08-2899-cv(L)

08-3016-cv(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CSX CORPORATION,

Plaintiff-Appellant-Cross-Appellee,

MICHAEL WARD,

Third-Party-Defendant,

—against—

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, also known as Alexandre Behring Costa,

Defendants-Third-Party-Plaintiffs-Counter-Claimants-Appellees-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT-CROSS-APPELLEE CSX CORPORATION

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July 3, 2008

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1 and to enable Judges of the Court to evaluate possible disqualification or recusal, the undersigned counsel for CSX Corporation hereby certifies that CSX Corporation does not have any corporate parents and that, based on public filings to date, no publicly held company owns 10 percent or more of CSX Corporation's stock.

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Reference Conventions

"Exchange Act": Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*

"Williams Act": Sections 13(d), 14(d) and 14(e) of the Exchange Act

"HSR": Hart-Scott-Rodino Antitrust Improvements Act of 1976

Citation Conventions

Parties:

"CSX": CSX Corporation

"TCI": The Children's Investment Fund Management (UK) LLP, The Children's Investment Fund Management (Cayman) Ltd., and The Children's Investment Master Fund

"3G": 3G Capital Partners Ltd., 3G Capital Partners, L.P., and 3G Fund L.P.

"Behring": Alexandre Behring, Managing Director of 3G

"Hohn": Christopher Hohn, Founding and Managing Partner and portfolio manager of TCIF UK, and the sole 100 percent owner of TCIF Cayman

"defendants": TCI, 3G, Behring, and Hohn

"Amin": Snehal Amin, Founding Partner of TCIF UK

Record Below:

"A-": Joint Appendix

"PX": Plaintiff's exhibits

"JX": Joint exhibits

"DX": Defendants' exhibits

"6/9/08 Hr'g": Transcript of June 9, 2008 hearing before Judge Kaplan

Preliminary Statement

CSX appeals in one limited respect the judgment of the district court (The Honorable Lewis A. Kaplan), No. 08 Civ. 2764, 2008 WL 2372693 (S.D.N.Y. June 11, 2008). After a bench trial, the district court, rejecting TCI's and 3G's denials of misconduct as incredible, found that they violated the securities laws in a clandestine campaign to take control of CSX, and enjoined them from further violations. Although the court held that it would have enjoined TCI and 3G from voting the CSX shares obtained as part of their unlawful campaign, it concluded that it was foreclosed from doing so as a matter of law. Since federal courts are not foreclosed from enjoining the voting of illegally-obtained shares, the judgment of the district court should be reversed in this limited respect, and TCI's and 3G's votes of their illegally-obtained shares should be deemed null and void.

Jurisdictional Statement

This action arose under Sections 13(d), 14(a), and 20(a) of the Exchange Act, 15 U.S.C. §§ 78m(d), 78n(a), 78t(a), and the Rules and Regulations promulgated thereunder, *see* 17 C.F.R. § 240.13d-1 *et seq*.

Subject matter jurisdiction is based on 28 U.S.C. §§ 1331, 1332, 1367, and Section 27 of the Exchange Act, 15 U.S.C. § 78aa.

This Court has jurisdiction under 28 U.S.C. § 1291 of CSX's timely appeal, filed on June 12, 2008 (A-5689-90), of the district court's final judgment, entered on June 11, 2008.

Statement of the Issue Presented

This appeal addresses whether federal courts may exercise their broad equitable powers to enjoin the voting of shares illegally obtained as part of a plan and scheme to take control of a public company in violation of the Williams Act.

Statement of the Case

TCI and 3G, along with their "friends and family", engaged in a clandestine effort to take control of CSX in violation of the securities laws. Although they "sought to control CSX for over a year" (A-5673), any disclosures they made depended on their tactical needs, not on the Williams Act or the truth. "As obstacles to control surfaced, they adapted their strategy for achieving control, *making disclosures only when convenient to their strategy*." (A-5673 (emphasis added).) TCI and 3G deliberately flouted the Williams Act—they crossed "the line dividing legal from illegal" because they saw "a sufficient opportunity for profit in doing so", and once caught, they sought "to justify their actions on the basis of formalistic arguments even when it is apparent that they have defeated the purpose of the law." (A-5561.) Moreover, after they filed a belated Schedule 13D, they continued to make disclosures dictated by strategy, not truth. That strategy

included misleading the court[1]—defendants "went to considerable lengths to cover their tracks" (A-5634) and "testified falsely in a number of respects, notably including incredible claims of failed recollection" (A-5673).

The district court, after consolidating the preliminary injunction hearing with the trial on the merits, held that:

(a) TCI intentionally used swaps "with the purpose and effect of preventing the vesting of beneficial ownership in TCI as part of a plan or scheme to evade the reporting requirements of Section 13(d)" (A-5632), and used them to attempt to exert influence over CSX (*see* A-5626);

(b) "TCI and 3G formed a group with respect to CSX securities . . . no later than February 13, 2007" (A-5637); and

(c) TCI and 3G solicited other hedge funds to join the Group to pressure CSX to acquiesce to their demands (A-5578).

The court enjoined defendants from future violations of Section 13(d) and made clear that it would have enjoined the voting of illegally-obtained shares except that the court was "foreclosed as a matter of law" from doing so. (A-5675.) It is this legal conclusion on relief that forms the basis of CSX's appeal.

[1] All citations to the district court's credibility findings are to the opinion or to the proposed findings adopted by the court (A-5565 n.7).

Statement of Facts

TCI and 3G carried out a clandestine scheme to take control of CSX for over a year in violation of Section 13(d) of the Exchange Act.

A. Defendants Secretly Accumulated a Control Stake in CSX.

1. Defendants Used Swaps to Evade Section 13(d) Disclosure.[2]

Defendants chose to evade their disclosure obligations and conceal their quest for control by purchasing swaps rather than physical shares of CSX.[3] TCI's CFO described a reason for using swaps as "the ability to purchase without disclosure to the market or the company." (A-5625, A-1697.) Defendants purchased swaps to avoid what they referred to as "front-running" that would occur if the market knew of defendants' position and control intentions. (A-5626, A-5572.) Defendants wanted to avoid the dissemination of "information that we or

[2] Section 13(d) "alert[s] the marketplace to every large, rapid aggregation or accumulation of securities . . . which might represent a potential shift in corporate control." *Treadway Cos., Inc. v. Care Corp.*, 638 F.2d 357, 380 (2d Cir. 1980). Section 13(d) thus requires any person acquiring beneficial ownership of more than 5 percent of a class of voting equity securities to disclose, within 10 days, specified information.

[3] A swap is a financial instrument whereby counterparties agree to exchange two cash flow streams. (A-5566.) TCI or 3G received cash flows based on dividends and payments for price appreciation of the CSX shares, and the counterparty bank received cash flows based on an interest rate linked to a benchmark interest rate, plus compensation for any price depreciation of the CSX shares. (*See* A-5566-67, A-1232, A-1236-37.) These swaps placed TCI and 3G in the same economic position that they would have occupied if they had owned the CSX stock referenced in the swaps. (*See* A-5568.)

our counterparties . . . could be buying" because "traders or other investors might acquire that stock ahead of us, thereby increasing the price before we acquired it (the same phenomenon could occur when we were unwinding our position through short selling ahead of us reducing our position)." (A-496.)

Not only did defendants use swaps to avoid the required disclosure of their plus 5 percent interest and their control intent, but they actively undertook to conceal knowledge of the swaps themselves from the market. TCI "carefully distributed its swaps among eight counterparties so as to prevent any one of them from acquiring greater than 5 percent of CSX's shares and thus having to disclose its swap agreements with TCI." (A-5586.) TCI even built a margin of error into this concealment—it wanted to "keep the position diversified around each counterparty so no one goes above *4pc* to start." (A-1729 (emphasis added).) TCI monitored the counterparties to ensure that TCI's position remained opaque to the market (A-5625-26, A-385-86)—TCI "ask[ed] the brokers about their total CSX exposure" because TCI was "concerned about [the banks'] having to file [13D disclosures] at 5%" (A-1705), and discussed the counterparties' filing requirements and positions in CSX, with "[a]ll inquiries . . . on [a] no names basis".[4] (A-1730.)

[4] Hohn and Amin falsely denied monitoring the counterparties to ensure they remained below the reporting threshold. Amin, when asked whether TCI "ever look[ed] to see whether the counterparties had in fact hedged the swaps by buying CSX stock" and whether TCI ever "asked them", responded "No." (A-716-17.)

Even after TCI consolidated its swap position with two counterparties, it left *de minimis* swaps with the other counterparties to conceal its primary counterparties and its position in CSX (A-5615); "TCI left swaps in each of its six other counterparties to obscure the identities of its principal counterparties." (A-5615 n.170.) TCI "didn't want people to be able to identify who [its] large counterparties were" because if they were identified, that would leave TCI "more susceptible to front-running by other hedge funds or other investors." (A-387-88.)

2. Defendants Used Swaps to Tilt the Playing Field.

Defendants' use of swaps promoted their clandestine control scheme in another way. Defendants knew that the counterparties would purchase shares to hedge the swaps, and this would change the composition of the shareholder base to favor defendants in the anticipated proxy fight.

a. Defendants Knew that the Counterparties Would Hedge.

Hohn and Amin denied under oath—both at their depositions and at trial—that they knew that the counterparties would hedge (and had hedged) the swaps. When asked at deposition and at trial whether he "assum[ed]" the counterparties

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Similarly, Hohn falsely testified that "we never ask . . . if they've hedged any swaps", and "I don't remember any . . . discussions" regarding TCI's desire to ensure that the counterparties held less than 5 percent in physical shares. (A-954.)

were hedging TCI's swaps, Amin answered in the negative at least eight times.[5] (A-716-17, A-385-86.) Similarly, Hohn testified that "we did not . . . have any knowledge of whether counterparties were hedging [the swaps] or not."[6] (A-955.) Moreover, defendants put in an "expert" report that tried to show that hedging was not necessary and did not occur. (A-1406, A-1420-24, A-1445-49.)

Those denials were all untrue. The court found that defendants understood that it was "inevitable" that the counterparty banks would hedge with matching physical shares; it was "precisely what TCI contemplated and, indeed, intended." (A-5612.) The court found that each counterparty had in fact hedged the CSX swaps one-for-one with matching physical CSX shares. (A-5611-14, A-5677-84; *see also* A-1250-51, A-1255.)

