plaintiff,

v. No. 21-2524

Macquarie Infrastructure Corporation, James Hooke, Jay Davis, Liam Stewart, Richard D. Courtney, Barclays Capital Inc., Robert Choi, Martin Stanley, Norman H. Brown, Jr., George W. Carmany, III, Henry E. Lentz, Ouma Sananikone, William H. Webb, Macquarie Infrastructure Management (USA) Inc.,

Defendants-Appellees.

FOR LEAD PLAINTIFF-APPELLANT:	SALVATORE J. GRAZIANO, Lauren A. Ormsbee, Jesse L. Jensen, James M. Fee, Bernstein Litowitz Berger &

Grossmann LLP, New York, NY.

FOR DEFENDANTS-APPELLEES:

Macquarie Infrastructure Corporation, James Hooke, Jay Davis, Liam Stewart, Richard D. Courtney, Robert Choi, Martin Stanley, Norman H. Brown, Jr., George W. Carmany, III, Henry E. Lentz, Ouma Sananikone, and William H. Webb

JOHN E. SCHREIBER, Frank S. Restagno, Winston & Strawn LLP, New York, NY.

Linda T. Coberly, Winston & Strawn LLP, Chicago, IL.

Lauren Gailey, Winston & Strawn LLP, Washington, DC.

Richard W. Reinthaler, Pinehurst, NC.

Macquarie Infrastructure Management (USA) Inc.

Christopher M. Paparella, Justin Ben-Asher, Steptoe &

Johnson LLP, New York, NY.

Barclays Capital Inc.

Susanna M. Buergel, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY

Appeal from a judgment of the United States District Court for the Southern District of New York (Vernon S. Broderick, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the October 7, 2021 judgment of the district court is **VACATED** and the case is **REMANDED** for further proceedings.

Plaintiff Moab Partners, L.P. appeals from a judgment of the United States District Court for the Southern District of New York dismissing Plaintiff's consolidated amended complaint (the "Complaint") under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Complaint alleges Defendants made material omissions and false and misleading statements regarding one of Macquarie Infrastructure Corporation's ("MIC") top-performing subsidiaries, International-Matex Tank Terminals ("IMTT"), in violation of various provisions of the Securities Exchange Act of 1934 ("Exchange Act"), the Securities Act of 1933 ("Securities Act"), and the regulations promulgated thereunder. Defendants are MIC, MIC's manager, Macquarie Infrastructure Management (USA) Inc. ("MIMUSA"), MIC's underwriter for its November 2016 secondary public offering, Barclays Capital Inc., and certain former executives and directors of MIC, IMTT, and MIMUSA.

Because we hold that Plaintiff adequately pleaded material omissions and facts giving rise to a strong inference of scienter, we vacate the judgment and remand for further proceedings. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, which we only recount in a limited manner to explain our decision.

DISCUSSION

I. Standard of Review

We review a dismissal under Rule 12(b)(6) de novo, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor. *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). In doing so, we consider "any written instrument attached to the complaint as an exhibit or any statements or documents incorporated in it by reference, as well as public disclosure documents required by law to be, and that have been, filed with the SEC, and documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit." *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 100 (2d Cir. 2015) (alterations omitted) (quoting *Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000)).

II. Material Misstatements or Omissions

The Complaint adequately alleges Defendants made material omissions and false or misleading statements. Section 10(b) of the Exchange Act (and Rule 10b-5 thereunder) and Sections 11 and 12(a)(2) of the Securities Act prohibit material omissions or misstatements in certain documents in connection with purchases and sales of securities. *See Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37 (2011)

(Section 10(b) and Rule 10b-5 claims); *see also Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 119–20 (2d Cir. 2012) (Sections 11 and 12(a)(2) claims). That said, "a corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact." *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993). Rather, as relevant here, there are two circumstances which impose a duty on a corporation to disclose omitted facts. First, "a duty [to disclose] may arise when there is . . . 'a statute or regulation requiring disclosure,'" *Stratte-McClure*, 776 F.3d at 101 (quoting *Glazer v. Formica Corp.*, 964 F.2d 149, 157 (2d Cir. 1992)), such as Items 303 and 503 of SEC Regulation S-K. Second, "[e]ven when there is no existing independent duty to disclose information, once a company speaks on an issue or topic, there is a duty to tell the whole truth." *Meyer v. JinkoSolar Holdings Co.*, 761 F.3d 245, 250 (2d Cir. 2014) (citing *Caiola v. Citibank, N.A.*, 295 F.3d 312, 331 (2d Cir. 2012)).

Plaintiff alleges that Defendants omitted material information and made affirmative misstatements, to conceal (1) the extent of IMTT's exposure to No. 6 fuel oil, which was subject to an impending regulation ("IMO 2020") and the anticipated resulting losses of revenue; (2) the fact that IMTT's customer base included speculative commodities traders who typically move in and out of the market based on short-term opportunities; (3) the extent of IMTT's need to undertake significant capital expenditures to repurpose No. 6 fuel oil storage tanks so that they would be suitable to store other liquid commodities; and (4) the related risks to MIC's historically predictable quarterly dividends (together, the "Alleged Omissions or Misstatements").

We agree with the district court that the majority of Defendants' alleged misstatements are not actionable, including several constituting non-actionable puffery or expression of corporate optimism.[1] Nonetheless, the federal securities laws require plaintiffs to adequately allege that defendants make material omissions *or* materially false or misleading statements, and we find that Plaintiff has satisfied that burden by pleading actionable omissions.

A. Affirmative Duty Under Item 303 of Regulation S-K

Plaintiff has adequately alleged a "known trend[] or uncertaint[y]" that gave rise to a duty to disclose under Item 303. *Stratte-McClure*, 776 F.3d at 101 (quoting 17 C.F.R. § 229.303(a)(3)(ii)). Item 303 requires that a company disclose certain information "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 conditions or results of operations." *Id.* (quoting Management's Discussion and Analysis of Financial Condition and Results of Operations at 13, Exchange Act Release No. 6835, 43 S.E.C. Docket 1330 (May 18, 1989) (hereinafter "SEC's Interpretive Release")); *see also* 17 C.F.R. § 229.303.

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[1]For example, certain of the identified misstatements (such as those claiming MIC's businesses had been "boringly predictable" and "just the kind of unsexy business model we want") are "too general to cause a reasonable investor to rely upon them." *ECA, Loc. 104IBEW Joint Pension Tr. of Chi. v. JP Morgan Chase Co.,* 553 F.3d 187, 206 (2d Cir. 2009). The same is true of MIC's statement describing infrastructure generally as an "inherently more stable asset class." Accordingly, on remand, the court need not consider them.

The failure to make a material disclosure required by Item 303 can serve as the basis for claims under Sections 11 and 12(a)(2), and for a claim under Section 10(b) if the other elements have been sufficiently pleaded. *See Panther Partners*, 681 F.3d at 120–22 (Sections 11 and 12(a)(2) claims); *Stratte-McClure*, 776 F.3d at 101–04 (Section 10(b) and Rule 10b-5 claim).

The SEC has explained that Item 303 requires disclosure "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." SEC's Interpretive Release at 14. Pertinently, the SEC's Interpretive Release sets forth an example relating to disclosure of "the reasonably likely material effect of a known uncertainty regarding implementation of recently adopted legislation":

> Where a trend, demand, commitment, event or uncertainty is known, management must make 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.
> >
> > (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.
>
> Each final determination resulting from the assessments made by management must be objectively reasonable, viewed as of the time the determination is made.

Id. at 19–20.

Crediting Plaintiff's allegations as true, IMO 2020's significant restriction of No. 6 fuel oil use was known to Defendants and reasonably likely to have material effects on MIC's financial condition or results of operation. In these circumstances, even if Defendants could not determine with certainty that IMO 2020 would be implemented, they were required to evaluate IMO 2020's consequences on the assumption that it would come to fruition and to disclose its potential impact unless Defendants "determine[d] that a material effect on the registrant's financial condition or results of operations is not reasonably likely to occur." *Id.* As pleaded, it would not have been "objectively reasonable" for Defendants to determine that IMO 2020 would not likely have a material effect on MIC's financial condition or operations. *See Stratte-McClure*, 776 F.3d at 102–03 (internal quotation marks omitted) (explaining that Item 303 materiality analysis requires "balancing . . . both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity" (emphases omitted) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988))).[2]

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[2] The complaint also alleged that Defendants failed to meet their disclosure obligations under Item 503 of Regulation S-K ("Item 503"), since recodified as Item 105. FAST Act Modernization and

When reviewing the sufficiency of a complaint, a district court may not dismiss for lack of materiality unless the alleged misstatements or omissions "are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance." *Litwin v. Blackstone Group, L.P.*, 634 F.3d 706, 717 (2d Cir. 2011) (quoting *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 162 (2d Cir. 2000)). As pleaded, a reasonable investor would consider the omitted information important.

B. Affirmative Duty to Disclose Information to Prevent Statements from Being Inaccurate, Incomplete, or Misleading

The district court also erred in determining that Plaintiff failed to plead any actionable omissions or "half-truths." Having chosen to speak about their base of customers, Defendants had a duty to speak accurately, giving all material facts in addressing those issues to permit investors to evaluate the potential risks. *Setzer v. Omega Healthcare Investors, Inc.*, 968 F.3d 204, 214 n.15 (2d Cir. 2020) (holding that the company need not "disclose all the facts that pertain to a subject (many of which would be immaterial), but instead [must] not . . . omit material facts whose omission, in the light of what was stated, would be misleading."). The omissions are not cured by disclosures MIC did make—including those regarding "changes in government regulations" and "capital expenditures" related to repurposing tanks—which did not reveal the information necessary for the

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Simplification of Regulation S-K, 2019 WL 1437180, at *1 (12688-89) (Apr. 2, 2019). It requires that a prospectus include a "discussion of the material factors that make an investment in the registrant or offering speculative or risky." 17 C.F.R. § 229.105(a) (formerly 17 C.F.R. § 229.503(a)(c)).

investing public to make a proper assessment of the alleged risks. *See JinkoSolar Holdings Co.*, 761 F.3d at 251 ("A generic warning of a risk will not suffice when undisclosed facts on the ground would substantially affect a reasonable investor's calculations of probability."). Accordingly, the generic cautionary language here does not satisfy Defendants' disclosure obligations.

III. Scienter

We further conclude that the Complaint adequately alleges that Defendants acted with scienter in making the material omissions or false or misleading statements. The scienter requirement may be satisfied "either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Ganino*, 228 F.3d at 168–69 (quoting *Shields v. Citytrust Bancorp.*, 25 F.3d 1124, 1128 (2d Cir. 1994)).

If we credit the allegations in the Complaint, there is sufficient circumstantial evidence that Defendants Hooke, Davis, Stewart, and Courtney were each in the unique position of knowing that IMTT had a significant portion of its storage reserved for No. 6 fuel oil, that significant upfront costs and lost revenues were associated with repurposing No. 6 oil tanks, that IMTT's customers in the shipping industry—the last remaining market for No. 6 fuel oil—would be undergoing a significant shift in the time leading up to IMO 2020's enforcement, and that it was likely that revenue contributions would be down from IMTT, MIC's "top asset and largest profit-driver." Nonetheless, these Defendants did not make

corresponding disclosures and, instead, allegedly minimized the exposure that IMTT faced from IMO 2020. *See Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000) ("[Under Second Circuit precedent], securities fraud claims typically have sufficed to state a claim based on recklessness when they have specifically alleged defendants' knowledge of facts or access to information contradicting their public statements.").

Plaintiff further alleges that discussions regarding contract renewals were likely taking place at least as early as February 2017, and that around the same time, MIC began pursuing Epic Midstream, an operator of storage terminals focused on jet fuel, in an effort to diversify its portfolio and minimize the risk posed by IMTT's reliance on No. 6 fuel oil. The timing of these events allegedly permitted Defendants to announce the Epic acquisition at the same time they announced that IMTT's utilization rates were beginning to decrease, allowing Defendants to divert attention away from IMTT's declining performance. Considering "*all* of the facts alleged, taken collectively," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323 (2007), Plaintiff adequately pleaded strong circumstantial evidence of conscious recklessness "at least as strong as any opposing inference," *id.* at 326.

IV. Control Person and Insider Trading Claims

The district court dismissed Plaintiff's claims under Section 15 of the Securities Act and Sections 20(a) and 20A of the Exchange Act based on Plaintiff's failure to plead a primary violation of securities law. *See Rombach v. Chang*, 355 F.3d 164, 177–78 (2d Cir. 2004) (explaining that control person claims brought

under Sections 15 and 20(a) are "necessarily predicated on" primary underlying violations of securities law); *see also Arkansas Pub. Emps. Ret. Sys. v. Bristol-Myers Squibb Co.*, 28 F.4th 343, 356 (2d Cir. 2022) (discussing primary violation requirement for Section 20A claims). Because we vacate and remand the district court's dismissal of Plaintiff's claims under Sections 11 and 12(a)(2) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, we similarly vacate and remand the judgment on Plaintiff's claims under Section 15 of the Securities Act and Sections 20(a) and 20A of the Exchange Act for further consideration by the district court.

