08-2899-cv(L)

08-3016-cv(XAP)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CSX Corporation,

Plaintiff-Appellant-Cross-Appellee,

v.

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-Appellees-Cross-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF AMICUS CURIAE COALITION OF PRIVATE INVESTMENT COMPANIES IN SUPPORT IN PART OF DEFENDANTS-APPELLEES-CROSS-APPELLANTS AND REVERSAL IN PART OF THE JUDGMENT OF THE DISTRICT COURT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and to assist judges in making a determination of whether they have any interests in any of a party's related corporate entities that would disqualify the judges from hearing the appeal, *amicus curiae* Coalition of Private Investment Companies hereby certifies that the Coalition of Private Investment Companies has no parent corporations, and no public companies own 10% or more of Coalition of Private Investment Companies' stock.

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Amicus Curiae Coalition of Private Investment Companies ("CPIC") respectfully urges this Court to reverse in part the judgment of the District Court in accordance with the arguments set forth below. All parties have consented to CPIC's appearance.

INTEREST OF CPIC

CPIC is a coalition of over 20 private investment companies whose members and associates manage or advise an aggregate of over $100 billion in assets. CPIC was established in 2005 to educate policymakers, the media, and the public about the hedge fund industry and the benefits it provides to capital markets. CPIC's members are diverse in size and the investment strategies they pursue. Since its inception, CPIC has advised Congress, the SEC, state governments, and various other policymakers on a wide range of proposed laws, rules, regulations, and policies affecting the capital markets. CPIC submits this *amicus curiae* brief to provide perspective from the private investment community on statements and conclusions of the District Court regarding the impact of derivative contracts and the existing legal regime governing their use that CPIC believes are incorrect and that could have unintended and adverse consequences on the financial markets if the District Court's broad ruling is not reversed.

PRELIMINARY STATEMENT

In finding that Defendants failed to disclose beneficial ownership positions in CSX stock in accordance with SEC Rule 13d-3, the District Court did not limit itself to the particular facts of the case or well-settled law, under which the District Court could have addressed any inappropriate conduct, to the extent it occurred. Instead, the District Court's opinion redefined Rule 13d-3 beneficial ownership in a manner inconsistent with the statutory scope and purpose of the Williams Act, the SEC's interpretation of its own rules, and the previously uniform understanding of market participants. This ruling threatens to upset the vitality and efficiency of the country's financial markets, and should be reversed for the following reasons.

First, the District Court's interpretation of what constitutes a scheme to evade Section 13(d) reporting requirements is erroneous as a matter of law. In order to participate in a scheme to evade Section 13(d) disclosure requirements, one must first beneficially own the amount of outstanding securities required to trigger disclosure. The hallmark of beneficial ownership is the ability to control the voting or disposition of shares. By themselves, without any additional agreements or understandings, standard cash-settled equity swap contracts convey no such authority. By collapsing the previously well-understood distinction between economic-only interests and beneficial ownership, the District Court effectively read "beneficial ownership" out of Section 13(d), and undermined

shared decades of understanding of the SEC's disclosure rules by market participants and regulators. Moreover, in so holding, the District Court flatly rejected the SEC's view that "a person that does nothing more than enter into an equity swap should not be found to have engaged in an evasion of [Section 13(d)] reporting requirements." JA5627.

Second, the District Court's radical interpretation of Section 13d-3(b) is based on inaccurate, or at best unsupported, presumptions concerning market practices relating to equity swaps. For example, the District Court opined that swap holders are able to control the voting of reference shares. In fact, under standard swap documentation, swap holders cannot control the voting or disposition of reference shares and have no right to obtain the shares (if any) held by the counterparty. To the extent such rights exist, through any agreement or understanding, formal or informal, beneficial ownership exists and must be disclosed. In other words, the existing securities laws already prevent swap holders from "papering around" Section 13(d) disclosure requirements by entering into secret voting or call agreements. In sum, there was no gap in the securities laws that compelled the District Court's novel ruling.

