THE FORM OF ESG SECURITIES FRAUD

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The increasing interest by investors in Environmental, Social, and Governance (ESG) issues has seen a corresponding rise in private securities fraud litigation when a company's ESG rhetoric fails to match the reality of its actions. When corporate defendants move to dismiss those claims, the ruling often hinges on the court's finding of whether those statements are material. ESG disclosures differ significantly from financial disclosures, such as covering a broader array of information and coming in a wider variety of forms. Unfortunately, courts fail to account for these informational and formal differences in assessing materiality. This includes the global sense of the context of the type of disclosure, such as voluntary versus mandatory, and the local sense of the style of the individual statement, such as whether it is general or specific. The lack of a principled approach leads to inconsistent rulings. To understand these problems and offer a corrective, this article turns to rhetorical theory about the appeal of form: some forms aim more at informational delivery and persuasion while others lean more into their formal aspects and thus manifest the appeal of form as form. From there, the article develops a three-step strategy to guide courts in ruling on the materiality of ESG statements. First, the court should find that hyperbole is immaterial as puffery and that forward-looking statements with sufficient cautionary language are shielded by the Private Securities Litigation Reform Act's safe harbor. Then, the materiality of statements in voluntary disclosures like sustainability reports and corporate codes should be assessed by the jury, but the court can rule whether statements in mandatory disclosures are material or immaterial. Finally, the court should be mindful of general statements that are repeated because their context might raise a jury issue even if they appear in mandatory disclosures.

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Introduction

The Environmental, Social, and Governance (ESG) legal literature reveals a repeated concern with rhetoric, in particular with how corporate actions often fall short of their ESG claims.[1] The mismatch between what corporations say and what they do raises the question of how to hold companies accountable if their ESG rhetoric is false.[2] One option is a private securities fraud lawsuit, which is similar to common-law fraud but based on Section 10(b) of the Securities & Exchange Act of 1934 ("1934 Act") and the accompanying Securities and

1. *See, e.g.*, Sharon Hannes et al., *The ESG Gap*, 49 B.Y.U. L. Rev. 1137, 1139–40 (2024) (lamenting the "wide gap between the rhetoric that calls for promotion of ESG goals and the advancement of ESG goals in practice"); Leo E. Strine, Jr. et al., Caremark *and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *and EESG Strategy*, 106 Iowa L. Rev. 1885, 1911–12 (2021) (pondering whether the proliferation of ESG reporting approaches engages companies more in the "rhetoric" of ESG than in the "reality" of stakeholder-focused management).

2. *See* Lisa M. Fairfax, *ESG Hypocrisy and Voluntary Disclosure*, 26 N.Y.U. J. Legis. & Pub. Pol'y 127, 129 (2023) ("How can we make corporations accountable for ESG and thus ensure that corporate commitment to ESG isn't merely rhetorical . . . ?").

Exchange Commission (SEC) Rule 10b-5.[3] Given the phenomenal growth of ESG-oriented investing and the concomitant increase in corporate ESG disclosures and reporting,[4] it is unsurprising that investors have already based lawsuits upon corporate ESG disclosures and that commentators expect many more to follow.[5]

The increase in private securities fraud litigation based on ESG disclosures raises new challenges, in particular with materiality, which is part of the first element of the tort.[6] Material information is that which a "reasonable investor" considers important in deciding whether to buy or sell company stock.[7] Gauged by the increased interest from both institutional and mainstream investors, ESG information is likely material.[8] Securities fraud litigation hinges not upon the general embrace of ESG principles by investors, however, but instead upon the specifics of the ESG statements that plaintiffs challenge.[9] Compared to financial disclosures, ESG disclosures address a wider scope of information, come in a greater variety of forms (ranging from mandated SEC filings to voluntary sustainability reports), and have significant differences in the amount and quality of information among those forms.[10] Unfortunately, courts lack principles that account for these distinctions of form, which leads to inconsistent rulings: one judge might dismiss

3. Dura Pharms., Inc. v. Broudu, 544 U.S. 336, 341 (2005) (citing 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5 (2004)) ("The courts have implied from these statutes and Rule a private damages action, which resembles, but is not identical to, common-law tort actions for deceit and misrepresentation.").
4. *See, e.g.*, Becky L. Jacobs, *From CSR and TBL to ESG and the SDGs: Roots from Resistance to Regularization*, 84 La. L. Rev. 1251, 1257–58 (2024) (reporting that "in 2021, 86% of S&P 500 firms regularly issued some kind of ESG-related report" and that "as of July 2021, over 6,000 investors, including asset managers and financial firms, had over $35 trillion of ESG assets, nearly one-third of the total global assets under management.").
5. *See, e.g.*, Barbara Ballan & Jason J. Czarnezki, *Disclosure, Greenwashing, and the Future of ESG Litigation*, 81 Wash. & Lee L. Rev. 545, 599 (2024) ("[A]s ESG investing continues to gain prominence, it is likely that courts will be asked to decide on more cases involving alleged misrepresentations or omissions related to a company ESG disclosure under § 10(b) of the Exchange Act and SEC Rule 10b-5.").
6. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008) (listing the six elements for private securities fraud, with the first being "a material misstatement or omission by the defendant").
7. *See, e.g.*, Amanda M. Rose, *The "Reasonable Investor" of Federal Securities Law: Insights from Tort Law's "Reasonable Person" & Suggested Reforms*, 43 J. Corp. L. 77, 78–79 (2017).
8. *See, e.g.*, Jacobs, *supra* note 4, at 1257 (claiming that there is "market interest in ESG initiatives by retail and institutional investors").
9. *See* Donald C. Langevoort, *Disasters and Disclosures: Securities Fraud Liability in the Shadow of a Corporate Catastrophe*, 107 Geo. L.J. 967, 981 (2019) (writing that plaintiffs "usually offer scores of individual statements said to have deceived," which courts must "individually evaluate").
10. *See, e.g.*, Lisa M. Fairfax, *Dynamic Disclosure: An Expose on the Mythical Divide Between Voluntary and Mandatory ESG Disclosure*, 101 Tex. L. Rev. 273, 294 (2022) [hereinafter Fairfax, *Dynamic*] (contrasting required SEC filings from voluntary ESG disclosures, which report "a wider variety of topics" and are "far more extensive and in-depth").

a lawsuit after finding the ESG statements immaterial, while another in a similar case denies dismissal so that the factfinder can assess materiality.[11]

One approach to establishing standards for the analysis of materiality reveals itself through the scholars who bemoan ESG rhetoric. Although they invoke this term in its most common understanding of empty or insincere speech,[12] the word "rhetoric" also refers to the art or discipline of analyzing discourse.[13] This includes an ongoing scholarly interest in the rhetoric of law.[14] Commentators have paid scant attention to the rhetoric of ESG and securities fraud, however. For example, legal rhetoricians have addressed individual aspects of ESG like environmental issues,[15] social change,[16] and corporate practices,[17] but not ESG as a unitary concept. Further, most law review articles on the rhetoric of corporate and securities law predate ESG investing,[18] so we find only hints about how rhetorical theory might illuminate our understanding of ESG statements.[19]

11. James J. Park, *ESG Securities Fraud*, 58 Wake Forest L. Rev. 1149, 1165–66 (2023); *compare, e.g.*, Lopez v. CTPartners Exec. Search Inc., 173 F. Supp. 3d 12, 17, 25 (S.D.N.Y. 2016) (dismissing case with prejudice after finding that corporate statements about a sexual-harassment-free culture were puffery), *with, e.g.*, SEB Inv. Mgmt. AB v. Wells Fargo & Co., 742 F. Supp. 3d 1003, 1008, 1017–19 (N.D. Cal. July 29, 2024) (denying motion to dismiss amended complaint where claim was based on company statements regarding diverse hiring initiatives).
12. Lisa M. Fairfax, *Easier Said Than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 Fla. L. Rev. 771, 775 (2007) (quoting American Heritage Dictionary of English Language (4th ed. 2000)).
13. Sonja K. Foss, Rhetorical Criticism: Exploration and Practice 6 (4th ed. 2009) (calling rhetorical criticism "the systematic investigation and explanation of symbolic acts and artifacts for the purpose of understanding rhetorical processes").
14. The publication of two recent books on law and rhetoric, both classical and contemporary, demonstrates the continuing interest in the merger of these two disciplines. *See generally* Delia B. Conti et al., Law & Rhetoric: A Primer (2023); Classical Rhetoric and Contemporary Law: A Critical Reader (Francis J. Mootz III et al. eds., 2024).
15. *See generally* Jeff Todd, *The Economic Rhetoric of Carbon Pricing*, 90 Brook. L. Rev. 421 (2025) (applying rhetoric to economic studies of laws regulating greenhouse gas emissions).
16. *See generally* Melissa H. Weresh, *Rethinking Rhetoric in the Asylum Context: Lessons from #metoo*, 30 UCLA J. Gender & L. 65 (2023) (analyzing the rhetorical strategies employed by victims of sexual violence in the #metoo movement to recommend strategies for women seeking asylum to escape sexual violence).
17. *See generally* Susan E. Provenzano, *How Rhetoric Reveals Judicial Motives in Employment Discrimination Cases*, 90 Tenn. L. Rev. 149 (2022) (applying the pentad of rhetorician Kenneth Burke to analyze judicial opinions about employment discrimination).
18. *See, e.g.*, Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. Corp. L. 675, 677–78 (2006) (arguing that the "corporate embrace of stakeholder rhetoric . . . may signal a growing dissatisfaction with the shareholder primacy norm"); Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 Duke L.J. 1, 34–52 (2005) (analyzing how "good faith" in corporate law is a rhetorical device); Hillary A. Sale, *Judging Heuristics*, 35 U.C. Davis L. Rev. 903, 904–05 (2002) (applying rhetoric to the heuristics that judges use in securities litigation).
19. *See* Dionysia Katelouzou, *The Rhetoric of Activist Shareholder Stewards*, 18 N.Y.U. J.L. & Bus. 665, 758–62 (2022) (devoting subsection on article about the rhetoric of activist shareholders to ESG activism).

Given the importance of form for understanding corporate ESG disclosures, this article turns to the rhetoric of form to articulate why the form of ESG disclosure matters for assessing materiality and to establish guidelines for courts to conduct that analysis. Part I discusses the materiality element in private securities fraud litigation, which is often challenged in a motion to dismiss but is typically for the jury to decide since it presents a mixed question of law and fact. Part II turns to the unique challenges posed by assessing the materiality of ESG disclosures. This Part explains how, compared to corporate financial disclosures, ESG disclosures cover a wider scope of information and come in a greater variety of forms, with further differences between voluntary and mandatory disclosures. Part II closes by describing how courts lack principles with which to account for these informational and formal differences when ruling on materiality as part of a motion to dismiss, and the inconsistencies that result.

Part III summarizes the rhetoric of form. It first explains the appeal and persuasiveness of form, including how an audience might identify with a text on a purely formal level even if that text does not persuade the auditor to accept the underlying proposition. This Part closes by describing the five aspects of form as a method for textual analysis. Some forms appeal more to their informational content and so require a broader consideration of context, while others appeal more to form as form and so can be evaluated a-contextually.

Part IV shows how the rhetoric of form can be applied to assess the materiality of ESG statements in private securities fraud lawsuits. The rhetoric of form underscores why a disclosure's form is essential for evaluating that statement's materiality. Because some documents are forms that emphasize informational content to persuade the audience, and because that attempt at persuasion may or may not be successful, the judge should decline to dismiss claims based on statements contained in those documents so that the jury can assess whether a reasonable investor would find the statement material. If the individual statement or document is a type of form that does not appeal to information, however, then the judge can rule on its (im)materiality. From there, this Part converts the five aspects of form into a three-step strategy for judges to rule on materiality in a motion to dismiss: the court should (1) dismiss claims based on statements that are hyperbolic or are forward-looking if accompanied by cautionary language; (2) differentiate claims contained in voluntary versus mandatory disclosures by sending the former to the jury but evaluating whether the latter can be dismissed as immaterial; and (3) consider the effect of repeated statements because those sometime raise a jury question about materiality. The article ends with a brief conclusion.

I. Materiality and Motions to Dismiss Private Securities Fraud Lawsuits

The disclosure of information serves the fundamental purpose of protecting investors from fraud by regulated companies.[20] U.S. securities law requires covered entities to disclose certain material information and contains antifraud provisions to ensure the accuracy of that information.[21] Section 10(b) "subjects an Exchange Act reporting company to civil liability for material omissions or misrepresentations in periodic reports filed with the SEC" as well as "any other document or information released by the company."[22] Section 10(b) ties the unlawfulness of the "manipulative or deceptive device" to violations of "rules and regulations" promulgated by the SEC.[23] The SEC implemented Section 10(b) through Rule 10b-5, which prohibits using "any device, scheme, or artifice to defraud"; making untrue statements of material fact or omitting material facts necessary to make another statement not misleading; or "engag[ing] in any act, practice, or course of business" that constitutes "a fraud or deceit upon any person."[24]

While neither Section 10(b) nor Rule 10b-5 specified enforcement through a private cause of action, federal courts started to imply it in the 1940s.[25] The U.S. Supreme Court subsequently endorsed it in 1971,[26] as has Congress through legislation like the Private Securities Litigation Reform Act ("PSLRA").[27] Private securities fraud has roots in common-law fraud, so it functions like a

20. Ann M. Lipton, *Not Everything Is About Investors: The Case of Mandatory Stakeholder Disclosure,* 37 Yale J. on Reg. 499, 509 (2020).
21. Hilary Sale, *Disclosure's Purpose*, 107 Geo. L.J. 1045, 1048 (2019) (writing that the "disclosure regimen is paired with an antifraud rule" and that the rules combined "require that disclosures may not be misleading—either affirmatively or through omissions or half-truths").
22. Stephen Kim Park, *Targeted Social Transparency as Global Corporate Strategy*, 35 Nw. J. Int'l L. & Bus. 87, 98 (2014) (citing 15 U.S.C. § 78j(b) (2010)).
23. 15 U.S.C. § 78j(b) (making it "unlawful for any person" to use "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe").
24. Employment of Manipulative and Deceptive Devices, 17 C.F.R. § 240.10b-5 (2025).
25. Matthew C. Turk, *The Securities Fraud Class Action after* Goldman Sachs, 59 Am. Bus. L.J. 281, 288 (2022) (citing Kardon v. National Gypsum Co., 69 F. Supp. 512, 514–15 (E.D. Pa. 1946)).
26. Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971); *see* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313 (2007) (calling "meritorious private actions to enforce federal antifraud securities laws . . . an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC)").
27. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 81 (2006) (quoting H.R. Rep. No. 104–369, at 31 (1995) (Conf. Rep.) (describing how the House Conference Report accompanying the PSLRA "acknowledge[ed] that private securities litigation was 'an indispensable tool with which defrauded investors can recover their losses'"); *see* Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(1) (2010) (imposing heightened pleading standard for private securities fraud complaints); *id.* § 78u-5 (1995) (providing safe harbor for forward-looking statements).

