No. 22-1165

IN THE

Supreme Court of the United States

MACQUARIE INFRASTRUCTURE CORPORATION, *et al.*,

Petitioners,

v.

MOAB PARTNERS, L.P., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.................................... iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT....................................2

ARGUMENT..5

I. Allowing Section 10(b) Claims Based On An Alleged Failure To Make Disclosures Required Under Item 303 Would Harm Issuers' Ability To Effectively Use And Protect Confidential Business Information...5

   A. Confidential business information is highly valuable to companies, and maintaining its secrecy benefits the companies and the public 5

   B. Item 303 could be interpreted to require disclosure of confidential business information...9

   C. Plaintiffs would use Item 303 to bring unwarranted or abusive Section 10(b) suits against issuers based on non-disclosure of confidential business information 14

   D. The enormous potential liability from unwarranted or abusive Section 10(b) suits premised on alleged Item 303 omissions would place issuers into an untenable dilemma 18

II. The Many Adverse Impacts That Section 10(b) Claims Based On Item 303 Omissions Would Have On Issuers' Use Of Confidential Business Information Underscore The Reasons Why The Court Should Not Expand The Section 10(b) Private Right Of Action To Include Such Claims....................21

CONCLUSION....................23

TABLE OF AUTHORITIES

Page(s)

Cases

Bd. of Trade of City of Chi. v. Christie Grain & Stock Co., 198 U.S. 236 (1905) 7

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 19

Carpenter v. United States, 484 U.S. 19 (1987) 7

Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) 21

Decker v. Massey-Ferguson, Ltd., 681 F.2d 111 (2d Cir. 1982)................................. 19

Eden Hannon & Co. v. Sumitomo Tr. & Banking Co., 914 F.2d 556 (4th Cir. 1990) 7, 20

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) 21

Flamm v. Eberstadt, 814 F.2d 1169 (7th Cir. 1987) 6, 7, 20

Janus Cap. Grp., Inc. v. First Derivative Traders, 564 U.S. 135 (2011) 5, 22

Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) 8

Malack v. BDO Seidman, LLP,
617 F.3d 743 (3d Cir. 2010)................................ 19

Matrixx Initiatives, Inc. v. Siracusano,
563 U.S. 27 (2011) 15

SEC v. Materia,
745 F.2d 197 (2d Cir. 1984).................................. 2

SEC v. Tex. Gulf Sulphur Co.,
401 F.2d 833 (2d Cir. 1968).................................. 6

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 22, 23

Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.,
552 U.S. 148 (2008) 19, 22

Stratte-McClure v. Morgan Stanley,
776 F.3d 94 (2d Cir. 2015).................................. 17

United States v. Chestman,
947 F.2d 551 (2d Cir. 1991)...........................2, 6, 8

In re Yunji Inc., Sec. Litig.,
2021 WL 1439715 (E.D.N.Y. Mar. 31, 2021)...... 18

Statutes & Regulations

Private Securities Litigation Reform Act of 1995,
Pub. L. No. 104-67, 109 Stat. 737....................... 22

15 U.S.C. § 77k(a) (Securities Act Section 11(a)) 19

15 U.S.C. § 78j(b) (Exchange Act Section 10(b)).... 1-5,
14-23

17 C.F.R. § 229.303 (Reg. S-K, Item 303) 1-5, 9-22

17 C.F.R. § 229.303(b)(2)(ii) 3, 9

17 C.F.R. § 240.10b-5 (Rule 10b-5) 1, 14,15, 19, 21, 22

Other Authorities

1 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 3:47 (2023) 9, 13

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Allan Horwich, *When the Corporate Luminary Becomes Seriously Ill: When Is a Corporation Obligated to Disclose That Illness and Should the Securities and Exchange Commission Adopt a Rule Requiring Disclosure?* 5 NYU J.L. & Bus. 827 (2009) 13

Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement*, 108 Colum. L. Rev. 1301 (2008) 16

