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4 IN THE MATTER OF:
5 CSX Corporation,
6
7 Plaintiff-Appellant-Cross-Appellee
8 Michael Ward, Third-Party-Defendant
9
10 - Vs. - 08-2899

11
12 The Children's Investment Fund Management
13 (UK) LLP, The Children's Investment Fund
14 Management (Cayman, Ltd., The Children's
15 Investment Master Fund, 3G Capital Partners
16 LTD., 3G Capital Partners, L.P., 3G Fund L.P.,
17 Christopher Hohn, Snehai Amin and Alexandre
18 Behring, also known as Alexandre Behring Costa,
19
20 Defendants-Third-Party-Plaintiffs-Counter-
21 Appellees-Cross-Appellants
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4 August 25, 2008
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6 BEFORE: PANEL:
7 Judge Winters,
8 Judge Calabresi,
9 Judge Newman
10
11 APPEARANCES: Chris Landau
12 Attorney for the Appellees
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14 Rory Middleton
15 Attorney for CSX
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17 TRANSCRIBER: ANN ARUNDEL
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1 PANEL MEMBER: We will hear CSX
2 Corporation versus Children's Investment.
3 MR. LANDAU: May it please the Court. I
4 am Chris Landau here for the Appellees, the
5 Appellees Cross Appellants. The big issue in
6 this case is whether investors must disclose
7 the securities reference by a cash swap when
8 they don't have either voting power or
9 investment power over those securities.
10 PANEL MEMBER: The question as to
11 whether CSXs are per se an ownership isn't
12 what this question is, this case is about.

13 The District Court didn't hold it that way.
14 We have an amicus telling us for heaven's
15 sakes don't hold that that's what it is. The
16 question is whether the District Court found
17 correctly that in this case on these facts
18 what you and PMI and 3G were doing was
19 engaging in a plan or scheme and acting as a
20 group, etc., etc., etc. It is not whether
21 CSXs in general are ownership. That isn't
22 the question at all.
23 MR. LANDAU: Excuse me, Your Honor,
24 that's what I tried to say in there. Where

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1 there is no voting or investment power over
2 the securities. In other words they've
3 accused us of taking that kind of wrong
4 proposition that Your Honor just correctly
5 recognized.
6 PANEL MEMBER: There can't be a scheme
7 unless there is explicit voting power.
8 MR. LANDAU: No, Your Honor, there can't
9 be beneficial ownership unless there is
10 voting. And then I think what Your Honor is
11 saying--
12 PANEL MEMBER: [Interposing] Deemed
13 beneficial ownership.
14 MR. LANDAU: Okay.
15 PANEL MEMBER: If there is a scheme.
16 MR. LANDAU: But, Your Honor--
17 PANEL MEMBER: The District Court found
18 deemed beneficial ownership because it found
19 two things, one, a scheme or plan and two, a
20 group having been formed for one of the four
21 purposes. Now whether the Court was specific
22 on these things is another matter.
23 MR. LANDAU: Right.
24 PANEL MEMBER: But found those in order

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1 to do these things and, therefore, found
2 deemed. Now your argument is that ain't
3 enough.
4 MR. LANDAU: Well, Your Honor, if I
5 could clarify. What you just said is exactly
6 what the District Court said with respect to
7 Rule 13 (b) (3) (b) which is the deeming
8 provision.
9 PANEL MEMBER: That is correct.
10 MR. LANDAU: In other words, the
11 District Court did not find beneficial
12 ownership.
13 PANEL MEMBER: They did not find (a).
14 MR. LANDAU: You were focusing us on
15 really the crux of the--
16 PANEL MEMBER: [Interposing] I am
17 focusing on what District Court found.
18 MR. LANDAU: Absolutely, Your Honor.
19 And I think the key point here is for Section
20 13 (b), the Rule 13 (b) (3) (b) to apply you
21 need an official ownership. But you need to
22 have--the District Court expressly said I am
23 extending this rule, subsection b, to go
24 beyond beneficial ownership. And that would

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1 take it beyond the statute.
2 In other words, the statute says look,
3 when you have beneficial ownership of 5% or
4 more of securities you've got to disclose,
5 Rule 13 (b) (3) in both subsections (a) and
6 (b) implements that statute.
7 The question, the real crux of the
8 question as Your Honor just observed is
9 whether rule 13 (b) (3) (b) can be extended
10 to go beyond beneficial ownership. And the
11 District Court said--
12 PANEL MEMBER: [Interposing] Are you
13 saying 13 (b) is an unauthorized regulation,
14 is that your--
15 MR. LANDAU: [Interposing] No, Your
16 Honor, if improperly construed it would be.
17 But it doesn't--
18 PANEL MEMBER: [Interposing] Why, what
19 is the point of (b), (b) of (b) if all it
20 does is cover what would be covered anyway by
21 (a)? Why isn't (b) there to say--I mean, if
22 it is beneficial ownership under (a) no
23 question. But (b) says you may have deemed
24 beneficial ownership when you have engaged in

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1 certain things.
2 So in order to avoid surplusages, why
3 isn't--why isn't the Court sought to give
4 meaning a perfectly appropriate thing. Now
5 whether what it found was adequate to support
6 this is another matter.
7 MR. LANDAU: Sure, but if could address
8 the surplusages question I think this is the
9 very core of this case and I think the key
10 point here is as the SEC pointed out in the
11 letter filed in this case the--you have to
12 read Rule 13 (b) (3) (b) as a whole. The
13 District Court focused on the second clause
14 which said the purpose or affect of divesting
15 such person of beneficial ownership or
16 preventing the vesting of beneficial
17 ownership and the District Court said okay,
18 well, that means no beneficial ownership.
19 But that has to be as part--and this is again
20 what the SEC focused on this.
21 The third clause says as part of a plan
22 or scheme to evade the reporting requirements
23 of Section 13 (b).

24 PANEL MEMBER: Okay, there has to be a

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1 plan or scheme to avoid the reporting
2 requirements. So that if you had done
3 exactly what you did but you could show that
4 you had done it to avoid paying capital gains
5 taxes because you wanted to not sell some
6 things but you wanted to diversify,
7 everything had been done exactly the same
8 way, but it had nothing to do with control,
9 nothing to do with proxy price it had to do
10 with taxes, then the (b) would not apply.
11 MR. LANDAU: But, Your Honor, that is
12 true, but it is not--it is not limited to
13 situations where the motivation is the key.

14 That's the point. At a--
15 PANEL MEMBER: [Interposing] Well,
16 except that the section says a plan or a
17 scheme in order to avoid reporting
18 requirements.
19 MR. LANDAU: Right. But the reporting
20 requirements--
21 PANEL MEMBER: [Interposing] That looks
22 like motivation to me.
23 MR. LANDAU: Well, it--and that's part of
24 it, Your Honor. But, again, the reporting

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1 requirements apply to beneficial owners. In
2 other words, this statute does not--this rule
3 does not go beyond the scope of the statute.
4 This is anti-evasion provision for the
5 statute, but it doesn't go beyond the
6 statute.
7 PANEL MEMBER: Well, if it is congruent
8 with the statute and that that's your theory
9 that it only covers a person who has
10 beneficial ownership, right?
11 MR. LANDAU: Correct.
12 PANEL MEMBER: Then what does (d) mean
13 when it says or prevent the vesting? How can
14 you prevent the vesting of something you
15 don't own?
16 MR. LANDAU: Your Honor, as the SEC
17 explained in the letter in this case, it is
18 basically a parking scheme. In other words
19 it is avoid a technicality or a loophole
20 where you can say well, I have the--I don't
21 technically have these shares because they
22 are over there. They are in my wife's name
23 or they are in this other corporation's name.
24 But you have voting in full. In other words--

