

[Securities Regulation Daily Wrap Up, FRAUD AND MANIPULATION—S.D.N.Y.: Macquarie slips claims over fuel oil storage disclosures, \(Sept. 9, 2021\)](#)

Securities Regulation Daily Wrap Up

[Click to open document in a browser](#)

By [John M. Jascob, J.D., LL.M.](#)

The plaintiff failed to prevail on claims that the global infrastructure firm concealed from investors that its single largest product faced a "near-cataclysmic" regulatory ban.

The federal district court in Manhattan has dismissed federal securities fraud claims against Macquarie Infrastructure Corporation and certain officers for allegedly failing to disclose uncertainties regarding its bulk liquid storage business. The plaintiff failed to identify any statements that were actionable as half-truths due to the defendants' failure to disclose its business reliance on storing a type of oil threatened by pending regulation. Moreover, the plaintiff did not plead any business uncertainty that required affirmative disclosure under Item 303 of Regulation S-K. ([City of Riviera Beach General Employees Retirement System v. Macquarie Infrastructure Corp.](#), September 7, 2021, Broderick, V.).

Macquarie is a publicly traded Delaware holding company that owns and operates various infrastructure and infrastructure-related businesses. According to the plaintiff, Macquarie's "most important operating division" is International-Matex Tank Terminals-Bayone, Inc. (IMTT), a wholly-owned subsidiary that operates large bulk liquid storage terminals within the U.S.

The dispute in the instant case arose out of IMTT's storage of a category of refined petroleum known as "No. 6 fuel oil." Given its relatively high percentage sulfur content, governments and other bodies with regulatory authority have sought to limit or ban No. 6 fuel oil's use for over a decade. In particular, the use of No. 6 fuel oil was threatened by a regulation known as "IMO 2020." First adopted in October 2008 by the International Maritime Organization, 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 percent or more by the beginning of 2020.

At the end of the class period, on February 21, 2018, Macquarie 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 percent, down from 94 percent at the end of the second quarter of 2017. Macquarie also announced that it had missed its financial projections and would be cutting its dividend guidance. On February 22, 2018, Macquarie held an earnings call in which its new CEO, Christopher Frost, said that the company's financial downturn was in large part due to the "structural decline in the 6 oil market." Frost also called this sudden downturn "a surprise." That same day, Macquarie's stock price fell around 41 percent.

Although the complaint raised a "host" of allegedly actionable misstatements and omissions, the court observed that the crux of the [lead plaintiff](#)'s argument was that Macquarie concealed from investors that IMTT's single largest product was No. 6 fuel oil, which constituted over 40 percent of IMTT's storage capacity and which faced a "near-cataclysmic" ban on the bulk of its worldwide use through IMO 2020. Accordingly, as framed by the plaintiff, a key issue was whether the defendants had a duty to disclose the extent to which IMTT's storage capacity was devoted to No. 6 fuel oil.

The court held, however, that the complaint did not identify any statements that were actionable as half-truths due to the defendants' failure to disclose its business reliance on storing No. 6 fuel oil. For example, the plaintiff argued that the defendants made misleading statements when they stated on earnings calls that Macquarie's business performance had been "boringly predictable" and that the company had an "unsexy business model."

These non-specific, generic statements, were the "type of milquetoast corporate-speak" that did not create a duty to disclose more facts, the court held.

The court also rejected the contention that the defendants violated affirmative disclosure obligations under Item 303 of Regulation S–K. Although the plaintiff asserted that Item 303 required the defendants to speak to the "increasing uncertainty" that Macquarie faced, the plaintiff did not actually plead an uncertainty that should have been disclosed, nor did the plaintiff plead in what SEC filing or filings the defendants were supposed to disclose it. Instead, the complaint merely claimed that Item 303 required Macquarie to disclose that its profits, revenues, and dividends were at risk due to the implementation of IMO 2020. And even if the plaintiff identified some known trend or uncertainty that implicated disclosure of IMTT's reliance on No.

6 fuel oil, the plaintiff would still have had to allege that the probability of that uncertainty coupled with its anticipated magnitude was enough to make it material in light of the totality of Macquarie's activity.

After finding that the plaintiff likewise failed to plead scienter, the court dismissed the complaint.

The case is [No. 18-CV-3608](#).

Attorneys: Avi Josefson (Bernstein Litowitz Berger & Grossmann LLP) for City of Riviera Beach General Employees Retirement System. John Erik Schreiber (Winston & Strawn LLP) for Macquarie Infrastructure Corp.

Companies: City of Riviera Beach General Employees Retirement System; Macquarie Infrastructure Corp.

LitigationEnforcement: FraudManipulation GCNNews NewYorkNews