common-law tort, including elements that are "largely judge-made."[28] A plaintiff must show six elements: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation."[29]

As with common law fraud, the first element of securities fraud requires the plaintiff to prove that the company's misleading statement or omission was material.[30] This primacy means that materiality has emerged as the "lynchpin element" of securities fraud cases.[31] The Supreme Court first defined materiality in the securities law context in *TSC Industries v. Northway, Inc.*,[32] and that definition was later adopted for Section 10(b) and Rule 10b-5 lawsuits in *Basic Inc. v. Levinson*.[33] A "fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[34] Further, a fact is material if it would be "viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[35] Materiality thus serves as a filter so that, for a statement to be actionable as fraud, it must contain information upon which an investor can act, such as deciding how to vote or whether to trade shares.[36] Even if false, a statement is immaterial if it is "insignificant" to the investor's decision-making.[37]

Materiality presents a mixed question of law and fact so that, when deciding a motion to dismiss, courts typically should rule against dismissal on this ground.[38] The traditional materiality analysis hinges upon two factors: (1) an

28. Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 Iowa L. Rev. 811, 815 (2009).
29. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008).
30. Thomas Lee Hazen, *Social Issues in the Spotlight: The Increasing Need to Improve Publicly-Held Companies' CSR and ESG Disclosures,* 23 U. Pa. J. Bus. L. 740, 755 (2021) [hereinafter Hazen, *Social*].
31. Thomas M. Madden, *Significance and the Materiality Tautology*, 10 J. Bus. & Tech. L. 217, 217 (2015).
32. 426 U.S. 438 (1976).
33. 485 U.S. 224, 231–32 (1988).
34. *TSC Indus.*, 426 U.S. at 449.
35. *Id.*
36. Richard A. Booth, *The Two Faces of Materiality*, 38 Del. J. Corp. L. 517, 518 (2013); *see* Kurt S. Schulzke & Gerlinde Berger-Walliser, *Toward a Unified Theory of Materiality in Securities Law*, 56 Colum. J. Transnat'l L. 6, 12 (2017) (claiming that materiality "filters the quantity and quality of information that issuers are required to provide to market players and regulators.").
37. *Basic*, 485 U.S. at 238.
38. *See* ECA & Loc. 134 IBEW Joint Pension Tr. of Chicago v. JP Morgan Chase Co., 553 F.3d 187, 197 (2d Cir. 2009) ("Because materiality is a mixed question of law and fact, in the context of a Fed. R. Civ. P. 12(b)(6) motion, a complaint may not properly be dismissed on the ground that the alleged misstatements or omissions are not material unless they are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance.") (citation modified).

understanding of who the "reasonable investor" is and (2) the "factual context" in which the statement was made.[39] The reasonable investor is "rational" (but "average"), "capable of reading and comprehending" market data in formal disclosures and other sources, and able to assess risks and rewards "when given the requisite information."[40] The identity of this "shadowy figure" varies from case to case[41] because different investors have different needs, so what is material to one investor may not be material to another.[42] Similarly, the determination of a statement's materiality depends on the facts of the case because it requires an analysis of the context in which it was made.[43] The Supreme Court takes a broad view of context, writing that considerations for the factfinder include the type of document in which the statement appears; its "surrounding text, including hedges, disclaimers, and apparently conflicting information"; "the customs and practices of the relevant industry";[44] and facts about the company and its market.[45] Given its fact-specific nature and the importance of context, the jury rather than the judge should evaluate materiality.[46]

This does not mean that judges are forbidden from ever assessing materiality, however. For example, since only statements of fact can be false, the determination of whether a statement is fact or opinion raises a "threshold question."[47] The threshold questions about materiality have expanded through various doctrines to help combat strike suits by plaintiffs.[48] Some of these are judicial "safety

39. Rose, *supra* note 7, at 90.

40. Tom C.W. Lin, *Reasonable Investor(s)*, 95 B.U. L. Rev. 461, 467–68 (2015).

41. Rose, *supra* note 7, at 79; *see* Hillary A. Sale & Donald C. Langevoort, "*We Believe":* Omnicare*, Legal Risk, Disclosure and Corporate Governance*, 66 Duke L.J. 763, 776 (2016) (claiming that some judges view reasonable investors as "steely-eyed skeptics, who are unlikely to draw many inferences at all beyond what was clearly said" while others see them "as more trusting in management's candor and hence willing to draw inferences that make reliance more natural and normal").

42. Schulzke & Berger-Walliser, *supra* note 36, at 9–10 ("If reasonable investors exist, they have such a variety of liquidity, consumption, and risk preferences that courts are hard-pressed to choose from among them.").

43. *See* Sale & Langevoort, *supra* note 41, at 764 ("The Court said [that] words in context can generate inferences for the reasonable investor that go beyond narrow linguistic confines.").

44. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175, 190 (2015).

45. Basic Inc. v. Levinson, 485 U.S. 224, 239 (1988).

46. *See id.* at 240 (calling materiality "a fact-specific inquiry"); Sec. & Exch. Comm'n v. Jarkesy, 603 U.S. 109, 120 (2024) ("The SEC's antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury.").

47. Amanda Shanor & Sarah E. Light, *Greenwashing and the First Amendment*, 122 Colum. L. Rev. 2033, 2072 (2022).

48. *See* Eric C. Chaffee, *A Call for Legislative Reform: Expanding the Extraterritorial Application of the Private Rights of Action Under Federal Securities Law While Limiting the Scope of Relief Available*, 22 Stan. J.L. Bus. & Fin. 1, 44–45 (2017) (explaining strike suits in private securities fraud litigation).

valves" like puffery.[49] Others are legislative, such as the PSLRA imposing heightened pleading standards and creating a safe harbor for forward-looking statements when they are accompanied by cautionary language.[50] One commentator writing before the rise of ESG investing observed that, through these doctrines, "courts frequently dismiss securities cases based on immateriality."[51] Because materiality will be as much—if not more—of a challenge in securities fraud cases based on ESG disclosures,[52] the next Part addresses how the materiality of ESG disclosures differs from that of financial ones and how courts assess that materiality.

II. The Importance of Form in Evaluating ESG Materiality

Evaluating the materiality of particular ESG statements raises unique challenges. ESG disclosures differ from financial ones because of the broader scope of ESG information and the wider variety of forms in which that information is conveyed. ESG disclosures also differ from each other depending on whether they are made voluntarily or as mandated by the SEC. These differences should dictate a heightened consideration of the form of ESG disclosures because a statement's context—which includes the type of document in which a statement appears and its surrounding text—as well as its sentence-level style affect its materiality. Rather than approach ESG disclosures in a principled manner, however, courts account for these differences in partial and imperfect ways, which leads to inconsistent rulings about whether to send an ESG statement's materiality to the jury or to grant dismissal because the judge finds the statement immaterial.

49. Stefan J. Padfield, *Immaterial Lies: Condoning Deceit in the Name of Securities Regulation*, 61 Case W. Res. L. Rev. 143, 147 (2010). Puffery and its various meanings are examined in Part II(B)(2).

50. Ballan & Czarnezki, *supra* note 5, at 598 (citing 15 U.S.C. § 78u-5) (discussing safe harbor provisions for future-oriented statements regarding a company's "financial projections, economic performance, and objectives"); Sharon Nelles & Hilary Huber, *Pleading Securities Fraud Claims: The Good, the Bad, and the Ugly*, 45 Loy. U. Chi. L.J. 653, 656 (2014) (quoting 15 U.S.C. § 78u-4(b)(1)) ("[T]he PSLRA attempts to discourage frivolous litigation . . . through a heightened pleading standard.").

51. Padfield, *supra* note 49, at 153.

52. *See* Caitlin M. Ajax & Diane Strauss, *Corporate Sustainability Disclosures in American Case Law: Purposeful or Mere "Puffery"?*, 45 Ecology L.Q. 703, 718 (2018) (observing that, for securities fraud cases involving sustainability-related disclosures, "the 'materiality' and 'reliance' prongs of the test above are where plaintiffs have the most difficulty in adequately pleading their cases").

A. Differences in Financial v. ESG Information and Voluntary v. Mandatory Disclosures: Why Form Matters

A wide swath of investors consider ESG information: the growing cohort of millennial investors care more than older investors about ESG issues,[53] mainstream investors view ESG information as important for investment analysis and portfolio construction,[54] and institutional investors value ESG information as an indicator of systemic risk.[55] Moreover, these investors equate company actions like responses to climate change, implementation of workplace safety policies, and management of supply chains with financial materiality.[56] These investors are supported by empirical research showing that many ESG factors can impact risk and return at both the firm and portfolio level.[57] Because shareholders and investors view ESG information as material to a company's stock price and financial performance,[58] they now demand that companies disclose more of it.[59] Heightened investor interest has led to an explosion in ESG disclosures by corporations, with 479 of S&P 500 companies issuing reports on ESG or sustainability.[60] In addition, 52% of respondents to one survey of companies of varying market capitalizations indicated that they report ESG information.[61]

53. Michal Barzuza et al., *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance,* 93 S. Cal. L. Rev. 1243, 1249–50, 1291–94 (2020).
54. Dan Esty & Todd Cort, *Toward Enhanced Corporate Sustainability Disclosure: Making ESG Reporting Serve Investor Needs*, 16 Va. L. & Bus. Rev. 423, 429 (2022).
55. John C. Coffee, Jr., *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk*, 2021 Colum. Bus. L. Rev. 602, 609–10, 614, 621.
56. Ruth Jebe, *The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream*, 56 Am. Bus. L.J. 645, 647 (2019) (linking financial materiality with "how companies respond to climate change, whether effective water management is in place, how companies manage their supply chains, and whether they have effective workplace safety policies").
57. Virginia Harper Ho & Stephan Kim Park, *ESG Disclosure in Comparative Perspective: Optimizing Private Ordering in Public Reporting*, 41 U. Pa. J. Int'l L. 249, 261 (2019) ("[T]he financial materiality of a wide range of ESG information is supported by empirical research across asset classes and, over time, has demonstrated the impact of many ESG factors on firm and portfolio-level risk and return, both individually and in the aggregate.").
58. Ballan & Czarnezki, *supra* note 5, at 596–97 ("Shareholders are particularly concerned with greenwashing claims as they can negatively impact a business's stock price, making it a material issue for investors to consider. Investors care about the transparency of ESG and climate-related disclosure because it can affect a company's image, financial performance and long-term viability on the market.").
59. Ho & Kim, *supra* note 57, at 260 ("Most institutional investors now expect companies to make materiality determinations about the financial impact of their environmental and social (i.e., employment-related) practices, in addition to increasing transparency around more traditional non-financial factors such as corporate governance.").
60. Thomas M. Madden, *Embattled SEC Climate-Related Disclosure Regulation*, 17 Wm. & Mary Bus. L. Rev. 71, 79 (2025) (characterizing ESG and similar reports as "utterly ubiquitous").
61. Ctr. for Cap. Mkts, Climate Change & ESG Reporting from the Public Company Perspective 3 (2021), https://perma.cc/V9PW-GUL3 (reporting that 67% of companies

As the volume of corporate ESG disclosures has increased, so has the possibility that many contain inaccuracies, some of them intentional.[62] ESG statements therefore provide the grounds for shareholders to pursue securities fraud lawsuits.[63] These lawsuits raise issues different from lawsuits based upon financial disclosures, however, because the information within and the forms of ESG disclosures vary significantly from financial disclosures. ESG disclosures even differ from each other, depending on whether disclosures are voluntary or mandatory.

ESG disclosures cover a broader range of topics than financial disclosures,[64] and each individual factor in turn "embodies a range of subject matter."[65] For example, environmental disclosures might address company efforts to reduce their carbon footprint, engage in recycling, minimize pollution, conserve natural resources, and protect animal life.[66] Social disclosures can cover company policies and commitments to employee safety and benefits, sexual harassment, diversity and inclusion, supply chain management, and community relations, as well as stances on issues like human rights.[67] Governance disclosures pertain to matters of board composition, proxy access and shareholder voting rights, board and officer compensation, cybersecurity, or compliance programs and policies.[68]

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responding to the survey were under $5 billion in capitalization and that 32% were below $700 million).

62. Thomas M. Madden & Gerlinde Berger-Walliser, *Making Sense of ESG with the SEC*, 25 U. Pa. J. Bus. L. 927, 960 (2023) ("[T]he current marketplace is awash in confusing, unchecked ESG claims. The market impact of these claims is likely open to both intentional and unintentional inaccuracies that are quite likely misleading would-be investors, voting shareholders, and the public.").
63. *See* Park, *supra* note 11, at 1152 ("As corporations increasingly make representations about their management of ESG risk, there will be more opportunities to contend that they misrepresented such risks.").
64. Stavros Gadinis & Amelia Miazad, *The ESG Information System*, 47 Seattle U. L. Rev. 695, 697 (2024).
65. Joan MacLeod Heminway, *The Materiality of ESG Information: Why It Matters*, 84 La. L. Rev. 1365, 1370 (2024).
66. *Id.* at 1370 (writing that environmental disclosures relate to "recycling, energy, water, land use, nonhuman animals, plant life, [and] climate"); Caley Petrucci & Guhan Subramanian, *Stakeholder Amnesia in M&A Deals*, 50 J. Corp. L. 87, 105 (2024) ("Environmental factors might include actions to reduce greenhouse gases, promote sustainability, reduce or recycle plastics, and minimize pollution.").
67. Kevin S. Haeberle, *Fraud-on-the-Market Liability in the ESG Era*, 98 Tul. L. Rev. 641, 649–50 (2024) (writing that corporate "S" disclosures "relat[e] to human capital, sexual harassment complaints, employee wellness and retention, and support of human rights" as well as "disclosure requirements relating to conflict minerals in supply chains and to CEO-to-median-employee pay ratios"); Petrucci & Subramanian, *supra* note 66, at 105 ("Social considerations might include the health and safety of employees, wage equality, reputational value and goodwill, employee diversity, and the relationship between the community and the corporation.").
68. Lisa M. Fairfax, *The O.G.: Unmasking Why Governance Is the* Most *Important Component of ESG*, 14 Harv. Bus. L. Rev. 153, 159 (2024) ("[I]ssues encompassed by the 'G' include corporate governance concerns such as proxy access, board declassification, majority voting,

Further, these categories can intersect, such as with diversity and inclusion, which is a social issue as it pertains to company commitments to hiring but a governance issue as it pertains to company policy and the makeup of boards.[69]

ESG securities fraud cases therefore involve a wider range of risks compared to those based on purely financial disclosures.[70] Each ESG component can raise different issues in litigation.[71] For example, plaintiffs might allege that a company has greenwashed its environmental compliance or commitments to climate change[72] or diversity-washed its initiatives in hiring or board member selection.[73] In event-driven securities litigation, shareholder plaintiffs might base their claims on corporate responses to environmental disasters like "oil spills, dam collapses, mining disasters, and wildfires"; or on statements playing down corporate scandals of social relevance like #MeToo-style malfeasance; or on conflicting statements or omissions about governance failures like corruption or cybersecurity breaches.[74]

In addition, ESG disclosures take a wider variety of forms—any of which could lead to securities fraud liability.[75] SEC rules mandating disclosure focus primarily upon a company's financial information.[76] Financial disclosures therefore have consistent, comparable, and thus useful meanings for concepts like

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supermajority voting arrangements, special meeting rights, written consent, and board composition."); Heminway, *supra* note 65, at 1370 (writing that governance relates to "a spectrum of considerations encompassing director, officer, and shareholder management and control in the firm involving, among other things, board composition and process, board and officer incentive compensation, business ethics, cybersecurity, and compliance programs and policies").