Edmund W. Kitch, *The Theory and Practice of Securities Disclosure*, 61 Brook. L. Rev. 763 (1995) 5, 6, 20

Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 Sup. Ct. Rev. 309 (1982) 2, 20

James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 Calif. L. Rev. 115 (2012)..................................... 16

John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534 (2006) 19

Richard A. Posner, *The Right of Privacy*, 12 Ga. L. Rev. 393 (1977).................................7, 20

SEC Concept Release, *Business and Financial Disclosure Required by Regulation S-K*, Release No. 10064, 2016 WL 1458170 (Apr. 13, 2016)...10, 15

SEC Interpretation, *In re Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations*, Release No. 8350, 2003 WL 22996757 (Dec. 19, 2003)... 13

SEC Interpretive Release, *Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures,* Release No. 6835, 1989 WL 1092885 (May 18, 1989)... 9-12, 15

Stanford Law School Securities Class Action Clearinghouse, *Top Ten by Largest Settlement*, https://tinyurl.com/s7vxwpbr (last visited November 20, 2023) 20

Tamar Frankel, *Implied Rights of Action*, 67 Va. L. Rev. 553 (1981)... 16

Tom C.W. Lin, *Executive Private Misconduct*,
88 Geo. Wash. L. Rev. 327 (2020). 13-14

INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * *

As a steadfast advocate for free enterprise, ALF has filed numerous amicus briefs urging this Court to decide cases in a way that promotes civil justice. The question presented here—whether the implied right of action under Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5 encompasses claims for alleged omissions of disclosures required under Item 303 of SEC Regulation S-K—is a civil justice issue. As this brief explains,

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[1] No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

allowing such suits would compel a publicly traded company to choose between over-disclosure of its commercially sensitive, confidential business information or the risk of ruinous liability. Such over-disclosure of confidential business information, which competitors could access, would have harmful consequences not only for a company, but also for investors and the public. These adverse effects underscore the reasons why the Court should not expand the Section 10(b) implied private right of action to allow claims based on Item 303 omissions.

SUMMARY OF ARGUMENT

In commercial markets, information is "the equivalent of the coin of the realm." *SEC v. Materia*, 745 F.2d 197, 198 (2d Cir. 1984). It allows companies to compete for scarce resources and opportunities, and it has value in its own right. *See United States v. Chestman*, 947 F.2d 551, 576 (2d Cir. 1991) (Winter, J., concurring in part and dissenting in part) ("Information is perhaps the most precious commodity in commercial markets.").

Yet because information "may be used without being used up," Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 Sup. Ct. Rev. 309, 313 (1982), and is easily transmittable, a company's commercially sensitive information can quickly lose value once it is disclosed. Competitors learn of and can snap up a valuable business opportunity. Other market participants that learn of a company's commitment to a business plan may impose higher transaction costs on the company once its cards are on the table. It is thus critical for companies to keep their

valuable confidential business information secret. And if the law fails to protect confidential business information or affirmatively requires its disclosure, companies will invest less in generating that useful information, and investors and society will be worse off.

By holding that a failure to make a disclosure required under Item 303 of SEC Regulation S-K can support a claim under Section 10(b) of the Securities Exchange Act of 1934, the Second Circuit's ruling jeopardizes publicly traded companies' ability to effectively use and protect their confidential business information. The intentionally flexible and general language of Item 303—which requires an issuer to disclose "known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact" on its financial performance, 17 C.F.R. § 229.303(b)(2)(ii)—and the SEC's interpretative guidance on Item 303 could be read to require an issuer to disclose confidential business information. Specifically, this confidential business information concerns an "event" or "uncertainty" that is known to management and is reasonably likely to have a material effect on the issuer's financial condition. Although Item 303, even as interpreted by the SEC, does not clearly require the disclosure of confidential business information, there is enough broad and vague language in the regulation and SEC guidance for aggressive investors to file class-action securities fraud suits alleging companies' violations of Item 303 by failing to disclose confidential business information.

