No. 11-15

IN THE

# Supreme Court of the United States

THE BLACKSTONE GROUP, L.P., ET AL.,
*Petitioners,*

v.

MARTIN LITWIN, ET AL.,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

**BRIEF FOR *AMICUS CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PETITIONERS**

IRA D. HAMMERMAN
KEVIN M. CARROLL
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Ave., N.W.
Washington, D.C. 20005
(202) 962-7382

CHARLES E. DAVIDOW
*Counsel of Record*
JOHN H. LONGWELL
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, D.C. 20006
(202) 223-7300
cdavidow@paulweiss.com

BRAD S. KARP
SUSANNA M. BUERGEL
DAVID K. KESSLER
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, N.Y. 10019
(212) 373-3000

*Counsel for* Amicus Curiae *Securities Industry and Financial Markets Association*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Blank Page

TABLE OF CONTENTS

# TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Blank Page

## INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") submits this brief as *amicus curiae* in support of the petition for a writ of certiorari filed by The Blackstone Group, L.P., and certain of its officers and directors.[1]

SIFMA is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the United States regional member of the Global Financial Markets Association.

SIFMA regularly files *amicus curiae* briefs in cases that raise legal issues of vital concern to the participants in the securities industry. SIFMA has appeared before this Court as *amicus curiae* in many cases involving the federal securities laws, most recently in *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179 (2011) (requirements for class certification of fraud-on-the-market claims); *Matrixx Initiatives, Inc.* v. *Siracusano*, 131 S. Ct. 1309 (2011) (pleading standard for materiality in private securi-

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amicus curiae* and its counsel, made a monetary contribution intended to fund its preparation or submission. Counsel of record for all parties have received timely notice of *amicus curiae*'s intent to file this brief and have consented to the filing of this brief in letters on file with the Clerk's office.

ties fraud claim), *Morrison* v. *National Australia Bank, Ltd.*, 130 S. Ct. 2869 (2010) (extraterritorial application of anti-fraud provisions of federal securities laws), *Merck & Co., Inc.* v. *Reynolds*, 130 S. Ct. 1784 (2010) (statute of limitations for bringing private securities fraud claim), and *Jones* v. *Harris Associates L.P.*, 130 S. Ct. 1418 (2010) (breach of fiduciary duty under the Investment Company Act of 1940).

This case involves important issues regarding the scope of the disclosure obligations under the federal securities laws. In particular, SIFMA is concerned that the Second Circuit's approach to materiality threatens to undermine the role of the materiality requirement as a means of ensuring meaningful disclosure. SIFMA is also concerned about the existence of a conflict among the courts on a principle that governs the day-to-day disclosures to investors made by all public companies. These issues are directly relevant to SIFMA's mission of promoting fair and efficient markets and a strong financial services industry.

## SUMMARY OF ARGUMENT

The materiality requirement that governs disclosure obligations under the federal securities laws is the principal legal tool for striking the balance between meaningful disclosure and an "avalanche of trivial information." *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 448 (1976). Although courts have been reluctant to establish *per se* rules, materiality must, in practice, be defined by reference to guideposts and presumptions that inform disclosure judgments. One of the most important such presumptions is the rule, endorsed by the SEC, of "assumed immateriality" for information that affects less than 5% of the relevant financial metric. This "quantitative" materiality standard informs countless materiality determinations made by companies (as well as their accountants and auditors) every day, and permits courts to evaluate the materiality of alleged disclosure violations objectively.

In this case, the Second Circuit adopted an analysis that threatens the very existence of this well-established presumption in a jurisdiction that is of special importance to the administration of the securities laws. In essence, the court determined that the 5% rule of thumb for quantitative materiality is satisfied where that impact occurs in a "significant" business *segment* of the company, rather than at the company-wide level. By defining the denominator for the 5% inquiry as any portion of a company's business that a plaintiff successfully alleges is "significant," the Court of Appeals has effectively written the presumption out of the materiality inquiry. This approach eliminates one of the very few tests by which a court can act as a gatekeeper at the pleading stage, dismissing cases that are meritless but may nonetheless have high settlement value because of the cost and risks of litigation.

Because the Second Circuit's approach to materiality conflicts with that of other federal courts on an issue of critical importance to the effective administration of the federal securities laws, and undermines the process of meaningful disclosure by substantially loosening the definition of materiality, this Court should grant the petition for a writ of certiorari.

