ROCK CENTER for CORPORATE GOVERNANCE

WORKING PAPER SERIES NO. 229

Ask Me No Questions and I Will Tell You No Lies: The Insignificance of *Leidos* Before the United States Supreme Court

Joseph A. Grundfest
Stanford Law School and
Rock Center for Corporate Governance
Stanford University

September 27, 2017

Rock Center for Corporate Governance at Stanford University
Stanford Graduate School of Business
655 Knight Way, C214
Stanford, CA 94305-7298 USA
rockcenterinfo@law.stanford.edu • http://www.law.stanford.edu/

Ask Me No Questions and
I Will Tell You No Lies:
The Insignificance of *Leidos*
Before the United States
Supreme Court

Joseph A. Grundfest
Stanford Law School and
The Rock Center for Corporate Governance

September 26, 2017

Abstract: What if the Supreme Court issued an opinion and no one cared? No one cared who won or lost. No one cared how the question presented was resolved. The prevailing party wouldn't gain a cent from its victory and the losing party wouldn't suffer one whit from its loss. *Leidos, Inc. v. Indiana Public Retirement System,* now pending before the Supreme Court, could be just that sort of case.

Leidos asks whether a "pure omission," an omission that does not render an affirmative statement false or misleading, is actionable under Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder. With so much affirmative mandatory and voluntary disclosure in the public domain it is trivially easy for plaintiffs to allege that material omissions create half-truths that are fully actionable under established precedent. Half-truths expose defendants to liability identical to that arising from corresponding pure omission claims, and it makes no meaningful difference whether pure omissions are actionable as omissions or as half-truths. *Leidos* itself proves the point: there, a single omission causes an affirmative statement to become misleading and is also alleged as a "pure omission." *Leidos* will be remanded to resolve the half-truth claim and, on remand, the probability that *Leidos* will be dismissed, and the amount for which *Leidos* settles if not dismissed, will not be materially affected by the Supreme Court's decision.

This is not to suggest that *certiorari* has been improvidently granted. There is virtue in semantic consistency. A clear opinion describing the scope of liability, if any, for pure omissions will contribute to judicial efficiency by eliminating complex briefing over rhetorical distinctions that don't move the liability needle.

As for the doctrinal question presented, the better interpretation of the law is that the relevant text, history, and precedent do not support Rule 10b-5 liability for pure omissions. A decision to the contrary would create substantial tension with Supreme Court precedent and generate unnecessary confusion over the application of the most important civil liability provision of the federal securities laws. The article also examines the potential for pure omission liability arising from the Sarbanes-Oxley Section 906 certification and concludes that neither the Commission nor private parties are likely to prevail on such a claim.

Keywords: Leidos, 10(b), 10b-5, 906 certification, pure omissions, Regulation S-K, Item 303, Duty to disclose, Sarbanes Oxley, 13(a)

JEL Classification: K22, K23, K41

Ask Me No Questions and I Will Tell You No Lies:[*] The Insignificance of *Leidos* Before the United States Supreme Court

Joseph A. Grundfest[**]
Stanford Law School and
The Rock Center for Corporate Governance

September 26, 2017

I. Introduction

What if the Supreme Court issued an opinion and no one cared? No one cared who won or lost. No one cared how the question presented was resolved. The prevailing party wouldn't gain a cent from its victory and the losing party wouldn't suffer one whit from its loss. *Leidos, Inc. v. Indiana Public Retirement System,*[1] now pending before the Supreme Court, could be just that sort of case.

On its surface, *Leidos* poses a fundamental doctrinal challenge to the interpretation of Section 10(b) of the Securities Exchange Act of 1934[2] and Rule 10b-5 thereunder,[3] the most important anti-fraud provisions in all of the federal securities laws. Thousands of lawsuits have

---

[*] Oliver Goldsmith, *She Stoops to Conquer* (1771) Act III, at 51 (London, Printed for F. Newberry, 1773) ("Ask me no questions and I will tell you no fibs."). Songs with the same title have been recorded by Bing Crosby with the Andrews Sisters (Decca Records, 1950); Lynyrd Skynryd, Second Helping (Studio One, Doraville, Georgia 1974); and Albert King and Stevie Ray Vaughan, In Session (Stax Records. 1999).

[**] William A. Franke Professor of Law and Business, Stanford Law School; Senior Faculty, Rock Center for Corporate Governance; Commissioner, United States Securities and Exchange Commission (1985-1990). I would like to thank Gal Dor, Eric Silverberg, and Kristen Savelle for their superb research assistance, and Andrew Vollmer for his careful and constructive commentary. Full Disclosure: I was a Commissioner of the Securities and Exchange Commission when the Commission issued its 1989 Interpretive Release addressing the application of Item 303 of Regulation S-K, and participated in the drafting of that Release. *See* Management's Discussion and Analysis of Financial Condition and Results of Operations, Exchange Act Release No. 34–26831, 54 Fed. Reg. 22427, 22430 (May 24, 1989) ("the 1989 Interpretive Release"). The 1989 Interpretative Release has contributed to confusion regarding the proper application of Item 303. See Section II, infra. The post-adoption views of legislators and regulators warrant no deference in the interpretation of previously adopted legislation or regulation. *See e.g.,* Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158, 168, (1989) ("the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute"); Sullivan v. Finkelstein, 496 U.S. 617, 630-32 (1990) (holding that subsequent legislative history, *i.e.*, post-enactment history of the statue, is entitled to no deference) (Scalia J. concurring). The views expressed in this article do not relate to the operation of the 1989 Interpretive Release.

[1] Indiana Pub. Ret. Sys. v. SAIC, Inc., 818 F3d 85 (2d Cir. 2016), *cert granted*, 137 S. Ct. 1395, 580 U.S. ____(Mar. 27, 2017). As of the date of the opinion below, Leidos was known by the name of its predecessor corporation, SAIC, which subsequently changed its name to Leidos and spun off a separate, publicly traded corporation that continues to operate under the name SAIC. For purposes of this article, the Second Circuit's decision is referred to as *SAIC*, whereas references to the case before the Supreme Court are to *Leidos*.

[2] 15 U.S.C. § 78j.

[3] 17 C.F.R. § 240.10b-5.

been filed and billions of dollars have passed hands litigating these provisions of law.[4] A Supreme Court opinion interpreting Section 10(b) and Rule 10b-5 can define the contours of insider trading law,[5] dramatically expand or contract the potential for securities fraud liability,[6] and can be a big deal.

Leidos is not a big deal. Unless the Court deviates significantly from established precedent, *Leidos* will have only a cosmetic effect on the real-world push and pull of securities fraud litigation.[7] *Leidos* might influence the literary style with which plaintiffs plead complaints, defendants argue motions to dismiss, and lower courts craft their opinions. But regardless of *Leidos'* ultimate holding, the same companies will likely be sued on the same sets of facts, the same cases will likely be dismissed, and the same settlements will likely be paid. From a pragmatic perspective, *Leidos* is a nothing-burger.[8]

---

[4] A total of 3,771 federal class action securities fraud lawsuits alleging violations of Section 10(b) have been filed between January 1, 1996 and September 18, 2017. These lawsuits have settled for an aggregate of $82,641,767,869. The entire amount of these settlements is not fully attributable to Section 10(b) claims because Section 10(b) claims can be combined with Section 11 claims, and with other causes of action. In addition, many of these cases remain unresolved. The settlement values associated with these filings are therefore likely to increase. (These calculations are based on data gathered by the Stanford Securities Class Action Clearinghouse, available at: securities.stanford.edu. Supporting data and calculations are on file with the author.)

[5] Chiarella v. U. S., 445 U.S. 222 (1980) (holding that there is no general duty to disclose nonpublic information); Dirks v. SEC, 463 U.S. 646 (1983) (establishing a personal benefit test in connection with tipper liability); Carpenter v. US, 484 U.S. 19 (1987) (upholding a securities fraud conviction of a newspaper reporter and stockbroker who transacted based upon information to be published in future newspaper columns); United States v. O'Hagan, 521 U.S. 642 (1997) (adopting misappropriation theory); Salman v. U.S. 137 S.Ct. 420 (2016) (holding that a tipper personally benefited by making gift of inside corporate information to his brother).

[6] *See*, *e.g.*, Blue Chip Stamps et al. v. Manor Drug Stores, 421 U.S. 723 (1975) (narrowing the scope of potential liability by applying a strict definition of the purchaser-seller requirement); TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976) (concluding, in a proxy-solicitation context, that an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (holding that scienter is necessary to establish a violation of Section 10(b) and rejecting negligence liability); Santa Fe v. Green, 430 U.S. 462 (1977) (holding that federal securities laws regulate disclosure while state law regulates corporate internal affairs); Central Bank of Denver, N.A. v. First Interstate Bank of Denver, 509 U.S. 951 (1993) (declining to extend section 10(b) liability to aiders and abettors); Basic v. Levinson, 485 U.S. 224, 232, 230-31 (1998) (adopting TSC's materiality test in the context of a Rule 10b-5 and adopting the fraud on the market theory); Erica P. John, Inc. v. Halliburton Co., 563 U.S. 804 (2011) (holding that plaintiffs do not have to prove loss causation at the class certification stage to invoke a class-wide rebuttable presumption of reliance); Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27 (2012) (rejecting a bright-line definition of materiality).

[7] *Accord*, Matthew C. Turk & Karen E. Woody, *The Leidos Mixup and the Misunderstood Duty to Disclose in Securities Law*, Kelly School of Business Research Paper 2017-44, available at https://papers.ssrn.com/sol3/results.cfm, page 42 ("as a practical matter, an omitted fact that violates Item 303 will almost always render a statement materially misleading for purposes of a [Rule 10b-5] fraud claim as well."); Douglas Greene, *Securities Claims Based on Item 303 of Regulation S-K: It Just Doesn't Matter*, D&O Disclosure, Sept. 30, 2015, available at http://www.dandodiscourse.com/2015/09/30/securities-claims-based-on-item-303-of-regulation-s-k-it-just-doesnt-matter/ ("very rarely, if ever, would there be an omitted fact that gives rise to an Item 303 claim without also rendering false or misleading one or more challenged statements; and the knowledge required under Item 303 is at least as great as is necessary to establish scienter.").

[8] A "nothing burger" is a thing "that is or turns out to be insignificant or lacking in substance." *See* https://en.oxforddictionaries.com/definition/us/nothingburger. While the term has recently gained currency among political pundits, its roots go back to 1950's Hollywood gossip columnist Louella Parsons. *See*, Alyssa Pereira, *Where Did the Term 'Nothing Burger' Actually Originate*? S.F. Chron. July 12, 2017.

The question presented in *Leidos* challenges the reach of Section 10(b) and Rule 10b-5 liability. Section 10(b) is not self-enforcing. It is a delegation of authority to the Commission to adopt regulations prohibiting "any manipulative or deceptive device or contrivance."[9] Pursuant to this delegated authority, the Commission in 1942 adopted Rule 10b-5, which has three sub-parts.[10] Rule 10b-5(a) prohibits "any device, scheme or artifice to defraud."[11] Rule 10b-5(b) prohibits making materially false statements in connection with the purchase or sale of a security.[12] It also prohibits half-truths, affirmative statements that are literally or technically accurate but that are misleading without the disclosure of additional material information.[13] Rule 10b-5(c) prohibits "any act, practice or course of business which operates as or would operate as a fraud or deceit upon any person."[14]

Nothing in the text of the statute or in the text of the rule expressly addresses liability for "pure omissions", the omission of information that Commission regulations require to be disclosed in periodic reports, but that does not render any affirmative statement false or misleading. *Leidos* takes that next step. More precisely, *Leidos* asks whether Rule 10b-5 also prohibits failures to disclose information that the Securities and Exchange Commission ("SEC" or "Commission") requires be disclosed in a periodic report (most commonly an annual report filed pursuant on Form 10-K or a quarterly report filed on Form 10-Q) even if the omission does not render any affirmative statement false or misleading. These mandatory disclosure

---

[9] 15 U.S.C. §78j; For a discussion of the nature of this delegated authority, *see, e.g.* Joseph A. Grundfest, *Disimplying Private Rights of Action under the Federal Securities Laws: The Commission's Authority*, 107 HARV. L. REV. 961 (1994).

[10] For a discussion of the history of the Rule's adoption, *see* Milton v. Freeman, *Conference on Codification of the Federal Securities Laws*, 22 BUS. LAW. 973 (1967); *Grundfest*, *supra* note 9, at 979-980.

[11] 17 CFR 240.10b-5(a).

[12] Section 10b-5(b) makes it unlawful for any person 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).

[13] *See, e.g.*, Omnicare, Inc. v. Laborers Dis. Council Construction Industry, 135 S. Ct. 1318, 1331 ("Thus, Omnicare's view would punch a hole in the statute for half-truths in the form of opinion statements."); In re Vivendi, S.A. Sec. Litig., 838 F. 3d 223, 240 (2d Cir. 2016) ("The rule against half-truths, or statements that are misleading by omission, comports with the common-law tort of fraudulent misrepresentation, according to which "a statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue." (*citing* Restatement (Second) of Torts, § 529, cmt. a (1977)); SEC. v. Gabelli, 653 F.3d 49, 57 (2d Cir. 2011), rev'd on other grounds, Gabelli v. S.E.C., 568 U.S. 442(2013) ("The law is well settled that so-called half-truths—literally true statements that create a materially misleading impression—will support claims for securities fraud.") (internal quotation marks omitted); Vervaecke v. Chiles Heider & Co. Inc., 578 F.2d 713 n. 2 (8th Cir. 1978) ("We conclude that misrepresentations, and omissions in the nature of misrepresentations (misleading statements, half-truths.), are appropriately considered alike in this case under 10b-5(2)."); In re Galena Biopharma Inc. Sec. Litig., 117 F.Supp. 3d 1145, 1181 (D. Or. 2015) (holding that "Rule 10b–5(b) "prohibits the telling of material half-truths, where the speaker 'omit[s] 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.'"). *See also* John H. Matheson, Corporate Disclosure Obligations and The Parameters of Rule 10b-5: Basic inc. v. Levinson and Beyond, 14 J. CORP. L. 1, 14 (1988) ("In addition, rule 10b-5 specifically proscribes half-truths."); Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences by Investors and Others*, 52 Stan. L. Rev. 87 (conducting a thorough analysis of the meaning and application of half-truth liability in 10b-5); Alan R. Bromberg, Lewis D. Lowenfels, and Michael J. Sullivan, BROMBERG & LOWENFELS on SECURITIES FRAUD, § 2:182 (2d ed.) ("Clause 2 [of Rule 10b-5), by its own terms, operates only if some statement is made, and thus outlaws half-truths and other forms of partial silence or failure to disclose.").

[14] 17 CFR 240.10b-5(c).

requirements are known as "line item" disclosures[15] and are defined by the Commission's Regulations S-K[16] and S-X.[17]

Petitioners argue that the Circuits are split over this question, and that much hinges on the resolution of this doctrinal inquiry.[18] Reasonable minds differ, however, as to whether the split is semantic or substantive.[19] To be sure, petitioners have every incentive to argue that the sky will fall and that the lower courts will be flooded with baseless claims if the Supreme Court holds that pure omissions violate Rule 10b-5.[20] By the same token, respondents have every incentive to howl that allowing silence in the face of affirmative SEC disclosure obligations creates a gaping, illogical hole in the law, and can facilitate all sorts of chicanery. [21]

---

[15] *See, e.g.*, Keith F. Higgins, *Shaping Company Disclosure*, Remarks Before the George A. Leet Business Law Conference, 3 (Oct. 3, 2014) (available at https://www.sec.gov/news/speech/2014-spch100314kfh#.WZyIWsVp8z8.email). ("there are certainly discrete line item requirements – such as the number of employees or the number of shares repurchased on a monthly basis irrespective of the dollar amount – that individually may not be material … but over the years the Commission has determined are relevant disclosures for investors").

[16] 17 CFR § 229. Regulation S-K prescribes textual reporting requirements for various SEC filings. The Regulation applies to registration statements under Section 12 of the Exchange Act; annual or other reports under Sections 13 and 15(d); going-private transaction statements under Section 13; tender offer statements under Sections 13 and 14 annual reports to security holders and proxy and information statements under Section 14; and any other documents required to be filed under the Exchange Act. Regulation S-K lists 105 disclosure items. See John J. Huber, *Leidos and MD&A: Seeing MD&A Through the Eyes of the SEC*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004064. See also SEC Report on Review of Disclosure Requirements in Regulation S-K at 8-32 (December 2013) available at https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf.

[17] 17 CFR Part 210. Regulation S-X requires disclosure of financial and accounting statement form and content. *See* Business and Financial Disclosure Required by Regulation S-K, SEC Release No. 33-10064; 34-77599; File No. S7-06-16 (April 13, 2016) *33. Regulation S-X applies to registration statements under Section 12; annual and other reports under Section 13 and 15(d) and proxy and information statement under Section 14 of the Exchange Act. 17 C.F.R § 210.1-01 (a).

[18] For a discussion of this split, *see* Section IV, *infra.*

[19] *See* Section IV, *infra*.

[20] *See, e.g.*, Petition for Certiorari, No. 16-581, 2016 WL 6472615, filed June 28, 2017, at *29 ("Permitting plaintiffs to bring securities fraud actions premised on Item 303 will lead to increased litigation, discovery costs, and exorbitant settlement demands, imposing significant costs on issuers and the securities market."); Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioner, No. 16-581, 2017 WL 2839268, filed June 28, 2017, at 30-31 ("There is little doubt that adopting the Second Circuit's holding will cause a flood of litigation. The plaintiffs' bar will seize the opportunity to attack companies' periodic filings for alleged Item 303 deficiencies."); Brief of the National Association of Manufacturers as Amicus Curiae in Support of Petitioner No. 16-581, 2017 WL 2839267, filed June 28, 2017, at 15 ("[t]he Second Circuit's holding threatens to open the floodgates of vexatious 10b-5 litigation against NAM's publicly traded members and other publicly traded companies"); Brief For the Securities Industry and Financial Markets Association of the United States of America as Amici Curiae in support of Petitioner, No. 16-581, 2017 WL 2859944, filed June 28, 2017, at 3-4 ("As long as the Second Circuit precedent remains uncorrected, any publicly traded company that transacts any portion of its business in the Second Circuit will face an increased threat of private civil liability."); Brief For the Retail Litigation Center, Inc. as Amicus Curiae in Support of Petitioner, No. 16-581, 2017 WL 2822781, filed June 28, 2017, at 27 ("Lowering the threshold for civil fraud to allow class actions based on nothing more than management's failure to report information that, in retrospect, could be characterized as a known trend or uncertainty will unfortunately create a moral hazard for litigious behavior.").

