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No. 08-1037

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

PIRATE INVESTOR, LLC AND FRANK PORTER STANSBERRY,

Defendants-Appellants,

On Appeal from the United States District Court
for the District of Maryland

BRIEF OF FORBES LLC, HEARST CORP., TRIBUNE COMPANY (INCLUDING THE BALTIMORE SUN), EAGLE FINANCIAL, INC., INVESTORPLACE MEDIA LLC, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE CALIFORNIA FIRST AMENDMENT COALITION, THE RADIO-TELEVISION NEWS DIRECTORS ASSOC., THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE SOCIETY OF PROFESSIONAL JOURNALISTS, and THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION AS *AMICI CURIAE* SUPPORTING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae include publishers of financial news and commentary and First Amendment public interest organizations. *Amici* who participated in the district court proceedings are indicated with an asterisk. The parties, rulings under review, and related cases are accurately stated in the appellants' brief.

1. **Publishers**

- **Forbes LLC** is the publisher of Forbes and other leading magazines, including Forbes Life and Forbes Asia, as well as an array of investment newsletters and the leading business website, Forbes.com. Forbes has been covering American and global business since 1917. Forbes has no parent corporation and no company owns 10% or more of its stock.

- **Hearst Corporation** is a diversified, privately held media company that publishes newspapers, consumer magazines, and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces programming for television, and is the majority owner of Hearst-Argyle Television, Inc., a publicly traded company that owns and operates numerous television broadcast stations. The Hearst Corporation is privately owned, has no parent corporations, and no publicly held corporation owns 10% or more of its stock.

- **Tribune Company, Inc.** operates businesses in publishing, broadcasting and on the Internet. It reaches more than 80% of U.S. households. In publishing, Tribune operates nine daily newspapers, including The Baltimore Sun, Newsday, Chicago Tribune, the Los Angeles Times, the Hartford Courant, the South Florida Sun-Sentinel, the Orlando Sentinel, the (Allentown) Morning Call and the (Virginia) Daily Press. In broadcasting, Tribune owns 23 television stations and Superstation WGN on national cable. These publishing and broadcasting interests are complemented by high-traffic news and information web sites. Tribune Company is 100% owned by the Tribune Company Employee Stock Ownership Plan. No publicly held company owns any of its stock.

- Eagle Financial, Inc. is the parent company of: Eagle Financial Publications, LLC, publisher of several leading investment newsletters; Regnery Publishing, Inc., a 60-year old trade-book publishing company; Human Events, LLC, publisher of the 64-year-old political newsweekly, Human Events; several current affairs/political e-newsletters; and the Conservative Book Club, established in 1964. Eagle has no parent company and no company owns 10% or more of Eagle's stock.

- InvestorPlace Media LLC* is a privately held company that publishes investment advice through newsletters and e-letters. No publicly held corporation owns 10% or more of InvestorPlace Media LLC stock. InvestorPlace Media LLC is a wholly-owned subsidiary of InvestorPlace Holdings LLC which is owned by Avista Capital Partners of New York.

2. First Amendment Public Interest Organizations & Trade Associations

- The American Society of Newspaper Editors is a professional organization of approximately 750 persons who hold positions as directing editors of daily newspapers in the United States and Canada. The purposes of the Society include assisting journalists and providing unfettered and effective press in the service of the American people. The American Society of Newspaper Editors has no parent corporation and no stock. ASNE is a "trade association" because it is a continuing association of numerous individuals operated for the purpose of promoting the general professional, legislative and other interests of the news media.

- The California First Amendment Coalition is a non-profit and nonpartisan public interest organization dedicated to enhancing rights to freedom of speech and open government through educational programs, information services, and litigation. Founded in 1988, CFAC is a membership organization whose members include California newspapers and other news organizations, individual journalists, historians and other academics, community activists, and ordinary citizens who care about government access and accountability. CFAC does not issue stock and has no parent corporation.

- The Radio-Television News Directors Association is the world's largest and only professional organization devoted exclusively to electronic journalism. RTNDA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTNDA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms. The Radio-Television News Directors Association is a nonprofit organization with no parent company and it does not issue stock.

- The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that work to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

- The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press. SPJ does not issue stock and has no parent corporation.

- **The Thomas Jefferson Center for the Protection of Free Expression** is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. The Center has as its sole mission the protection of freedom of speech and press from threats of all forms. The Center pursues that mission through research, educational programs, and intervention on behalf of the right of free expression. Since its founding in 1990, the Center has actively participated in state and federal court cases that raise important free expression issues. The Center has no parent corporation and does not issue stock.

Dated: May 22, 2008

Respectfully submitted,

Mark Davies

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INTEREST OF *AMICI CURIAE*

Amici Curiae include publishers that provide their readers with financial news and commentary, including reporting about public companies as well as disinterested advice about investing in the stock market. The publications do not provide advice that is specific to any reader's investments. *Amici* also include public interest news-gathering organizations that have an interest in assuring that the public has access to information. The parties have consented to the filing of this brief.