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2 PANEL MEMBER: [Interposing] But on your
3 example you don't have beneficial ownership,
4 right, your wife has?
5 MR. LANDAU: No, it depends. In other
6 words, it prevents--
7 PANEL MEMBER: [Interposing] I thought
8 your theory was this statute only applies to
9 people who have beneficial ownership?
10 MR. LANDAU: Yes, Your Honor.
11 PANEL MEMBER: Well, then, again, if the
12 wife has it how does the husband have it?
13 MR. LANDAU: Well, you can have
14 multiple--you can be a beneficial owner. If
15 you have voting control you can't play a
16 little gimmick where you say ah, she's got--
17 PANEL MEMBER: [Interposing] Well, I am
18 just talking about proof, preventing the
19 vesting. I am not yet on to voting control.
20 MR. LANDAU: Right.
21 PANEL MEMBER: I will ask you about
22 that.
23 MR. LANDAU: Right.
24 PANEL MEMBER: At the moment we are

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1 talking about the preventing the vesting of

2 ownership.
3 MR. LANDAU: Right.
4 PANEL MEMBER: And you're saying that
5 can happen as to a person who doesn't have
6 ownership.
7 MR. LANDAU: Right. In other words, in
8 other words--
9 PANEL MEMBER: [Interposing] Right? It
10 doesn't have it.
11 MR. LANDAU: No, you have to have
12 beneficial ownership.
13 PANEL MEMBER: Then if you have it why
14 worry about whether you prevented the vesting
15 of it.
16 MR. LANDAU: But, Your Honor, again,
17 this is a way; it is a belt and suspenders,
18 to prevent a too cute argument.
19 PANEL MEMBER: In other words it is
20 surplusage, belt and suspenders means both.
21 Is that what you mean really, belt and
22 suspenders?
23 MR. LANDAU: It is not, the Supreme
24 Court has said that it is not uncommon for

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1 agencies or congress to have overlapping
2 things to prevent people--
3 PANEL MEMBER: [Interposing] But just as
4 a matter of the English language what does it
5 mean to prevent the vesting of something you
6 already have?
7 MR. LANDAU: Your Honor, you are
8 preventing the vesting of the shares. You
9 are preventing the vesting--it is in order to
10 prevent you from saying ah, I, I don't have
11 the beneficial ownership because I don't have
12 something.
13 PANEL MEMBER: But then they would say
14 prevent the vesting of legal title.
15 MR. LANDAU: But, you know, but again--
16 PANEL MEMBER: [Interposing] But they
17 wouldn't say prevent the vesting of
18 beneficial ownership.
19 MR. LANDAU: I think we can--let's not
20 lose sight of the fact, I mean, is this the
21 most artfully drafted rule? I think the
22 answer is no. But I think, in fact, it even
23 has--
24 PANEL MEMBER: It is a rule we have to

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1 live with.
2 MR. LANDAU: I totally understand it,
3 Your Honor, but again you have to--the bigger
4 question, more important than the rule
5 against surplusage is a regulation cannot
6 extend the scope of the statute that it is
7 implementing. So I think the cardinal star
8 that must be--
9 PANEL MEMBER: [Interposing] Why can't
10 the SEC in implementing a statute that wants
11 disclosure of people who are trying to get
12 control and are using various schemes to hide
13 the fact that they are doing so and have
14 reached a certain amount of power put out a

15 regulation of this sort and when the SEC puts
16 out a regulation of this sort why aren't we
17 bound to give it Chevron difference if the
18 object of the statute is to avoid this kind
19 of thing?

20 Now, again, whether the District Court
21 found enough so that it fits there is another
22 question. But I am still--

23 MR. LANDAU: [Interposing] But, again,
24 you are assuming that the SEC had said this

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1 regulation means this. The SEC did not.

2 They came in--

3 PANEL MEMBER: [Interposing] The SEC
4 said something about what CSX's are and
5 beneficial ownership. It took no position as
6 to whether the relationship between you and
7 the banks was such as to constitute--

8 MR. LANDAU: Absolutely, Your Honor.

9 PANEL MEMBER: Are we talking about you
10 and the banks? I mean, there are two groups
11 here, possibly. One group is you and the
12 other fund.

13 MR. LANDAU: 3G.

14 PANEL MEMBER: The two funds.

15 MR. LANDAU: Right.

16 PANEL MEMBER: That's one possible
17 group. Another possible group is the two
18 funds in the bank. So are we talking about
19 that, whether the banks--

20 MR. LANDAU: [Interposing] No, Your
21 Honor.

22 PANEL MEMBER: --are part of a group?

23 MR. LANDAU: No, Your Honor. In fact,
24 he never said, he never made any such

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1 finding. In other words, what you are getting
2 at, I think is isn't there enough here to
3 show beneficial ownership because you had
4 some kind of an agreement with the banks who
5 would hold the shares that are referenced by
6 the swap. That would be a very different
7 kettle of fish. In other words, under those

8 circumstances you could have a situation
9 where a swap holder did have beneficial
10 ownership of the shares, if there were an
11 agreement with the banks. But that's not the
12 case here. The District Court made no such--

13 PANEL MEMBER: [Interposing] Well, I
14 would hope they would have beneficial
15 ownership and they would also be a member of
16 a group with the banks. The banks would then
17 be--

18 MR. LANDAU: [Interposing] Fair enough.
19 But the District Court--

20 PANEL MEMBER: --part of the group.

21 MR. LANDAU: --made no such finding to
22 that effect, Your Honor. In fact, he
23 specifically declined to make such a finding
24 in this case.

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1 Again I think though--

2 PANEL MEMBER: [Interposing] And by

3 declining to make such a finding he declined
4 to find that the banks and the funds would
5 act in concert with regard to buying,
6 selling, disposing or voting the shares.
7 MR. LANDAU: Yes, Your Honor.
8 PANEL MEMBER: He declined to find that.
9 MR. LANDAU: Yes and that's absolutely
10 critical because we are—we have been accused
11 of this position and I think this is to the
12 extent of the fallacy of amicus brief that is
13 filed in their behalf that comes in with the
14 premise that there is an agreement with
15 respect to voting between the banks and the
16 long party for the swap. That would be a
17 totally different case.

18 PANEL MEMBER: If your clients had
19 voting power over the shares, would that be
20 enough?

21 MR. LANDAU: Yes, Your Honor. I mean,
22 that would typically fall within--

23 PANEL MEMBER: [Interposing] All right.

24 MR. LANDAU: Now your first point--

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1 PANEL MEMBER: That would fall within
2 the definition of beneficial ownership?

3 MR. LANDAU: Absolutely. All right,
4 now--

5 PANEL MEMBER: [Interposing] And the
6 definition of group, which is a different
7 regulation of the SEC.

8 MR. LANDAU: That's correct, Your Honor.

9 PANEL MEMBER: And you take comfort in
10 the fact that there is no agreement between
11 your clients and the banks over voting power?

12 MR. LANDAU: Yes, that's an absolutely
13 critical point.

14 PANEL MEMBER: Well, let me call your
15 attention to the exchange release that the
16 judge quotes on 54, it is number is 33.58.05.
17 I don't expect you to know it by number, but
18 it is the one that refers to—it says for
19 example, under this rule the mere possession
20 of the legal right to vote may not be
21 determinative of who is a beneficial owner
22 inasmuch as another person may have the power
23 whether legal, economic or otherwise to
24 direct such vote.

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1 MR. LANDAU: Sure.

2 PANEL MEMBER: You are familiar with
3 that?

4 MR. LANDAU: Yes, Your Honor.

5 PANEL MEMBER: All right. So if there
6 was an agreement between your clients and the
7 banks your client would have the legal power,
8 right, because if they didn't vote they
9 wanted they could sue them to enforce the
10 agreement, right? So that would be the legal
11 power. What do you do with the phrase or
12 otherwise? Doesn't that imply something
13 beyond legal power?