69. *See* Hazen, *Social*, *supra* note 30, at 746.

70. Park, *supra* note 11, at 1163 ("ESG risk cases raise distinctive issues that are not seen in cases involving the company's core financial performance."); *id.* at 1153 ("ESG securities fraud cases differ from business failure risk cases because they relate to deceptions concerning a wider range of risks.").

71. *See, e.g.*, Gilda Sophie Prestipino, *U.S. Corporate Accountability in the ESG Era*, 17 Va. L. & Bus. Rev. 387, 403–08 (2023) (subdividing ESG litigation into "E" for climate change and greenwashing suits, "S" for suits based on statements about commitments to diversity, and "G" for suits related to compliance issues such as adherence to laws regarding supply chain management).

72. *See, e.g.*, Miriam A. Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 U.C. Davis Bus. L.J. 281, 282, 290–92 (2014).

73. *See, e.g.*, John Towers Rice, *Rainbow-Washing*, 15 Ne. U. L. Rev. 285, 346–56 (2023).

74. Gideon Mark, *Event-Driven Securities Litigation*, 24 U. Pa. J. Bus. L. 522, 573–74 (2022).

75. *See* Aisha I. Saad & Diane Strauss, *The New "Reasonable Investor" and Changing Frontiers of Materiality: Increasing Investor Reliance on ESG Disclosures and Implications for Securities Litigation*, 17 Berkeley Bus. L.J. 391, 394 (2020) ("These cases arose from the increased prevalence of voluntary corporate ESG disclosures in formal securities reporting, such as in 10-K forms, as well as from informal corporate communications, including public statements, sustainability reports, and sustainability reviews.").

76. E. Norman Veasey, *Corporate Governance and Ethics in a Post Enron/Worldcom Environment*, 72 U. Cin. L. Rev. 731, 733 (2003).

profit, income, and growth.[77] The ESG information infrastructure is polycentric, however, because disclosure is primarily voluntary but with some that is mandatory.[78] Many companies issue voluntary disclosures made pursuant to the reporting frameworks established by private standard setters like the International Stability Standards Board, the Global Reporting Initiative, and the Sustainability Accounting Standards Board.[79] Additional voluntary disclosures come in an array of forms like corporate web pages, public speeches, earnings calls, and presentations to investors.[80]

While financial reporting pursuant to SEC rules follows a single standard (and is often done via the standardized Form 10-K or Form 10-Q), ESG reporting pursuant to private frameworks can follow different standards and have different concepts for the term "materiality."[81] This has "resulted in a complex and confused governance space in which [ESG] report issuers face multiple reporting standards, yielding inadequate disclosure."[82] For example, these differing standards lead companies to report similar information in inconsistent ways.[83] Likewise, critics complain that these standards result in a lack of comparability of the information reported.[84] Some critics also contend that the information in voluntary disclosures tends to be of "generally poor quality."[85] Because these disclosures are voluntary rather than mandated, and because companies want to

77. Dana Brakman Reiser & Ann Tucker, *Buyer Beware: Variation and Opacity in ESG and ESG Index Funds*, 41 Cardozo L. Rev. 1921, 1926 (2020) ("In non-ESG investing, profit, income, and growth have consistent meanings across products, so their disclosure alone allows investors to make useful comparisons between them. In contrast, what qualifies as ESG performance is unclear and contested.").

78. Adam Sulkowski & Ruth Jebe, *Evolving ESG Reporting Governance, Regime Theory, and Proactive Law: Predictions and Strategies*, 59 Am. Bus. L.J. 449, 454 (2022).

79. Madden & Berger-Walliser, *supra* note 62, at 945–46.

80. Soc'y for Corp. Governance & Gibson Dunn, ESG Legal Update: What Corporate Governance and ESG Professionals Need to Know 3, 5 (2020), https://perma.cc/RUX4-DPSF.

81. Sulkowski & Jebe, *supra* note 78, at 454 ("In financial reporting, . . . there is one standard [for disclosures], created and mandated by the government for that jurisdiction. By contrast, ESG reporting is . . . dominated by private standard setters creating multiple voluntary disclosure standards, with limited government involvement."); *id.* (claiming that the "various actors in the system" can have "[d]ifferent definitions of materiality"); U.S. Sec. & Exch. Comm'n, *Form 10-K*, Investor.gov, https://perma.cc/D4UT-4W72 ("[D]omestic companies must submit annual reports on Form 10-K, quarterly reports on Form 10-Q, and current reports on Form 8-K for a number of specified events and must comply with a variety of other disclosure requirements.").

82. Sulkowski & Jebe, *supra* note 78, at 452.

83. Gadinis & Miazad, *supra* note 64, at 697–98.

84. Sulkowski & Jebe, *supra* note 78, at 451–52.

85. *Id.* at 451; *see* Cynthia A. Williams & Donna M. Nagy, *ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure*, 99 Tex. L. Rev. 1453, 1475 (2021) (claiming that voluntary disclosures have "not produced reliable, comparable information").

reduce liability risk, companies can "couch statements in sustainability reports in aspirational or vague terms," often on the advice of their lawyers.[86]

Not all commentators share this opinion, however. In part because voluntary disclosures tend to have a far greater quantity of information than SEC-mandated disclosures,[87] one scholar writes that "voluntary ESG disclosure is significantly more extensive, more specific, and more detailed" than mandatory disclosure.[88] One reason is because SEC rules only mandate disclosure of a handful of ESG-related topics. Consider Regulation S-K, in which the SEC mandates that required regular reports include the disclosure of certain non-financial information in a "plain English" narrative.[89] Only six of these mandates relate specifically to ESG: environmental compliance costs (Item 101); administrative and judicial environmental proceedings involving the company (Item 103); identification and backgrounds of directors, executive officers, promoters, and control persons (Item 401); executive compensation (Item 402); codes of ethics *if* they govern corporate managers, or if no such code exists, then an explanation why (Item 406); and diversity in the nomination and evaluation of directors (Item 407).[90] The SEC and scholars have identified additional items that *may* be ESG-relevant, such as Item 303—management's discussion and analysis (MD&A), which alerts investors to trends and uncertainties—as it pertains to environmental and cybersecurity risks.[91] Similarly, Item 503 might

86. Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 Wash. U. L. Rev. 1821, 1847–48 (2021); *see* Emily Strauss, *Is Everything Securities Fraud?*, 12 U.C. Irvine L. Rev. 1331, 1368 (2022) ("[B]ecause [ESG] disclosures are voluntary, firms can use vague language, emphasize positive information, omit negative information, and generally finesse their disclosures to make their sustainability practices look rosier than they really are.").

87. *See* Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 Geo. L.J. 923, 949 (2019); *see also Environmental, Social, and Governance Disclosures in Proxy Statements: Benchmarking the Fortune 50*, Sidley Austin LLP (Aug. 31, 2021), https://perma.cc/2C9G-ZUUS (finding "that most [Fortune 50] companies publish more fulsome ESG disclosures on their websites in standalone ESG reports" than in proxy statements).

88. Fairfax, *Dynamic*, *supra* note 10, at 294.

89. George S. Georgiev, *Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation*, 64 UCLA L. Rev. 602, 614 (2017) ("Regulation S-K . . . prescribes the substance and form of non-financial disclosure," which includes narratives in "'plain English'"); *see* Ronan Ó Fathaigh et al., *Mobile Privacy and Business-to-Platform Dependencies: An Analysis of SEC Disclosures*, 14 J. Bus. & Tech. L. 49, 64 (2019) (explaining that required disclosures like Form 10-K and Form 10-Q "must conform to the requirements" of Regulation S-K); *see also* 17 C.F.R. § 229.10 (2025).

90. Heminway, *supra* note 65, at 1378–82 (citing, *inter alia*, 17 C.F.R. §§ 229.101(c)(1)(xii), 229.103(c)(3), 229.401, 229.402, 229.406(a), 229.407(c)(2)(vi) (2024)).

91. Commission Guidance Regarding Disclosure Related to Climate Change, Securities Act Release No. 9106, Exchange Act Release No. 48,960, 97 SEC Docket 2414 (Feb. 2, 2010) (environmental risks); Commission Statement and Guidance on Public Company Cybersecurity Disclosures, Securities Act Release No. 10,459, Exchange Act Release No. 82,746, 83 Fed. Reg. 8166 (Feb. 21, 2018) (cybersecurity risks); *see* 17 C.F.R. § 229.303.

also require the disclosure of ESG information if among the "most significant factors" that make an offering "speculative" or "risky."[92] The SEC also has specialized disclosure obligations for conflict minerals in supply chains and for mine safety.[93]

Given the limited coverage of ESG issues in mandatory disclosures, it is ironic that investors prefer ESG information in mandatory filings like annual reports and proxy statements "because of their perceived reliability."[94] After all, mandated disclosures are "much more limited" in both their amount of information and their level of detail than are voluntary disclosures on the same topic.[95] Indeed, corporations report their ESG risks primarily in voluntary reports rather than in mandatory filings.[96] One study from the U.S. Government Accountability Office found that companies view their voluntary ESG disclosures as "complementary" to mandatory disclosures because the companies include more information in the former to appeal to ESG investors.[97] Commentators have identified several reasons why voluntary disclosures report more ESG information than mandatory disclosures: they have a wider audience of numerous stakeholders and not only investors;[98] the fear of litigation drives companies to limit certain statements (such as those about forward-looking information) or to make generic rather than clear and precise statements in their mandatory disclosures;[99] in their MD&A narratives, companies only need to report "known" risks that are "reasonably likely" to occur;[100] and companies "with

92. Virginia Harper Ho, *Nonfinancial Risk Disclosure and the Costs of Private Ordering*, 55 Am. Bus. L.J. 407, 426 (2018) (citing 17 C.F.R. § 229.503).
93. Ho & Park, *supra* note 57, at 291–92 (citing 15 U.S.C. § 78m, 17 C.F.R. § 229.104).
94. *Id.* at 263.
95. Fairfax, *Dynamic*, *supra* note 10, at 294 ("[W]hen corporations make disclosures about the same ESG topic in both their voluntary ESG report and in mandated filings, the ESG disclosure in the mandated filing is always much more limited than disclosure in voluntary documents."); *see* Ho & Park, *supra* note 57, at 267 ("The first challenge is that ESG information contained in annual reports and other mandatory filings is quite limited and varies widely, making meaningful comparison difficult.").
96. Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 Univ. Ill. L. Rev. 277, 288 (2022).
97. U.S. Gov't Accountability Off., GAO-20-530, Public Companies: Disclosure of Environmental, Social and Governance Factors and Options to Enhance Them 17–18 (July 2020), https://perma.cc/63GR-G5YX.
98. Ho, *supra* note 96, at 288. This does, however, have the potential downside that the investment information "is obscured" and thus more difficult to identify. *Id. See* Adam Sulkowski, *AI, ESG, and Law: Potential, Limitations, and Strategies Concerning Artificial Intelligence in Sustainability Reporting*, 55 Tex. Env't L.J. 40, 43 (2025) (writing that ESG reporting "remains a largely voluntary exercise, with companies choosing from a vast array of reporting standards depending on their stakeholders' perceived preferences").
99. Ho & Park, *supra* note 57, at 267.
100. Langevoort, *supra* note 9, at 992 ("The MD&A . . . has built-in limits, most importantly that the events, trends, and uncertainties have to be 'known' to management and 'reasonably likely' to occur.").

something to hide" engage in tactics to make the MD&A text denser and to redirect reader's attention.[101]

B. Should the Judge or Jury Decide? The Treatment of Form in Evaluating ESG Materiality

As discussed in the previous Section, crucial differences exist in the information and language for ESG versus financial disclosures as well as in voluntary versus mandatory ESG disclosures. Unfortunately, courts fail to recognize and adequately account for formal distinctions in their evaluation of materiality. Despite the Supreme Court's mandate that statements must be assessed in context, courts show little interest in form in its global sense as the type of document in which a disclosure appears. Though they display greater awareness of form in the local sense of sentence-level style, courts stretch concepts like puffery in ways that are inapt for ESG statements. Accordingly, their approach is ad hoc and arbitrary instead of principled.[102] And rather than generate predictable results, courts make incongruent and muddled rulings about whether particular statements are immaterial as a matter of law or potentially material and thus appropriate for the jury.[103]

1. Global Form: The Type of Disclosure Does (Not) Matter

While one article claims that judges find the form of ESG disclosures "important,"[104] the authors seem to mean form in the local sense of sentence-level style because another article by one of the same authors opines that courts

101. *Id.* at 992 ("Companies with something to hide appear to change their tone, use longer and more complex sentences, and seek to redirect reader attention away from the sensitive topic. There is some evidence that the obfuscation works."); *see* Williams & Nagy, *supra* note 85, at 1475 ("Nor have general materiality principles produced high-quality information, even pursuant to those Items in Regulation S-K where climate or ESG risks would be highly relevant, such as Items 105 (risk factors) or 303 (MD&A).").

102. Park, *supra* note 11, at 1165–66 ("Decisions in this area reveal the lack of a principled approach to determining whether an ESG statement is sufficiently specific to qualify as a misstatement."); *id.* at 1172 ("[T]he application of the [puffery] doctrine will depend on the arbitrary discretion of district court judges."); *id.* at 1178 ("The courts have largely taken an ad hoc approach in assessing the merits of ESG securities fraud lawsuits.").

103. Saad & Strauss, *supra* note 75, at 394 ("A number of recent securities cases highlight the emerging incongruities between established doctrine and the needs and expectations of contemporary investors who are increasingly concerned with corporate sustainability performance, and thus, ESG data."); *id.* at 412 ("While there is a strong case for considering ESG data as a material category of disclosure, the finer points concerning what types and forms of statements and data should be material and what should be properly classified as puffery remain muddled.").