CONCLUSION

We have considered all of the parties' remaining arguments and conclude they are without merit. For the foregoing reasons, we **VACATE** the judgment of the district court dismissing Plaintiff's Complaint, and we **REMAND** this case for further proceedings consistent with this order.

FOR THE COURT:

Catherine O'Hagan Wolfe,
Clerk of Court

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF RIVIERA BEACH GENERAL EMPLOYEES RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, v. MACQUARIE INFRASTRUCTURE CORPORATION, et al., Defendants.	USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: _____ DATE FILED: 9/7/2021 18-CV-3608 (VSB) **OPINION & ORDER**

VERNON S. BRODERICK, United States District Judge:

In this action, Lead Plaintiff Moab Partners, L.P. ("Plaintiff" or "Moab") asserts various securities law claims against Defendant Macquarie Infrastructure Corporation ("Macquarie" or "MIC"), Macquarie Infrastructure Management (USA) Inc. ("MIMUSA"), Barclays Capital Inc. ("Barclays"), James Hooke, Jay

Davis, Liam Stewart, Richard D. Courtney, (Hooke, Davis, Stewart and Courtney together known as the "Officer Defendants"), Robert Choi, Martin Stanley, Norman H. Brown, Jr., George W. Carmany III, Henry E. Lentz, Ouma Sananikone, and William H. Webb (together with the Officer Defendants, "Individual Defendants").[1] Plaintiff's claims center on its assertion that MIC and the other Individual Defendants made "material misrepresentations and omissions" about potential risks facing what it characterizes as MIC's "most important operating division," and specifically that Defendants were "actively conceal[ing] [MIC's] exposure" to a soon-to-be-effective environmental regulation. (CAC 1 & ¶ 1.)[2]

Currently before me are various Defendants' motions to dismiss Plaintiff's Consolidated Complaint. Because I find that Plaintiff does not plausibly allege false statements or omissions, nor does it allege facts from which to draw a strong inference of scienter, Defendants' motions to dismiss the Consolidated Complaint are GRANTED.

I. Factual Background[3]

The relevant time period for all of Plaintiff's alleged claims, the "Class Period," is February 22, 2016 to

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[1] MIMUSA, Barclays and Individual Defendants Robert Choi, Martin Stanley, Norman H. Brown, Jr., George W. Carmany III, Henry E. Lentz, Ouma Sananikone, and William H. Webb are not identified as defendants in the caption.

[2] "CAC" or "Consolidated Complaint" refers to the Consolidated Class Action Complaint for Violations of the Federal Securities Laws filed in this action. (Doc. 56.)

[3] In evaluating a motion to dismiss in a securities action, a court may consider "any written instrument attached to the complaint, statements or documents incorporated into the complaint by reference, legally required public disclosure documents filed with

February 21, 2018. (CAC ¶¶ 3, 41; Doc. 101 ("MIC MTD") at 12; Doc. 110 ("MTD Opp.") at 10.)

A. The Primary Defendants

Defendant Macquarie is a publicly traded Delaware holding company that owns and operates various infrastructure and infrastructure-related businesses. (CAC ¶ 28.) Central to the allegations in the Consolidated Complaint is what Plaintiff calls Macquarie's "most important operating division," International-Matex Tank Terminals-Bayone, Inc. ("IMTT"). (*Id.* ¶ 1.) IMTT is a wholly-owned MIC subsidiary that operates large "bulk liquid storage terminals" within the United States. (*See id.* ¶¶ 1, 33.) IMTT's terminals handle and store various liquid commodities, most notably "petroleum," but also "biofuels, chemicals, and vegetable/tropical oil products." (*Id.* ¶ 63.) IMTT does not buy and sell petroleum or other liquid products; it is solely a service provider to those who have title to various liquid products and need those products stored and handled. (*Id.* ¶¶ 37, 63.)

Just before the start of the alleged "Class Period" of February 22, 2016 to February 21, 2018, (CAC ¶¶ 3, 41; *see also* MTD Opp. 10), MIC's market capitalization was approximately $5.75 billion, with around 80,084,457 shares of common stock outstanding that had traded in the first quarter of

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the SEC, and documents possessed by or known to the plaintiff and upon which it relied in bringing the suit." *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). For the purpose of resolving this motion to dismiss, I will consider such documents, and I assume all well-pleaded facts in the Consolidated Complaint, *see supra* note 2, to be true, and draw all reasonable inferences in favor of Plaintiffs, *see Koch v. Christie's Int'l PLC*, 699 F.3d 141, 145 (2d Cir. 2012).

2016 at a high of $71.82.[4] Just before the close of the Class Period, MIC's market capitalization was still approximately $5.75 billion, with around 84,819,268 shares of common stock outstanding that had traded in the first quarter of 2018 at a high of $67.84.[5] By May of 2018, after the Class Period, MIC's market capitalization had declined to around $3.2 billion.[6]

Defendant MIMUSA acts as MIC's manager. (CAC ¶ 29.) Through a management service agreement with MIC, MIMUSA assigns its employees to work at MIC as MIC's officers. (*Id.*) MIMUSA is compensated based on how MIC performs financially, which considers factors including MIC's market capitalization. (*Id.* ¶ 58.)

Defendants Hooke and Stewart were both MIMUSA employees assigned to work as MIC officers; Hooke served as Chief Executive Officer ("CEO") of MIC from May 8, 2009 to December 31, 2017, and Stewart has served as Chief Financial Officer ("CFO") of MIC since June 2015. (*Id.* ¶¶ 29, 30, 32.) Since 2008, Defendant Davis has been MIC's Head of Investor Relations and a Vice President of MIC, (*id.* ¶ 31), and Defendant Courtney has served as CEO and President of IMTT since February 2015, (*id.* ¶ 33).

B. MIC's Business in No. 6 Fuel Oil

The disputes in this case arise out of MIC's business, through IMTT, in storing a category of refined petroleum known as "No. 6 fuel oil." (*Id.* ¶¶ 1,

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[4] *See* Macquarie Infrastructure Co., Annual Report (Form 10-K), at 51 (Feb. 23, 2016).

[5] *See* Macquarie Infrastructure Co., Annual Report (Form 10-K), at 54 (Feb. 21, 2018).

[6] *MIC Market Cap History*, https://www.marketcaphistory.com/mic/ (last visited Sept. 3, 2021).

109.) No. 6 fuel oil refers to a "group of heavy and residual fuel oils" that "are generally what is left in the bottom of the barrel at the end of petroleum refinement process." (*Id.* ¶ 81.) Because No. 6 fuel oil has various environmentally noxious qualities, including a relatively high percentage sulfur content compared to other oils, governments and other institutions with regulatory authority have sought to limit or ban No. 6 fuel oil's use for over a decade. (*See id.* ¶¶ 87–88, 91.) Regulation has led to declines in the usage of No. 6 fuel oil, though this "the decline in residual fuel oil usage [was] masked by increase in its use as a fuel for maritime bunkering."[7] (*Id.* ¶ 89.) Indeed, "large shipping vessels" were generally thought of as the main users of No. 6 fuel oil by the start of the Class Period. (*Id.*)

According to the allegations in the Consolidated Complaint, the use of No. 6 fuel oil was threatened by a pending regulation known as "IMO 2020." First adopted in October 2008 by the International Maritime Organization ("IMO"), the United Nations body charged with regulating global shipping, IMO 2020 sought to ban the use of fuels with a sulfur content of 0.5% or more by the beginning of 2020. (*See id.* ¶¶ 90–91.) Because No. 6 fuel oil "typically" has a "sulfur content" of closer to "3%," (*id.* ¶ 91), many believed "IMO 2020 w[ould] effectively eliminate the use of No. 6 fuel oil for global shipping," (*id.* ¶ 92; *see also id.* ¶ 99 (recounting the U.S. Energy Information

[7] "In shipping, bunkering refers to the fueling of ships with marine (bunker) fuels used to power them, and also includes food and drinking water supplies for the crew." Marquard & Bahls, *Glossary*, *Bunkering (Marine Fuelling)*, https://www.marquard-bahls.com/en/news-info/glossary/detail/term/bunkering-marine-fuelling.html (last visited Sept. 3, 2021).

Administration's "significantly lowered expectations for future" global use of products like No. 6 fuel oil)). At the same time, others believed that shippers might opt to continue using No. 6 fuel oil even after IMO 2020's adoption by "installing abatement technology such as scrubbers" that would remove sulfur content in excess of regulations from emissions. (Schreiber Decl. Ex. O,[8] at 4 (explaining that "the production and supply of" higher sulfur fuels like No. 6 fuel oil "would need to continue until the day before" IMO 2020 "kicks in") (cited in CAC ¶ 97).) Since 2013, IMO 2020 has been mentioned in the securities filings of at least one publicly-traded fuel storage business; one of these filings states that IMO 2020 has the potential to "reduce demand for our products and services." (CAC ¶ 98.) On October 27, 2016, IMO 2020 was "formally fixed" to place a 0.5% cap on sulfur in fuels like No. 6 fuel oil, (*id.* ¶ 120), a fact that was "widely reported" and about which there was a plethora of market analysis, (*id.* ¶¶ 121–23).

C. Relevant Pre-Class Period Statements

Plaintiff identifies Defendants' first alleged statements relating to No. 6 fuel oil as occurring during a May 3, 2012 earnings call. (*Id.* ¶ 105.) Specifically, during this earning call, Hooke stated that due to the "shutter[ing]" and "idl[ing]" of certain "refineries in the Northeast," MIC expected "less short term demand for storage of heavy oil residual product in the Northeast," and that MIC "ha[d] a reasonable

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[8] "Schreiber Decl. Ex. __" refers to the Declaration of John E. Schreiber in Support of the Motion to Dismiss and the exhibits thereto. (Doc. 104.) The Schreiber Declaration includes many of the public statements quoted or otherwise referenced in the Complaint. I may refer to these in resolving this motion. *See supra* note 3.

number of heavy oil tanks at" one of IMTT's main storage sites. (*See id.*; Schreiber Decl. Ex. B.) As a result, Hooke said, MIC "may" make "a one-off increase in capital expenditures to convert the heavy product tanks to service the clean product." (*Id.*) Hooke cautioned that MIC's approach was not to convert its tanks over right away, but to "wait-and-see" and evaluate what mix of petroleum products customers may want to store at its facilities. (*Id.*)

Defendants only referred to converting IMTT's "heavy product" storage tanks on two other occasions prior to the Class Period. On August 2, 2012, during an earnings call, Hooke reported that MIC did not "see an immediate need to convert large amounts of existing heavy oil storage" over to handle "clean product." (CAC ¶ 106.) Next, on a November 1, 2012 earnings call, Hooke said that MIC had, in "the past couple of months[,] . . . concluded that it would be in IMTT's long-term best interest to begin to convert a portion of the residual oil storage at Bayonne," one of IMTT's largest storage terminals, "to clean product storage." (*Id.* ¶ 107.)[9] Hooke added that converting storage capacity "from residual oil or six oil to" other product classes would require capital expenditures. (*Id.*)

D. Mid-Class Period Statements

Defendants did not again "publicly discuss the storage of No. 6 fuel oil" until "near the end of the Class Period." (*Id.* ¶ 108.) For example, a few days after the

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[9] *See also* Macquarie Infrastructure's CEO Discusses Q3 2012 Results - Earnings Call Transcript, Seeking Alpha (Nov. 5, 2014, 4:18 PM ET), https://seekingalpha.com/article/979731-macquarie-infrastructures-ceo-discusses-q3-2012-results-earnings-call-transcript.

IMO made a late October 2016 announcement that IMO 2020 would go into effect at the start of 2020, as it had previously publicly stated it would, (*id.* ¶ 120), MIC held a November 2016 earnings call and "did not mention IMO 2020," (*id.* ¶ 124). Speaking for MIC, Hooke did say that, based on MIC's customers' behavior around storage contracts, he thought "shippers and others probably" thought commodity prices "will not be either as low or as volatile as has been the case over the last couple of years." (*Id.* ¶ 124.) He then added "none of MIC's businesses are exposed directly to the price of crude oil or petroleum products." (*Id.* ¶ 124.) Next, during conferences held in May 2017, Davis stated that MIC's storage business had "no commodity exposure other than the very broad macroeconomic factors influencing supply and demand more broadly." (*Id.* ¶¶ 144–45.) By comparison, one of MIC's main competitors used its November 2016 earnings call to discuss the implications of IMO 2020 on the "storage of" "diesel and fuel oil." (*Id.* ¶ 128 (Chief Financial Officer for MIC's competitor stated "'the implications for global imbalances of diesel and fuel oil' as a result of IMO 2020, which he said raised the questions 'what does it mean for the storage of the products?' and 'what we are doing . . . as a business?'").)