The financial news and commentary of *amici* publishers is necessarily disinterested and objective. *Amici* publishers, like defendants here, have no economic interest in the companies about which they report or comment. Consumers and professional market analysts alike are increasingly receiving their financial news and commentary from neutral sources like *amici* publishers.

As the U.S. Securities and Exchange Commission ("SEC") and numerous economic experts have explained, disinterested and objective financial news and commentary plays an important role in assuring that capital flows to the companies that can best use it. Companies that are most likely to make future profits are able to put current capital to its most productive use. A vigorous "marketplace" of information is essential for investors to have a realistic portrait of a company's prospects.

Indeed, even disinterested financial speech that turns out to be mistaken plays a useful role in assuring that accurate speech is heard. Varied opinions about a company's future prospects may serve to sharpen understanding of the company even if one of those opinions turns out, in time, to have been mistaken. Likewise, when publishers report competing or even inconsistent versions of an event, readers evaluate the reports and can come to a judgment about which report, combination of report, or even a third report, is most likely to be accurate. So too, when a writer and source express different views about the contents of a conversation, the public is well able to assess which view is to be believed. Thus, a robust market in objective public speech about public companies necessarily includes speech that may turn out to be mistaken.

In view of the above, *amici* publishers, media companies, and public interest organizations are well positioned to address the broad impact of the district court's decision on established law protecting the freedom of expression and to explain why reversal is therefore necessary. Some *amici* publish general circulation newspapers and magazines and operate television stations, cable television networks, and Internet news sites. Others publish subscription-only newsletters. By virtue of their dissemination of disinterested financial news and commentary to the public, all of the *amici* are now equally exposed to potential securities fraud liability under the decision below. In the district court's view, a publisher can be liable of securities fraud based on commentary concerning future stock price movements or on financial news reports that turn out to be mistaken. Although the First Amendment is protective of a publisher's ability to speak without undue fear of liability, the district court's holding below threatens to undermine this necessary protection in the context of financial news and commentary.

SUMMARY OF ARGUMENT

When the federal government invokes securities fraud laws to punish speech consisting of financial news and commentary, the guiding principles are clear. Securities laws must give adequate breathing space to the freedoms protected by the First Amendment. At the same time, the reach of securities fraud laws is confined to the realm of financing corporate activity. And, when First Amendment concerns overlap with the concerns animating securities fraud laws, the law, as always, gives a "tie" to the First Amendment. The district court's holding that financial news and commentary can support securities fraud liability ignored these basic principles.

First, the decision below far too easily finds certain statements to be "false" and thus fails to afford sufficient breathing space to speech about financial matters. The court declared a mistaken *prediction* that a stock "should" rise to be a "false statement," even though a prediction is a statement of opinion that cannot be "false" within the meaning of the securities laws. Similarly, the court found an "intentionally" false statement sufficient to support a fraud claim, even though the sole evidence of intention was the mere falsity of the statement itself. By premising securities fraud liability on mere predictions or mistaken statements, the court's ruling fails to protect the breathing space necessary for a vigorous marketplace of financial speech.

Second, the decision below fails to confine the reach of securities fraud laws to the realm of corporate financing. The district court ruled that financial news and commentary can meet the "in connection with the purchase or sale" requirement of securities fraud under Section 10(b). That expansive ruling is in considerable tension with the Supreme Court's recent rejection of a similarly broad construction of securities laws. As the United States recently explained to the Supreme Court in disavowing the more expansive position of the SEC, federal securities laws do not reach all actions that affect the price of a security in some attenuated way.

Third, the decision below fails to afford publishers the routine First Amendment defense of premising liability only on statements made with "actual malice." But, as the Sixth Circuit recently held, the "actual malice" intent standard is necessary to assure that financial commentary and news are adequately protected. And, contrary to the view of the district court, the pure commercial speech doctrine has no application to this case involving speech that does far more than just propose a transaction.

Fourth, the decision below fails to interpret the securities laws to avoid a constitutional question despite the Supreme Court's instructions requiring such a method of construction in this setting. *Lowe v. SEC*, 472 U.S. 181 (1985). Under *Lowe*, securities laws may not reach financial news and commentary by disinterested publishers. The district court's rejection of the publisher's reliance on this constitutionally-mandated "disinterested publisher" defense to a securities action was erroneous.

In short, each one of the district court's holdings overestimates the intended reach of securities laws and underestimates the fundamental First Amendment interests at stake.

Reversal is warranted.

ARGUMENT

The district court found that the defendants are liable for securities fraud under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). Section 10(b) provides:

> It shall be unlawful for any person, directly or indirectly, . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange, . . . [a]ny manipulative or deceptive device.

At issue are certain statements involving financial news and commentary made in an investment letter. Contrary to the district court's expansive construction of Section 10(b), the First Amendment prohibits the law from imposing securities fraud liability on such statements.