104. Ajax & Strauss, *supra* note 52, at 706 ("[T]he form in which the sustainability disclosure is presented to the public . . . seems most important to judges.").

tend not to consider form in the global sense of the type of document in which a statement appears.[105] This is problematic because the materiality inquiry is "highly contextual,"[106] so the materiality of a particular statement "go[es] beyond narrow linguistic confines."[107] A statement's context includes not only factors about a particular company and sector but also the type of document in which a statement appears as well as the text surrounding that statement. The Supreme Court first suggested this in *Basic* when it wrote that "board resolutions, instructions to investment bankers, and actual negotiations between principals or their intermediaries may serve as indicia of interest" to investors.[108] Later, the Court in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund* confirmed the contextual importance of the type of document in which a statement appears when it contrasted "formal documents" like those mandated by law with comments made in "daily life."[109] Further, evaluating an individual statement also requires a consideration of its "surrounding text, including hedges, disclaimers, and apparently conflicting information."[110]

The context of the document in which a statement appears has heightened importance in ESG (as contrasted with financial) securities fraud litigation. This is because shareholders can base their lawsuits on mandatory disclosures, reports produced pursuant to framework organizations, or statements not governed by any law or framework; these forms vary widely in standards, wording, detail, completeness, target audiences, and quantity and type of information.[111] For example, in two recent cases involving corporate statements about safety and about commitments to sustainable practices, the plaintiffs alleged numerous false statements that appeared in a variety of documents: mandatory filings, sustainability reports, tweets, earnings calls, press releases, blogs, and YouTube videos.[112] In finding some of the statements immaterial, neither court considered

105. Saad & Strauss, *supra* note 75, at 396 ("Courts tend to place less emphasis on the form of disclosure, or type of document, where a[n] [ESG] statement appeared when deciding questions of materiality.").

106. Rose, *supra* note 7, at 93.

107. Sale & Langevoort, *supra* note 41, at 764.

108. Basic Inc. v. Levinson, 485 U.S. 224, 239 (1988).

109. 575 U.S. 175, 190 (2015) (writing that investors have different expectations about registration statements than about comments made in "daily life" because the former are "formal documents, filed with the SEC as a legal prerequisite for selling securities to the public"); *see* Rose, *supra* note 7, at 94 (writing that the reasonable investor pays attention to "the type of document [a statement] appears in").

110. *Id.* ("[A]n investor reads each statement within such a document, whether of fact or of opinion, in light of all its surrounding text, including hedges, disclaimers, and apparently conflicting information.").

111. *See supra* Part II(A).

112. Bhangal v. Haw. Elec. Indus., Inc., No. 23-cv-04332-JSC, 2024 WL 4505465, at *3–5 (N.D. Cal. Oct. 15, 2024) (analyzing, in case where plaintiffs alleged false statements regarding defendants' safety measures to reduce the risk of wildfires, statements made in ESG reports, sustainability reports, blog posts, press releases, YouTube videos, and Form 10-K filings);

the relevance of the type of document in which the statements appeared.[113] Ordering dismissal without considering the form of disclosure is especially worrisome since assessing the inferences a shareholder might draw from a statement is "peculiarly" for the trier of fact.[114]

To the extent that courts do consider the type of document in which an ESG statement appears, their treatment is unprincipled and unclear. Take as an example corporate codes of conduct or codes of ethics, which investors seemingly find material because they evaluate them to determine a company's commitment to ESG.[115] Courts often dismiss securities fraud claims based on these codes, however, because for some courts "a company's code of ethics is viewed as aspirational rather than a statement as to the actual conduct of the company and its employees."[116] Not all courts find these codes to be per se immaterial, though, with some ruling that a corporate code is material depending on context.[117] And in one lawsuit based on corporate bribery schemes, the judge characterized the Code of Ethics as "a generalized, aspirational statement" of expectations but found that its Code of Conduct was not immaterial as a matter of law since it contained specific statements about bribes.[118]

2. Local Form: The Unprincipled and Inconsistent Analysis of Individual Statements

In the local sense of form as the style of an individual statement, courts seem to have a greater recognition that the form of ESG statements matters. Judges parse the statements in ESG disclosures carefully,[119] analyzing wording, syntax, tone, tense, euphemisms, and hyperbole as part of a motion to dismiss.[120]

Fanucchi v. Enviva Inc., No. DKC 22-2844, 2024 WL 3302564, at *5–12 (D. Md. July 3, 2024) (analyzing, in case alleging false statements about defendants' sustainable practices, statements made in earnings calls, tweets, press releases, and the SOX certifications attached to Form 10-K filings).

113. *Bhangal*, 2024 WL 4505465, at *12–13; *Fanucchi*, 2024 WL 3302564, at *11–12.

114. TSC Indus. v. Northway, Inc., 426 U.S. 438, 450 (1976) (calling "assessments" about inferences that a reasonable investor would draw from a fact's context "peculiarly ones for the trier of fact.").

115. Thomas Lee Hazen, *Corporate and Securities Law Impact on Social Responsibility and Corporate Purpose*, 62 B.C. L. Rev. 851, 898 (2021) [hereinafter Hazen, *Corporate*].

116. *Id.* at 900.

117. Mark, *supra* note 74, at 616–17 (citing Singh v. Cigna Corp., 918 F.3d 57, 63 (2d Cir. 2019); *In re* Signet Jewelers Ltd. Sec. Litig., 389 F. Supp. 3d 221, 229–31 (S.D.N.Y. 2019)).

118. *In re* Tenaris S.A. Sec. Litig., 493 F. Supp. 3d 143, 158–69 (E.D.N.Y. 2020).

119. David Hackett et al., *Growing ESG Risks: The Rise of Litigation*, 50 Env't L. Rep. 10849, 10855 (2020) (citations omitted) (describing how courts in two ESG securities fraud cases "parsed the cited public statements").

120. Langevoort, *supra* note 9, at 984 (writing that "language indeed matters," including "[w]ording, syntax, hyperbole, euphemisms, and tone"); Park, *supra* note 11, at 1178 ("[Courts] have often unduly focused on the wording of corporate statements in screening which cases may proceed past a motion to dismiss."); Saad & Strauss, *supra* note 75, at 423 ("Trends in

Courts tend to allow juries to weigh the materiality of ESG statements that are "concrete, repetitive, and fact-based," but they will dismiss as immaterial those that use "'vague' and 'aspirational' language."[121] The materiality determination of ESG statements thus hinges on the level of detail, on whether a particular statement is general or specific.[122]

Their analyses and resulting rulings nevertheless suffer because courts stretch laws developed when securities fraud was based on mandatory financial disclosures, such as judicial safety valves like puffery or the PSLRA, to cover ESG statements that are non-financial and predominantly voluntary.[123] Puffery may be the more problematic concept.[124] Commentators seem to agree on the *effect* produced by a puffing statement: a reasonable investor does not take it at face value by relying on it, so puffery is per se immaterial.[125] What puffery *is*, however, remains a legal chimera of multiple definitions.[126] Puffery includes

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the courts' treatment of securities claims based on sustainability disclosures demonstrate that . . . the disclosure's tense, specificity, and incorporation of cautionary language are part of the assessment for actionability.").

121. *See* Ajax & Strauss, *supra* note 52, at 706; *see* Eitan Arom, Note, *Hidden Value Injury*, 121 Colum. L. Rev. 937, 961 (2021) (writing that courts dismiss cases where the sustainability disclosure is "too general, too aspirational, and too forward-looking" but that statements with "measurable facts" are material and "can survive motions to dismiss").

122. Saad & Strauss, *supra* note 75, at 417 (calling an ESG statement's level of generality "the most decisive factor in a court's materiality determination").

123. *See* Jeff Todd, *The (De)Mystification of Environmental Injustice: A Dramatistic Analysis of Law*, 93 Temp. L. Rev. 597, 603 (2021) (arguing that, when existing legal concepts "are stretched to address new situations," they may become "so abstract that their rationales no longer relate" to the reality of the new situation, which can lead to injustice); *see also* Padfield, *supra* note 49, at 146–47 (citing Basic v. Levinson, 485 U.S. 224, 245 (1988)) (claiming that courts "began to look for various 'safety valves'" like puffery to dismiss cases following the increase of potentially frivolous class action securities fraud lawsuits in the wake of the Supreme Court's 1988 *Basic* decision); *id.* at 157 (writing that the PSLRA was enacted in 1995 and "imposed higher procedural hurdles on filing for federal securities fraud class actions").

124. *See* Ann M. Lipton, *Reviving Reliance*, 86 Fordham L. Rev. 91, 114 (2017) ("[C]laims based on ESG statements, such as ethics codes and risk mitigation strategies, are particularly attractive targets for dismissal on puffery grounds.").

125. *See, e.g.*, Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 Emory L.J. 83, 91, 119 (2002) ("Puffery posits that vague statements of this ilk do not play a part in the investment decisions of reasonable investors" and that they "are per se immaterial."); Christine Hurt, *Socially Acceptable Securities Fraud*, 49 J. Corp. L. 785, 797 (2024) (writing that puffing statements are "not to be taken literally"); Lipton, *supra* note 124, at 112 (calling puffery "a species of immaterial statement . . . that investors are presumed to simply disregard").

126. Hurt, *supra* note 125, at 798 ("Unfortunately, not every court uses the same criteria for what is 'puffery,' leading to a patchwork of inconsistent cases and a definition that may be result-oriented.").

general or vague statements lacking in facts;[127] rosy, optimistic, and aspirational claims;[128] and hyperbole or otherwise exaggerated expressions.[129]

Because of this breadth, courts might over-rely on puffery to dismiss potentially meritorious ESG securities fraud cases.[130] For example, one commentator writing before the rise of ESG investing found that courts in securities fraud cases "almost always" find that future-looking statements are puffery since these disclosures do not affect investors.[131] Many corporate disclosures about ESG and climate-change, however, project into the future or discuss long-term commitments like pledges for net-zero carbon emissions.[132] Accordingly, two scholars argue that even "forward-looking statements, commitments, aspirations, and intentions in the ESG context" should not be readily dismissed as immaterial, such as when they "incorporate specific, measurable targets" or "imply a company is taking actual steps in the present."[133]

In addition, the lack of a single definition and clear criteria for puffery leads courts to make inconsistent rulings.[134] Consider the example of "Brazil's worst environmental disaster," the 2015 collapse of the Fundão dam, owned by a joint venture between two global mining companies, Vale and BHP Billiton.[135] Shareholders filed separate securities fraud lawsuits against each company, alleging that the companies had made misleading statements about

127. *See, e.g.*, Bainbridge & Gulati, *supra* note 125, at 91 ("vague statements"); Hurt, *supra* note 125, at 797 ("Generally, puffing statements do not contain many facts and instead focus on general adjectives to describe operations and events."); *id.* at 797 ("generic statements").

128. *See, e.g.*, Bainbridge & Gulati, *supra* note 125, at 91 (2002) ("statements of optimism"); Hazen, *Social*, *supra* note 36, at 759 ("aspirational generalizations"); Hurt, *supra* note 125, at 797 ("optimistic and rosy").

129. *See, e.g.*, Sheldon Gardner & Robert Kuehl, *Acquiring an Historical Understanding of Duties to Disclose, Fraud, and Warranties*, 104 Com. L.J. 168, 182 (1999) ("Puffery is a mild form of hyperbole, an exaggerated and subjective statement made by a seller giving his 'pitch.'"); Peter H. Huang, *Moody Investing and the Supreme Court: Rethinking the Materiality of Information and the Reasonableness of Investors*, 13 Sup. Ct. Econ. Rev. 99, 113 (2005) ("hyperbolic").

130. Haeberle, *supra* note 67, at 673 ("Such overuse of puffery doctrine in the hands of the judiciary is dangerous.").

131. David A. Hoffman, *The Best Puffery Article Ever*, 91 Iowa L. Rev. 1395, 1411 (2006).

132. Ballan & Czarnezki, *supra* note 5, at 598 (recognizing that some "ESG and climate-related disclosures . . . contain future projections and long-term commitments, such as net-zero pledges").

133. Saad & Strauss, *supra* note 75, at 397, 427.

134. Ajax & Strauss, *supra* note 52, at 723 (criticizing cases for failing to "offer a clear sense of what constitutes a 'predictive' or 'affirmative' representation as opposed to a mere 'optimistic,' 'aspirational,' or 'puffing' statement, let alone what to do with a statement that includes both 'predictive' and 'puffing' components"); Park, *supra* note 11, at 1172 ("There is no precise test for determining when a representation avoids classification as puffery."); Lipton, *supra* note 124, at 113 (noting that puffery is heavily criticized by commentators "partly for the notorious inconsistency with which it is applied").

135. Langevoort, *supra* note 9, at 972.

their commitments to safety and sustainability.[136] Despite the same underlying facts and the similarity of the disclosures made by each company, the judges reached contrary findings: BHP Billiton's repeated statements about safety raised a materiality issue for the jury,[137] while Vale's aspirational and general statements about safety were puffery so that the judge dismissed the claims as to those statements.[138]

Another source of confusion is whether puffery applies only to an individual statement or can be broader, even encompassing entire documents. Multiple factors suggest that puffery pertains only to a single statement, such as one of its definitions as a figurative expression like hyperbole.[139] Moreover, plaintiffs often list multiple statements in their complaint, and courts examine each of them in turn.[140] This sometimes results in claims being dismissed as to particular statements but not others.[141] Yet courts have considered an entire document to be puffery, as with the codes of conduct discussed above.[142] Plus, courts sometimes rule that general statements which in isolation would be puffing can become material through repetition. In the *In re BHP Billiton Ltd. Securities Litigation* case already discussed, the court recognized the generality of the defendant's statements about safety but noted how the defendant made those statements "over and over and over," which suggested the defendant's awareness that investors care about these risks.[143]

Finally, even if judicial doctrines like puffery disappeared, the analysis and results in many cases might remain unchanged because of the PSLRA's safe harbor. The PSLRA immunizes a company's forward-oriented statements from liability, assuming that those statements are "accompanied by adequate cautionary

136. *In re* BHP Billiton Ltd. Sec. Litig., 276 F. Supp. 3d 65 (S.D.N.Y. 2017); *In re* Vale S.A. Sec. Litig., No. 1:15-cv-9539-GHW, 2017 WL 1102666 (S.D.N.Y. Mar. 23, 2017).

137. *In re BHP Billiton*, 276 F. Supp. 3d at 80 (concluding that "[b]y touting its commitment to safety to such a degree, BHP put the topic 'at issue'").

138. *In re Vale*, 2017 WL 1102666, at *22 (concluding that the statements were "aspirational generalizations" that were "too general to cause a reasonable investor to rely upon them" and so inactionable puffery) (citation omitted).

139. *See, e.g.*, Gardner & Kuehl, *supra* note 129, at 182; *see also* Claudia Claridge, Hyperbole in English: A Corpus-Based Study of Exaggeration 5 (2010) (explaining that hyperbole is typically limited to a single word, phrase, or sentence).

140. Langevoort, *supra* note 9, at 981 ("Complaints usually offer scores of individual statements said to have deceived, which courts will individually evaluate in response to defendants' motion to dismiss denying that any of the omissions were fraudulent.").

141. *See, e.g.*, San Antonio Fire & Police Pension Fund v. Dentsply Sirona Inc., 732 F. Supp. 3d 300, 315–16 (S.D.N.Y. 2024) (granting dismissal in part and denying in part after analyzing approximately thirty paragraphs listed in defendants' brief, including several related to supply chain management and ESG commitments, and finding some but not all to be opinion or puffery).