[21] *See, e.g.*, Brief for Respondents, No. 16-581, 2017 WL 3913771, at 1 (filed August 31, 2017) ("Petitioner's theory also contains no limiting principle and would immunize companies from both government and private actions for deceptive violations of other SEC disclosure rules designed to protect the investing public."); Brief of the US as Amicus Curiae in Support of Respondents, 16-581, 2017 WL 4004533, filed September, 2017 at 32 ("Acceptance of

Both sides should catch a breath. The complex web of SEC disclosure requirements, combined with the reality of modern communications practice, in which issuers commonly and voluntarily provide the market with quarterly earnings calls, quarterly and annual outlooks, and other information, create a thicket of affirmative disclosures.[22] With so much affirmative information from the company entering the public domain it becomes trivially easy for plaintiffs to allege that material omissions cause affirmative statements to become materially misleading. Because half-truths are undoubtedly actionable under Rule 10b-5, and because the resolution of a half-truth claim exposes the defendant to liability identical to that arising from the resolution of the corresponding pure omission claim, it will, in general, make no practical difference whether material pure omissions are actionable as pure omissions or only as generating half-truths.[23]

Also, even if a situation arises in which private plaintiffs have an incentive to file a Section 10(b) claim attacking an omission, but cannot do so because the pure omission generates no actionable half-truth – a "black swan" event – it bears emphasis that the Commission has unquestioned authority to prosecute pure omissions under Section 13(a) of the Securities and Exchange Act.[24] Commission enforcement actions under Section 13(a) provide the Commission with substantially all the relief available to it under Rule 10b-5,[25] and the Commission can distribute to injured shareholders certain recoveries it obtains in Section 13(a) proceedings.[26] Further, Section 13(a) is a strict liability provision that does not require the demonstration of scienter, whereas Section 10(b) requires such a showing. It is therefore easier for the Commission to prevail in a Section 13(a) proceeding than in an equivalent Rule 10b-5 case.[27] The scope of the Commission's enforcement agenda will therefore not be meaningfully impacted by the outcome in *Leidos*. *Leidos* is significant as a practical matter primarily in defining the

---

petitioner's position would harm investors and the securities markets by exempting from Section 10(b) liability conduct that is clearly fraudulent. Under petitioner's approach, an issuer could deliberately violate Item 303 and omit a material disclosure precisely to dupe investors into believing that the security was less risky than it actually was."). Brief of Professors at Law and Business Schools as Amicus Curiae in Support of Respondents, No. 16-581, at 22 (on file with authors) ("The failure to affirm a duty to disclose will harm the system of required disclosure for public companies by reducing deterrence for noncompliance, a particular concern with respect to nondisclosure.").

[22] *See* Section III, *infra*.

[23] This proposition is most strongly stated in connection with the omission of information required pursuant to Item 303, the specific question at issue in *Leidos*. As explained in Part III, *infra*, a small number of situations exist in which material omissions do not create material half-truths. These situations are rare and are unlikely to support private securities fraud claims. They are, in any event, fully prosecutable by the Commission regardless of the outcome in *Leidos*. These outlier cases are therefore of little practical import to the analysis.

[24] 15 U.S.C. § 78m. For more detailed analysis, *see* Section V.A, *infra.*

[25] There exists a small set of remedies that are available to the Commission under Rule 10b-5, but not under Section 13(a). These remedies are not, however, significant as a practical matter, and there is no indication that Congress intended that these remedies would apply to pure omission cases. *See* Section V.A, *infra*.

[26] The Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7246(a), contains a Fair Fund provision that allows the Commission to distribute certain recoveries to defrauded investors. For discussion of the Fair Funds provision, and its practical operation, *see, e.g.,* Matthew Ady, *Living in a Material World: Does a Violation of Item 303 of Regulation S-K Satisfy* the *Materiality Element in a Rule 10b-5 Cause of Action?*, 17 WAKE FOREST J. BUS. & INT'L PRO. 401, 433-435 (2017). Urska Velikonja, *Public Compensation For Private Harm: Evidence From the SEC's Fair Fund Distributions*, 67 STAN L. REV. 331 (2015). *See also* Commissioner Paul A. Atkins, Remarks Before the U.S. Chamber Institute for Legal Reform, Washington D.C., February 16, 2016, available at https://www.sec.gov/news/speech/spch021606psa.htm (commenting that, the benefits of the Fair Fund notwithstanding, the provision adds burden for the Commission.)

[27] *See* Section V.A, *infra*.

scope of the implied private right of action under Section 10(b), and not in defining the scope of the Commission's enforcement program.

If the Court holds that pure omissions are not actionable under Rule 10b-5, plaintiffs will simply reframe those omissions as creating actionable half-truths. If the Court holds that pure omissions are actionable under Rule 10b-5, plaintiffs will describe those same fact patterns as generating actionable pure omissions and/or half-truths. The framing of the claim does not alter the materiality of the alleged misrepresentation, the scienter with which the alleged violation occurred, the damages caused by the omission, any other element of the cause of action, or the likely outcome of the litigation. Changing the framing of the complaint to allege a half-truth or a pure omission is thus a semantic device. It is not a substantive modification of the law that alters outcomes or settlement cash flows.

Leidos itself underscores this point. As explained in greater detail below,[28] plaintiffs in *Leidos* allege that the issuer omitted information that SEC regulations require be disclosed in annual reports, and that this omission, standing alone, violates Rule 10b-5. But plaintiffs also allege that the identical omission causes an affirmative statement made pursuant to Financial Accounting Standard 5 (FAS5)[29] to become materially false and misleading, thereby illustrating how easily pure omissions can be reframed as half-truths. Moreover, even a cursory reading of the annual report at issue in *Leidos* reveals that plaintiffs could have alleged several additional affirmative statements as false and misleading by virtue of the same omission that animates their Item 303 omission claim. Plaintiffs in *Leidos* therefore did not need to pursue a pure omission theory to state a viable claim, or even to increase their complaint's settlement value.[30] *Leidos* may therefore be before the Supreme Court primarily because of plaintiffs' sub-optimal pleading practices: a better drafted complaint could have avoided this controversy altogether.

But no matter how the Court decides *Leidos*, the case will be remanded so that the lower courts can resolve the FAS5 half-truth claim that exists independently of the Item 303 pure omissions claim. On remand, the probability that *Leidos* will be dismissed, and the amount for which Leidos settles if not dismissed, will not be materially affected by the Supreme Court's decision in *Leidos*.[31] In other words, the Supreme Court's resolution of the question presented in *Leidos* will have no material impact on *Leidos's* ultimate resolution. It's hard for a Supreme Court opinion to get more insignificant than that.

None of this is to argue that *certiorari* has been improvidently granted.[32] There is virtue in semantic consistency among the lower courts, and a clear Supreme Court opinion describing the scope of Section 10(b) liability, if any, for pure omissions will contribute to judicial

[28] *See* Section II, *infra*.
[29] Financial Accounting Standards No. 5, Accounting for Contingencies (1975). FAS 5 has been recodified as ASC 450-20. The change in codification did not change the substantive standard.
[30] *See* Section II, *infra.*
[31] Under both Item 303 or FAS5, only that portion of the omission or half-truth that is material under *Basic* can support liability or enter the negotiations over settlement amounts. Because *Basic* applies equally to the Item 303 claim and to the FAS5 claim, and because damage calculations are identical under both theories of liability, it makes no practical difference whether the case proceeds under an Item 303 omission theory or under a FAS5 half-truth theory.
[32] *See* Section IV, *infra*.

efficiency by eliminating unnecessarily complex briefing over rhetorical distinctions that don't move the liability needle.

Observing that *Leidos* is essentially insignificant from a pragmatic perspective does not, however, address the doctrinal question pending before the court. While several arguments support Rule 10b-5 liability for pure omissions, precedent suggests that the Court will likely conclude that pure omissions are not actionable under Rule 10b-5.[33] This conclusion is supported by the text of the statute, the text of the Rule, Supreme Court and lower court precedent, and by the Court's reticence to expand the scope of the Rule 10b-5 implied private right of action.

The argument that Rule 10b-5 encompasses pure omission liability is supported by a simple economic observation: the social harm caused by pure omissions can be identical to the harm caused by lies or half-truths. They should therefore be equally prohibited. This argument is likely to fail, however, because it asks the Court to make a public policy determination that would expand the scope of the implied private right of action, and the Court has repeated demurred when facing such invitations.[34] Section 10(b) pure omission liability is also supported by the theory that every periodic filing has, associated with it, an implied representation of completeness. Reports with material omissions breach that implied representation. This theory, if correct, transmogrifies every pure omission that is questionably subject to Rule 10b-5 liability into a misrepresentation or half-truth that is clearly actionable under Rule 10b-5. But even if correct, this argument begs the question of whether Congress intended that a breach of an implied representation of completeness should be enforced solely by the Commission, or whether it should also support an implied private right of action under Rule 10b-5. The text, structure, and history of the statute and of the Rule, combined with substantial precedent, suggest that the better interpretation is that pure omissions are to be addressed exclusively by the Commission under Section 13(a) and that implied Rule 10b-5 liability should not be expanded to cover pure omissions claims. Put another way, recognizing an implied private right of action to enforce an implied representation is likely one implication too far for a majority of the Court.

An intellectually intriguing and closely related doctrinal issue arises in connection with the interpretation of Section 906 of the Sarbanes Oxley Act of 2002.[35] Section 906 requires that CEOs and CFOs of issuers filing periodic reports certify that, to the best of their knowledge, the report fully complies with Section 13(a).[36] Thus, there is no need to conjure an implied representation of completeness because Section 906 compels the making of just such an affirmative representation. Plaintiffs in *Leidos*, however, never pled this theory and it is not now before the Court. Plaintiffs in future litigation may, however, argue that Congress intended to create private Rule 10b-5 liability for false Section 906 certifications, provided all the elements of the Rule 10b-5 cause of action are satisfied. Closer examination of the text suggests, however,

---

[33] *See* Section V.C, *infra.*

[34] *See e.g.*, *Blue Chip*, *supra* note 6 (refusing to expand the implied right of action under Rule 10b-5 to offerees that neither purchased nor sold any of the offered shares.); Central Bank of Denver, N.A. v. First Interstate Bank of Denver, 509 U.S. 951 (1993) (holding that the implied right of action under Section 10(b) and Rule 10b–5 did not include a right of action against aiders and abettor); Stoneridge Investment Partners, LLC v. Scientific–Atlanta, Inc., 552 U.S. 148 (2008) (explaining the danger in expanding the implied right of action under Section 10(b) and Rule 10b–5.).

[35] 18 U.S.C. SECTION 1350.

[36] For a more complete analysis of Section 906 certifications, *see* Section V.D, *infra*.

that Section 906 was adopted as an amendment to the criminal code and does not amend the federal securities laws. Section 906 provides for criminal sanctions that can be applied to the filing of false or incomplete certifications. Because it does not amend the securities laws, and because there is no indication in the text or legislative history that Congress intended to expand the implied Section 10(b) private right of action. The debate over the implication of the Section 906 certification for pure omission liability under Rule 10b-5 will, however, have to wait for a future case that raises the claim.

All that said, no one should expect great changes in litigation practice as a consequence of *Leidos*. While respondent-plaintiffs will likely emerge on the short end of the doctrinal stick, they shouldn't wail, wear ashes, or don sackcloth. Nor should petitioner-defendants gather for a ticker tape parade down Broadway.

Part II of this article describes the facts of *Leidos* and observes that *Leidos* will, regardless of the Court's ruling on the doctrinal question presented, be remanded and resolved in a manner invariant to the Court's holding. This observation underscores the fact that pure omissions claims are readily recast as actionable half-truth claims. Part III looks beyond the facts of *Leidos* and observes that, in order to prevail, petitioner-defendants will have to defend the far broader proposition that registrants may omit any or all information required pursuant to Regulations S-K and S-X, and not just information required pursuant to the controversial Item 303 disclosure at the heart of the *Leidos* claim. Part III also observes that, given the rich disclosure environment prevailing in U.S. markets, plaintiffs will be able to reframe material omissions as half-truths. Part IV addresses the Circuit split and concludes that the Court should address the question presented even if the split is more semantic than real. Part V addresses the doctrinal question before the Court, as well as the possibility that a future case may raise a claim based on an allegedly false Section 906 certification, and concludes that the Court is unlikely to expand the private right of action to recognize pure omission liability under Rule 10b-5 or under Section 906. Part VI concludes.

II. <u>*Leidos* on Its Facts: Who Cares?</u>

Leidos itself underscores the insignificance of the question it presents. On June 2, 2011, SAIC announced that it was the subject of a criminal investigation involving $635 million in billings to the City of New York in connection with SAIC's involvement in the CityTime project.[37] It also announced that one of its employees had been arrested for fraud.[38] In March of 2012, SAIC announced that it had entered into a deferred prosecution agreement "pursuant to which SAIC agreed to reimburse the City approximately $500.4 million and to forfeit $40 million in unpaid receivables."[39]

On March 25, 2011, nine weeks prior to SAIC announcing the criminal investigation, the company filed an annual report on Form 10-K[40] disclosing net income of $618 million,[41] slightly

---

[37] SAIC, *supra* note 1, at 89.
[38] *Id*. at 89-90.
[39] *Id*. at 90.
[40] *Id*. at 89.
[41] SAIC, Inc., Form 10-K, filed March 25, 2011 at 24 (the "March 25, 2011 10-K") (Net Income).

less than the aggregate amount of billing at issue in the CityTime investigation. The filing did not, however, mention the pending investigation or a potential half-billion-dollar liability to the City of New York. The Second Circuit held that plaintiffs had adequately alleged that, as of the Form 10-K's filing date, SAIC's management was aware that the government investigation was focused on SAIC itself, and not just on wrongdoing by individual employees.[42] SAIC had by then also received grand jury subpoenas, and the City of New York had announced "a reevaluation of SAIC's role in the CityTime project, including a full review of all payments the City had made…"[43] In addition, management had received the results of an internal investigation setting forth "its own potential liability to the City."[44]

Plaintiffs alleged two theories that SAIC's annual report violated Rule 10b-5. The first was that Item 303 of Regulation S-K[45] required disclosure of the loss contingency. Omitting that information violated Rule 10b-5 even if the omission did not render any affirmative statement materially misleading. Item 303 is, perhaps, the most controversial of all SEC periodic disclosure requirements because it calls for discussion of "known trends and uncertainties."[46] This disclosure requirement inevitably compels issuers to engage in prognostication that can expose them to a risk of fraud by hindsight, and can cause great concern among issuers and counsel.[47]

---

[42] *Id.* at 93.
[43] *Id.* at 94.
[44] *Id.* at 94.
[45] 17 C.F.R. § 229.303(a)(3)(ii) (2016).
[46] *See, e.g.*, Eric R. Harper, *Unveiling Management's Crystal Ball*, 77 LA. L. REV. 879, 888 (2017) ("MD&A has been described as one of the most challenging sections to prepare in a prospectus or other SEC filings."); Lauren M. Mastronardi, *Shining the Light a Little Brighter: Should Item 303 Serve as a Basis for Liability Under Rule 10b-5?*, 85 FORDHAM L. REV. 335, 349 (2016) ("The requirements under [item 303] are flexible and complicated, leaving the company with a difficult task."); Denis V. Crawford & Dean Galaro, *A Rule 10b-5 Private Right of Action for MD&A Violations?* 43 SEC. REG. L. J. 1, 1 (2015) ('MD&A disclosures are inherently tricky, straddling the line between protected projections and vulnerable facts."); Brian Neach, *Item 303's Role in Private causes of Action Under the Federal Securities Laws*, 76 NOTRE DAME L. REV. 741, 748 (2001) ("Given [Item 303] general requirements, it is not surprising that reporting companies have had a difficult time determining just what information to disclose."); Thomas L. Hazen, TREATISE ON THE LAW OF SECURITIES REGULATION, 2 Law Sec. Reg. § 9:50 (2017 update) ("The most significant and challenging public disclosures are those required by item 303 of Regulation S–K."); Mark S. Croft, *MD&A: The Tightrope of Disclosure*, 45 S.C. L. REV 477, 478 (1994) ("Under Item 303 and its applicable interpretive releases, the MD&A disclosure requirements are open-ended and exceedingly complex.); Suzanne J. Romajas, *The Duty to Disclose Forward-Looking Information: A Look At The Future of MD&A*, 61 FORDHAM L. REV. 245, 286 (1993) ('[T]he distinction that the SEC has drawn between required and optional disclosures is so subtle that corporations and courts alike find Item 303 of Regulation S-K difficult to apply."). The Commission itself has characterized MD&A as "difficult to understand and confusing…." Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Securities Act Release No. 8350, Exchange Act Release No. 48,960, 68 Fed. Reg. 75,056, 75,057 (Dec. 29, 2003), at *5.
[47] *See. e.g.*, Brief for Petitioner, 2017 WL 2729693, filed June 28, 2017, at 47 ("With the benefit of hindsight, however, virtually any event that does occur and correlates with a change in the company's stock price could be recast as a "trend" or "uncertainty" that was known to be reasonably likely to occur."); Brief of Amicus Curiae Retail Litigation Center, Inc. in Support of Petitioner, 2017 WL 2822781, filed June 28, 2017, at 28 ("Item 303 disclosures are forward-looking and subject to managements' judgment about what may happen in the future, and are therefore uniquely susceptible to second-guessing after the fact."); Brief of Amicus Curiae Society for Corporate Governance in support of Petitioner, 2017 WL 2839266, June 28, 2017, at 4 ("The Second Circuit's ruling, which creates significant potential liability under Section 10(b) by allowing plaintiffs to use hindsight to second-guess management's judgments about developing trends, would lead to an unnecessary and counterproductive paradigm shift in the preparation of MD&A.").

Confusion also arises over the appropriate standard of materiality to be applied when analyzing Item 303 disclosure obligations. Liability under Rule 10b-5 does not attach unless the information disclosure at issue is "material"[48] as defined by the Supreme Court in *Basic v. Levinson*,[49] and in a string of related cases.[50] The Commission has, however, articulated a standard under Item 303 that can call for disclosure of information that is immaterial under *Basic*.[51] The Commission has also sought to clarify that Rule 10b-5 liability does not attach

---

[48] *See* Oran v. Stafford, 226 F.3d 275, 287-88 (3d. Cir. 2000). In *Oran*, then Circuit Judge Alito explained that the "general test for securities fraud materiality is set out by the Supreme Court in *Basic Inc. v. Levinson* which premised forward-looking disclosure 'upon a balancing of 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'.") (internal citations omitted); TSC Industries, Inc. at 449 (a material fact that must be disclosed is a statement that "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available"); *accord Basic*, *supra* note 6 at 485; SEC v .Texas Gulf Sulphur Co., 401 F.2d, 833, 849, (2d Cir. 1968) ("[M]aterial facts include not only information disclosing the earnings and distributions of a company but also those facts which affect the probable future of the company and those which may affect the desire of investors to buy, sell, or hold the company's securities."); Connett v. Enterprise of Kansas, Inc., 68 F.3d 382, 385 (10th. Cir. 1995) ("Liability for failure to disclose only arises when the duty to disclose exists and the withheld information is material.). *See, generally Ady*, *supra* note 26 at 409; Turk & Woody, *supra* note 7 at 9.