Third, the District Court's decision likely will undermine the effective functioning of the country's financial markets by curbing shareholder activism. In addition, given the wide-ranging use of "beneficial ownership" as a benchmark for

corporate and statutory triggers (*e.g.*, shareholders' rights plans, bank holding company control statutes and regulations, state anti-takeover statutes, lending and commercial agreements of all types, bond indentures, real estate leases, employee stock option plans and executive compensation plans), the District Court's decision may have sweeping consequences beyond the confines of this case.

CPIC has a strong interest in preventing and punishing violations of the securities laws. CPIC believes that the existing securities laws fundamentally are effective in deterring abuses; however, CPIC is aware that additional guidance may be desirable in order to provide market participants with certainty concerning disclosure obligations. To that end, CPIC will be considering the development of a set of best practices for market participants and would welcome the SEC's consideration of whether more formal guidance on the application of existing law is warranted. What CPIC cannot support, however, is a radical change in the disclosure provisions of the Williams Act, implemented by a single district court operating without input from market participants that stand to be affected by such a ruling.

ARGUMENT

CPIC submits this brief to highlight the clear errors in law reflected in the Court's interpretation of Rule 13d-3, the extent to which the District Court's decision flows from fundamental misunderstandings concerning the swap markets,

and the potential negative consequences to the financial markets that likely will flow from the District Court's decision.

I.

THE DISTRICT COURT ERRED IN EXTENDING SEC RULE 13d-3(b) TO "REACH ARRANGEMENTS THAT OTHERWISE WOULD NOT AMOUNT TO BENEFICIAL OWNERSHIP"

The District Court erred in extending SEC Rule 13d-3(b) to "reach[] arrangements that otherwise would not amount to beneficial ownership." JA5631. The very purpose of Section 13(d) is to disclose significant "beneficial ownership" of a registered security. *See* 15 U.S.C. § 78m(d)(1) (applying reporting requirements to persons "acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to [15 U.S.C. § 78l]"). By finding that TCI violated Section 13(d) even if there was "no beneficial ownership" of CSX stock conferred by TCI's position in equity swaps (JA5631), the District Court improperly extended Rule 13d-3(b) beyond the terms of the statute it was meant to implement.

During trial, the District Court queried "whether one could put aside entirely" the question of whether there was any underlying beneficial ownership of CSX stock and find a Section 13(d) violation based on a "scheme to evade." *See* JA405. In its opinion, the District Court did just that. However, the issue of whether there is any underlying beneficial ownership of a registered security

cannot be put to the side. A scheme to evade the disclosure requirements of Section 13(d) requires a reportable, but concealed, beneficial ownership of a registered security. To put to the side, as the District Court did, the issue of whether there is any underlying beneficial ownership of a registered security improperly reads beneficial ownership out of Section 13(d). Rule 13d-3(b) was intended to capture attempts to avoid disclosure of such beneficial ownership, not to eliminate "beneficial ownership" as a requirement for disclosure. As the SEC explained in its letter to the District Court, a scheme to evade under Rule 13d-3(b) requires *both* an underlying beneficial ownership of a registered security and an intent to conceal such beneficial ownership. *See* JA5550 ("[T]he mental state contemplated by the words 'plan or scheme to evade' is generally the intent to enter into an arrangement that creates a false appearance. Thus, a person who entered into a swap would be a beneficial owner under Rule 13d-3(b) if it were determined that the person did so with the intent to create the false appearance of non-ownership of a security.")[1]

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[1] Similarly, in its release accompanying the adoption of Section 13(d) and the rules thereunder, the SEC provides as an example of a scheme to evade under Rule 13d-3(b) a parking scheme in which "X" causes ten different institutions to each purchase three percent of the voting securities of "Z" for him and gives "A" the proxy to vote the securities. *See* Adoption of Beneficial Ownership Disclosure Requirements, Exchange Act Release No. 34,13291, 1977 WL

[Footnote continued on next page]