E. The Offering

On November 13, 2016, Defendants announced that MIMUSA would hold a secondary public offering of 2,870,000 shares of MIC common stock, which represented about 40% of MIMUSA's holdings (the "Offering"). (*Id.* ¶ 131.) The Offering documents "did not discuss" No. 6 fuel oil or IMO 2020. (*Id.* ¶ 132; *cf. id.* ¶ 133 (mentioning a separate fuel distributor that discussed IMO 2020 as an "adverse condition" in its public securities filings).) Investors purchased "over

$235 million of [MIC] common stock" through the Offering from the underwriter, Barclays. (*Id.* ¶ 132.) MIMUSA had previously sold "27.6% of its holdings" in MIC "in June 2015." (*Id.* ¶ 309.)

F. The Epic Acquisition

Around August 2017, Defendants announced that MIC would acquire Epic Midstream ("Epic"), another operator of storage terminals, for $171.5 million. (*Id.* ¶ 153.) At the time, the Epic acquisition price represented less than 3% of MIC's market capitalization. *See supra* note 5 and accompanying text. Epic offered MIC diversity in its storage offerings as it "principally stored jet fuel," a business that would not be impacted by IMO 2020. (*Id.*) MIC paid for Epic "largely in shares of [its] stock," (*id.*), with stock representing about 72% of the acquisition price, (*see id.* ¶ 155).

G. MIC's Stock Downturn

At the end of the Class Period, on February 21, 2018, MIC announced that IMTT's utilization—the amount of its storage tank capacity actually contracted for use by IMTT's customers—had dropped to 89.6%. (*Id.* ¶ 170.) Previously, at the end of the second quarter of 2017, IMTT's utilization was 94%, (*id.* ¶ 150), and at the end of the third quarter of 2017, utilization had been 93.2%, (*id.* ¶ 170). MIC also announced that it had missed its financial projections and would be cutting its dividend guidance. (*Id.* ¶¶ 180–82.)[10]

On February 22, 2018, MIC held an earnings call in which its new CEO, Christopher Frost, who had replaced Hooke, said that MIC's financial downturn

[10] Prior to this, MIC's stock's desirability was based in part on "its stable and growing dividend." (CAC ¶ 4.)

was in large part due to the "structural decline in the 6 oil market." (*Id.* ¶ 184.) Frost 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 at IMT's facility in St. Rose" and even "shut down their operations and exited the industry." (*Id.* ¶ 185.) Frost called this sudden downturn "a surprise." (*Id.*) That same day, MIC's stock price fell around 41%, from a price of $63.62 per share the previous day to $37.41.

II. Procedural History

On April 23, 2018, Plaintiff City of Riviera Beach General Employees Retirement System began this securities fraud class action by filing its complaint. (Doc. 1.) On January 30, 2019, I granted a motion to consolidate this action with the related action numbered 18-cv-3744 because it "set forth substantially identical questions of law and fact," and I appointed Moab as Lead Plaintiff. (Doc. 52 at 2–3.) Moab then filed the Consolidated Complaint on February 20, 2019. (Doc. 56.) The Consolidated Complaint alleges violations of (i) Section 10(b) of the Securities Exchange Act of 1934 ("'34 Act") and SEC Rule 10b-5 against MIC and the Officer Defendants[11]—Count I (CAC ¶¶ 317–25); (ii) Section 20(a) of the '34 Act against MIMUSA and the Officer Defendants—Count II (*id.* ¶¶ 326–29); (iii) Section 20A of the '34 Act against MIMUSA—Count III (*id.* ¶¶ 330–35); (iv) Section 11 of the Securities Act of 1933 ("'33 Act") against MIC, Barclays, and the Individual

[11] Although MIMUSA is listed in the caption for Count I, by stipulation filed April 4, 2019, Moab and Defendants MIC and MIMUSA agreed that the Consolidated Complaint does not name MIMUSA in Count I, but does name MIMUSA in Counts II, III, and VI. (*See* Doc. 83.)

Defendants—Count IV (*id.* ¶¶ 373–83); (v) Section 12(a)(2) of the Securities Act against MIC and Barclays—Count V (*id.* ¶¶ 384–92); and (vi) Section 15 of the Securities Act against MIMUSA and the Individual Defendants—Count VI (*id.* ¶¶ 393–98).

The Individual Defendants filed their motion to dismiss and memorandum of law on April 22, 2019. (Docs. 100–101.) That same day MIC and MIMUSA filed their motion to dismiss, memorandum of law, and declarations with exhibits. (Docs. 102–104.) Barclays also filed its motion and joinder memorandum of law—joining in the arguments made by the other Defendants in their motions to dismiss—on April 22, 2019.[12] (Docs. 104–105.) Moab filed its opposition brief and declaration with exhibits on June 21, 2019, (Docs. 110–11), and Defendants MIC and MIMUSA filed their reply brief on July 22, 2019, (Docs. 112). The Individual Defendants filed their reply brief and reply declaration, (Docs. 113, 115), and Barclays filed its joinder to the replies of the other defendants on July 22, 2019, (Doc. 114).

III. Legal Standard

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim will have "facial plausibility when the plaintiff pleads

[12] Barclays also filed a letter motion requesting oral argument on April 22, 2019. (Doc. 107.) By endorsement the following day, I informed Barclays that pursuant to my Individual Rule 4.J, I would inform the parties if I deemed oral argument necessary. (Doc. 108.)

factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This standard demands "more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Plausibility . . . depends on a host of considerations: the full factual picture presented by the complaint, the particular cause of action and its elements, and the existence of alternative explanations so obvious that they render plaintiff's inferences unreasonable." *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 430 (2d Cir. 2011).

In considering a motion to dismiss, a court must accept as true all well-pleaded facts alleged in the complaint and must draw all reasonable inferences in the plaintiff's favor. *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007). A complaint need not make "detailed factual allegations," but it must contain more than mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). Although all allegations contained in the complaint are assumed to be true, this tenet is "inapplicable to legal conclusions." *Id.* A complaint is "deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002) (quoting *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995)).

"Securities fraud claims are subject to heightened pleading requirements that the plaintiff must meet to survive a motion to dismiss." *ATSI*, 493 F.3d at 99; *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Federal Rule of Civil Procedure 9(b) requires a securities fraud claim to "state with

particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). This standard requires that the complaint "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *ATSI*, 493 F.3d at 99. "Allegations that are conclusory or unsupported by factual assertions are insufficient." *Id.*

The Private Securities Litigation Reform Act (the "PSLRA") also imposes a heightened pleading standard on securities fraud complaints. *See* 15 U.S.C. § 78u–4(b); *Lewy v. SkyPeople Fruit Juice, Inc.*, No. 11 Civ. 2700(PKC), 2012 WL 3957916, at *7 (S.D.N.Y. Sept. 10, 2012) ("Courts must dismiss pleadings that fail to adhere to the requirements of the PSLRA."). To satisfy the PSLRA, a securities fraud complaint must "'specify' each misleading statement"; "set forth the facts 'on which a belief' that a statement is misleading was 'formed'"; and "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) (quoting 15 U.S.C. § 78u–4(b)). Although a court ordinarily draws all reasonable inferences in favor of the plaintiff, the PSLRA "establishes a more stringent rule for inferences involving scienter because the PSLRA requires particular allegations giving rise to a strong inference of scienter." *ECA, Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co.*, 553 F.3d 187, 196 (2d Cir. 2009) (internal quotation marks omitted).

IV. Discussion

A. Section 10(b) and Rule 10-b5

1. Applicable Law

a. Misstatements or Falsity

Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder prohibit fraud in connection with the purchase or sale of securities. *See* 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5. Rule 10b-5(b) targets misleading disclosures, and Rules 10b-5(a) and (c) target deceptive conduct. *See SEC v. Lee*, 720 F. Supp. 2d 305, 325 (S.D.N.Y. 2010); *see also Wilson v. Merrill Lynch & Co.*, 671 F.3d 120, 129 (2d Cir. 2011) ("Section 10(b), in proscribing the use of a manipulative or deceptive device or contrivance, prohibits not only material misstatements but also manipulative acts." (citation omitted)); *United States v. Finnerty*, 533 F.3d 143, 148 (2d Cir. 2008) ("'Conduct itself can be deceptive,' and so liability under § 10(b) or Rule 10b-5 does not require 'a specific oral or written statement.'" (quoting *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 158 (2008)).

"To succeed on a claim under Section 10(b) of the Exchange Act and Rule 10b-5, 'a plaintiff must allege that each defendant (1) made misstatements or omissions of material fact, (2) with scienter, (3) in connection with the purchase or sale of securities, (4) upon which the plaintiff relied, and (5) that the plaintiff's reliance was the proximate cause of its injury.'" *Indiana Pub. Ret. Sys. v. SAIC, Inc.*, 818 F.3d 85, 93 (2d Cir. 2016) (quoting *ATSI*, 493 F.3d at 105). "A false statement was made with the requisite scienter if it was made with the 'intent to deceive, manipulate, or defraud.'" *SEC v. Frohling*, 851 F.3d

132, 136 (2d Cir. 2016) (quoting *SEC v. Obus*, 693 F.3d 276, 286 (2d Cir. 2012)).

The PSLRA, which amended the Exchange Act, provides for "a statutory safe-harbor for forward-looking statements." *Slayton v. Am. Express Co.*, 604 F.3d 758, 765 (2d Cir. 2010). Under the PSLRA, a forward-looking statement is "(i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or (ii) immaterial." 15 U.S.C. § 78u-5(c)(1)(A). The safe harbor provision "requires dismissal if the plaintiffs do not 'prove that the forward-looking statement . . . was . . . made or approved by an executive officer with *actual knowledge* by that officer that the statement was false or misleading.'" *Slayton*, 604 F.3d at 773 (quoting 15 U.S.C. § 78u-5(c)(1)(B)).

2. Application

Plaintiff pleads a host of allegedly actionable misstatements and omissions. The crux of Plaintiff's argument is that the "statements were false and misleading" because MIC "concealed from investors that IMTT's single largest product . . . was No. 6 fuel oil," which "constitute[ed] over 40% of [IMTT's] storage capacity" and which "faced a near-cataclysmic ban on the bulk of its worldwide use through IMO 2020." (MTD Opp. 28.) Accordingly, as Plaintiff frames the case, a key issue is whether "Defendants ha[d] a duty to disclose" the extent to which IMTT's storage capacity was devoted to No. 6 fuel oil. (*Id.* at 28–29.)

Section 10 "do[es] not create an affirmative duty to disclose any and all material information." *Matrixx*

Initiatives, Inc. v. Siracusano, 563 U.S. 27, 44 (2011). "A company has no duty to disclose information 'merely because a reasonable investor would very much like to know' that information." *S.C. Ret. Sys. Grp. Trust v. Eaton Corp. PLC*, 791 F. App'x 230, 234 (2d Cir. 2019) (quoting *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993)).

Nevertheless, there are two relevant situations where a company will be bound to disclose facts. The first is when a company or its officers makes a statement that is only a "half-truth[]," i.e. where a defendant's affirmative statement, albeit "literally true," "create[s] a materially misleading impression" due to defendant's choice to omit that information. *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 239–40 (2d Cir. 2016) (collecting cases); *see, e.g.*, *Menaldi v. Och-Ziff Cap. Mgmt. Grp. LLC*, 277 F. Supp. 3d 500, 513 (S.D.N.Y. 2017); *Meyer v. Jinkosolar Holdings Co.*, 761 F.3d 245, 250 (2d Cir. 2014) ("The literal truth of an isolated statement is insufficient; the proper inquiry requires an examination of defendants' representations, taken together and in context." (citation omitted)). As such, although many cases talk about how "once a company speaks on an issue or topic, there is a duty to tell the whole truth," *Plumbers & Steamfitters Loc. 137 Pension Fund v. Am. Express Co.*, 15 Civ. 5999 (PGG), 2017 WL 4403314, at *13 (S.D.N.Y. Sept. 30, 2017) (quoting *Jinkosolar*, 761 F.3d at 250), *aff'd sub nom. Pipefitters Union Loc. 537 Pension Fund v. Am. Express Co.*, 773 F. App'x 630 (2d Cir. 2019), there is no "boundless" "duty" to "reveal all facts on the subject" just because a company or its officers speak on a subject, *see id.* (internal quotation marks omitted). In particular, the statement made and the fact that allegedly should have been disclosed

must share a reasonable level of specificity. *Compare Jinkosolar*, 761 F.3d at 247, 250 (finding an actionable half-truth where a public offering described specific "pollution abatement equipment . . . to process, reduce, treat, and where feasible, recycle the waste materials before disposal" and commenting on the "environmental teams at each of our manufacturing facilities" while at the same time not disclosing "that the prophylactic steps were then failing to prevent serious ongoing pollution problems") *with Luo v. Sogou, Inc.*, 465 F. Supp. 3d 393, 409–10 (S.D.N.Y. 2020) ("To the extent [the company] made any disclosures at all about its compliance measures, those disclosures were tentative and generic", not "a testament to the adequacy of [the company]'s compliance program" (internal quotation marks omitted)), *and Menaldi v. Och-Ziff Cap. Mgmt. Grp. LLC*, 277 F. Supp. 3d 500, 513 (S.D.N.Y. 2017) (no actionable half-truth from statements describing a "global compliance program," "comprehensive policies and supervisory procedures," "mandatory compliance training," and "strong relationships with a global network of local attorneys" because these statements "did not describe specific regions, specific initiatives, or make any assurances of efficacy."); *see Diehl v. Omega Protein Corp.*, 339 F. Supp. 3d 153, 163 (S.D.N.Y. 2018) ("it is the specificity" of a statement that may require a defendant to speak more fully).