Private plaintiffs asserting Section 10(b) claims based on Item 303 omissions would be primarily

motivated by their own economic interests and would have no incentive to exercise restraint in prosecuting claims. They thus would bring whatever claims are available under Item 303's text and the SEC's guiding standards and are economically attractive to them. Whenever a company shared important news regarding its business—good or bad—investors who bought or sold the company's shares while the company kept its business plans to itself would face Section 10(b) class actions asserting that the company's business plans and strategy were required to be disclosed under Item 303.

Given the enormous costs of litigating Section 10(b) class actions and the potentially ruinous monetary damages and other business harms threatened by such lawsuits, allowing Section 10(b) claims to be based on the failure to make disclosures required under Item 303 would present companies with a difficult and inappropriate dilemma as to their confidential business information. Management would be forced to choose between over-disclosure of the company's confidential business information—and suffering the negative competitive and financial effects of doing so—or risking a crushing damages award or settlement in a Section 10(b) class action. How companies would come out on these decisions likely would vary, but the important point is that these are choices the securities laws never contemplated issuers having to make.

These harmful effects all reinforce that this Court should not expand the Section 10(b) implied private right of action to allow claims based on Item 303 omissions. Indeed, in analyzing the scope of the Section 10(b) right of action, this Court has been

"mindful that [it] must give 'narrow dimensions . . . to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law.'" *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011) (quoting *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 165 (2008)).

ARGUMENT

I. Allowing Section 10(b) Claims Based On An Alleged Failure To Make Disclosures Required Under Item 303 Would Harm Issuers' Ability To Effectively Use And Protect Confidential Business Information

A. Confidential business information is highly valuable to companies, and maintaining its secrecy benefits the companies and the public

A company's confidential business information is highly valuable. It is at the core of the company's ability to identify profitable business opportunities and then effectively execute on them without competitors appropriating some or all of the value of those opportunities. Without confidential business information, a company would, in essence, have no "power to compete effectively" in the market. Edmund W. Kitch, *The Theory and Practice of Securities Disclosure*, 61 Brook. L. Rev. 763, 772 (1995).

The information's value, of course, depends on its remaining secret. If a company discloses a confidential business strategy that correctly explains why the strategy will be profitable, "competitors can simply do the same thing," and when they do, "they

will drive down [the] profitability" of the company's strategy. *Id.* at 853-54. Companies thus keep business strategies and other commercially sensitive information confidential. For example, if a company is working on a valuable invention, it "may elect not to disclose the existence of the project, let alone daily progress," because "[m]uch of the value of the invention may come from stealing a march on rivals, a value that would be dissipated if the firm turned valuable information over to its investors and therefore inescapably to rivals." *Flamm v. Eberstadt*, 814 F.2d 1169, 1176 (7th Cir. 1987) (Easterbrook, J.), *abrogated on other grounds by Basic, Inc. v. Levinson*, 485 U.S. 224 (1988); *see Chestman*, 947 F.2d at 576-77 (Winter, J., concurring in part and dissenting in part) ("[T]here is a ubiquitous risk that those who pay to produce information will see others reap the profit from it.").

The court in *Flamm* found another salient example of this principle in one of securities law's most famous cases, *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (en banc):

> TGS found the world's biggest lode of nickel. To capitalize, it had to line up the mineral rights for the whole area. If TGS had released the assays immediately, other firms (or the owners of the surface interests) could have captured the rewards of TGS's search. TGS had to keep its find secret for a while, and investors who sold their stock while TGS was silent had no complaint. TGS did its investors a favor by saying as little as possible for as long as necessary. Once TGS started disclosing it had

> a duty not to lie, but that's another problem
> . . . .

Flamm, 814 F.2d at 1176 (citation omitted).

