

## Southern District of New York: Misleading “Comforting Statements” Not Alleged Even Where Defendants Speculated About a Potential Positive Impact on Demand

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On September 7, 2021, the Southern District of New York dismissed a putative securities fraud class action alleging that a holding company and certain of its executives made misstatements and omissions concerning potential risks facing its subsidiary, a liquid commodity storage and handling business, and concealed the company’s exposure to an impending environmental regulation seeking to largely ban its subsidiary’s single largest product (No. 6 fuel oil). [City of Riviera Beach Gen. Emps. Ret. Sys. v. Macquarie Infrastructure](#), 2021 WL 4084572 (S.D.N.Y. 2021) (Broderick, J.). The court determined that plaintiff did not plausibly allege false statements or omissions. The court held that plaintiff did not allege that defendants made “comforting statements” while they already knew that the company’s business storing No. 6 fuel oil was waning, even though one investor relations email, among other things, speculated on a potential positive impact on storage demand if producers started selling No. 6 fuel oil where it was not banned.

The court summarized plaintiff’s position on defendants’ affirmative statements to be that “securities fraud defendants must be forthright about the present facts, risks, and threats facing their company when affirmatively disclosing its business and environment.” The court explained that this statement “misse[d] the mark” because merely speaking on one’s business did not trigger a duty to disclose all facts an investor may want to know. The court distinguished plaintiff’s cases stating that they actually “show[ed] 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.”

For example, in *Meyer v. Jinkosolar Holdings*, 761 F.3d 245 (2d Cir. 2014), the Second Circuit held that it was “misleading for a company to make detailed, comforting statements about how it handled environmental compliance . . . while at the same time withholding that, at the very moment it spoke, the company had known, ongoing issues preventing substantial violations of particular environmental regulations[.]”

The court stated that, by contrast, plaintiff did “not allege that Defendants made comforting statements while they already knew that [their] business storing No. 6 fuel oil was waning.” The court noted that plaintiff had asked how the new regulations, banning ships from using heavy

oils unless improved scrubbers were installed, would impact demand. The company’s head of investor relations replied that plaintiff’s information was consistent with their understanding of the regulatory changes. The head also speculated on the potential positive impact on storage demand if producers started selling No. 6 fuel oil where it was not banned and stated that the producing industry would try to find other uses for it.

The court determined that nothing in that response amounted to a specific comforting statement about the subsidiary’s ability to withstand the new regulation, “much less a comforting statement made while [the head of investor relations] knew or should have known that [the subsidiary’s] business had already been negatively impacted[.]” The court continued that “[f]ar from comforting Plaintiff, [the head of investor relations] confirmed that Plaintiff, ‘a sophisticated institutional investor,’ correctly understood that [the regulation] could prevent the shipping industry from burning No. 6 fuel oil.”

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