The SEC also made clear in its letter to the District Court that "a person that does nothing more than enter into an equity swap should not be found to have engaged in an evasion of the reporting requirements" (JA5551) and that mere "economic or business incentives, in contrast to some contract, arrangement, understanding, or relationship concerning voting power or investment power between the parties to an equity swap, are not sufficient to create beneficial ownership under Rule 13d-3" (JA5549). And with good reason. An equity swap does not require an underlying beneficial ownership position. The terms of the vast majority of equity swaps are based on the standard language promulgated by the International Swaps and Derivatives Association ("ISDA"), which does not give the swap holder any power to command: (i) the dealer to hedge; (ii) how the dealer should hedge (if it does so); (iii) whether the dealer will hold any shares acquired during a shareholder meeting, or will lend them to another party; (iv) whether the dealer will vote any shares held during a shareholder meeting; or (v) how the dealer would vote those shares. *See* International Swaps and

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[Footnote continued from previous page]
185650, at *14, at Example 8 (Feb. 24, 1977). The SEC's example thus involves a sham transaction on the part of "X" (division of its 30% stake among the ten institutions and giving of proxy to "A") for the sole or principal purpose of concealing its beneficial ownership. There is no such underlying beneficial ownership which is concealed in the case of a swap absent other agreements or understandings.

Derivatives Association, 2003 ISDA Credit Derivatives Definitions, available at http://www.isda.org/. A standard equity swap thus has no provision requiring any purchase of any equity at any time. Nor do cash-settled equity swaps contain provisions that purport to give the equity swap holder any control or influence over shares held by the dealer – the *sine qua non* of any Rule 13d-3(b) scheme.

Rather than accord any deference to the SEC's views, the District Court took the unprecedented position that the SEC has the power to extend its rules beyond the terms of a statute and then substituted its own views for the SEC's views. *See* JA5630-31 (finding that "the SEC . . . has the power to treat as beneficial ownership a situation that would not fall within the statutory meaning of that that term" and that Rule 13d-3(b) appropriately "reaches arrangements [such as cash-settled equity swaps] that otherwise would not amount to beneficial ownership").

An equity swap, in and of itself, cannot constitute a scheme to evade in violation of Rule 13d-3(b). There must be more, such as an additional agreement or understanding, formal or informal, for the dealer to both match shares with the swap position and vote the shares at the direction of the swap holder. Here, the District Court found "no evidence that TCI explicitly directed the banks to purchase the hedge shares upon entering into the swaps or to sell them upon termination" and was "not persuaded that there was any agreement or understanding between TCI and any of the other banks with respect to the voting

of their hedge shares." JA5614, JA5618. Thus, the District Court's holding that TCI should be "deemed to be a beneficial owner of the shares held by its counterparties to hedge their short exposures" (JA5632) was clear error.[2]

II.

THE OPINION BELOW SHOULD NOT BE AFFIRMED ON THE GROUND THAT EQUITY SWAPS, STANDING ALONE, CONVEY BENEFICIAL OWNERSHIP UNDER RULE 13d-3(a)

This Court should not affirm the District Court's opinion on the ground that equity swaps convey beneficial ownership under Rule 13d-3(a).

A. Actual Control Is Required In Order To Trigger The Disclosure Provisions Of Section 13(d)

Although the District Court declined to hold that TCI, merely by virtue of entering into cash-settled equity swaps, had beneficial ownership for Rule 13d-3(a) purposes over the reference shares (JA5624), it strongly suggested in dicta that the

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[2] In holding that Rule 13d-3(b) would be "superfluous" if it only concerned situations involving an underlying beneficial ownership of a security (JA5632), the District Court improperly extended Rule 13d-3 beyond the scope of Section 13(d), which applies only to beneficial ownership of a security. *See* 15 U.S.C. § 78m(d)(1). The District Court's interpretation of Section 13d-3(b) also conflicts with Section 3A of the 1934 Act, which expressly excludes cash-settled swaps from the definition of "equity securities" subject to disclosure under Section 13(d). *See* 15 U.S.C. § 78c-1(b).

"practical realities" of the swap market supported such a finding. JA5622.[3] In fact, the critical element required to establish Rule 13d-3 beneficial ownership – namely, actual control of the voting or disposition of the reference shares – was missing, and thus any finding of beneficial ownership under Rule 13d-3(a) would have been erroneous as a matter of law. *See Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 122 (2d Cir. 2001) ("§13(d) focuses on control, not on pecuniary benefits."). As the District Court acknowledged, TCI had no legal right to control the voting or disposition of shares held by its swap counterparties. *See, e.g.,* JA5611; JA5614-15; JA5568.

