No. 22-13129

IN THE

United States Court of Appeals for the Eleventh Circuit

U.S. SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

v.

SPARTAN SECURITIES GROUP, LTD., ET AL.
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION
DISTRICT JUDGE VIRGINIA M. HERNANDEZ COVINGTON
(NO. 8:19-cv-00448-VMC-CPT)

DEFENDANTS-APPELLANTS' SUPPLEMENTAL BRIEF

Kara M. Rollins
John J. Vecchione
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
Phone: (202) 869-5210
Kara.Rollins@ncla.legal
John.Vecchione@ncla.legal
Counsel for Defendants-Appellants

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Defendants-Appellants rely on the CIP in their opening brief, Doc. 20, as amended and attached to their November 2, 2023 Rule 28(j) Letter, Doc. 60, as required by Fed. R. App. P. 26.1, 11th Cir. R. 26.1, and 11th Cir. R. 26.1-2(b).

No publicly traded company or corporation has an interest in the outcome of this case or appeal.

s/ Kara M. Rollins
KARA M. ROLLINS
Counsel for Defendants-Appellants

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INTRODUCTION

Appellants have asked this Court, among other issues, to determine whether the trial court erred in finding sufficient evidence to support a jury verdict determining them liable for violating Rule 10b–5(b). Br. 1. After briefing and oral argument was completed, the Supreme Court decided *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 601 U.S. 257 (2024), which unanimously held, in the context of a private right of action, that "[p]ure omissions are not actionable under Rule 10b–5(b)."[1] *Id.* at 260. On April 23, 2024, this Court ordered the parties to submit supplemental briefs "explaining the effect" that the *Macquarie Infrastructure* decision "may have on the disposition of this appeal." Doc 65.

Appellants submit that the *Macquarie Infrastructure* decision is dispositive regarding omissions relied upon by the court to deny Appellants' Rule 50(b) motion as to Appellant Micah Eldred ("Eldred").

STATEMENT OF THE CASE

Appellants dispense with a full recitation of the facts, as they have been fully briefed before, *see*, *e.g.*, Br. 2-6. However, for present purposes, they highlight facts,

[1] Plaintiff-Appellee Securities and Exchange Commission ("SEC") by and through the United States participated in *Macquarie Infrastructure* as *amici curiae* including participation at oral argument. *See Macquarie Infrastructure Corporation, et al. v. Moab Partners, L.P., et al.*, No. 21-2524, Docket (Jan. 16, 2024).

evidence, and prior opinions and arguments relevant to this Court's consideration of how *Macquarie Infrastructure* affects the disposition of this case.

After a 12-day trial in July 2021, the jury returned a verdict in Appellants' favor on 13 of SEC's 14 counts, and a verdict for SEC on a single count.[2] Doc 263 - Pg 9. That count alleged that Appellants made materially misleading statements or omissions in connection with purchases of certain issuers' securities in violation of Section 10(b) of the Exchange Act, 15 U.S.C. § 78(j)(b), and SEC Rule 10b–5(b), 17 C.F.R. § 240.10b–5(b), thereunder. Doc 263 - Pg 2. As to this count, the jury instructions outlined 19 types of misrepresentations or omissions that Appellants allegedly made. Doc 249 - Pgs 38-39. Appellants had sought to determine the substance of their alleged misstatements throughout discovery, but SEC articulated them in writing only at the jury instruction stage. Doc 219 - Pgs 53-55. SEC objected to a requirement that the jurors specify which of the statements they found false. *Id*. After trial, Appellants filed a renewed motion for judgment as matter of law under Federal Rule of Civil Procedure 50(b), which the district court denied. Doc 263 - Pg 30.

As noted in prior briefing, of the 19 alleged misrepresentations and omissions identified in the jury instructions, 16 relate to statements or omissions in Form 211

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[2] The jury's verdict fully exonerated a fifth defendant, David D. Lopez. *See* Doc 250 - Pg 1; Doc 256 - Pg 1.

Applications that Appellant Spartan Securities Ltd. ("Spartan") filed with the Financial Industry Regulatory Authority ("FINRA") for 19 issuers. Doc 249 - Pgs 38-39. Those Form 211 Applications were either signed by Eldred or Appellant Carl Dilley ("Dilley") as principal. Br. 22; Doc 249 - Pg 12 (Eldred signed only Court Document, Quality Wallbeds, Top to Bottom, and PurpleReal.com); Br. 4, 20; Doc 249 - Pg 12 (Dilley signed the Form 211 Applications for the other 15 issuers). As signing principal, Eldred and Dilley could only be the "maker" of the statements contained in the applications and their supporting materials like cover letters that they signed. Br. 20, 22. Likewise, they could only be liable for omissions related to the Form 211 Applications they signed.