## ARGUMENT

## THE SECOND CIRCUIT'S UNPRECEDENTED APPLICATION OF THE MATERIALITY REQUIREMENT THREATENS THE PROCESS OF MEANINGFUL DISCLOSURE UNDER THE SECURITIES LAWS.

### A. A Properly Defined Materiality Standard Is Essential to Meaningful Disclosure.

Materiality is perhaps the single most important concept underlying the system of meaningful disclosure under the federal securities laws. It is central to nearly every disclosure obligation, from the long-standing duty to provide accurate and non-misleading information, Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b); Securities Act of 1933 §§ 11-12, 15 U.S.C. §§ 77k-77l; 17 C.F.R. § 229.303 ("Item 303" of "Regulation S–K"); *id.* § 229.404 ("Item 404" of "Regulation S–K"), to more recent requirements such as the prohibition on selective disclosure to market professionals, 17 C.F.R. pt. 243 (2006) ("Regulation FD").

The materiality requirement serves not merely to ensure that the burden of disclosure is a reasonable one. Materiality is essential to the goal of *quality* disclosure that promotes transparency in securities markets and informed decisionmaking by investors. As one commentator has aptly observed:

> The disclosure requirements at the heart of the federal securities laws involve a delicate and complex balancing act. Too little information provides an inadequate basis for investment decisions; too much, particularly of a trivial or speculative nature, can muddle and diffuse disclosure and thereby lessen its usefulness.

> What information should go in and what [should] stay out of corporate disclosure, and which errors are sufficiently serious to merit remedial or punitive measures, are questions determined through application of the legal concept of materiality.

Richard C. Sauer, *The Erosion of the Materiality Standard in the Enforcement of the Federal Securities Laws*, 62 Bus. Law. 317, 355 (2007).

This Court has repeatedly emphasized the importance of the materiality standard to this "delicate and complex balancing act," holding that avoiding overdisclosure is as important as avoiding underdisclosure. In the Court's seminal case on materiality, *TSC Industries*, the Court recognized that setting the materiality bar too low would "bury shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking." 426 U.S. at 448-49; *see also Basic* v. *Levinson*, 485 U.S. 224, 231-32 (1988) ("[T]oo low a standard of materiality . . . might bring an overabundance of information within its reach").

Taking this guidance to heart, lower courts have identified general standards under which certain categories of disclosure may be deemed presumptively immaterial as a matter of law. *See, e.g.*, *Raab* v. *Gen. Physics Corp.*, 4 F.3d 286, 289-91 (4th Cir. 1993) (predictions of future business prospects not represented as guarantees); *ECA & Local 134 IBEW Joint Pension Trust of Chicago* v. *JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009) ("puffing" and unspecific optimism); *Oran* v. *Stafford*, 226 F.3d 275, 282 (3d Cir. 2000) (Alito, J.) (omissions with no market impact when disclosed).

This case involves one such presumption—the rule of assumed immateriality of information having an actual or potential impact lower than 5% on the relevant financial metric of the issuer. App. 27a; *see, e.g.*, *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 714 n.14 (3d Cir. 1996) (Alito, J.) (recognizing "a 'rule of thumb' of 5-10 percent of net income"); *In re Nova-Gold Res. Inc. Sec. Litig.*, 629 F. Supp. 2d 272, 300-301 (S.D.N.Y. 2009) ("misstatements of less than 5% . . . are *prima facie* unlikely to be material"). This benchmark of "quantitative materiality," which has been endorsed by the SEC and widely applied in the lower courts, stands as one of the most important substantive standards for making materiality judgments. And while it is only a presumption (and does not establish a zone of *per se* immateriality for any information), its influence on the day-to-day disclosure decisions of issuers and their advisors is immense.[2]

The presumption also provides an important bulwark against spurious claims of liability under the securities laws. This is nowhere more true than in the case of claims, such as those at issue here, for misleading statements or omissions in registration statements and prospectuses under Sections 11 and 12 of the Securities Act of 1933. Unlike a claim of securities fraud under Section 10(b) of the Securities Exchange Act of 1934 and the SEC's Rule 10b-5, 17 C.F.R. § 240.10b-5, which is subject to rigorous

[2] This presumption does not run afoul of *Matrixx Initiatives, Inc.*, which rejected "a bright-line rule" establishing an entire category of misstatements as immaterial as a matter of law. 131 S. Ct. at 1313-14. Unlike the rule in *Matrixx*, the 5% presumption at issue here is a rule of thumb, which is subject to qualitative considerations.