[49] *Basic*, *supra* note 6 at 238 ("materiality 'will depend at any given time upon a balancing of 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.'"(internal citation omitted).

[50] *TSC*, *supra* note 6 at 2128 (An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.); *Matrixx*, *supra* note 6 at 36 ("An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."); *Central Bank*, *supra* note 6 at 177 ("As in earlier cases considering conduct prohibited by § 10(b), we again conclude that the statute prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act.").

[51] As explained in *Stratte McClu*re, the decision upon which *SAI*C heavily relied, the SEC's test for a duty to report under Item 303 involves a two-part inquiry that can deviate from the analysis compelled by *Basic*. Once a trend becomes known, management must make two assessments:

> (1) Is the known trend ... 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 ... 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.

Stratte McClure v. Morgan Stanley, 776 F.3d 94, 101 (2nd Cir. 2015). As several cases and commenters have observed, this test can call for disclosure of information that is immaterial under *Basic*. *See, e.g.*, *Oran*, 226 F.3d at 288 (noting that Item 303's disclosure obligations "extend considerably beyond those required by Rule 10b-5"); In re Nvidia, 768 F.3d 1046, 1055 (9th Cir. 2014) ("As the court in Oran also determined, these two standards differ considerably. Management's duty to disclose under Item 303 is much broader than what is required under the standard pronounced in *Basic*.") (internal quotes omitted); Ash v. Powersecure Int'l. Inc., No. 4:14-cv-92-D, 215 WL. 5444741, *11 (E.D.N.C., Sep. 15, 2015) ("Item 303 is not a magic black box in which inadequate allegations under Rule 10b–5 are transformed, by means of broader and different SEC regulations, into adequate allegations under Rule 10b–5."); Feldman v. Motorola, Civ.A. No. 90–C–5887, 1993 WL 497228, at *9 (N.D. Il. Oct. 14, 1993) ("A demonstration of a violation of the disclosure requirements of Item 303 does not inevitably lead to the conclusion that such disclosure would be required under Rule 10b–5."); In re Canandaigua Sec. Lit., 944 F.Supp. 1202, 1209 n. 4 (S.D.N.Y.1996) ("[It is] far from certain that the requirement that there be a duty to disclose under Rule 10b–5 may be satisfied by importing the disclosure duties from S–K 303."); Kriendler v. Chemical Waste Management, Inc. 877 F.Supp. 1140, 1157 (N.D.Il.1995) (declining to hold that a violation of S–K 303 can be "a unless the Item 303 compliance failure is indeed material as defined in *Basic*.[52] These alternative definitions have caused confusion among lower courts.[53] However, as long as the Supreme Court's decision in *Leidos* is clear that Rule 10b-5 liability requires that the underlying omission or misrepresentation satisfy the *Basic* materiality standard, and not the lower threshold articulated by Item 303, *Leidos* will have no meaningful effect on the evolution of securities fraud litigation, no matter how it is resolved. Significantly, none of the parties in *Leidos* have shown any inclination to argue that the Supreme Court should alter its definition of materiality for purposes of analyzing liability under Item 303, and there is no reason to expect that the Court will view *Leidos* as a vehicle to revisit *Basic* as setting the relevant standard of materiality.

Plaintiffs' second theory was that the failure to disclose the loss contingency arising from the CityTime contract rendered SAIC's affirmative disclosures under Financial Accounting Standard 5 (FAS5) false and misleading.[54] FAS 5 "requires the issuer to disclose a loss contingency when a loss is a "reasonable possibility," meaning that it is "more than remote but less than likely."[55] Like Item 303, FAS5 can call for the disclosure of information that is immaterial under Basic. SAIC's Form 10-K disclosed several litigation-related contingencies,[56]

---

surrogate for materiality analysis under § 10(b) and Rule 10b–5"). *See also Neach, supra* note 46 at 773 ([m]andatory Item 303 disclosures encompass a broad spectrum of both material and immaterial information); Ady, *supra* note 26, at 426 ("[i]tem 303 requires disclosure of both material and immaterial information" that would allow "plaintiffs to bring Rule 10b-5 actions in connection with immaterial omissions, thereby sidestepping and ignoring the Supreme Court ruling in *Basic*"); Aaron J. Benjamin, *Stuck With Steckman: Why Item 303 Cannot be Surrogate for Section 11*, 7 HAR. BUS. L. REV. 49 (2017) (explaining that Item 303 is not sufficient to state a Section 10(b) claim because Section 10(b) claims are subject to the heightened *Basic* standard).

[52] Management's Discussion and Analysis of Financial Condition and Results of Operations, Exchange Act Release No. 34–26831, *288 54 Fed.Reg. 22427, 22430 (May 24, 1989), *6, n. 27 (the 1989 Release) ("This disclosure standard [Item 303 standard] is unique to Item 303 and 'the probability/magnitude test for materiality approved by the Supreme Court in [*Basic*] is inapposite."). *See also*, Stratte–McClure v. Morgan Stanley, *supra* note 51 at 101–04 (2d Cir.2015) ("At a minimum, *Oran* is consistent with our decision that failure to comply with Item 303 in a Form 10–Q can give rise to liability under Rule 10b–5 so long as the omission is material under *Basic*, and the other elements of Rule 10b–5 have been established."); Beaver County Emp. Ret. Fund v. Tile Shop Holding, Inc., 94 Supp. 3d 1035, 1047 (D. Minn. 2015) (adopting Stratte-McClure's conclusion); In re Lions Gate Entm't Corp, Sec. Litig., 165 F.Supp. 3d 1, 20 (S.D.N.Y. 2016) ("Moreover, while a failure to make a required disclosure under Item 303 in a Form 10-Q filing is an omission that can serve as the basis for a Section 10(b) securities fraud claim, the omission is only actionable if it satisfies the materiality requirement under *Basic* and if all the other requirements to sustain a securities fraud action are met." (*citing* Stratte-McClure)). *See also* Turk & Wooly, *supra* note 7 at 21 (discussing *Oran*, *Stratte-McClure* and *Nvidia* and concluding: "while not every Item 303 violation will give rise to Section 10(b) liability, some Item 303 violations also can give rise to violations of Rule 10b-5").

[53] Turk & Wooly, *supra* note 7 at 4 (suggesting that the interpretation of *Oran*, *Stratte*-McClure and *Nvidia* is "symptomatic of fundamental misconceptions about how the securities regulation architecture works …"); Aaron J. Benjamin, *supra* note 51, at 66 (suggesting that misinterpretation of Item 303 caused a "[M]isplaced reliance on *Steckman*" that resulted in an end runs to Supreme Court's carefully calibrated materiality standards."); Denis V. Crawford & Dean Galaro, *supra* note 46 at 11 (noting that the different tests for materiality stem from confusion); Langevoort & Gulati, *The muddy Duty to Disclose Under Rule 10b-5*, 57 VAD. L. REV. 1637, 1651 (2014) (suggesting that courts "are willing to twist and turn in a variety of directions to avoid finding a duty stemming out of SEC rules").

[54] *SAIC*, *supra* note 1 at 93-94, citing Financial Accounting Standards No. 5, Accounting for Contingencies (1975). FAS 5 has since been redesignated as ASC 450-20. This change in nomenclature and did not result in any substantive change in FAS 5's standards.

[55] *Id*. at 93 (citing FAS 5 paras 3 and 10).

[56] The March 25, 2011 10-K at 31 (Note 18) (disclosing contingent liabilities involving the National Center for Critical Information Processing, the Government of Greece, and the Nuclear Regulatory Commission).

and continued with the affirmative statement that "the company is involved in various claims and lawsuits arising from the normal conduct of its business, none of which, in the opinion of the Company's management, based upon current information, will likely have a material adverse effect on the Company's consolidated financial position, result of operations, or cash flows."[57] This denial of the existence of any material adverse effect arising from the CityTime contract is an affirmative statement that is arguably rendered false and misleading by virtue of the omission of the CityTime information. Note by way of contrast that in SAIC's Item 303 discussion, SAIC never makes an affirmative statement denying the existence of other "known trends or uncertainties" that might trigger Item 303 disclosure requirements. A single omission regarding the New York City contract fraud thus gives rise to allegations of both a pure omission under Item 303 and a half-truth in connection with FAS5.

The Second Circuit agreed that plaintiffs had adequately pled causes of action under both theories of liability. Therefore, regardless of whether *Leidos*'s Item 303 omission is actionable under Rule 10b-5 as a pure omission, *Leidos* will be remanded for further proceedings to resolve the FAS5 half-truth claim. And, on remand, defendants' exposure on the pure omission theory will be functionally identical to its exposure on the half-truth theory. The probability of dismissal, and the amount for which the case will settle if not dismissed, will therefore be unchanged by the Supreme Court's ruling in the case.[58]

A fuller examination of the record underscores the irrelevance of the distinction between omissions and half-truths on the facts of *Leidos*. Even a cursory review of the Form 10-K at issue in *Leidos* reveals two additional affirmative statements that are easily characterized as half-truths. In its risk factors disclosure section, the Form 10-K states that "[o]ur business is subject to governmental review and investigation which could adversely affect our profitability, cash

---

[57] *Id.* at 18.

[58] Just as Item 303 cannot establish a lower standard for Rule 10b-5 liability, FAS5 also cannot establish a lower standard for Rule 10b-5 liability. If an omission or misrepresentation satisfies the materiality standard, then the measure of damages would be calculated under the standard out-of-pocket damages model regardless of whether the claim rests on a pure omission, half-truth, or full-lie theory. Out-of-pocket damages are the difference between price inflation (deflation) at the time the share was purchased and price inflation (deflation) that remained at the time the share was sold, or as of the date of the corrective disclosure, whichever is earlier. *See. e.g.*, *Estimating Recoverable Damages in Rule 10b-5 Securities Class Actions.* 2 CORNERSTONE RESEARCH (2014) (CORNERSTONE 2014). The Private Securities Litigation Reform Act (PLSRA), (Pub. L. No. 104-67 Stat. 737 (1995)) included a new rule that caps the amount of recoverable damages so as not to exceed "the difference between the purchase or sale price paid ... by the plaintiff for the subject security and the mean trading price of that security during the 90–day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market." 15 U.S.C. § 78u–4(e)(1). *See also* Edward Brodsky & Patricia Adamski, LAW OF CORPORATE OFFICERS AND DIRECTORS: RIGHTS, DUTIES AND LIABILITIES, § 12:39 (updated 2016); William E. Aiken, *Measure and Elements of Damages Recoverable From Insider in Private Civil Action for Violation of § 10(b) of Securities Exchange Act (15 U.S.C.A. § 78j(b)) or SEC Rule 10b-5*, 29 A.L.R. Fed. 646 (1976) ("Out-of-pocket losses are standard measure of damages for Rule 10b" violations); Joseph A. *Grundfest*, *Damages and Reliance Under Section 10(B) of the Exchange Ac*t, 69 BUS. LAW. 307, (2014) BUS. L. 307, 310 ("Under current law, private party plaintiffs can collect out-of-pocket damages in section 10(b) litigation …"); Arnold S. Jacobs, DISCLOSURE AND REMEDIES UNDER THE SECURITIES LAWS, § 20:07 (updated 2017) ("The traditional measure of damages in 10b-5 action is the out-of-pocket measure. It has been classified as a restitutionary measure."); Jon Koslow, *Estimating Aggregate Damages in Class-Action Litigation Under Rule 10B-5 For Purposes of Settlement*, Note, 59 FORDHAM L. REV. 811, 817 (1991).

position or growth prospects,"[59] and that "[m]isconduct of our employees … could cause us to lose customers or our ability to obtain new contracts."[60] It is well established that risk disclosures are actionable half-truth under Rule 10b-5 if they fail accurately to describe the extent to which a contingency has in fact materialized.[61] Given the Second Circuit's analysis of the FAS5 claim and of management's state of mind as of the report's filing date, each of these risk factor disclosures could easily be framed as a material half-truth. Neither risk factor explained that the risks of investigations or of misconduct were not merely abstract, generic, or speculative, but were real and substantial, to the potential tune of a half billion dollars. It is for plaintiff counsel to explain why they did not allege that these two risk factor disclosures were actionable half-truths.

Leidos is therefore not a pure omissions case. It is a half-truth case pled as both a pure omissions case and a half-truth case, in which the pure omission claim adds nothing to the defendants' potential liability. Indeed, had plaintiffs' counsel been so inclined, they could have pled this case as involving three material half-truths and no pure omissions, a formulation that would have entirely avoided this trip to the Supreme Court and that would not have adversely affected the value of their claim.

III. Beyond the Facts of *Leidos*

Leidos' insignificance reaches well beyond the four corners of the case. There is no basis upon which to distinguish Item 303 disclosure requirements from any other line item disclosure requirement of Regulations S-K or S-X. Petitioner-defendants will therefore have to defend the broader proposition that issuers may omit *any* information required by *any* periodic disclosure requirement and not incur Rule 10b-5 liability. Petitioner-defendants cannot cabin their argument to the peculiarities of Item 303, of which there are many.[62] The literature's focus on Item 303's minutiae are therefore entirely beside the point at the core of *Leidos*. Indeed, in the extreme, petitioner-defendants must defend the proposition that a complete failure to disclose any of the information required by any of the Commission's periodic disclosure rules is not actionable under Rule 10b-5, provided that the omissions do not result in misrepresentations or half-truths.[63]

---

[59] March 25, 2011 10-K, at .10.

[60] March 25, 2011 10-K, at 12.

[61] Rombach v. Change, 355 F.3d 164, 173 (2d Cir. 2004) ("Cautionary words about future risk cannot insulate from liability to failure to disclose that the risk has transpired."); Dolphin & Bradbury v. SEC, 512 F.3d 634, 640 (D.C. Dis. (2008) (noting the critical distinction between "disclosing a risk a future event *might* occur and disclosing actual knowledge the event *will* occur (emphasis in original); Berson v. Applied Signal Tec. Inc., 527 F.3d 982, 986 (9th Cir. 2008) ("The passage [in the public filing], moreover, speaks entirely of as-yet-unrealized risks and contingencies. Nothing alert the reader that some of these risks may already have come to fruition …"); In re Herman Inter. Indus. Inc. Sec. Litig., 791 F.3d 90, 103 (D.C. Dist. 2015) (citing *Dolphin*).

[62] *See supra* note 46 for references to literature critiquing Item 303.

[63] A failure to file a periodic report without seeking an extension under Rule 12b-25, 17 CFR 240.12b-25, is actionable by the Commission. The data suggest that late filing of a periodic report, even if pursuant to a Rule 12b-25 extension, is associated with a statistically significant stock price decline. *See e.g.*, Joost Impink et al., *Did Accelerated Filing Requirements and SOX Section 404 Affect the Timeliness of 10-K Filings?*, REV. OF ACCT. STU. 227 (2012); Carol Callaway *et. al., No News is Bad News: Market Reaction to Reasons Given for Late Filing of Form 10-K*. 22, RES ACC. REG.121 (2010); Jian Cao. *et al. Analyzing Late SEC Filings for Differential Impacts of IS and Accounting Issues*, INT'L J. OF ACC. INFO. SYS. 11, 189 (2010); Paul A. Griffin, *Got Information? Investor Response to Form 10-K and Form 10-Q EDGAR Filings*, 8 REV. ACCT. STU. 433 (2003). For a summary of the literature reviewing investors' reaction to late filing of quarterly and annual filings *see* Eli Bartov & Yaniv

Although this proposition is significantly more aggressive than the fact pattern arising in *Leidos*, petitioner-defendants are likely to prevail in asserting this more expansive proposition.

From a pragmatic perspective, expanding from the proposition that a material omission under Item 303 will cause a material misrepresentation or half-truth to the more aggressive proposition that the omission of any material information required by Regulations S-K or S-X will also generally cause a material misrepresentation or half-truth is supported by a range of observations. First and foremost is the lesson of history. It has taken decades for a purported pure omissions case to reach the Supreme Court, and even so, this purported pure omissions case, *Leidos*, is not a pure omissions case.[64] There is also precious little precedent on point. Why would precedent be so sparse under such a heavily litigated provision of the law? Because plaintiffs have successfully avoided the question by framing omissions as creating misrepresentations or half-truths. Indeed, as explained above, *Leidos* itself is not a pure omissions case, and the fact that *Leidos* is before the Supreme Court may have more to do with plaintiffs' suboptimal pleading practices than with any compelling need to resolve the question presented in the petition for *certiorari*.

More broadly, the Commission's mandatory disclosure requirement are sweeping. They are so vast, that a substantial literature suggests that investors are subject to information overload.[65] Calls are common, including from Congress, for the Commission to cut back on the

---

Konchitchki, *SEC Filings, Regulatory Deadlines, and Capital Market Consequences*, (2017). New York University Law and Economics Working Papers. 254. http://lsr.nellco.org/nyu_lewp/254. Bartov et. al found that the stock price decline continued for several months after the late filing, and that reaction to a late filing of Form 10-Q was larger than the reaction to a late filing of Form 10-K. *Cf* Andrew W. Alford *et al.*, *Extensions and Violations of the Statutory SEC Form 10-K Filing Requirements*, 17 J. OF ACCT. AND ECON. 17, 229 (1994). Alford, *et al.* found an insignificant market reaction for all firms, except to those firms that were late by more than 17 days. For a critique of Alford's methodology and conclusions, *see* Bartov, *et al.*

64 As explained in Section V.B *infra*, *Affiliated Ute* and the insider trading cases that have reached the Supreme Court are not pure omission cases because they each involved an act of trading and were addressed under Rules 10b-5(a) and (c), not under Rule 10b-5(b).

65 *See, e.g., TSC Industries*, *supra* note 6 at 448-49 (explaining that too low a threshold of materiality will lead management "simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decision making."); *accord Basic*, *supra*, note 6 at 231; Lauren M. Mastronardi, *supra* note 46 at 344 ("As the amount of detail required to satisfy disclosure obligations increases, investors may be so inundated with information that they are unable to accurately ascertain what information is relevant."); Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 BAYLOR L. REV. 139, 160 (Winter 2006) ("Corporations have become accustomed to disclosing more and more information to investors without accounting for the drawbacks of information overload … Moreover, disclosure that is too long or complex to be comprehensible to the average person floods the individual with too much nonessential data and overloads the person with information that inhibits optimal decision-making."); Arthur Levitt, Chairman U.S. Securities And Exchange Commission, *Corporate Finance in the Information Age*, Securities Regulation Institute, San Diego, California (January 23, 1997), at 19("[t]oo much information can be as much a problem as too little");); Mary Jo White, Chairman U.S. Securities and Exchange Commission, *The Path Forward to Disclosure*, Speech National Association of Corporate Directors - Leadership Conference 2013 in National Harbor, Md. Oct. 15, 2013, available at https://www.sec.gov/news/speech/spch101513mjw#.VCyAzE10zIU ("When disclosure gets to be 'too much' or strays from its core purpose, it could lead to what some have called 'information overload' — a phenomenon in which ever-increasing amounts of disclosure make it difficult for an investor to wade through the volume of information she receives to ferret out the information that is most relevant."); Troy A. Paredes, *Blinded by The Light: Information Overload and its Consequences for Securities Regulation*, 81 WASH. U.L. Q. 417, 446 (2013)

scope of disclosures required pursuant to Regulations S-K and S-X.[66] The breadth of these disclosure requirements is entirely consistent with the observation that a registrant who omits material information required pursuant to any line item disclosure requirement is likely creating an actionable half-truth because of a conflict with some other mandatory disclosure requirement.