In denying Appellants' Rule 50(b) Motion the court identified trial evidence that it deemed sufficient to establish liability under Rule 10b–5(b). Doc 263, Pgs 14-18. In its briefing before this Court, SEC argued additional facts that allegedly supported the verdict. SEC Br. 13.

As Appellants have argued, SEC has conceded that Appellants did not make *any* materially misleading omissions, choosing instead to argue that all the conduct at issue constituted misrepresentations. *See* Reply Br. 8. It should not be permitted to argue otherwise now. Despite the SEC's waiver, some of the trial evidence relied on to deny Appellants' Rule 50(b) motion as to Eldred is best categorized as omissions. Reply Br. 8 n.4 (citing Br. 19-29). This is particularly true regarding the

trial evidence the court relied on to support a finding that Eldred violated Rule 10b–5(b). That evidence hinges on the erroneous view that he was under an obligation to disclose certain information that he allegedly possessed. Br. 22-23. Before this Court, the SEC has likewise argued that Eldred failed to disclose certain information and that failure was sufficient to establish liability. SEC Br. 12-13.

As the Supreme Court's *Macquarie Infrastructure* decision shows, however, both the court below and the SEC are incorrect.

ARGUMENT

In *Macquarie Infrastructure*, the Supreme Court considered "whether the failure to disclose information required by [a regulation] can support a[n] … action under Rule 10b–5(b), even if the failure does not render any 'statements made' misleading." 601 U.S. at 260. Finding that Rule 10b–5(b) cannot support such an action, the Court held that "[p]ure omissions are not actionable under Rule 10b–5(b)." *Id*. Such "pure omission[s] occur[] when a speaker says nothing, in circumstances that do not give any particular meaning to that silence." *Id.* at 263. As the Court reasoned, the Rule "requires identifying affirmative assertions (*i.e.*, 'statements made') *before* determining if other facts are needed to make those statements 'not misleading.'" *Id*. at 263 (emphasis added).

The Court reiterated its view that "§ 10(b) and Rule 10b–5(b) do not create an affirmative duty to disclose any and all material information." *Id*. at 264 (quoting

Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 44 (2011)). It also reestablished that "'[s]ilence, absent a duty to disclose, is not misleading under Rule 10b–5.'" *Id.* at 265 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 239, n.17 (1988)). The Court clarified its position in *Basic* stating that "[e]ven [a] duty to disclose, however, does not automatically render silence misleading under Rule 10b–5(b)." *Id*. "The failure to disclose information required by [a regulation] can support a Rule 10b–5(b) claim *only* if the omission renders affirmative statements made misleading." *Id*. (emphasis added).

Rejecting arguments made by Moab and the United States, the Court observed that the "focus" of § 10(b) and Rule 10b–5(b) is "fraud" *not* "disclosure[.]" The Court also rejected concerns raised by Moab that if "pure omissions" are outside the scope of Rule 10b–5(b), then it would provide "broad immunity" for omitted information that is required to be disclosed under SEC regulations. *Id*. at 265-266. As the Court discussed, recognizing the limits of Rule 10b–5(b) would not stop SEC from "prosecut[ing] violations of its own regulations" including disclosure-based regulations. *Id*. at 266. Here the SEC did just that—it prosecuted Appellants for violating § 15(c)(2) and Rule 15c2-11—which the jury rejected. Doc 250 - Pg 1.

I. *MACQUARIE INFRASTRUCTURE* CONFIRMS THAT ELDRED'S OMISSIONS CANNOT SUPPORT A FINDING OF LIABILITY UNDER RULE 10b–5(b)

As Appellants have consistently argued, omissions, as opposed to misrepresentations, are "actionable only to the extent that the absence of those facts