I. The First Amendment Requires Construing Securities Laws To Protect Speech

The First Amendment states: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Although courts use a variety of doctrines to enforce this prohibition, the unifying theme is that all laws must give adequate "breathing space" to the freedoms protected by the First Amendment. *See NAACP v. Button*, 371 U.S. 415, 433 (1963). The securities laws are not exempt from this constitutional requirement. *See Lowe v. SEC*, 472 U.S. 181, 204 (1985).

A. Under the First Amendment, Laws Must Provide "Breathing Space" For Speech

The purposes of the First Amendment are familiar. The Constitution prohibits restrictions on speech to assure "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion.'" *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (citation omitted). Accordingly, all "formulae for the repression of expression" – such as laws against "insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business" – "must be measured by standards that satisfy the First Amendment." *Id.* (footnotes omitted).

Because First Amendment freedoms are "delicate and vulnerable, as well as supremely precious in our society," the Supreme Court has explained that they need "breathing space to survive." *NAACP*, 371 U.S. at 433. Adequate legal protection for speech necessarily includes protecting statements that are, at least in hindsight, erroneous because "erroneous statement[s are] inevitable in free debate, and [they] must be protected if the freedoms of expression are to have the breathing space that they need to survive." *N.Y. Times*, 376 U.S. at 271-72.

Thus, for example, in order to encourage discussions on matters of public concern, the law will occasionally protect mistaken statements, acknowledging that "the advantages derived are so great that they more than counterbalance the inconvenience of private persons" who are injured by the erroneous speech in some way. *Id.* at 281. Newspapers, accordingly, are protected from liability even when they publish private advertisements that contain inaccurate statements about public officials, so long as they do not make these statements with "actual malice." *Id.* at 262-64; *see also Phil. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986) (private figure defamation plaintiff alleging defamation has burden of proving falsity of media defendant's speech on matter of public concern).

Protecting incorrect statements that allegedly defame public officials illustrates a broader concern about assuring sufficient "breathing space" for First Amendment rights. Many courts – including the Supreme Court and this Court – have applied the "actual malice" standard of *New York Times* beyond its defamation roots. In *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988), for example, the Supreme Court required a showing of actual malice on a state-law tort claim of intentional inflection of emotional dismiss for an offensive and allegedly false satiric cartoon. *Id.* at 56.

This Court followed suit in *Food Lion, Inc. v. Capital Cities / ABC Inc.*, 194 F.3d 505 (4th Cir. 1999). There, an undercover investigation television program accused a grocery store chain of unsafe food handling practices. Food Lion sought to recover "publication damages" in a state law tort for loss to its reputation and lost sales. *Id.* at 522. This Court refused to allow "an end-run around First Amendment strictures" and the actual malice standard. *Id.* Echoing the Supreme Court, this Court found the result necessary "'in order to give adequate "breathing space" to the freedoms protected by the First Amendment.'" *Id.* at 524 (quoting *Falwell,* 485 U.S. at 56).[1]

In sum, regardless of legal context, courts must assure that any effort to punish speech leaves sufficient "breathing space" for the First Amendment. All laws must be construed with this basic principle in mind.

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[1] Other circuit courts have also imposed the "actual malice" standard outside the defamation context. *See, e.g., Jefferson County Sch. Dist. No. R-1 v. Moody's Inc.*, 175 F.3d 848, 856-58 (10th Cir. 1999) (state-law intentional interference with prospective business relations claim); *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 196 (8th Cir. 1994) (state-law "tortious interference" claim); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990) (same).

B. Securities Laws Must Provide "Breathing Space" For Financial News And Commentary

The district court would allow the SEC to punish defendants for something they wrote and published, not for some action they took. That alone is sufficient to bring the government's actions here under First Amendment scrutiny. Moreover, the speech at issue has three distinct sources of First Amendment value.

First, readers are passionately interested in financial news and commentary. With the modern day phenomenon of direct consumer investing, the need for disinterested stock market information is at an all-time high. A quick look at the current media illustrates the point. Just this year, new magazines were launched, new cable channels started, new investment letters founded, all aimed at serving the public's abiding interest in this type of news and commentary. Many people have retirement and other life-event funds invested in stocks; information relevant to these investments is of surpassing importance to these investors.

Second, financial news and commentary about public companies is of economic importance. Publishers of financial news and commentary, like professional market analysts, "ferret out and analyze information," often, as here, "by meeting with and questioning corporate officers," and "information that the analysts obtain normally may be the basis for judgments as to the market worth of a corporation's securities." *Dirks v. SEC*, 463 U.S. 646, 658-59 & n.17 (1983) (quotations omitted). All agree that "market efficiency in pricing is significantly enhanced by [such] initiatives to ferret out and analyze information, and thus the analyst's work redounds to the benefits of investors." *Id.* at 659 & n. 17, *quoting* 21 S.E.C. Docket 1401, 1406 (1981). *See also* Mike Steere, *The Genius, The Gurus, & The Grumpy Old Men*, Worth, Nov. 1996 (noting an emphasis on "the 'efficient market' hypothesis").

