08-2899, 08-3016 (XAP)

United States Court of Appeals for the Second Circuit

CSX CORPORATION,
Plaintiff-Appellant-Cross-Appellee,

MICHAEL WARD,
Third Party Defendant,

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-Cross-Appellants.

On Appeal from the United States District Court
for the Southern District of New York (Kaplan, J.)
Civil Action No. 08-cv-2764 (LAK)

OPENING BRIEF OF DEFENDANTS-APPELLEES-CROSS-APPELLANTS

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July 3, 2008

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the corporate defendants-appellees-cross-appellants hereby state as follows:

1. Defendant-appellee-cross-appellant The Children's Investment Fund Management (UK) LLP is a limited liability partnership incorporated and existing under the laws of England and Wales. The majority of the members' voting rights are held by The Children's Investment Fund Management (UK) Limited, which in turn is wholly owned by defendant-appellee-cross-appellant The Children's Investment Fund Management (Cayman) Ltd. No publicly held corporation holds 10% controls any of the members' voting rights of The Children's Investment Fund Management (UK) LLP.

2. Defendant-appellee-cross-appellant The Children's Investment Fund Management (Cayman) Ltd. has no parent corporation, and no publicly held corporation holds 10% or more of its stock.

3. Defendant-appellee-cross-appellant The Children's Investment Master Fund is wholly owned by The Children's Investment Fund, The Children's Investment Fund L.P., and The Children's

Investment Segregated Fund. No publicly held corporation holds 10% or more of the stock of The Children's Investment Master Fund.

4. Defendant-appellee-cross-appellant 3G Capital Partners Ltd. does not have any parent corporation, and no publicly held company owns 10% or more of the stock of 3G Capital Partners Ltd.

5. The parent corporation of defendant-appellee-cross-appellant 3G Capital Partners, L.P. is its general partner, 3G Capital Partners, Ltd. No publicly held company owns 10% or more of the stock of 3G Capital Partners, L.P.

6. The parent corporation of defendant-appellee-cross-appellant 3G Fund, L.P. is its general partner, 3G Capital Partners, L.P. No publicly held company owns 10% or more of the stock of 3G Fund, L.P.

/s/ Christopher Landau
Christopher Landau, P.C.
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PRELIMINARY STATEMENT

This is an appeal from a final judgment and permanent injunction entered by the U.S. District Court for the Southern District of New York (Kaplan, J.) on June 11, 2008. SPA131-32.[1] The district court's supporting opinion is reported at __ F. Supp. 2d __, 2008 WL 2372693 (S.D.N.Y. June 11, 2008), and reproduced at SPA1-130.

INTRODUCTION

This case represents the latest flare-up in the perennial conflict between entrenched corporate management and concerned shareholders seeking change. Defendants are substantial investors in plaintiff CSX Corporation who believe that the company is underperforming. Not surprisingly, CSX's incumbent management and directors disagree, and launched this lawsuit as a preemptive strike against defendants. In particular, CSX alleged that defendants violated the disclosure requirements of the Securities Exchange Act of 1934 by failing to file a disclosure statement within 10 days of (1) entering into cash-settled swaps referencing more than 5% of CSX's shares, and (2) forming a

[1] Citations beginning with SPA reference documents in the Special Appendix. Citations beginning with JA reference documents in the Joint Appendix.

"group for the purpose of acquiring, holding, voting, or disposing of" such shares.

The district court agreed with CSX on both scores, and thereby triggered an earthquake in federal securities law and practice. The district court acknowledged that entering into standard cash-settled swaps has never been held to confer "beneficial ownership" of the securities referenced by those swaps, and expressly declined to so hold here. But the court then turned around and effectively held just that by deeming entry into such swaps, at least when motivated in whole or in part by a desire to avoid the 1934 Act's disclosure requirements, to confer beneficial ownership of the referenced securities. The court purported to base that ruling on Rule 13d-3(b) promulgated by the Securities and Exchange Commission (SEC), even though (1) the SEC itself has never interpreted the Rule that way and the SEC's Corporation Finance Division urged the district court not to do so here, and (2) the SEC Rule, if interpreted that way, would run afoul of the underlying 1934 Act upon which it is based. To deem standard cash-settled swaps as conferring "beneficial ownership" of referenced securities within the meaning of the 1934 Act would represent a sea change in law and policy, and any such change should come, if at all, from Congress or the SEC, not a federal court.