14 MR. LANDAU: But, Your Honor, again--

15 PANEL MEMBER: And in this respect, if I

16 could add this, the Court said that there was
17 reason to believe that TCI could influence
18 the banks. You said if they made no
19 findings, but they said that. So how does
20 that tie to this or otherwise?
21 MR. LANDAU: Reason to believe, Your
22 Honor, is not necessarily a finding. A
23 reason to believe is the language of saying I
24 am not making a finding, I am saying thee is

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1 reason to believe but it is not a finding.
2 But, again--
3 PANEL MEMBER: [Interposing] In terms
4 of--
5 MR. LANDAU: --going back to your point.
6 I think this, if you read the SEC letter that
7 is filed in this case, it addresses this very
8 point. It says what the judge means by
9 influence, he takes it down and I think the
10 ISBA brief is very powerful on this point;
11 voting power is not the same thing as this
12 homomorphous influence. I think what the
13 District Court is saying--
14 PANEL MEMBER: Maybe you didn't
15 understand my question. I don't think I even
16 mentioned the District Court. I didn't
17 mention his findings or his lack of him. I
18 am asking what you do with the word otherwise
19 in a release that talks about ways of
20 directing voting power other than having the
21 legal right to do so.
22 MR. LANDAU: I think, I don't have the
23 exact quote that you are citing direct in
24 front of me, but as I recall what you said it

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1 was saying you may have an absolute legal
2 agreement or you may have a more winky-winky
3 agreement but that is still an agreement.
4 PANEL MEMBER: It doesn't use the word
5 agreement.
6 MR. LANDAU: But it is still, it still
7 voting power.
8 PANEL MEMBER: Another person may have
9 the power.
10 MR. LANDAU: Power.
11 PANEL MEMBER: Whether legal, economic
12 or otherwise to direct such voting.
13 MR. LANDAU: Right, Your Honor, and I
14 think it goes back to power. Power is the
15 touchtone that the SEC--
16 PANEL MEMBER: Well, if I'm--see, if I'm
17 your client and I am putting millions of
18 dollars of business in Deutsche Bank and I've
19 moved it from eight other banks to put it
20 there--
21 MR. LANDAU: [Interposing] Your Honor,
22 the SEC--
23 PANEL MEMBER: --don't I have a lot of
24 otherwise power get Deutsche Bank to do the

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1 innocuous thing of voting. Deutsche Bank
2 doesn't care how these shares are voted,
3 right? It is irrelevant to them, isn't it?

4 MR. LANDAU: Well, they typically don't
5 vote, right.
6 PANEL MEMBER: That's a good definition
7 of irrelevant.
8 MR. LANDAU: Yes.
9 PANEL MEMBER: So they don't care. So
10 as to somebody who cares so little that they
11 typically don't vote and they are my prime
12 customer, I am their prime customer, excuse
13 me, don't I have some otherwise power?
14 MR. LANDAU: No, Your Honor, with all
15 respect, that is not the power. And the SEC-
16 -
17 PANEL MEMBER: That's not power? In the
18 real world of finance that's no power to say
19 somebody who is dependent on my business, I
20 would like you to vote them and they say
21 well, you don't have any power.
22 MR. LANDAU: Well, Your Honor, the SEC--
23 PANEL MEMBER: Is that what they going
24 to say, Deutsche Bank?

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1 MR. LANDAU: Your Honor, with all
2 respect the SEC, whether or not the SEC could
3 say that that was enough to qualify as power,
4 the SEC has not and we know that because in
5 this very case they have said so.
6 PANEL MEMBER: Well, that's the
7 division; we don't have the Commission's
8 view.
9 MR. LANDAU: Well, Your Honor--
10 PANEL MEMBER: [Interposing] We have a
11 division letter, which leaves open a lot of
12 things. But, in any event, we don't have the
13 Commission's view.
14 MR. LANDAU: Well, Your Honor.
15 PANEL MEMBER: [Interposing] What we do
16 have is the Commission's release which says
17 there can be ways of directing power other
18 than through legal power. Indeed there can
19 be economic power. We haven't even talked
20 about that.
21 MR. LANDAU: Your Honor, again, if you
22 start to say that the line goes there to say
23 well the fact that you might have these
24 relationship, that there could be economic

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1 power, that would be a major expansion of
2 where the SEC is.
3 PANEL MEMBER: But your principal
4 argument has to be that anything which is not
5 highly specific creates the impossible set of
6 non rules and that investors, people who buy
7 CSXs will not know when they have to reply
8 and when they don't, because in the end we
9 certainly can read it this way. Your
10 argument has to be that you need a bright
11 line here, otherwise what are people to do?
12 The answer the other way is if you are
13 engaged in trying to get control of a company
14 and you are coming close, what's so bad about
15 revealing?
16 MR. LANDAU: One thing again, if this

17 broad prospective, as you just put it, the
18 odd thing here is they are acting as if we
19 were trying to hide something. We went to
20 CSX and we--there is no subterfuge here. This
21 from the beginning was a situation--
22 PANEL MEMBER: [Interposing] No, the
23 claim is you didn't go to the public.
24 MR. LANDAU: But, but, that was released

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1 in CSX's AK. They said we have a heavy
2 position in swaps. And, again, one thing to
3 really keep in mind here, Your Honor, is that
4 everything that was at issue here, the
5 District Court did find this specifically by
6 saying that our disclosure in December of
7 2007 did not have any material problems with
8 it, that everything was out there more than
9 six months before the shareholder vote.
10 So at the end of the day, putting aside
11 the liability issues on which we have been
12 focused so far, in terms of the remedial
13 issues in this case, clearly under Section 13
14 (b), an informational statute, all the
15 information was out there.
16 PANEL MEMBER: You are now against the
17 cross appeal.
18 MR. LANDAU: I just want to--
19 PANEL MEMBER: That's what you're to
20 trying to prove.
21 MR. LANDAU: Yes, Your Honor, I just
22 want to make sure that we don't lose sight of
23 the fact that whatever we decide on the
24 liability issues, at the very least on the

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1 liability issues I would say if you were to
2 start saying what these agency rules mean in
3 ways that are at least in consistency with
4 the agency or some division thereof has said
5 in this case, at the very least I would
6 respectfully urge you to ask the agency to
7 opine on what its rules mean. Obviously
8 Chevron difference would apply if the agency
9 is saying yes, this is what our rules mean.
10 Then you are present with a Chevron question.
11 We don't really have a Chevron question here
12 because the agency is not coming in and
13 saying that is what the rules mean, the
14 District Court is.
15 But, again, I just to underscore the
16 point that on the remedy issue they filed
17 this lawsuit three months after all this
18 information went out.
19 PANEL MEMBER: Well, let's wait on the
20 remedy issue until after we've got them.
21 MR. LANDAU: Very well.
22 PANEL MEMBER: And you come back. Is
23 there other questions?
24 MR. LANDAU: No.

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1 PANEL MEMBER: I think we should hear
2 the opposing side.
3 MR. LANDAU: Thank you, Your Honor.
4 PANEL MEMBER: Mr. Middleton.

5 MR. MIDDLESON: Good morning. May it
6 please the Court. My name is Rory Middle son
7 and I am appearing on behalf of CSX.
8 Let me deal out of order by just dealing
9 with the exchange that just went on there
10 about what Mr. Landau, who is the core of the
11 case, which was what this 13 (d) (3) (a) and
12 (b) mean.
13 The section is entitled Determination of
14 Beneficial Owner. This is the SEC's rule for
15 the whole section (a) and (b). So (b) says
16 how do you get a beneficial owner? The SEC
17 is plainly within its power to pass a rule
18 that says you are going to determine
19 beneficial owner in the following way, I am
20 going to tell you under (a) that this is
21 exactly what it is going to be and I want to
22 come back to Judge Newman's "or otherwise" in
23 a second and then it can say under (b) which
24 is part of 13 (b) (3) it says, determination

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1 of beneficial owner, subsection B says, this
2 is all of the stuff that the District Court
3 found and as Judge Newman pointed out in
4 terms of questioning it can't be that
5 subsection b of 13 (b) (3) requires you to be
6 a beneficial owner under (a) to begin with,
7 otherwise we have a wasted section.
8 And there isn't really any dispute on
9 the findings of fact. They say in their
10 final reply brief, they have a phrase that
11 says--what did they say? This appeal is
12 about the law and not the facts. So there is
13 no--

14 PANEL MEMBER: [Interposing] Well, I
15 know they say that. On the other hand, if
16 the law requires a finding of fact that there
17 is a scheme or plan to evade and if the law
18 requires that a group be formed at a certain
19 time for certain purposes, then an argument
20 that the law doesn't show that is that the
21 court did not find facts sufficient to
22 establish these things.

