UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CSX CORPORATION,

Plaintiff-Appellant,

v.

THE CHILDREN'S INVESTMENT FUND MANAGEMENT (UK) LLP, THE CHILDREN'S INVESTMENT FUND MANAGEMENT (CAYMAN) LTD., THE CHILDREN'S INVESTMENT MASTER FUND, 3G CAPITAL PARTNERS LTD., 3G CAPITAL PARTNERS, L.P., 3G FUND, L.P., CHRISTOPHER HOHN, SNEHAL AMIN AND ALEXANDRE BEHRING, A/K/A ALEXANDRE BEHRING COSTA,

Defendants-Appellees.

No. 08-2899

ORAL ARGUMENT REQUESTED

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF-APPELLANT CSX CORPORATION'S EXPEDITED APPEAL AND/OR INTERIM RELIEF TO PRESERVE THE STATUS QUO

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Preliminary Statement

TCI and 3G secretly amassed CSX shares in a clandestine scheme to take control of CSX in violation of the securities laws. The district court concluded that:

> "*Defendants have sought to control CSX for over a year*. As obstacles to control surfaced, they adapted their strategy for achieving control, making disclosures only when convenient to their strategy." (Op. at 113 (emphasis added).)

Moreover, it was not "convenient to their strategy" to tell the truth under oath at trial. The district court noted the "frequent lack of credibility of Hohn, Amin, and Behring" (Op. at 77) and made numerous specific findings in support of its conclusion that the defendants "testified falsely in a number of respects, notably including incredible claims of failed recollection, to avoid responsibility for their actions" (Op. at 113).[1] The only reason that this Court is not now faced with defendants' much publicized -- but dilatory -- appeal is that the district court concluded that it lacked the power to enjoin the defendants from voting the shares illegally obtained pursuant to the year-long scheme to take control of CSX (Op. at 115).

Our appeal is a simple one, namely whether this Court, in a footnote in the *Treadway* decision nearly 30 years ago, enunciated a "bright line" test that precluded any relief other than corrective disclosure for violations of Section 13(d). We believe there is no such rule, and that the Court should so hold now. The parties have identified

[1] We attach a summary of some of the district court's credibility findings as Addendum A.

all the authority on this issue -- here and below -- and there is *no* authority for such a limitation. Our position is consistent with *Borak* and *Rondeau* and with the Supreme Court's observation in another footnote, this time in *Piper v. Chris-Craft Industries, Inc.*, that deterrence is "a meaningful goal" where, as here, there are the "most flagrant sort of violations". *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 40 n.26 (U.S. 1977). We urge the Court to affirm the federal courts' equitable power to "fashion private remedies . . . consistent with the legislative scheme and necessary for the protection of investors", *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 62 (1975), and to rule immediately that the *Treadway* footnote does not bar the relief that Judge Kaplan would otherwise have ordered. (*See* Section I below.)

Defendants' argument for delay is without merit. (*See* Section II below.) The district court's opinion is 115 pages long, not because the issues are complicated, but because defendants' scheme covered a year and they lied a lot. Moreover, defendants' desire to delay their appeal is no reason to delay this Court's ruling on our appeal.

I. FEDERAL COURTS HAVE BROAD POWERS TO REMEDY VIOLATIONS OF THE SECURITIES LAWS.

"Fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange." *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964) (citing H. R. Rep. No. 1383, 73d Cong., 2d Sess., 13). The Court there held that "the protection of investors" implies "the availability of judicial relief where necessary to achieve that result" and that "under the circumstances here, it is the duty of the courts

to be alert to provide such remedies as are necessary to make effective the congressional purpose". *Id.* at 432-33. The Court thus held that "federal jurisdiction for this purpose does exist" -- "federal courts have the power to grant all necessary remedial relief". *Id.* at 435.