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[5] Amin claimed that "[t]here was no reason for us to ever make an assumption" (A-386) and that "I don't know for any specific counterparty whether they hedge or not" (A-389). In response to the court's question whether the counterparties were in business of taking risks by holding unhedged swaps, Amin speculated that perhaps "someone else wants to have a short position [in a] swap" and that the counterparty "would cross" that swap with the TCI swap "without participating in the physical stock". (A-389.) The court found that "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". (A-5613 n.164; *see* A-5556.)

[6] According to Hohn, "I did not know" that the counterparties were actually buying physical shares as of December 2006. (A-954-55.) "Whether they hedge it or not is their business"; "we don't know if they hedge". (A-954.)

Even Amin was forced to admit on re-cross-examination that TCI understood that its counterparties hedged by purchasing physical shares. On re-direct examination, he sponsored a voting analysis that included holdings by the counterparties. (A-A-384-85, A-4902.) On re-cross, he had to concede that he had just "presented to the court an analysis that said 100 percent of the swaps are hedged by physical shares". (A-400.) Indeed, TCI's diversification among eight counterparties and monitoring of their positions "would have been a cause for concern only if TCI understood that its counterparties, although not legally obligated to do so, in fact would hedge by purchasing CSX shares equal or substantially equal to the shares referenced by the TCI swaps." (A-5613.)

At the post-trial hearing, counsel for TCI finally conceded, "[w]e entered into swaps. . . . [I]n turn, the counter parties hedged. Nothing wrong with that. *It's a natural consequence of a swap transaction*." (6/9/08 Hr'g 27:20-23 (emphasis added), A-5620.)

Just as the "natural consequence" of the swaps was that the counterparties acquired shares to hedge, it was a "natural consequence" that the counterparties sold those shares upon termination of the swaps. TCI "as a general rule . . . would assume" that the counterparties would sell upon termination of the swaps, and TCI had the right to terminate the swaps at any time. (A-957.) "Certainly the banks had no intention of allowing their swap desks to hold the unhedged long positions

that would have resulted from the unwinding of the swaps." (A-5621.) The court found that the counterparties in fact sold the shares referenced in the swaps upon termination of the swaps:

> "The corollary to the bank's behavior at the front end of these transactions, viz. purchasing physical shares to hedge risk, is that the banks would sell those shares at the conclusion of the swaps (assuming cash settlement) so as to avoid the risk that holding the physical shares would entail once the downside protection of the swap was removed. And that is exactly what happened here. With very minor exceptions, whenever TCI terminated a swap, the counterparty sold the same number of physical shares that were referenced in the unwound swap and it did so on the same day that the swap was terminated." (A-5614.)

By terminating the swaps, TCI had the ability to "afford a ready supply of shares to the market at times and in circumstances effectively chosen and known principally by [TCI]", which gave TCI a "real advantage in converting its exposure from swaps to physical shares even if it does not unwind the swaps in kind." (A-5573.) Moreover, since TCI "and its counterparties have the ability to agree to unwind the swaps in kind, *i.e.*, by delivery of the shares to TCI at the conclusion of each transaction, as indeed commonly occurs" (A-5613), "[b]y entering into cash-settled [swaps], such an investor may concentrate large quantities of an issuer's stock in the hands of its short counterparties and, when it judges the time to be right, unwind those swaps by acquiring the referenced shares from those counterparties in swiftly consummated private transactions" (A-5573). "That simple fact means that the hedge positions of the counterparties hang like the

sword of Damocles over the neck of CSX" because TCI could easily convert the swaps to physical shares at any time. (A-5613.)

Thus, not only did TCI have the power to cause the counterparties to buy CSX stock, or at the very least have the power to influence them to do so, but "once the counterparties bought the shares, TCI had the practical ability to cause them to sell simply by unwinding the swap transactions." (A-5621.) "On this record, TCI manifestly had the economic ability to cause its short counterparties to buy and sell the CSX shares."[7] (A-5620.)

b. Defendants Used Swaps to Influence Voting.

Defendants used the "natural consequence" of the swaps in their favor in another way. TCI knew that it had the ability to influence voting by the

[7] Defendants have argued that their appeal involves "novel issues" (Defs. Expedited Appeal Opp'n 2; Defs. Form C.) It does not. For example, the "group" finding is no different from a finding of conspiracy by an antitrust cartel or drug dealer; the evasion finding is the result of "overwhelming" evidence, including a litany of false testimony to try to cover up their scheme; the "friends and family" finding is based on a direct finding of Hohn's obvious lack of candor; and the control finding is again a fact-specific finding based on substantial evidence. The only arguably novel legal question was whether TCI and 3G had investment power or voting power over the shares referenced in their swap arrangements such that defendants had beneficial ownership pursuant to 17 C.F.R. § 240.13d-3(a). Despite the "persuasive arguments" for such a finding, the district court determined that "it ultimately is unnecessary to reach such a conclusion to decide this case" (A-5562)—the court "therefore does not rule on the legal question whether TCI is a beneficial owner under Section 13d-3(a)." (A-5624.) Thus, defendants' reference to this issue as a "novel issue" decided by the district court (Defs. Expedited Appeal Opp'n 2; Defs. Form C) is misleading.

counterparties, which purchased the CSX shares solely to hedge the swap transactions (and thus had no economic interest in voting).

TCI "could and at least to some extent did select counterparties by taking [its] business to institutions it thought would be most likely to vote with TCI in a proxy contest." (A-5618-19.) Indeed, the Group's proxy solicitor stated that it "would guess that such [swap] shares will be voted for election of the TCI/3G nominees". (A-2570.) The Group's proxy solicitor further stated that "*[i]f the [swap counterparties] vote as we would expect them to vote*, a TCI/3G victory may require the support of only about 16.2% of the overall vote cast by CSX's institutional owners." (A-2580.) Even if a counterparty did not vote, "TCI could ensure that that bank's hedge shares would not be voted against it by the simple expedient of soliciting its counterparty." (A-5619.) Although abstention "would not be as favorable a result as dictating a vote in its favor, it would be better than leaving the votes of those shares to chance." (A-5619.)

Defendants did not leave the voting to chance. To ensure the shares referenced by their swaps would be voted in the Group's favor, TCI consolidated virtually its entire CSX swap position, representing approximately 11 percent of CSX's then-outstanding shares, in Deutsche Bank and Citigroup.[8] (A-5586,

[8] TCI shifted swaps from the other counterparties to Deutsche Bank and Citigroup between October 30 and November 29, 2007. (A-5586.) The number of

A-1359.) TCI chose Deutsche Bank because it thought it would be "helpful that a hedge fund within Deutsche Bank, Austin Friars Capital, also had a proprietary position in CSX."[9] (A-5587.) TCI and Austin Friars had been "working together, at least to some degree, on the CSX project for some time" and Deutsche Bank was "exceptionally receptive, to say the least, to TCI's goals and methods". (A-5587.)

3. Defendants Used Swaps to Obtain 14 Percent of CSX.

TCI began amassing a large stake in CSX on October 20, 2006. (A-5574, A-1238.) By December 6, 2006, TCI's position in CSX had passed 5 percent of CSX's then-outstanding shares. (A-1238.) TCI should have disclosed its position on or before December 16, 2006, 10 days after crossing the 5 percent threshold. It failed to do so.

By the end of 2006, TCI's position had reached nearly 8.8 percent. (A-5575, A-1238.) By the end of March 2007, before it had purchased a single share of

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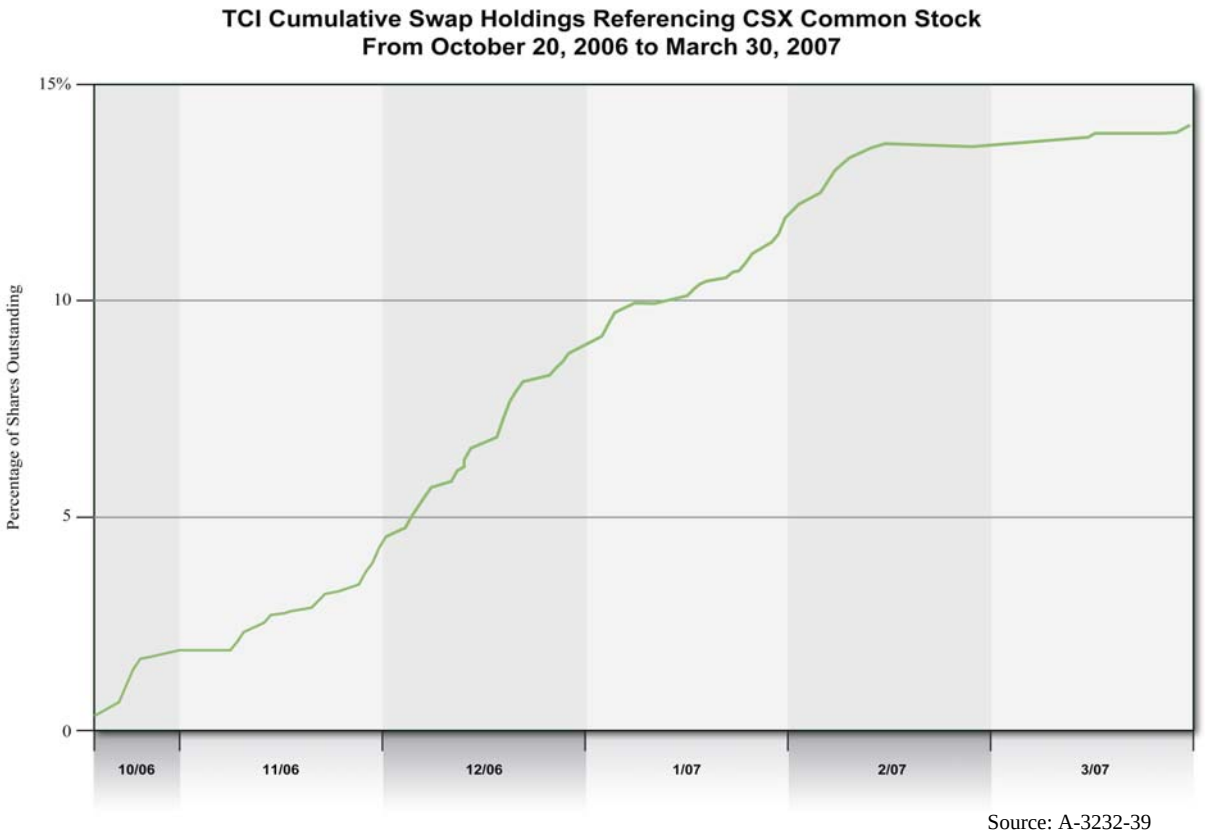
TCI swaps presently at Deutsche Bank and Citigroup represent 28,410,100 and 17,984,900 CSX shares, respectively (A-5615, A-1220), 11.46 percent of the 404,783,890 shares outstanding on the record date for the annual meeting.