Third, financial news and commentary has non-economic value for numerous readers. Financial news and commentary, of course, is news and comment of great public importance given the role of corporations in public life. Moreover, financial commentary may additionally at times serve as a form of entertainment. The media is filled with information that is purportedly to provide advice but is often enjoyed for entertainment. Whether on cooking, home improvement, or dancing, people enjoy receiving advice that they may well never use. It is this phenomena that explains why so many investment media include a large dose of "mad" or "foolish" verbiage in an effort to entertain the reader.

Nor is financial news and commentary "purely commercial speech" that would warrant affording it reduced constitutional protection. Commercial speech is generally defined as "speech proposing a commercial transaction." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562-64 (1980); *see also Lamparello v. Falwell*, 420 F.3d 309, 313-14 (4th Cir. 2005).[2] Financial news and commentary is not akin to the presentation of information in the traditional simple advertising or sales context and thus is in no sense purely commercial speech. In short, there is "no reason why disseminators of corporate financial information should not have as strong a claim to First Amendment protection as do disseminators of other kinds of information." *In re Scott Paper Co. Sec. Litig.*, 145 F.R.D. 366, 369 (E.D. Pa. 1992).[3]

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[2] *But see Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 504-05 (1997) (Thomas, J. joined by Scalia, J. dissenting) (disagreeing with "the discounted weight given to commercial speech generally").

[3] The fact that the report was only available to readers who paid for it does nothing to alter its status as non-commercial speech. "[T]he degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away." *City of Lakewood*

Furthermore, the publications at issue here did more than propose a commercial transaction. As the Maryland Court of Appeals expressly held in a case involving the same publications, the publisher's speech "did not propose that its readers should buy their shares from [the publisher]." *Lubin v. Agora Inc.*, 882 A.2d 833, 848 (Md. 2005). Specifically, the special report does not propose a transaction at all; once the reader purchased it, he could choose to invest based on the report or not. The publisher had nothing to gain or lose from the reader's investments. And the newsletter announcing the availability of the special report is speech about speech, and cannot be detached from its content. As one court explained when rejecting the argument that a newspaper advertisement for a book was commercial speech, "the challenged advertisement is not about laundry detergent, it cannot be divorced from the book . . . and the book is protected speech." *Lane v. Random House, Inc.*, 985 F. Supp. 141, 152 (D.D.C. 1995).

To be sure, the government has a regulatory interest in protecting participants in the stock market. But permitting the government to punish disinterested financial news and commentary would seriously

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v. Plain Dealer Publ'g Co., 486 U.S. 750, 756 n. 5 (1988); *Rossignol v. Voorhaar*, 316 F.3d 516 (4th Cir. 2003) burden First Amendment freedoms. Under the SEC's views, any publisher of financial information is subject to suit (by either the SEC or a private plaintiff enforcing Section 10(b)) because such news or commentary could turn out to be mistaken after someone considered the content in making a stock transaction. Such legal exposure could easily chill a speaker's efforts to engage in speech concerning investments. Basing securities fraud liability on stock movement predictions or other statements about corporations would, in other words, "have serious ramifications on reporting" of information relevant to the public. *Dirks*, 463 U.S. at 659, n.18.

At the same time, it is difficult to see why the federal government needs to regulate the type of speech at issue here. As defendants note, state law provides ample basis to punish those who engage in fraud by making misleading statements about public companies in order to sell publications. There is no reason for the federal government to duplicate this task.

C. "When The First Amendment Is Implicated, The Tie Goes To The Speaker, Not The Censor"

The Supreme Court recently explained that "[w]hen the First Amendment is implicated, the tie goes to the speaker, not the censor."

FEC v. Wisc. Right to Life, Inc., 127 S. Ct. 2652, 2669, 2674 (2007) ("[W]e give the benefit of the doubt to speech, not censorship"). As explained above, this preference for speech explains why speech must, as a constitutional matter, have sufficient "breathing space."

Additionally, under the long-standing doctrine of constitutional avoidance, a court faced with an ambiguous statutory question should read the statute to avoid resolving an open constitutional question. *See Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (describing "a series of rules under which [the Court] has avoided passing upon a large part of all the constitutional questions pressed upon it for decision"). In *Lowe v. SEC*, 472 U.S. 181 (1985), the Court relied on the doctrine of constitutional avoidance to construe securities laws to protect financial news and commentary.

The statute before the *Lowe* Court was the Investment Advisors Act of 1940 ("IAA"), 15 U.S.C. § 80b-3, a companion statute to the statute under which defendants here are charged, the Securities Exchange Act of 1934. The IAA imposed several registration requirements for "investment advisors," and the Court was faced with deciding whether certain financial publications fit that phrase's definition. *Lowe*, 472 U.S. at 203-04.