In this way, "[s]ecrecy is an important method of appropriating social benefits to the entrepreneur who creates them." Richard A. Posner, *The Right of Privacy*, 12 Ga. L. Rev. 393, 404 (1977). If, in contrast, a company "invests resources in acquiring information about the true values of things," but were then forced to share this information, it "would obtain no return on [its] investment, and the process—basic to a market economy—by which people transfer goods through voluntary exchange into successively more valuable uses would be impaired." *Id.* at 397. Moreover, "the value of a firm is [often] its special knowledge," and if "that firm cannot protect that knowledge from immediate dissemination to competitors, it may not be able to reap the benefits from the time and money invested in building that knowledge," thus reducing "the incentive to engage in the building of such knowledge." *Eden Hannon & Co. v. Sumitomo Tr. & Banking Co.*, 914 F.2d 556, 561 (4th Cir. 1990).

The law therefore recognizes the value of permitting companies to keep their confidential business information secret. Confidential business information thus has "long been recognized as property." *Carpenter v. United States*, 484 U.S. 19, 26 (1987); *see also Bd. of Trade of City of Chi. v. Christie Grain & Stock Co.*, 198 U.S. 236, 250 (1905) (Holmes, J.) (recognizing that the plaintiff's confidential business information "is entitled to the protection of the law" and that "[t]he plaintiff has the right to keep

the work which it has done, or paid for doing, to itself"); *Chestman*, 947 F.2d at 576 (Winter, J., concurring in part and dissenting in part) ("If the law fails to protect property rights in commercial information, . . . less will be invested in generating such information."). As this Court observed nearly 50 years ago, "[i]t is hard to see how the public would be benefited by the disclosure of" a company's confidential business information. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 483 (1974). Instead, "keeping such items secret encourages businesses to initiate new and individualized plans of operation, and constructive competition results." *Id.*

In the opposite direction, a company's confidential business information can help lessen the financial harm it suffers from scaling back or pulling the plug on an unsuccessful venture. To take a simple example, consider an operator of retail stores that decides to expand its business by offering delivery service for its merchandise and purchases a fleet of vehicles for deliveries. After the delivery service proves to be far less popular than anticipated and generates sizable losses for the company, management decides to quickly reduce its fleet of delivery vehicles by half. Keeping this internal business strategy confidential will allow the company to sell the half of delivery vehicles at significantly better prices than the fire-sale prices buyers may demand when they know the company is desperate to unburden itself from the vehicles.

Another type of confidential business information concerns significant personal matters of company executives or other key employees. Some companies' executives are perceived as being critical to their

company's success and future prospects, and if such an executive is facing a major personal matter that could bear on his or her management ability, such as a diagnosis with a serious illness or the death of an immediate family member, investors will likely consider that information to be material. *See* 1 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 3:47 (2023) (hereinafter "Hazen").

B. Item 303 could be interpreted to require disclosure of confidential business information

Although Item 303 of SEC Regulation S-K, even as interpreted and enforced by the SEC, does not clearly require the disclosure of confidential business information, there is enough broad and vague language in the regulation and SEC guidance for aggressive investors to file class-action securities fraud suits alleging that a company has violated Item 303 by failing to disclose confidential business information.

As relevant here, Item 303 requires an issuer to disclose "known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact" on its financial performance. 17 C.F.R. § 229.303(b)(2)(ii).[2] Item 303 "is intended to give the investor an opportunity to look at the company through the eyes of management by providing both a short and long-term analysis of the business of the company." SEC Interpretive Release,

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[2] Item 303 was amended in 2021, and this language comes from the current version of Item 303. Although the previous version of Item 303 governs this case, its language does not differ from the current version in any way material to this case.

Management's Discussion and Analysis [M,D&A] *of Financial Condition and Results of Operations; Certain Investment Company Disclosures,* Release No. 6835, 1989 WL 1092885, at *3 (May 18, 1989) (hereinafter "Release No. 6835"). Under this release, 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 conditions or results of operations." *Id.* at *4.