[9] "Hohn believed that TCI could exploit this relationship to influence how Austin Friars, and in turn how Deutsche Bank, voted its CSX shares" and "it is entirely clear that the move into at least Deutsche Bank was made substantially out of Hohn's belief that he could influence the voting of the shares it held to hedge TCI's swaps." (A-5616.) The court rejected the contrary testimony: "Amin's testimony to the contrary is not credible" (A-5616 n.173, A-5556); and Hohn's argument that the reason for the consolidation was that Deutsche Bank and Citigroup exposed TCI to less credit risk than the other investment bank counterparties was "not entirely persuasive" (A-5615-16).

CSX, TCI's position in CSX was over 14 percent of CSX's then-outstanding shares. (A-5580, A-1238.)

The following chart shows TCI's swap activity through March 30, 2007[10]:



Source: A-3232-39

B. Defendants Formed an Undisclosed Group in Early 2007.

The court found that the circumstantial evidence here, namely the "existing relationship, the admitted exchanges of views and information regarding CSX,[11]

[10] The percentage of shares outstanding in this chart takes into account the periodic changes in the number of CSX shares outstanding. (*See* A-1350-55.)

[11] TCI and 3G have a longstanding relationship. 3G, through Synergy, one of 3G's funds, has been an investor in TCI since TCI's inception in 2004. (A-5594.) Hohn and Behring spoke at least once a month (A-304-05) and specifically spoke

3G's striking patterns of share purchases immediately following meetings with Hohn and Amin, and the parallel proxy fight preparations—all suggest that the parties' activities from at least as early as February 13, 2007, were products of concerted action".[12] (A-5635.)

"in January and February" 2007 about TCI's investment in CSX (A-340). TCI and 3G were in constant contact throughout 2007 (*e.g.*, A-1001-04); 3G "met with [Amin] several times" (A-292); and Behring and Hohn discussed TCI's experience as an activist investor periodically throughout 2007 (A-303). Moreover, TCI and 3G exchanged ideas and financial models and analyses regarding CSX no later than March 2007 (*e.g.*, A-362, A-303), eventually creating parallel models with activist scenarios for CSX (A-1944, A-2821).

[12] In reaching its conclusion that defendants formed an undisclosed group, the court applied the test set forth in *Morales v. Quintel Entertainment, Inc.*, in which this Court held that "[w]hether the requisite agreement exists is a question of fact." 249 F.3d 115, 124 (2d Cir. 2001). As the district court stated:

> "[T]he group point is really not much different, if different at all, in substance than the question of whether competitors have entered into an agreement to fix prices or to do something else or whether street criminals have reached a conspiracy to commit a robbery or whether a bunch of dope dealers have entered into a narcotics conspiracy. The fundamental question is was there an agreement, explicit or otherwise, and almost invariably everybody in a position to know says, 'Who, me? There was no agreement.' So in every single case it's a circumstantial case and a matter of inferences and the evidence doesn't always point in one direction." (6/9/08 Hr'g 47:8-18.)

The importance of circumstantial evidence here was "perhaps greater than usual because the parties went to considerable lengths to cover their tracks." (A-5634.)

This section addresses the "striking pattern[] of share purchases immediately following meetings" between TCI and 3G and other "concerted action[s]" with respect to CSX. (A-5635.)

In January 2007, Hohn tipped 3G as to TCI's investment in CSX. (A-5634.) Hohn told 3G at least the approximate size of TCI's holding in CSX, more than 8 percent of CSX. (A-5594, A-5634, A-1351-52.) On February 9, 3G began purchasing large blocks of CSX stock.[13] (A-5634, A-3232.) Over the course of one week through February 16, 3G accumulated over 8 million shares, approximately 1.9 percent of CSX's then-outstanding shares.[14] (A-5589, A-3232.)

From TCI's point of view, 3G's share purchases "risked having the marketplace become aware of the accumulation of a position that might presage a

[13] The parties agreed on a schedule that reflects all transactions by TCI and 3G in CSX shares and swaps referencing CSX shares from October 2006 to the date of trial. (A-3232-39.) The information contained in this schedule was used to create the charts in this section.

[14] The court rejected Behring's testimony that he did not have conversations with Hohn in February 2007 at the time 3G began making purchases of CSX stock (A-5553), and Hohn's testimony that he never discussed with Behring whether TCI was going to purchase more shares of CSX. (A-5555.) The court also held that Hohn's testimony that TCI and 3G never discussed their respective purchases of CSX stock and Amin's testimony that he never discussed, in any of his meetings with Behring, the subject of buying or selling CSX stock or acquiring swap positions, was not credible. (A-5555, A-5556.)

control battle." (A-5596.) On February 13, 2007, Hohn sent Amin an email that stated:

> "Increased activity in csx cds has caused excitement in the stock. I want to also discuss our friend alex of Brazil."[15] (A-1759.)

As a result of a conversation between Hohn and Behring (A-5595, A-5635, A-3234), 3G temporarily ceased purchasing CSX shares, in fact until March 29 (A-3232-37).

The following chart demonstrates the transactions by 3G in CSX shares after the Hohn tip in January and the impact of the "friend alex" email:

[15] Hohn admitted that he had a discussion with Behring, but denied that their discussion or the mention of "friend alex" was related to CSX. (A-5595.) The court found that Hohn's denial "that his interest in discussing his 'friend alex' with Amin, or his conversation with Behring that occurred at this time, related to CDS [credit default swap] activity in CSX" was "not credible". (A-5595-96.) Hohn's testimony was "undermined by his deposition testimony", in which he claimed that he did not know that "friend alex of Brazil" was Behring. (A-5595-96 n.111.) The court rejected Hohn's further testimony that the first sentence refers to CSX, but the second sentence ("I want to also discuss our friend alex of Brazil") does not. (A-5555.) Indeed, the court stated that "[w]hat makes the least sense of that e-mail is [Hohn's] attempt to explain it away on this witness stand." (6/9/08 Hr'g 56:4-5.)

Date	Quantity
2/9/07	1,700,000
2/12/07	2,029,833
2/13/07	2,350,000
2/13/07	100,000
2/14/07	642,800
2/14/07	970,900
2/15/07	485,860
2/16/07	40
2/20/07	-17,300
02/22/2007	-40
TOTAL	**8,262,093**

Source: A-3232

These transactions were unusual for 3G. Indeed, on March 14, 2007, UBS, one of 3G's prime brokers, asked 3G about the trading in CSX shares, "a very sizeable position and not something that fits into [3G's] regular trading patterns." (A-1873.)

Despite the fact that these transactions represented "a very sizeable position" and "not something that fits into [3G's] regular trading patterns", 3G promptly increased its position in a "very sizeable" way again as a result of a March 29 meeting with TCI.

On March 29, 2007, Amin and Behring met.[16] (A-5635.) The court found that Amin and Behring "both testified, unpersuasively, that they did not discuss

[16] Both Amin and Behring "claimed not to recall attending that meeting," although Behring finally admitted that he could have met with Amin, and Amin finally admitted that he had no reason to believe the meeting did not occur. (A-5596-97 n.114.)

their respective holdings in CSX" at this meeting. (A-5596-97.) In fact, TCI and 3G met secretly on March 29 to coordinate their investment and control strategy.[17]

Thus, immediately after the March 29 meeting, 3G resumed purchasing CSX stock at a rapid rate. (A-5590, A-5597.) Between March 29 and April 17, 3G acquired over 11.1 million shares, adding 2.54 percent to its prior "very sizeable position" of 1.9 percent. (A-3237, A-1356.) As a result, 3G reached over 4.4 percent of CSX's then-outstanding shares by April 17, 2007, and maintained its position below 5 percent.[18] (A-5626.) The following chart shows these purchases:

[17] Later on March 29, Amin threatened CSX that there would be "no limits" to what TCI would do if CSX failed to implement TCI's proposals. (A-5580; *see infra* Part D.)

[18] The court rejected Behring's testimony that 3G's purchases of CSX stock from March 29 to April 17, 2007 had nothing to do with the March 29 meeting and that it was just a coincidence. (A-5553.)

Date	Quantity
3/29/07	600,000
3/29/07	114
3/30/07	550,000
4/2/07	1,528,700
4/2/07	1,880,986
4/2/07	1,091,879
4/2/07	954,822
4/4/07	150,550
4/4/07	672,000
4/5/07	360,000
4/5/07	250,000
4/6/07	757,100
4/9/07	120,000
4/9/07	493,000
4/10/07	300,000
4/10/07	500,000
4/11/07	835,000
4/12/07	80,950
4/13/07	14,200
4/17/07	6,500
TOTAL	**11,145,801**

Source: A-3237

Moreover, after the March 29 meeting, TCI also began to purchase shares. Since the waiting period for the previously-filed HSR notice expired right after the March 29 meeting, "TCI began to unwind some of its swaps and to purchase CSX stock with a goal of keeping its exposure to CSX 'roughly constant.'" (A-5581.) This process started on April 3, 2007.[19] (A-3234.) TCI acquired 17.6 million shares, over 4 percent of CSX's then-outstanding shares, by April 18. (A-5597.) "Certainly there is no persuasive evidence that any economic factor that led TCI to

[19] The court rejected Amin's testimony that he and Behring had not discussed at the March 29, 2007 meeting that TCI was about to buy shares of CSX. (A-5556.)

choose swaps in the first place had changed." (A-5581.) Rather, it is "obvious" that "TCI by this time understood that a proxy fight likely would be required to gain control of or substantial influence over CSX", and knew that "holding shares that it could vote directly had an advantage over swaps". (A-5581-82.) "This advantage, however, was not enough to cause TCI to dump a large part of its [swap] position." (A-5582.) TCI kept its physical shares below 5 percent so as to avoid the reporting requirements "until it was ready to disclose its position". (A-5626.)

Starting in the middle of August, 3G began once again to increase its holdings, purchasing about 493,000 shares on August 15. (A-5591, A-3237.) In addition, 3G entered into its first swaps, which referenced 1.7 million CSX shares, on August 16. (A-5591-92.)