It is also common for issuers to supplement mandatory disclosures with voluntary disclosures that can go far beyond Commission requirements.[67] Several market forces induce issuers to make voluntary disclosures that include quarterly analyst calls and a range of forecasts and outlooks.[68] These voluntary disclosures contribute to the thicket of affirmative disclosures that can be rendered false or misleading as a consequence of a material omission.

The caveat to this proposition is that there can exist a small subset of cases in which material omissions do not give rise to material misrepresentations or half-truths. Plaintiffs cite to a small number of these cases, but upon closer examination, these cases could often also have been pled as material misrepresentation or half-truth cases, precisely the same pattern observed in *Leidos*.[69] The rare case that cannot be pled as generating a material misrepresentation or half-

---

("A regime like the federal securities laws needs to consider how more disclosure affects decision making. Meaningful, effective disclosure does not simply mean more disclosure. Because of information overload, in some cases, more disclosure can mean less effective disclosure.").; Kelly Mathews, *Crowdfunding, Everyone's Doing It: Why and How North Carolina Should Too*, 94 N.C. L. REV. 276, 320-21 (2015) ("Furthermore, the volume of information contained in the prescribed securities disclosures can create cognitively-crippling information overload, causing investors to limit their attention to disclosure or avoid them altogether.").

[66] On April 5, 2012, Congress passed the Jumpstart Our Business Startups Act, Pub. L. No. 112-106, [126 Stat. 306] (2012). (the "JOBS Act"). The stated purpose of the bill was to "encourage small companies to go public in the U.S., to spur economic growth, and to create jobs." Section 108 of the JOBS Act required the Commission to conduct, within 180 days of enactment of the JOBS Act, a review of Regulation S-K to determine how such requirements can be updated to modernize and simplify the registration process. Specifically, Section 108 required the Commission to "conduct a comprehensive analysis of the current registration requirements of Regulation S-K and determine how such requirements can be update to modernize and simplify the registration process and reduce the costs and other burdens associated with these requirements for issuers who are emerging growth companies.". In 2013, the SEC issued the Report on Review of Disclosure Requirements in Regulation S-K (approving amendments to revise the rules related to the thresholds for registration, termination of registration, and suspension of reporting under Section 12(g) of Exchange Act of 1934; relaxing requirements of Regulation S-X and Regulation S-K applicable to emerging growth companies and adopting regulations implementing the crowdfunding provisions of the JOBS act.).

[67] For reviews of the economics, finance, and accounting literature relating to voluntary disclosures, *see, e.g.*, Christian Levz and Peter D. Wysocki, *The Economics of Disclosure and Financial Reporting Regulation: Evidence and Suggestions for Future Research*, 54 J. ACT RES. 525, 543 (2016) ("Many empirical studies in accounting examine the economic consequences of corporate disclosure and reporting based on association with firms' *voluntary* disclosure and reporting choices.") (emphasis in original); Anne Beyer, et al., *The Financial Reporting Environment Review of the Recent Literature*, 50 J. ACCt. & ECON. 296, 300-315 (2010) ((identifying conditions under which firms voluntarily disclose private information.).

[68] *See* Beyer, et al., *supra* note 67, at 300-315; Karen K. Nelson and Adam C. Pritchard, *Carrot or Stick? The Shift from Voluntary Mandatory Disclosure of Risk Factors*, J. OF EMPIRICAL L. STUD. 13, 179 (2016).

[69] Respondents and amici have strong incentives to identify instances in which pure omissions cannot be reframed as generating misrepresentations or omissions outside the context of Item 303 disclosure obligations. Even so, their briefing suggests the existence of only five such cases, all of which can be challenged as examples of pure omissions that do not generate half-truths. Respondents' brief, No. 16-581, 2017 WL 3913771, filed August 31, 2017, at 47 note 18 cites the following four examples: "SEC v. Kovzan, 807 F. Supp.2d 1024, 1037 (D. Kan. 2011)(failure to disclose company's payments to CEO for lavish personal expenses as required by …Item 402; SEC v. Saltsman, No. 07-CV-4730 (NGG) (RML) 2016 WL 4136829 at *12 – 14 (E.D.N.Y. Aug. 2, 2016) (failure to disclose related party transactions …); SEC v. Das, No. 8:10CV103, 2010 WL 4615336 at *7-8 (D. Neb. Nov. 4, 2010) (failure to

truth will likely involve a situation in which the omitted information is unrelated to the performance of the issuer's business. The omission will instead tend to arise from a failure to disclose facts about the personal characteristics of officers or directors, or facts about related party transactions. This distinction is entirely sensible because the thicket of mandatory and voluntary disclosures tends not to generate disclosures relating to personal characteristics or to individual related party transactions.

Experience also suggests that cases involving pure omissions that cannot be pled as causing material misrepresentations are unlikely to cause statistically significant stock price moves that generate dollar losses large enough to attract private party litigation. The examples of pure omission cases cited in respondent and *amicus* briefs – if they are pure omissions cases at all – generally involve smaller issuers that, with only one exception, did not attract private party litigation.[70] This pattern suggests that granting private parties the right to pursue Rule 10b-5 claims would not be doing them a great favor because the need to assert these claims would tend to arise in situations when plaintiffs wouldn't be asserting those claims in any event. In other words, as a practical matter, plaintiffs lose very little, if anything, if they are prohibited from pursuing pure omission cases because they would be prevented from pursuing cases that they likely wouldn't have filed in the first instance.

And, when a pure omission case arises that cannot be pled as causing a misrepresentation or half-truth, the case can be pursued by the Commission under Section 13(a).[71] Thus, even if pure omissions cases are not actionable under Rule 10b-5, the effect of this limitation is constrained by the Commission's ability to pursue those claims in the future as it has in the past. No one gets a free pass because of a pure omission.

Taken together, these factors suggest that if history is a useful guide, pure omissions cases that cannot readily be framed as misrepresentation or half-truth cases are likely to be rare,

---

disclose valuable perks and related party transactions as required by Items 402 and 404); In re Ciro Inc., Release No. 612, 1994 WL 548994, at *5 (Sept. 30, 1994)(failure to disclose CEO's bankruptcy …)." The Brief of Professors at Law and Business School, 16-581, filed September 5, 2017 (on file with authors), at 12 cites to one example in addition to Ciro, supra: ""related party transactions under Item 404, see In re DeGeorge Fin. Corp., Exchange Act Release No. 39,319, 1997 WL 700691, at *4 (admin. Proc. Nov. 12, 1997)." Upon closer examination however, it is apparent that a private class action lawsuit was also filed in against Xybernaut, the company of which Saltsman was the CEO. See In re Xybernaut Sec. Litig.,403 F.Supp. 2d 1354 (2015). That claim was settled for approximately $6.3 million. See http://securities.stanford.edu/filings-documents/1034/XYBRE05_01/20071025_r01n_0501705.pdf. Thus, a successful private remedy was pursued in that case. Also, in Saltzman, the company's registration statement thought to increase the number of authorized shares, and indicated that the company did not have a specific use planned for the new shares, even though it actively sought, and in fact received, financing from a group of investors to use the newly issued shares in a PIPE transaction. These facts would support a misrepresentation claim. In Das, the Commission alleged that defendants "improperly approved" $9.5 million in payments that "should have been treated as compensation or perquisites." 2010 WL 4615336 at *2. This failure to characterize the payments as compensation expense or perquisites would have rendered the actual compensation reported materially false and misleading. In Ciro, the company overstated its net income by improperly recognizing its franchise revenues. Again, the facts could have been pled as a material misrepresentation case. In DeGeorge Financial, the Commission explained that the respondent either did not disclose related party payments or "disclosed in a false and misleading manner," 1997 WL 700691, at *1, again indicating that the case was not a pure omissions case.

[70] See note 69 *supra*.

[71] See Section V.A *infra* for a discussion of Section 13(a) liability.

small, related to disclosures that are not core to the issuer's business operations, and will in any event be subject to Commission enforcement action.

IV. The Circuit Split

None of this is to suggest that *certiorari* has been improvidently granted. The Second Circuit has held that the omission of Item 303 information is actionable under Rule 10b-5.[72] The Ninth Circuit has ruled to the contrary.[73] The Second Circuit has also expressly stated that its views are "at odds" with those of the Ninth Circuit.[74] The Third Circuit, in an earlier opinion authored by current Justice Alito, explained that Item 303 disclosures are sometimes actionable under Rule 10b-5 and sometimes not, depending on whether the defect in the disclosure is material under *Basic* and on whether all elements of the cause of action were satisfied[75]

The Third Circuit's opinion is, in many respects, the most carefully reasoned and best articulated of the three cases.[76] Indeed, by emphasizing the Third Circuit's interpretation it is entirely possible to parse the language of the Second and Ninth Circuit opinions in a manner that eliminates the conflict.[77] However, any effort to avoid the asserted conflict requires deep familiarity with the underlying question of law, and will in any event fail to resolve the fact that the Second Circuit's statement regarding the existence of a circuit split would remain on the books, thereby creating ongoing confusion and opportunity for expensive and complex wordplay over the operation of the underlying doctrine.

---

[72] *In re SAIC Inc. Sec. Litig.*, *supra* note 1 at 103-04 (Item 303 imposes an "affirmative duty to disclose ... [that] can serve as the basis for a securities fraud claim under Section 10(b) … failure to comply with Item 303 ... can give rise to liability under Rule 10b–5 so long as the omission is material under *Basic* and the other elements of Rule 10b–5 have been established.") (internal quotes omitted); *Stratte-McClure*, *supra* note 51 at 101 ("Item 303's affirmative duty to disclose in Form 10–Qs can serve as the basis for a securities fraud claim under Section 10(b).").
[73] *In re Nvidia Sec. Litig.*, 768 F.3d 1046 (9th Cir. 2014) (citing extensively from *Oran* and concluding that: "Item 303 does not create a duty to disclose for purposes of Section 10(b) and Rule 10b–5. Such a duty to disclose must be separately shown according to the principles set forth by the Supreme Court in *Basic* and *Matrixx Initiatives*.").
[74] *Stratte-McCLure supra* note 51 at 103 ("We note that our conclusion is at odds with the Ninth Circuit's recent opinion in *NVIDIA*.") (citation omitted).
[75] *Oran supra* note 48 at 288 ("Because the materiality standards for Rule 10b–5 and SK–303 differ significantly, the demonstration of a violation of the disclosure requirements of Item 303 does not lead inevitably to the conclusion that such disclosure would be required under Rule 10b–5. Such a duty to disclose must be separately shown.").
[76] Turk and Wooly, *supra* note 7, at 24 ("[T]he Third Circuit in *Oran* laid out the blueprint that has been followed by subsequent Second and Ninth Circuit decisions, including *Leidos*.").
[77] Turk and Woody, *supra* note 7 at 18-22 ("In summary, an inspection of the 2-1 split [*Oran*, *Stratte-McClure* and *Nvidia*] alleged by the Cert Petition reveals a 3-0 consensus with respect to the core legal question in *Leidos*: the Second Circuit (*Leidos* and *Stratte-McClure)* agree in full with the Third Circuit (*Oran*), which in turn is entirely consistent with the Ninth Circuit (*Nvidia* and its predecessors.)"). *See also* Brian Currie, *Much Ado About Nothing: The Limits of Liability For Item 303 Omission and the Circuit Split That Never Was*, 8 WM. & MARY BUS. L. REV. 379, 399-400 (2017) (observing that *Nvidia* and *Stratte-McCLure* in fact agree on three crucial points: "First, both courts agree that disclosure requirements are broader under Item 303 than under Basic's requirement for Rule 10b-5. Second, the opinions agree that an Item 303 omission does not automatically establish materiality under Basic's Rule 10b-5 standard. Third, and most importantly, the opinions both conclude that a plaintiff must allege that the omission independently satisfies Basic's heightened standard in order to sustain a Rule 10b-5 action."); Straight Arrow, Securities Diary, available https://securitiesdiary.com/tag/item-303-regulation-s-k/ (listing two points of agreement between *Stratte-McClure and Nvidia* and conclude that "the difference between these decisions reflect the proverbial "distinction without a difference"").

There is virtue in semantic consistency among the lower courts. A clear opinion describing the scope of liability, if any, for pure omissions will contribute to judicial efficiency by eliminating unnecessarily complex briefing over rhetorical distinctions that don't move the liability needle. An opinion promoting consistency will also eliminate the incentive to engage in inter-circuit forum shopping in order to gain semantic advantage. Moreover, the fact that there may be little at stake as a practical matter hardly distinguishes *Leidos* from some other cases that come before the Court.[78]

V. Addressing the Doctrinal Challenge

With the practical implications of *Leidos* cut down to size, the doctrinal question remains. The parties and *amici* disagree, however, as to the phrasing of the question presented, and the petitioner itself has framed the question two different ways.[79] These differences in locution arise because, given the complexity of the doctrinal debate, subtle distinctions can tilt the analysis in one direction or another. Without suggesting that the following framing is the best or most neutral statement of the case, a parsimonious articulation of the question presented is: "When, if ever, does the omission of information required by Commission rule in a periodic filing support

---

[78] *See, e.g.*, Oral Argument before the Supreme Court in Perry v. Merit System Protection Board, 137 S.Ct. 1975 (2017), available at https://www.oyez.org/cases/2016/16-399 (Justice Alito's comment: "This is a case that's about, at bottom, not very much substantively, right? No matter which side wins, Mr. Perry will, in the end, get a decision if he wants it in the district court on both of the questions.").

[79] The briefing offers four different articulations of the question presented. The petition for *certiorari* frames the question as: "Whether the Second Circuit erred in holding - in direct conflict with the decisions of the Third and Ninth Circuits - that Item 303 of SEC Regulation S-K creates a duty to disclose that is actionable under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5." Petition for a Writ of Certiorari, No. 16-581, 2016 WL 6472615, filed Oct. 31, 2016, at i. Petitioner's merits brief states the question as: "Whether Item 303 of SEC Regulation S-K creates a duty to disclose that is privately enforceable under § 10(b) of the Securities Exchange Act and SEC Rule 10b-5." Brief for Petitioner, No. 16-581, 2017 WL 2729693, filed June 21, 2017 at i. The primary difference between these locutions is that the former is more broadly framed and also implicates the Commission's ability to proceed under Rule 10b-5, whereas the latter draws attention to the scope of the implied private right of action under Section 10(b). The brief *amicus curiae* filed by Professors at Law and Business Schools frames the question in a manner substantially identical to that presented in the petition for *certiorari*. Brief of Professors at Law and Business Schools as Amicus Curiae in Support of Respondents, No. 16-581, filed September 6, 2017, on file with authors, at i.

Respondents frame the question as: "Whether an issuer of publicly traded securities that deceptively omits from a securities filing material information required to be disclosed under Item 303 of SEC Regulation S-K violates § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5." Brief for Respondents, No. 16-851, 2017 WL 3913771, filed August 31, 2017, at i. This formulation incorporates into the question a reference to the notion of "deception," a word that appears in the text of Section 10(b), and frames the question more expansively so as also to implicate SEC enforcement authority.

The amicus brief of the United States frames the question as: "Whether an issuer's submission of a Form 10-K that discloses some but not all of the trends, events, or uncertainties it was required to disclose under Item 303 of SEC Regulation S-K, …is categorically exempt from liability under Section 10(b) of the Securities Exchange Act of 1934 …, and SEC Rule 10b-5." Brief of the United States as Amicus Curiae in Support of Respondents, No. 16-581, WL 4004533, filed September 5, 2017, at i. This framing introduces the notion of a "categorical" exemption, which need not be at issue here inasmuch as an omission can, if combined with other forms of conduct, clearly be actionable under Rule 10b-5.

an implied right of action under Rule 10b-5, even if the omission does not cause an express affirmative statement to become false or misleading?”[80]

The answer to this question, and to all the other formulations of the question presented, turns on a choice of interpretive style. If the Court hews to a textualist approach that carefully parses the words of the statute and of the rule, and emphasizes limits on the expansion of private Rule 10b-5 liability absent clear Congressional guidance, the Court will likely conclude that pure omissions are not actionable under Rule 10b-5. But if the Court adopts a more expansive view and interprets the fact of filing as making an implied representation of completeness, then the Court could conclude that pure omissions of the sort at issue in *Leidos* violate Rule 10b-5 because the omission causes an implied representation of completeness to become an actionable misrepresentation or half-truth. Under that logic, every pure omission is transmogrified into a misstatement or half-truth.

Given the text and tone of recent Supreme Court opinions interpreting the scope of the implied Rule 10b-5 private right of action, and in light of the wording of the relevant statutes and regulations, the better view is that Rule 10b-5 does not support an implied private right of action for pure omissions. The central observation here is that the statute expressly grants the Commission, and only the Commission, authority to pursue pure omission cases. There is no support in the text of the statute or rule, or in the relevant legislative or regulatory history, for the proposition that Congress or the Commission ever intended to extend Rule 10b-5 private liability to cover pure omissions. To find the grant of such authority to private parties under Rule 10b-5 requires a linguistic stretch that creates substantial tension with prior Supreme Court precedent and with the text of the statute and of the rule.

The implications of the Section 906 certification are not at issue in *Leidos* because plaintiffs never alleged that the certification was false. The Section 906 certification is, however, an express, affirmative statement of compliance by the issuer's CEO and CFO that would be rendered false and misleading if the periodic filing suffered from a material omission. Because the implications of the Section 906 certification are intellectually so inter-related with the question of pure omission liability and the notion of an implied representation of completeness, this article also analyzes the implications of the Section 906 certification. The analysis concludes that because Section 906 is an amendment to the criminal code that has the effect of enhancing penalties, and is not adopted as an amendment to the federal securities laws, it is unlikely to support an implied private right of action under Rule 10b-5.

The doctrinal analysis proceeds by first considering the Commission’s ability to address omissions under Section 13(a). It then considers arguments against recognizing pure omission liability under Rule 10b-5 and arguments favoring such liability. It closes with an assessment of the argument that Section 906 certifications can, in certain instances, be used to create private liability for pure omissions, also concludes that neither the Commission nor private parties are likely to prevail in asserting pure omission liability under Section 906.