Although Section 13(d) is silent on relief, the Supreme Court has "not hesitated to recognize the power of federal courts to fashion private remedies for securities laws violations when to do so is consistent with the legislative scheme and necessary for the protection of investors as a supplement to enforcement by the [SEC]". *Rondeau*, 422 U.S. at 62. Any inflexible rule prohibiting all remedies other than disclosure would be inconsistent with the courts' broad equitable power "'to do equity and to mould each decree to the necessities of the particular case'". *Id.* (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). That is "[t]he essence of equity jurisdiction", which has been distinguished by "[f]lexibility rather than rigidity". *Hecht*, 321 U.S. at 329.

Indeed, once a private right of action is found, the availability of *all* appropriate remedies is presumed unless Congress has expressly indicated otherwise. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 66 (1992). Congress did *not* intend to preclude courts from granting any relief other than disclosure for violations of the Williams Act. On the contrary, "[t]he legislative history of the Williams Act, of which § 13(d) is a part, makes clear that the Act was intended to assist shareholders while at the same time remaining 'evenhanded' in any struggle between the issuer and entity

purchasing large quantities of stock". *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 286 F.3d 613, 621 (2d Cir. 2002). Sterilization of the shares here is "consistent with the legislative scheme" of ensuring an even playing field, and such relief is here "necessary for the protection of investors". *Rondeau*, 422 U.S. at 62. Unlike in *Rondeau*, where the Court reversed a sterilization order because there was no showing of irreparable harm, TCI's and 3G's conduct here strikes at the very heart of the Williams Act. *See id.*, 422 U.S. at 59 ("none of the evils to which the Williams Act was directed ha[d] occurred or [wa]s threatened"). They seek to take control of CSX by way of an illegal scheme that has included evading the reporting requirements of the securities laws, forming an undisclosed group, and seeking at every turn to cover their tracks, including by offering false testimony.

Moreover, ruling that federal courts lack the power to enforce Section 13(d) by entering a sterilization order would render compliance essentially voluntary. If the only available remedy for egregious violations such as this is corrective disclosure, there will be little reason to comply with Section 13(d). Would-be violators will be secure in the knowledge that, if caught, they will only be told to announce their scheme's success in a Schedule 13D. Sterilization, which removes the incentive to violate, must be available as a deterrent in order to maintain the integrity of the Williams Act and to effectuate Congressional intent. Indeed, in *Piper*, 430 U.S. at 40 n.26, the Supreme Court suggested that deterrence may be a relevant consideration in formulating relief

for "flagrant" violations of the Williams Act. The SEC likewise has argued that equitable relief going beyond further disclosure may be appropriate as a deterrent:

> "Equitable relief beyond corrective disclosure, including rescission and divestiture, may be particularly appropriate in the case of deliberate violations of the provisions of Section 13(d). Absent a remedy that deprives the defendant of his wrongfully obtained shares, a person will have little incentive to comply with the statute. On the one hand, the potential benefits to be gained from a violation can be quite substantial . . . . On the other hand, corrective disclosure is no real deterrent, since it merely requires compliance with the original statutory disclosure obligation and leaves the violator with the profitable fruits of his illegal conduct." Brief for SEC as Amicus Curiae Supporting Power of Court to Grant Equitable Relief in Section 13(d) Actions, *General Steel Indus., Inc. v. Walco Nat'l Corp.*, No. 81-2345 (8th Cir. 1981).

Given the expansive relief pronouncements by the Supreme Court in *Borak* and *Rondeau*, we urge the Court to hold that *Treadway* did not announce a bright line test, unrelated "to the necessities of a particular case", the "legislative scheme", and the "protection of investors". Quite the reverse. The *Treadway* Court expressly held open that disenfranchisement could be an appropriate remedy where a defendant obtained "a degree of effective control" as a result of purchases made before it complied with Section 13(d), but the Court found it unnecessary to reach the question because "Care [the potential acquirer] has never had 'a degree of effective control' over Treadway". *Treadway Cos. v. Care Corp.*, 638 F.2d 357, 380 n.45 (2d Cir. 1980). Nothing in the footnote suggests a bright line rule that stock holdings of less than 31 percent cannot constitute a degree of effective control, and the Court's decision does not suggest that it intended to specify in this footnote a rule prohibiting relief other than disclosure.