Section 13(d)'s focus on actual control stands in sharp contrast to Section 16, which requires a beneficial owner of 10% of an equity security to disclose not only "the amount of all equity securities" beneficially owned, *but also* "purchases and sales of the security-based swap agreements." 15 U.S.C. § 78p(a)(3). The inference is unavoidable – for the purpose of the securities laws, beneficial ownership and economic interest are not synonymous. The SEC drew this clear distinction based on the vastly different purposes of Section 13(d) and Section 16 in rejecting economic interest as an indicia of beneficial ownership for purposes of

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[3] As discussed in more detail in Section III, the District Court's understanding of the "practical realities" of the swap market is fundamentally mistaken.

Section 13(d). *See* Adoption of Beneficial Ownership Disclosure Requirements, Exchange Act Release No. 34,13291, 11 SEC Docket 1779 (Feb. 24, 1977) ("[T]he new rules are not intended to affect interpretations of the provisions of Section 16 of the Exchange Act, or the rules and regulations thereunder, since the purposes of Section 16 are different from those of Section 13(d).").

For this reason, equity swaps, standing alone, which convey only the economic benefits and risks of ownership, have never been understood by practitioners or market participants, or interpreted by the SEC, to constitute "beneficial ownership" for Section 13(d) purposes. *See* SEC's Letter to the District Court (reaffirming the SEC's position that beneficial ownership results from "actual authority to vote or dispose, or the authority to 'direct' the voting or disposition."). JA5549.

B. Other Regulators Have Recognized The Distinction Between Equity Swaps And Beneficial Ownership

The SEC's distinction between equity swaps and beneficial ownership is not unique. Other federal regulators likewise have respected the distinction between entering into instruments (such as equity swaps) that do not convey voting control, and beneficial ownership.

For example, the HSR Act imposes premerger notification and waiting periods on persons that "hold" specified amounts of voting securities. *See* 15 U.S.C. § 18a(a)(2). Further, the term "hold" under HSR regulations means

"beneficial ownership, whether direct, or indirect through fiduciaries, agents, controlled entities or other means." *See* 16 C.F.R. § 801.1(c)(1). In interpreting what constitutes beneficial ownership, the FTC consistently has excluded instruments that convey solely the economic benefits and risks of ownership. *See* JA23,[4] Offenhartz Decl., Ex. A, ABA Section of Antitrust Law, Premerger Notification Practice Manual 71 (Neil W. Imus, 3d ed. 2003) (derivative instrument that allows an individual to recognize a gain or loss on voting securities held by another person does not confer beneficial ownership because "the holder of the derivative . . . has only one indicium of beneficial ownership and will not receive any other indicia of ownership in the voting securities such as the right to vote or dispose of the acquired securities").

In a more recent informal opinion, the FTC stated that it agreed with the analysis in the following inquiry, which specifically addressed the question of whether equity swaps confer beneficial ownership for HSR purposes:

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[4] The record on appeal incorporates the entire docket from the District Court proceedings below. Although the Joint Appendix does not include the documents filed by *amicus curiae* CPIC below, the documents appear in docket entry 81, at JA23. Among these documents are the Declaration of Adam Offenhartz, dated June 2, 2008 ("Offenhartz Decl."), and the accompanying exhibits, which appear at docket entry 81 as documents 3-13. JA23. Citations in this brief to JA23 refer to the Offenhartz Declaration and accompanying exhibits.

> A holds $40 million of C's voting securities. A now enters into a swap contract with investment bank B valued at $30 million, pursuant to which A realizes a gain or a loss derived from the gain or loss of the underlying voting securities of C. . . . There is no obligation for either A or B to purchase any of C's stock as a result of the swap agreement, even though B is likely to buy stock in C as a hedge. A has no title to or the power to vote or dispose of B's shares in C, and A has no power to instruct B to do any of these things.
>
> In my view, the transaction is not reportable, because A has no beneficial ownership of C's voting securities beyond the $40 million that it owns outright. The swap agreement does not confer beneficial ownership over those voting securities of C that B may hold to A, because A does not have title to, or the power to vote or dispose of C's shares. . . .