The second relevant situation is when "a statute or regulation require[es] disclosure." *Stratte -McClure v. Morgan Stanley*, 776 F.3d 94, 101 (2d Cir. 2015) (citation omitted). One such regulation is "Item 303 of SEC Regulation S–K, 17 C.F.R. § 229.303(a)(3)(ii)," *SAIC*, 818 F.3d at 88, which obligates a company to make a disclosure in its SEC filings "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 conditions or results of operations." *Id.* at 94 (quoting *Stratte–McClure,* 776 F.3d at 101). To allege a violation of Item 303 sufficient to support a Section 10(b) claim, a plaintiff must allege, first, that some "trend, event, or uncertainty" was "actually know[n]" to a company's management "when [the company] files the relevant report with the SEC," *id.* at 95, and second, that the omission in violation of Item 303 "was material," which requires "balancing . . . both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity." *Stratte-McClure*, 776 F.3d at 102–03 (internal quotation marks omitted) ("Item 303's disclosure requirement can only sustain a claim under Section 10(b) and Rule 10b-5 if the allegedly omitted information satisfies the [balancing] test" just stated).

a. Alleged Misleading Affirmative Statements

Here, Plaintiff does not identify any statements that are actionable as half-truths due to Defendants' failure to disclose its business reliance on storing No. 6 fuel oil. None of Defendants' alleged statements were literally true but misleading absent a disclosure about how much No. 6 fuel oil IMTT's facilities could store, nor does Plaintiff identify any statements that share a reasonable level of specificity with a breakdown of how much No. 6 fuel oil IMTT stored or what other uses could be made of the IMTT's storage tanks. For example, Plaintiff argues that Defendants made misleading statements when they stated on earnings calls that MIC's business performance had been

"boringly predictable" and that MIC had an "unsexy business model." (MTD Opp. 19 (citing CAC ¶¶ 8, 38, 110, 112, 129, 144–45, 150, 230, 232–33, 247–48, 269, 354).) These non-specific, generic statements, as with many others Plaintiff identifies, are the "type of milquetoast corporate-speak" that do not create a duty to disclose more facts. *See Menaldi*, 277 F. Supp. 3d at 513.[13] Moreover, many of Defendants' alleged statements, when actually read "in context" in which they were made, *cf. Jinkosolar*, 761 F.3d at 250, are not forward-looking accounts of IMTT's business, but backward-looking explanations of "historical fact[s,]" which are not actionable absent some reason to believe that they were false when made or that Defendants later learned to be untrue but failed to correct, *see In re Sanofi-Aventis Sec. Litig.*, 774 F. Supp. 2d 549, 562, 569 (S.D.N.Y. 2011). For example, Plaintiff points to SEC filings in which MIC reported that it had seen

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[13] As yet another example, Plaintiff alleges that Defendants "misled investors about IMTT's considerable storage of No. 6 fuel oil" because a MIC officer stated in May of 2016 that IMTT had "the 'flexibility' and 'optionality' to change when 'one day our customer . . . [sic] want gasoline in his tanks, next day he may want distillate.'" (CAC ¶116). Plaintiff alleges that this was misleading because any tank used to store No. 6 fuel oil "could take up to nine months" to be repurposed for other uses. (*Id.*) Putting to the side that the source transcript quoted is obviously riddled with errors, a review of the transcript shows that the officer was not making a claim about the amount of "flexibility" or "optionality" IMTT had in its tanks. (Schreiber Decl. Ex. H, at 21.) Telling people that it is beneficial to have flexibility is quite different from saying that a business has even a qualitative amount of flexibly to store different categories of products. As such, Plaintiff has offered me no reason to think that these statements would have done anything to give investors an impression about the extent of IMTT's business in No. 6 fuel oil. I also note that throughout the relevant period IMTT did have the capacity to store products other than No. 6 fuel oil.

"continued strong demand for the products stored" at IMTT during a reporting period, (CAC ¶¶ 111, 271), which is not only a backwards-looking account of what happened in a particular reporting period, but a statement made in the context of explaining how "sizeable and largely unforeseen volatility in petroleum product prices recently has impacted IMTT," (Schreiber Decl. Ex. F, at 8). As such, far from being an assurance to investors that "none of IMTT's stored commodities were susceptible to any known market trends" as Plaintiff argues, (MTD Opp. 28), this statement and others like it confirm precisely what it says: that "volatility in petroleum product prices" has "impact[s]" on IMTT.

Moreover, Plaintiff never pleads facts to support its argument that Defendants knew any alleged statement was untrue or a half-truth when made.[14] To

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[14] One statement Plaintiff argues Defendants must have known was false when made concerns IMTT's "utilization"—meaning the amount of IMTT's storage capacity in use at a particular time. Specifically, Plaintiff says, in December 2017, when Defendants said that IMTT's utilization "was "[c]onsistently high," (CAC ¶ 169), Defendants knew this had become untrue. Plaintiff argues that IMTT's utilization must have fallen to below its higher historic rate by late October 2017 because, while "IMTT utilization at the end of the third quarter 2017 was 93.2%," the "utilization at the end of the fourth quarter was 89.6%. To reconcile that decline with the reported average utilization rate for the fourth quarter of 90.6% means that there must have been at least 66 days of 89.6% utilization rate, or that IMTT lost the utilization as early as October 25, 2017. [CAC] ¶170." (MTD Opp. 42.) Defendants counter that Plaintiff's "flawed math equation . . . assumes a steady, linear rate of utilization decline." (Doc. 113 at 8 n.3). I agree; Defendants are correct to call Plaintiff's math "flawed." The equation Plaintiff provides in the CAC appears to be an erroneous extrapolation of the formula for calculating an arithmetic mean. If there are 92 days in the Q4 2017 period, and if the mean utilization for the period is 90.6%, then 90.6% =

the contrary, Plaintiff pleads that Christopher Frost, who replaced Hooke as MIC's CEO after the end of 2017 (*see* CAC ¶¶ 30, 259), stated that it was not until "December [of 2017] and early January" of 2018 that "a number of [IMTT] customers terminated contracts," and that this loss of business was "quite sudden" and "a surprise." (CAC ¶ 185.) Plaintiff attempts to contradict this account of "surprise" with statements from three of MIC's former employees, (*id.* ¶¶ 187, 189), but none of these statements suggest Frost spoke untruthfully. Indeed, the most directly allegedly "contradictory" account concerns whether "the decline in No. 6 fuel oil markets snuck up on [Defendants] in one quarter," (*id.* ¶ 187), but Frost only spoke about surprise as to the much more specific circumstance of sudden contract cancellations and the fact that certain customers were leaving the business entirely, (*id.* ¶ 185).[15] Moreover, the Consolidated Complaint does not plead that the former employees whose statements

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$\frac{x_1+x_2+x_3+\cdots+x_{91}+x_{92}}{92}$, where each x_1, x_2, etc., is the utilization rate on each of the days during the period. But Plaintiff writes "90.6% = 89.6% * $\left(\frac{x}{92}\right)$ + 93.2% * $(\frac{(92-x)}{92})$." Plaintiff's equation thus proceeds from the assumption that IMTT's utilization rate on each day of Q4 2017 was either 89.6% or 93.2%. Plaintiff does not point to any allegations to support this assumption.

[15] Further cutting against Plaintiff's misstatement theory, market analysis articles quoted in the CAC indicate that the precise moment of any IMO 2020-related downturn in No. 6 fuel oil was always going to catch the industry by surprise. For example, one article states that, under IMO 2020, the "production and supply of [high-sulfur fuels like No. 6 fuel oil would need to continue until the day before the 0.5% requirement kicks in, and immediately demand for [these heavy fuels] will shrink dramatically the day after, creating a [sic] never before known situation of severe supply/demand mismatch." (Schreiber Decl. Ex. O, at 4 (cited in CAC ¶ 97).)

it recounts were in any position to know if Frost or MIC as a whole were "surprised" by sudden contract cancellations or by customers leaving the business. Two of these employees had left MIC before the Class Period began—one in 2011, (*id.* ¶ 59), and the other in December 2014, (*id.* ¶ 74)—and the third simply told Plaintiff that "IMTT was already working on the renewals of No. 6 fuel oil contracts" "by February 2017," (*id.* ¶ 189). As such, none of these statements provide facts from which I can infer that Frost lied about being surprised by sudden contract cancellations and customers leaving the business in December of 2017 and January of 2018. *Cf. Galestan v. OneMain Holdings, Inc.*, 348 F. Supp. 3d 282, 301 (S.D.N.Y. 2018) ("[T]he FEs identified which reports were circulated during the Class Period; they stated that these reports reached senior executives; they described the Symphony platform reports to which Defendants had access during the Class Period; and they described the Individual Defendants' attendance at meetings and on conference calls during which integration-related issues were discussed.").

Thus, despite Plaintiff's various arguments to the effect that Defendants must have already known that IMTT was experiencing a downturn or at a major risk for a downturn, (*e.g.*, MTD Opp. 40), Plaintiff falls short of pleading facts showing that Defendants' statements were "not honestly believed when they were made," *In re Pretium Res. Inc. Sec. Litig.*, 256 F. Supp. 3d 459, 472 (S.D.N.Y. 2017), *aff'd sub nom. Martin v. Quartermain*, 732 F. App'x 37 (2d Cir. 2018) (internal quotation marks omitted).

Plaintiff's position with regard to many of Defendants' affirmative statements seems to boil down to the view that securities fraud defendants must "be

forthright about the present facts, risks, and threats facing [their company] when affirmatively disclosing its business and environment." (MTD Opp. 29.) This statement misses the mark, because simply speaking on one's business does not trigger a duty to disclose all facts an investor may want to know no matter how tangential they are to what the speaker is talking about. Rather, the cases cited by Plaintiff show that the duty to be forthright is triggered when a defendant speaks with sufficient "specificity" while omitting information that one would normally expect the defendant to have included had the defendant known it. *See Diehl*, 339 F. Supp. 3d at 163. In *Jinkosolar*, for example, the Second Circuit held that it was misleading for a company to make detailed, comforting statements about how it handled environmental compliance, 761 F.3d at 247, while at the same time withholding that, at the very moment it spoke, the company had known, ongoing issues "prevent[ing] substantial violations of" particular environmental regulations, *id.* at 251. Similarly, a company makes a misleading statement if it says it "anticipate[s] 'relatively flat' revenues" from a particular customer while its management already knows that the company has lost substantial business from that customer. *In re BioScrip, Inc. Sec. Litig.*, 95 F. Supp. 3d 711, 737 (S.D.N.Y. 2015); *see also Darquea v. Jarden Corp.*, No. 06 CV 0722(CLB), 2007 WL 1610146, at *8 (S.D.N.Y. May 31, 2007) (holding statements were misleading when defendants spoke in "present tense" about a business's positive performance when they already knew that "sales fell $20 million short of its projections").

In contrast to these cases, Plaintiff does not allege that Defendants made comforting statements while

they already knew that MIC's business storing No. 6 fuel oil was waning. For example, Plaintiff identifies an email that Defendant Davis exchanged with representatives of the Plaintiff, in which Plaintiff's employees directly asked about "new regulations coming in 2020"—i.e., IMO 2020—"that prevent fuel ships from using heavy oils unless improved scrubbers are also installed to clean exhaust – how will this impact demand for heavy oil?" (Schreiber Decl. Ex. BB, at 2 (cited in CAC ¶ 166).) In response, Davis writes that Plaintiff's "information" about what IMO 2020 will do "is consistent with our understanding of the proposed regulatory changes." (*Id.*) He goes on to say that, because black oil is always produced as part of the petroleum refinement process, the producing industry will try to find other uses for it. (*Id.*) Davis then speculates on a potential "positive" impact on "storage demand at IMTT-Bayonne" if producers decide to start selling "the [No. 6 fuel oil]" to "other parts of the world" where its burning will not be banned. (*Id.*) Nothing in this email amounts to a specific "comforting statement[]" about IMTT's ability to withstand IMO 2020, much less a comforting statement made while Davis knew or should have known that IMTT's business had already been negatively impacted by IMO 2020.[16] *See In re*

[16] Plaintiff also argues that Davis' email was an actionable misstatement because Plaintiff's representatives asked "What percent of IMTT's storage is in heavy oil?" Davis responded "About 20%." (Schreiber Decl. Ex. BB, at 2). Plaintiff argument assumes that the answer concerns MIC's total storage capacity for No. 6 fuel oil; however, Plaintiff's citation does not provide the context within which this question was asked and answered: that of MIC's storage business in a region around New York. Specifically, the individual questions were preceded by a preamble stating that the "questions" are meant to get at previously "highlighted weakness in the NY harbor" and how

Lululemon Sec. Litig., 14 F. Supp. 3d 553, 571 (S.D.N.Y. 2014) ("without *contemporaneous* falsity, there can be no fraud"), *aff'd*, 604 F. App'x 62 (2d Cir. 2015). Far from comforting Plaintiff, Davis confirmed that Plaintiff, "a sophisticated institutional investor," (CAC ¶ 27), correctly understood that IMO 2020 could prevent the shipping industry from burning No. 6 fuel oil.