II. DEFENDANTS' ARGUMENTS FOR DELAY ARE WITHOUT MERIT

TCI and 3G did not violate Section 13(d) inadvertently, as was the case in *Rondeau*. In their quest for control of CSX, TCI and 3G engaged in a plan and scheme to evade the reporting requirements of, and thus knowingly violated, the securities laws, at the expense of both CSX and its other shareholders. They deliberately tilted the playing field. And they lied about it.

Defendants' rhetoric here is reminiscent of St. Augustine's plea: "give me chastity and continency -- but not yet". They say they want "to clear their names" (Opp'n at 6) but not too quickly. They want to announce -- for purposes of the proxy fight -- that they intend to appeal, but they are fully aware of the hopelessness of an attack on Judge Kaplan's credibility and factual findings. So they say they want to appeal, but oppose expedition of their appeal.

Defendants' protests of hard issues -- "questions of first impression", the creation of an "unprecedented rule for liability with sweeping implications for the use of equity swaps across the financial industry", or "novel rulings on liability" (Opp'n at 1-2) -- are all bogus. Judge Kaplan found TCI and 3G liable for violating the securities laws based upon a straightforward application of long-standing rules. The evidence of defendants' misconduct was "overwhelming" under these settled rules. (Op. at 65.)

For example, although defendants state that they intend to appeal the group finding (Opp'n at 6), there is nothing "novel" about the district court's ruling. The

court followed this Court's test: "[w]hether the requisite agreement exists is a question of fact". *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 124 (2d Cir. 2001). The district court found that there was such a group and that defendants had lied about it. (*See* Addendum A § 1.)

Similarly, there is nothing "novel" about the district court's finding that TCI tipped "hedge funds that TCI regarded as favorably disposed to TCI . . . in an effort to build support for whatever course of action it ultimately might choose". (Op. at 18.) And they lied about it. (*See* Addendum A § 3.)

Moreover, although defendants state that they intend to appeal the evasion ruling on swaps (Opp'n at 6), there is nothing "novel" about the court's conclusion that defendants used swaps with the purpose and effect of divesting themselves of beneficial ownership as part of a plan or scheme to evade the reporting requirements of Section 13(d) (Op. at 64-72). The application of Rule 13d-3(b) is straightforward: defendants had contracts (swap agreements), which had both the "purpose and the effect" of preventing the vesting of beneficial ownership, and they had a "plan or scheme" not to make the disclosures required by Section 13(d) or (g). The district court so found. (Op. at 72.) And the district court so found, even under the tests proposed by the SEC's Division of Corporation Finance. (Op. at 67.) In any event, defendants are wrong that the Division of Corporation Finance gave any advice to the district court (Opp'n at 7) on the application of the rule to this case. (Op. at 67.) Moreover, defendants lied about

their scheme. (*See* Addendum A § 4.)

Indeed, defendants simply misstate the district court's decision when they refer to "questions of first impression". (Opp'n at 1.) They refer to Judge Kaplan's statement that beneficial ownership under Rule 13d-3(a) is "novel and hardly settled" (Opp'n at 7), but do not point out that the court did not decide that question. (Op. at 64)

The somewhat breathless rhetoric -- "turn[ing] orderly procedure . . . on its head", with a "headlong rush to judgment" and with a "tail … wag[ging] the dog" (Opp'n at 1-2) -- is somewhat reminiscent of their rhetoric in the district court where we were accused of engaging in fiction for our cataloguing of the defendants' scheme. But here the assertion of an "unprecedented rule for liability with sweeping implications for the use of equity swaps" (Opp'n at 1) ignores what we proved: egregious violations, coupled with false testimony to the court.[2] We trust that false statements to the SEC, Congress, and the court are not an "unprecedented rule for liability" and will have less than "sweeping implications for the use of equity swaps".