The publications in *Lowe* contained investment advice directed to the public (not to any one client) and "general commentary" about the securities markets. *Id.* at 185. They included: "reviews of market indicators and investment strategies," "specific recommendations for buying, selling or holding stocks," and even advertisements for a "telephone hotline" that provided current stock information to subscribers. *Id.*

Regulating this sort of publication, the *Lowe* Court explained, would raise serious First Amendment concerns. *Id.* at 204. "[B]ecause we have squarely held that the expression of opinion about a commercial product [] is protected by the First Amendment, it is difficult to see why the expression of an opinion about a marketable security should not also be protected." *Id.* at 201 n.58, *citing Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513 (1984). Noting that the Court "should not decide a constitutional question if there is some other ground upon which to dispose of the case," and that the district court and dissenting court of appeals judge "both believed that the case should be decided on statutory grounds," the Court focused on the "character of the profession that Congress intended to regulate." 472 U.S. at 190 (quotation omitted).

After finding that Congress was sensitive to the constitutional implications of its law, the Court held that the securities statute was only "designed to apply to those persons engaged in the investment-advisory profession – those who provide personalized advice attuned to a client's concerns." *Id.* at 207-08. By contrast, publications that offer general disinterested advice to the public at large – even when pertaining to specific stocks – were outside the scope of the securities law "because they do not offer individualized advice attuned to any specific portfolio or to any client's particular needs." *Id.*

In short, the doctrine of constitutional avoidance provides another reason to construe the securities laws not to reach financial news and commentary by disinterested publishers and writers.

II. The District Court Erred By Expansively Construing Section 10(b) In Disregard Of First Amendment Principles

The district court made four holdings before concluding that defendants were liable under Section 10(b). Each holding improperly extends the scope of securities law at the expense of First Amendment interests, depriving publishers and authors of the breathing space necessary to encourage robust discourse about public companies and other investments.

A. Stock Price Predictions Are Never "False Statements" For Purposes Of Securities Laws

The district court held that an investment newsletter and special report included "false statements" because the publications predicted that a stock price would rise on a particular day and based that prediction in part on statements wrongly attributed to a corporate executive. In the district court's view, the "Super Insider Solicitation and Special Report contain the actionable false statement that a [corporate executive] had told the author that the stock price would rise on May 22, 2002." *SEC v. Agora Inc.,* No. MJG-03-1042, slip op. at 14 (D. Md. Aug. 3, 2007) ("Dist. Ct. Op"). Repeatedly, the district court emphasized that the false statement was a misrepresentation concerning when "the stock price would rise." Dist. Ct. Op. at 10. *Accord, e.g., id.* at 28 ("These documents provided the false statement that the purchasers of the Special Report would obtain information not generally available from [the corporation] as to the precise date on which a specific event would cause the corporate stock to 'skyrocket.'").[4] The lower court ruling conflicts with precedent in this circuit protecting statements of opinion, and will have a broad and negative impact on all publications, from general-interest newspapers and magazines to specialized newsletters, which inform the public about financial matters.

Contrary to the view of the district court, a prediction about a stock price change is not an "actual fact" but an "opinion" that can never be a "false" statement for purposes of the securities laws. *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180 (4th Cir. 1998) is directly on point. That case arose out of a Forbes magazine stock tip story about Biospherics, Inc., a publicly traded company. In a "Streetwalker" column, the magazine gave the stock a "downward arrow" and recommended "short[ing] the stock." *Id.* at 182. The company sued for defamation.

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[4] The author noted that he "can't guarantee that the stock will pop" because "[n]obody can guarantee the actions of the stock market." Am. Compl. Ex. A at 6. Although *amici* take no position on the particular facts of this case, the district court appears to have misstated the record in this key respect. *See* Dist. Ct. Op. at 23 ("[n]o cautionary language accompanies the false statements").

Noting that the First Amendment protects "opinion," *see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974), this Court ruled that the column, including its prediction of future stock price movement, contained "constitutionally protected subjective views, not factual statements." *Biospherics*, 151 F.3d at 184, *applying Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). Emphasizing the "context" and the "tenor" of the article, the Court stated that "rarely would a stock tip article" prove actionable. 151 F.3d at 184. *See also id.* at 186, *quoting Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993) (when a speaker expresses "a subjective view, an interpretation, a theory, conjecture or surmise, rather than [a] claim[] to be in possession of objectively, verifiable [false] facts, the statement is not actionable").

As *Biospherics* recognizes, a statement about a future stock price is an opinion rather than a fact. Under standard economic theory, in an efficient market the current price of a stock reflects all known information about the stock. Actual future stock prices are determined by countless subsequent events regarding both the broader economy and factors relevant to a particular stock. Thus, by definition, any comment on future stock price reflects a speculative attempt to predict an unknowable future. For First Amendment interests to be adequately protected in this investment context, Section 10(b) liability cannot be based on a prediction of a future stock price movement.[5] The district court's contrary holding is in conflict with *Biospherics.*

B. Financial News and Commentary Is "In Connection With" A Securities Transaction Only When The Publisher Or Author Is Party To The Transaction

The district court also erred in finding that financial news and commentary can necessarily satisfy the "in connection with" requirement of Section 10(b). In the view of the district court, "it is enough if Defendants' actions affected the price of the stock or induced others to purchase the stock." Dist. Ct. Op., at 27. This reasoning – reasoning that would sweep in virtually any type of financial reporting or analysis – is wrong for three reasons.