142. *See* Andropolis v. Red Robin Gourmet Burgers, Inc., 505 F. Supp. 2d 662, 685–86 (D. Colo. 2007) (finding that a company's ethics code "is inherently aspirational" so not actionable in securities fraud litigation).

143. 276 F. Supp. 3d 65, 80 (S.D.N.Y. 2017).

language that identifies important facts that could cause actual results to differ from those in the statement."[144] Commentators recognize that the PSLRA safe harbors overlap with puffery as well as the "bespeaks caution" doctrine.[145] For example, a statement need not have cautionary language to qualify for the safe-harbor: forward-looking statements that are "immaterial" are also immune.[146] This rationale may direct courts right back to puffery (as aspirational rather than hyperbolic) and thus lead to the same result as if there were no statutory safe harbor.[147] On the other hand, the PSLRA safe harbor may offer plaintiffs a lower materiality bar than puffery since some courts have found that it did not immunize the defendant's ESG statements.[148]

III. The Rhetoric of Form

As shown in the previous Part, the legal literature reveals that the forms of corporate ESG disclosures differ from financial disclosures, that courts often fail to account for these formal differences when evaluating the materiality of ESG disclosures, and that the lack of principles for evaluating ESG disclosures leads to inconsistent rulings on motions to dismiss. Correcting this situation so that judges can better distinguish between material and immaterial ESG statements necessitates both a theoretical grounding and usable principles for private securities fraud law.[149] Rhetoricians have written extensively on the psychology and philosophy of form and have proffered methods for analyzing discursive

144. Ballan & Czarnezki, *supra* note 5, at 598 (citing 15 U.S.C. §§ 78u-5(c)(1), 78u-5(i)(1)).

145. Mark, *supra* note 74, at 555–56 ("The statutory harbor continues to complement the similar and sometimes overlapping common law 'bespeaks caution' doctrine. Under the doctrine alleged misrepresentations are deemed immaterial as a matter of law if no reasonable investor could consider them important in light of adequate cautionary language, and thus if a statement is puffery the doctrine likely applies. Forward-looking statements often are aspirational and if they are deemed to be puffery they will be regarded as immaterial and likewise will be protected under the statutory harbor.").

146. 15 U.S.C. § 78u-5(c)(1)(A)(ii); 17 U.S.C. § 77z-2(c)(1)(A)(ii).

147. *See* Saad & Strauss, *supra* note 75, at 396 ("Courts are more inclined to find past and present-tense statements to be actionable while they dismiss forward-looking statements and aspirations as exempt under the PSLRA safe harbor provision *or* as inactionable puffery.") (emphasis added).

148. *See, e.g.*, *In re* BP P.L.C. Sec. Litig., 843 F. Supp. 2d 712, 775–76 (S.D. Tex. 2012) (finding that statements regarding the safety of defendant's offshore oil rigs were material and not protected by the PSLRA safe harbor); *In re* Vale S.A. Sec. Litig., No. 19 CV 526 (RJD) (SJB), 2020 WL 2610979, at *16 (E.D.N.Y. May 20, 2020) (declining to find that statements about safety related to the collapse of a dam at Coorego do Feijao, Brazil were protected by the PSLRA safe harbor).

149. Saad & Strauss, *supra* note 75, at 403 ("In securities fraud litigation, public and private plaintiffs seeking to recover must prove omission or misrepresentation of 'material' facts in order to establish a claim. Enforcing a mandatory disclosure regime requires a theory and mechanism for discerning between material and immaterial information.").

form,[150] so the rhetoric of form could provide the means to enable courts to address the materiality of ESG disclosures. Accordingly, this Part opens with the theory of rhetoric as identification and the role of form in persuasion, including differentiating the appeal of form from the appeal of information. This Part then discusses the five aspects of form as a method for textual analysis.

A. Rhetorical Identification and the Role of Form

Unlike animals, humans employ symbols—language—to "ascribe meaning to things, to each other, and our world."[151] Through the resources afforded by language, individuals demonstrate how their interests align with the interests of others.[152] This identification of shared interests is the essence of rhetoric.[153] Individuals are not identical to each other, yet "insofar as their interests are joined," one person identifies with another.[154] This identification can be in the classical sense of rhetoric as the art of persuasion: a conscious and deliberate means to an end, such as when companies advertise their products by depicting individuals who share characteristics with the target audience.[155] Identification is a broader concept than classical rhetoric, however, because it can also result from "unconscious persuasion."[156] Whether deliberate or unconscious, and whether framed

150. *See, e.g.*, Kenneth Burke, Counter-Statement 29–44 (3d ed. 1968) [hereinafter CS] (establishing the psychology of form); *id.* at 123–49 (explaining the five aspects of form); Kenneth Burke, The Philosophy of Literary Form: Studies in Symbolic Action (Univ. Cal. Press, 3d ed. 1973) (1941) [hereinafter PLF] (articulating a philosophy of form and discussing methods for textual analysis); Foss, *supra* note 13, at 65 (listing form as a "critical method[]" for rhetorical analysis). This article follows the practice of Burke scholars by using abbreviations for his book titles for subsequent citations. *See* William H. Rueckert, Kenneth Burke and the Drama of Human Relations vii–viii (2d ed. 1982).

151. Jeff Todd, *A Rhetoric of Sustainable Development*, 42 Pace L. Rev. 417, 422–23 (2022) [hereinafter Todd, *Rhetoric*] (citing Kenneth Burke, Language as Symbolic Action: Essays on Life, Literature, and Method 16 (1966) [hereinafter LASA]).

152. Kenneth Burke, A Rhetoric of Motives 285 (Cal. ed. 1969) (1950) [hereinafter RM]; *see* Courtney Megan Cahill, *"If Sex Offenders Can Marry, Then Why Not Gays and Lesbians?": An Essay on the Progressive Comparative Argument*, 55 Buff. L. Rev. 777, 800–01 (2007) (quoting RM, *supra* note 152, at 23) ("[R]hetorical imitation is the way in which speakers use their magic to enable group cooperation, build social networks, and even 'assist[ ] the survival of cultures by promoting social cohesion.'").

153. *See* David Blakesley, The Elements of Dramatism 42 (2002) ("Identification, or an alignment of interests and motive, is the aim of rhetoric, with consubstantiality (shared substance) being its ideal."); RM, *supra* note 152, at 21 ("To identify A with B is to make A 'consubstantial' with B.").

154. RM, *supra* note 152, at 20.

155. Sonja K. Foss et al., Contemporary Perspectives on Rhetoric 190–91 (2014); *see* RM, *supra* note 152, at 46 (linking identification with Aristotle's concept of rhetoric as the art of persuasion).

156. Although Burke writes that the meanings of persuasion and identification cannot be kept apart, he nevertheless suggests that identification is a broader concept because it includes the unconscious. *Compare* RM, *supra* note 152, at 46 ("So, there is no chance of our keeping

as identification or persuasion, the effective use of language is essential: "You persuade a man only insofar as you can talk his language by speech, gesture, tonality, order, image, attitude, idea, *identifying* your ways with his."[157]

Because humans are "the symbol-using (symbol-making, symbol-misusing) animal,"[158] we respond not only to the content of a text but also to the symbols that create that text.[159] The form of a text thus has its own appeal so that an audience might identify with that separate and apart from identifying with the text's underlying message.[160] Consequently, determining whether and how a text persuades requires an understanding of how form produces effects in the audience.[161] Form is "the psychology of the audience" because it "is the creation of an appetite in the mind of the auditor, and the adequate satisfying of that appetite."[162] This definition aligns with the concept of rhetoric as identification because form has a rhetorical appeal to which an audience responds.[163] The form of a given discourse generates audience interest through "certain processes or arrangements" and then gratifies the audience's expectations through its sequences.[164] Formal appeal deals not with how the audience responds to the "information or material" but instead with the extent to which the audience

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apart the meanings of persuasion, identification ('consubstantiality') and communication (the nature of rhetoric as 'addressed')."), *with* Kenneth Burke, *Rhetoric—Old and New*, 5 J. Gen. Educ. 202, 203 (1951) ("The key term for the old rhetoric was 'persuasion' and its stress was upon deliberate design. The key term for the 'new' rhetoric would be 'identification,' which can include a partially 'unconscious' factor in appeal.").

157. RM, *supra* note 152, at 55; *see id.* at 41 (claiming that "the basic function of rhetoric" is "the use of words by human agents to form attitudes or to induce actions in other human agents"); *see also* Cahill, *supra* note 152, at 800 ("Reduced to its simplest terms, identification assumes the following: the more I 'speak your language,' the more likely it is that you will identify with me, and, perhaps, do what I want.").

158. LASA, *supra* note 151, at 16 (emphasis omitted).

159. *See* RM, *supra* note 152, at 43 (writing that rhetoric "is rooted in an essential function of language itself," which is "the use of language as a symbolic means of inducing cooperation in beings that by nature respond to symbols.") (emphasis omitted).

160. Blakesley, *supra* note 153, at 49 (writing that form has "a rhetorical dimension, an appeal"); Rueckert, *supra* note 150, at 24 (claiming that "[a]ny work, down to its smallest detail, can be analyzed for its formal appeal"); Tilly Warnock, Kenneth Burke's Rhetoric of Identification: Lessons in Reading, Writing, and Living 66 (2024) (recognizing the possibility of a purely "*formal identification*" where "we identify with forms").

161. CS, *supra* note 150, at 123 (writing that form is "concerned with *how* effects are produced"); *see* Rueckert, *supra* note 150, at 24 (claiming that an analysis of form "tells one both what and how effects are produced").

162. CS, *supra* note 150, at 31; *see* Ross Wolin, The Rhetorical Imagination of Kenneth Burke 39 (2001) ("Burke argues that form is not a structural feature of the artwork, but a psychological state combining the artwork, artist, and viewer.").

163. Blakesley, *supra* note 153, at 15 (claiming that "the devices of form" are "a type of rhetorical appeal, the arousal and gratification of desire."); Elizabeth Weiser, Burke, War, Words: Rhetoricizing Dramatism 108 (2008) (writing that Burke's rhetoric examines "the audience response to a work's form").

164. CS, *supra* note 150, at 46, 124.

recognizes how that information is arranged.[165] Moreover, form can be intrinsic to the text and satisfy audience expectations "without being functionally related to the context."[166]

By contrast, the psychology of information relates to the content of a work.[167] When the audience is ignorant of the subject matter, the author may appeal to the audience more through the revelation of information than through the words used to convey that information.[168] "In so far as the details in a work are offered, not for their bearing upon the business of molding and meeting the reader's expectations, but because these details are interesting in themselves, the appeal of form retreats behind the appeal of information."[169] The appeals of form and of information are not mutually exclusive but instead operate on a sliding scale based on an inverse relationship, where a greater emphasis on informational delivery means less emphasis on formal appeal.[170] Form and information "coexist together in all acts of communication," but the emphasis depends upon factors like the discourse community and the cultural context for the work, so that sometimes form predominates while other times it is secondary to the information conveyed.[171]

Accordingly, all texts—including information-focused texts—have form, through which the writer or speaker attempts to persuade.[172] A speaker or writer

165. Jeff Pruchnic, *The Priority of Form: Kenneth Burke and the Rediscovery of Affect and Rhetoric*, *in* The Palgrave Handbook of Affect Studies and Textual Criticism 371, 379 (Donald R. Wehrs & Thomas Blake eds., 2017) ("'[F]orm' is that name we have given to arrangements of information or material that are recognizable and reproducible, but have a clear degree of internal flexibility.").

166. CS, *supra* note 150, at 34; *see* Pruchnic, *supra* note 165, at 374 ("[T]here is a 'form' to affects that remains despite the 'content . . . .'").

167. CS, *supra* note 150, at 32–33.

168. *Id.* at 145–46 (explaining that the presence of information means that the writer is depending upon the reader's ignorance to appeal to him or her and that the observations in the text are more important than the words used).

169. *Id.* at 144.

170. *Id.* at 33 ("The hypertrophy of the psychology of information is accompanied by the corresponding atrophy of the psychology of form."); *see* Gretchen K. G. Underwood, *From Form to Function: In Defense of an Internal Use of the Pentad*, 7 KB Journal: J. Kenneth Burke Soc'y (2011), https://perma.cc/5P2K-R73R ("Increased information leads to a lack of form because there is no longer a need to crave when you know that you will be fed . . . .").

171. Pruchnic, *supra* note 165, at 380 (explaining that, "within different discourse communities" and "in different cultural contexts," "the form may take a greater or lesser degree of priority over the 'content' being presented within its structure" and "either form is most prominent or form takes a secondary position to the content or 'information' being communicated—even as they tend to coexist together in all acts of communication"); *see* Warnock, *supra* note 160, at 57 (writing that both form and information are "probable means of persuasion in given contexts").

172. Kirsten K. Davis, *Legal Forms as Rhetorical Transaction: Competency in the Context of Information and Efficiency*, 79 UMKC L. Rev. 667, 694 (2012) (noting the relationship between form and information); *id.* at 695 (claiming that, even when information "dominates" a work, a work's form "is essential to its validity as well"); *see* LASA, *supra* note 151, at 45 (writing that "even the most unemotional scientific nomenclatures" has a "necessarily suasive nature") (emphasis omitted).

who desires to persuade the audience to accept the information often does so through formal appeals, "by inducing the auditor to participate in the form, as a 'universal' locus of appeal."[173] Formal patterns "awaken an attitude of collaborative expectancy" in the audience, so form "invites participation." [174] This can be a powerful means of persuasion "in cases where a decision is still to be reached" because the audience, in yielding to form, prepares to assent to the matter associated with that form.[175] In short, form can lead to persuasion since a text that "gratifies the needs it creates" makes people more likely to accept the propositional content.[176]

The recognition of and participation in form does not mean, however, that the audience will be persuaded by the discourse.[177] Form is separable from the proposition or argument put forward in a work since form is merely "the shape in which the idea is presented."[178] Form can thus invite audience participation "regardless of whether one agrees or disagrees with, is ambivalent about, or is indifferent to the claim."[179] The auditor can therefore "yield[] to the formal development" of a text without agreeing to the proposition being presented—or even if opposed to it.[180] After all, the opponent who reads a legal brief can "make allowances for the planned disproportion" and thus better understand

173. RM, *supra* note 152, at 59; *see* Greig E. Henderson, *Aesthetic and Practical Frames of Reference: Burke, Marx, and the Rhetoric of Social Change*, *in* Extensions of the Burkeian System 173, 177 (James W. Chesebro ed., 1993) (claiming that, through form, "a writer necessarily manipulates readers' ideologies in order to arouse, shape, and control their desires").

174. RM, *supra* note 152, at 58.

175. *Id.* (writing that "a yielding to the form prepares for assent to the matter identified with it" and that "this attitude of assent may then be transferred to the matter which happens to be associated with the form").

176. Blakesley, *supra* note 153, at 56; *see* Foss et al., *supra* note 155, at 193 (writing that the audience can "yield to the symmetry of the form" and thus "transfer[] the attitude of assent to the content of the argument").