Later in August 2007, TCI and 3G became concerned about a downturn in the U.S. economy and the threat of re-regulation of the rail industry. (A-485, A-505, A-519.) Indeed, "Amin told Hohn on September 12, 2007 that he wished that TCI had sold CSX '10 dollars ago.'" (A-5598 (quoting A-2254).)

Moreover, TCI was concerned about how to gain control of CSX in light of advice that it received that ISS would likely not support a majority slate. (A-2270-74.) TCI was told that one of the factors that would "exert the greatest influence over the vote" is "how proxy advisory [firm ISS], recommend[s] [its]

institutional subscribers vote". (A-2202.) In early August, TCI's proxy solicitor had advised TCI that the control slate TCI sought was not likely to succeed because ISS would be more willing to endorse a short slate. (A-5584.)

As a result of these uncertainties, TCI and 3G coordinated a sell down of a portion of their positions. Between August 23 and August 31, 2007, TCI reduced its swap (and total) position in CSX by 1,971,000 shares. (A-3235.) Likewise, 3G sold a net 8,315,171 shares of CSX common stock during the period from August 24 through September 14, 2007, which was "over 40 percent of [3G's] position."[20] (A-5598, A-3237-38.) The following chart shows the Group's sell-down:

[20] The court rejected Behring's testimony that 3G's sales during this time were unrelated to TCI's doubts as to whether it would continue to hold its CSX shares and run a proxy fight. (A-5553.)

Type	Date	Quantity
Swap	8/23/07	-580,000
Stock	8/24/07	-165,800
Stock	8/24/07	-47,300
Stock	8/27/07	-520,835
Stock	8/27/07	-148,810
Stock	8/28/07	-82,500
Stock	8/28/07	-1,017,870
Stock	8/29/07	-1,180,809
Stock	8/29/07	-95,741
Stock	8/30/07	-1,163,662
Stock	8/30/07	-94,400
Stock	8/30/07	-21,106
Swap	8/31/07	-1,391,000
Stock	9/11/07	-795,289
Stock	9/11/07	-140,345
Stock	9/12/07	-110,600
Stock	9/12/07	-626,783
Stock	9/13/07	-1,080,327
Stock	9/13/07	-190,600
Stock	9/14/07	-33,000
Stock	9/14/07	11,700
Stock	9/14/07	-186,650
Stock	9/14/07	66,306
Stock	9/14/07	-587,150
Stock	9/14/07	-103,600
TOTAL		**-10,286,171**

Source: A-3237-38

The Group reversed position when it decided to proceed with the proxy fight. On September 20, TCI informed its proxy solicitor that it was "likely to proceed in a proxy contest". (A-5585, A-2257.) Therefore, on September 26, 2007, Amin and Behring met to discuss their CSX strategy. The court found that the meeting took place despite Behring's testimony at deposition that he did not recall the "Amin" entry in his calendar on September 26, 2007. (A-5599, A-2771, A-768.) "Although both parties den[ied] that they discussed anything related to the purchase of CSX common stock, they both admitted that the topic of CSX likely

arose and that each knew that the other had an investment position in the company."[21] (A-5599.)

As a result of that meeting, 3G resumed buying CSX stock that very day. (A-5599.) By October 5, 3G had acquired an additional 4.2 million shares. (A-3238-39.) The following chart shows these purchases:

Date	Quantity
9/26/07	449,122
9/26/07	168,200
9/26/07	82,400
9/26/07	30,800
9/27/07	120,000
9/27/07	42,000
9/27/07	889,300
9/27/07	308,000
9/27/07	7,700
9/28/07	271,200
9/28/07	133,000
9/28/07	3,156
9/28/07	44,844
9/28/07	1,512
9/28/07	21,488
10/1/07	233,200
10/1/07	41,000
10/2/07	12,500
10/2/07	31,900
10/2/07	2,200
10/2/07	5,600
10/3/07	150,000
10/3/07	850,000
10/4/07	225,900
10/4/07	30,461
10/4/07	9,539
10/5/07	16,500
10/5/07	93,500
TOTAL	**4,275,022**

Source: A-3238-39

[21] The court did "not credit Amin's testimony that they never discussed buying or selling CSX stock." (A-5599 n.123, A-5556.)

On October 8, 2007, TCI and 3G held coordinated meetings with two of their slate's nominees. (A-2764, A-2773.) The court rejected Behring's testimony that he and Hohn did not discuss these meetings with nominees for the CSX Board. (A-5554.) These meetings triggered another series of purchases by 3G. From October 11, 2007 through October 15, 2007, 3G purchased an additional 951,000 shares of CSX. (A-3239.)

Date	Quantity
10/11/07	359,000
10/11/07	63,200
10/12/07	235,500
10/12/07	41,600
10/15/07	37,700
10/15/07	214,000
TOTAL	**951,000**

Source: A-3239

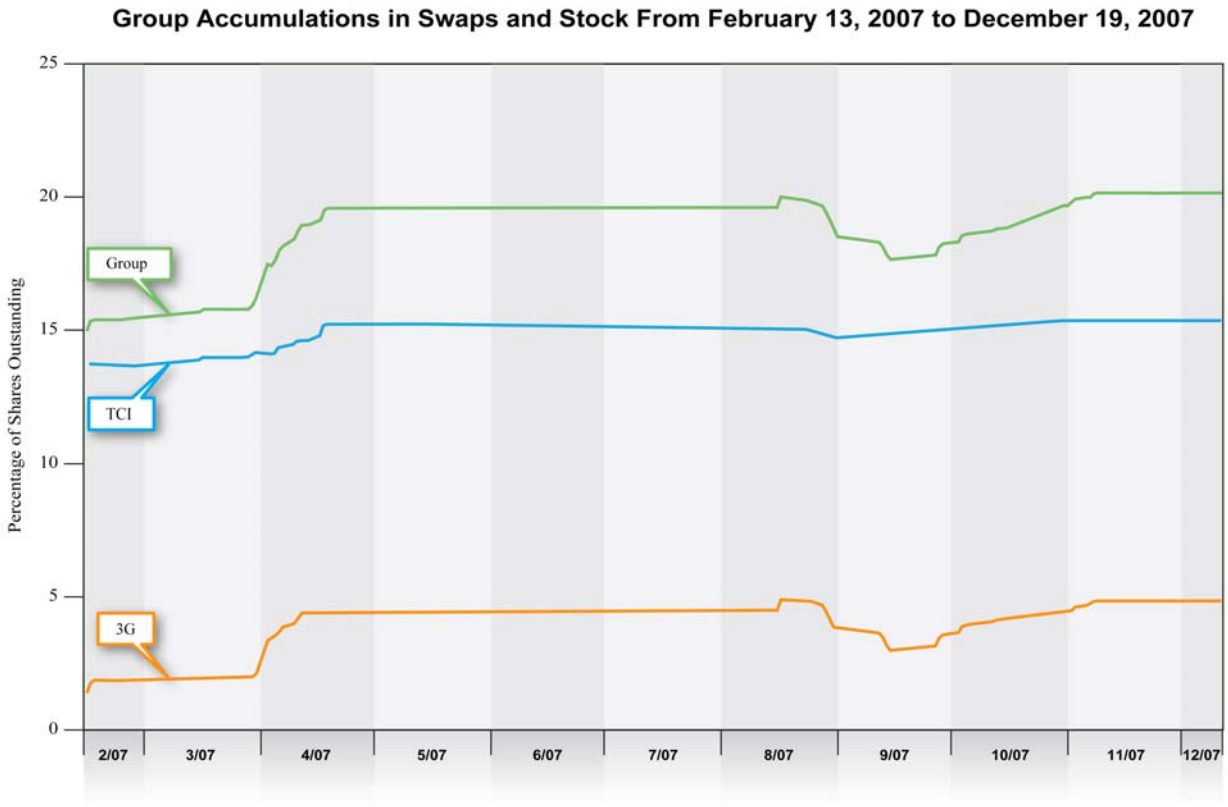
Further proxy preparations led to more purchases. On November 1, 2 and 8, 2007, 3G met with its nominee (A-5593, A-2798, A-2323), and on November 6, the nominee made his first purchases amounting to 22,600 shares of CSX to "qualify[] for election to the board". (A-5593, JX 12 at 24.) Therefore, 3G acquired more shares and swaps totaling over 2 million CSX shares:

Date	Quantity
11/1/07	68,000
11/1/07	12,000
11/1/07	358,100
11/1/07	63,200
11/2/07	425,000
11/2/07	75,000
11/5/07	255,000
11/5/07	45,000
11/7/07	510,000
11/7/07	90,000
11/8/07	85,000
11/8/07	15,000
TOTAL	**2,001,300**

Source: A-3239

The following chart shows the Group's accumulation of swaps and stock from February 13 through the filing of their Schedule 13D on December 19, 2007[22]:

[22] The percentage of shares outstanding in this chart takes into account the periodic changes in the number of CSX shares outstanding. (*See* A-1350-55.)



Source: A-3232-39

The Group's total position in CSX on the date of the Schedule 13D (which is the same as the Group's position on the record date) was 84,710,852 shares in swaps and physical shares, just shy of 21 percent of CSX shares outstanding on the record date. (JX 8 at 15, A-1355, A-1358, A-3232-39.)

The district court found that defendants violated Section 13(d) by failing to file a Schedule 13D by 10 days after February 13, *i.e.*, February 24. Between February 24 and the filing of their Schedule 13D, TCI and 3G acquired 26,767,759

physical shares of CSX common stock (net of the 8,393,177 shares that they acquired and then disposed of during the same period).[23] (A-3234-39.)

C. Defendants Secretly Tipped "Friends and Family".

In February 2007, after forming the Group, TCI and 3G began to tip other hedge funds about CSX, in an "effort to steer CSX shares into the hands of like-minded associates." (A-5577-78, A-5635.) Defendants' purpose in tipping off these funds was "to promote the acquisition of CSX shares by hedge funds that TCI regarded as favorably disposed to TCI and its approach to CSX in an effort to build support for whatever course of action [TCI] ultimately might choose with respect to the company." (A-5578.)

3G discussed CSX with "multiple funds" or "[t]ens" of funds during the course of 2007. (A-1021; *see also* A-1022, A-756-57.) Moreover, the court found that "it is likely that TCI made similar approaches" to various hedge funds in addition to 3G.[24] (A-5578.) TCI on numerous occasions communicated with

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[23] Based on the 404,783,890 outstanding shares as of the April 21, 2008 record date for the 2008 annual meeting (JX 5 at 1), these shares represent 6.61 percent of CSX's outstanding shares.