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[5] Similarly, Section 10(b) liability cannot be based on financial news reports that turn out to be mistaken. In *Biospherics*, the defamation plaintiff did not challenge the accuracy of the facts that formed the basis of the protected opinion. Here, although the district court appears to have found certain statements to be intentionally false or recklessly made, First Amendment law does not permit a district court to infer calculated falsity from the mere conclusion that a statement was mistaken. *See Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485 (1984) ("[t]here is a significant difference between proof of actual malice and mere proof of falsity"); Brief for Appellant-Defendants ("Def. Br.") at 48-51.

First, as appellants' brief demonstrates, the law requires that defendants' actions include a stock transaction before liability under Section 10(b) can be imposed. *United States v. O'Hagan*, 521 U.S. 642 (1997) ("in connection with" requirement met when defendant "uses the information to purchase or sell securities"). Although at times the meaning of "in connection with" a purchase or sale has been extended to include a limited class of individuals with legal duties to those that engage in the securities transaction, no court has seen fit to extend the reach of securities laws beyond that well-defined class.

Second, the First Amendment principles outlined above provide a compelling reason to construe "in connection with" to require that defendant's actions include a stock transaction. Justice Scalia's separate opinion in *O'Hagan* is instructive. In *O'Hagan*, the majority upheld a Section 10(b) criminal conviction of an individual who had purchased stock based on inside information he acquired as a member of a law firm representing a party to a pending deal. In Justice Scalia's view, the "principle of lenity" – *i.e.*, the doctrine that ambiguous criminal statutes must be construed in favor of the accused – required that the "unelaborated statutory language" "must be construed to require the manipulation or deception of a party to a securities transaction." *Id.* at 679-680 (Scalia, J., concurring in part and dissenting in part). In this case, it is not the rule of lenity but the "breathing space" needed for First Amendment interests that requires construing Section 10(b) to prohibit fraud by a party to a securities transaction, rather than fraud by anyone who reports on or analyzes the financial industry.

Third, the Supreme Court recently reminded the SEC that Section 10(b) regulates only the specific "realm of financing business." *Stoneridge Inv. Partners v. Scientifc Atlanta, Inc.*, 128 S. Ct. 761, 777 (2008). In *Stoneridge*, investors urged that Section 10(b) could reach entities that agreed to arrangements that allowed the investors' company to issue a misleading financial statement. The Supreme Court ruled that these deceptive acts were "too remote to satisfy" the Section 10(b) "reliance" requirement. 128 S. Ct. at 770. In so holding, the Court emphasized that allowing such a suit would present a "risk that the federal power would be used to invite litigation beyond the immediate sphere of securities litigation and in areas already governed by functioning and effective state-law guarantees." *Id.* at 771; *see id.* at

774 (challenged arrangement "took place in the marketplace for goods and services, not in the investment sphere").

Indeed, the publications at issue here are "poles apart" from the personalized investment advice that warrants federal regulation. As articulated by a dissenting judge on the Court of Appeals in the *Lowe* case, advice in an investment newsletter is "poles apart from the traditional giving of investment advice; just as remote as a health care publication (*e.g.*, "Prevention Magazine") is from the practice of medicine, or a book advising how to avoid probate is remote from the practice of law." *SEC v. Lowe,* 725 F.2d 892, 903 (2d Cir. 1984). "The latter require a medical or law degree," the judge continued, "while the former are protected First Amendment expression." *Id.*

Notably, the United States has disavowed the expansive views of the SEC concerning the scope of Section 10(b). Prior to *Stoneridge*, the SEC filed amicus briefs taking the position that the "reliance requirement is satisfied where a plaintiff relies on a material deception flowing from a defendant's deceptive act, even though the conduct of other participants in the fraudulent scheme may have been a subsequent link in the causal chain leading to the plaintiff's securities transaction." Brief for the United States as *Amicus Curiae*, *Stoneridge Inv. Partners, LLC v. Scientific-Atlantic, Inc.*, 2007 WL 2329639 at *23 n. 13 (Aug. 15, 2007), *quoting Simpson v. AOL Time Warner Inc.*, 452 F.3d 1040 (9th Cir. 2006). The Solicitor General, however, noted in his *Stoneridge* brief that the SEC's briefs "*were filed without the involvement of the Solicitor General, and the position on reliance that was expressed in those briefs does not reflect the views of the United States.*" *Id.* (emphasis added). The more restrained position advocated by the Solicitor General in *Stoneridge* — a position with which the Supreme Court agreed — supports a similarly restrained understanding of Section 10(b) in this closely related context.

C. Any Securities Liability Premised On Publication Of Financial News Or Commentary Requires A Showing Of Actual Malice

Even if financial commentary can be a false statement and even if such a statement is always "in connection" with a securities transaction, the First Amendment requires that the publisher or author make the statements with "actual malice" before it can support a securities fraud claim. The district court, however, construed the pure commercial speech doctrine to bar application of the actual malice standard here. That was error.