statutory pleading requirements, Private Securities Litigation Reform Act of 1995 § 101(b), 15 U.S.C. § 78u-4(b), a claim for violation of Sections 11 or 12 survives a motion to dismiss so long as the Rule 8 pleading requirements are satisfied, App. 19a-20a. Neither are scienter nor reliance elements of the '33 Act offenses. *Rombach* v. *Chang*, 355 F.3d 164, 169 n.4 (2d Cir. 2004). And Sections 11(e) and 12(a)(2) provide for substantial statutory remedies subject only to an affirmative loss causation defense, enhancing the settlement value of even a very weak claim that survives a motion to dismiss.[3] Such claims have become increasingly common in recent years. *See* David I. Michaels, *An Empirical Study of Securities Litigation After WorldCom*, 40 Rutgers L. J. 319, 336-43, 347 (2009). Materiality and the statute of limitations are often the only defenses to such claims available at the pleading stage.

For these reasons, proper application of the quantitative materiality presumption by the lower courts is an issue of singular concern to SIFMA's members, and of utmost importance to the effective administration of the securities laws. As explained in the petition and further below, the Second Circuit's decision in this case represents a significant departure from the settled approach of other lower courts to quantitative materiality. Because the Second Circuit is a prominent jurisdiction for securities litigation, this

---

[3] *See, e.g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975) ("in the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment").

departure, if left unreviewed by this Court, threatens to have an outsized impact on the disclosure process and the scope of liability under the securities laws.

### B. By Considering the Quantitative Effect of a Misstatement on a Segment of the Issuer's Business Rather than on the Business as a Whole, the Court of Appeals Undermined the Quantitative Test of Materiality.

This Court has held that a misrepresentation or omission is material if it significantly alters the "total mix" of information available to the investor. *Matrixx Initiatives, Inc.*, 131 S. Ct. at 1318 (citing *Basic*, 485 U.S. at 231-32). In order to determine whether an alleged misrepresentation meets this standard, courts consider both quantitative and qualitative factors. *See, e.g.*, App. 24a; *ECA & Local 134 IBEW*, 553 F.3d at 197; *see also* Securities and Exchange Commission Staff Accounting Bulleting No. 99 ("SAB No. 99"), 64 Fed. Reg. 45,150 (Aug. 12, 1999).

Under the quantitative analysis, a misrepresentation that has an impact on the relevant financial metric of less than 5% is "presum[ed]" to be immaterial. *E.g.*, App. 27a. This 5% threshold is firmly established in the securities laws and has been applied routinely to dismiss allegations of securities violations as immaterial as a matter of law. *See, e.g.*, *Parnes* v. *Gateway 2000, Inc.*, 122 F.3d 539, 547 (8th Cir. 1997) (2% overstatement immaterial as a matter of law); *In re Westinghouse*, 90 F.3d at 714-15 (rejecting as immaterial allegations of misstatements amounting to from 0.51% of net income to 1.2% of net income); *In re Computer Scis. Corp. Erisa Litig.*, 635 F. Supp. 2d 1128, 1142 (C.D. Cal. 2009) (adjustments to financial statements immaterial because they "represented only 1.4% of CSC's aggregate net income"); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 397-398 (D. Md. 2004) (fraud that "amounted to only 0.48%" of pre-tax earnings "immaterial as a matter of law"); *In re First Union Corp. Sec. Litig.*, 128 F. Supp. 2d 871, 895 (W.D.N.C. 2001) (dismissing complaint for immateriality where misrepresentation "amount[ed] to a mere 2.1 percent of operating earnings and 2.8 percent of earnings after [merger-related] charges"); *In re Newell Rubbermaid Inc. Sec. Litig.*, No. 99 C 6853, 2000 WL 1705279, at *8 (N.D. Ill. Nov. 14, 2000) (dismissing complaint for failure to allege materiality where misstatements related to "less than 1% of the total" sales expenses); *see also Higginbotham* v. *Baxter Int'l, Inc.*, 495 F.3d 753, 759 (7th Cir. 2007) (because alleged fraud increased operating profits by only about 1.5%, it was immaterial and did not support inference of scienter by senior management).