[24] The court rejected Hohn's testimony 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". (A-5555.) In part because of the court's "assessment of Hohn's credibility," the court found that Hohn "suggested, in one way or another, that [other hedge funds] buy CSX shares and alerted them to the fact that CSX had become a TCI target." (A-5578.)

Deccan Value, a hedge fund, and urged Deccan Value to "buy" CSX stock. (A-1806, A-1820, A-355-56, A-942-43).) TCI engaged in similar efforts with respect to Lone Pine Capital.[25] (A-5577-78, A-355-56.)

Another one of the tippees was Austin Friars Capital, a proprietary hedge fund of Deutsche Bank, one of TCI's swap counterparties. (A-5579.) TCI made clear to Austin Friars "that TCI was looking at the possibility of trying to take CSX private."[26] (A-5580.) The court rejected Hohn's testimony that TCI did not solicit Austin Friars' support for TCI's campaign. (A-5556.) Moreover, in March 2007, Austin Friars invited TCI to listen in on a conference call with John Snow, a former CSX CEO. (A-5579.) In advance of that call, Austin Friars sent TCI proposed questions to review, including "whether railroad companies could 'lend themselves to being ru[n] by private equity.'" (A-5579-80 (quoting A-1827).)

D. Defendants "Lay the Groundwork for a Proxy Fight".

TCI selectively disclosed information to CSX to attempt "exert pressure" for substantial changes to promote short-term increases in the stock price. (A-5574-80.) For example:

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[25] The court rejected Hohn's testimony that he was not encouraging Lone Pine Capital to purchase CSX stock. (A-5555.)

[26] TCI "subsequently enlisted Deutsche Bank to analyze its LBO [leveraged buyout] proposal, and Deutsche Bank concluded that CSX was a 'terrific LBO candidate.'" (A-5580 (quoting A-1884).)

- On October 23, 2006, TCI demanded a meeting, representing that TCI had approximately $100 million of CSX stock. (A-5574, A-2264.)
- In late 2006, Amin told CSX that TCI's swaps could be converted into direct ownership at any time. (A-5575.) The court "d[id] not credit" Amin's denial of this statement. (A-5575 n.25.)
- "TCI's belief that it could profit substantially if it could alter CSX's policies or, if need be, management manifested itself when, during December 2006, it began to investigate the possibility of a[n] . . . [LBO]." (A-5575.) TCI sent an LBO model to an investment bank (A-5575-76), commissioned a profile of CSX's takeover defenses (A-1700, A-1704, A-1708-09, A-1738-39) and subsequently met with CSX's financial advisors to make the LBO proposal. (A-5576, A-5581.)
- On February 15, 2007, Amin asked CSX how it intended to conduct its share repurchase program and stated that TCI "owned" 14 percent of CSX. (A-5577.) The court "d[id] not credit" Amin's denial of this statement. (A-5577 n.36.)
- On March 29, 2007, Amin pressed CSX to implement TCI's proposals. Amin indicated that TCI held up to "14 percent of CSX's stock" through swaps that could be converted at any time to physical

shares, and that there were "no limits" to what TCI would do if CSX did not acquiesce to TCI's demands.[27] (A-5580.)

TCI and 3G intended to take control of CSX from the beginning, and they knew that a proxy fight would likely be required. "TCI embarked on a course designed from the outset to bring about changes at CSX" (A-5574) and "was determined to force changes in CSX's policies and, if need be, to bring about a change in control" (A-5581 n.49). TCI acquired physical shares after making an HSR filing[28] only "to place more pressure on the company and to lay the groundwork for a proxy fight". (A-5578.) Owning shares gave TCI the "optionality of potential activism in the future" (A-1824, A-939), where in TCI's language "potential activism" means a proxy fight (A-365). TCI converted its swaps into physical shares because "TCI saw the payoff on its CSX investment, if there was to be one, resulting from a change in CSX policies and, if need be, management." (A-5581.) TCI "understood that a proxy fight likely would be required to gain control of or substantial influence over CSX. Holding shares that

[27] TCI and 3G coordinated their contacts with CSX. For example, in May 2007, TCI and 3G each contacted CSX to inquire about the results of the shareholder vote at the CSX annual meeting held a week earlier, as did several other hedge funds. (A-5597.)

[28] An HSR filing is not required for purchases of physical securities representing no more than 10 percent of a company's voting securities if the purchases are made "solely for the purpose of investment". 15 U.S.C. § 18a(c)(9).

[TCI] could vote directly had an advantage over swaps because the votes of shares held by swap counterparties were less certain." (A-5582.)

Likewise, 3G was "interest[ed] in a proxy fight right from the outset." (A-5588.) Before 3G bought a single share, a 3G employee informed Behring that 3G had missed the deadline to submit board nominations for CSX's 2007 annual meeting, which demonstrates that interest. (A-5588.) The court found that 3G's denial of that interest was "not credible" (A-5588 n.77) and rejected Behring's testimony that the email was just "part of [the] normal due diligence on any investment [3G] make[s]". (A-5555.) Indeed, 3G invested in CSX because CSX had "tons of optionality". (A-986.) This same word—"optionality"—is TCI shorthand for a proxy fight. (A-939, A-365.) Moreover, 3G constantly considered "activist" scenarios in its analysis of CSX all this time. For example, on April 3, 2007, just as TCI was purchasing shares in support of its goal of "optionality", 3G examined shareholder voting patterns with respect to the upcoming 2007 CSX annual meeting. (A-327-28.) The court rejected Behring's testimony that 3G was "not giving serious consideration to an activist scenario [on April 3, 2007] yet". (A-5555.) Similarly, 3G sent an HSR notice dated June 13, 2007, in which 3G disclosed that it may acquire CSX shares in excess of $597.9 million and cross the 50 percent reporting threshold under HSR. (A-2153.) At the time of that filing, 3G told CSX that 3G "wanted to keep all of [its] options open". (A-1019.)

TCI largely completed its share purchases by April 18 and "essentially paused its trading activities", but "continued and, perhaps, stepped up its efforts to lay the groundwork for a proxy contest". (A-5582.)

On August 2, TCI met with its proxy solicitor to discuss proxy contest mechanics. (A-5583-84.) TCI wanted to put up a control slate because it was "skeptical about what a minority slate can accomplish". (A-2265.) TCI was advised, however, that success was more likely if TCI proposed a "short slate" because ISS would be more willing to endorse a short slate. (A-5584.) Even after TCI informed its proxy solicitor that it was "likely to proceed in a proxy contest" (A-5585, A-2257), TCI still asked its proxy solicitor whether it was feasible to run a slate for half of the board, which it again advised would not likely succeed. (A-5585, A-2270-71.)

TCI began looking for suitable nominees for the board. (A-5598-99.) During the same time period, 3G began to pursue possible nominees.[29] (A-5599.)

[29] The court rejected Behring's testimony that he did not know before Thanksgiving 2007 that TCI was contacting potential nominees. (A-5554.) The court rejected Behring's testimony that he and Hohn did not tell each other on or about October 11 that they had met with candidates for the CSX Board. (A-5554.) On October 17, 2007, Behring met again with Amin, and the court rejected Behring's testimony that he did not tell Amin at that time that he had met with his candidate five days earlier. (A-5555.)

Indeed, TCI and 3G both met with their first identified nominees on the same day, October 8, 2007. (A-732, A-1051, A-2764, A-2773.)

Defendants' goal is to control CSX:

- Defendants threatened CSX several times that they intend to "go to war"; that TCI "would seek to replace the entire Board as a means to change management"; and that TCI "will get support from the shareholders in making the changes at CSX". (A-2190 (cited at A-5656 n.282));
- Defendants reiterated that "TCI would, in due course, attempt to change the entire Board" and that TCI's objective was "to find management that would be more open to leveraging [CSX] and that would pursue cost improvements more aggressively".[30] (A-2193 (cited at A-5656 n.282));
- Defendants nominated a minority slate (only because the advice from their proxy solicitor was that they could not succeed with the control slate that they initially sought), but still intend to use that minority

[30] In April 2007, TCI had contacted Hunter Harrison, the CEO of Canadian National Railway Company, to inquire whether "he would be interested in coming in as CEO of CSX." (A-5581.) The court rejected Amin's testimony that TCI was not looking to have a new CEO at CSX in April 2007, when Amin and Hohn talked about approaching Harrison. (A-5556.)

slate to obtain effective control. "TCI told CSX that it would use this [minority slate] to influence the work of the board." (A-5656.)

On January 8, 2008, TCI submitted a notice to CSX indicating its intention to nominate five nominees to the CSX Board, including Hohn, Behring and nominees identified by each of TCI and 3G. (A-5601, A-4673.)

In January 2008, Edward Kelly III, the presiding director of the CSX board, met with Hohn to see if a proxy fight could be avoided. But Hohn's efforts in the negotiations "were not limited to seating directors on the board" (A-5602)—he demanded to interview the current directors and dictate which of them the Group's nominees would replace; separation of CEO and Chairman roles; a prohibition on increasing the number of directors without shareholder approval or approval of 80 percent of the board; and a bylaw amendment to permit shareholders controlling 10 or 15 percent of the shares to call a special meeting at any time.[31] (A-5602; *see* A-432-33, A-2616.) Moreover, Hohn threatened that:

- He would create a dissident board and "make things unpleasant" for Kelly (A-5602);

[31] In an email, Amin noted that it was "unfortunate[ ]" that Hohn articulated TCI's demands to CSX in writing. (A-5602 n.135, A-4331.) Amin testified that the reason he said that was because "things like this are better discussed in person". (A-391.) The court found that this testimony, "which borders on the absurd, is patently incredible". (A-5602 n.135; *see* A-5556.)

- The CEO's future would be "bleak" (A-5602-03); and
- The Group's directors would decline to provide written consent actions and otherwise disrupt the operation of the Board (A-433).

"The implicit premise underlying Mr. Hohn's threats was that his five nominees would vote together as a bloc." (A-433-34.)

E. Defendants Repeatedly Offered False Testimony.

Defendants' practice of disclosing the truth only if and when "convenient" to their strategy (A-5673) continued under oath at trial, where they went "to considerable lengths to cover their tracks". (A-5634.) TCI and 3G "testified falsely in a number of respects, notably including incredible claims of failed recollection".[32] (A-5673.)