177. Don J. Kraemer, *Between Motion and Action: The Dialectical Role of Affective Identification in Kenneth Burke*, 16 Advances in the History of Rhetoric 145, 152–53 (2013) (citing RM, *supra* note 152, at 58) (writing that the audience's surrender to form "is no guarantee of persuasion"); *see* Arabella Lyon, Intentions: Negotiated, Contested, and Ignored 88 (1998) ("[F]orm exists as a shared situation and experience and so innately has *potential* for a common meaning and effect . . . .") (emphasis added).

178. Robert L. Heath, Realism and Relativism: A Perspective on Kenneth Burke 68 (1986).

179. Kraemer, *supra* note 177, at 152.

180. RM, *supra* note 152, at 58 ("Formally, you will find yourself swinging along with the succession of antitheses, even though you may not agree with the proposition that is being presented in this form. Or it may even be an opponent's proposition which you resent—yet for the duration of the statement itself you might 'help him out' to the extent of yielding to the formal development, surrendering to its symmetry as such. Of course, the more violent your original resistance to the proposition, the weaker will be your degree of 'surrender' by 'collaborating' with the form.").

"the true proportions of the situation."[181] As a result, the audience may acknowledge the form of a message without accepting the message itself, so statements with which an audience identifies only on a "purely formal" level will fail to persuade.[182]

B. Analyzing Discourse: The Five Aspects of Form

Statements acquire meaning through "the particular contexts" in which they occur within a given text.[183] The critic's first step is therefore to understand the "objective structure" of the text and how that structure contributes to the text's function, an approach that integrates form and content.[184] The five aspects of form offer the analytical means for this textual criticism.[185] Through them, one can understand the dynamic of identification between the author or speaker and the audience.[186] The five aspects are syllogistic progression, qualitative progression, repetitive, conventional, and minor or incidental.[187] These aspects "necessarily overlap" and "merge into one another,"[188] with the potential to "produce multiple effects,"[189] but one type will nevertheless dominate for a given text.[190]

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181. Kenneth Burke, Attitudes Toward History 249–50 (3d ed. 1984) ("[A lawyer's] tactics can assist us to understand the world only insofar as we know how to discount them by considering the *interests* behind the caricature. We understand the true proportions of a situation not on the basis of the work itself, but by making allowances for the planned disproportion.").
182. *See* Kraemer, *supra* note 177, at 152 (citing RM, *supra* note 152, at 58) ("Yet identification with words and syntax (let alone with images) can be purely formal."); *see also* Foss et al., *supra* note 155, at 193 ("Identification or persuasion results from an interaction of form *and* content.") (emphasis added).
183. PLF, *supra* note 150, at 89 ("To know what 'shoe, or house, or bridge' means, you don't begin with a 'symbolist dictionary' already written in advance. You must, by inductive inspection of a given work, discover the particular contexts in which the shoe, house, or bridge occurs.").
184. *Id.* at 90 (understanding a text's structure requires thinking about its function, about how it "is designed to 'do something,'" and this emphasis "promptly integrates considerations of 'form' and 'content'"); *see id.* at 70 ("The first step . . . requires us to get our equations inductively, by tracing down the interrelationships as revealed by the objective structure of the book itself."); *id.* at 101 ("To guide our observations about the form itself, we seek to discover the *functions* which the structure serves.").
185. CS, *supra* note 150, at 129.
186. Blakesley, *supra* note 153, at 59 ("All four types of form, as well as the many minor forms that Burke also catalogues, play on an interactive dynamic of identification between the writer and the audience.").
187. CS, *supra* note 150, at 124–28.
188. *Id.* at 128–29.
189. Rueckert, *supra* note 150, at 23 (noting that the types of form "are necessarily interrelated and act, not in isolation, but more often simultaneously to produce multiple effects"); *see* CS, *supra* note 150, at 129 (noting that the various formal principles can also conflict with one another).
190. Davis, *supra* note 172, at 701.

The two progressive forms deal with the order of a text, "with the appropriateness of 'what follows what' in a given work."[191] While the sequence leads "the audience to anticipate or desire certain developments,"[192] progressive forms also rely more upon information than on formal appeals like structure and word choice.[193] Because they focus on the information contained therein, these forms attempt to persuade the audience to accept the underlying content, which they do through form in the "larger sense" as the sequence of a text as a whole.[194]

Syllogistic progression is "the form of a perfectly conducted argument, advancing step by step."[195] The term syllogism comes from deductive logic and involves two premises that lead the audience toward drawing a particular conclusion.[196] Accordingly, this form is "syllogistic because, given certain things, certain things must follow, the premises forcing the conclusion." [197] While the form of syllogistic progression is important, "the information within the type dominates its soundness or overall truthfulness."[198] A syllogistic progression directs the attention of the audience and then appeases its desire for clarification, elaboration, and conclusions.[199] A legal example of a work with syllogistic progression is a brief, because in these documents, "the key to a 'perfectly constructed argument' is a combination of syllogistic progression and relevant information—the relevant facts and authority combined in a way that advances the argument step by step."[200]

The other progressive form, qualitative progression, is "subtler" than syllogistic progression,[201] although its use may be just as common.[202] Rather than rely on prior information or syllogistic proof, the text establishes one quality to prepare the audience for the next quality in the sequence,[203] which puts the audience in a "state of mind which another state of mind can appropriately

191. Rueckert, *supra* note 150, at 21.
192. Kenneth Burke, *Dramatic Form—And: Tracking Down Implications*, 10 Tulane Drama Rev. 54, 54 (1966).
193. Davis, *supra* note 172, at 695–96, 702–03.
194. *See* RM, *supra* note 152, at 69 (explaining "*persuasive* form in the larger sense, formulated as a *progression* of steps" with the example of "the set stages of an oration") (emphasis added).
195. CS, *supra* note 150, at 124.
196. Blakesley, *supra* note 153, at 56; Foss et al., *supra* note 155, at 194.
197. CS, *supra* note 150, at 124; *see* Rueckert, *supra* note 150, at 21 (writing that syllogistic progression involves argument "or a predictable cause and effect chain reaction").
198. Davis, *supra* note 172, at 695; *see* Blakesley, *supra* note 153, at 56 ("Syllogistic form is the generative principle behind works that also rely on the appeal of information . . . .").
199. Blakesley, *supra* note 153, at 57.
200. Davis, *supra* note 172, at 695–96.
201. CS, *supra* note 150, at 124–25.
202. Blakesley, *supra* note 153, at 57.
203. *Id.*; *see* Patsy Callaghan, *Myth as a Site of Ecocritical Inquiry: Disrupting Anthropocentrism*, 22 Interdisc. Stud. Lit. & Env't 80, 88 (2015) (calling qualitative progression "evident not in the linear unfolding of plot but in the way that stories evolve from one state of mind or emotional climate to another, one qualitative environment preparing us for the next").

follow."[204] Qualitative progression has validity if the qualities established in different parts of the text bear a relationship to each other.[205] Like syllogistic progression, qualitative progression relies more on information than structure, so this form succeeds "only if the information is qualitatively related in such a way that the audience can understand the pattern established by the qualities of the document."[206] An example of a legal text associated with qualitative progression is a transactional document, which does not contain an argument but instead relies "on a progression of information, such as definitions preceding promises and promises preceding housekeeping or administrative provisions," and "that progression is based on the quality of the information contained in each section."[207]

Repetitive form is "the consistent maintaining of a principle under new guises" and "the restatement of the same thing in different ways."[208] Qualitative progression involves the presence of one quality that prepares the audience for the presence of another, different quality.[209] By contrast, with repetitive form, the same idea is restated in different ways so that the "work embodies a fixed character or identity and manifests internal consistency."[210] Repetitive form "has its appeal in the familiarity of the underlying pattern," which the audience learns and comes to expect elsewhere in the text.[211] Repetitive form is therefore persuasive because, by varying the details, the author leads the audience "to feel more or less consciously the principle underlying them."[212] Like the progressive forms, repetitive form stresses the importance of the information contained within the text.[213] One example of a legal document that employs repetitive form is an appellate brief. Syllogistic progression may be the dominant form of a legal brief, but the writer also "advance[s] a theme" by using different phrasings of the legally significant facts throughout the brief. [214]

While the other types of form can be effective even if the audience does not recognize their formality, conventional form involves "the appeal of form *as*

204. CS, *supra* note 150, at 124–25; *see* PLF, *supra* note 150, at 78 (characterizing the entries of a "new quality" in a text as "critical points" and "watershed moments").
205. Davis, *supra* note 172, at 696.
206. *Id.*
207. *Id.* at 696–97.
208. CS, *supra* note 150, at 125.
209. Foss et al., *supra* note 155, at 194–95 (writing that the "grotesque seriousness of a murder scene . . . prepares the audience for the grotesque buffoonery of the scene that follows," so while "the action differs, the quality characterizing the scenes is the same").
210. *Id.* at 194.
211. Blakesley, *supra* note 153, at 58.
212. CS, *supra* note 150, at 125; *see* RM, *supra* note 152, at 69 (calling amplification by extension "the saying of something in various ways," which "increases in persuasiveness by the sheer accumulation").
213. Davis, *supra* note 172, at 703.
214. *Id.* at 698.

form."[215] And while progressive and repetitive forms arise during reading, conventional forms pre-exist an individual work, such as the standards for genres like classical tragedy or an Elizabethan sonnet.[216] The audience therefore "has certain categorical expectations" that exist prior to encountering the individual tragedy or sonnet, and the author must abide by the established standards to meet those expectations.[217] Because conventional form is the appeal of "form as form,"[218] the information contained in the text is secondary to the formal structure.[219] "[I]n some legal documents, conventionality is dominant," such as "where the structure of and, perhaps most of the information within, the document itself have been dictated by statute, court rule, or custom."[220] For a document like a fill-in-the-blank form provided by a court or agency, the structure of the information is more important than the information itself since "the specific information that is placed in the form must fit the conventional pattern."[221]

The final category is minor or incidental forms, which "are aspects of a work 'which can be discussed as formal events in themselves.'"[222] Rather than provide the structure for a complete text, they serve as parts of the other, more complex types of form.[223] In fact, they can be as small as a sentence or an "individual figure of speech,"[224] such as well-known rhetorical figures and tropes like reversal, expansion, and metaphor.[225] While the other four aspects envision form in a broad sense of the entire text, figures of speech move away from form and

215. CS, *supra* note 150, at 126.

216. *Id.* at 127; *see* Heath, *supra* note 181, at 68 ("[P]rogressive and repetitive rely upon expectations satisfied through the development of an idea" while "[c]onventional form is based on expectations acquired, not by encountering the development of ideas, but through experience with other literary and rhetorical works.").

217. CS, *supra* note 150, at 139; *see* Rueckert, *supra* note 150, at 23 (writing that "the element of 'categorical expectancy' is always present" in conventional form, so audience expectations are anterior to reading rather than arising during the process of reading).

218. CS, *supra* note 150, at 126 (emphasis omitted).

219. Davis, *supra* note 172, at 698 ("Conventional form is dominant when an audience is more interested in its preexisting familiarity with the form in which the information is presented than in the information itself.").

220. *Id.* at 699.

221. *Id.*

222. Greig E. Henderson, Kenneth Burke: Literature and Language as Symbolic Action 56 (1988) (quoting CS, *supra* note 150, at 127); *see* CS, *supra* note 150, at 127 (writing that minor forms have an "independent curve of plot").

223. Rueckert, *supra* note 150, at 23.

224. CS, *supra* note 150, at 139.

225. *Id.* at 127 (giving the examples of "metaphor, paradox, disclosure, reversal, contraction, expansion, bathos, apostrophe, series, chiasmus"); *see id.* at 46 (calling "innate forms of the mind" those "feeling[s] for such arrangements of subject-matter as produce crescendo, contrast, comparison, balance, repetition, disclosure, reversal, contraction, expansion, magnification, series, and so on"); *see also* M. H. Abrams & Geoffrey Galt Harpham, A Glossary of Literary Terms 133 (11th ed. 2015) (dividing figurative language into tropes (figures of thought), which involve the use of a "conspicuous change" in wording from the standard or literal meaning, and rhetorical figures (figures of speech), which involve the manipulation of the patterns of words).

toward style, which are textual effects "in their line-for-line aspect."[226] These "basic forms" of tropes and figures are also conventional,[227] so as with conventional form, the appeal to the audience of minor or incidental forms can be distinct from the context of the work in which they appear.[228]

As a consequence, the audience in recognizing the incidental form acts as a cocreator and thus a formal participant[229]—even if that audience member rejects the proposition. Consider as an example a statement about the 1948 "Berlin crisis": "'Who controls Berlin, controls Germany; who controls Germany controls Europe; who controls Europe controls the world.'"[230] A reader might reject the claim that controlling Berlin leads to global conquest or disagree with the imperialist desire for control.[231] Because of the layers of figuration, however—such as repetition of the words "who controls" at the beginning of each clause (the figure of anaphora) and building from a city to the entire world (crescendo toward climax)—the reader recognizes the form and knows by the second clause how the statement "is destined to develop."[232] Accordingly, "on the level of purely formal assent you would collaborate to round out its symmetry by spontaneously willing its completion and perfection as an utterance."[233]

IV. A Rhetoric of Form for Assessing the Materiality of Corporate ESG Statements

The rhetoric of form and its analytical method answer the challenges raised by the materiality of ESG statements. Conceptually, the importance of certain forms for conveying information and for persuading the audience supports allowing the jury to assess the materiality of ESG statements in information-heavy forms like voluntary disclosures. Where the appeal of form as form dominates, though, then the judge can evaluate materiality a-contextually. Analytically, the five aspects of form provide a specific means for courts to categorize texts and

226. CS, *supra* note 150, at 38.

227. *Id.* at 142.

228. *Id.* at 127 ("Their effect partially depends upon their function in the whole, yet they manifest sufficient evidence of episodic distinctness to bear consideration apart from their context."); *see id.* at 139 (calling "the relation between form and gratification of desire . . . admittedly more tenuous" because "the element of gratification" of a single sentence can be "apart from its context").

229. Kraemer, *supra* note 177, at 153 (writing that "the audience cocreates" when figurative language is involved); *see* CS, *supra* note 150, at 143 (writing that metaphor is an abstract concept, but a specific metaphor in a text appeals as form because "its particular subject-matter enables the mind to follow a metaphor-process").

230. RM, *supra* note 152, at 58.

231. *Id.* at 58–59.

232. *Id.* at 59; *see* Abrams & Harpham, *supra* note 225, at 344 (explaining anaphora); Pruchnic, *supra* note 165, at 377 ("[T]he prevalence of a crescendo suggests that there is something internal to humans that recognizes or responds to this pattern.").

233. RM, *supra* note 152, at 59; *see* Kraemer, *supra* note 177, at 153 ("The pull of form is forceful, gravitational.").

statements as part of assessing materiality in response to a motion to dismiss. This Part therefore establishes a three-step strategy based on those aspects, which in broad strokes requires courts to first evaluate individual statements that are hyperbolic or forward-looking, then differentiate voluntary and mandatory disclosures, and finally consider the effect of repeated statements.