would, under the circumstances, render another reported statement misleading to the reasonable investor, in the exercise of due care." *In re Galectin Therapeutics, Inc. Sec. Litig.*, 843 F.3d 1257, 1275 (11th Cir. 2016) (internal quotation marks omitted); Br. 20. Omissions do not violate Rule 10b–5(b) unless defendant has "a duty to disclose" the omitted information. *Badger v. S. Farm Bureau Life Ins. Co.*, 612 F.3d 1334, 1340-41 (11th Cir. 2010); Br. 21, 23, 25; Reply Br. 7. The "mere possession of nonpublic market information" does not create a duty to disclose. *Chiarella v. U.S.*, 445 U.S. 222, 235 (1980); Br. 21; Reply Br. 7. There is no "duty to disclose something that had yet to occur." *Levie v. Sears Roebuck & Co.*, 676 F. Supp. 2d 680, 687 (N.D. Ill. 2011); Reply Br. 11. Similarly, there is no basis for "liability on circumstances that arise after the speaker makes [a] statement." *Stransky v. Cummins Engine Co., Inc.*, 51 F.3d 1329, 1332 (7th Cir. 1995); Reply Br. 11.

In denying Appellants' Rule 50(b) motion, the court found that the trial evidence supported a liability finding against Eldred because he did not disclose[3] nonpublic information about some issuers' hypothetical future mergers. *See* Doc 249, Pgs 38-39; Doc 263, Pgs 7, 15-16. SEC argued a similar theory before this Court.

[3] Of course, this "omission" was not to any investor that could have relied upon it at any stage of the proceedings as previously argued. Br. 19-22, 22 (Eldred was not "maker" of the statements), 23 (the statements were not "material to the investing public), 24 (the statements did not coincide with the purchase or sale of securities); Br. 21, 24; Reply Br. 6-9.

See SEC Br. 12-13. The court also seemed to attribute statements about one issuer, Dinello Restaurant Ventures, as establishing liability for Eldred even though he was not the signing principal for that company. *See* Doc 263, Pgs 17-18. On appeal, SEC posited an alternative theory of liability based on Eldred's alleged failure to disclose Michael Daniels's regulatory history. SEC Br. 13. The court mentioned this failure but made no attempt to explain how it impacted its Rule 10b–5(b) analysis. Doc 263, Pg 18. None of these omissions-based theories of liability can withstand the Supreme Court's *Macquarie Infrastructure* decision.

a. ELDRED'S "OMISSIONS" REGARDING NONPUBLIC INFORMATION ABOUT HYPOTHETICAL FUTURE MERGERS DID NOT VIOLATE RULE 10b–5(b)

As noted in Appellants' opening brief, the court appeared to have premised Eldred's liability on the basis that he omitted some nonpublic information regarding Michael Daniels, Diane Harrison, and Andy Fan regarding their future intentions for the issuers they were involved with. *See* Doc 249 - Pgs 38-39. And the court appears to have assumed as much in denying the Rule 50(b) motion. *See* 263 - Pgs 7, 15-16. Quoting *Basic* for the principle that "'[s]ilence absent a duty to disclose, is not misleading under Rule 10b–5(b)[,]'" the Court further clarified that "[e]ven [a] duty to disclose … does not automatically render silence misleading under Rule 10b–5(b)." *Macquarie Infrastructure*, 601 U.S. at 265.

As Appellants have argued, Eldred was under no obligation to disclose nonpublic information about hypothetical *future* events. *See* Br. 22-23; Reply Br. 10-11. Nor did the court find that Eldred was under an obligation to disclose such information. In fact, the word "duty" is absent from the court's entire Rule 50(b) opinion. That error alone warrants reversal post-*Macquarie Infrastructure*, which suggests that determining whether there is a duty to disclose omitted information factors into determining if an omission violates Rule 10b–5(b).

This Court should reject the SEC's argument that by "cho[o]s[ing] to speak" there arose a "duty" for Eldred to "speak fully and truthfully," because SEC did not argue that such a duty existed below. *See* SEC Br. at 24-25. While the Supreme Court did not explicitly reject the exact theory SEC has pursued here, in *Macquarie Infrastructure* the Supreme Court vacated the Second Circuit's opinion that, at least in part, turned on similar reasoning to what SEC presses here. *See* 601 U.S. at 262 (noting that the Second Circuit's decision reasoned that "[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.").