Despite the fact that TCI and 3G had formed a Group in early 2007, they offered false testimony about the formation of the Group. For example:

- Hohn testified falsely that TCI and 3G never discussed purchases of CSX stock and that he never discussed with Behring whether TCI was going to purchase more shares of CSX. (A-5555.) Hohn also testified

[32] TCI also misled Congress. Amin testified falsely before Congress that "TCI [was] not seeking and has never sought control of CSX" (DX 83:2); had not called for management change (DX 82:121); had no idea when 3G purchased shares (DX 82: 183); and had never been interested in a leveraged buyout of CSX (DX 82: 151). The district court found the contrary on each of these statements. (A-5582, A-5581, A-5635-36, A-5575-76.)

falsely that, while he told another hedge fund that was not an investor in TCI to buy CSX stock, he never recommended CSX to 3G, which is an investor in TCI. (A-5556.)

- Behring testified falsely that he did not have conversations with Hohn around the time that 3G began making purchases of CSX stock in February 2007. (A-5553.) Behring further testified falsely that 3G's purchases of CSX stock from March 29 to April 17, 2007 had nothing to do with the March 29 meeting with TCI and that it was just a coincidence; and that 3G's sales of CSX shares in August and September 2007 were unrelated to TCI's doubts as to whether it would continue to hold its CSX shares and run a proxy fight. (A-5553.)
- The court did "not credit Amin's testimony that [he] never discussed buying or selling CSX stock" with Behring. (A-5599 n.123, A-5556.) Amin further testified falsely that they did not discuss at the March 29 meeting that TCI intended to buy shares of CSX when TCI's HSR waiting period expired, and that TCI and 3G never discussed buying or selling CSX shares. (A-5556.) Amin also testified falsely that he did not discuss the buying of CSX shares with Behring at the September 26 meeting. (A-5556.)

- Amin and Behring "both testified, unpersuasively, that they did not discuss their respective holdings in CSX" at their March 29, 2007 meeting. (A-5596-97.)

Defendants also offered false testimony about their intent to seek control of CSX through a coordinated proxy fight from the outset. For example:

- 3G's denial of "its interest in a proxy fight right from the outset" was "not credible". (A-5588 n.77, A-5555.) Behring testified falsely that 3G was "not giving serious consideration to an activist scenario [on April 3, 2007] yet" and he was forced to retract it. (A-5555.)
- Amin testified falsely that TCI was not looking to replace the CEO at CSX in April 2007. (A-5556.)
- Behring 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. (A-5554.) Behring further testified falsely that when he met with Amin on October 17, 2007, he did not tell Amin that he had met with its nominee five days earlier. (A-5555.) Behring testified falsely that he did not know before Thanksgiving 2007 that TCI was contacting potential nominees for the CSX Board. (A-5554.)

Defendants offered false testimony about their tipping of "friends and family". For example, 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." (A-5578; *see also* A-5555.)

Defendants offered false testimony about their use of swaps to evade the reporting requirements and the fact that the inevitable result of the swaps was that the counterparties would purchase physical shares. For example,

- The court found that "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." (A-5613 n.164; *see also* A-5556.)
- Amin testified falsely that he did not say that the swaps could be converted into direct ownership at any time. (A-5575 n.25.) Amin also testified falsely that he did not tell CSX in February 2007 that TCI "owned" 14 percent of CSX. (A-5577 n.36.)
- Amin testified falsely about DX 96 insofar as he did not acknowledge that the voting scenario depicted in that exhibit was one of a number of different scenarios. (A-5556.)

- 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. (A-5616 n.173, A-5556.)
- Hohn testified falsely that TCI did not solicit Austin Friars' support for TCI's activism campaign. (A-5556.)

F. Defendants Manipulated the Playing Field.

Defendants stuffed the ballot box with votes in their favor long before they filed a Schedule 13D disclosing their ownership position and their intent to conduct a proxy contest at the 2008 annual meeting. The Group's tipping of other hedge funds helped to shift the CSX ownership profile away from institutional investors and into the hands of hedge funds "that TCI regarded as favorably disposed to TCI", *i.e.*, who were assumed would vote in favor of an activist slate like TCI/3G's in a proxy fight. (A-5577-78, A-5635.)

Moreover, the Group caused the rapid accumulation of CSX shares in the counterparties, which "significantly alter[ed] the corporate electorate" by:

> "(1) eliminating the shares constituting the hedge positions from the universe of available votes, (2) subjecting the voting of the shares to the control or influence of a long party that does not own the shares, or (3) leaving the vote to be determined by an institution that has no economic interest in the fortunes of the issuer, holds nothing more than a formal interest, but is aware that future swap business from a particular client may depend upon voting in the 'right' way." (A-5571.)

Indeed, the Group's proxy solicitor's analysis showed that "*[i]f the broker-dealers [i.e., the swap counterparties] vote as we would expect them to vote*, a TCI/3G victory may require the support of only about 16.2% of the overall vote cast by CSX's institutional owners". (A-2580.)

As a result, from December 31, 2006 to the date the Group filed its Schedule 13D, hedge funds' interests in CSX increased from approximately 11 percent to 35 percent of CSX's outstanding shares, and holdings by other institutions decreased from over 60 percent to approximately 39 percent. (A-2655, A-2724.)

Moreover, in 2008, Deutsche Bank, "exceptionally receptive, to say the least, to TCI's goals and methods" (A-5587), helped tilt the playing field even further. In connection with the initial record date for CSX's annual meeting of February 27, 2008, Deutsche Bank made sure that it recalled CSX shares it owned to hedge the TCI swaps, which had been lent to short sellers, so that Deutsche Bank would be the holder of those shares on the record date and thus have the right to vote those shares. Between February 12 and February 27, 2008, Deutsche Bank increased its record holdings by 23 million, resulting in total holdings of 27 million shares on that record date. (A-5616-17; *see* A-1278, A-2753.) In the eight business days following that record date, Deutsche Bank decreased its holdings by over 24 million shares. (A-1279, A-2753.) This pattern of "large and aberrant

movements of CSX shares into and out of Deutsche Bank's hands" (A-5617) is consistent with Deutsche Bank's recalling lent shares so that it could vote them (and lending them back again after the record date passed). (A-1278-79, A-2655, A-2753.) The court rejected TCI's argument that the receipt of dividends motivated this share movement. (A-5617-18.)

CSX moved the annual meeting after the initial aberrant share movements were discovered because the "unprecedented movement and concentration of shares into the hands of swap counterparties to hedge funds likely rendered a fair proxy contest impossible". (A-471.)

Even though CSX filed a well-publicized suit after this discovery, "a similar influx and outflow of shares took place around the adjourned record date." (A-5617-18, A-267.)

Standard of Review

The district court's decision that it was foreclosed from enjoining defendants from voting their illegally-obtained shares was a legal conclusion. Legal conclusions, as well as mixed questions of law and fact, are reviewed *de novo*. *F.D.I.C. v. Providence Coll.*, 115 F.3d 136, 140 (2d Cir. 1997).

Summary of Argument

The Court has the power to enjoin the voting of the illegally-obtained shares. The federal courts' broad powers to enforce the securities laws, including the

Williams Act, confer the authority to enter all appropriate remedies, including an injunction against voting shares.

The district court refrained from enjoining the voting of the illegally-obtained shares because it read the Supreme Court's decision in *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975), and this Court's decision in *Treadway Cos., Inc. v. Care Corp.*, 638 F.2d 357 (2d Cir. 1980), to foreclose the courts from ordering such relief. (A-5668-70.) However, neither *Rondeau* nor *Treadway* precludes such an injunction. *See infra* Part I.

An injunction against defendants' voting the illegally-obtained shares is necessary to promote the Williams Act, by restoring, at least in part, the shareholder franchise that has been undermined as a result of defendants' manipulation of the playing field, and by deterring future deliberate violations. *See infra* Part II.

Argument

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

Federal courts have "exclusive jurisdiction . . . of all suits . . . brought to enforce any liability" arising under Section 13(d). 15 U.S.C. § 78aa. Courts have the "duty . . . to be alert to provide such remedies as are necessary to make effective the congressional purpose" of the Williams Act and they should "adjust their remedies so as to grant the necessary relief". *J.I. Case Co. v. Borak*, 377 U.S.

426, 433 (1964). This duty manifestly "implies the power to make effective the right of recovery afforded by the Act" and "the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case." *Id.* at 433-34. As the *Rondeau* Court stated, "traditional remedies [are] available [to a private litigant] to redress any harm" for violations of the securities laws. 422 U.S. at 63.

These remedial powers are to be construed broadly. Once a federal right of action exists, there is a "traditional presumption" that the courts can use "all available remedies" unless Congress clearly has provided otherwise. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 61, 66 (1992). "The general rule . . . is that absent clear direction to the contrary by Congress, the federal courts have the power to award *any appropriate relief*". *Id.* at 70-71 (emphasis added). Thus, courts "have 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.

Nothing in the Williams Act forecloses an injunction against voting shares obtained in violation of the Act. To the contrary, "[t]he legislative history of the Williams Act . . . 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). In addition to full disclosure, a "central theme" of the Williams Act is to maintain "a level playing field that does not unduly advantage either incumbent management or its challenger". *ICN Pharms. Inc. v. Kahn*, 2 F.3d 484, 490 (2d Cir. 1993). "Allowing an issuer to seek injunctive relief 'furthers the object of § 13(d) by increasing honest disclosure for the benefit of investors without placing incumbent management in a stronger position than aspiring control groups.'" (A-5663 (quoting *Hallwood*, 286 F.3d at 620-21).)

Rondeau in no way detracts from these broad principles. Quite the contrary. In *Rondeau*, the "narrow issue" was "whether [the] record supports the grant of injunctive relief, a remedy whose basis in the federal courts has always been irreparable harm". 422 U.S. at 57. The "determinative question [was] whether, absent an injunction, there would be irreparable harm to the interests which Section 13(d) seeks to protect – viz. 'alert[ing] investors to potential changes in corporate control.'" (A-5667 (quoting *Kamerman v. Steinberg*, 891 F.2d 424, 430 (2d Cir. 1989)).)

Addressing the "evils to which the Williams Act was directed", the *Rondeau* Court found no irreparable injury[33]—the wrongdoer "ha[d] not attempted to obtain control"; there was "no suggestion that [the wrongdoer] will fail to comply with the Act's requirements" in the future; and there was "no likelihood that . . . shareholders will be disadvantaged should [the wrongdoer] make a tender offer" or that the company "will be unable to adequately place its case before them should a contest for control develop". 422 U.S. at 59. Moreover, the Court held that the district court was within its discretion to deny "relief which is historically 'designed to deter, not to punish'", where the wrongdoer "acted in good faith and . . . promptly filed a Schedule 13D when his attention was called to this obligation". *Id.* at 61-62.