[80] This framing can obviously be criticized as favoring the petitioner’s perspective because it focuses on the scope of the implied private remedy while minimizing implications for the Commission’s enforcement authority. The Commission’s enforcement authority is not materially at risk in *Leidos,* so the real controversy is over the reach of the implied private right of action. *See* Section V.A, *infra.*

A. Section 13(a) and the Commission's Enforcement Program

The analysis proceeds most efficiently by first observing that the Commission does not need authority under Section 10(b) to attack pure omissions in periodic filings, and that the Supreme Court's opinion in *Leidos* will have no meaningful effect on the Commission's enforcement program. Section 13(a) of the Exchange Act requires that issuers file reports "in accordance with such rules and regulations as the Commission may prescribe."[81] An issuer who omits material information required by Commission regulation can be sued by the Commission in either an administrative proceeding or in federal court, even if that omission does not render an affirmative statement false or misleading. There is no doubt that Commission could bring an enforcement proceeding against Leidos on a pure omission theory if it so desired. Private party plaintiffs, however, have no implied private right of action under Section 13.[82]

Proceedings to enforce Section 13(a) liability provide the Commission with substantially all of the relief available to it under Rule 10b-5,[83] including the ability to distribute certain recoveries to shareholders in accordance with the Fair Funds provision of the Sarbanes Oxley Act of 2002.[84] The Commission also does not have to establish scienter under Section 13, but must do so under Rule 10b-5.[85] Section 13(a) is thus a strict liability violation, and it is uniformly

---

[81] 15 U.S.C. § 78m(a).

[82] *See, e.g.*, In re Penn Central Securities Litigation, 494 F.2d 528, 540 (3d Cir. 1974) ("(w)e have not been cited, nor have we found, any appellate decisions concerning the possible existence of a private right of action under 13(a)"); In re Equity Funding Co. of America Securities Litigation, 416 F.Supp. 161, 190 (C.D. Ca. 1976) ("The sense of the statute [the 1934 Act] and the rules, however, is that they are administrative devices not intended to provide private rights to investors, except as might be narrowly provided for in s 18 of the 1934 Act."); Rosengarten v. Int'l Tel. & Tel, 466 F.Supp. 817, 827 (S.D.N.Y. 1979) (No express private right of action exists under either of these sections [12(b)(1)(I) and 13(a)], and the courts have consistently held that the exclusive remedy for violation of these reporting requirements is a suit under s 18(a) of the Exchange Act.); Davis v. DCB Financial Corp., 259 F. Supp. 2d 664, 674 (S.D. Ohio 2003) (reaffirming that there is no private cause of action for a violation of § 13(a)).

[83] Under Section 13(a), the Commission can impose civil penalties (SEC v. Life Partners Holdings, Inc., 854 F.3d 765 (5th Cir. 2017); obtain injunctions (SEC v. Diversified Growth Co., 595 F.Supp. 1159 (D.D.C. 1984); seek disgorgement (SEC v. General Refractories Co., 400 F.Supp. 1248, 1260 (D.D.C. 1975); and petition for the appointment of a receiver (SEC v. Amer. Capital Inv. Inc., 98 F.3d 1133, 1136 (9th Cir. 1966)). Identical forms of relief are available to the SEC for violations of Rule 10b-5: civil penalties, injunctions, disgorgement, and the appointment of a receiver. *See* Arnold S. Jacobs, DISCLOSURE AND REMEDIES UNDER THE SECURITIES LAWS, §§ 12:110-12:120 (updated 2017).

However, under 10(b), but not under 13(a), the Commission can obtain an officer and director bar, 15 USC 78u(d)(2), cause the loss of regulatory benefits associated with an issuer's status as a "well-known seasoned issuer" 17 CFR 230.405, and cause the issuer to become disqualified from certain securities offerings. Brief for United State as Amicus Curiae, No. 16-581, 2017 WL 4004533, filed Sep. 7, 2017, at 32-33. These distinctions are minor as a practical matter because, as explained above, material omissions will likely cause material half-truths that, if made with scienter, would allow the Commission to obtain the remedies available under Section 10(b), and not just those available under Section 13(a).

[84] Section 308(a) of the Sarbanes-Oxley Act (Sarbanes-Oxley Act of 2002, PL 107-204, 116 Stat 745).

[85] Scienter is not an element of civil enforcement actions brought by the SEC under Section 13. *See, e.g.,* SEC v. Wills, 472 F. Supp. 1250, 1268 (D. D.C. 1978); SEC v. McNulty, 137 F.3d at 740–41 (2d Cir. 1998) (Section 13 of the Exchange Act and the rules thereunder do not require scienter); SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1167 (D.C. Cir. 1978) (no showing of scienter is required to establish violation of Section 13(a) of the Exchange Act). Under Section 10b-5, however, the Commission and private party litigants must prove scienter. *See, e.g.,* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 212 (1976).

easier for the Commission to prevail in Section 13(a) actions than in equivalent Rule 10b-5 proceedings.[86]

The dominant effect, by far, of any decision in *Leidos* will therefore be on the scope of the implied private right of action under Rule 10b-5. A decision holding that pure omissions do not violate Rule 10b-5 will not allow registrants to run amok, free of liability for omissions that do not generate half-truths. It will, instead, vest authority over pure omission cases exclusively in the Commission's hands, which is where it has traditionally resided. In contrast, a decision recognizing pure omission liability under Rule 10b-5 will permit private claims asserting liability under an out-of-pocket damage rule, that can systematically generate exposure significantly larger than that which arises in Commission proceedings.[87] This is, however, likely a distinction without a difference because, as suggested above, plaintiffs can generally reframe pure omissions as half-truths and thereby obtain access to out-of-pocket damage recoveries in any event.

B. <u>The Case Against Pure Omission Rule 10b-5 Liability</u>

The analysis of a statute and regulation begins with the relevant text.[88] When Congress drafted the Securities Exchange Act of 1934 it had already demonstrated its ability to craft language creating pure omission liability. Section 11(a) of the Securities Act of 1933[89] creates liability not only for material omissions and misrepresentations, but also "in case any part of the registration statement … omitted to state a material fact required to be stated therein…"[90] Congress demonstrated the same ability in drafting the '34 Act when it crafted Section 13(a) in a manner that supports liability for pure omissions, but only for actions brought by the Commission.[91] But when it came to creating an express private right of action arising from flaws in periodic reports filed with the Commission, Congress crafted Section 18(a) of the Exchange Act so as to create express civil liability for material misrepresentations and half-truths, but did not include language parallel to Section 11's or Section 13(a)'s express creation of liability for pure omissions.[92] The plain text of the Securities Act and of the Exchange Act thus creates a

---

[86] *See, generally,* SEC v. Schiffer, Fed. Sec. L. Rep. p. 90, 247, 1998 WL 307375 (S.D. N.Y. 1998); United States v. Berger, 473 F.3d 1080, 1098 (9th Cir. 2007); SEC v. Jensen, 835 F.3d 1100 (9th Cir. 2016); SEC v. Spogetech Delivery Sys. Inc., 2011 WL 887940, Fed. Sec. L. Rep. P 96, 246 (Mar. 14, 2011); SEC v. Koeing, 1972 WL 329, Fed. Sec. L. Rep. P 93, 536, (June 20, 1972); In the Matter of Matrix Science Corporation, Exchange Act Rel. No. 26234, Accounting and Auditing Enforcement Rel. No. 207 (November 1, 1988) (consenting to violations of Section 13(a)).

[87] For an explanation of the operation of the out-of-pocket damage rule, *see, e.g*., *Grundfest*, *supra* note 58 and cases and articles cited therein.

[88] *See, e.g.*, *Blue Chip, supra* note 6 at 756 (Powell J., concurring) ("The starting point in every case involving construction of a statute is the language itself."); Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985) (quoting *Blue Chip*); Int'l Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am. v. Daniel, 439 U.S. 551, 558 (1979) (same).

[89] 15 U.S.C. § 77k (2000).

[90] 15 U.S.C. § 77k(a).

[91] *Supra*.

[92] Section 18(a) imposes liability for statements contained in these reports if the statement: "was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact. . .." 15 U.S.C. § 78r(a). *See also*, Dewitt v. Amer. Stock Transfer Co. 433 F. Supp. 994, 1005 (SDNY 1977) (holding that plaintiff can state a claim under Section 18(a) only when the wrong alleged is premised on the making of material misstatement). Plaintiffs will generally not bring claims under Section 18(a) because that statute imposes an affirmative "eyeball and eardrum" reliance requirement that, as a practical matter, precludes class certification. *See*

regime in which private parties have the right to pursue pure omissions in registration statements filed under the ’33 Act but not in periodic filings under the ’34 Act because the right to pursue those pure omission claims are reserved for the Commission.

The language of Section 10(b) of the Exchange Act is less detailed than the text of any of the securities laws’ express liability provisions,[93] because Section 10(b) is not self-executing. It operates as a delegation of authority to the Commission to adopt rules that prohibit manipulative or deceptive devices. Indeed, when Congress adopted Section 10(b) it did not intend to create a private right of action, and would therefore have perceived no need to address any questions regarding the scope of an implied private right of action it did not even realize it was creating.[94]

The Commission drafted Rule 10b-5 in 1942 to address fraud in the purchase rather than in the sale of securities.[95] The Commission had several statutory templates it could follow,

---

Berman v. Richford Indus. Inc., 1978 WL 1104, at *7 (July 28, 1979) (“Section 18(a) has been construed as requiring direct or “eyeball” reliance, which means that plaintiff must aver that he personally reviewed and was induced to act upon specific misrepresentations contained in documents filed with the SEC.”); Ross v. A.H. Robins Co. Inc., 607 F.2d 545, 552 (2d Cir. 1979) (“Section 18 requires that a plaintiff establish knowledge of and reliance upon the alleged misstatements contained in any document filed with the SEC.”); Heit v. Weitzen, 402 F.2d 909, 916 (2d Cir. 1968), *cert. denied*, 395 U.S. 903, 89 S.Ct. 1740, 23 L.Ed.2d 217 (1969) (“Reliance on the actual (filed) report is an essential prerequisite for a Section 18 action and constructive reliance is not sufficient.”); Elster v. Alexander et al., Fed. Sec. Cas. Archive P 96401 (C.C.H.), 1977 WL 460544, (N.D. Ga. Sept. 29. 1977) (holding, in denying a motion for class certification, that to test a claim under Section 18(a), the court would be confronted with questions of individual reliance). *See also Grundfest*, *supra* note 58 at 313 (“Section 18(a), however, requires that plaintiffs affirmatively establish actual “eyeball or eardrum” reliance as a precondition to recovery, and the rebuttable presumption of reliance does not apply in section 18(a) litigation.”); Thomas Lee Hazan, TREATISE ON THE LAW OF SECURITIES REGULATION, § 12:176 (updated 2017) ("The section 18(a) cause of action is available to any investor who, after having read the faulty document filed, *actually* relies upon statements in the document and is therefore injured." (emphasis in original)).

93 In Musick, Peeler & Garrett v. Emp'rs Ins. of Wausau, 508 U.S. 286, 295 (1993), the Supreme Court enumerated eight express liability provisions in the Securities Act and the Exchange Act: § 11 of the Securities Act which imposes liability for misstatements or omissions in registration statements; § 12 of the Securities Act, which imposes liability for the sale of unregistered securities and for fraud in the sale of securities; § 15 of the Securities Act, which imposes liability on controlling persons; § 9 of the Exchange Act, which imposes liability for specified manipulations of exchange-traded securities; § 16 of the Exchange Act, which imposes liability for “short-swing” profits; § 18 of the Exchange Act, which imposes liability for misleading statements in periodic reports filed with the Commission; § 20 of the Exchange Act, which imposes liability on controlling persons; and, § 20A of the Exchange Act, which imposes insider trading liability on contemporaneous traders. *See also* Louis Loss, FUNDAMENTALS OF SECURITIES REGULATIONS, 726 (2d ed. 1988) (observing, in regard to Rule 10b, that “it is difficult to think of another instance in the entire *corpus juris* in which the interaction of the legislative, administrative rulemaking, and judicial processes have produced so much from so little”).

94 *Blue Chip*, *supra* note 6, at 737 (it is "disingenuous to suggest that Congress in 1934 or the SEC in 1942 preordained the present state of the law with respect to Rule 10b-5"); *Grundfest*, *supra* note 9 at 976 (“Rule 10b-5 has spawned a massive, intricate, ever-expanding federal jurisprudence that was entirely unplanned by Congress when it enacted Section 10(b) and by the Commission when it adopted Rule 10b-5.”); *Grundfest*, *supra* note 58 at 311-312 (“Congress never intended to create a private right of action when section 10(b) was adopted in 1934 and never had occasion to define the elements of a cause of action that it was unaware would later be inferred by the courts.”).

95 *See* Exchange Act Release No. 34-3230, 13 Fed. Reg. at 8177 (May 21, 1942) (“The Securities and Exchange Commission today announced the adoption of a rule prohibiting fraud by any person in connection with the purchase of securities.... The new rule closes a loophole in the protections against fraud administered by the Commission by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase.”); Tenth ANNUAL REPORT OF THE SECURITIES AND EXCHANGE COMMISSION (1942) (“During the fiscal year the Commission

including Section 11 of the ’33 Act and Section 13(a) of the ’34 Act, both of which prohibited pure omissions. The Commission followed neither path. It instead modeled Rule 10b-5 on Section 17(a) of the Securities Act, which does not create pure omissions liability.[96] Thus, the plain text of Rule 10b-5(b), which is modelled after Section 17(a)(2), only renders it unlawful “[t]o 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 light of the circumstances under which they were made, not misleading.”[97] The Rule thereby prohibits lies and half-truths but does not prohibit pure omissions although it would have been trivially easy for the Commission to have inserted language that would have reached that result. Omissions can therefore be attacked under Rule 10b-5 “only when” they cause affirmative statements to become materially false or misleading.[98]

This structure is not mere happenstance and there is a perfectly logical reason for the Commission to have decided in 1942 that Rule 10b-5 did not need to be written so as to prohibit pure omissions: the Commission already had authority to pursue pure omissions under Section 13(a), and creating liability for pure omissions had nothing to do with the Commission’s rationale for adopting Rule 10b-5. A prohibition on pure omissions would therefore have been pure surplusage in light of the Commission’s Section 13(a) authority, and would also have been irrelevant given the Commission’s objectives in adopting Rule 10b-5.

Further, the Supreme Court and lower courts impart independent significance to sub-sections (a), (b), and (c) of Rule 10b-5 in a manner that is fundamentally inconsistent with the implication of pure omissions liability. *Affiliated Ute* involved an omission that did not render any affirmative statements false or misleading.[99] The Court refused to find liability under Rule 10b-5(b). It instead found liability under Rules 10b-5(a) and (c), and then only because the defendants engaged in trading activity that constituted a “course of business” or … “device, scheme or artifice” that operated as a fraud.”[100] *Affiliated Ute* thus teaches that a pure omission is not actionable under Rule 10b-5 unless it is coupled with a kinetic component, such as the act of trading, that is sufficient to trigger liability under subparagraphs (a) or (c). The reasoning in *Affiliated Ute* is therefore incompatible with the suggestion that a pure omission, uncoupled from any kinetic component, such as trading activity, can generate Rule 10b-5 liability.

Lower court precedent is consistent. The Second Circuit has explained that “where the sole basis for [a Rule 10b-5 claim] is alleged misrepresentation or omission, plaintiffs have not

---

adopted Rule X-10B-5 as an additional protection to investors. The new rule prohibits fraud by any person in connection with the purchase of securities, while the previously existing rules against fraud in the purchase of securities applied only to brokers and dealers.”); Birnbaum v. Newport Steel Corp., 193 F.2d 461, 463 (2d Cir. 1952) (noting that prior to the adoption of Rule 10b-5, “[n]o prohibition existed against fraud on a seller of securities by the purchaser if the latter was not a broker or a dealer. Consequently, on May 21, 1942[,] the SEC adopted Rule X-10B-5 to close this “loophole in the protections against fraud administered by the Commission by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase.”' (quoting Exchange Act Release No. 34-3230.))). *See also Grundfest, supra* note 9 at 321-322; *Freeman, supra* note 10.

[96] *Grundfest, supra* note 9 at 979-981 (explaining that Rule 10b-5 is simply a modification of Section 17(a) of the Securities Act).

[97] 17 C.F.R. 240.10b-5(b).

[98] *Matrixx*, *supra* note 6 at 44.

[99] Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972).

[100] *Id.*, at 152-153.

made out a claim under Rule 10b-5(a) and (c)."[101] The Ninth Circuit has similarly held that "misrepresentations and most omissions fall under the prohibition of Rule 10b-5(b) whereas manipulative conduct typically constitutes a "scheme … to defraud" in violation of Rule 10b-5(a) or a "course of business which operates … as a fraud or deceit …" in violation of Rule 10b-5(c)."[102] Thus, "scheme liability under subsections (a) and (c) of Rule 10b-5 hinges on the performance of an inherently deceptive act that is distinct from an alleged misstatement,"[103] and a defendant "may only be liable as part of a fraudulent scheme base on a misrepresentation and omission under Rule 10b-5(a) or (c) when the scheme encompasses conduct beyond those misrepresentations or omissions."[104] "A 'pure omission' theory is … not strictly within the letter of Rule 10b-5"[105] according to the Second Circuit.

From a textualist perspective, perhaps the conversation ends with the Second Circuit's concession that "[a] 'pure omission' theory is … not strictly within the letter of Rule 10b-5." More bluntly, if pure omission liability isn't *strictly* within the letter of the law, it cannot be the law, particularly if the underlying cause of action is implied, not express. The Second Circuit's decision below can therefore be viewed as being in conflict with prior circuit precedent.

Thus, very same Circuits whose purported split supports the grant of certiorari in *Leidos*[106] concur that cases alleging misrepresentation or omission must be analyzed under Rule 10b-5(b) if there is no accompanying kinetic act.[107] The plain text of Rule 10b-5(b) covers lies and half-truths, but does not extend liability to pure omissions. Further, the text of Rules 10b-5(a) or (c) cannot be stretched to create pure omission liability absent a kinetic component to defendant's conduct. Because plaintiffs allege no kinetic component in *Leidos*, defendant cannot be held liable under Rule 10b-5.

[101] Lentell v. Merrill Lynch & Co., 396 F.3d 161, 177 (2d Cir. 2005).

[102] Desai v. Deutsche Bank Securities Ltd., 573 F.3d 931, 938 (9th Cir. 2009); (explaining that Rules 10b-5(a) and/or (c) prohibit "activities designed to affect the price of a security artificially by simulating market activity that does not reflect genuine investor demand").

[103] SEC v. Kelly, 817 F. Supp. 2d 340, 344 (SDNY 2011) ("Scheme liability under subsections (a) and (c) of Rule 10b–5 hinges on the performance of an inherently deceptive act that is distinct from an alleged misstatement.").