A. The Rhetoric of Form for ESG Disclosures

A material statement contains information which a reasonable investor would consider important when making decisions.[234] The Supreme Court has held that the context of a statement affects its materiality and such context includes text: both the document in which a statement appears as well as the language surrounding that statement.[235] This legal standard mirrors the rhetoric of form, which at a fundamental level posits a relationship between form and content.[236] As beings that by nature respond to symbols, humans identify with the language of a given text—with its form.[237] Form is therefore the psychology of the audience because it arouses and fulfills desire.[238] To put it less poetically, the form of discourse (like the document and surrounding text of a corporate ESG statement) affects how the audience responds to a particular text and its content.[239]

The psychology of information contrasts the psychology of form, with the appeal of the former tied more to the audience's desire for content than to the form in which that content is conveyed.[240] Somewhat counterintuitively, however, form may matter more in texts with high informational appeal. This is because both form and information interact to persuade an audience.[241] These texts seek to persuade the audience to accept the underlying propositions, so the audience's acceptance of that proposition will depend on how persuasive the text is.[242]

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234. *See, e.g.*, TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976); Booth, *supra* note 36, at 518.
235. *See, e.g.*, Rose, *supra* note 7, at 94; Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175, 190 (2015); Sale & Langevoort, *supra* note 41, at 764 ("The Court said [that] words in context can generate inferences for the reasonable investor that go beyond narrow linguistic confines.").
236. *See, e.g.*, Foss et al., *supra* note 155, at 193 ("Identification or persuasion results from an interaction of form and content."); *id.* ("For Burke, how an idea is developed through form is linked inextricably to the effects of rhetoric on an audience."); PLF, *supra* note 150, at 89–90 (describing the interaction of form and content as discerning the meaning of words in their textual context).
237. *See supra* text accompanying notes 158–60.
238. *See* CS, *supra* note 152, at 31 (defining form).
239. *See supra* text accompanying note 164–66, 170–71.
240. *See supra* text accompanying notes 167–69.
241. *See* Warnock, *supra* note 160, at 57.
242. PLF, *supra* note 150, at 89–90 (discussing the merger of form and content); RM, *supra* note 152, at 69 (recognizing the persuasiveness of progressive forms); Davis, *supra* note 172, at 695–97, 702–03 (discussing forms that prioritize information and the role of form in conveying that information).

As a result, corporate disclosures with higher informational content necessitate consideration of that disclosure's form. Voluntary ESG disclosures like sustainability reports, web pages, and presentations to investors have a much higher volume of information than mandatory disclosures.[243] In seeking to persuade the audience to accept a proposition, a speaker or writer supports informational appeals with formal ones that engage the audience member as a participant in the discourse.[244] Sometimes these formal appeals help persuade the audience (such as when the auditor has not formed an opinion about the subject), but other times the audience rejects the message—even when the audience responds to, or identifies with, its form.[245] In light of the numerous types of voluntary ESG disclosures and varied quality of information contained therein,[246] the accompanying formal appeals may—or may not—push a reasonable investor to find a particular statement important. Faced with such uncertainty about whether the disclosure's form impacts a statement's materiality, the judge should thus defer to the jury as factfinder to conduct this assessment.[247]

A judge need not send all ESG statements to a jury, however. For example, mandatory disclosures have a lower volume of information and so do not raise the same formal concerns as voluntary disclosures.[248] In addition, a reasonable investor should recognize a puffing or a forward-looking statement as inherently questionable regardless of its broader context.[249] In both scenarios, the text appeals more to its form as form rather than to its information, and these formal appeals should be recognizable to a reasonable investor.[250] As discussed in more detail in the next section, in these situations, the judge could find those statements immaterial and order dismissal of claims based upon them.

B. A Strategy for Assessing the Materiality of Corporate ESG Statements

In response to a motion to dismiss, courts tend to ignore the type of document in which an ESG statement appeared and instead focus on whether

243. *See supra* text accompanying notes 79–80, 87–88, 95–96.
244. *See supra* text accompanying notes 172–74, 229.
245. *See supra* text accompanying notes 175–82, 229–33.
246. *See supra* text accompanying notes 75–78.
247. *See* TSC Indus. v. Northway, Inc., 426 U.S. 438, 450 (1976) (calling "assessments" about inferences that a reasonable investor would draw from a fact's context "peculiarly ones for the trier of fact").
248. *See supra* text accompanying notes 89–101.
249. *See* Gardner & Kuehl, *supra* note 129, at 182 ("Puffery . . . is ordinarily so vague and/or humorous that it cannot reasonably be taken seriously by the buyer."); Lipton, *supra* note 124, at 112 (calling puffery "a species of immaterial statement . . . that investors are presumed to simply disregard"); Ronald J. Colombo, *Buy, Sell, or Hold?: Analyst Fraud from Economic and Natural Law Perspectives*, 73 Brook. L. Rev. 91, 122 n.158 (2007) (claiming that the PSLRA safe harbors create "a zone of safety" regarding "soft information").
250. *See supra* text accompanying notes 215–34; *see* Pruchnic, *supra* note 165, at 376 (calling tropes "recognizable").

the statement is general or specific.[251] Because this approach lacks principles and leads to inconsistent rulings, courts need a method for analyzing ESG statements.[252] In light of the relationship between form and content, the chosen method needs to help judges determine whether an ESG disclosure's form likely affected the audience's perception of an individual statement. The five aspects of form offer one analytical device,[253] which this Section converts into a three-step strategy. First, no matter the type of disclosure, the court can find that a hyperbolic statement is immaterial as puffery or that a forward-looking statement is immune if it satisfies the PSLRA safe harbor. Then, the court should consider whether the ESG statement appears in a voluntary versus a mandatory disclosure, with the jury assessing voluntary disclosures while the judge can rule on the potential immateriality of mandatory disclosures. Finally, even with mandatory disclosures, repeated general statements might raise a jury question about materiality.

1. If Statements Are Hyperbolic or Forward-Looking, Then the Judge Can Find Them Immaterial

Courts should first determine whether the statement is hyperbolic or forward-looking. If the former, then the judge can find the statement immaterial as puffery. If the latter, then the judge can rule whether the statement comports with the PSLRA safe harbor.

Judges can continue to apply puffery to rule that certain statements are immaterial, though they should limit the doctrine to just one of its three common meanings: hyperbole.[254] Figurative expressions like tropes are examples of minor or incidental form, a form that is merely part of a larger text and that manifests in sentence-level style.[255] Figures appeal because of their form and not the information conveyed, so they can be analyzed apart from the text in which they appear.[256] Perhaps more importantly, the defining characteristic of figurative expressions is that the audience recognizes that they are not literal.[257] If reasonable investors are indeed reasonable, then the court can assume that they

251. *See* Saad & Strauss, *supra* note 75, at 396, 417.
252. *See supra* Part II(B); *see also* Saad & Strauss, *supra* note 75, at 403 (urging "a theory and mechanism" for securities fraud "for discerning between material and immaterial information" in securities litigation).
253. CS, *supra* note 150, at 123–38.
254. *See supra* text accompanying notes 126–29.
255. *See* CS, *supra* note 150, at 38, 127–28.
256. *See supra* text accompanying notes 222–28.
257. *See* Pruchnic, *supra* note 165, at 376 (calling tropes "recognizable but flexible forms of arrangement"); *id.* (explaining that tropes "exploit innate modes of response and recognition").

recognize and thus discount the credibility of hyperbolic expressions,[258] rendering those statements per se immaterial.

Judges can therefore dismiss claims based upon hyperbole as puffery—and can do so no matter whether contained in a voluntary or mandatory disclosure. "Hyperbole is bold overstatement, or the extravagant exaggeration of fact or of possibility."[259] Consider well-known examples from advertising like "The Ultimate Driving Machine (BMW)" or "The Greatest Show on Earth (Barnum and Bailey circus)."[260] A sampling of ESG securities fraud cases reveals similar exaggerations that were (rightly) held to be immaterial puffery. For example, the founder of Papa John's stated in a press release that "it all comes down to better ingredients—and our most important ingredient is our people."[261] And U.S. Bancorp proclaimed, "Our commitment to doing the right thing is at the heart of everything we do."[262] Or consider Dentsply's claim that "across the company, across the globe, all of our employees are embracing ESG."[263]

Likewise, judges can rule whether aspirational statements should reach a jury, but instead of puffery or bespeaks caution, they should only apply the PSLRA safe harbors for forward-looking statements. Treating the statutory safe harbors as a conventional form aligns with those commentators who urge that the narrower and more specific statutes supersede broader judicial doctrines.[264] Conventional forms emphasize the appeal of form as form rather than appealing to the information contained therein,[265] so a critic can evaluate individual statements outside of their textual context. Further, these have pre-existing structures with which an audience is already familiar, such as fill-in-the-blank forms required by courts or agencies.[266]

The PSLRA safe harbors are similar: the statutes immunize a company's forward-looking statements but also prescribe the cautionary language that must

258. *See* Todd, *Rhetoric*, *supra* note 151, at 434 ("[A]ll tropes require an active audience and thereby give that audience credit: the reader or hearer recognizes a disjunction and has to slow down and work through potential meanings to reconcile that disjunction.").

259. Abrams & Harpham, *supra* note 225, at 169.

260. Randy Allen Harris, *The Tropes: Metaphor and Its Friends*, *in* Routledge Handbook of Language and Persuasion 227, 237 (Jeanne Fahnestock & Randy Allen Harris eds., 2022).

261. Okla. L. Enf't Ret. Sys. v. Papa John's Int'l, Inc., 444 F. Supp. 3d 550, 555, 562 (S.D.N.Y. 2020).

262. Buhrke Fam. Revocable Tr. v. U.S. Bancorp, 726 F. Supp. 3d 315, 336–37 (S.D.N.Y. 2024).

263. San Antonio Fire & Police Pension Fund v. Dentsply Sirona Inc., 732 F. Supp. 3d 300, 315–16 (S.D.N.Y. 2024).

264. *See, e.g.*, Ann Morales Olazábal, *False Forward-Looking Statements and the PSLRA's Safe Harbor*, 86 Ind. L.J. 595, 622 (2011) (writing that, because the PSLRA safe harbor "appl[ies] only in the context of private securities litigation," then in such litigation "the statute prevails" over judicial doctrines like bespeaks caution).

265. *See supra* text accompanying notes 215–21.

266. Davis, *supra* note 172, at 698–700.

accompany the statement.[267] Accordingly, context is still relevant but in a more focused way as the relationship of the forward-looking statement to the cautionary language.[268] Consider one case involving allegations that the company's statements about commitments to worker well-being and collective bargaining were false.[269] The court first determined whether several challenged statements were forward-looking, and then for each statement it considered whether linguistic markers reflected hedging and caution and whether there were allegations that the speakers knew the statements to be false.[270] The court found that the safe harbor shielded some but not all of the statements.[271]

2. Assessing Materiality: Statements in Voluntary Disclosures Are for the Jury and Statements in Mandatory Disclosures Are for the Judge

If the ESG statement is not hyperbole or protected by the safe harbor, then the judge should consider whether it appears in a voluntary or mandatory disclosure. Courts typically do not consider the type of document in ruling on dismissal; instead, they gauge whether a statement is vague or specific and then dismiss those that they deem too general.[272] The problem is not necessarily that judges evaluate the generality of a statement; after all, they can and should sometimes do so, such as if the statement is pure opinion.[273] The problem is rather that they lack standards for *when* they should do so. The progressive and conventional forms supply the necessary standards. Courts should allow the jury to assess the materiality of statements in documents that have syllogistic or qualitative progressive forms—namely, voluntary disclosures. But judges can gauge the generality of statements in documents that have conventional form—namely, mandatory disclosures.

Courts frequently dismiss claims based on ESG statements that they find too general as immaterial, often declaring them to be puffery.[274] Analyzing

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267. 15 U.S.C. § 78u-5 (1995).

268. Olazábal, *supra* note 264, at 623 (arguing that, in applying the PSLRA safe harbor, the court should analyze "the forward-looking statements and their accompanying cautionary language to determine whether, considered together, they materially mislead a reasonable investor and therefore are actionable").

269. City of Warren Gen. Emps.' Ret. Sys. v. Teleperformance SE, No. 23-24580-CIV-Altonaga/Reid, 2024 WL 2320209, at *2 (S.D. Fla. May 22, 2024).

270. *Id.* at *15–16 (finding words like "anticipate," "personal view," "subjective," and "perception" to be cautionary).

271. *Id.* (finding that present-tense statements fell outside the safe harbor).

272. *See supra* text accompanying notes 104–14, 121.

273. *See, e.g.*, San Antonio Fire & Police Pension Fund v. Dentsply Sirona Inc., 732 F. Supp. 3d 300, 315 (S.D.N.Y. 2024) (labeling statements that "express only a subjective state of mind or feeling" as "classic opinion" and therefore inactionable).

274. *See supra* text accompanying notes 134–40; *see, e.g.*, ECA & Loc. 134 IBEW Joint Pension Tr. of Chicago v. JP Morgan Chase Co., 553 F.3d 187, 206 (2d Cir. 2009) (ruling that "generalizations" about "business practices" are inactionable puffery); City of Pontiac Policemen's &

generality without accounting for a statement's broader context invites problems. For example, courts may lump specific statements in with more general ones and then declare the whole lot to be too general, as with statements about the defendant's food safety program that included verifiable facts like how the defendant would pull products from distribution, terminate unsatisfactory suppliers, and conduct spot inspections for drug residue.[275] Also, focusing only on a general statement might lead the court to ignore surrounding text that offers more specificity.[276] Plus, some courts recognize that general statements can be material, such as when the defendant repeats them.[277] Legal commentators offer additional reasons, such as if the managers issuing those statements have high credibility or when the statement relates to particularly severe risks.[278]

The concept of progressive form reinforces the necessity of considering an ESG statement's context, more particularly the type of disclosure in which the statement appeared. In the two progressive forms, not only does the appeal of information predominate over the appeal of form, but the purpose is to persuade the audience to accept the content.[279] A text with syllogistic progression advances an argument or point step by step with propositions that lead the audience toward a particular conclusion.[280] Consider some examples of voluntary disclosures, both larger documents like sustainability reports as well as smaller texts like press releases and presentations, which have an overt purpose of convincing investors of the company's ESG bona fides.[281] A text with qualitative

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Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173, 183 (2d Cir. 2014) (calling it "well-established that general statements about reputation, integrity, and compliance with ethical norms are inactionable 'puffery'").

275. *In re* YUM! Brands, Inc. Sec. Litig., 73 F. Supp. 3d 846, 862-63 (W.D. Ky. 2014), *aff'd*, Bondali v. Yum! Brands, Inc., 620 F. App'x 483, 489–93 (6th Cir. 2015).