This "'reasonably likely' standard is a lower threshold than 'more likely than not.'" SEC Concept Release, *Business and Financial Disclosure Required by Regulation S-K*, Release No. 10064, 2016 WL 1458170, at *46 (Apr. 13, 2016) (hereinafter "Release No. 10064"). The SEC has thus described Item 303's requirements as "intentionally flexible and general" and emphasized their individualized application to each issuer. Release No. 6835, 1989 WL 1092885, at *4 ("Because no two registrants are identical, good MD&A disclosure for one registrant is not necessarily good MD&A disclosure for another.").

Furthermore, the SEC's guidance on Item 303 has also distinguished between disclosures that are *required* and those that are *optional*: "Required forward-looking disclosure is based on currently known trends, events and uncertainties that are reasonably expected to have material effects, while optional forward-looking disclosure involves either anticipating a future trend or event or anticipating a less predictable impact of a known event, trend or uncertainty." Release No. 10064, 2016 WL 1458170, at *45. Whether a future event is "known" or

"anticipated" is a fine distinction, and, in practice, the line between required and optional disclosures under Item 303 "is far from a clear one." 2 Hazen § 9:52.

Item 303's disclosure requirements are simultaneously broad and nebulous, and they present "[t]he most significant and challenging public disclosures" for an issuer. 2 Hazen § 9:52. The expansive sweep of Item 303's text and the SEC's interpretative guidance could be read as requiring an issuer to disclose confidential business information it generates as it conducts its business. Under the SEC's standards, an issuer must disclose a "commitment" or "event" that is "known to management and reasonably likely to have material effects" on the issuer's financial condition. Release No. 6835, 1989 WL 1092885, at *4. The issuer's development of a new product or pursuit of a new business opportunity can readily be characterized as fitting within these bounds: The new business plan is a "commitment" or "event," is "known" to management, and is reasonably likely to have a material effect on the issuer's financial condition. The same conclusion obtains to an issuer's plans to scale down an unprofitable segment of its business. Taken at face value, giving investors the "opportunity to look at the company through the eyes of management" would include management's view of confidential business information. *Id.* at *3.

Indeed, the SEC has acknowledged that Item 303 could be interpreted to require an issuer to disclose its confidential business information. Consider the following passage from Release No. 6835:

> While Item 303 could be read to impose a duty to disclose otherwise nondisclosed preliminary merger negotiations, as known events or uncertainties reasonably likely to have material effects on future financial condition or results of operations, the Commission did not intend to apply, and has not applied, Item 303 in this manner. As reflected in the various disclosure requirements under the Securities Act and Exchange Act that specifically address merger transactions, the Commission historically has balanced the informational need of investors against the risk that premature disclosure of negotiations may jeopardize completion of the transaction.

Release No. 6835, 1989 WL 1092885, at *16 (footnotes omitted).

And while the SEC has made clear that confidential preliminary merger negotiations need not be disclosed under Item 303, it has identified other types of confidential business information as potentially falling within Item 303's purview, but has left open-ended whether and when an issuer must disclose that confidential business information:

> [W]hen preparing MD&A, companies should consider whether disclosure of all key variables and other factors that management uses to manage the business would be material to investors, and therefore required. . . . Companies should . . . consider disclosing information that may be peripheral to the accounting function, but is integral to the business or operating activity. Examples of

> such measures, depending on the circumstances of a particular company, can include those based on . . . product development, . . . business strategy, changes in the managerial approach or structure, . . . and any other pertinent macroeconomic measures.

SEC Interpretation, *In re Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations*, Release No. 8350, 2003 WL 22996757, at *8 & n.27 (Dec. 19, 2003).