23 So I don't think that you can treat them
24 as having waived any arguments about the

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1 facts, because they are saying the law.

2 MR. MIDDLESON: I believe on page 1 of
3 their reply brief they say even on the facts
4 as found they win, that there should be a
5 reversal. There isn't a serious argument on
6 the proof--

7 PANEL MEMBER: [Interposing] Oh, I
8 understand that, but to say that doesn't mean
9 that the facts are inadequate for them to win
10 even if they lose on their definition of law.

11 MR. MIDDLESON: Let me--

12 PANEL MEMBER: [Interposing] I think
13 that is overstated.

14 MR. MIDDLESON: All I was trying to say
15 is on the group findings there isn't--their
16 argument, their legal argument on the group
17 findings is that there had to be specific one

18 purpose, one, two, three, four.
19 PANEL MEMBER: That's right.
20 MR. MIDDLESON: I believe that the
21 Latent case and 2111 and all of those things
22 say this Court just looks at the record.
23 PANEL MEMBER: Let me ask you, just to
24 understand your position. Had they gone out

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1 and bought 4.9% of CSX and in order not to
2 report stock deliberately, stock buying at
3 that point, would they not violate (b) under
4 your view?
5 MR. MIDDLESON: No, Your Honor. But you
6 have to do it to avoid the purposes of a plan
7 and scheme under 13 (d) and 13 (d) requires
8 that you have 5%. They can stay under 5%.
9 PANEL MEMBER: No, but this all gets
10 very circular because it also requires
11 beneficial ownership. And if you read (b) as
12 a definition of beneficial ownership you do
13 have the question whether it is within the
14 power of the SEC.
15 Suppose further they had gone to some
16 large shareholders of CSX and discussed with
17 them purchasing their shares and reached no
18 agreement but let them know they were
19 interested and delayed that purchase until
20 they were ready. They have ten days I
21 believe to file the report under 13 (d).
22 They have these large shareholders who
23 already may have bought more shares knowing
24 an offer would come along, but they have

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1 readied the marked, as it were, would that
2 not violate 13 subsection b, under your view?
3 MR. MIDDLESON: It would violate
4 subsection A, going back to Judge Newman's
5 question.
6 PANEL MEMBER: No agreement on price, no
7 agreement on date of sale and they would have
8 violated Section A?
9 MR. MIDDLESON: It says--Your Honor said
10 to me that they had lined these people up to
11 buy the shares.
12 PANEL MEMBER: No, no, I said they
13 engaged in negotiations with them. They had
14 no agreement on price and they had no
15 agreement on date.
16 MR. MIDDLESON: If you don't have an
17 agreement on price it is very hard to imagine
18 that someone is going to find that you have
19 an arrangement.
20 PANEL MEMBER: No, but my--that's right,
21 but they would have done exactly what is
22 claimed to have been done here, which is they
23 have facilitated a very large purchase of
24 shares on the date when they are ready to

0031

1 disclose. In fact, ten days before.
2 MR. MIDDLESON: They--what you--if there
3 was a price agreement there there would be a
4 violation of (A) and (B). And what we had--
5 PANEL MEMBER: No, no price agreement.

6 MR. MIDDLESON: But, Your Honor, is
7 analogizing --
8 PANEL MEMBER: [Interposing] Isn't that
9 a scheme to evade reporting?
10 MR. MIDDLESON: But you can't have--
11 PANEL MEMBER: [Interposing] Isn't it a
12 scheme to evade reporting?
13 MR. MIDDLESON: No.
14 PANEL MEMBER: Very similar to what you
15 have here?
16 MR. MIDDLESON: No, Your Honor. You
17 have to have a price. If there is a price
18 and there was a wink at a price it would be a
19 scheme to evade reporting.
20 PANEL MEMBER: Oh, we all agree on that.
21 PANEL MEMBER: Suppose that instead of
22 being shareholders they are somebody's great
23 aunt, the person's great aunt, they have 4.9
24 and the great aunt buys 2%, is that a scheme?

0032

1 MR. MIDDLESON: The great--
2 PANEL MEMBER: And they are not, they
3 have no particular conversation except that
4 everybody knows that this great aunt will do
5 everything for the holder of 4.9.
6 MR. MIDDLESON: You would likely get
7 into a group discussion there under the rule,
8 the--
9 PANEL MEMBER: [Interposing] Well, the
10 problem with that is Judge Winters earlier
11 question as to whether there was a finding of
12 a group between the defendants and the banks.
13 Sure, if there were a group between
14 defendants and the banks then there would be
15 no problem, but there is a problem with that.
16 MR. MIDDLESON: But Your Honor is now
17 asking me about the great aunt.
18 PANEL MEMBER: Yes.
19 MR. MIDDLESON: And the 4.9 and 2, I
20 don't see that that is an arrangement to
21 avoid reporting. That is you are going to
22 your great aunt and you are getting a wink.
23 This is a group question. It is--I don't see--
24 I see Your Honor's question where you say I

0033

1 go to a big holder and say I am with you.
2 What the difference between that and here is
3 you have a price. If you have a price then a
4 wink like that would be covered by (A).
5 And I want to go back to Judge Newman's
6 question on the press release.
7 PANEL MEMBER: I mean, what do you mean
8 you here you have a price?
9 MR. MIDDLESON: There is a price on the
10 stock, on the swap. There is a price, an
11 agreed to price, exercised price on the
12 stock. They go out and buy the stock.
13 PANEL MEMBER: I still have--
14 PANEL MEMBER: I'm sorry, could you
15 explain that to me?
16 MR. MIDDLESON: There is a swap that
17 goes ahead at a price. The bank then goes
18 buys that physical stock.

19 PANEL MEMBER: It is a hedge.
20 MR. MIDDLESON: It is a hedge. So there
21 is a price in the market that they bought
22 these shares at.

23 PANEL MEMBER: Right.

24 MR. MIDDLESON: This isn't--

0034

1 PANEL MEMBER: The bank paid a price, a
2 determinable price for the shares.

3 MR. MIDDLESON: Right. And the rewards
4 are based on that price. The payment that
5 TCI is going to get is going to depend on
6 that price.

7 PANEL MEMBER: What is--I don't
8 understand what that is relevant to. I don't
9 understand what you are--

10 PANEL MEMBER: I mean, what happens when
11 they unwind?

12 MR. MIDDLESON: They sell. They sell
13 the shares.

14 PANEL MEMBER: They what?

15 MR. MIDDLESON: They sell the shares.

16 PANEL MEMBER: Yeah.

17 MR. MIDDLESON: And, but--

18 PANEL MEMBER: And most of the time they
19 will sell to their counterparty.

20 MR. MIDDLESON: No, here in fact they
21 say they didn't--they just sold it in the
22 market and their counterparty went and bought
23 in the market a lot of the time. But there
24 wasn't--there isn't a wink here saying, I am

0035

1 going back to your question, Your Honor, your
2 question is is there a wink with someone on a
3 stock that there isn't a price? And I am
4 saying, no. Here they went out and got a
5 price and they now have someone who is a
6 shareholder.