And the district court committed another error with similarly sweeping implications by concluding that defendants established a disclosure-triggering "group for the purpose of acquiring, holding, voting, or disposing of" securities, as specified in the 1934 Act and a corresponding SEC Rule, without linking that alleged "group" to any of those specific purposes. In essence, the court reasoned backwards from the acknowledged and disclosed fact that defendants *ultimately* formed a "group" for the purpose of voting their CSX shares to attribute their prior communications relating to CSX to that "group." It is hard to overstate the practical ramifications of that approach. It is a good thing, not a bad thing, for investors to communicate with each other, and such communications do not remotely trigger any disclosure requirements except insofar as they involve an agreement to acquire, hold, vote, or dispose of securities. And when shareholders ultimately enter into such an agreement, their prior communications do not retroactively become disclosure-triggering. By blurring the legal line for what is necessary to establish a "group for the purpose of acquiring, holding, voting, or disposing of" securities, the decision below leaves shareholders in the dark about how to conform their conduct to the law in this respect as well.

The bottom line here is that the district court concluded that defendants had crossed "the line dividing legal from illegal" and "defeated the purpose of the law," SPA5, only by defining both the letter and the purpose of the law far more broadly than either Congress or the SEC. Because the court thereby overstepped its bounds, and injected uncertainty into a vital sector of the American economy that demands legal certainty, this Court should reverse the judgment.

STATEMENT OF JURISDICTION

CSX invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1332, 1367 and § 27 of the 1934 Act, 15 U.S.C. § 78aa. JA36. The district court entered judgment in favor of CSX on June 11, 2008, but declined to give CSX all the relief it was seeking. SPA115, 131. Accordingly, CSX filed a notice of appeal on June 12, 2008, and defendants filed a notice of appeal on June 13, 2008. This Court has jurisdiction over both appeals under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred by holding that TCI should be deemed the beneficial owner of CSX securities referenced by its cash-settled swaps.

2. Whether the district court erred by concluding that defendants formed a disclosure-triggering "group for the purpose of acquiring, holding, voting, or disposing of" CSX securities no later than February 13, 2007.

3. Whether the district court erred by entering a permanent injunction broadly prohibiting defendants from violating the disclosure requirements of the 1934 Act with respect to any future transaction.

STATEMENT OF THE CASE

This case arises out of competing visions over the future direction of plaintiff CSX, a public corporation that operates one of the Nation's largest freight rail systems. SPA7. Defendants are CSX shareholders: (1) TCI, consisting of defendants The Children's Investment Fund Management (UK) LLP, The Children's Investment Fund Management (Cayman) Ltd., The Children's Investment Master Fund, Christopher

Hohn (TCI's managing partner), and Snehal Amin (a TCI partner),[2] and (2) 3G, consisting of defendants 3G Fund L.P., 3G Capital Partners L.P., 3G Capital Partners Ltd., and Alexandre Behring (3G's managing director). SPA8.

For roughly six months, TCI and 3G have been involved in a spirited proxy fight with CSX. SPA8, 44. In particular, after announcing in December 2007 that they had formed a group for the purpose of voting their CSX shares, TCI and 3G in January 2008 proposed a slate of five nominees for seats on CSX's twelve-member Board of Directors, and sought to amend the company's bylaws to allow holders of at least 15% of its shares to call a special shareholders' meeting at any time for any permissible corporate purpose. SPA8.

CSX opposed these moves, and filed this lawsuit in March 2008 alleging that TCI and 3G had violated § 13(d) of the 1934 Act, 15 U.S.C. § 78m(d), by filing inadequate and untimely disclosures. JA56-61. As

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[2] In its post-trial brief below, CSX dropped its § 20(a) claim against Amin, the only individual claim asserted against him. *See* Proposed Findings of Fact & Conclusions of Law of CSX Corp. Relating to Its Claims at 1 n.1 (5/27/08) (Docket No. 61). Accordingly, the district court found only Hohn and Behring individually liable for violations of § 13(d). SPA91.

relevant here, CSX alleged that (1) TCI violated § 13(d) by failing to file a disclosure statement within 10 days of entering into cash-settled swaps referencing more than 5% of CSX's shares, and (2) both TCI and 3G violated § 13(d) by failing to file a disclosure statement within 10 days of forming a "group for the purpose of acquiring, holding, voting, or disposing of" more than 5% of CSX's shares. JA58. As relief, CSX sought among other things to require corrective disclosure, void the proxies obtained by defendants, and preclude defendants from voting their CSX shares at the annual shareholders' meeting scheduled for June 25, 2008. JA61-63.