Finally, Plaintiff argues that Defendant Davis affirmatively misrepresented IMTT's reliance on No. 6 fuel oil during the Class Period based on remarks he made a conference in November 16, 2017, but, once again, these arguments fail to account for the context within which the statements were made. Specifically, Davis told conference attendees that IMTT's business is in storing "primarily refined petroleum products" and that IMTT does "very little [business storing] crude" petroleum products. (Schreiber Decl. Ex. CC, at 4 (cited in CAC ¶ 258).) Davis then said that "[a] little over half the capacity is in service and petroleum products, and as I say, very little of that is in crude or asphalt, any heavy product." (*Id.*) Plaintiff argues this was an assurance that IMTT did "very little" business in "heavy products" including "No. 6 fuel oil." (MTD Opp. 30.) But Plaintiff's argument ignores the distinction Davis had already drawn between "refined petroleum products" and "crude" products, a distinction that he reiterated when he said "as I say, very little of that is in crude." I do not read the subsequent qualifying statement of "any heavy product" as undoing the distinction Davis drew not

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"IMTT['s] results" in the New York harbor have "h[eld] up pretty well" in spite of these weaknesses. (*Id.*) Moreover, both the first and third enumerated questions are explicitly stated as concerning the New York harbor. (*Id.*)

just once but twice. Moreover, Plaintiff in fact pleads that "No. 6 fuel oil" is a "refined petroleum product." (CAC ¶ 109.) As such, I cannot conclude that Davis was including No. 6 fuel oil as part of the "crude" side of the ledger in his remarks, and Plaintiff does not point to well-pleaded facts that suggest otherwise.

b. Alleged Omission

Plaintiff's argument that Defendants violated disclosure obligations under Item 303 also fails. Although Plaintiff submits that Item 303 required Defendants to speak to "th[e] 'increasing uncertainty'" MIC faced, (MTD Opp. 28), Plaintiff does not actually plead an uncertainty that should have been disclosed, nor does Plaintiff plead in what SEC filing or filings Defendants were supposed to disclose it. Instead, Plaintiff pleads that Item 303 required MIC to "disclose that its profits, revenues, and dividends were at risk due to the implementation of IMO 2020," (CAC ¶ 278); however, Plaintiff pleads at length that IMO 2020 "was widely understood" as threatening the businesses of everyone "in the supply chain for No. 6 fuel oil," (*e.g.*, *id.* ¶¶ 9, 98). Indeed, Plaintiff specifically asked Davis about IMO 2020 and its potential impact on "fuel ships." (Schreiber Decl. Ex. BB, at 2 (cited in CAC ¶ 166).) Plaintiff also does not "allege that" any "omitted information was material" under the relevant "probability/magnitude test" for assessing Item 303 violations. *Stratte-McClure*, 776 F.3d at 103. Thus, even if Plaintiff had identified some known trend or uncertainty that implicated disclosure of IMTT's reliance on No. 6 fuel oil, Plaintiff would still have to allege that the "probability" of the event or uncertainty coupled with "the anticipated magnitude" of it were enough to make it material "in light of the totality of [MIC's] company activity." *Id.* at 102–03

(quoting *Basic, Inc. v. Levinson*, 485 U.S. 224, 238 (1988)). Pleading materiality does not require much, *see SAIC*, 818 F.3d at 96, but it does require a plaintiff to say why there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available," *ECA, Loc. 134 IBEW Joint Pension Tr. v. JP Morgan Chase Co.*, 553 F.3d 187, 197 (2d Cir. 2009) (internal quotation marks omitted).

More to the point, Plaintiff does not allege when Defendants "actually kn[ew]" of some uncertainty that rose to the level of requiring an Item 303 disclosure. *Cf. SAIC*, 818 F.3d at 95. Unlike in the Second Circuit's leading cases about when Item 303 violations can support Section 10(b) claims, Plaintiff does not allege that MIC "had already" taken on losses related to its No. 6 fuel oil business before the Class Period began, *cf. Stratte-McClure*, 776 F.3d at 104–05, or that Defendants "actually knew" of an extant liability that it could be obligated to repay, *SAIC*, 718 F.3d at 95. Although, as stated, this is not meant to be a burdensome pleading requirement, at minimum, Plaintiff must plead facts supporting an inference that Defendants had actual knowledge of a material trend or uncertainty facing MIC's No. 6 fuel oil storage business, and that it had this knowledge early enough to require disclosure in some pre-February 2018 securities filing.

B. *Scienter*

1. Applicable Law

Pursuant to the PSLRA, a well-pleaded securities fraud claim must "state with particularity facts giving rise to a strong inference that the defendant acted with

the required state of mind." 15 U.S.C. § 78u-4(b)(2)(A). "The requisite state of mind in a section 10(b) and Rule 10b-5 action is an intent 'to deceive, manipulate, or defraud.'" *ECA*, 553 F.3d at 198 (quoting *Tellabs*, 551 U.S. at 313). In the Second Circuit, a strong inference of scienter "can be established by alleging facts to show either (1) that defendants had the motive and opportunity to commit fraud, or (2) strong circumstantial evidence of conscious misbehavior or recklessness." *Id.*

"In order to raise a strong inference of scienter through 'motive and opportunity' to defraud," a plaintiff must allege that the defendant or its officers "benefitted in some concrete and personal way from the purported fraud." *Id.* (quoting *Novak v. Kasaks*, 216 F.3d 300, 307–08 (2d Cir. 2000)). "Motives that are common to most corporate officers, such as the desire for the corporation to appear profitable and the desire to keep stock prices high to increase officer compensation, do not constitute 'motive' for purposes of this inquiry." *Id.*

As an alternative to the motive and opportunity to defraud, a plaintiff can raise a strong inference of scienter under the "strong circumstantial evidence" prong, requiring a plaintiff to show conscious misbehavior or recklessness. *Id.* at 199 (citation omitted). Conscious misbehavior "encompasses deliberate illegal behavior," *Novak*, 216 F.3d at 308, whereas recklessness includes "conscious recklessness" or "a state of mind approximating actual intent, and not merely a heightened form of negligence," *S. Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98, 109 (2d Cir. 2009) (quoting *Novak*, 216 F.3d at 312). If motive to commit fraud has not been shown, "the strength of the circumstantial allegations

must be correspondingly greater." *Kalnit v. Eichler*, 264 F.3d 131, 142 (2d Cir. 2001) (quoting *Beck v. Mfrs. Hanover Tr. Co.*, 820 F.2d 46, 50 (2d Cir. 1987)).

Additionally, a strong inference of scienter "must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs*, 551 U.S. at 314. There are at least four circumstances that "may give rise to a strong inference of the requisite scienter: where the complaint sufficiently alleges that the defendants (1) 'benefitted in a concrete and personal way from the purported fraud'; (2) 'engaged in deliberately illegal behavior'; (3) 'knew facts or had access to information suggesting that their public statements were not accurate'; or (4) 'failed to check information they had a duty to monitor.'" *ECA*, 553 F.3d at 199 (quoting *Novak*, 216 F.3d at 311).

2. Application

Plaintiff argues that they have pleaded scienter both through Defendants' motive and opportunity, (MTD Opp. 44), and through Defendants' recklessness or conscious misbehavior, (*id.* at 47).

As an initial matter, it does not appear that the motive and opportunity theory is viable under the circumstances presented here. Plaintiff's theory of the case is that Defendants "actively concealed from investors" the extent of "IMTT's" business in "No. 6 fuel oil." (MTD Opp. 28.) This is an assertion of "conscious misbehavior or," at minimum, "recklessness," and thus seems like a theory that cannot be supported by a motive and opportunity theory. *See Stratte-McClure*, 776 F.3d at 106 (citing *ECA*, 553 F.3d at 202). Nevertheless, I will address

both Plaintiff's arguments related to recklessness or conscious misbehavior and on motive and opportunity.

First, with regard to recklessness or conscious misbehavior, Plaintiff rehashes its already rejected arguments that Defendants made "numerous statements" that it later "admitted" were false and that Defendants had actual knowledge "contradicting their public statements." (MTD Opp. 47–48 (quoting *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 76 (2d Cir. 2001).) With regard to establishing scienter, "Second Circuit cases uniformly rely on allegations that [1] specific contradictory information was available to the defendants [2] at the same time they made their misleading statements." *In re PXRE Grp., Ltd. Sec. Litig.*, 600 F. Supp. 2d 510, 536 (S.D.N.Y. 2007) (citation omitted). Although Plaintiff "do[es] not have to fix the exact date and time" that Defendants were aware that their statements were false, "they must supply some factual basis for the allegation that the defendants had reached this conclusion at some point during the time period alleged." *Rothman v. Gregor*, 220 F.3d 81, 91 (2d Cir. 2000) (internal quotation marks omitted). As I have already determined, however, "nowhere in the [CAC] do[es] Plaintiff[] identify with specificity" the knowledge Defendants had or when they acquired this knowledge that their statements were false. *Cf. Pretium*, 256 F. Supp. 3d at 481 (citing *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc.*, 531 F.3d 190, 196 (2d Cir. 2008)). Without actual, contemporaneous knowledge, Plaintiff's scienter arguments appear to be a "seiz[ing] upon disclosures made . . . later" coupled with unsupported assertions that Defendants "should have" made disclosures sooner. *See Denny v. Barber*, 576 F.2d 465, 470 (2d Cir. 1978).

Second, with regard to pleading scienter through motive and opportunity, Plaintiff also fails. As an initial matter, I find that one of Plaintiff's arguments simply cannot provide a motive. The fact that certain Defendants' compensation increased with MIC's "market capitalization," (MTD Opp. 45), does not move the ball for Plaintiff, as "[m]otives that are common to most corporate officers, such as the desire . . . to keep stock prices high to increase officer compensation" do not suffice to show scienter. *ECA*, 553 F.3d at 198; *Pretium*, 265 F. Supp. 3d at 481. Plaintiff's argument that Defendants wanted to prop up MIC's stock price so that it could purchase Epic in a majority-stock transaction and thereby increase MIC's capacity for storing fuels not affected by IMO 2020, (MTD Opp. 45–46), is not precluded by the case law as a motive, since "the artificial inflation of stock price in the acquisition context may be sufficient for securities fraud," *Rothman*, 220 F.3d at 93. There is thus some merit to Plaintiff's argument that the Epic acquisition benefited Defendants since it provided MIC with more capacity to store fuels unaffected by IMO 2020. (MTD Opp. 46.) "But the incentive to boost stock price to stimulate an impending acquisition or optimize the terms for the corporation, without more, does not constitute an adequate motive to defraud investors." *In re Yukos Oil Co. Sec. Litig.*, No. 04 CIV. 5243(WHP), 2006 WL 3026024, at *18 (S.D.N.Y. Oct. 25, 2006) (citing *Kalnit v. Eichler*, 264 F.3d 131, 141 (2d Cir. 2001) ("[a]chieving a superior [merger] agreement . . . does not demonstrate defendants' intent to benefit themselves at the expense of the shareholders")). In the circumstances of this case, I recognize that there could not have been much of a "concrete" "benefit[.]" *Cf. ECA*, 553 F.3d at 198 (internal quotation marks omitted). MIC's market capitalization was around

$5.75 billion through the end of the Class Period, *see supra* 3–4 & n.6, whereas MIC acquired Epic for only around $171.5 million, (CAC ¶ 153). Even after the Class Period and the substantial loss to MIC's stock's value, MIC was still so much larger than Epic that it is hard to believe that this acquisition motivated any alleged securities fraud. In other words, the acquisition did not impact MIC's value as a company in a material way. Moreover, although Plaintiff asserts that MIC acquired Epic "to buffer" it "against IMO 2020," (*id.*), Plaintiff neither pleads facts to support the inference that MIC thought about IMO 2020 at all when it acquired Epic—much less that Epic could bolster MIC against any anticipated downturn that may result from IMO 2020—nor does Plaintiff demonstrate that the Epic acquisition "benefited [MIC] in some concrete . . . way," as the law requires, *see ECA*, 553 F.3d at 198 (internal quotation marks omitted), since no facts suggest that Epic buffered MIC at all against whatever forces caused the eventual in its stock price.

Plaintiff also argues that the Offering demonstrates motive and opportunity. Specifically, in the Offering, MIMUSA sold roughly 40% of its holdings in MIC for about $235 million dollars, and it did so shortly after IMO 2020 was re-affirmed as going into effect on schedule. (MTD Opp. 44; CAC ¶¶ 130–31.) The Offering is thus helpful to Plaintiff's scienter argument, since, if the Class Period high stock price was propped up by misrepresentations or omissions, then MIMUSA could be said to have timed the Offering to maximize its profit. *See ECA*, 553 F.3d at 198 (motive and opportunity "is generally met when corporate insiders allegedly make a misrepresentation in order to sell their own shares at a profit.").