TCI's and 3G's pursuit of an appeal of Judge Kaplan's liability findings for PR purposes should not impact the very narrow question that kept the court from enjoining

[2] The defendants also made false statements on the Schedule 13D, despite the warning concerning 18 U.S.C. § 1001. And Mr. Amin likewise falsely testified to Congress in March 2008 that "TCI [was] not seeking and has never sought control of CSX" (DX 83 at 2); "[has not] called for a management change" (DX 82 at 121:2729-30); had no idea "when 3G acquired stock" (DX 82 at 183:4283-84); and had never been interested in an LBO (DX 82 at 151:3477-79). The district court found the contrary on each of these statements. (Op. at 22 (control), 21 (management), 75-76 (3G), 15-16 (LBO).)

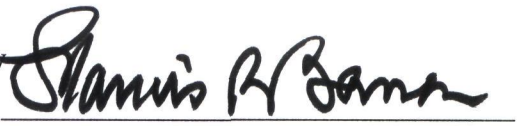
TCI and 3G from voting CSX shares obtained illegally as part of their scheme to take control of CSX, the prompt resolution of which would prevent irreparable harm. The Court can rule on that issue now, before the upcoming meeting of CSX shareholders on June 25, 2008.

In the event such a ruling is not possible, we continue to believe the status quo should be maintained (pending the Court's decision) by holding the votes on the illegally obtained shares in escrow. (*See* CSX initial brief at 9-19.)

Dated: June 18, 2008

Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP,

by 

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ADDENDUM A

THE DISTRICT COURT'S CREDIBILITY FINDINGS.[1]

1. Group Purchases

- Amin testified falsely that he never discussed, in any of his meetings with Behring, the subject of buying or selling CSX stock or putting on swap positions. (CSX PFF ¶ 13.4.) The court did "not credit Amin's testimony that they never discussed buying or selling CSX stock". (Op. at 39 n.123.)

- Hohn testified falsely that TCI and 3G never discussed their respective purchases of CSX stock. (CSX PFF ¶ 12.6.) Hohn further testified falsely that he never discussed with Behring whether TCI was going to purchase more shares of CSX. (CSX PFF ¶ 12.4.) Hohn also testified falsely that, while he told another hedge fund that was not an investor in TCI (Deccan) to buy CSX stock, he never recommended CSX to 3G, which is an investor in TCI. (CSX PFF ¶ 12.8.)

- Behring testified falsely that he did not have conversations with Hohn in February 2007, at the time that 3G began making purchases of CSX stock. (CSX PFF ¶ 11.3.)

- Hohn testified falsely that, in his email to Amin of February 13, 2007, the first sentence in the second paragraph refers to CSX, but the second sentence ("I want to also discuss our friend Alex in Brazil") refers to Arcelor. (CSX PFF ¶ 12.2.) Hohn's testimony that he did not discuss CSX with his "friend Alex" was "not credible" and was "undermined by his deposition testimony". (Op. at 35-36 & n.111.)

- Amin and Behring "both testified, unpersuasively, that they did not discuss their respective holdings in CSX" at their March 29, 2007 meeting. (Op. at 36-37.) Behring testified falsely that 3G's purchases of CSX stock from March 29 to April 17, 2007, had nothing to do with a meeting that he had with Amin of TCI on March 29, 2007, and that it was just a coincidence.

[1] Many of the court's credibility findings were set out in its Opinion. In addition, the court expressly adopted twenty-three findings from CSX's Proposed Findings of Fact on the Conduct of the Trial ("CSX PFF"). (Op. at 5 n.7.) All citations here are either to the court's Opinion or to those findings of fact expressly adopted by the court.

(CSX PFF ¶ 11.4.) Amin testified falsely that, at his March 29, 2007, meeting with Behring, they did not discuss that TCI was about to buy shares of CSX when TCI's Hart-Scott-Rodino waiting period expired, and that TCI and 3G never discussed buying or selling CSX shares. (CSX PFF ¶ 13.2.)