Similarly, if an executive's personal matter is sufficiently serious and likely to command significant time and attention from the executive, Item 303 could be read as requiring the company to disclose that personal matter because it is an "event" "known" to management that is reasonably likely to have a material effect on the company's financial condition. *See* Release No. 6835, 1989 WL 1092885, at *4; *see also* Allan Horwich, *When the Corporate Luminary Becomes Seriously Ill: When Is a Corporation Obligated to Disclose That Illness and Should the Securities and Exchange Commission Adopt a Rule Requiring Disclosure?* 5 NYU J.L. & Bus. 827, 838 (2009) ("There should be little doubt that [Item 303] would encompass material uncertainties arising out of a known health problem suffered by a [corporate] luminary."). This would entail highly difficult assessments about whether an executive's personal matter was sufficiently "material" to warrant disclosure, requiring judgment about a host of sensitive matters such as mental health, addiction, infidelity, and divorce. *See* 1 Hazen § 3:47; Tom C.W. Lin, *Executive Private Misconduct*, 88 Geo. Wash. L.

Rev. 327, 363, 365 (2020) ("[T]here are no clear legal precedents, best practices, or regulatory guidance for these types of disclosure decisions.").

Thus, although even the SEC—which "vigorously enforces the MD&A disclosure requirements," 2 Hazen § 9:52—has not interpreted Item 303 to clearly require the disclosure of confidential business information, there is enough broad and vague language in the regulation and SEC guidance for aggressive investors to file class action securities fraud suits alleging Item 303 violations based on non-disclosure of confidential business information. In view of the many types of harms resulting from disclosure of confidential business information, Section 10(b) suits based on alleged Item 303 omissions should not be allowed.

C. Plaintiffs would use Item 303 to bring unwarranted or abusive Section 10(b) suits against issuers based on non-disclosure of confidential business information

Allowing private plaintiffs to bring Section 10(b) claims based on an issuer's failure to make disclosures required under Item 303 would lead to unwarranted or abusive suits premised on issuers' non-disclosure of confidential business information.

Section 10(b) makes it unlawful for any person to "use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b). Rule 10b-5 makes it unlawful 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." 17 C.F.R. § 240.10b-5(b). Critically, and in stark contrast to Item 303, Section 10(b) and Rule 10b–5(b) "do not create an affirmative duty to disclose" material information—disclosure is required "only when necessary 'to make . . . statements made, in the light of the circumstances under which they were made, not misleading.'" *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011) (quoting 17 C.F.R. § 240.10b-5(b)).

If, as the Second Circuit held below, an issuer's failure to make a disclosure required by Item 303 can serve as a basis for a Section 10(b) claim brought through Section 10(b)'s implied private right of action, Pet. App. 8a, the door would be wide open for plaintiffs to bring claims based on companies' omissions of confidential business information supposedly required to be disclosed under Item 303. Item 303's standards are "intentionally flexible and general," Release No. 6835, 1989 WL 1092885, at *4, yet also demanding, requiring issuers to disclose future events and possibilities that are not even "more likely than not" to come to fruition and whose likelihood of having a material financial effect on the company is similarly remote, Release 10064, 2016 WL 1458170, at *46. The complexity of Item 303 is further amplified by the hazy distinction between Item 303 disclosures that are "required" and those that are merely "voluntary." *Id.* at *45. These broad and nebulous standards provide the plaintiff's bar the clay to mold a boundless array of securities fraud claims based on issuers' non-disclosure of confidential business information.

And plaintiffs will. Although protecting confidential business information is important for both issuers and the public, plaintiffs have no incentive to exercise moderation in light of these concerns and will bring whatever claims might be available under Item 303's text and the SEC's guidelines and are economically attractive to them. "In general, private plaintiffs engage in litigation to further their own economic interests; they rarely concern themselves with the social costs and social benefits of their lawsuits." Tamar Frankel, *Implied Rights of Action*, 67 Va. L. Rev. 553, 571 (1981). Private plaintiffs "have no qualms about stretching the limits of a broadly worded statute," James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 Calif. L. Rev. 115, 122 (2012), and they "can and do" bring Section 10(b) actions that the "[SEC] would not want litigated by private enforcers," Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement*, 108 Colum. L. Rev. 1301, 1347 (2008).