However, Defendants' other relevant behavior around MIC's stock cuts against a finding of scienter here. First, no individual Defendant is alleged to have sold any MIC stock during the Class Period. *See Rombach*, 355 F.3d at 177 (no motive established where plaintiffs failed to allege "that defendants sold stock or profited in any way during the relevant period"). Second, pursuant to its management service agreement with MIC, MIMUSA continually elected to accept its base management fee in stock rather than in cash, including in both the third and fourth quarters of 2016. (Schreiber Decl. Ex. N, at 9–10); Macquarie Infrastructure Corp., Annual Report (Form 10-K), at 60 (Feb. 21, 2017); *see Avon Pension Fund v. GlaxoSmithKline PLC*, 343 F. App'x 671, 673 (2d Cir. 2009) (no scienter where "[t]hree of the four individual defendants increased their net holdings of GSK stock during the class period, and the fourth individual defendant did not sell any shares at all."). Third, Defendants point out that there was a fifteen- month gap between the Secondary Public Offering and the drop in MIC's stock price at the end of the class period. *See In re Take-Two Interactive Sec. Litig.*, 551 F. Supp. 2d 247, 279 (S.D.N.Y. 2008) ("The lapsing . . . of approximately four months between these substantial sales and the revelation of the alleged falsity, inescapably attenuates any inference of scienter that may be drawn in Lead Plaintiffs' favor."). Fourth, MIMUSA made a pre-Class Period sale of 27.6% of its holdings of MIC stock in June 2015, (CAC ¶ 309), which suggests that the Secondary Public Offering was not all that unusual.

Even considering "all of the facts alleged, taken collectively," *Tellabs*, 551 U.S. at 323, I cannot find that Plaintiff has adequately pleaded facts giving rise

to a strong inference of scienter. At best, it appears that Defendants were negligent concerning the risks IMTT faced in its exposure to a potential downturn in the demand to store No. 6 fuel oil. However, that is not legally sufficient to demonstrate scienter.

C. *Plaintiff's Remaining Claims*

Plaintiff's remaining claims all fail because they depend on Plaintiff's having successfully pleaded, at minimum, material misrepresentations or omissions, which Plaintiff failed to do, *see supra*. Specifically, each of the other statutes Plaintiff claims have been violated require a primary violation and/or material misrepresentations or omissions. *See Slayton*, 604 F.3d at 778 (pleading a section 20(a) claim requires "a primary violation" of the '34 Act) (internal quotation marks omitted); *In re Keyspan Corp. Sec. Litig.*, 383 F. Supp. 2d 358, 389 (E.D.N.Y. 2003) ("In the absence of a primary violation of Section 10(b) or Rule 10b-5, plaintiffs cannot state a claim . . . for insider trading under Section 20A."); *In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 296 (S.D.N.Y. 2003) (Section 11 liability requires "material misrepresentations"); *City of Roseville Emps. Ret. Sys. v. EnergySolutions, Inc.*, 814 F. Supp. 2d 395, 423 (S.D.N.Y. 2011) ("Section 12(a)(2) . . . imposes liability" when "a prospectus . . . 'includes an untrue statement of material fact or omits to state a material fact'" (quoting 15 U.S.C. § 77l(a)(2)); *In re Lehman Bros. Mortg.-Backed Sec. Litig.*, 650 F.3d 167, 185 (2d Cir. 2011) ("Section 15 imposes . . . liability" on those who "control[] any person liable under § 11." (internal quotation marks omitted).

V. Conclusion

For the foregoing reasons, Defendants' motion to dismiss is GRANTED. The Clerk's office is directed to terminate the open motions on the docket and to post notice of this Opinion & Order on the docket for the related action numbered 18-cv-3744.

SO ORDERED.

Dated: September 7, 2021
New York, New York

s/
Vernon S. Broderick
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of January, two thousand twenty-three.

Moab Partners, L.P.,

Lead Plaintiff-Appellant,

City of Riviera Beach General Employees Retirement System, on behalf of itself and all others similarly situated,

Plaintiff,

v.

Macquarie Infrastructure Corporation, James Hooke, Jay Davis, Liam Stewart, Richard D. Courtney, Barclays Capital Inc., Robert Choi, Martin Stanley, Norman H. Brown, Jr., George W. Carmany, III, Henry E. Lentz, Ouma Sananikone, William H.

ORDER
Docket No: 21-2524

Webb, Macquarie Infrastructure Management (USA) Inc.,

Defendants-Appellees.

Appellees filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe,
Clerk

APPENDIX D

15 U.S.C. § 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To 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 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.

* * *

17 C.F.R. § 240.10b-5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

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

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the

circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 229.303 (Item 303) Management's discussion and analysis of financial condition and results of operations.

(a) Objective. The objective of the discussion and analysis is to provide material information relevant to an assessment of the financial condition and results of operations of the registrant including an evaluation of the amounts and certainty of cash flows from operations and from outside sources. 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. The discussion and analysis must be of the financial statements and other statistical data that the registrant believes will enhance a reader's understanding of the registrant's financial condition, cash flows and other changes in financial condition and results of operations. A discussion and analysis that meets the requirements of this paragraph (a) is expected to better allow investors to view the registrant from management's perspective.

(b) *Full fiscal years.* The discussion of financial condition, changes in financial condition and results of operations must provide information as specified in paragraphs (b)(1) through (3) of this section and such other information that the registrant believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations. Where the financial statements reflect material changes from period-to-period in one or more line items, including where material changes within a line item offset one another, describe the underlying reasons for these material changes in quantitative and qualitative terms. Where in the registrant's judgment a discussion of segment information and/or of other subdivisions (e.g., geographic areas, product lines) of the registrant's business would be necessary to an understanding of such business, the discussion must focus on each relevant reportable segment and/or other subdivision of the business and on the registrant as a whole.

(1) *Liquidity and capital resources*. Analyze the registrant's ability to generate and obtain adequate amounts of cash to meet its requirements and its plans for cash in the short-term (i.e., the next 12 months from the most recent fiscal period end required to be presented) and separately in the long-term (i.e., beyond the next 12 months). The discussion should analyze material cash requirements from known contractual and other obligations. Such disclosures must specify the type of obligation and the relevant time period for the related cash requirements. As part of this analysis, provide the information in paragraphs (b)(1)(i) and (ii) of this section.

(i) *Liquidity*. Identify any known trends or any known demands, commitments, events or uncertainties

that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way. If a material deficiency is identified, indicate the course of action that the registrant has taken or proposes to take to remedy the deficiency. Also identify and separately describe internal and external sources of liquidity, and briefly discuss any material unused sources of liquid assets.

(ii) *Capital resources.*

(A) Describe the registrant's material cash requirements, including commitments for capital expenditures, as of the end of the latest fiscal period, the anticipated source of funds needed to satisfy such cash requirements and the general purpose of such requirements.

(B) Describe any known material trends, favorable or unfavorable, in the registrant's capital resources. Indicate any reasonably likely material changes in the mix and relative cost of such resources. The discussion must consider changes among equity, debt, and any off-balance sheet financing arrangements.

(2) *Results of operations.*

(i) Describe any unusual or infrequent events or transactions or any significant economic changes that materially affected the amount of reported income from continuing operations and, in each case, indicate the extent to which income was so affected. In addition, describe any other significant components of revenues or expenses that, in the registrant's judgment, would be material to an understanding of the registrant's results of operations.

(ii) Describe any known trends or uncertainties that have had or that are reasonably likely to have a

material favorable or unfavorable impact on net sales or revenues or income from continuing operations. If the registrant knows of events that are reasonably likely to cause a material change in the relationship between costs and revenues (such as known or reasonably likely future increases in costs of labor or materials or price increases or inventory adjustments), the change in the relationship must be disclosed.[1]

(iii) If the statement of comprehensive income presents material changes from period to period in net sales or revenue, if applicable, describe the extent to which such changes are attributable to changes in prices or to changes in the volume or amount of goods or services being sold or to the introduction of new products or services.

(3) *Critical accounting estimates.* Critical accounting estimates are those estimates made in accordance with generally accepted accounting principles that involve a significant level of estimation uncertainty and have had or are reasonably likely to have a material impact on the financial condition or results of operations of the registrant. Provide qualitative and quantitative information necessary to understand the estimation uncertainty and the impact

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[1] Before Item 303 was amended in 2021, Section 229.303(b)(2)(ii) was codified at Section 229.303(a)(3)(ii), which provided:

> Describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations. If the registrant knows of events that will cause a material change in the relationship between costs and revenues (such as known future increases in costs of labor or materials or price increases or inventory adjustments), the change in the relationship shall be disclosed.

the critical accounting estimate has had or is reasonably likely to have on financial condition or results of operations to the extent the information is material and reasonably available. This information should include why each critical accounting estimate is subject to uncertainty and, to the extent the information is material and reasonably available, how much each estimate and/or assumption has changed over a relevant period, and the sensitivity of the reported amount to the methods, assumptions and estimates underlying its calculation.

Instructions to paragraph (b): 1. Generally, the discussion must cover the periods covered by the financial statements included in the filing and the registrant may use any presentation that in the registrant's judgment enhances a reader's understanding. A smaller reporting company's discussion must cover the two-year period required in §§ 210.8–01 through 210.8–08 of this chapter (Article 8 of Regulation S–X) and may use any presentation that in the registrant's judgment enhances a reader's understanding. For registrants providing financial statements covering three years in a filing, discussion about the earliest of the three years may be omitted if such discussion was already included in the registrant's prior filings on EDGAR that required disclosure in compliance with § 229.303 (Item 303 of Regulation S-K), provided that registrants electing not to include a discussion of the earliest year must include a statement that identifies the location in the prior filing where the omitted discussion may be found. An emerging growth company, as defined in § 230.405 of this chapter (Rule 405 of the Securities Act) or § 240.12b-2 of this chapter (Rule 12b-2 of the Exchange Act), may provide the discussion required in paragraph (b) of this section for its two most recent

fiscal years if, pursuant to Section 7(a) of the Securities Act of 1933 (15 U.S.C. 77g(a)), it provides audited financial statements for two years in a Securities Act registration statement for the initial public offering of the emerging growth company's common equity securities.

2. If the reasons underlying a material change in one line item in the financial statements also relate to other line items, no repetition of such reasons in the discussion is required and a line-by-line analysis of the financial statements as a whole is neither required nor generally appropriate. Registrants need not recite the amounts of changes from period to period if they are readily computable from the financial statements. The discussion must not merely repeat numerical data contained in the financial statements.

3. Provide the analysis in a format that facilitates easy understanding and that supplements, and does not duplicate, disclosure already provided in the filing. For critical accounting estimates, this disclosure must supplement, but not duplicate, the description of accounting policies or other disclosures in the notes to the financial statements.

4. For the liquidity and capital resources disclosure, discussion of material cash requirements from known contractual obligations may include, for example, lease obligations, purchase obligations, or other liabilities reflected on the registrant's balance sheet. Except where it is otherwise clear from the discussion, the registrant must discuss those balance sheet conditions or income or cash flow items which the registrant believes may be indicators of its liquidity condition.

5. Where financial statements presented or incorporated by reference in the registration statement

are required by § 210.4-08(e)(3) of this chapter (Rule 4-08(e)(3) of Regulation S-X) to include disclosure of restrictions on the ability of both consolidated and unconsolidated subsidiaries to transfer funds to the registrant in the form of cash dividends, loans or advances, the discussion of liquidity must include a discussion of the nature and extent of such restrictions and the impact such restrictions have had or are reasonably likely to have on the ability of the parent company to meet its cash obligations.

6. Any forward-looking information supplied is expressly covered by the safe harbor rule for projections. See 17 CFR 230.175 [Rule 175 under the Securities Act], 17 CFR 240.3b-6 [Rule 3b-6 under the Exchange Act], and Securities Act Release No. 6084 (June 25, 1979).

7. All references to the registrant in the discussion and in this section mean the registrant and its subsidiaries consolidated.

8. Discussion of commitments or obligations, including contingent obligations, arising from arrangements with unconsolidated entities or persons that have or are reasonably likely to have a material current or future effect on a registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements or capital resources must be provided even when the arrangement results in no obligations being reported in the registrant's consolidated balance sheets. Such off-balance sheet arrangements may include: Guarantees; retained or contingent interests in assets transferred; contractual arrangements that support the credit, liquidity or market risk for transferred assets; obligations that arise or could arise

from variable interests held in an unconsolidated entity; or obligations related to derivative instruments that are both indexed to and classified in a registrant's own equity under U.S. GAAP.

9. If the registrant is a foreign private issuer, briefly discuss any pertinent governmental economic, fiscal, monetary, or political policies or factors that have materially affected or could materially affect, directly or indirectly, its operations or investments by United States nationals. The discussion must also consider the impact of hyperinflation if hyperinflation has occurred in any of the periods for which audited financial statements or unaudited interim financial statements are filed. See § 210.3-20(c) of this chapter (Rule 3-20(c) of Regulation S-X) for a discussion of cumulative inflation rates that may trigger the requirement in this instruction 9 to this paragraph (b).