- Behring testified falsely that 3G's sales of CSX shares in August and September of 2007 were unrelated to TCI's doubts as to whether it would continue to hold its CSX shares and run a proxy fight. (CSX PFF ¶ 11.5.)

- Amin testified falsely that he did not discuss the buying of CSX shares at his meeting with Behring on September 26, 2007. (CSX PFF ¶ 13.3.)

2. Co-ordinated Proxy Fight

- 3G's denial of "its interest in a proxy fight right from the outset" was "not credible". (Op. at 28 & n.77.) Behring testified falsely that 3G was "not giving serious consideration to an activist scenario at that point [April 3, 2008] yet" and he was forced to retract it. (CSX PFF ¶ 11.22.) Behring further testified falsely that Schwartz's email referring to the deadline for shareholder proposals at the CSX annual meeting was just "part of your normal due diligence on any investment we make". (CSX PFF ¶ 11.21.)

- Amin testified falsely that TCI was not looking to have a new CEO at CSX in April 2007, when Amin and Hohn talked about approaching Hunter Harrison. (CSX PFF ¶ 13.5.)

- Behring testified falsely that when he met with Amin on October 17, 2007, he did not tell Amin that he had met with Lamphere five days earlier. (CSX PFF ¶ 11.20.) Behring also testified falsely that around October 11, 2007, he and Hohn did not tell each other that they had met with candidates for the CSX board. (CSX PFF ¶ 11.19.)

- Behring testified falsely that he did not know before Thanksgiving 2007 that TCI was contacting potential nominees for the CSX board of directors. (CSX PFF ¶ 11.17.)

- Amin testified falsely that he stated that it was unfortunate that Hohn sent his proposal to Kelly of CSX by email because "things like this are better discussed in person". (CSX PFF ¶ 13.8.) "This testimony, which borders on the absurd, is patently incredible." (Op. at 42 n.135.)

3. Tipping Other Hedge Funds

- The district court specifically rejected Hohn's testimony that he did not discuss CSX in particular with other hedge funds:

> "Given the evidence to the contrary regarding Hohn's discussions with Deccan Value and Lone Pine, the Court's assessment of Hohn's credibility, and TCI's clear interest in doing so, the Court finds that Hohn . . . suggested, in one way or another, that they buy CSX shares and alerted them to the fact that CSX had become a TCI target." (Op. at 18.)

- Hohn testified falsely that "[w]e are very careful not to ever tip another investor as to whether we are going to increase our stake in a company or not, because that would disadvantage our investors". (CSX PFF ¶ 12.5.) Hohn testified falsely that he was not encouraging Lone Pine Capital to purchase CSX stock. (CSX PFF ¶ 12.7.)

4. Swaps

- "Amin's testimony that TCI could not and did not assume that each counterparty would hedge the swaps by purchasing a corresponding number of physical shares simply is not credible." (Op. at 53 (internal citation omitted).) Amin testified falsely that he did not assume that each counterparty would hedge with physical shares. (CSX PFF ¶ 13.7.)

- Amin testified falsely about DX 96 insofar as he did not acknowledge that the scenario depicted in that exhibit was one of a number of different scenarios. (CSX PFF ¶ 13.9.)

- Amin testified falsely that TCI did not put swaps in Deutsche Bank so that TCI could try to influence them to vote because of the influence of Austin Friars. (CSX PFF ¶ 13.10.) Hohn testified falsely that TCI did not solicit Austin Friars' support for TCI's activism campaign. (CSX PFF ¶ 12.9.) "Amin's testimony to the contrary is not credible." (Op. at 56 n.173 (internal citation omitted).)

- Amin testified falsely that he did not say that the swaps could be converted into direct ownership at any time. (Op. at 15 n.25.) Amin testified falsely that he did not tell CSX in February 2007 that TCI "owned" 14 percent of CSX. (Op. at 17 & n.36.)