7 PANEL MEMBER: I see the line of
8 questioning of Judge Winters go back to my,
9 what was termed by opposing counsel, the
10 broader question. That is, if we do not have
11 a bright line then what is it that because of
12 intention to violate to avoid reporting
13 constitutes enough to be a violation?

14 MR. MIDDLESON: You need--

15 PANEL MEMBER: [Interposing] I am
16 having, I am having a little bit a problem
17 because you told Judge Winters that 4.9% with
18 conversations is one side clearly on one side
19 of the line and what happened here is clearly
20 on the other side of the line.

21 MR. MIDDLESON: They went--

22 PANEL MEMBER: I am having a little bit
23 of trouble with it because I don't see a
24 line.

0036

1 PANEL MEMBER: In my hypothetical they
2 but the shares ultimately from the large
3 investors they had preliminary negotiations
4 with.

5 MR. MIDDLESON: If you have preliminary-

6 -

7 PANEL MEMBER: In your case they bought
8 it on the market. If anything, my
9 hypothetical is a stronger case for the
10 application of (B) than yours.

11 MR. MIDDLESON: But your--no, what they
12 did here was they said I want to get say 14%
13 and they went and got 14% by going to swaps
14 and they didn't have as of March 31, they
15 didn't have any shares and they did that to
16 avoid making a 13 (D) disclosure. The
17 District Court so found if you go back to
18 Judge Calabresi's question, which is do you
19 need a bright line. The bright is if you
20 have 5% and a control intent you must
21 disclose. That is not--we heard that there
22 was going to be.

23 PANEL MEMBER: 5%, how do you have 5%?
24 You have 5% in CSX's investment?

0037

1 MR. MIDDLESON: You had 5% economic
2 interest in the company and you have done
3 that evade--

4 PANEL MEMBER: So that if your argument
5 is that if somebody has more than 5% of CSX's
6 and ultimately intends to control the company
7 that is enough, even though they have no
8 relationship to the banks? That's getting
9 very close to the position which Amicus says
10 for heaven's sakes don't go and the SEC has--

11 MR. MIDDLESON: No, what--what we said is
12 that if you get to that 10% and you do this
13 so that you will not have to make the
14 disclosure and you have a control intent that
15 is what--

16 PANEL MEMBER: So, if you buy CSX's in
17 order ultimately to get control once you get
18 over the official figure you are arguing that
19 then you have to report. Now that's a very
20 nice bright line, but I am not sure it is a
21 bright line that the statute sets up.

22 MR. MIDDLESON: It is the bright line
23 that subsection B sets you, Your Honor. It
24 says that they, if I can just go through it.

0038

1 PANEL MEMBER: I would have thought that
2 you were better off.

3 PANEL MEMBER: Can I hear him go through
4 this.

5 PANEL MEMBER: I'm sorry.

6 MR. MIDDLESON: Subsection B says any
7 person who directly or indirectly creates or
8 uses, it goes on, or other contract with the
9 purpose or effect of divesting such person or
10 beneficial ownership of a security, that's
11 not here, or preventing the vesting of such
12 beneficial ownership, the judge found that
13 they did that. And if part of a plan or
14 scheme to evade the reporting requirements of
15 Section 13 B the judge found they did that,
16 is deemed to be the beneficial owner.

17 PANEL MEMBER: Yeah, that's what I want
18 to ask you about. I don't want to ask you
19 about what we largely talked, whether it was

20 as part of a plan to evade. That's the
21 motive part. I want to ask you about the
22 thing you must do "preventing the vesting."
23 What did they do to prevent vesting?

24 MR. MIDDLESON: They went into swaps in

0039

1 order to get the economic exposure and--

2 PANEL MEMBER: [Interposing] Had they
3 not gone into swaps, would any shares have
4 come to them? If they had not?

5 MR. MIDDLESON: Yeah.

6 PANEL MEMBER: Had they not gone into
7 swaps would any shares have come to them?

8 MR. MIDDLESON: No, Your Honor, I mean--

9 PANEL MEMBER: [Interposing] Well, then
10 how did they prevent vesting by going into
11 swaps?

12 MR. MIDDLESON: Because they went into
13 swaps instead of going into shares. If they
14 had gone into the shares and, in fact, on
15 April 3rd--

16 PANEL MEMBER: [Interposing] Hold it.
17 Well, that is coming very close to saying
18 you've got to--you've got to report if you buy
19 and since you didn't buy you still got to
20 report.

21 PANEL MEMBER: Yep.

22 MR. MIDDLESON: It says--

23 PANEL MEMBER: You had a dream last
24 night of controlling CSX.

0040

1 MR. MIDDLESON: No, it says if you are
2 using swaps as a mechanism to get an economic
3 interest.

4 PANEL MEMBER: No, it doesn't say that,
5 it says prevent the vesting. Those are the
6 words. I know it seems bizarre to be reading
7 a statute or a regulation literally but every once a
8 while we do it.

9 MR. MIDDLESON: I believe that what they
10 did to prevent the vesting was to do swaps
11 instead of buying shares.

12 PANEL MEMBER: And any time--

13 PANEL MEMBER: Used them instead of.

14 MR. MIDDLESON: Yes.

15 PANEL MEMBER: That prevented. But if
16 you present something, you normally do
17 something--prevent normally means if I don't
18 take the prevention something will happen.
19 If I don't hold up the wall, if I don't
20 prevent the wall from falling down, it will
21 fall down. That's prevention. What did they
22 prevent here? They didn't prevent those
23 shares from coming into their treasury.

24 MR. MIDDLESON: They could, Your Honor.

0041

1 PANEL MEMBER: The shares were never
2 destined for their treasury. The shares were
3 out on the open market.

4 MR. MIDDLESON: The shares were destined
5 for their treasury in the sense that they got
6 someone to go and buy those shares in their
7 safe/

8 PANEL MEMBER: Ahhh, now we are back to
9 the fact that the banks had it. And now we
10 are back to the question of what the
11 relationship between them and the banks was
12 and there is no question that if they were a
13 group with the banks that that would be so.
14 If they are not a group of the bank do they
15 have enough otherwise control over the bank
16 so that the bank's ownership--so we are back--
17 MR. MIDDLESON: [Interposing] They knew
18 that it was inevitable and they said so at
19 oral arguments.
20 PANEL MEMBER: Exactly. That's why I
21 started asking not about the prevention of
22 vesting but about the otherwise means of
23 directing voting. I might agree with you,
24 although the judge didn't go that far, maybe

0042

1 he will get a chance to.
2 MR. MIDDLESON: And he--
3 PANEL MEMBER: He didn't go that far to
4 say that they otherwise directed the voting.
5 He did talk about influence, but all he said
6 was there is reason to believe. He didn't
7 make a finding of influence, did he?
8 MR. MIDDLESON: He did not make a direct
9 finding of influence.
10 PANEL MEMBER: Even an indirect one as
11 far as I could see.
12 MR. MIDDLESON: Well, it depends on what
13 you've taken to mean why there is reason to
14 believe.
15 PANEL MEMBER: Well, I don't think we
16 have affirmed many findings under 52 (A) just
17 because a judge says there is reason to
18 believe.
19 MR. MIDDLESON: I don't--I would agree
20 with that Your Honor.
21 PANEL MEMBER: Okay. So he didn't nail
22 it on the otherwise having the power to
23 direct voting. At least he hasn't done that
24 yet.

0043

1 MR. MIDDLESON: I believe he did not
2 nail it on the otherwise.
3 PANEL MEMBER: So that's--so what he did
4 is, he put it on the deeming part of
5 preventing the vesting. That's why I now
6 have asked you what he--what they did to
7 prevent and all you said is they did swaps.
8 MR. MIDDLESON: They did swaps. And
9 they did swaps deliberately to prevent, they
10 wanted to get an economic exposure to this
11 company and they did swaps.
12 PANEL MEMBER: That's a funny use of the
13 word prevent, isn't it? You would think that
14 would cover any person who wants shares and
15 figures out a way to have a chance to get
16 them, not a contract to get them, but a good
17 chance to get them, violates 13 (D). You
18 wouldn't use the language of preventing
19 vesting to cover that.
20 MR. MIDDLESON: Well, when I read it I

21 did, but Your Honor is—I am probably not
22 going to be able to convince you from saying
23 that that's what I took preventing vesting to
24 mean, because I don't see what else.