[104] SEC v. Wells, 2012 WL 342551, at *6 (N.D. C. Aug 10, 2012) (citing WPPP Luxembourg Gamma Three Sari v. Spot Runner, Inc. 655 F.3d 1039, 1057 (9th Cir. 2011)) ("Generally a Rule 10b–5(a) and (c) claim cannot be premised on the alleged misrepresentations or omissions that form the basis of a Rule 10b–5(b) claim.").

[105] In re Vivendi SA Securities Litigation, 838 F.3d 223, 240 n.9 (2d Cir 2016).

[106] *See* Petition for a Writ of Certiorari, No. 16-581, 2016 WL 6472615, filed Oct. 31, 2016, at i, presenting the questions as "[w]hether the Second Circuit erred in holding - in direct conflict with the decisions of the Third and Ninth Circuits - that Item 303 of SEC Regulation S-K creates a duty to disclose that is actionable under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5."

[107] Other cases reaching the same conclusion include In re Parmalat Sec. Litig., 375 F.Supp.2d 278, 298-299 (SDNY 2005) (holding that auditors' liability under Rule 10b-5 (a) and (c) requires participating in a fraudulent scheme); SEC v. Lee, 720 F. Supp. 2d 305, 325 (SDNY 2010) (stating a claim under Rule 10b–5(a) or (c), plaintiff must include an allegation that the defendant committed a manipulative act); Lautenberg Foundation v. Maddof, 2009 WL 2928913, at *11 (D. N. J. Sep. 9, 2009) (confirming that liability under Rule 10b-5 (a) and (c) is premised on deceptive conduct even absent making a misleading statement); Global Crossing Ltd. Sec. Litig., 322 F.2d 319, 387 (setting the forth the elements to sustain a cause of action under Rule 10b (a) and (c)). *See also*, Alan R. Bromberg, Lewis D. Lowenfels, and Michael J. 5 SULLIVAN, BROMBERG & LOWENFELS ON SECURITIES FRAUD, § 7:306.59 (2d ed. updated 2017 (explaining the applicability of Rule 10b-5 (a) and (c)).

These observations are consistent with the Court's explanation that "silence absent a duty to disclose" is not actionable under Section 10(b) or Rule 10b-5,[108] and that Section 10(b) and Rule 10b-5 "do not create an affirmative duty to disclose any and all material information."[109]

Thus, neither the text of statute or of the rule supports pure omissions liability particularly in the context of an implied private right. The statute's legislative history and the Rule's administrative history provide further support for that conclusion. Neither Congress in 1934, when it adopted the Exchange Act, nor the Commission in 1942, when it adopted Rule 10b-5, intended to create a private right of action.[110] Indeed, it is questionable whether the Commission could, even if it wanted to, create a private right of action through rulemaking when Congress has not done so in the statute. Instead, Congress adopted Section 10(b) as a "catch-all" provision designed to aid the Commission in dealing with "new manipulative devices."[111] But the Commission didn't then and doesn't now need a "catch-all" provision to address pure omissions because pure omissions are already caught by Section 13(a). They are not "new manipulative devices" requiring rulemaking under Section 10(b) to protect the agency's enforcement mission. Thus, there is nothing for the "catch-all" provision to catch in terms of the original Congressional intent that animated adoption of Section 10(b).

The same is true of Rule 10b-5's administrative history. The Commission adopted Rule 10b-5 to address the challenge presented by fraud in the sale of securities, and not to create liability for pure omissions.[112] Indeed, as explained above, the Commission did not need a new rule to achieve that objective, and any argument that the Commission intended to interpret Rule 10b-5 in that manner at the time of the rule's adoption is revisionist history.

Substantial Supreme Court precedent counsels that implied private rights of action are, in general, to be narrowly construed,[113] and that expanding implied private rights "is now a disfavored judicial activity."[114] Rule 10b-5 is, in particular, to be approached with caution.[115]

---

[108] *Basic*, *supra* note 6, at 239 n. 17 (1988).
[109] *Matrixx*, *supra*, note 6 at 44.
[110] *Blue Chip, supra* note 6 at 737 (it is "disingenuous to suggest that either Congress in 1934 or the SEC in 1942 foreordained the present state of the law with respect to Rule 10b-5"). *See also Grundfest*, *supra* note 58 at 322.
[111] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 202-03(1976) (quoting *Stock Exchange Regulation: Hearings on H.R. 7852 and H.R. 8720 Before the H. Comm. on Interstate and Foreign Commerce*, 73d Cong. 115(1934). *See also* Grundfeset, *Damages and Reliance*, at 343. *See also* Chiarella v. U.S., 445 U.S. 222, 235 (1980) ("Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud."); Second, SEC v. Clark, 915 F.2d 439, 448 (1990) (citing Chiarella and adding that "Rule 10b-5 is a catchall because its terms are notoriously vague."); March v. Armada Corp., 533 F.2d 978, 982 (1976) ("Rule 10b-5 … is a catchall provision to cover schemes not specifically prohibited in other provisions.").
[112] *See* note 113 and accompanying text.
[113] *See, e.g.,* Cort v. Ash, 422 U.S. 66, 78 (1975) (articulating the test for implying a private right of action); Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (holding that private rights of action to enforce federal law must be clearly indicated by Congress); Ziglar v. Abassi, 137 S. Ct. 1843, 1857 (listing a long line of cases in which the Supreme Court refused to imply a private right of action where Congress did not specifically grant such right).
[114] Ziglar v. Abassi, 137 S.Ct. 1843, 1848 (2017) (holding that expanding implied rights is now considered a "disfavored" judicial activity) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).
[115] Janus Capital Group, Inc. v. First Derivative Traders, 564 U.S. 135, 142 (2011) (holding, with respect to the private right of action implied under Rule 10b-5 that "we must give 'narrow dimensions … to a right of action Congress did not authorize when it first enacted the statue and did not expand when it revisited the law'" (quoting *Stoneridge* 552, U.S. at 167)). *See also,* Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N. A., 511

Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.[116] adds precision to this limiting principle by explaining that when Congress adopted the Private Securities Litigation Reform Act of 1995[117] (PSLRA) it "accepted the §10(b) private cause of action as then defined but chose to extend it no further."[118] Because "[t]he §10(b) private cause of action is a judicial construct" it "should not be extended beyond its present boundaries."[119]

This interpretive principle freezes the Rule 10b-5 implied private right at its 1995 contours. Viewed from that historical perspective, it is significant to observe that there appears to be no precedent as of 1995 holding that a pure omission, if not coupled with some kinetic act and/or breach of a duty of a fiduciary nature, violates Rule 10b-5. Indeed, while it is entirely true that the Supreme Court has repeatedly recognized that omissions can give rise to liability under Rule 10b-5 in the context of insider trading litigation and in *Affiliated Ute*, each of those cases is entirely distinguishable from *Leidos* for two distinct reasons. First, each involves kinetic activity – trading - in addition to the trader's silence. Second, each involves a breach of a fiduciary duty of nature distinctly different from the disclosure obligation triggered by Section 13(a) of the Exchange Act.[120] The entire debate over pure omissions liability under Rule 10b-5 appears to be of relatively recent origin and may well be driven by plaintiffs' suboptimal pleading procedures in *Leidos.*

The PSLRA also creates a potentially insolvable problem for the pure omission theory. That statute requires that "in any private action … in which the plaintiff alleges that the defendant (a) made an untrue statement of material fact, or (b) omitted to state a material fact necessary in order to make the statements made, in light of the circumstances in which they were made not misleading"[121] the complaint "specify each statement alleged to have been misleading" and "the reason or reasons that why the statement is misleading."[122] Complaints that fail to comply with this requirement are to be dismissed.[123] This statutory language tracks the text of Rule 10b-5(b), which has been interpreted to preclude liability for omissions.[124] But if an omission is pure then no affirmative statement is rendered misleading and there is nothing that can be specified in a complaint. Nor is it possible to explain why an affirmative statement is misleading when no affirmative statement is in fact misleading. It is therefore impossible for a plaintiff alleging a pure omission to comply with this PSLRA pleading requirement.

Did Congress intend to create a pleading requirement that would be impossible to satisfy in a pure omissions case? Or, did Congress legislate with an understanding that pure omissions cases could not be pursued under Section 10(b) and that it would therefore always be possible to

---

U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994) (refusing to recognize aiding-and-abetting liability under the Rule 10b–5 cause of action).

[116] 552 U.S. 148, 164-165 (2008)

[117] Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995).

[118] *Stoneridge*, at 166.

[119] *Id*. at 164-65.

[120] The duty that generates insider trading liability under Rule 10b-5 "attaches only when a party has legal obligations other than a mere duty to comply with the general antifraud proscriptions in the federal securities laws." Dirks v. SEC, 463 U.S. 646, 657 (1983).

[121] 15 U.S. §78u-4(b)(1)(A-B)

[122] 15 USC 78u-4(b)(1).

[123] Id. 78u-4(b)(3)(A).

[124] *See supra* notes 96-98 and accompanying text.

comply with this PSLRA pleading requirement? Statutes "should not be interpreted to produce absurd results."[125] The better view is thus that Congress in 1995 did not believe that Section 10(b) could support pure omission liability in a private action, and certainly did not intend to create such liability. It therefore drafted the pleading requirement on the presumption that there would always be an affirmative statement that would be rendered false or misleading. Indeed, the main thrust of the PSLRA was to constrain the growth of private securities fraud litigation.[126] It would therefore be curious in the extreme to interpret any provision of the PSLRA as affirming or creating a form of liability that was not then well established.

There also appears to be no legislative history indicating that Congress has ever considered creating pure omissions liability in favor of private party litigants. Perhaps even more telling is the fact that there appears to be no evidence of meaningful efforts by private party plaintiffs to petition Congress or the Commission to adopt language that would create pure omissions liability under Rule 10b-5. The absence of petitions for such reform reinforces the conclusion that plaintiffs have not, as a practical matter, needed pure omissions liability in order to prevail in private Rule 10b-5 proceedings because they can easily reframe material omissions as creating half-truths. Interpreting Rule 10b-5 to reach pure omissions would thus be using the judicial process to create an implied right for which plaintiffs had never even petitioned Congress or the Commission, and that they do not even need in *Leidos* itself in order to prevail, assuming that they can demonstrate that the omission at issue creates a half-truth that otherwise satisfies all elements of the cause of action.

History has moved on from the PSLRA. Congress has, in SLUSA,[127] in the Dodd-Frank Act of 2010,[128] and in other legislation subsequent to the PSLRA amended the federal securities laws.[129] None of this subsequent legislation touches indicates any superseding Congressional intent to expand the scope of Rule 10b-5 liability to encompass pure omissions. The state of the

---

[125] *See, e. g.*, City of Columbus v. Ours Garage and Wrecker Serv. Inc., 536 U.S. 424, p. 4 (2002) (explaining that statute should not be interpreted to produce absurd results); U.S. v. Wilson, 503 U.S. 329, 334 (1992) (in interpreting statute, absurd results should be avoided); Griffing v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) (interpretations of a statute that would produce absurd results are to be avoided); See. e.g., FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (we must "interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into a[ ] harmonious whole' " (citation omitted)); Compucredit Corp. v. Greenwood, 565 U.S. 95, 115 (2012) (acknowledging that "a statute is to be read as a whole, since the meaning of statutory language ... depends on context."); In re Welzel, 275 F.3d 1308, 1317 (11th Cir.2001) ("In interpreting one part of a statute, we must not be guided by a single sentence or member of a sentence, but must look to the provisions of the whole law, and to its object and policy.").

[126] *See, e,g,,* Chadbourne & Parke, LLP. v. Troice, 134 S. Ct. 1058, 1068 (2014) (the PSLRA was enacted to reduce frivolous suites); In re Milestone Scientific Sec. Litig., 187 F.R.D. 165, 174 (D.N.J. 1999) ("Congress enacted the PSLRA to remedy perceived abuses in private securities class action litigation.") (citing, *inter alia*, In re Cendant Corp. Sec. Litig., 182 F.R.D. 144, 145 (D.N.J. 1998)); In re Kingate Management Litig., 784 F3d. 128, 138 ("The PSLRA was designed to curtail in numerous ways abuses in claims brought under the anti-falsity provisions of the 1933 and 1934 Acts."). *See also* Eugene Zelensky, *New Bully on the Class Action Block – Analysis of Restrictions on Securities Class Actions Imposed by Private Securities Litigation Report Act of 1995*, 73 NOTRE DAME L. REV. 1135 (1998) (detailing Congressional intent to curb out abusive litigation).

[127] Securities Litigation Uniform Standards Act of 1998, Pub.L. No. 105–353, § 101, 112 Stat. 3227 (1998).

[128] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[129] Jumpstart Our Business Startups Act ("JOBS Act"), H.R. 3606 (Apr. 5, 2012); Fixing America's Surface Transportation (FAST) Act, H.R. 22, 2015, which includes amendments to the Exchange Act as well as to the JOBS Act

law in 1995, and as reflected in the PSLRA itself, thus continues to describe the appropriate historical context for fixing the contours governing the implied Rule 10b-5 right of action.

C. The Case for Pure Omissions Rule 10b-5 Liability

Simple economics provides the most powerful argument supporting pure omission liability. The social harm caused by material pure omissions can be identical to the harm caused by material lies or half-truths: all can cause secondary market mispricing and distort capital allocations.[130] It can therefore be rational from a public policy perspective to penalize pure omissions just as aggressively as misrepresentations or half-truths. By this logic, there is no economic reason to recognize an implied private right of action under Rule 10b-5 against misrepresentations and half-truths, but not against pure omissions.

But whatever the merit of this argument as a matter of economics or of public policy, it fails as a matter of law because the Court has repeatedly observed that, when interpreting the implied private right of action under Section 10(b), policy arguments of this sort are best addressed by Congress: the judiciary's role is to implement the statutory design fashioned by the legislative branch.[131] The same fate befalls all other policy-based arguments regarding the virtues and flaws of pure omissions liability. Claims that pure omissions liability will open the floodgates of litigation and swamp investors with mountains of irrelevant precautionary disclosures[132] can be ignored, and so too can claims that private liability is necessary to induce adequate disclosure under Item 303.[133] Public policy considerations sway the Court's analysis through a different lens: the implied Section 10(b) private right of action is to be narrowly construed because it is simultaneously a judicial invention that exists without Congressionally defined contours and presents particularly vexatious litigation risk.[134]

---

[130] For an analysis of the potential economic harm resulting from secondary market mispricing as opposed to mispricing in the initial sale of securities, see, e.g. Urska Velikonja, *The Cost of Securities Fraud*, 54 WILLIAM & MARY L. REV. 1887–1957 (2013).

[131] *Central Bank*, *supra* note 6 at 188 ("Policy considerations cannot override our interpretation of the text and structure of the Act, except to the extent that they may help to show that adherence to the text and structure would lead to a result 'so bizarre' that Congress could not have intended it … That is not the case here."); Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979) (In interpreting an implied private right of action, "[t]he ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law;" arguments as to the justice of a particular result are thus best made to Congress, not the courts); S.E.C. v. Sloan, 436 U.S. 103, 117 (1978) ("But [the] time limit [in § 12(k) of the Securities Exchange Act of 1934] is clearly and precisely defined. It cannot be judicially or administratively extended simply by doubtful arguments as to the need for a greater duration of suspension orders than it allows. If extension of the summary suspension power is desirable, the proper source of that power is Congress."); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 744–745 (1973) ("If, as petitioner contends, there is now a compelling need to fill the gap in the Commission's regulatory authority, the need should be met in Congress where the competing policy questions can be thrashed out and a resolution found. We are not ready to meet that need by rewriting the statute and legislative history ourselves."); S.E.C. v. Seaboard Corp., 677 F.2d 1301, 1311, n. 12 (9th Cir. 1982) (noting that "[a]iding and abetting and other 'add-on' theories of liability have been justified by reference to the broad policy objectives of the securities acts … The Supreme Court has rejected this justification for an expansive reading of the statutes and instead prescribed a strict statutory construction approach to determining liability under the acts.").

[132] *See supra* note 20 and accompanying text.

[133] *See supra* note 21 and accompanying text.

[134] *Blue Chip*, *supra* note 6, at 736-737 ("It would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action."); Stoneridge Investment Partners LLC. v Scientific Atlanta, Inc., 552 U.S. 148, 167

If pure omission liability is to exist under Rule 10b-5, it will have to find support in the text of the statute, in the text of the rule, and in judicial precedent. Two textual and precedential arguments most strongly support pure omission liability: (1) a theory of equivalence that posits that the dictionary definition of the statutory phrase "deceptive" can be grafted onto the language of Rule 10b-5(b) so as to proscribe pure omissions; and (2) a theory that there exists an implied representation of completeness, pursuant to which the act of filing a periodic report, or of making statements required by Item 303, gives rise to an implied representation that the filing or statement is accurate and complete, the violation of which supports Rule 10b-5 liability. Neither theory withstands scrutiny.

<u>The Theory of Equivalence.</u> The text of Section 10(b) authorizes the Commission to adopt regulations prohibiting "any manipulative or deceptive device or contrivance…"[135] The omission of material information that is required to be disclosed pursuant to Commission rules is easily interpreted as being deceptive, given the common meaning of the term.[136] The Supreme Court has also explained that "the scope of Rule 10b-5 is co-extensive with the coverage of Section 10(b) … and we therefore use Section 10(b) to refer to both the statutory provision and to the Rule."[137] Combining these observations, the argument reasons that if the statutory term "deceptive" includes pure omissions, and if the statute and Rule are equivalent, then pure omissions, which are deceptive, must also violate Rule 10b-5.

While appealing in its simplicity, this exercise in transitive logic suffers multiple flaws. First, although the statutory phrase "deceptive" certainly can be interpreted to include pure omissions, it need not be so interpreted. Section 10(b) is not self-executing. It is a delegation of rulemaking authority to the Commission.[138] "Deceptive," as used in the statute, can only have the meaning adopted by the Commission because the statutorily prohibited "deceptive" practice must be "in contravention of such regulations as the Commission may prescribe." Therefore, if Commission rules define "deceptive" more narrowly than dictionary definitions, the narrower Commission interpretation must control. However, as already explained, the text of Rule 10b-5 cannot be read to create liability for pure omissions.[139] It follows that the statutory meaning of the word "deceptive," given the wording of Rule 10b-5, also cannot be read to include pure omissions.

(2008) ("[W]e are mindful that we 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 Capital Group, Inc., v. First Derivative Traders, 564 U.S. 135, 142 (citing *Stoneridge*).

[135] 15 U.S. Code § 78j.

[136] Brief for Respondents, No. 16-581, 2017 WL 3913771, filed August 31, 2017, at 17 ("Section 10(b) broadly prohibits the use of "any … deceptive device or contrivance." Filing an annual report on Form 10-K that purports to comply with the disclosure requirements of the securities laws but in fact deliberately omits required, material information is "deceptive" because it leads reasonable investors to conclude that the omitted facts do not exist."); Brief for United States as Amicus Curiae supporting Respondents, No. 16-581, 2017 WL 4004533, filed September 5, 2017, at 18 ("An issuer that deliberately omits material adverse information, in a legal context where reasonable investors would infer from nondisclosure that no such adverse information exists, engages in "fraud" and "deceit" within the usual meaning of those terms.").