The *Rondeau* Court set no limitation on the scope of equitable remedies when the "evils to which the Williams Act was directed [*had*] occurred or [*were*] threatened." *Id.* at 59. For example, the Court did not address "whether or under what circumstances a corporation could obtain a decree enjoining a shareholder who is currently in violation of § 13(d) from acquiring further shares, exercising

[33] The Court's finding of a lack of irreparable injury resolved the "narrow issue" presented. *Rondeau*, 422 U.S. at 59. The Court reversed the Seventh Circuit's holding that the "claim was not to be judged according to traditional equitable principles, and that the bare fact that [the defendant] violated the Williams Act justified entry of an injunction". *Id.* at 60.

voting rights, or launching a takeover bid, pending compliance with the reporting requirements". *Id.* at 59 n.9. Similarly, the Court stressed that equity permits the courts "'to mould each decree to the necessities of the particular case'". *Rondeau*, 422 U.S. at 61 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). As the *Hecht* Court explained:

> "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Hecht*, 321 U.S. at 329 (quotation omitted).

In addition, the Court recognized that deterrence is inherent in the injunctive process—the "usual basis for injunctive relief" is the "danger of recurrent violation" and such relief is designed "to deter, not to punish". *Rondeau*, 422 U.S. at 59, 61. The Court reiterated the point in *Piper*, stating that deterrence may be "a meaningful goal" in fashioning relief for "the most flagrant sort of violations" of the Williams Act. *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 40 n.26 (1977).[34]

[34] The SEC has endorsed the importance of deterrence in Section 13(d) remedies: "equitable remedies in addition to corrective disclosure . . . may be necessary or appropriate . . . particularly in cases where the defendant deliberately violated Section 13(d)". 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) ("*General Steel* SEC Amicus"). Otherwise, "shareholders could be irreparably harmed and the defendant would be

Nor does any decision of this Court limit the scope of equitable remedies where "the evils to which the Williams Act was directed [*had*] occurred or [*were*] threatened." *Rondeau*, 422 U.S. at 59. Indeed, this Court's decision in *ICN Pharmaceuticals* contemplates "a permanent, as distinguished from corrective, ban against participation in a takeover" to be imposed for securities laws violations in appropriate circumstances. 2 F.3d at 490. Far from ruling that injunctive relief beyond disclosure was unavailable as a matter of law, this Court expressly left open the possibility that relief even stricter than the relief sought here could be granted in the appropriate case; the Court compared a permanent ban against participating in a takeover to the "more limited remedies of disenfranchisement or compelled divestiture of the tainted shares". *Id.* at 492.

Contrary to defendants' contention (Defs. Expedited Appeal Opp'n 9-15), this Court's decision in *Treadway* does not deviate from *Rondeau* or *Piper* (or state a rule inconsistent with this Court's later decision in *ICN*). *Treadway* was "not a case in which a takeover attempt 'followed on the heels' of a belated curative

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permitted to benefit from its wrongful conduct". *Id.* "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, *San Francisco Real Estate Investors v. Real Estate Inv. Trust of Am.*, No. 82-1853 (1st Cir. 1982) ("*San Francisco* SEC Amicus").

filing"; "shareholders had four months to ponder [a corrected Schedule 13D], before being asked, in the proxy contest, to reach any decision about a . . . takeover." *Treadway*, 638 F.2d at 380. The Court held simply that "[s]ince the informative purpose of § 13(d) had thereby been fulfilled, there was no risk of irreparable injury and no basis for injunctive relief." *Id.*

Defendants impermissibly try to jump from the fact that in *Treadway* there was "no risk of irreparable injury"—and thus, not surprisingly, "no basis for injunctive relief"—to the assertion that the *Treadway* Court contemplated that the only remedy was disclosure (Defs. Expedited Appeal Opp'n 14-15), *i.e.*, that sunlight is the *only* disinfectant. That is incorrect.

Although *Treadway* focused principally on the "informative purpose" of Section 13(d), that is not its only purpose. The statute also seeks to provide a level playing field and to promote compliance.[35] In response to our showing, defendants rely on dicta in footnote 45 of *Treadway*. In that footnote, the Court, in response to Treadway's argument that "disenfranchisement or divestiture may be appropriate" in circumstances where the defendant obtains a "degree of effective control" while in violation of Section 13(d), stated that it "express[ed] no view" on "[w]hatever may be the merit of that proposition". *Id.* at 380 n.45.

[35] *Treadway* did not address the deterrence goal of the Williams Act referred to in *Piper* (which was not cited to the *Treadway* Court).

The Court went on to say that defendant "Care has never had 'a degree of effective control' over Treadway". *Id.* Defendants seek to turn this observation (about the specific facts in *Treadway*) into a bright line rule that they must have 31 percent ownership of CSX to have "effective control" before the court can address an argument of a "degree of effective control". (Defs. Expedited Appeal Opp'n 14-15.) Again, defendants are wrong.

The Court's power does not depend on defendants' having obtained a "degree of effective control". The Court has the power to order relief to restore the level playing field and to promote compliance even if defendants do not have a "degree of effective control". Deliberately undermining the shareholder franchise constitutes irreparable injury, independent of defendants' degree of control. Congress "meant to promote the free exercise of stockholders' voting rights and protect fair corporate suffrage". *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1103 (1991). "[F]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange". *Borak*, 377 U.S. at 431. The Court has the power—and the duty—to protect fair corporate suffrage from defendants' manipulation.

Moreover, *Treadway* cannot properly be read to set forth a bright line rule that 31 percent ownership is required to establish "effective control." The Court did not even mention the ownership figure anywhere in the Section 13(d) analysis,

let alone in footnote 45. Indeed, the defendant in *Treadway* held only 28 percent of the voting stock because the incumbent board had issued an off-setting 20 percent block of voting stock to a white knight, which diluted defendant's position to 28 percent. *Treadway*, 638 F.2d at 368, 370. As a result of the 20 percent voting block issued to the white knight, the defendant lost the proxy contest and the incumbent board was re-elected. *Id*. at 371.

Not only was there no need to establish any test at all because the Court found that the defendant did not in fact have effective control, but also there is no reason to believe the Court would have put forward such a bright-line test. A determination of control depends upon the facts and circumstances of each case. *See Rondeau*, 422 U.S. at 62-64. As a result, many courts have found that considerations apart from actual stock ownership can result in "effective control". (A-5669 n.325 (citing *Dan River, Inc. v. Unitex Ltd.*, 624 F.2d 1216, 1225 (4th Cir. 1980) (20 percent "frequently is regarded as control of a corporation"); *Standard Fin., Inc. v. LaSalle/Kross Partners, L.P.*, No. 96-8037, 1997 WL 80946, at *4-5 (N.D. Ill. Feb. 20, 1997) (defendant's intention to obtain two board seats and to influence company evidence purpose to exercise control, even with only 5.2 percent ownership)).)[36]

[36] *See also Chromalloy Am. Corp. v. Sun Chem. Corp.*, 611 F.2d 240, 246-47 (8th Cir. 1979) (finding control purpose where stock purchaser planned to acquire

Indeed, market realities—not a bright line rule—demonstrate effective control. To quote the district court: "[o]ne need look no farther than Hohn's threat" to make CSX's CEO's "future 'bleak' and be disruptive in the CSX boardroom to see why that is so." (A-5668.) Just hours after the polls closed at the CSX 2008 annual meeting and the meeting adjourned, defendants issued a press release proclaiming that they had won four of the five contested seats on the CSX Board. The actual results of the election will not be known for several weeks, but defendants seem to believe—or at least they publicly assert—that they have obtained one-third of the CSX Board seats as a result of their scheme to manipulate the shareholder electorate.

In sum, the courts have broad powers to redress violations of the securities laws. Nothing in the Williams Act, its legislative history, or the Supreme Court's decision in *Rondeau* curtails those powers and renders courts powerless to preclude adjudicated securities law violators from voting shares obtained by them illegally as part of a plan and scheme to take control of a public company. Nor does

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20 percent stake; attempted to have board representation; prepared acquisition model); *Gen. Aircraft Corp. v. Lampert*, 556 F.2d 90, 92-96 (1st Cir. 1977) (concluding that Schedule 13D by a 12 percent group inaccurately described as investment purpose: forcing management change, electing two board members, proposing dramatic operational and corporate structure changes, and creating dissident slate).

footnote 45 or any other part of this Court's decision in *Treadway* stand for such a proposition.

II. THE COURT SHOULD ENJOIN THE VOTING OF THE ILLEGALLY-OBTAINED SHARES TO PROMOTE THE GOALS OF THE WILLIAMS ACT.

Rondeau makes clear that courts are empowered to remedy the "evils to which the Williams Act was directed". 422 U.S. at 59. While "none of th[ose] evils . . . [was] threatened" in *Rondeau*, by contrast here:

- Defendants *have* "attempted to obtain control". The district court so found (A-5673-75);
- There is *every* "suggestion that [defendants] [would] fail to comply with the Act's requirements" in the future. Indeed, the district court enjoined the defendants from future violations because of this very concern (A-5675);
- There is *every* "likelihood that [] shareholders [have been] disadvantaged" in defendants' proxy fight. Defendants' own proxy solicitor said so (A-2270-71), and the district court so found (A-5666);
- Defendants did not act "in good faith". (A-5646-47, A-5673-74);
- Defendants did not "promptly file[] a Schedule 13D when [their] attention was called to this obligation". Rather, defendants "were

more than cognizant of the obligation to file promptly", but "deliberately evaded disclosure obligations", making "disclosures only when convenient to their strategy" of obtaining control (A-5673);

- Defendants' actions were flagrant and egregious violations of the Williams Act (A-5673-74); and
- Defendants offered a litany of false testimony to the court in an effort to cover up their violations (*e.g.*, A-5673).

Defendants contend that the Court is powerless to right these wrongs. The sunlight, they say, is the only disinfectant. That is inaccurate.[37] The court had the power to enjoin defendants from voting their illegally-obtained shares because their scheme tilted the playing field so as to preclude a fair election, *see infra* Part II.A, and because defendants and others must be deterred from such egregious violations, *see infra* Part II.B.