Therefore, although the SEC has demonstrated well-considered and appropriate restraint in connection with enforcement of Item 303, this nebulous regulation can be expected to serve as a vehicle for private party Section 10(b) litigation based on new theories of securities fraud relating to non-disclosure of confidential business information. For example, when a company announces good news—an innovative new product, a new technology that substantially reduces manufacturing costs, the discovery and capture of a highly valuable mineral deposit—investors who sold their securities while that

information remained confidential would bring Section 10(b) claims asserting that the company's Item 303 omission caused them to sell their securities at an artificially deflated price. Likewise, the company that withdraws from a major geographic market, but kept its plans to do so secret for several months until it was ready to execute on its strategy and external conditions were favorable, would be bombarded by Section 10(b) plaintiffs alleging the company's Item 303 omission caused them to buy securities at an artificially inflated price. And if a company's prominent and influential CEO passes away from a previously undisclosed illness, the company will be met with Section 10(b) suits alleging Item 303 omissions as far back as the company knew the CEO had the illness. The permutations are innumerable, but would not be lost on the plaintiff's bar.

The Second Circuit in *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94 (2d Cir. 2015), stated that the SEC "has never gone so far as to require a bank to announce its internal business strategies or to identify the particulars of its trading positions" and then concluded that Item 303 did not require a company to disclose the details of a "long" trading position in the subprime mortgage market. *Id.* at 105. The court found that instead, the company "needed to disclose only that it faced deteriorating real estate, credit, and subprime mortgage markets, that it had significant exposure to those markets, and that if the trends came to fruition, the company faced trading losses that could materially affect its financial condition." *Id.* at 105-06. But the Second Circuit's recommended disclosure would still require the bank

to disclose the competitive information that it was heavily involved in those markets, and that the Second Circuit stopped short of requiring the bank to close the exact details of its long position does not mean that bank's confidential business information was not implicated.

Regardless, other circuits could view the issue differently and agree with plaintiffs that, based on Item 303's language and the SEC's interpretative releases, Item 303 requires disclosure of many types of confidential business information. And in the Second Circuit, it can be difficult for district courts to ascertain whether an issuer's alleged violation of Item 303 was based on non-disclosure of confidential business information or instead on events that were not secret or commercially sensitive, and encroachments on issuers' confidential business information will occur. *See In re Yunji Inc., Sec. Litig.*, No. 19-CV-6403, 2021 WL 1439715, at *6 (E.D.N.Y. Mar. 31, 2021) (distinguishing between e-commerce company's failure to disclose the launch of a new business model and failure to disclose the expected impact on the company's revenue from the new business model).

D. The enormous potential liability from unwarranted or abusive Section 10(b) suits premised on alleged Item 303 omissions would place issuers into an untenable dilemma

The effects on issuers of facing manifold private Section 10(b) claims based on non-disclosure of confidential business information would be severe. Plaintiffs have been able to assert claims alleging

Item 303 omissions under Section 11(a) of the Securities Act of 1933—which provides liability for a pure omission where an issuer "omitted to state a material fact required to be stated" in a registration statement, 15 U.S.C. § 77k(a). But the threat presented by a Section 10(b) class action premised on trading in the secondary market is greater by orders of magnitude. "There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975). Section 10(b) class actions burden a company with "extensive discovery and the potential for uncertainty and disruption" in the company's business activities. *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 163 (2008). "Rule 10b–5 litigation, by its very nature, is costly," *Malack v. BDO Seidman, LLP*, 617 F.3d 743, 755 (3d Cir. 2010), and these costs "fall largely on the defendant corporation," John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1536 (2006). The "in terrorem" effect of discovery in a Section 10(b) class action thus makes it so "a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial. *Blue Chip*, 421 U.S. at 740-41. Likewise, a company may strive to quickly end a Section 10(b) class action to minimize "the irreparable damage to reputations and goodwill which results from charges of fraud." *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 114 (2d Cir. 1982).