10. If the registrant is a foreign private issuer, the discussion must focus on the primary financial statements presented in the registration statement or report. The foreign private issuer must refer to the reconciliation to United States generally accepted accounting principles, and discuss any aspects of the difference between foreign and United States generally accepted accounting principles, not discussed in the reconciliation, that the registrant believes are necessary for an understanding of the financial statements as a whole, if applicable.

11. The term statement of comprehensive income is as defined in §210.1-02 of this chapter (Rule 1-02 of Regulation S-X).

(c) *Interim periods.* If interim period financial statements are included or are required to be included by 17 CFR 210.3 [Article 3 of Regulation S-X], a

management's discussion and analysis of the financial condition and results of operations must be provided so as to enable the reader to assess material changes in financial condition and results of operations between the periods specified in paragraphs (c)(1) and (2) of this section. The discussion and analysis must include a discussion of material changes in those items specifically listed in paragraph (b) of this section.

(1) *Material changes in financial condition.* Discuss any material changes in financial condition from the end of the preceding fiscal year to the date of the most recent interim balance sheet provided. If the interim financial statements include an interim balance sheet as of the corresponding interim date of the preceding fiscal year, any material changes in financial condition from that date to the date of the most recent interim balance sheet provided also must be discussed. If discussions of changes from both the end and the corresponding interim date of the preceding fiscal year are required, the discussions may be combined at the discretion of the registrant.

(2) *Material changes in results of operations.*

(i) Discuss any material changes in the registrant's results of operations with respect to the most recent fiscal year-to-date period for which a statement of comprehensive income is provided and the corresponding year-to-date period of the preceding fiscal year.

(ii) Discuss any material changes in the registrant's results of operations with respect to either the most recent quarter for which a statement of comprehensive income is provided and the corresponding quarter for the preceding fiscal year or, in the alternative, the most recent quarter for which a statement of comprehensive

income is provided and the immediately preceding sequential quarter. If the latter immediately preceding sequential quarter is discussed, then provide in summary form the financial information for that immediately preceding sequential quarter that is subject of the discussion or identify the registrant's prior filings on EDGAR that present such information. If there is a change in the form of presentation from period to period that forms the basis of comparison from previous periods provided pursuant to this paragraph, the registrant must discuss the reasons for changing the basis of comparison and provide both comparisons in the first filing in which the change is made.

Instructions to paragraph (c): 1. If interim financial statements are presented together with financial statements for full fiscal years, the discussion of the interim financial information must be prepared pursuant to this paragraph (c) and the discussion of the full fiscal year's information must be prepared pursuant to paragraph (b) of this section. Such discussions may be combined. Instructions 2, 3, 4, 6, 8, and 11 to paragraph (b) of this section apply to this paragraph (c).

2. The registrant's discussion of material changes in results of operations must identify any significant elements of the registrant's income or loss from continuing operations which do not arise from or are not necessarily representative of the registrant's ongoing business.

APPENDIX E[2]

Number of § 10(b) Cases Using Item 303 Theory

Year	2d Cir.	3d Cir.	9th Cir.
2014	10	1	6
2015	8	3	2
2016	6	0	2
2017	15	3	2
2018	16	3	3
2019	15	5	2
2020	12	1	5
2021	14	2	6
2022	12	2	3

Percent of § 10(b) Cases Using Item 303 Theory

Year	2d Cir.	3d Cir.	9th Cir.
2014	25.0%	5.0%	16.7%
2015	18.2%	20.0%	4.0%
2016	10.5%	N/A	3.6%
2017	21.4%	9.4%	4.9%
2018	25.8%	13.0%	5.4%
2019	16.3%	22.7%	4.9%
2020	20.3%	5.3%	7.4%
2021	19.2%	14.3%	12.0%
2022	20.7%	13.3%	6.3%

[2] The Section 10(b)/Rule10b-5 filings data are based on data from the Stanford Law School Securities Class Action Clearinghouse (SCAC), https://securities.stanford.edu/, which tracks federal securities class actions by compiling data from PACER. For purposes of SCAC's numbers, suits that raise the same allegations against the same defendant(s) (which are often consolidated) are

treated as a single "filing." This data, which reflect information from the initial complaints, was searched by year, circuit, and allegation (e.g., Section 10(b)) to generate an initial list of all Section 10(b) claims in the most relevant circuits from 2014 through 2022. The Eleventh Circuit, which did not answer the question presented in this case until 2019, is excluded.

To identify which of these Section 10(b) class actions were based on an Item 303 theory, the docket of each was manually reviewed to identify the operative complaint. The operative complaint was then searched for "Item 303," and the results manually reviewed to confirm that each operative complaint expressly alleged a violation of Rule 10b-5 based on a failure to disclose under Item 303. These cases, which are listed in Appendix F *infra*, are accounted for on these charts under the year of their initial filing (regardless of the date of the operative complaint). Operative complaints based solely on Securities Act claims, or otherwise alleging that defendants "negligently" failed to disclose information as required by Item 303 or that defendants should have known of a duty to disclose even if Item 303 does not apply, were excluded from the count.

APPENDIX F

List of Item 303 Cases Filed in Each Relevant Circuit[3]:

SECOND CIRCUIT

Date filed	Case
5/21/2014	City of Pontiac General Employees' Retirement System v. Dell (S.D.N.Y. No. 14-3644)
5/27/2014	Perez v. Higher One Holdings (D. Conn. No. 14-755)
5/28/2014	Winkler v. Prospect Capital Corp. (S.D.N.Y. No. 14-3761)
8/1/2014	Patel v. L-3 Communications Holdings (S.D.N.Y. No. 14-6038)
8/22/2014	In re EZCORP, Inc. (S.D.N.Y. No. 14-6834)
9/30/2014	In re Millennial Media, Inc. (S.D.N.Y. No. 14-7923)
10/20/2014	In re Retrophin, Inc. (S.D.N.Y. No. 14-8376)
11/7/2014	In re Salix Pharmaceuticals, Ltd. (S.D.N.Y. No. 14-8925)
11/12/2014	Gauquie v. Albany Molecular Research, Inc. (E.D.N.Y. No. 14-6637)
12/29/2014	Weston v. RCS Capital Corp. (S.D.N.Y. No. 14-10136)
1/30/2015	Khunt v. Alibaba Group Holding, Ltd. (S.D.N.Y. No. 15-759)

[3] The methodology used to compile this list is described in Pet. 62a–63a n.2 *supra*. "Date filed" refers to the date of the initial (as opposed to operative) complaint.

Date filed	Case
2/27/2015	Lopez v. CTPartners Executive Search, Inc. (S.D.N.Y. No. 15-1476)
5/13/2015	Altayyar v. Etsy (E.D.N.Y. No. 15-2785)
7/30/2015	Plumbers and Steamfitters Local 137 Pension Fund v. American Express Co. (S.D.N.Y. No. 15-5999)
9/9/2015	Levin v. Resource Capital Corp. (S.D.N.Y. No. 15-7081)
9/21/2015	Thomas v. Shiloh Industries, Inc. (S.D.N.Y. No. 15-7449)
10/1/2015	Randall v. Fifth Street Finance Corp. (S.D.N.Y. No. 15-7759)
12/9/2015	In re Supercom, Ltd. (S.D.N.Y. No. 15-9650)
1/8/2016	Ong v. Chipotle Mexican Grill, Inc. (S.D.N.Y. No. 16-141)
2/24/2016	In re BHP Billiton, Ltd. (S.D.N.Y. No. 16-1445)
6/28/2016	Wilbush v. Ambac Financial Group (S.D.N.Y. No. 16-5076)
6/28/2016	Jackson v. Halyard Health, Inc. (S.D.N.Y. No. 16-5093)
8/8/2016	Kukkadapu v. Embraer (S.D.N.Y. No. 16-6277)
10/25/2016	Speakes v. Taro Pharmaceutical Industries, Ltd. (S.D.N.Y. No. 16-8318)
2/24/2017	Finger v. Pearson PLC (S.D.N.Y. No. 17-1422)
3/24/2017	In re Tempur Sealy International, Inc. (S.D.N.Y. No. 17-2169)
3/31/2017	Culhane v. U.S. Physical Therapy, Inc. (S.D.N.Y. No. 17-2347)

Date filed	Case
5/10/2017	City of Warwick Municipal Employees Pension Fund v. Rackspace Hosting, Inc. (S.D.N.Y. No. 17-3501)
6/29/2017	Rex and Roberta Ling Living Trust v. B Communications Ltd. (S.D.N.Y. No. 17-4937)
7/20/2017	Oklahoma Firefighters Pension and Retirement System v. Lexmark International, Inc. (S.D.N.Y. No. 17-5543)
7/26/2017	City of Warren Police and Fire Retirement System v. Zebra Technologies Corp. (E.D.N.Y. No. 17-4412)
7/28/2017	Scheufele v. Tableau Software, Inc. (S.D.N.Y. No. 17-5753)
8/23/2017	Brady v. Top Ships Inc. (E.D.N.Y. No. 17-4987)
10/20/2017	Steamfitters Local 449 Pension Plan v. Skechers U.S.A., Inc. (S.D.N.Y. No. 17-8107)
10/23/2017	Robinson v. Diana Containerships Inc. (E.D.N.Y. No. 17-6160)
10/30/2017	Holbrook v. Trivago N.V. (S.D.N.Y. No. 17-8348)
11/7/2017	Sjunde AP-Fonden v. General Electric Co. (S.D.N.Y. No. 17-8457)
11/16/2017	In re Omega Healthcare, Inc. (S.D.N.Y. No. 17-8983)
12/15/2017	In re Liberty Tax, Inc. (E.D.N.Y. No. 17-7327)
1/18/2018	Salazar v. General Electric Co. (D. Conn. No. 18-106)

Date filed	Case
2/5/2018	Parchmann v. Metlife, Inc. (E.D.N.Y. No. 18-780)
3/7/2018	In re Henry Schein, Inc. (E.D.N.Y. No. 18-1428)
3/9/2018	City of Warren Police and Fire Retirement System v. Foot Locker, Inc. (E.D.N.Y. No. 18-1492)
4/4/2018	Shreiber v. Synacor, Inc. (S.D.N.Y. No. 18-2979)
4/23/2018	City of Riviera Beach General Employees Retirement System v. Macquarie Infrastructure Corp. (S.D.N.Y. No. 18-3608)
4/24/2018	In re Aceto Corp. (E.D.N.Y. No. 18-2425)
8/2/2018	In re Helios and Matheson Analytics Inc. (S.D.N.Y. No. 18-6965)
8/27/2018	Construction Laborers Pension Trust for Southern California v. CBS Corp. (S.D.N.Y. No. 18-7796)
8/30/2018	Oklahoma Law Enforcement Retirement System v. Papa John's International, Inc. (S.D.N.Y. No. 18-7927)
9/4/2018	In re Skechers USA, Inc. (S.D.N.Y. No. 18-8039)
10/4/2018	In re Adient PLC (S.D.N.Y. No. 18-9116)
11/6/2018	In re Evoqua Water Technologies Corp. (S.D.N.Y. No. 18-10320)
11/6/2018	City of Birmingham Firemen's and Policemen's Supplemental Pension System v. Ryanair Holdings (S.D.N.Y. No. 18-10330)

Date filed	Case
12/12/2018	In re Tenaris S.A. (E.D.N.Y. No. 18-7059)
12/14/2018	Labul v. XPO Logistics, Inc. (D. Conn. No. 18-2062)
1/2/2019	Lewis v. YRC Worldwide, Inc. (N.D.N.Y. No. 19-1)
1/23/2019	In re Micron Technology, Inc. (S.D.N.Y. No. 19-678)
1/29/2019	In re Proshares Trust II (S.D.N.Y. No. 19-8)
2/1/2019	In re General Electric Co. (S.D.N.Y. No. 19-1013)
2/25/2019	Gordon v. Vanda Pharmaceuticals Inc. (E.D.N.Y. No. 19-1108)
3/4/2019	In re Weight Watchers International Inc. (S.D.N.Y. No. 19-2005)
4/1/2019	In re AT&T/DirectTV Now (S.D.N.Y. No. 19-2892)
5/14/2019	In re Jumia Technologies AG (S.D.N.Y. No. 19-4397)
5/16/2019	In re Dynagas LNG Partners (S.D.N.Y. No. 19-4512)
5/24/2019	Gluck v. Hecla Mining Co. (S.D.N.Y. No. 19-4883)
6/12/2019	Woolgar v. Kingstone Cos. (S.D.N.Y. No. 19-5500)
6/26/2019	In re FedEx Corp. (S.D.N.Y. No. 19-5990)
7/31/2019	City of Miami General Employees' & Sanitation Employees' Retirement Trust v. Venator Materials PLC (S.D.N.Y. No. 19-7182)