This Court should hold that no liability under an omissions theory can be upheld under Rule10b–5(b) for Eldred's omissions regarding nonpublic information about hypothetical future events.

b. ELDRED'S "OMISSIONS" REGARDING DINELLO RESTAURANT VENTURES DID NOT VIOLATE RULE 10b–5(b)

As the Supreme Court has instructed, Rule10b–5(b) requires the SEC to allege and the trier of fact to "identify[] affirmative assertions (*i.e.*, 'statements made') before determining if other facts are needed to make those statements 'not misleading.'" *Macquarie Infrastructure*, 601 U.S. at 264. In denying the Appellants' Rule 50(b) motion, the court relied on testimony that it determined showed that Eldred failed to disclose certain information about Harrison, Daniels, or the issuers related to them. Doc 263, Pgs 17-18. Eldred's omission regarding this information is a "pure omission." Because Eldred was not the signing principal for the Dinello Restaurant Ventures Form 211 Application, he made no affirmative assertions to FINRA regarding the information the court relied on regarding that issuer to deny the Rule 50(b) motion. Because Eldred said nothing to FINRA about Dinello Restaurant Ventures, there are no circumstances "giv[ing] any particular meaning to that silence." *Id*. at 263. Neither the court nor the SEC has identified any affirmative assertion by Eldred that would be made misleading by omitting this information.

This Court should find that no liability accrued under Rule10b–5(b) for Eldred's "omissions" as to Dinello Restaurant Ventures, because: (1) Eldred did not sign the Form 211 Application for that issuer and he made no affirmative statements about the issuer, *see* Br. 20-21, 22; Doc 224 - Pg 62; Doc 249 - Pg 12; Doc 257-70 (Court); Doc 257-76 (Quality); Doc 255-62 (Top to Bottom); Doc 255-63 (same),

Doc 257 -82 (PurpleReal.com); (2) any omitted information was not material information, *see* Br. 19-22, 23; (3) any omitted information was known to the regulators, *see* Reply Br. 11; Doc 255-40 - Pg 6; Doc 255-43 - Pg 2; (4) there was no duty to disclose, Br. 20-21; Reply Br. 11; and/or (5) the "omissions" did not coincide with any securities transaction, Br. 24; Reply Br. 7-8. Such "omissions" are not cognizable under § 10(b) and Rule 10b–5(b).

c. ELDRED'S "OMISSION" REGARDING DANIELS'S REGULATORY HISTORY DID NOT VIOLATE RULE 10b–5(b)

As noted above, Rule 10b–5(b) requires the SEC to allege and the trier of fact to "identify[] affirmative assertions (*i.e.*, 'statements made') before determining if other facts are needed to make those statements 'not misleading.'" *Macquarie Infrastructure*, 601 U.S. at 264. Eldred's omission regarding Daniels's regulatory history is a "pure omission." Eldred said nothing about Daniels's regulatory history and there are no circumstances "giv[ing] any particular meaning to that silence." *Id.* at 263. Neither the court nor the SEC identified any affirmative assertion by Eldred that would be made misleading by omitting this information. While the inquiry should end there, it is worth noting that neither Daniels nor Eldred was under any duty to disclose Daniels's regulatory history even if he knew something to report. *See* Reply Br. 12. But as Eldred testified, a background check on Daniels came back with nothing. S.A.810. "Silence, absent a duty to disclose, is not misleading under Rule 10b–5.'" *Basic*, 485 U.S. at 239, n.17. And as *Macquarie Infrastructure*

clarified, "[e]ven [a] duty to disclose … does not automatically render silence misleading under Rule 10b–5(b)." 601 U.S. at 265. Hence, this Court should find no liability can be upheld under Rule 10b–5(b) for Eldred's omission as to Daniels's regulatory history.

CONCLUSION

Considering the Supreme Court's decision in *Macquarie Infrastructure*, Appellants respectfully request that this Court find that Eldred made no materially misleading omissions in violation of § 10(b) of the Exchange Act and SEC Rule 10b–5(b).

Respectfully submitted, this 14th day of May, 2024, by:

/s/ Kara M. Rollins
Kara M. Rollins
John J. Vecchione
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
Phone: (202) 869-5210
Fax: (202) 869-5238
Kara.Rollins@ncla.legal
John.Vecchione@ncla.legal
Counsel for Defendants-Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the Court's April 23, 2024 Order, Doc 65, and typeface and typestyle requirements under Fed. R. App. P. 32(a)(5)-(6) and 11th Cir. R. 28-1(m) because this brief is 11 pages, excluding the parts of the brief exempted under the Rules, prepared in proportionally spaced typeface using Microsoft Word for Office365 Times New Roman 14-point font and double-spaced.

Dated: May 14, 2024

/s/ Kara M. Rollins
KARA M. ROLLINS
Counsel for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2024, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system which sent notification of such filing to all counsel of record.

Dated: May 14, 2024

/s/ Kara M. Rollins
KARA M. ROLLINS
Counsel for Defendants-Appellants