[37] Courts have used their broad equitable powers to fashion remedies beyond merely ordering corrective disclosure. *See, e.g.*, *Bender v. Jordan*, 439 F. Supp. 2d 139, 179 (D.D.C. 2006); *Mason-Dixon Bancshares, Inc. v. Anthony Invs., Inc.*, No. 96-3836, 1997 WL 33482710, at *12 (D. Md. Mar. 3, 1997); *Lane Bryant, Inc. v. Hatleigh Corp.*, No. 80-1617, 1980 WL 1412, at *5 (S.D.N.Y. June 9, 1980); *see also, e.g.*, *San Francisco Real Estate Investors v. Real Estate Inv. Trust of Am.*, 701 F.2d 1000, 1010 (1st Cir. 1983). Courts have enjoined voting on various occasions. *See, e.g., Champion Parts Rebuilders, Inc. v. Cormier Corp.*, 661 F. Supp. 825, 853-54 (N.D. Ill. 1987); *Twin Fair, Inc. v. Reger*, 394 F. Supp. 156, 161 (W.D.N.Y. 1975); *Water & Wall Assocs., Inc. v. Am. Consumer Indus., Inc.*, Nos. 99-73 & 103-73, 1973 WL 383, at *11 (D.N.J. Apr. 19, 1973).

A. The Court Should Level the Playing Field.

Through the secret use of swaps and stock and selective disclosures to friendly third parties, TCI and 3G materially altered the electorate, thereby causing irreparable harm to shareholders who are entitled to "fair corporate suffrage". *Borak*, 377 U.S. at 431. Defendants' orchestrated plan and scheme manipulated the shareholder composition of CSX, until, at the eleventh hour, the shareholders discovered that they were part of a significantly weakened, unbalanced electorate, where undisclosed agreements already were in place. (A-5665-66; *see supra* Part F.)

Disclosure does not cure this problem. As Judge Kaplan found, TCI's and 3G's

> "actions may have contributed to creating a corporate electorate that is materially different today than it was before [TCI and 3G] made th[eir] purchases. Those who are content with present management and unconvinced by [TCI's and 3G's] blandishments may be in a weaker position than they might have occupied had [TCI and 3G] made full and timely disclosure. *That all of the facts now have been disclosed does not alter this prospect.*" (A-5665-66 (emphasis added).)

No amount of disclosure, no matter how far in advance of the shareholder meeting, could remedy the defendants' invasion of the "free exercise of stockholders' voting rights" and "[f]air corporate suffrage". *Virginia Bankshares*, 501 U.S. at 1103.

The problem created by defendants' scheme here differs from the problem in *Treadway*. Although defendants' Schedule 13D disclosed their control intent six

months before the CSX annual meeting, CSX shareholders were not "free to accept or reject" defendants' overtures in a fair election. Unlike *Treadway*, where the defendant made a timely Schedule 13D filing upon acquiring over 5 percent of the stock, here defendants did not file a Schedule 13D at all for at least 10 months after one was required, because they wanted to accumulate an economic interest in CSX, while tipping their hedge fund allies and encouraging them to acquire CSX stock before any disclosure was made to the investing public. By the time their manipulation of the electorate was complete—long before they filed their Schedule 13D—defendants were at a significant advantage in the then-upcoming election. With the hedge funds' and counterparties' votes in place, "a TCI/3G victory may require the support of only about 16.2% of the overall vote cast by CSX's institutional owners". (A-2580.) They had stuffed the ballot box for a proxy contest that they had intended from the outset without disclosing any of it to the market until the last moment.

By way of their control scheme, defendants created exactly the sort of unbalanced playing field the Williams Act was meant to prevent. The "extreme care" that was taken "to avoid tipping the balance of regulation either in favor of management *or in favor of the person making the takeover bid*", *Rondeau*, 422 U.S. at 58-59 (emphasis added), requires an injunction against the voting of the illegally-obtained shares.

B. The Court Should Deter Egregious Violations.

The Court's equitable remedy here—"to deter, not to punish"—should take into account two aspects of defendants' conduct.

First, defendants deliberately flouted the Williams Act. Their violations were the product of a concerted effort by sophisticated hedge funds; unlike *Rondeau*, they "were not products of ignorance." (A-5673.) Indeed, the district court found "a substantial likelihood of future violations"—if defendants' "strategy is not successful, the Court perceives a substantial likelihood that the defendants would craft a new strategy for control without regard to their disclosure obligations." (A-5673-74.) Moreover, defendants flouted the Williams Act in order to acquire a significant stake in CSX without the market's knowledge. As Judge Kaplan found, this allowed defendants to keep CSX's stock price down (A-5666 n.315) and to reap enormous financial profit, while permitting them secretly to tip off fellow hedge funds that they expected to be sympathetic to their cause in order further to tilt the playing field in their favor.

Second, defendants repeatedly "testified falsely" (A-5673)—before the court as well as Congress—and went to "considerable lengths to cover their tracks" to further their interests (A-5634). This misconduct is particularly significant in the era where Congress has had to pass the Sarbanes-Oxley Act of 2002 to regulate executive misconduct. The standard for directors, let alone would-be directors

who testify in court, cannot be the one articulated by ISS, namely that a finding of perjury is necessary to a finding of "egregious" behavior.[38]

The district court correctly found that defendants' violations were egregious.[39] According to the district court, defendants "are engaged in lines of endeavor in which future violations are far more than a speculative possibility": they "deliberately evaded disclosure obligations"; they "were more than cognizant of the obligation to file promptly upon forming a group" and "knew full well, or recklessly disregarded the substantial likelihood, that they had formed a group"; repeatedly "testified falsely . . . to avoid responsibility for their actions"; and "[made] disclosures only when convenient to their strategy." (A-5673.)

Courts have the inherent authority to sanction misconduct of the kind at issue here. *See Chambers v. Nasco, Inc.*, 501 U.S. 32, 44-45, 51 (1991). "Federal courts have both the inherent power and the constitutional obligation to protect

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[38] "According to ISS, to date, no law enforcement agency has brought perjury charges against the dissidents. We note that a finding by a judge that testimony is not credible is subject to a much lower evidentiary burden than is a criminal charge of perjury. CSX cannot claim that TCI and 3G have been 'proven' to have lied on the stand." All quotes from the ISS report are public, *available at* http://www.issproxy.com/governance_weekly/2008/131.html.

[39] ISS asserts defendants' behavior has not been "particularly egregious". ISS asserts further that "[w]ith respect to the court's finding that TCI and 3G formed a 'group,' we note the court's ruling is based on circumstantial evidence", that "we find little evidence that TCI/3G has sought control of CSX".

their jurisdiction from conduct which impairs their ability to carry out Article III functions." *In re Martin-Trigona*, 737 F.2d 1254, 1261 (2d Cir. 1984). This authority permits courts to police themselves and deter future abuse of the judicial process. *Nat'l Hockey League v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976). A court's "inherent powers" are "governed . . . by the control necessarily vested in courts to manage their own affairs" including the "ability to fashion an appropriate sanction for conduct which abuses the judicial process". *Chambers*, 501 U.S. at 43, 44-45.

The availability of meaningful injunctive relief cannot and should not be limited to the SEC or the Department of Justice. In fact, CSX has a private right of action under Section 13(d) precisely because it may be the "only party in a position to uncover and litigate violations of that statute" and its "superior resources" can be "vital where remedial action must be speedy and forceful." *San Francisco* SEC Amicus.[40]

If the Court does not use its broad powers to enjoin the vote of shares in an egregious case like this, shareholders will suffer irreparable injury because their

[40] A right of action under Section 18 is not an adequate or even relevant remedy. As the district court noted, Section 18 addresses shareholders "who have sold", not the current shareholders that are "casting their votes in an electorate that is considerably different from the electorate in which they would have been casting those votes but for" defendants' violations. (6/9/08 Hr'g 34:13-22); *see also San Francisco* SEC Amicus.

right to fair corporate suffrage will be impaired by the tilting of the playing field in favor of flagrant raiders given to offering false testimony. An injunction would also deter—after all, who would comply with the statute if non-compliance results only in belatedly having to tell the truth? An injunction precluding defendants from voting their shares would not be punitive. TCI and 3G would not be permanently divested of their shares; they would be free either to abandon their attempt at control or, on the next go-around, to avail themselves of proper means to obtain control on a level playing field (as they should have done in the first place).

* * *

In sum, if the Williams Act is to be given any practical effect on the unique facts of this case, then this Court must exercise its inherent and equitable powers to level the playing field. It cannot be that the courts have no choice but to permit adjudicated, deliberate violators of the securities laws to reap the benefits of their misconduct while leaving shareholders without a remedy to correct their having to vote in an election with a stuffed ballot box.

Conclusion

For the foregoing reasons, this Court should reverse the district court's determination that it was foreclosed as a matter of law from enjoining the votes of TCI's and 3G's illegally-obtained shares in connection with the CSX 2008 annual meeting.

Dated: July 3, 2008
New York, NY

Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,655 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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July 3, 2008

CRAVATH, SWAINE & MOORE LLP,

by 

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See Second Circuit Interim Local Rule 25(a)6.

CASE NAME: CSX Corp. v. The Children's Investment Fund Mgmt. (UK) LLP

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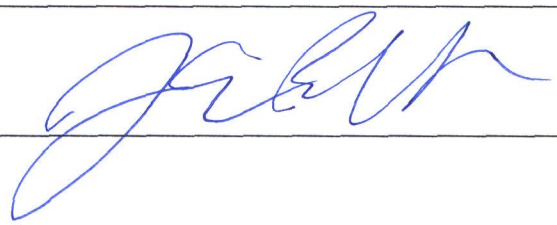
(Your Signature) 

Date: 07/03/2008

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.

Nos. 08-2899 cv (L); 08-3016 cv (XAP)

CERTIFICATE OF SERVICE

Robert B. Zwillich hereby certifies the following under the penalty of perjury:

I am over the age of 18 years, not a party to this action and reside at 255 Killarney Drive, Berkeley Heights, New Jersey 07922.

On the 3rd day of July, 2008, I served the annexed

BRIEF FOR PLAINTIFF-APPELLANT-CROSS-APPELLEE CSX CORPORATION

upon

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by having two (2) true copies of the aforementioned BRIEF delivered to a courier for UPS NEXT DAY AIR, an overnight delivery service, for delivery on Saturday, July 5, 2008.

Further, on the 3rd day of July, 2008, I filed ten (10) copies of the BRIEF with the Clerk of the Court, United States Court of Appeals for the Second Circuit, United States Courthouse, 500 Pearl Street, New York, NY 10007, by delivering same to the above named courier, for next business day delivery, to wit: Monday, July 7, 2008.

Dated: July 3, 2008
New York, NY

Robert B. Zwillich