To be sure, the 5% rule of thumb is not determinative in every case. In some circumstances, "qualitative" considerations can render certain information material that from a purely quantitative perspective may seem insignificant. Qualitative considerations focus upon whether a misrepresentation or omission reflects so poorly on the integrity of management or the prospects of the business that it would be of substantial importance to investors notwithstanding its limited direct impact upon the company's financial performance. *See, e.g.*, SAB No. 99, 64 Fed. Reg. at 45,152 ("hides a failure to meet analysts' consensus expectations," "changes a loss into income or vice versa," "affects the registrant's compliance with regulatory requirements," "affects the registrant's compliance with loan covenants or other contractual requirements," "involves concealment of an unlawful transaction"); *Bendaoud* v. *Hodgson*, 578 F. Supp. 2d 257, 279 (D. Mass. 2008) (omitted material might "have made a reasonable investor question whether other malfeasance would occur (or be revealed) in the future"); *Interpublic Grp. of Cos., Inc.* v. *Fratarcangelo*, No. 00 Civ.3323 SHS, 2002 WL 31682389, at *11 (S.D.N.Y. 2002) ("alleged overstatement masked a change in earnings and a failure to meet the expectations engendered by IPR's revenue projections").

In the present case, the Court of Appeals acknowledged that the alleged misrepresentations were quantitatively immaterial because each fell "below the presumptive 5% threshold of materiality." App. 27a. The court then, however, engaged in a purported "qualitative" analysis that, in reality, was simply a quantitative review of the impact of the alleged omissions on individual lines of Blackstone's business, rather than the firm as a whole. By determining materiality on the basis of the quantitative impact on the business segment to which the omissions related, the court effectively created a new, lower materiality standard.

In its purported analysis of "qualitative" factors, the court considered, among other things, whether the misrepresentation "relate[d] to a segment that plays a 'significant role' in [Blackstone's] business." App. 29a (quoting SAB No. 99). In analyzing that consideration, however, the court effectively performed a second *quantitative* analysis. This time the court asked whether the alleged omission was quantitatively material not to Blackstone as a whole but rather to the underlying business line to which the alleged omission related. App. 29a. Specifically, the Court reasoned that because investors would "want to know[4] information . . . that Blackstone reasonably expects will have *a material adverse effect* on [the] future revenues" of the allegedly "important" *segment*, the alleged misrepresentations were "plausibly material" to Blackstone's investors. App. 30a; *see also id.* ("Even where a misstatement or omission may be quantitatively small compared to a registrant's firm-wide financial results, its *significance to a particularly important segment* of a registrant's business tends to show its materiality." (emphasis added)).[5]

In determining whether the alleged omissions were "plausibly" material, the court did not assess any qualitative aspect of the alleged omissions, such as whether they revealed management self-dealing or intentional manipulation of financial results. Rather, the court merely reapplied, to segments of the business, the quantitative analysis that had failed to establish that the misrepresentations were material to Blackstone as a whole. For example, the court observed that the Freescale investment accounted for

---

[4] Here the Second Circuit misstated the materiality inquiry. A test of what investors might "want to know" is vague and subjective, and does not reflect the law. Issuers are obligated to disclose only information that significantly alters the "total mix" of information available to the investor. *Matrixx Initiatives, Inc.*, 131 S. Ct. at 1318.

[5] The Second Circuit recently reaffirmed its view that a misrepresentation that has a quantitatively material effect on a "significant" segment of a business can be material to the company as a whole. In *Hutchison* v. *Deutsche Bank Securities, Inc.*, No. 10-1535-cv (2d Cir. July 26, 2011), the court stated that "[i]f a particular product or product-line, or division or segment . . . has independent significance for investors, then even a matter material to less than all of the company's business may be material for purposes of the securities laws." Slip op. at 24.

9.4% of the Corporate Private Equity segment's assets under management, App. 15a, 30a, well above the 5% materiality threshold. As for FGIC, the court based its materiality determination on the write-down's substantial contribution to the decline in the segment's fourth quarter revenues. App. 9a-10a. Using the same logic, the court concluded that the alleged omissions related to real estate were material because the Real Estate segment played a significant role in Blackstone's operations, App. 34a, although residential real estate assets were at most 3.4% of Blackstone's total assets under management, App. 12a n.6.