0044

1 PANEL MEMBER: And my problem is that if
2 that is preventing vesting, it is immensely
3 broad. I mean, I don't see how anybody who
4 buys CSXs isn't going to be in--and has an
5 idea of getting control isn't going to be
6 preventing vesting if that's what you mean by
7 it.

8 MR. MIDDLESON: I would say, Your Honor,
9 if they intend to get control and they go
10 over 5%, then that's the result you get.

11 PANEL MEMBER: Well, let me ask you,
12 isn't the difference now, there are two things
13 here, relevant beneficial ownership. One is
14 the investment—I mean, the ownership of the
15 stock, a market for the stock, which you keep
16 emphasizing and the other is voting.

17 MR. MIDDLESON: We are in Subsection A
18 now. Yes, Your Honor.

19 PANEL MEMBER: Well, we are in
20 Subsection A or in Subsection—or we are in
21 the group subsection, I mean, the definition
22 of group in A and B clearly overlap. They
23 are directly, more or less, in many ways
24 exactly the same thing.

0045

1 My question, I am voting—I mean, I
2 frankly don't understand how somebody having
3 a swap and then buying the shares on the
4 market has done anything beyond what they get
5 by talking to large investors about
6 possibilities in the future, but I am voting
7 the power to direct voting. It doesn't have
8 to be more than a bank saying well, we want
9 to keep this fund as a client.

10 MR. MIDDLESON: Well, I think if you
11 look at the introductory words and this is
12 going to back to Judge Newman's question on
13 the press release, introductory words of
14 subsection A now, say through any contract
15 arrangement, understanding, relationship or
16 otherwise and we are back to the or
17 otherwise.

18 PANEL MEMBER: If we are under
19 Subsection A and the District Court did not
20 make these findings, we can do one of three
21 things, assuming that we didn't go with you
22 on Subsection B and affirm, we can say there
23 isn't enough here to find a subsection A
24 violation. We can say there is so clearly

0046

1 otherwise this power so that we can affirm on
2 that ground because we can affirm the
3 District Court on any ground or what would
4 see to be the more sensible thing to say the
5 District Court did not find this, it
6 expressly excluded finding this because it
7 thought it had enough on B so we send it back
8 to the District Court to see what they can

9 come up with, whether it will find that or
10 not.
11 Now why isn't that the sensible thing
12 rather than arguing on whether on these facts
13 it might be one way or it might be the other?
14 MR. MIDDLESON: In terms of my
15 supplemental ground for appeal, I agree with
16 that. I was just trying to answer Judge
17 Winters' question.
18 PANEL MEMBER: I'm sorry.
19 MR. MIDDLESON: Which was he asked me
20 didn't I--you have to have something more than
21 and I said--
22 PANEL MEMBER: [Interposing] Well, a
23 bank having these shares might not vote them.
24 MR. MIDDLESON: They might not vote

0047

1 them.
2 PANEL MEMBER: There are tons of
3 instances where they don't vote them in these
4 circumstances.
5 MR. MIDDLESON: And they might not vote
6 them. And you were just asking did you have
7 to have--
8 PANEL MEMBER: I mean, don't you need
9 specific evidence that in a particular case
10 there was some kind of understanding between
11 the two about the bank voting them?
12 MR. MIDDLESON: if you were going to go
13 on a--I think the right answer to Judge
14 Calabresi's question is you would go back.
15 PANEL MEMBER: I mean, there may be such
16 evidence here, lending shares, not lending
17 shares for short selling and things. I mean,
18 I am not saying you have to show the actual
19 communication. You may be able to show
20 behavior that does this. But it seems to me
21 that that power to direct--I mean, evidence to
22 that means something more than well they were
23 the bank's customer.
24 PANEL MEMBER: Even under the otherwise

0048

1 clause it is even the otherwise clause
2 requires something, but how much I don't
3 know.
4 MR. MIDDLESON: It does say relationship
5 or otherwise and I would go with the approach
6 that Judge Newman was asking earlier in terms
7 of, you know, the way the world works, if you
8 will.
9 PANEL MEMBER: Was the bank ever, was
10 Deutsche Bank ever asked in discovery would
11 you have voted the shares the way TCI wanted,
12 if they had asked you?
13 MR. MIDDLESON: No, Your Honor. The--
14 PANEL MEMBER: [Interposing] That would
15 seem to be a pretty interesting question.
16 MR. MIDDLESON: The issue with Deutsche
17 Bank is that they were in Europe and it in--
18 PANEL MEMBER: Oh, come on now, we can
19 ask for interrogatories, really?
20 MR. MIDDLESON: In the time available to
21 us.

22 PANEL MEMBER: I can really take with my
23 chambers from Europe all the time.
24 MR. MIDDLESON: Maybe not having had the

0049

1 benefit of Judge Newman's reading of
2 preventing the vesting of something, I took
3 this to be--
4 PANEL MEMBER: It is my question. Don't
5 assume I am there. I am asking you about
6 preventing.
7 MR. MIDDLESON: But that, the way I read
8 this section is that it must mean what I--
9 PANEL MEMBER: How about if it went the
10 other way. Supposing instead of the loan
11 going from the bank to TCI, TCI finds a
12 friendly investor and says here is the deal I
13 have for you. I will lend you a lot of money
14 at a very nominal interest rate or going
15 market rate, not a deal, going market rate,
16 if you will buy a whole lot of shares of CSX
17 and my deal with you is if the stock goes
18 down I will pay you the downside. If it goes
19 up you will pay me the upside. But there is
20 no contract to turn the shares back. It just
21 says I am loaning you the money, I would like
22 you to buy them and you will be spared market
23 fluctuation. Do you have to report under 13
24 (B).

0050

1 MR. MIDDLESON: Tell me this is TCI,
2 they have more than 5%.
3 PANEL MEMBER: No, no, no. No, no, no.
4 They are under now, they are under 5%.
5 MR. MIDDLESON: Okay.
6 PANEL MEMBER: But they are saying to
7 somebody, you go out and buy 6% of CSX using
8 my money.
9 MR. MIDDLESON: And they have a control
10 intent?
11 PANEL MEMBER: Oh, yes.
12 MR. MIDDLESON: Yes, they have to report
13 that.
14 PANEL MEMBER: They have to report it.
15 MR. MIDDLESON: Right. If we got a
16 price this is where--
17 PANEL MEMBER: [Interposing] No, no, no,
18 no price, no price.
19 MR. MIDDLESON: Well--
20 PANEL MEMBER: Just to say harmless
21 against price fluctuation.
22 MR. MIDDLESON: I take that to be a
23 price, Your Honor.
24 PANEL MEMBER: Oh, okay.

0051

1 MR. MIDDLESON: Isn't that, doesn't it
2 sound like a price?
3 PANEL MEMBER: But at the end of the end
4 of the day in my hypothetical, CSX is getting
5 ready for the--TCI getting ready for the vote
6 says to their friend, okay, I need your
7 shares now in order to effectuate my control
8 intent and the friend says I am not going to
9 do that. You did hold my harmless, I don't

10 have any obligation to give you the shares
11 and, in fact, I am not going to because CSX
12 turns out to have a better Board of Directors
13 than I thought and I am going to vote my
14 shares their way.

15 MR. MIDDLESON: Okay.

16 PANEL MEMBER: So why is that covered by
17 13 (B)?

18 MR. MIDDLESON: Because you—I took your
19 assumption to be that you had exercised
20 investment power under 13 (B) (3) at (2) by
21 getting someone to buy the shares.