[137] Brief for Respondent, No. 16-581, 2017 WL 3913771, filed August 31, 2017, at 27, 33 (*citing* to SEC v. Zandford, 535 U.S. 813, 816 n.1 (2002); Brief of the United States as Amicus Curiae for Respondents, No. 16-581, 2017 WL 4004533 (filed September 7, 2017) (same).

[138] *See* note 94 and accompanying text.

[139] *See supra*, Section V B.

Supreme Court precedent "equating" the language of the rule to the language of the statute actually negates the inference advocated by supporters of pure omission liability. The Supreme Court has equated the language of the text and of the rule on three occasions. In *O'Hagan* and in *Ernst & Ernst*, the equivalence proposition was cited as a limiting principle that constrains Rule 10b-5's scope so that it cannot be interpreted more broadly than the plain language of the statutory delegation. It emphatically does not follow that the Rule should be given the broadest possible meaning within the scope of that delegation. As the Court explained, "[l]iability under Rule 10b-5, our precedent indicates, does not extend beyond conduct encompassed by Section 10(b)'s prohibition."[140] These opinions nowhere suggest that the Rule must be given the broadest definition that might be supported by the statutory text. In *Zandford*, the notion of equivalence was cited to support the proposition that a criminal conviction "estopped respondent from contesting facts that established a violation of Section 10(b)."[141] That proposition in no way supports the notion that Rule 10b-5 must be interpreted as prohibiting pure omissions.

Thus, there is no Supreme Court precedent supporting the proposition that Section 10(b)'s statutory terms acquire dictionary definitions that must then be incorporated into Rule 10b-5. That approach turns the statutory delegation structure on its head by eliminating any role for the Commission's implementing regulations and distorting the context in which the Court has examined the relationship between Section 10(b) and Rule 10b-5.

<u>The Implied Theory of Completeness</u>. The second major legal argument for pure omissions liability rests on the notion of an "implied representation of completeness." Here, the logic is that issuers make a statement in the form of the Item 303 disclosure. Reasonable investors "expect that the MD&A section of a Form 10-K to disclose all the information that Item 303 requires, at least in the absence of language specifically disclaiming that implication."[142] Thus, if an issuer omits material information required by Item 303, or any other line item requirement for that matter, the reasonable investor's reasonable expectations are frustrated, and that causes the issuer's Item 303 disclosure to become "the sort of misleading half-truth that may constitute actionable securities fraud if the other prerequisites to liability can be established." [143] In other words:

> "incomplete MD&A is misleading because a reasonable investor knows that an issuer must include and MD&A section to comply with an SEC mandate (Item 303) that requires disclosure of all the know trends and uncertainties that meet the regulatory ("reasonable expectation") threshold. In light of that mandate a reasonable investor understands the MD&A as implicitly representing that no additional qualifying trends or uncertainties exist. "[T]he reader of the disclosure sees that the issuer is responding to the

[140] O'Hagan, 521 U.S. at 651 citing "*Ernst & Ernst*, 425 U.S. at 214 (scope of Rule 10b-5 cannot exceed power Congress granted Commission under Section 10(b); *see also Central Bank*, 511 U.S. at 173 ("We have refused to allow [private] 10b-5 challenges to conduct not prohibited by the text of the statute.")."
[141] *SEC v. Zandford*, 535 U.S. at 816.
[142] Brief of United States as Amicus Curiae for Respondents, No. 16-581, 2017 WL 4004533, filed September 5, 2017, at 10.
[143] *Id.*

disclosure obligation and is entitled to assume that the response is not only accurate but complete as well.”.”[144]

By this logic, every material pure omission that violates a Commission disclosure requirement is transmogrified into a material misrepresentation or half-truth. And, because material misrepresentations or half-truths are clearly actionable under Rule 10b-5, the Court in *Leidos* need not even consider the question of liability for pure omissions because they are all really half-truths.

Additional support for this position arguably resides in *Omnicare*,[145] *Universal Health,*[146] and “throughout the common law.”[147] In *Omnicare,* the court explained that “whether a statement is ‘misleading’ depends on the perspective of a reasonable investor: The inquiry *** is objective.”[148] The reasonable investor “may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion.”[149] But then, if “the real facts are otherwise, but not provided, the opinion statement will mislead its audience.”[150] It follows that if a reasonable investor infers from the making of an Item 303 disclosure that the disclosure fully complies with Item 303’s requirements, then the implied representation of completeness is breached.

In *Universal Health* the Court interpreted the False Claims Act as supporting an “implied false certification theory.” It found that when a provider submits claims for Medicaid reimbursement a reasonable person would infer that the provider had complied with all Medicaid requirements, including those related to licensure and specialized training.[151] Therefore, even if the institution submitting the claims remains silent as to the qualifications of the individuals providing the services for which reimbursement is sought, the institution can be held liable for submitting a false claim if individual providers were not properly licensed.

Further, as the Court explained, concern over the effect of half-truths “recurs through the common law.”[152] Because “common-law fraud has long encompassed certain misrepresentations by omission, “false or fraudulent claims” include more than just claims containing express falsehoods.”[153] Moreover, “[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or

---

[144] *Id.* at 12, quoting Donald C. Langevoort & G. Mitu Gulati, *The Muddled Duty to Disclose Under Rule 10b-5*, 57 VAND. L. REV. 1639, 1689 (2004).
[145] Omnicare, Inc., v. Laborers District Council Construction Industry Pension Fund et al., 135 S.Ct. 1318 (2015).
[146] Universal Health Servs., Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989 (2016).
[147] Brief of United State, *supra*, note 142, quoting *Universal Health*, 136 S. Ct. at 2000 n.3, citing Restatement (Second) of Torts Sec. 529 (1977) (“A representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation.”); W. Page Keeton, et al, Prosser and Keaton on the Law of Torts, Sec 106 at 738 (5th ed. 1984) (“[H]alf of the truth may obviously amount to a lie, if it is understood to be the whole.”).”
[148] *Omnicare*, 135 S.Ct. at 1327.
[149] *Id*. at 1328.
[150] *Id*.
[151] *Universal Health*, 136 S.Ct, at 2000-01.
[152] *Id.* S.Ct. at 2000, note 3.
[153] *Id.* at 1999.

qualifying matter" is actionable."[154] The court thus concluded: "we hold that the implied certification theory can be a basis for liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths."[155]

In addition, several lower courts have expressly recognized that the act of filing a periodic report with the Commission gives rise to an implied representation that the filing is truthful and complete.[156] The notion of an implied representation of completeness already exists in the federal securities law, and need not be invented.

However, the suggestion that an implied representation of completeness serves as a basis for an implied private right of action under Rule 10b-5 differs significantly from the simple recognition of such an implied representation, and suffers from four major flaws. Each is fatal to the claim of Rule 10b-5 liability.

First, even if we assume without agreeing that an implied representation of completeness exists, it does not automatically follow that breaches of that implied representation are enforceable through an implied private right of action. The federal securities laws are replete with duties that are enforceable only by the Commission, and it is neither new nor remarkable to conclude that a person has a duty under the federal securities laws but that only the Commission can enforce that duty.[157] Indeed, the lower courts that have already held that an implied representation of completeness exists have done so only in the context of Commission enforcement proceedings or criminal prosecutions.[158] Thus, to concede that an implied representation exists, but that it can only be enforced by the Commission, is simply to recognize the law as it now stands.

This approach is also entirely consistent with the statute's plain text. Pure omissions and implied representation of completeness are legal doppelgangers – they are synonymous, they are

---

[154] *Id*. quoting Restatement (Second) of Torts §529, p. 62 (1976).
[155] *Universal Health* at 1993
[156] United States v. Bilzerian, 926 F.2d 1285, 1298 (3d. Cir. 1991) ("A duty to file under § 13(d) creates the duty to file truthfully and completely.") (*citing* SEC v. Savoy, 587 F.2d 1149, 1165 (D.C. Cir. 1978); SEC v. Lauer, 2008 WL 4372896 (D.S. Fl. Sep. 24, 2008) (*citing* Bilzerian); US v. Wey, 2017 WL 237651, (S.D.N.Y. Jan 18, 2017) (same); GAF Corp. v. Milstein, 453 F.2d 709, 720 (2nd Circ. 1971) ("the obligation to file truthful statements is implicit in the obligation to file with the issuer … "); United States v. Gomez–Gutierrez, 140 F.3d 1287, 1288–89 (9th Cir. 1998) ("the affixing of a signature is not a mere formality, but rather signifies that the signer has read the document and attests to its accuracy"), *cert. denied,* 525 U.S. 889, 119 S.Ct. 206, 142 L.Ed.2d 169 (1998); SEC v. IMC Int'l, Inc., 384 F.Supp. 889, 893 (1974) ("The reporting provisions of the Exchange Act are clear and unequivocal, and they are satisfied only by the filing of complete, accurate and timely reports."). *See also* SEC Release No. 41987, 1999 WL 955088 at *29 n. 57 (Oct. 7, 1999) ("by signing documents filed with the Commission, board members implicitly indicate that they believe that the filing is accurate and complete").
[157] *See, e.g.,* Section 13(a) of the Securities Act (no express or implied private right of action); Section 17(a) of the Securities Act (no express or implied private right of action). *Touche Ross & Co. supra* note 131 (refusing to imply a private right of action under Section 13(a) and holding that the Commission alone can pursue action under it).
[158] *See* note 156.

simply two different sets of words that describe precisely the same conduct and reach precisely the same legal consequence. Section 13(a) grants the Commission the right to pursue pure omissions. That's the same as granting it the right to pursue violations of an implied representation of completeness. The Exchange Act can therefore be naturally read as recognizing the existence of an implied representation of completeness, but as reserving to the Commission the right to pursue violations of that representation.

The later invention of the implied private right of action under Rule 10b-5 does not compel a different conclusion. Section 10(b) prohibits the use of a "manipulative or deceptive device or contrivance" in violation of Commission regulations. This text is to be interpreted in the context of the statute read as a whole,[159] and is a "catchall" provision.[160] But as already explained,[161] Section 13(a) expressly grants the Commission authority to challenge violations of an implied representation of completeness. It follows that there is no "catchall" reason to interpret Section 10(b)'s statutory language that delegates to the Commission authority to prohibit "manipulative or deceptive device or contrivance" as encompassing authority to prohibit either a pure omission, or its synonymous breach of an implied representation of completeness. Further, if the implied private right of action under Section 10(b) is to be narrowly construed, then there is no need to interpret the statute as prohibiting conduct that the Commission can already pursue under Section 13(a).

Second, the pragmatic reason to recognize an implied representation of completeness under Section 10(b) as opposed to recognizing it under Section 13(a) is to expand the scope of the implied private right of action. This extension would, however, violate the Court's admonition against expanding the implied private right. It would also be the first instance in which the Court recognizes an implied private right arising from the violation of an implied representation rather than from a flaw in an actual statement. The contrast with *Omnicare*,[162] which is cited as support for the implication of a representation of completeness[163] is instructive. In *Omnicare*,[164] defendants made affirmative statements of opinion giving rise to claims that the statements were false or misleading. In contrast, in *Leidos*, there is utter silence: there is no affirmative statement suggesting that the filing is complete.[165] A Court loath to expand the scope of the implied private right of action will be skeptical of the double-implication required to reach breaches of implied representations under an implied private right of action.

Universal Health can also be distinguished, if necessary. There, the Court held that liability can arise under an implied representation of completeness only if, among other

---

[159] *See Supra* note 125.
[160] *See supra* note 111.
[161] *See supra* Section V. B.
[162] *Omnicare*, 135 S.Ct. 1318 (2015).
[163] Respondents Brief, No. 16-581, 2017 WL 3913771 (filed August 31, 2017) at 17, 27. (relying on *Omnicare* to state that a reasonable investor expects formal SEC filings such as annual reports contain all of the material information required to be disclosed); Brief of the United States as Amicus Curiae for Respondents, No. 16-581, 2017 WL 4004533 (filed September 7, 2017) at 2 (relying on *Omnicare* to support the example of a company that discloses some, but not all, of lawsuits pending against the company as misleading in that context of mandatory SEC filing.)...
[164] 135 S.Ct. at 1331.
[165] *See infra*, Section V B and note 186.

conditions, "the claim does not merely request payment, but also makes specific representations about the goods or services provided."[166] The analogous requirement in the context of a securities filing would be that the document is not merely filed (which would be the analogue to requesting payment) but that it makes specific representations about the factors that are omitted (those would be the analogues to "specific representations about the goods or service provided.") In other words, the implied completeness theory propounded for *Leidos* is broader than that implied completeness theory accepted in *Universal Health*. The implied representation in *Leidos* would be triggered by the simple fact of filing. The implied representation in *Universal Health* is triggered by a filing plus a specific representation that is rendered misleading by the fact of the omission.

The third major flaw with the implied representation of completeness as a source of implied private liability under Rule 10(b) is that it creates unnecessary tension with the text of the statute and of the rule, and with judicial precedent. By transmogrifying every pure omission into a violation of an implied representation of completeness, the implied representation eliminates all meaningful distinctions between pure omission cases and half-truth cases. The plain text of the '33 Act and '34 Act, however, suggests that Congress apprehended a real distinction between half-truths and pure omissions when it came to allocating enforcement rights. That distinction would be eviscerated by the implied representation of completeness. In particular, had Congress thought that every pure omission was also an actionable half-truth, there would have been no reason in Section 11 of the '33 Act expressly to grant to private parties the right to pursue pure omissions. Nor would there have been a need to authorize the Commission to pursue pure omissions under Section 13(a) because those would have all been actionable as misrepresentations. Instead, the natural reading of the statutory text suggests that Congress distinguished between pure omissions and half-truths and allocated enforcement authority in a differential manner between these two different forms of misrepresentation.

The notion of an implied representation of completeness that is actionable under the Rule 10b-5 is also irreconcilable with the text of Rule 10b-5(b) and with Supreme Court and lower court precedent. In *Janus Capital Group, Inc. v. First Derivative Traders*,[167] the Supreme Court explained that, given the text of the rule,[168] only the "maker" of a statement can be held liable under Rule 10b-5(b). The Court refused to extend the definition of "maker" to cover a person who creates a statement but does not "make" it.[169] As the *en banc* First Circuit explained in *Securities and Exchange Commission v. Tambone,*[170] Rule 10b-5(b) "itself does not define [the

[166] *Universal Health*, 136 S. Ct. at 2000.
[167] 564 U.S. 135 (2011).
[168] "It is 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. Cite (emphasis supplied).
[169] *Janus*, at 144-145 ("The Government's definition would permit private plaintiffs to sue a person who "provides the false or misleading information that another person then puts into the statement.").
[170] 597 F.3d 436 (1st Cir. 2010) (*en banc)*.

word "make"] nor does it suggest the word is imbued with any exotic meaning."[171] The word "make" should "be given its ordinary meaning."[172] The First Circuit therefore concluded that

> "[i]n light of the deliberate word used ("make") in Rule 10b-5(b), the SEC's asservation that one can "make" a statement when he merely uses a statement created entirely by others cannot follow. That asservation ignores the obvious distinction between the verbs contained in the statute ("use," "employ") and the significantly different (and narrower) verb contained in Rule 10b-5(b) ("make"). Word choices have consequences, and this word choice leaps off the page. There is no principled way that we can treat it as meaningless."[173]

If the Supreme Court refuses to read the word "make" to cover the concept of "cause" and if the First Circuit draws a sharp distinction between the maker of a statement and the user of a statement, by what logic can one reach the conclusion that the word "make" in Rule 10b-5(b) creates liability for a person who does not make a statement, or a person who causes a statement not to be made? This is not the "ordinary meaning" of the word "make."

Harking back to the theory of equivalence, proponents of an implied representation of completeness seek to avoid the constraining effect of Rule 10b-5(b)'s use of the word "make" by pointing to the statute's use of the phrase "deceptive" and the Supreme Court's statement that "[t]he scope of Rule 10b-5 is co-extensive with the coverage of §10(b)."[174] By this logic, the text of Rule 10b-5(b), which relies on the word "make," is not controlling because the broader statutory term "deceptive" supports the existence of an implied representation of completeness, even if the use of the work "make" in Rule 10b-5(b) does not.

This argument fails again for the reasons stated above, as well as for the further reason that, when applied to the Rule's "make" requirement, the argument is nothing more than a re-heated articulation of the same logic the Commission employed in *Tambone* and that was there resoundingly rejected, *en banc*. As the First Circuit explained, "[t]his argument comprises more cry than wool. Most notably, it fails to account for an abecedarian point: even if Rule 10b-5 is coextensive with the coverage of Section 10(b), that supposed verity does not mean that each of the subparagraphs of Rule 10b-5, taken singly, is itself coextensive with the coverage of section 10(b). That cannot be so. If it was, then each subparagraph would proscribe exactly the same conduct. They do not."[175] Thus, Rule 10b-5(b) retains its independent meaning, and the word "make" controls the scope of Rule 10b-5(b) liability.

Any other interpretation suggests that *Janus* was wrongly decided. If deception is the controlling concept because of the purported equivalence of the text of Section 10(b) with the

---

[171] 597 F.3d at 442.
[172] 597 F.3d at 443 citing *Smith v. United States*, 508 U.S. 223, 223 ("when a word is not defined by statute we normally construe it in accord with its ordinary or natural meaning"); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 472 (interpreting Rule 10b-5 according to the "commonly accepted meaning" of its words).
[173] 597 F. 3d at 443.
[174] Brief for Respondent, No. 16-581, 2017 WL 3913771, filed August 31, 2017, at 27, 33 (*citing* to SEC v. Zanford, 535 U.S. 813, 816 n.1 (2002); Brief of the United States as Amicus Curiae for Respondents, No. 16-581, 2017 WL 4004533 WL 4004533 (filed September 7, 2017) (same).
[175] *Tambone*, 597 F.3d at 444 citing *Finkel v. Docutel/Olivetti Corp.*, 817 F.2d 356, 359-60 (5th Cir. 1987).

scope of Rule 10b-5, then the Court in *Janus* should have spent no energy on the interpretation of the word "make." The Court should instead have contemplated the far broader scope of the term "deceptive" and should not have concluded that only the "maker" of a statement could be held liable under Rule 10b-5 because the any "deceiver" could be held liable. That obviously was not the holding in *Janus.*

A fourth major flaw with the invention of an implied representation of completeness as source of implied private liability under Rule 10b-5 is that it introduces a form of logic that knows no bounds and that, if unleashed, can create material tension with existing precedent. For example, if every investor can presume that every trader is complying with the federal securities laws, then every illegal insider trade becomes actionable under Rule 10b-5(b) as a violation of an implied representation of compliance. But then there is no need to find that the omissions associated with insider trading violate Rules 10b-5(a) and (c) but not (b), because the act of insider trading violates an implied representation of compliance, just as much as the act of filing an incomplete periodic report would be violating an implied representation of completeness. Recognizing the implied representation of completeness therefore challenges precedent holding that insider trading cases and omissions of the sort encountered in *Affiliated Ute*, violate subsections (a) and (c) of Rule 10b-5, but not subsection (b).