Date filed	Case
9/26/2019	Gordon v. Tencent Music Entertainment Group (E.D.N.Y. No. 19-5465)
11/1/2019	UA Local 13 & Employers Group Insurance Fund v. Sealed Air Corp. (S.D.N.Y. No. 19-10161)
1/22/2020	Benedetto v. Qudian Inc. (S.D.N.Y. No. 20-577)
1/24/2020	Brown v. Opera Ltd. (S.D.N.Y. No. 20-674)
2/13/2020	In re Luckin Coffee Inc. (S.D.N.Y. No. 20-1293)
3/17/2020	Rotunno v. Wood (S.D.N.Y. No. 20-2357)
4/10/2020	Ruttenberg v. ServiceMaster Global Holdings, Inc. (S.D.N.Y. No. 20-2976)
6/19/2020	In re U.S. Oil Fund, LP (S.D.N.Y. No. 20-4740)
7/28/2020	Di Scala v. Proshares Ultra Bloomberg Crude Oil (S.D.N.Y. No. 20-5865)
9/16/2020	Ko v. Nano-X Imaging Ltd. (E.D.N.Y. No. 20-4355)
10/24/2020	In re JPMorgan Chase & Co. (E.D.N.Y. No. 20-5124)
10/30/2020	In re Citigroup Inc. (S.D.N.Y. No. 20-9132)
11/12/2020	Swanson v. Interface, Inc. (E.D.N.Y. No. 20-5518)
11/13/2020	In re Alibaba Group Holding Ltd. (S.D.N.Y. No. 20-9568)
2/17/2021	Africa v. Jianpu Technology Inc. (S.D.N.Y. No. 21-1419)

Date filed	Case
2/19/2021	Pitman v. Immunovant, Inc. (E.D.N.Y. No. 21-918)
2/26/2021	In re Infinity Q Diversified Alpha Fund and Infinity Q Volatility Alpha Fund (E.D.N.Y. No. 21-1047)
3/8/2021	In re Plug Power Inc. (S.D.N.Y. No. 21-2004)
4/16/2021	In re Romeo Power Inc. (S.D.N.Y. No. 21-3362)
7/2/2021	In re DraftKings Inc. (S.D.N.Y. No. 21-5739)
7/6/2021	In re Didi Global Inc. (S.D.N.Y. No. 21-5807)
7/23/2021	In re Piedmont Lithium Inc. (E.D.N.Y. No. 21-4161)
7/26/2021	In re Oatly Group AB (S.D.N.Y. No. 21-6360)
8/16/2021	In re SelectQuote, Inc. (S.D.N.Y. No. 21-6903)
9/24/2021	In re AppHarvest, Inc. (S.D.N.Y. No. 21-7985)
10/5/2021	In re Nano-X Imaging Ltd. (E.D.N.Y. No. 21-5517)
12/10/2021	Dong v. Cloopen Group Holding Ltd. (S.D.N.Y. No. 21-10610)
12/10/2021	Meyer v. Organogenesis Holdings Inc. (E.D.N.Y. No. 21-6845)
1/24/2022	Parot v. Clarivate PLC (E.D.N.Y. No. 22-394)
2/4/2022	New Mexico State Investment Council v. TAL Education Group (S.D.N.Y. No. 22-1015)
2/23/2022	Lozada v. Taskus, Inc. (S.D.N.Y. No. 22-1479)

Date filed	Case
3/16/2022	In re Grab Holdings Ltd. (S.D.N.Y. No. 22-2189)
6/9/2022	In re Waste Management, Inc. (S.D.N.Y. No. 22-4838)
6/15/2022	City of St. Clair Shores Police and Fire Retirement System v. Unilever PLC (S.D.N.Y. No. 22-5011)
8/5/2022	In re Kiromic Biopharma, Inc. (S.D.N.Y. No. 22-6690)
8/19/2022	RTD Bros LLC v. Lottery.com, Inc. (S.D.N.Y. No. 22-7111)
9/23/2022	Maeshiro v. Yatsen Holding Ltd. (S.D.N.Y. No. 22-8165)
10/3/2022	Trivedi v. General Electric Co. (S.D.N.Y. No. 22-8453)
10/31/2022	Maschhoff v. Polished.com Inc. (E.D.N.Y. No. 22-6606)
12/5/2022	Diaz v. The Gap, Inc. (E.D.N.Y. No. 22-7371)

THIRD CIRCUIT

Date filed	Case
6/13/2014	Ansfield v. Hertz Corp. (D.N.J. No. 14-3790)
2/2/2015	Sun v. Han (D.N.J. No. 15-703)
9/29/2015	Silverstein v. Globus Medical, Inc. (E.D. Pa. No. 15-5386)
10/1/2015	Messner v. USA Technologies, Inc. (E.D. Pa. No. 15-5427)
2/27/2017	Roper v. Sito Mobile Ltd. (D.N.J. No. 17-1106)
3/12/2017	In re Toronto-Dominion Bank (D.N.J. No. 17-1665)

Date filed	Case
8/18/2017	SEB Investment Management v. Endo International PLC (E.D. Pa. No. 17-3711)
2/6/2018	Public Employees' Retirement System of Mississippi v. Advance Auto Parts, Inc. (D. Del. No. 18-212)
6/21/2018	In re Newell Brands, Inc. (D.N.J. No. 18-10878)
9/28/2018	In re Campbell Soup Co. (D.N.J. No. 18-14385)
1/15/2019	Ito-Stone v. DBV Technologies S.A. (D.N.J. No. 19-525)
3/22/2019	Utah Retirement Systems v. Healthcare Services Group, Inc. (E.D. Pa. No. 19-1227)
7/11/2019	Tanaskovic v. Realogy Holdings Corp. (D.N.J. No. 19-15053)
7/15/2019	City of Sterling Heights Police & Fire Retirement System v. Reckitt Benckiser Group PLC (D.N.J. No. 19-15382)
11/27/2019	City of Warren Police & Fire Retirement System v. Prudential Financial, Inc. (D.N.J. No. 19-20839)
4/14/2020	Vitello v. Bed Bath & Beyond Inc. (D.N.J. No. 20-4240)
1/20/2021	Holland v. 9F Inc. (D.N.J. No. 21-948)
7/12/2021	Bell v. Kanzhun Ltd. (D.N.J. No. 21-13543)
8/4/2022	In re Coinbase Global, Inc. (D.N.J. No. 22-4915)
10/4/2022	In re PayPal Holdings, Inc. (D.N.J. No. 22-5864)

NINTH CIRCUIT

Date filed	Case
1/15/2014	Hatamian v. Advanced Micro Devices (N.D. Cal. No. 14-226)
3/17/2014	Angley v. UTi Worldwide Inc. (C.D. Cal. No. 14-2066)
4/3/2014	In re Allied Nevada Gold Corp. (D. Nev. No. 14-175)
4/24/2014	Cowan v. Axesstel, Inc. (S.D. Cal. No. 14-1037)
9/3/2014	In re Rocket Fuel Inc. (N.D. Cal. No. 14-3998)
11/6/2014	In re Barrett Business Services, Inc. (W.D. Wash. No. 14-5884)
10/9/2015	Xu v. ChinaCache International Holdings Ltd. (C.D. Cal. No. 15-7952)
11/16/2015	In re Capstone Turbine Corp. (C.D. Cal. No. 15-8914)
3/25/2016	Murphy v. Precision Castparts Corp. (D. Or. No. 16-521)
5/16/2016	In re LendingClub Corp. (N.D. Cal. No. 16-2627)
3/27/2017	Schoenfeld v. Inventure Foods Inc. (D. Ariz. No. 17-910)
5/3/2017	In re Sunrun Inc. (N.D. Cal. No. 17-2537)
3/9/2018	In re Wageworks, Inc. (N.D. Cal. No. 18-1523)
3/22/2018	Shah v. A10 Networks, Inc. (N.D. Cal. No. 18-1772)
3/30/2018	Milbeck v. Truecar, Inc. (C.D. Cal. No. 18-2612)

Date filed	Case
7/25/2019	North Miami Beach Police Officers' and Firefighters' Retirement Plan v. National General Holdings Corp. (C.D. Cal. No. 19-6468)
8/14/2019	Smith v. NetApp, Inc. (N.D. Cal. No. 19-4801)
1/2/2020	Sayce v. Forescout Technologies, Inc. (N.D. Cal. No. 20-76)
3/26/2020	Killyoung Oh v. Hanmi Financial Corp. (C.D. Cal. No. 20-2844)
8/24/2020	Sakkal v. Anaplan Inc. (N.D. Cal. No. 20-5959)
9/16/2020	Kendall v. Odonate Therapeutics, Inc. (S.D. Cal. No. 20-1828)
11/23/2020	Hessong v. Pinterest, Inc. (N.D. Cal. No. 20-8243)
3/3/2021	Farhar v. Ontrak Inc. (C.D. Cal. No. 21-1987)
4/16/2021	Ali v. Franklin Wireless Corp. (S.D. Cal. No. 21-687)
5/17/2021	Boehning v. ContextLogic, Inc. (N.D. Cal. No. 21-3671)
6/25/2021	Wang v. Athira Pharma, Inc. (W.D. Wash. No. 21-861)
8/13/2021	Sieggreen v. Live Ventures Inc. (D. Nev. No. 21-1517)
11/18/2021	Bernstein v. Ginkgo Bioworks Holdings, Inc. (N.D. Cal. No. 21-8943)
2/15/2022	In re Acutus Medical, Inc. (S.D. Cal. No. 22-206)
3/8/2022	Plumbers and Steamfitters Local 60 Pension Trust v. Meta Platforms, Inc. (N.D. Cal. No. 22-1470)

Date filed	Case
5/6/2022	Joyce v. Amazon.com (W.D. Wash. No. 22-617)

APPENDIX G

List of Law Firm Communications and Commentary Addressing MD&A Disclosures:

1. *When Rules Collide* – Leidos*, the Supreme Court, and the Risk to the MD&A*, BNA Securities Regulation & Law Report, Morgan Lewis (Sept. 25, 2017), https://perma.cc/MN63-YSWT.
2. Robert L. Hickok and Gay Parks Rainville, *Are Item 303 Omissions Actionable Under Rule 10b-5?*, Troutman Pepper (June 7, 2017), https://perma.cc/5NPN-VRS2.
3. *Supreme Court to Consider Whether Non-Compliance with SEC Regulation Can Give Rise to Securities Fraud Liability*, Dechert LLP (May 3, 2017), https://perma.cc/7BLF-N4ZQ.
4. Stephen J. Crimmins and James K. Goldfarb, Murphy & McGonigle, *Will the Supreme Court Expand Silence as a Basis for Securities Fraud?*, Colum. L. Sch. Blue Sky Blog (Apr. 4, 2017), https://perma.cc/VXE7-H38K.
5. *U.S. Supreme Court To Consider Registrant's Liability For Non-Disclosure Under Item 303 of Regulation S-K*, Shearman & Sterling (Apr. 4, 2017), https://perma.cc/ZMZ5-BPWQ.
6. *Supreme Court Grants Review in Securities Case About Duty to Disclose*, Gibson Dunn (Apr. 3, 2017), https://perma.cc/VHL8-ASMR.

7. Michelle S. Kallen, *Supreme Court to Examine Key Question of Securities Fraud Liability Based Solely on Omissions*, Paul Weiss (Mar. 30, 2017), https://perma.cc/KT9N-EZLM.

8. *Securities and Shareholder Litigation & Class Actions*, Sidley (Mar. 29, 2017), https://perma.cc/7HVH-U4EU.

9. Thomas O. Gorman, *U.S. Supreme Court Agrees To Hear Securities Fraud Omissions Case*, Dorsey & Whitney LLP (Mar. 29, 2017), https://perma.cc/58BN-J7D7.

10. Carmen Germaine, *Silence May Not Be Golden For Cos. After High Court Review*, Law360 (Mar. 27, 2017, 11:09 PM), https://perma.cc/K3QG-AHRR (quoting Cohen Milstein Sellers & Toll PLLC partner).

11. Mark T. Plichta and Garrett F. Bishop, *Failure to Disclose Known Trends or Uncertainties in Public Filings May Create Liability Under Section 10(b)*, Foley & Lardner (Feb. 27, 2015), https://perma.cc/SA5X-ASR7.

12. *Second Circuit Warns That Omission In Public Filings May Constitute Actionable Securities Fraud*, Kleinberg Kaplan (Feb. 18, 2015), https://perma.cc/A27K-GF3M.

13. Douglas Flaum et al., *Second Circuit Finds That Failure to Make Required Item 303 Disclosure Can Provide Basis for Securities Fraud Claim*, Paul Hastings (Jan. 29, 2015), https://perma.cc/DBZ9-7MP3.

14. Jonathan C. Dickey and Noah F. Stern, *Creating a Clear Circuit Split, the Second Circuit Holds That Failure to Disclose Known Trends or Uncertainties Under Item 303 of Regulation S-K Creates Liability Under Section 10(b)*, Gibson Dunn (Jan. 22, 2015), https://perma.cc/BF3E-BF38.

15. Michael Eisenkraft, Cohen Milstein Sellers & Toll PLLC, *Can Silence Keep You Safe? New Debate on 10b-5 Liability*, Law360 (Jan. 20, 2015, 10:57 AM), https://perma.cc/9JYD-7974.