22 PANEL MEMBER: Can you invest--

23 MR. MIDDLESON: Investment power
24 includes the power to dispose of--

0052

1 PANEL MEMBER: [Interposing] but I can't
2 dispose of them in my hypothetical. The
3 friend has complete power to either retain
4 them or dispose of them.

5 MR. MIDDLESON: But you got him to buy
6 them in the first place.

7 PANEL MEMBER: I got him to be in a
8 position where if he wanted to be nice to me,
9 as he may well be, he would give me the
10 shares at no cost to himself, but he doesn't
11 have to. And you think that's enough.

12 MR. MIDDLESON: I think that's enough. I
13 think it would certainly be covered under the
14 group section 13 (b) (5) when you are getting
15 together to acquire equity securities of an
16 issuer.

17 PANEL MEMBER: We have kept you way over
18 time, but I think you ought to address the
19 sterilization issue, your cross appeal. And
20 you might also address the breadth of the
21 injunction which goes not only to this
22 company and these things, but to any other
23 company in the future. Specifically you cite
24 the first clause of Express Publishing but

0053

1 you don't cite the second clause of Express
2 Publishing, which cuts very much the other
3 way.

4 MR. MIDDLESON: If we did that that was
5 in error.

6 PANEL MEMBER: It was, it was.

7 MR. MIDDLESON: That would not be a wise
8 thing to do.

9 PANEL MEMBER: No, it was not a wise
10 thing to do especially in a brief which is so
11 full of criticism of a behavior of the other
12 side.

13 MR. MIDDLESON: If we did that I am
14 immensely apologetic that we did such a thing
15 and I confess I did not even notice that when
16 I read the cases. So it is my fault.

17 PANEL MEMBER: But the main thing is
18 what that case holds and also the
19 sterilization.

20 MR. MIDDLESON: Right. What my appeal
21 addresses is the District Court's decision
22 where he says where the Court free is a

23 matter of law to issue such an injunction it
24 would do so. And he concludes that Rondo and

0054

1 Treadway prevent him from doing that, for
2 different reasons.
3 He starts with Rondo and says I don't-it
4 doesn't prevent sterilization by itself. He
5 says you have to show irreparable injury and
6 you have to show irreparable injury to the
7 interests that the Williams Act is intended
8 to permit, to promote.
9 And then you have to look and say what
10 are the interests that the Williams Act is
11 intended to promote. And there are a number
12 of decisions that we have cited and we
13 started with Rondo saying there are two of
14 them, one of them is information and the
15 other is a level playing field.
16 And we then cited from ICM saying that
17 we cited from Hallwood, where Your Honor
18 found that there shouldn't be 13 (b) damages
19 because there was such an interest in a level
20 playing field.
21 In rereading Judge Coate's I on opinion
22 last night I found a decision of this court
23 in--
24 PANEL MEMBER: [Interposing] But how

0055

1 long would you have these things be
2 sterilized? That is--
3 MR. MIDDLESON: [Interposing] For one
4 election, Your Honor.
5 PANEL MEMBER: Why one election, if
6 sixty days before, if what you are doing is
7 to punish them, then I don't understand where
8 it falls.
9 MR. MIDDLESON: That's the one word I am
10 not going to use, Your Honor.
11 PANEL MEMBER: Of course you are not
12 going to use it, because you lose on it. So
13 the question is what is it that you are
14 trying to do when these people had notice
15 more than sixty days. If it had been-if they
16 had gotten control before, then Treadway
17 would say okay, we blocked the control. But
18 here they didn't get control, so what is it
19 that you would have done differently if you
20 had known sometime before rather than the
21 time you knew?
22 MR. MIDDLESON: What I would have done?
23 PANEL MEMBER: I mean, CSX, obviously.
24 MR. MIDDLESON: There is not much you

0056

1 can do differently. In fact, the--
2 PANEL MEMBER: [Interposing] So then
3 why--
4 MR. MIDDLESON: --District court finds
5 that disclosure wouldn't straighten the
6 playing field. He makes that finding. And
7 so the question is is there a goal in the
8 Williams Act of having there being a level
9 playing field?
10 PANEL MEMBER: I don't understand what

11 that means, did I use it in another opinion?
12 MR. MIDDLESON: Your Honor used it in
13 the Hallwood opinion.
14 PANEL MEMBER: Well, there it is.
15 MR. MIDDLESON: And it is--
16 PANEL MEMBER: That's the beauty of
17 Victor.
18 MR. MIDDLESON: It is also in the
19 Billing case where the Court is saying one
20 purpose of the Williams Act is to have a
21 level playing field.
22 PANEL MEMBER: Is that any different
23 than saying that's the consequence of proper
24 disclosure?

0057

1 MR. MIDDLESON: It is in the sense, one
2 is a totalitive sense, and that I am
3 obviously using it in a different way, but in
4 the cases there is a distinction that is
5 drawn frequently between the two goals. In
6 the Billing case I read last night, you know,
7 they give the two goals.
8 PANEL MEMBER: Well, once you have
9 disclosed, would anyone come into court to
10 say oh, well, you have disclosed, but you
11 haven't created a level playing field?
12 MR. MIDDLESON: I know of one entity,
13 Your Honor, this case. I mean, this is the--
14 PANEL MEMBER: Because you disclosed too
15 late.
16 MR. MIDDLESON: No. We are saying that
17 you have tilted the playing field in a way
18 that you have changed the make-up of the
19 shareholders--
20 PANEL MEMBER: [Interposing] But that's
21 non-disclosure during a certain period of
22 time before you disclose.
23 MR. MIDDLESON: Right. And but then--
24 PANEL MEMBER: So that's still non-

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1 disclosure.
2 MR. MIDDLESON: It is non-disclosure but
3 the non-the theory is that non disclosure-the
4 disclosure does not invent.
5 PANEL MEMBER: If the District Court
6 found that disclosure earlier would not have
7 made any difference and if we find that
8 finding not to be clearly erroneous, then
9 what does it mean to talk about a level
10 playing field?
11 MR. MIDDLESON: What it meant was that
12 the District Court found that there was
13 incorrect disclosure before the 13 (D) was
14 filed.
15 PANEL MEMBER: Yes.
16 MR. MIDDLESON: and he said that was
17 mute now that the information was out.
18 PANEL MEMBER: In other words, it made
19 no difference. So that the field was as
20 level as--
21 MR. MIDDLESON: [Interposing] No, it
22 goes on to discuss what has happened to the
23 playing field in the period up until May and

24 he says that what has happened is that they
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1 managed to get their friends and family and
2 all of these things in a way that the playing
3 field was not level. And he reads Treadway
4 to say that the only interest in—under the
5 Williams Act is disclosure and, therefore,
6 once you have disclosure then it is all over.

7 PANEL MEMBER: Okay.

8 PANEL MEMBER: Are you seeking any
9 relief with respect to the two directors as
10 to whom the challenge votes matter?

11 MR. MIDDLESON: I'm sorry, Your Honor, I
12 didn't get that.

13 PANEL MEMBER: Are you seeking any
14 relief with respect to the two directors as
15 to whom the challenged votes mattered?

16 MR. MIDDLESON: Matter?

17 PANEL MEMBER: Mattered.

18 MR. MIDDLESON: Yes.

19 PANEL MEMBER: You are seeking relief?

20 MR. MIDDLESON: Yes.

21 PANEL MEMBER: What relief are you
22 seeking?

23 MR. MIDDLESON: We are seeking to have
24 the 26.7 million shares not count.

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1 PANEL MEMBER: And since they were
2 elected, but the meeting has been postponed,
3 has it not?

4 MR. MIDDLESON: No, the meeting has—

5 PANEL MEMBER: Isn't there a September
6 date.

7 MR. MIDDLESON: There is now a September
8 date, I'm sorry, Your Honor, yes.

9 PANEL MEMBER: But they have been
10 elected.

11 MR. MIDDLESON: They have been
12 preliminarily elected, yes.

13 PANEL MEMBER: So is the issue whether
14 they will be, their election will be ratified
15 and they will be seated at the September
16 meeting, is that the issue?