Furthermore, the sheer enormity of damages awarded in a Section 10(b) class action against a company whose securities are widely traded in the secondary market present an existential threat to companies. The threat is clear enough in the eyes of companies' managers that very few securities class actions go to trial, but even those that settle frequently involve settlement amounts in the hundreds of millions or billions of dollars. *See* Stanford Law School Securities Class Action Clearinghouse, *Top Ten by Largest Settlement*.[3]

Given Section 10(b)'s potentially ruinous effects on a company, allowing Section 10(b) claims to be based on the failure to make disclosures required under Item 303 would present companies with a difficult and inappropriate dilemma as to their confidential business information. Companies would be forced to choose between over-disclosure of their confidential business information—and suffering the negative competitive and financial effects of doing so, *see Eden Hannon*, 914 F.2d at 561; *Flamm*, 814 F.2d at 1186; Kitch, *supra*, at 848, 853-54; Easterbrook, *supra*, at 326-27; Posner, *supra*, at 397, 404—or risking crushing liability in a Section 10(b) class action. Companies also would have to decide whether exposing sensitive personal information of top executives is necessary to avoid a Section 10(b) class action.

How companies would come out on these decisions is unknown and could vary depending on the company and the degree of sensitivity of the information, but the important point is that these are choices the

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[3] https://tinyurl.com/s7vxwpbr (last visited November 20, 2023).

securities laws never contemplated issuers having to make. *Cf. Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 n.33 (1976) ("The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes those consequences.") (quoting *Ultramares Corp. v. Touche*, 255 N.Y. 170, 179-80 (1931) (Cardozo, C.J.)). And, ultimately, requiring companies to face these lose-lose situations will be to the detriment of investors and the public.

II. The Many Adverse Impacts That Section 10(b) Claims Based On Item 303 Omissions Would Have On Issuers' Use Of Confidential Business Information Underscore The Reasons Why The Court Should Not Expand The Section 10(b) Private Right Of Action To Include Such Claims

The plain texts of Section 10(b) and Rule 10b-5 do not permit claims based on pure omissions, and this alone requires vacatur of the Second Circuit's ruling that Section 10(b) claims can be based on Item 303 omissions. *See* Pet. Br. at 20-25; *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994) ("The private plaintiff may not bring a 10b–5 suit against a defendant for acts not prohibited by the text of § 10(b).").

Moreover, the many adverse impacts that Section 10(b) claims based on Item 303 omissions would have on issuers' ability to effectively use and protect confidential business information reinforce the reasons why this Court should not expand the Section 10(b) implied private right of action to include such claims. In assessing the scope of the Section 10(b)

right of action, this Court has been "mindful that [it] must give 'narrow dimensions . . . to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law.'" *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011) (quoting *Stoneridge*, 552 U.S. at 165). In enacting the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, Congress accepted the Section 10(b) implied "private cause of action as then defined but chose to extend it no further." *Stoneridge*, 552 U.S. at 166. Furthermore, an implied private right of action is informed by the consequences of "permit[ting] enforcement without the check imposed by prosecutorial discretion." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

These considerations should inform the Court's opinion here. When Congress enacted the PSLRA, courts had not interpreted Section 10(b) and Rule 10b-5 to allow claims based on Item 303 omissions. For the reasons discussed in this brief, allowing such claims now would significantly expand the Section 10(b) private right of action and expose issuers to substantial liability for not disclosing confidential business information. And because private plaintiffs have no incentive to exercise moderation and would bring whatever claims are available under Item 303's text and the SEC's guiding standards and are economically attractive to them, expanding the Section 10(b) right of action to include claims premised on Item 303 omissions would lead to a significant number of suits that jeopardize companies' ability to effectively use confidential business information. This too counsels against expansion of

the Section 10(b) right of action. *See Sosa*, 542 U.S. at 727.

CONCLUSION

The Court should vacate the judgment of the Second Circuit and remand the case for further proceedings.

Respectfully submitted,

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