As noted above, *supra* at 8-9, when a speaker is speaking on a matter of public concern any subsequent defamation lawsuit must establish that the statement was issued as a deliberate lie or with reckless indifference to the truth. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272-73 (1964). This same "actual malice" standard should apply when determining liability for financial news and commentary.

A recent decision from the Sixth Circuit applied the "actual malice" standard to a breach of contract claim concerning an allegedly incompetent financial report issued by a rating agency. *Compuware v. Moody's Inc.*, 499 F.3d 520, 530 (6th Cir. 2007). The court found that the contract between Moody's and the company it evaluated was "intimately tied to speech, expression, and publication." *Id.* at 531. The ensuing claim, the court found, was just "a backdoor attempt to recover damages for the harm allegedly caused by Moody's protected expression of its opinion of Compuware's financial condition." *Id.*

As mentioned above, the Sixth Circuit is not alone. Many courts have applied the "actual malice" standard beyond its defamation origin.

See supra at 10. As in those cases, the SEC's Section 10(b) claim here is "intimately tied to speech, expression, and publication." *Compuware,* 499 F.3d at 531. Indeed, in relevant substance, the SEC's claim is very much like a defamation claim – it is brought to assess damages for inaccurate information just like a defamation claim is brought to impose liability for false speech. There are also good reasons to protect the speech of those who publish financial information similar to the reasons for protecting speech about public officials. As explained above, in both contexts the First Amendment needs "breathing space" to survive. *Hustler Magazine v. Falwell,* 485 U.S. 46, 50 (1988); *Food Lion Inc., v. Capital Cities / ABC Inc.*, 194 F.3d 505, 524 (4th Cir. 1999).

Nevertheless, the district court held the actual malice standard inapplicable to financial news and commentary. In the court's view, the speech at issue was purely "commercial" and entitled to less First Amendment protection than noncommercial speech. Dist. Ct. Op. at 31. But the speech in this case was not "commercial" merely because it relates to the financial industry. *See supra* at 13-14. The "false" statements that the district court focused on were predictions that a stock price "should" rise and the source of a prediction that a trade deal would be struck. Such statements are not like the speech in the traditional simple advertising or sales context; it does not just "propose a commercial transaction," *Lamparello,* 420 F.3d at 313-14, and it has value independent from any commercial message.

Indeed, the district court's decision in *Lowe* – the decision that was ultimately vindicated by the Supreme Court – explains in detail why financial news and commentary is not commercial speech: "Investment advisory material disseminated to the public is not commercial advertising of a product or service. Such publications are not the words of a seller peddling his own wares or services, but those of an apparently detached observer commenting on the value of choses [sic] offered or held by others." *SEC v. Lowe,* 556 F. Supp. 1359, 1366 (E.D.N.Y. 1983). Moreover, "[f]inancial news and analysis is persistently flavored with projected consequences of political events and both may form the predicate for particular investment advice." *Id.* at 1367. The resulting "combination of fact, economic and political analyses, conjecture, and recommendation characteristic of investment newsletters places them outside the rubric of commercial speech." *Id.*

The commercial speech doctrine thus has no application here and the district court was wrong to invoke it to deprive the publisher and author of the First Amendment's full protection.

D. Financial News And Commentary From A "Disinterested Publisher" Cannot Create Securities Fraud Liability

The district court's disregard of basic First Amendment principles also led it to disregard the specific import of *Lowe v. SEC*, 472 U.S. 181 (1985). As described above, the *Lowe* Court construed a securities law to exclude publishers of "disinterested financial advice" because the Court believed Congress was sensitive to the implications of the First Amendment. Although the district court here correctly assumed that the "disinterested publisher" defense applies to a Section 10(b) charge, the court found that the publications at issue do not qualify for the disinterested publisher defense because they were not "publications of general and regular circulation." Dist. Ct. Op. at 36. This analysis misses the mark.

First, the "general and regular" statutory requirement for exclusion from the Investment Advisors Act is not the main touchstone used by the *Lowe* Court. What mattered to the Court, sensitive to the First Amendment, was not whether a publication was "general and regular," but whether a publication "provid[ed] personalized advice attuned to . . . any specific portfolio, "472 U.S. at 208, or whether it provided "disinterested commentary and analysis . . . offered to the general public on a regular schedule," *id.* at 206.[6] Because the IAA excluded disinterested publishers, the statutory language was consistent with the First Amendment. But there is no suggestion in *Lowe* that Congress would have had the authority to include disinterested publishers in the IAA statutory scheme. To the contrary, *Lowe* strongly implies that exempting disinterested publishers is compelled by the First Amendment regardless of the specific statutory text at issue.