The segment-by-segment approach dramatically alters the quantitative materiality analysis, diluting the 5% threshold by changing the denominator from a company-wide figure to one based on the smallest relevant segment that a plaintiff can plausibly allege is "significant" to the defendant's business. Faced with a misrepresentation that is immaterial to the company as a whole, a plaintiff may simply allege that (1) the misrepresentation relates to a business segment of such a size that the misrepresentation is quantitatively material to that segment and (2) the segment plays a "significant role" in the company. The Second Circuit has thus transformed an important presumption that can be objectively applied on a motion to dismiss into a subjective analysis of whether a segment plays a "significant role" in the overall company—an inquiry unlikely to be susceptible to resolution at the pleading stage.[6]

[6] The analysis is only complicated by the court's failure to provide concrete guidance about which business lines are "significant."

Moreover, the Second Circuit's approach is inconsistent with the way investors view materiality. Because a public-market investor invests in a whole company, not just part of it, the investor is concerned with the overall financial position of the company.[7] Ultimately each business segment, no matter how "significant" to the company in qualitative terms (such as growth potential or market reputation) has a financial impact that can be measured in relation to the company as a whole. And if a misrepresentation is not quantitatively significant enough to change materially the *company's* financial position, an investor has no basis for concern about it in the absence of any unique qualitative significance. Were it otherwise, and materiality could be based on the purely quantitative significance of a misrepresentation to some portion of the business without reference to company-wide impact, the 5% threshold for quantitative materiality would be meaningless.

Indeed, the Second Circuit acknowledged that its holding could require extensive new disclosure relating to the operations of business segments. App. 35a. The court's response to this concern—that disclosure is required only where "the omitted information [is] material" and there is "a duty to disclose," App. 35a-36a—is perfectly circular. The concern arises from the court's expansion of the definition of materiality.

---

[7] SAB No. 99 appears to acknowledge as much. It advises auditors confronted with a misstatement that "involve[s] a segment of the registrant's operations" to "assess[] materiality of a misstatement to the financial statements *taken as a whole*" and to "consider not only the size of the misstatement but also the significance of the segment information to the financial statements *taken as a whole*." 64 Fed. Reg. at 45,152 (emphases added).

### C. The Second Circuit's Segment-Based Approach to Quantitative Materiality Conflicts with the Firm-Wide Inquiry Conducted by Other Courts.

The Second Circuit's determination of materiality based on the quantitative impact of the alleged omissions on a company's business segments, instead of the company as a whole, is inconsistent with the approach of other courts.

The general rule is that even though a misrepresentation may have a greater effect on a specific part of the company, the quantitative materiality analysis must be conducted based upon the "[c]ompany as a whole, not any one particular aspect of the [c]ompany's operations." *Fecht* v. *Price Co.*, 70 F.3d 1078, 1080 (9th Cir. 1995) (summarizing district court's materiality analysis, and reversing on other grounds); *see, e.g.*, *Garber* v. *Legg Mason, Inc.*, 537 F. Supp. 2d 597, 613 (S.D.N.Y. 2008); *SEC* v. *Yuen*, No. CV 03-4376(MRP), 2006 WL 1390828, at *37 (C.D. Cal. May 16, 2006) (concluding that misstatements relating to particular sectors of company were both quantitatively and qualitatively material to the company as a whole); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d at 398 (conducting quantitative analysis of alleged fraud at subsidiary on parent company's total pre-tax earnings); *In re Duke Energy ERISA Litig.*, 281 F. Supp. 2d 786, 791-92 (W.D.N.C. 2003); *In re Newell Rubbermaid, Inc. Sec. Litig.*, 2000 WL 1705279, at *8; *In re Westinghouse Sec. Litig.*, 90 F.3d at 715.

The following examples well illustrate the majority approach.[8] In *In re Westinghouse Securities Litigation*, purchasers of securities issued by Westinghouse Electric Corporation ("Westinghouse")—just as the plaintiffs here—focused on omissions relating to particular businesses. The complaint alleged that Westinghouse and various other defendants concealed losses at Westinghouse Credit Corporation ("WCC"), which was owned by Westinghouse Financial Services, Inc. ("WFSI"), a wholly owned subsidiary of Westinghouse. 90 F.3d at 699. In conducting the quantitative materiality analysis, the Third Circuit analyzed the effect of the alleged misstatements in relation to Westinghouse's current assets, not the assets of WCC or WFSI. It declined to find the misrepresentations material because they "amount[ed] to just 0.51% of *Westinghouse's* current assets for the first and second quarters of 1989 and only 1.2% of *Westinghouse's* current assets for the third quarter of 1989." *Id.* at 715 (emphases added).