FTC Informal Staff Opinion (Nov. 14, 2005), available at http://www.ftc.gov/bc/hsr/informal/opinions/0511010.htm. The same logic applies here. Something more than economic exposure is required to convey beneficial ownership, both under the letter and the spirit of the law.

Numerous other regulators have interpreted statutes and rules dealing with beneficial ownership by reference to Section 13(d), and have similarly concluded that beneficial ownership does not result from transactions that do not convey voting control. The FHLBB has explicitly noted that the term "beneficial ownership" in conversion regulations was intended to track similar provisions in Section 13(d). *See* JA23, Offenhartz Decl., Ex. B, 41 Fed. Reg. 50415 (Nov. 16, 1976) (Fed. Home Loan Bank Bd.) ("The language as to . . . 10 percent beneficial owner is modeled after language in the Securities Exchange Act (15 U.S.C. 78m)

and is intended to have similar meaning."). In keeping with Section 13(d)'s emphasis on voting control, the FHLBB has opined that revocable proxies do not confer voting control or beneficial ownership absent "some agreement or arrangement evidencing a more continuous or less tenuous control." *Id.*

Similarly, when interpreting the term "beneficial ownership" for the purpose of the Depository Institution Management Interlocks Act (*see* 12 U.S.C. §§ 3201-08) and related rules, the FDIC has explicitly relied on Section 13(d)'s definition of "beneficial ownership." *See* 1982 FDIC Interp. Ltr. LEXIS 22 (Dec. 30, 1982); *see also* 1981 FDIC Interp. Ltr. LEXIS 16 (June 18, 1981) (interpreting the term "beneficial ownership" by reference to the definitions in Section 13(d)). Moreover, in an opinion applying that definition, the FDIC concluded that a directed proxy did not convey beneficial ownership because the proxy holder had "no choice regarding the selection and election of directors" and thus did not "control" the voting power of the stock. *See* 1982 FDIC Interp. Ltr. LEXIS at 22.

III.

THE OPINION BELOW REFLECTS A FUNDAMENTAL MISUNDERSTANDING OF HOW THE SWAP MARKETS OPERATE AND THE APPLICABLE LEGAL REGIME

The District Court seemed concerned that Section 13(d) of the Williams Act, at least as it had been uniformly interpreted by practitioners and market participants, leaves open the possibility of abuses in proxy contests and noted that

"the securities markets operate in the real world, not in a law school contracts classroom." JA5622. In fact, the District Court's conclusions regarding general swap practices rely heavily on theoretical assertions and are incorrect in key aspects.

A. The District Court's Ruling Was Based On A Fundamental Misunderstanding Of Existing Market Practices

The District Court's ruling was based on a fundamental misunderstanding about market practices in the swap market. Specifically, the District Court was under the misimpression that swap holders routinely dictate the manner in which shares held by swap counterparties are voted, or in the alternative, can rapidly convert their "economic only" interests (*i.e.*, swaps) into ownership of physical shares by acquiring shares held by the swap counterparties. JA5573. Simply put, there is no empirical evidence to support the District Court's conclusion that cash-settled equity swaps allow the swap holder to engage in a stealth takeover or unfairly manipulate proxy contests.[5]

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[5] The sole support for some of the most sweeping assertions in the District Court opinion comes from one law review article. For example, in footnote 165, the District Court cites Hu & Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. Cal. L. Rev. 811 (2006) for the proposition that swap holders often settle in securities rather than stock. This article offers not a single example of such an occurrence in the United States

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1. Swap Holders Do Not Control The Voting Or Disposition Of Referenced Shares

Without regard to the facts of this case, the typical swap transaction does not allow the swap holder to control how referenced shares are voted. The swap holder has no control over how (or whether) a counterparty hedges its position and cannot force a swap counterparty to either purchase physical shares as a hedge, or to abstain from lending out shares purchased as a hedge. JA5477.

Even in cases where the counterparty buys and holds physical shares as a hedge, the swap holder cannot directly control how those shares are voted. Indeed, standard swap documentation states that the swap holder does not, and may not, control how physical shares are voted. *See* International Swaps and Derivatives Association, 2003 ISDA Credit Derivatives Definitions, available at http://www.isda.org/.