Further, if an implied representation of completeness exists as a matter of reasonable inference, then why is there not also a privately enforceable implied representation of compliance with all other aspects of the securities laws? After all, the implied representation of completeness is merely a specific example of an assumption that persons subject to the securities laws comply with those laws. Even more broadly, if a person is permitted to presume reasonable compliance with the law, then why then can't everyone everywhere presume reasonable compliance with all aspects of any applicable law? Proponents of the implied representation of completeness offer no insight as to a limiting principle that might cabin that logic under the federal securities laws, or under any other body of law.

D. <u>The Section 906 Certification</u>

The Sarbanes-Oxley Act of 2002[176] contains two certification requirements, Sections 302 and 906. Each calls for that the issuer's CEO and CFO make affirmative statements that repeat precise wording defined by SEC regulation and by statute.[177] The certifications differ in several material respects, and the Section 906 certification is the more relevant to the debate over pure omissions liability under Rule 10b-5.

---

[176] *See* Sarbanes Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (July 30, 2002) (codified as amended in scattered sections of 11, 15, 18, 28 and 29 U.S.C.).

[177]*See* 18 U.S.C. § 1350 (requiring each periodic report containing financial statements filed by an issuer with the Securities Exchange Commission pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934 to be accompanied by a written certification by the chief executive officer and chief financial)*;* Certification of Disclosure in Companies' Quarterly and Annual Reports, Securities Act Release No. 33-8124, Exchange Act Release No. 34-46427, Investment Company Act Release No. IC - 25722, 78 S.E.C. Docket 875 (Aug. 28, 2002) (hereinafter, "August 28th Certification Release") ("[W]e are adopting rules to require an issuer's principal executive and financial officers each to certify the financial and other information contained in the issuer's quarterly and annual reports.").

Section 302, entitled "Corporate Responsibility for Financial Reports," requires that the Commission adopt regulations mandating that, in connection with the filing of quarterly and annual reports, an issuer's CEO and CFO each must certify that: (1) they have reviewed the report;[178] (2) based on their knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary to in order to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by the report;[179] and (3) based on their knowledge, the financial statements and other financial information included in the report fairly present in all material respects the financial condition, results of operations and cash flows of the issuer for the periods presented in the report.[180] CEOs and CFOs must also certify as to a range of additional, more detailed matters.[181]

The Section 302 certification nowhere requires that the CEO or CFO affirm that the report fully complies with the Commission's disclosure requirements. The certification of full compliance resides in Section 906, which has a very different structure.

Section 906, also entitled "Corporate Responsibility for Financial Reports," does not direct the Commission to adopt any regulations, and does not amend the federal securities laws. It amends Title 18 of the United States Code, *i.e.,* the criminal code, by adding a new Section 1350 requiring that CEOs and CFOs affirm that, to the best of their knowledge, "[t]he Report fully complies with the requirements of Section 13(a) … of the Securities Exchange Act of 1934..."[182] Section 906 establishes criminal penalties of up to $5 million and imprisonment not to exceed twenty years.[183] These penalties are consistent with other provisions of the Sarbanes-Oxley Act that increased the sanctions for criminal violations of the federal securities laws from a maximum of up to $1 million and imprisonment not to exceed 10 years to a maximum of up to $5 million and imprisonment not to exceed twenty years.[184]

Thus, there is no need to conjure a hypothetical representation of completeness: the CEO and CFO in *Leidos* made the requisite Section 906 certifications and affirmed that the annual report at issue fully complied with Section 13(a).[185] But if *Leidos*' filing was materially

---

[178] 15 U.S.C.A. § 7241(a)(1).
[179] *Id.* at § 7241(a)(2).
[180] *Id.* at § 7241 (a)(3).
[181] Section 302 also requires officers to certify that: they are "responsible for establishing, maintaining and regularly evaluating the effectiveness of, the issuer's internal controls; they have made certain disclosures to the issuer's auditors and the audit committee of the board of directors about the issuer's internal controls; and they have included information in the issuer's quarterly and annual reports about their evaluation and whether there have been significant changes in the issuer's internal controls or in other factors that could significantly affect internal controls subsequent to the evaluation." August 28th Certification Release, *supra* note 177.
[182] 18 U.S.C. § 1350 (a), (b).
[183] 18 U.S.C. § 1350(c).
[184] *See* Sarbanes Oxley Act of 2002, Pub. L. 107-204, Title XI, § 1106, 116 Stat. 810 (July 30, 2002) (amending 15 U.S.C. § 78ff).
[185] *See* the March 25, 2011 10-K, Exhibit 32.1:

> In connection with the Annual Report of SAIC, Inc. (the "Company") on Form 10-K for the period ended January 31, 2011, as filed with the Securities and Exchange Commission on the date hereof (the "Report"), I, Walter P. Havenstein, Chief Executive Officer of the Company, certify, pursuant to 18 U.S.C. §1350, as adopted pursuant to § 906 of the Sarbanes-Oxley Act of 2002, that to the best of my knowledge: 1. The Report fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of

incomplete, then the express Section 906 certification is false. Does the falsity of this affirmative certification of compliance support liability under Rule 10b-5, assuming that all other elements of the cause of action can be established?

Plaintiffs in *Leidos* do not allege that the Section 906 certification is false.[186] The question is not before the Court. A complete analysis of the potential for pure omission liability should, however, consider the possibility that plaintiffs in future actions will state such a claim. If such a future claim succeeds then the current debate as to whether Rule 10b-5 supports pure omission liability becomes largely moot.[187] Plaintiffs will simply allege that the affirmative Section 906 certification transforms the material pure omission into an affirmative misrepresentation that is clearly actionable.

To support Rule 10b-5 liability for false Section 906 certifications, plaintiffs can reason that if an issuer affirmatively but falsely represents, outside of a Section 906 certification, that its filings are complete, then the issuer can be liable under Rule 10b-5 if all other elements of the cause of action are satisfied.[188] Congress knew in 2002 that such false affirmative statements could support an implied private right of action under Rule 10b-5. Thus, by forcing CEOs and CFOs to make affirmative statements of compliance, Congress intended to expose them to Rule 10b-5 liability, as well as to heightened criminal sanctions. Otherwise, Congress could simply have increased the penalty for violations of Section 13(a), as it did for all provisions of the federal securities laws, without requiring any certifications of compliance. Indeed, any other conclusion leads to the curious result that an affirmative statement of completeness made outside of a Section 906 certification can generate Rule 10b-5 liability, whereas precisely the same statement made as a Section 906 certification is immune to Rule 10b-5 liability.

Relevant precedent interpreting Section 906 is thin and split,[189] but there is strong cause to conclude that false Section 906 certifications cannot support an implied Rule 10b-5 private

---

> 1934; and 2. The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

An identical certification was filed by SAIC's CFO, Mark W. Sopp. *See* the March 25, 2011 10-K, Exhibit 32.2.

[186] Plaintiff-respondents do, however, cite to the Section 906 certifications in their briefs. Brief for Respondent, No 16-581, filed August 31, 2017, 2017 WL 3913771 at 11, 24.

[187] Inasmuch as the Section 906 certification is based on personal knowledge of two specific executives, it is possible to conceive of realistic situations in which the CEO and CFO have no knowledge of the alleged omission. A Section 906-based pure omission claim might then fail whereas a comparable Rule 10b-5 omission claim would succeed.

[188] *Id.* at 24 ("The omission of required information from an annual report is deceptive when it leads investors to the erroneous conclusion that material omitted facts do not exist."). Respondents cite to Donald C. Langevoort & G. Mitu Gulati, *supra* note 144 at 1680, for the proposition that "a deliberate omission" in an SEC filing has the "potential to mislead" because "the reader of the disclosure sees that the issuer is responding to the disclosure obligation and is entitled to assume that the response is not only accurate but complete as well." Brief for Respondent, *supra* note 21, at 24 n.8.

[189] *See, e.g.*, Erin Massey Everitt, *Sarbanes-Oxley's Officer Certification Requirements – Has Increased Accountability Equated Increased Liability?*, 6 DE PAUL BUS. & COM. L. J. 225, 2200 (2008) (noting that case law interpreting Section 906 is limited). Several courts have held that there is no private right of action under either Sections 302 or 906. City of Roseville Emps.' Ret. Sys. v. Horizon, 686 F.Supp. 2d 404, 417 (D. Del. 2009) ("Although Congress has provided for criminal penalties, it has not specifically created a separate private right of action under Sarbanes-Oxley for violations of the certification requirements, and none can be implied."); Srebnik v. Dean, No. 05-cv-01086, 2006 WL 2790408, at *5 (D. Colo. Sept. 26, 2006) (contrasting Sections 302 and 906 with

right of action, or any Commission enforcement proceeding under any provision of the securities laws, even if all elements of the Rule 10b-5 cause of action are satisfied. As an initial matter, had Congress sought to change the scope of liability under the federal securities laws, the most reasonable approach would have been to amend the federal securities laws, or to require that the Commission adopt regulations under the federal securities laws. Section 906 does no such thing. It amends the criminal code. It changes the federal securities laws not one whit. This form of legislation is more consistent with a Congressional intent to cause CEOs and CFOs to make an affirmative statement of compliance that exposes them to heightened criminal sanctions for violations of that specific statement, without increasing the SEC's enforcement authority in any regard, and without expanding the pre-existing private right of action with respect to that statement.

Section 306 of the Exchange Act, which explicitly creates a private right of action, and refusing to infer private right of action under Sections 302 and 906); *In re* Intelligroup Sec. Litig., 468 F. Supp. 2d 679, 707 (D.N.J. 2006) ("Because neither the text of Section 906 nor the structure of SOX demonstrates Congressional intent to create a private remedy in favor of Plaintiffs, this Court can neither infer a private right of action under this provision nor conclude that Defendants' certification of Intelligroup's statements created a presumption altering or automatically satisfying Plaintiffs' pleading requirements with respect to *any* element of Plaintiffs' 10b–5 claim."); *In re* Silicone Storage Tech., Inc., No. C-05-0295 PJH, 2007 WL 760535, at *17 (N.D. Cal. Mar. 9, 2007) (holding that a statement in a Sarbanes-Oxley certification that financial statements comply with GAAP is not independently actionable under § 10(b) or Rule 10b-5, as opposed to simply providing a basis for an inference of scienter). The majority of circuit courts have also ruled that "Sarbanes–Oxley certifications are not sufficient, without more, to support a strong inference of scienter." *See Glazer Capital Mgmt., LP v. Magistri,* 549 F.3d 736, 747–48 (9th Cir. 2008); *see also In re* Ceridian Corp. Sec. Litig., 542 F.3d 240, 248 (8th Cir. 2008) ("Allegations that accounting errors were discovered months and years later do not give rise to a strong inference that the certifications were knowingly false when made."); *Ind. Elec. Workers' Pension Trust Fund IBEW v. Shaw Grp., Inc.,* 537 F.3d 527, 545 (5th Cir. 2008) ("a Sarbanes–Oxley certification is only probative of scienter if the person signing the certification was severely reckless in certifying the accuracy of the financial statements." (internal citation omitted)); Cent. Laborers' Pension Fund v. Integrated Elec. *Servs. Inc.,* 497 F.3d 546, 555 (5th Cir. 2007) (holding that the Sarbanes–Oxley certifications at issue did not permit an inference of scienter); *Garfield v. NDC Health Corp.,* 466 F.3d 1255, 1265-66 (11th Cir. 2006) (plain meaning of language contained in Sarbanes-Oxley Act does not indicate any intent to change the requirements for pleading scienter set forth in the PSLRA; Sarbanes-Oxley certification is probative of scienter only if person signing certification was severely reckless in certifying accuracy of financial statements)*; In re Watchguard Sec. Litig.,* No. C05-678J, 2006 WL 2038656, at *10 (W.D. Wash. April 21, 2006) (finding no strong inference of scienter where certifier was not aware of or deliberately reckless regarding the statement's falsity). *But see In re Lettice Semiconductor Corp. Sec. Litig.,* No. CV04–1255, 2006 WL 538756, at *17-18 (D. Or. Jan.3, 2006) ("I conclude that the Sarbanes–Oxley certifications give rise to an inference of *scienter* because they provide evidence either that defendants knew about the improper journal entries and unreported sales credits that led to the over-reporting of … or, alternatively, knew that the controls they attested to were inadequate …"), *declined to follow by* Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 1004 (9th Cir. 2009). Some courts have also held, or at least not rejected the proposition, that SOX certification can form the basis for a securities fraud claim provided that all other pleading requirements are satisfied. *See, e.g.,* Wieland v. Stone Energy Corp., No. 05-2088, 2007 WL 2903178, at *7 (W.D. La. Aug. 17, 2007) (finding plaintiffs had adequately alleged that statements in the SOX certifications signed by the CEO and the CFO were false and misleading and had also alleged the requisite scienter); Liman Tour v. Cray, Inc., 432 F. Supp 2d 1129, 1160 (W.D. Wash. 2006) (although the Complaint adequately alleged that the Forms 10–Q and SOX 302 certifications were false or misleading, they failed to adequately plead scienter); *In re* InVision Techs. Sec. Litig., No. C04–03181 MJJ, 2006 WL 538752, at *6 (N.D. Cal. Mar. 7, 2006) (granting motion to dismiss and finding that "[a]lthough the Complaint contains general allegations, none of these plead facts clearly contradicting statements actually made within the Sarbanes–Oxley certifications."); *In re* Watchguard Sec. Litig., No. C05-678J, 2006 WL 2038656, at *10 (W.D. Wash. April 21, 2006) ("Although the passage of Sarbanes-Oxley may make it somewhat more reasonable to infer that a certifying Defendant whose head is in the sand is being deliberately reckless, it does not transform the PSLRA's requirement of falsity-plus-scienter into a requirement of falsity-plus-a-Sarbanes-Oxley-certification.").

The Commission's enforcement authority under the '33 Act and '34 Act is also limited to situations in which a person is "engaged or is about to engage in acts or practices constituting a violation of any provision of this title, [or of] the rules or regulations thereunder."[190] But violation of the Section 906 certification does not violate any provision of the federal securities laws because Section 906 does not amend the federal securities laws. The Commission therefore has no authority to bring any enforcement action for a false Section 906 certification. It would be difficult to argue that Congress intended to create implied private liability under Rule 10b-5 when the Commission itself has no authority to pursue such a claim.

The Commission has also taken several steps to minimize the securities law liability that might arise from a false Section 906 certification. Section 906 requires that the certifications "accompany" the periodic report to which they relate. This is in contrast to Section 302 which requires the certifications to be included "in" the periodic report. In recognition of this distinction, the Commission requires that issuers "furnish," rather than "file," the Section 906 certifications.[191] Section 906 certifications are therefore not subject to liability under Section 18 of the Exchange Act.[192] The certifications are also not subject to automatic incorporation by reference into an issuer's Securities Act registration statements, which are subject to liability under Section 11 of the Securities Act, unless the issuer takes steps to include the certifications in a registration statement.[193] With the Commission taking the inference from subtleties of statutory text that the Section 906 certification is to be provided in a manner that minimizes exposure to express private rights of action, it is all the more difficult to argue that Congress intended simultaneously to expand private litigation exposure to an implied private right of action.

Most significantly, however, substantial precedent teaches that the criminalization of conduct does not, in and of itself, support the implication of a private right of action to pursue violations of the newly criminalized conduct. There must instead be a clear Congressional intent to create a private right of action.[194] In the case of Section 906, there is no indication in the text of the statute or in the relevant legislative history that Congress intended to create or to expand a

---

[190] 15 U.S. Code § 78u(d); 15 U.S.C. § 77t(b).
[191] Certification of Disclosure in Certain Exchange Act Reports, Securities Act Release No. 33-8212, Exchange Act Release No. 34-47551, Investment Company Act Release No. IC-25967, 79 S.E.C. Docket 2558, at *3 (Mar. 21, 2003).
[192] *Id.*
[193] *Id.*
[194] *Central Bank*, *supra* note 6 at 190 ("We have been quite reluctant to infer a private right of action from a criminal prohibition alone …"); *Cort, supra* note 113 at 79-80 (1979) (noting that the Court has rarely implied a private right of action under a criminal statute, and where it has done so "there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone … Here, there was nothing more than a bare criminal statute, with absolutely no indication that civil enforcement of any kind was available to anyone."), departed from on other grounds by Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11 (1979); Chrysler Corp. v. Brown, 441 U.S. 281, 316 (1979) (noting that the court has rarely implied a private right of action under a criminal statute); Wisdom v. First Midwest Bank, 167 F.3d 402, 407 (8th Cir. 1999) (holding that a criminal statute may provide an implied private right of action only if Congress so intended in enacting the criminal statute); *see also* Cannon v. Univ. of Chicago, 441 U.S. 677, 690 n.13 (1979) ("Conversely, the Court has been especially reluctant to imply causes of actions under statutes that create duties on the part of persons for the benefit of the public at large.").

private right of action. Indeed, because the filing of an incomplete periodic report was subject to criminal sanction as a violation of Section 13(a) even prior to the Sarbanes-Oxley Act, it can be argued that Section 906 doesn't even criminalize a new form of conduct. Instead, it enhances the penalties for conduct that was already criminal. It would be quite a stretch, and an unprecedented one at that, to reason that the enhancement of a criminal sanction for a pre-existing violation of the federal securities laws, arising from a statute that did not even amend the federal securities laws, and that has no effect on the SEC's enforcement authority, expands an implied private right of action under the federal securities laws in the absence of text or legislative history supporting that conclusion.

The curiosity of this conclusion cannot be denied. If this logic is correct, then CEOs and CFOs can knowingly make false affirmative Section 906 statements of completeness that expose them to enhanced criminal liability, but not to implied private liability, or to an enforcement action by the Commission. Yet, precisely the same false affirmative statement made in any context other than a Section 906 certification, would expose the maker to liability under the implied Rule 10b-5 private right of action, provided that all elements of the cause of action are satisfied.

VI. Conclusion

Rule 10b-5 cannot be comfortably interpreted to create liability for pure omissions. The text of the statute and of the rule, as well as relevant precedent, all militate against such a conclusion. Private party plaintiffs seeking to assert pure omission liability premised on Section 906 certifications are also likely to fail. Private party plaintiffs will, however, be able to reframe pure omissions cases as actionable misrepresentations or half-truths, and the Commission has unquestioned authority to attack pure omissions under Section 13(a) of the Exchange Act. A holding in *Leidos* that Rule 10b-5 cannot support pure omission liability will therefore not open the floodgates for fraud in the form of pure omissions.