276. *In re* Vale S.A. Sec. Litig., No. 1:15-cv-9539-GHW, 2017 WL 1102666, at *11 (S.D.N.Y. Mar. 23, 2017). (recognizing that statement about safety was general in isolation, but "[w]hen read in full," it was "neither aspirational nor vague" because there were "specific representations about [defendant Vale's] then-existing practices for monitoring dam stability that an investor could reasonably rely upon in assessing the strength of Vale's risk management practices and the risk of a dam collapse").

277. *Id.* at *1233 (finding that Vale put its commitment to "safety and sustainability" at issue by "repeatedly" making "generic" statements about these topics).

278. Langevoort, *supra* note 9, at 985 ("When management's credibility is high based on investors' prior experience, even general optimism can be influential on matters to which management has exclusive knowledge."); Lipton, *supra* note 124, at 140 (arguing that "general positive statements about the business" can be "rendered false" if related to problems that "are extremely severe").

279. *See* Davis, *supra* note 172, at 695–96, 702–03; *see also* RM, *supra* note 152, at 69.

280. CS, *supra* note 150, at 124.

281. *See supra* Part II(A); *see also* Todd, *Rhetoric*, *supra* note 151, at 454 (writing that large Brazilian companies linked with deadly dam accidents (Vale), a corruption scandal (Petrobras), and packaging beef on deforested areas (JBS) enacted "voluntary sustainability initiatives . . . to attract ESG-conscious investment and financing").

progression also seeks to persuade, but through the less overt means of listing different qualities, each leading the audience to anticipate the next quality, as with a contract.[282] Corporate conduct codes, ethics codes, and policies and procedures statements may not put forward an argument, but in describing various corporate qualities, each one builds an impression of sound governance and ethical practices that is of particular interest to investors.[283]

Accordingly, as established in Part IV(A), when an ESG statement appears in a voluntary disclosure, the assessment of its persuasiveness—and thus its materiality to the reasonable investor—necessitates consideration of the text in which it appeared, which falls to the jury. Consider a syllogism, the term from logic upon which syllogistic progression is based: given the major or universal premise ("All people are mortal") and the minor or specific premise ("Socrates is a person"), the audience can determine where the logic is headed and draw its own conclusion ("Therefore, Socrates is mortal").[284] The general statement necessarily contributes to the persuasiveness of the message, which means that (1) general statements can be material and (2) materiality depends upon other aspects of the text.[285]

For example, the court in a case alleging that the defendant misstated its commitment to sustainability found statements in several earnings calls to be "too vague."[286] Yet in one earnings call, the speaker made two relevant statements: "Sustainability is the foundation of our business and is increasingly an area of focus for our investors," and then, "Programs [including] our industry track and trace system, tangibly and transparently illustrate our innovation on and commitment to sustainability in ways that extends [sic] far beyond third-party audits, and legal and regulatory compliance."[287] Considered syllogistically, the first statement makes a general claim about valuing sustainability and the second opens with a specific identification of programs. This could lead the audience to draw the same conclusion made in the second part of the second statement—that the defendant implements sustainable practices—so dismissal was not warranted because both statements read together are potentially material.

Likewise, statements in corporate codes about a company's qualities might be vague in isolation, yet together they can build toward a persuasive appeal, the impact of which is for the jury to decide. This was the reasoning of one court that ruled that a code of conduct is material if it conflicts with a defendant's

282. CS, *supra* note 150, at 124–25; Davis, *supra* note 172, at 696–97.

283. *See* James D. Cox, *"We're Cool" Statements After* Omnicare*: Securities Fraud Suits for Failure to Comply with the Law*, 68 SMU L. Rev. 715, 719 (2015) (writing that "insights" into company management, such as "disclosures of philosophy, policies, and practices," can "pique the interest of investors"); *see also* Hazen, *Corporate*, *supra* note 115, at 898.

284. Jim Greene, *Syllogism*, *in* Salem Press Encyclopedia (2025).

285. *Id.* ("Syllogisms can also serve as persuasive devices and can build larger arguments from smaller constituent parts.").

286. Fanucchi v. Enviva Inc., No. DKC 22-2844, 2024 WL 3302564, at *10–11 (D. Md. July 3, 2024).

287. *Id.* at *10 (first alteration in original) (emphases and citations removed).

actions.[288] Note the interplay of various statements, or qualities, listed in Signet's code: Signet was "committed to a workplace that is free from sexual, racial, or other unlawful harassment," the company "bases . . . decisions solely on a person's [merit]," "[c]onfidential and anonymous mechanisms for reporting concerns are available," and "[t]hose who violate the standards in this Code will be subject to disciplinary action."[289] Considered as a qualitative progression, these different qualities build upon each other to create the impression of a company that would not tolerate quid pro quo harassment, an impression "directly contravened by allegations in the [complaint] that the company conditioned employment decisions on whether female employees acceded to sexual demands and retaliated against women who attempted to anonymously report sexual harassment."[290]

Contrast this reasoning with another case that conflated the first element of securities fraud, materiality, with the second element, scienter.[291] Despite citing specific provisions from defendant's sustainability report and code of ethics prohibiting bribery and requiring employees to report it,[292] the court held that these documents were immaterial puffery because there were no allegations that defendant's "purpose" in issuing these documents was to mislead investors about its conduct.[293] In short, courts should no longer find that corporate ethics and conduct codes are per se immaterial,[294] or even rule that statements in a particular code are too general,[295] because their cumulative effect may persuade a jury of their materiality.

Sometimes, however, the judge can determine whether a statement is specific enough to be material or too vague and thus immaterial. Voluntary disclosures have no preset structural, informational, or timing requirements because they are governed by multiple reporting frameworks or no framework at all.[296]

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288. *In re* Signet Jewelers Ltd. Sec. Litig., No. 16-cv-6728, 2018 WL 6167889, at *17 (S.D.N.Y. Nov. 26, 2018).

289. *Id.* at *9, *17.

290. *Id.*

291. *In re* Braskem S.A. Sec. Litig., 246 F. Supp. 3d 731 (S.D.N.Y. 2017); *see* Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008) (listing a material misstatement or omission and scienter as the first and second elements, respectively, of private securities fraud).

292. *Braskem*, 246 F. Supp. 3d at 744–46.

293. *Id.* at 754–57.

294. *See* Andropolis v. Red Robin Gourmet Burgers, Inc., 505 F. Supp. 2d 662, 685–86 (D. Colo. 2007) (finding that a company's ethics code "is inherently aspirational" and so not actionable in securities fraud litigation).

295. *See In re* Tenaris S.A. Sec. Litig., 493 F. Supp. 3d 143, 158–60 (E.D.N.Y. 2020) (finding statements in code of ethics immaterial as too vague but statements in code of conduct actionable because they addressed bribery, an issue in the lawsuit).

296. *See supra* text accompanying notes 79–81. Because Item 406 addresses the disclosure of corporate ethics codes, one might assume that those codes are mandatory rather than voluntary. 17 C.F.R. § 229.406 (2025). Item 406 does not require companies to have ethics codes, nor does it prescribe the structure of those codes, however; it only requires that companies disclose them—but only if the codes pertain to corporate managers—or explain why they do not have them. *Id.*

By contrast, mandatory disclosures have SEC-prescribed informational requirements and even structures, as evidenced by the 165 standardized forms on the SEC's website.[297] For example, Form 10-K, the mandated annual report where companies disclose both financial and nonfinancial information,[298] is often at issue in ESG securities fraud cases.[299] The company issuing such disclosures is merely satisfying legal obligations rather than communicating what it chooses in the manner that it chooses, as evidenced by their lower informational content and quality and even obfuscatory language.[300] As already discussed, such preexisting arrangements constitute a conventional form, which has low informational appeal, so the judge can assess the materiality of individual statements outside of the context of the document in which they appear.[301] Perhaps the court will find these statements too general and order dismissal, such as with representations in annual reports and Form 10-K filings about the defendant's risk management policies and procedures.[302] Or the court might find that specific statements—or the combination of general and specific statements—create a fact issue for the jury, as with one defendant's numerous filings including a prospectus that linked general claims about safety with specific data about the defendant's "nonfatal days lost" rate.[303]

3. The Repetition of General Statements May Raise a Jury Issue

The final consideration is whether statements have been repeated because repetitive form can arise in voluntary or mandatory disclosures. If an idea is repeated in different ways within the same disclosure, this suggests a greater emphasis on information and thus persuasion,[304] which creates a jury issue about materiality—even for mandatory disclosures. Consider one case where the court

297. *Forms Index*, Sec. & Exch. Comm'n, https://perma.cc/57UQ-5Q4U.

298. Elizabeth Weeks Leonard et al., *Employers United: An Empirical Analysis of Corporate Political Speech in the Wake of the Affordable Care Act*, 38 J. Corp. L. 217, 228 (2013) ("Form 10-K provides a comprehensive summary of a company's business and financial condition."). The SEC also requires the publication of an annual report to shareholders, the information in which largely overlaps with the Form 10-K report. *Id.* at 228, 228 n.93. Accordingly, "most companies use their Form 10-K as their annual report to shareholders," so "the 10-K filed with the SEC and the annual report provided to shareholders are usually identical." *Id.* at 228 n.93.

299. *See, e.g.*, Bhangal v. Haw. Elec. Indus., Inc., No. 23-cv-04332-JSC, 2024 WL 4505465, at *5 (N.D. Cal. Oct. 15, 2024) (listing numerous statements across four Form 10-K filings); Buhrke Fam. Revocable Tr. v. U.S. Bancorp, 726 F. Supp. 3d 315, 341–43 (S.D.N.Y. 2024) (examining statements in numerous annual reports to shareholders and in Form 10-K filings).

300. *See supra* text accompanying notes 95–101.

301. *See supra* text accompanying notes 215–20, 249–50.

302. *Buhrke Fam. Revocable Tr.*, 726 F. Supp. 3d at 341–43.

303. *In re* Massey Energy Co. Sec. Litig., 883 F. Supp. 2d 597, 614–16 (S.D. W. Va. 2012).

304. *See supra* text accompanying notes 208–14.

identified five similar statements with a variety of wordings that addressed regulatory risk in a company's 2019 annual report.[305] Although the court subsequently ruled that the statements were either opinion or not misleading, it did recognize that these "descriptive statements" differed from the "general, platitudinal affirmative statements" that it had found to be puffery.[306]

A thornier question arises if plaintiffs challenge statements that are repeated across multiple disclosures. Because repetitive form relates to the restatement of ideas in different ways within a single text,[307] judges in these cases should not be guided solely by the rhetoric of form. Instead, they should consider context more broadly and look specifically at the rhetorical situation. The rhetorical situation is "a natural context of persons, events, objects, relations, and an exigence which strongly invites utterance."[308] One such "exigence" that invites a corporate "utterance" is a major public event like a disaster or corporate scandal because the company's repeated disclosures in that situation can make even general statements material, thus creating a jury issue.[309] In the absence of such an exigence, if similar statements are repeated across multiple mandatory disclosures, then the judge can rule on the materiality of each statement independently.

Conclusion

Instead of the simplistic approach of determining materiality by the generality versus specificity of an individual ESG statement, the rhetoric of form supplies a strategy that accounts for a statement's textual context. Doing so should result in more consistent rulings for motions to dismiss in private securities fraud lawsuits so that plaintiffs with similar claims receive similar treatment instead of one case settling for a nine-figure payday while another is dismissed with prejudice.[310] Further, strike suits are accounted for because judges start

305. Buhrke Fam. Revocable Tr. v. U.S. Bancorp, 726 F. Supp. 3d 315, 343–44 (S.D.N.Y. 2024).

306. *Id.* at 344; *see id.* at 344–51.

307. CS, *supra* note 150, at 125; *see* Blakesley, *supra* note 153, at 58 (distinguishing repetitive form from "sheer repetition," with examples of the latter advertising campaigns like "Got Milk?" or "Just Do It" that seek to build brand recognition).

308. Lloyd F. Bitzer, *The Rhetorical Situation*, 1 Phil. & Rhetoric 1, 4 (1968).

309. *See In re* Banco Bradesco S.A. Sec. Litig., 277 F. Supp. 3d 600, 660 (S.D.N.Y. 2017) (concluding "that, while at least some of the statements . . . may be mere puffery when viewed in isolation, context shows they were made in an effort to reassure the investing public about the Company's integrity, specifically with respect to bribery, during a time of concern," so the reasonable investor might rely on them); *see generally* Mark, *supra* note 74 (discussing event-driven securities litigation).

310. Rose, *supra* note 7, at 82 ("[I]f the case is not disposed of by the court pretrial, it almost inevitably will settle."). *Compare, e.g.*, *In re* Signet Jewelers Ltd. Sec. Litig., No. 16 Civ. 6728, 2018 WL 6167889, at *2–5 (S.D.N.Y. Nov. 26, 2018) (denying dismissal of fifth amended complaint challenging defendant's statements about risky underwriting practices and sexual harassment), *and In re* Signet Jewelers Ltd. Sec. Litig., No. 1:16-cv-06728-CM-SDA, 2020 WL 4196468, at *1 (S.D.N.Y. July 21, 2020) (approving $240 million settlement), *with, e.g.*,

with puffery to weed out meritless statements (except now puffery has a single definition limited to hyperbole) as well as the PSLRA safe harbors since the statute provides the applicable guidelines for aspirational statements. Plus, even if courts find that more ESG statements are potentially material, the heightened pleading standards of Federal Rule of Civil Procedure 9(b) and the PSLRA impose additional checks so that courts can still dismiss complaints that do not sufficiently allege falsity and the defendant's scienter.[311] Of course, even if judges decide that juries should assess the materiality of more ESG statements in voluntary disclosures, this result comports with Supreme Court reasoning about the importance of a statement's context and of the jury's role in securities fraud.[312] Finally, grounding the consideration of materiality in rhetorical theory provides some much-needed "moral valence" for private securities fraud law.[313]

Lopez v. CTPartners Exec. Search Inc., 173 F. Supp. 3d 12, 17, 25, 43–44 (S.D.N.Y. 2016) (dismissing lawsuit with prejudice after finding corporate statements about sexual harassment were puffery).

311. *See, e.g.*, Cheng v. Activision Blizzard, Inc., Case No. CV 21-6240 PA (JEMx), 2022 WL 2101919, at *7–13 (C.D., Apr. 18, 2022) (finding, in securities fraud case about rampant sexual harassment and gender discrimination at Activision Blizzard, that plaintiffs' complaint failed to allege falsity and scienter adequately under the heightened pleading requirements for securities fraud).

312. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175, 190 (2015) (calling the type of document and surrounding wording contextual considerations for the factfinder); Sec. & Exch. Comm'n v. Jarkesy, 603 U.S. 109, 120 (2024) ("The SEC's antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury.").

313. *See* Samuel W. Buell, *What Is Securities Fraud?*, 61 Duke L.J. 511, 521 (2011) ("If the law does not appear to make principled distinctions or to display predictability with respect to the persons it chooses to sanction for fraud, then the project of regulating fraud will lose moral valence . . . .").