The plaintiffs in *Garber* v. *Legg Mason, Inc.*, purchasers of stock issued by Legg Mason, a global asset management company, alleged various misrepresentations in connection with an agreement whereby Legg Mason exchanged certain of its businesses for Citigroup's asset management division ("CAM"). 537 F. Supp. 2d at 604. The court evaluated the quantitative materiality of alleged misstatements relating to CAM's revenue in comparison with Legg Mason's annual revenue, not CAM's revenue. *Id.* at 613. It concluded that the "material omission from the Prospectus of $12 million in owed distribution

---

[8] Because full discussion of this issue is often reflected in trial court, rather than appellate, opinions, we review several district court cases here as well.

fees accounted for only 0.4% of Legg Mason's annual revenue." Notably, the court explained that "this share is simply too small to be material as a matter of law *when considered in the broader context of the company's revenues and expenses*." *Id.* (emphasis added).

In *In re Duke Energy ERISA Litigation*, the district court assessed the materiality of understated profits at a subsidiary in relation to the parent company's finances. 281 F. Supp. 2d at 792. The court observed that the plaintiffs failed to allege why underreporting at "Duke Energy's franchised electric subsidiary . . . would matter to a reasonable investor, *especially since no such 'underreporting' occurred at the consolidated level at which Duke Energy's finances are reported*." *Id.* (emphasis added). The court did not consider the quantitative effect of the misrepresentation on the subsidiary. And in *In re Newell Rubbermaid Inc. Securities Litigation*, the district court assessed misrepresentations at a large, diversified manufacturer and marketer of consumer products in relation to "the company's total revenues," not to any particular business line. 2000 WL 1705279, at *8.[9]

---

[9] In the present case, the Second Circuit relied upon *In re Kidder Peabody Securities Litigation* for the proposition that a quantitative materiality analysis should be conducted at the segment level. 10 F. Supp. 2d 398 (S.D.N.Y. 1998); *see* App. 30a. At least one other court has explicitly rejected the approach in *Kidder*. In *SEC* v. *Patel*, the S.E.C. urged that *Kidder Peabody* provided a basis for finding materiality even though the misstatements were quantitatively small in relation to the company as a whole. Civil No. 07-cv-39-SM, 2008 WL 781912, at *10 (D.N.H. March 24, 2008). The court, however, continued to assess quantitative materiality in relation to the company's "actual quarterly revenue." It found that the misstatements

These examples illustrate that, contrary to the segment-by-segment approach to quantitative materiality adopted by the Second Circuit, other courts have recognized that the relevant consideration is the quantitative effect of a misrepresentation upon the company as a whole.

Where courts find a misrepresentation to be material even though it is quantitatively small, they have not done so because the misrepresentation had a quantitatively large effect on a significant business segment. Instead, courts have generally held such misstatements to be material because of special facts or circumstances that are unrelated to quantitative considerations. For example, courts have found a quantitatively small misrepresentation to be material where it masked the company's failure to meet analyst expectations, *Interpublic Grp.*, 2002 WL 31682389, at *11, or "raise[ed] concerns about [the] company's internal controls," *In re Kidder Peabody Sec. Litig.*, 10 F. Supp. 2d 398, 411 (S.D.N.Y. 1998).

In the absence of such qualitative factors, courts have generally held that a quantitatively small misstatement is immaterial. *See, e.g.*, *ECA and Local 134 IBEW*, 553 F.3d at 204 ("alleged misrepresentation [did] not even come close to [the] threshold" for quantitative materiality and qualitative factors were not present); *In re Computer Scis. Corp. ERISA Litig.*, 635 F. Supp. 2d at 1142.

---

accounted for less than one percent of quarterly revenue and that the SEC had alleged no qualitative factors to overcome the misstatements' *prima facie* immateriality. *Id.* at *9. As a result, it held that the misrepresentations were immaterial.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

IRA D. HAMMERMAN
KEVIN M. CARROLL
SECURITIES INDUSTRY
AND FINANCIAL
MARKETS ASSOCIATION
1101 New York Ave., N.W.
Washington, D.C. 20005
(202) 962-7382

CHARLES E. DAVIDOW
*Counsel of Record*
JOHN H. LONGWELL
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, D.C. 20006
(202) 223-7300
cdavidow@paulweiss.com

BRAD S. KARP
SUSANNA M. BUERGEL
DAVID K. KESSLER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, N.Y. 10019
(212) 373-3000

*Counsel for* Amicus Curiae *Securities Industry and Financial Markets Association*

August 1, 2011