17 MR. MIDDLESON: The issue at that
18 September will be do these 26 million shares
19 count.

20 PANEL MEMBER: Yeah, but they didn't
21 vote it. The count is already in, I
22 understand. That's what we were given to
23 believe from the recent submission.

24 MR. MIDDLESON: The count is in, but we

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1 are awaiting a decision from this Court.

2 PANEL MEMBER: So they have not been
3 elected, is that what you are saying?

4 MR. MIDDLESON: They have not been
5 elected. No one has been elected from the
6 2008 meeting.

7 PANEL MEMBER: And that won't happen
8 until the September meeting?

9 MR. MIDDLESON: Right. Ours guys
10 haven't been elected, no one has been
11 elected.

12 PANEL MEMBER: Okay, thank you. We
13 should hear a rebuttal.
14 MR. LANDAU: A couple of quick points,
15 Your Honor. With respect to this issue of
16 power under Subsection A of the rule, I think
17 you, Judge Newman have been picking up on,
18 what--
19 PANEL MEMBER: A, no I have been asking
20 about the release.
21 MR. LANDAU: But the question is
22 otherwise, what kind of power qualifies to
23 kind of have enough of beneficial ownership
24 between a long party to the swap and the

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1 banks. And I think one thing that is really--
2 this otherwise power. There is--and also the
3 question that Judge Calabresi asked, the
4 record here is clear, the deposition
5 testimony that Deutsche Bank's practice is
6 not to vote hedge shares, that it never spoke
7 to TCI about voting hedge shares, that it had
8 no intent to vote the hedge shares at the
9 CSX annual meeting and, in fact, as we point
10 out in the most recent supplemental filing
11 they did not vote those shares at the hedge
12 meeting.

13 So, again, unless you take power, that
14 otherwise power, to be something very
15 amorphous as general economic incentives,
16 there is no power, there is no agreement.
17 And again I refer to you the SEC letter--

18 PANEL MEMBER: Are you asking us with
19 respect to (A) to make that decision
20 ourselves rather than asking the District
21 Court, assuming that we decided your way on
22 (B) to consider whether on the facts of this
23 particular case there was such power?

24 MR. LANDAU: I think you could make it

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1 yourself on the facts of this case, because
2 power properly construed the evidence is all
3 clear that there is no power.
4 The only--the problem is you can--if the
5 definition of power is sufficiently deluded,
6 then I suppose you could, but that's really a
7 legal question not a factual question, what
8 does it mean to have this or otherwise. Is
9 it enough that somebody says gee, this is a
10 good client? I just want to make sure--

11 PANEL MEMBER: And supposing it is more,
12 supposing it does go back, I am not saying it
13 will or should, but supposing it does, he has
14 now said there is reason to believe.
15 Supposing if he is advised that a finding on
16 that point is rather significant and he finds
17 that had TCI asked Deutsche Bank to vote,
18 Deutsche Bank would have, would that finding
19 support liability?

20 MR. LANDAU: No, Your Honor, because the
21 question isn't if they had.

22 PANEL MEMBER: The otherwise.

23 MR. LANDAU: The question is was there
24 an agreement. The question isn't whether if

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1 they had decided to make an agreement.
2 PANEL MEMBER: You keep coming back to
3 agreement, which again sounds like a legal
4 rider.
5 MR. LANDAU: No, but regardless of
6 whether it is legal or whether it is your
7 wife and it is winky-winky, I am not, I am
8 not—I apologize if I—I'm certainly not trying
9 to rest on a legal formal agreement.
10 PANEL MEMBER: Okay.
11 MR. LANDAU: I am saying some kind of
12 agreement, whether it is a legal agreement or
13 whether it is a more casual agreement that
14 gives them voting power. Again I would like
15 to quote the--
16 PANEL MEMBER: [Interposing] But if the
17 judge finds that from all the economic
18 realities of the relationship between these
19 parties they would have voted with TCI had
20 they only been asked, why isn't that enough?
21 MR. LANDAU: Because, Your Honor, if I
22 can quote the language of the SEC in this
23 case, in our view the presence of economic or
24 business incentives that the counterparty may

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1 have to vote the shares of the other party,
2 as the other party wishes, or to dispose of
3 the shares to the other party or such
4 incentives may exist the counterparty chooses
5 to act in these areas and circumstances where
6 it's unconstrained by either legal rights
7 held by the other party or by any
8 understanding, arrangement or restricting
9 relationship with the other party, is acting
10 independently and in its own economic
11 interests.
12 PANEL MEMBER: That's the division.
13 MR. LANDAU: Yes.
14 PANEL MEMBER: That's the division.
15 MR. LANDAU: Well, yes.
16 PANEL MEMBER: But the Commission issued
17 this release which seems to go farther.
18 MR. LANDAU: Well, Your Honor, again it
19 depends what it means by otherwise power. I
20 mean, in other words--
21 PANEL MEMBER: [Interposing] Well, it is
22 certainly something more than an agreement.
23 MR. LANDAU: Than a legal right. I mean,
24 again, you still have to have--

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1 PANEL MEMBER: Okay. Are you going to
2 address the cross appeal?
3 MR. LANDAU: Absolutely, Your Honor.
4 PANEL MEMBER: Because your time is
5 already up.
6 MR. LANDAU: I am at your disposal, Your
7 Honor, whatever. Our basic point is very
8 simple. In order to get injunctive relief
9 you need to show irreparable injury. You
10 cannot show irreparable injury in a
11 situation, under a statute, whose purpose is
12 information, to get this out there to the

13 shareholders in time to digest before a vote.
14 Once it is out there for the vote, then the
15 purpose of 13 (a), 13 (b), excuse me, has
16 been served and there is no basis for
17 injunctive relief.
18 When they brought—they brought this
19 lawsuit at a strange time. They brought this
20 in March, three months after the December
21 disclosure.
22 PANEL MEMBER: I think you are saying
23 too much, because Treadway says at least if
24 they haven't gotten control.

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1 MR. LANDAU: That's the one asterisk
2 that we recognize, the Treadway opened that
3 question, but they didn't decide that
4 question. Look on 45 of Treadway. it says a
5 different circumstance may be presented if
6 prior to the collective disclosures control
7 has been obtained.
8 PANEL MEMBER: Why is there a difference
9 if they obtain control or if they obtain the
10 certainty of getting a certain number of
11 votes which they would not have gotten if
12 they had not—if they had disclosed.
13 MR. LANDAU: Well, the question is, Your
14 Honor--
15 PANEL MEMBER: [Interposing] What is it
16 about control that says that you can do it in
17 one case but not in the other?
18 MR. LANDAU: Well, I think the question
19 is, Your Honor, is the information out there
20 in time for the voting? If the vote—if by
21 the time there is a vote the outcome of the
22 vote has already been--
23 PANEL MEMBER: [Interposing] That
24 applies as much to control.

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1 MR. LANDAU: Excuse me?
2 PANEL MEMBER: You see my problem is
3 that that applies as much to control. If the
4 issue is there time to counter then that
5 applies to control. If the issue is did they
6 do something that gave them an advantage
7 before, then that applies as much to non-
8 control as to control. So I am not quite
9 sure I understand the asterisk in Treadway.
10 MR. LANDAU: And, Your Honor, and,
11 again, Treadway is very clear, it must not be
12 a way, it did not say this is the way it is,
13 it just says this is not the question before
14 us and we express no view on that position.
15 PANEL MEMBER: Okay, fine. Thank you.
16 MR. LANDAU: If there are no further
17 questions?
18 PANEL MEMBER: No.
19 MR. LANDAU: Thank you, Your Honor.
20 PANEL MEMBER: We will reserve decision.
21 [End of Case]

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