Moreover, as the District Court acknowledged, institutional voting practices vary, and many institutions simply refuse to vote shares held to hedge swap risk. JA5571. Others have a policy of voting the shares as they see fit. *Id.* There is simply no empirical evidence to support the District Court's presumption that "banks seeking to attract swap business well understand that activist investors will

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(only in New Zealand and the United Kingdom), nor do other available articles from the same authors.

consider them to be more attractive counterparties if they vote in favor of the positions their clients advocate." *Id.*

2. Equity Swaps Do Not Facilitate More Rapid Acquisitions Of Shares

Contrary to the District Court's presumption, a swap holder's ability to acquire a large beneficial ownership stake in a short period of time is determined by overall liquidity in the market, particularly in the case of large companies such as CSX, and is not the product of swap counterparties "dumping" huge blocks of shares into the market. In other words, the incremental liquidity provided by the divesting swap counterparties has little impact on a swap holder's ability to acquire shares. Indeed, swap counterparties typically have little problem acquiring large blocks of physical shares in the open market as a hedge when they enter into swap agreements. In order to address this potential concern, however, most broker-dealers have internal volume and temporal restrictions that limit their ability to sell shares acquired as a hedge. For instance, swap holders routinely face broker-dealer counterparties that limit the unwinding of hedge positions (if any) in connection with the settlement of a cash-settled equity swap to no more than 20% of the referenced-company stock's daily trading volume so as to limit the impact of the liquidation of the position on market prices. In sum, the swap holder does not acquire, by virtue of unwinding a swap, the ability to rapidly accumulate beneficial

ownership where it otherwise would have been unable to do so. JA 1242-43. The benefit to the swap holder remains only an economic one.

3. Use Of Equity Swaps By Activist Shareholders Does Not Harm Other Shareholders

Contrary to the District Court's conclusion, equity swaps neither deprive non-activist shareholders of value nor unfairly tilt the outcome of proxy contests in favor of activist shareholders. *See, e.g.,* JA5572. The activist's campaign, if successful, creates value for all existing shareholders. If the activist's campaign is unsuccessful, existing shareholders are left with the status quo. In other words, they suffer no diminution in the value of their shares as a result of the activist's campaign. The only shareholders that are even arguably deprived of value are those that sold shares prior to the activist's emergence. And these shareholders have no more (and arguably less) entitlement to the value created by the activist shareholder than the activist itself. After all, these shareholders knowingly sold their shares in advance of a scheduled shareholder meeting rather than waiting to see if a change would be offered at the meeting or proposing a change themselves. Shareholder meetings are at least an annual event in the life of every public company, and under today's proxy rules, typically are made public knowledge months before such meeting. Any policy decision to shift value away from the activist shareholder who is proactively seeking change for the benefit of all shareholders and towards those shareholders who knowingly sold in advance of a

regularly scheduled meeting is best left for the appropriate legislative or rule-making body.

The District Court also erroneously concluded that an activist benefits in a proxy contest if the swap counterparty (either as a matter of policy or preference) fails to vote the shares it acquired in the open market as a hedge. Contested director elections are not, as the District Court stated at trial, a "specialized case." JA394. The overwhelming majority of proxy contests relating to activist campaigns involve contested director elections. *See* Lucian Arye Bebchuk, *The Case For Shareholder Access To The Ballot*, 59 Bus. Law. 43, 45-46 (2003) (finding that, of 215 contested proxy solicitations from 1996 to 2002, 162 of them involved contested director elections); Glenn S. Curtis, *2008 Shareholder Activism – Updated for Q1*, Thomson Reuters Strategic Research, June 2008 ("The most common demand that activists made is for board seats. This is consistent with two previous studies that we conducted."). In virtually all contested director elections, directors are elected by a plurality of shares voted, not a plurality of shares outstanding. *See* Julian Velasco, *Taking Shareholder Rights Seriously*, 41 U.C. Davis L. Rev. 605, 611 (2007). Thus, the activist benefits only if the shareholders that sold their shares to swap counterparties would have been more likely than other shareholders to vote in favor of incumbent management and against the activist. Logic compels the opposite conclusion. Shareholders "vote with their