Instead of "general and regular," the constitutional question here is whether the publisher is disinterested in the financial news and commentary it offered so as to exclude it from the ambit of Section 10(b). The First Amendment concerns attributed by the *Lowe* Court to

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[6] *See also Morse v. Republican Party of Virginia,* 517 U.S. 186, 245 (1996) (Scalia, J. dissenting) (reading *Lowe* as construing a securities law not to cover "persons who publish 'nonpersonalized' investment advice such as periodic market commentary"); *Taucher v. Brown-Hruska,* 396 F.3d 1168, 1172 (D.C. Cir. 2005) (interpreting *Lowe* as protecting "those [publications] whose investment advice was not personalized for clients").

Congress – that Congress "did not seek to regulate the press through the licensing of nonpersonalized publishing activities," *id.* at 204 – are not limited to the Investment Advisors Act but relate to securities regulation generally. *See SEC v. Wall Publ'g Inst., Inc.*, 664 F. Supp. 554, 555-56 (D.D.C. 1986), *rev'd on other grounds*, 851 F.2d 365 (D.C. Cir. 1988) (applying *Lowe's* treatment of disinterested publications to claims brought under section 10(b)). Under *Lowe*, the federal government may not, consistent with the First Amendment, invoke securities laws to punish publishers of disinterested financial news and commentary.

The publication in this case is clearly by a "disinterested publisher": it does not counsel clients, it does not tailor advice or commentary to specific portfolios, and the e-mail solicitations advertising it – much like the advertisement for the telephone hotline in *Lowe* – simply comment on specific stocks. *See* 472 U.S. at 208 ("[T]he mere fact that a publication contains advice and comment about specific securities does not give it the personalized character that identifies a professional investment advisor."). Nor did the author have a financial interest in the stock.

Moreover, even if only publishers of "general and regular" financial news and commentary are exempt from securities fraud prosecutions, the publications at issue here qualify for this defense. The district court found otherwise, but its application of the test betrayed a misunderstanding of the modern financial publication industry. The court explained that "even if the Super Insider Solicitation had been part of a semi-regular series of email circulations, if those other emails were of the same character, the frequency of issuance would not make them publications of general and regular circulation." Dist. Ct. Op. at 36. At most, the court continued, "the series would be akin to regular mailings from a retailer sending alerts and special deals to potential customers." *Id.*

The court's decision ignores the modern world of financial investment publishing. The Internet and resulting 24 hour news cycle means that consumers of financial news and commentary no longer need or want to wait for the monthly magazine to arrive on their doorstep. Instead, modern publishers of financial information must act quickly and provide information to their subscribers as soon as it becomes available.

Much of this communication happens "off-cycle" or in between traditional publication schedules. "Off-cycle" updates on market events of particular relevance to companies discussed in the publications are a growing part of the financial publication industry. *See* Supplement to David L. Nelson's Written Expert Testimony, Def. Ex. 7 at 2 (Internet is used "to support Web-based publishing products and to deal with breaking news events in a framework to compete with cable and TV"). These periodic communications with regular customers do not make the publications irregular; they make them current. Off-cycle updates are not "special deals" or additional "alerts" but are a core reason why individuals subscribe to investment newsletter and other financial news services.

By comparing this modern practice to mailed retailer advertisements, the district court defined the industry in an old-fashioned manner; indeed, its definition would exclude the greater part of the publishing and media industry as it exists today. In the contemporary age of Internet publications, a bona fide "general and regular" publication must include off-cycle updates. A construction of "general and regular" to cover publishers of such updates is required for the exemption to advance its purpose of excluding bona fide publishers.

The district court also erred by emphasizing that the report issued only once. Dist. Ct. Op. at 36. A financial publication will never be "of general or regular circulation" if that phrase is defined by focusing on the specific issue that is in controversy, rather than on the publication as a whole. The June 1, 2008 issue of a printed newspaper will only be issued once, but that does not mean the newspaper itself is not of general or regular circulation. Indeed, the publication in *Lowe* was issued only eight times over a 15-month period. *Lowe,* 472 U.S. at 185. Disqualifying publications from the disinterested publisher defense on this basis would render the defense completely useless to the vast majority of the publishing and media industry. The district court, in other words, applied the test framed at an incorrect level of generality.

In short, the district court mangled what it means to publish general or regular investment advice and thus badly transfigured the "disinterested publisher" defense of *Lowe.* It left in its place a doctrine that would look to one particular issue of a newsletter to see if it is circulated often (a test that will never be met), irrespective of whether the contents of the publication advise clients based on their specific needs or merely offer general disinterested commentary. This is a misapplication of Supreme Court precedent.

* * *

Time and time again, the Supreme Court and this Court have explained that legal doctrines must protect the "breathing space" necessary for speech to flourish without fear that mistakes will lead to legal punishment. The district court, however, paid no heed to this constant refrain. Faced with no less than four questions of statutory construction, the district court opted every time for a construction that would disserve the interests of promoting financial news and commentary. Those constructions are untenable both on their own terms and in light of First Amendment principles. Left undisturbed, the district court's decision poses a serious threat to all who publish financial news and commentary. Reversal is warranted.

CONCLUSION

The decision of the district court should be reversed.

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CERTIFICATE OF COMPLIANCE

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