After a two-day bench trial, the district court (Kaplan, J.) entered a final judgment in CSX's favor on June 11, 2008, holding that TCI and 3G had violated the disclosure requirements of § 13(d). SPA1-132. In particular, the court concluded that (1) TCI's entering into cash-settled swaps referencing more than 5% of CSX's shares must be "deemed" beneficial ownership of those shares, even though TCI was never the beneficial owner of those shares, SPA68-76, and (2) TCI and 3G formed a "group for the purpose of acquiring, holding, voting, or disposing of" more than 5% of CSX's shares almost ten months before they disclosed the formation of such a "group," SPA76-81. The court declined, however, to find that TCI and 3G's filings made any materially misleading statements or omissions. SPA81-87. As relief, the court entered a permanent injunction broadly prohibiting TCI and 3G from violating § 13(d) requirements with respect to any future transaction, SPA119, 131-32, but otherwise denied the extraordinary injunctive relief sought by CSX, SPA85-87, 115.

All parties appealed, and CSX sought interim relief from this Court. After emergency briefing and oral argument, this Court denied such relief, but expedited the appeals. Order (6/20/08). The annual CSX shareholders' meeting then took place as scheduled on June 25, 2008. Although CSX has taken the unusual step of announcing that the votes cast at that meeting will not be tabulated until July 25, 2008, TCI and 3G believe that four of their five nominees were elected and that their proposed bylaw amendments were approved. *See* Angela Greiling Keane, *CSX Says Vote "Too Close to Call"; TCI Claims 4 Seats*, Bloomberg News, June 25, 2008, *available at* http://www.bloomberg.com/apps/news?pid=20601087&sid=aAsBjxp3AAWs&refer=home (last visited July 3, 2008).

STATEMENT OF THE FACTS

A. Background

Because a key issue in this appeal involves the legal consequences of entering into a cash-settled swap (which the district court called a Total Return Swap or TRS), it is helpful to understand the nature of such a transaction. A cash-settled swap is a recognized and widely used financial instrument: it is a contract through which two parties agree to "exchange cash flows on two financial instruments over a specific period of time." SPA10 (citing JA1228); JA3122-31.

The terms of a standard cash-settled swap follow a framework established by the International Swaps and Derivatives Association, Inc. (ISDA), although parties are of course free to depart from ISDA's form contracts. In a typical swap, one party (the "short" party, often a bank) agrees to pay the other party (the "long" party, often an investment fund) cash flows based on the performance of a "reference obligation" or "notional asset" such as a security; in return, the short party receives payments based on interest that accrues at a negotiated rate on an agreed amount of principal (the "notional amount"). SPA10-12.

For purposes of this case, the critical attribute of a standard cash-settled swap is that its terms are resolved through cash payment exclusively. The notional asset is only an economic yardstick against which the cash flows are calculated. Accordingly, cash-settled swaps do not require a counterparty bank to purchase the referenced stock or even to hedge as a means of funding its payments. And, as a result, the investment fund that has entered into a standard cash-settled swap lacks the power either to vote or control the referenced shares. The fund's rights in a cash-settled swap are to *cash*—not to whatever assets, stock or otherwise, that a counterparty bank may have used as a hedge. JA5549.

The parties to a cash-settled swap have different economic motivations for entering into these contracts.

The short party to a cash-settled swap (a bank) may enter into such a transaction as a pure gamble, betting that the interest payments it earns on the notional amount will exceed the amount the underlying asset will appreciate (and thus the amount it will have to pay the long party) over the term of the cash-settled swap. If it wishes to minimize its risk, it may hedge, either by accepting what it considers to be an offsetting risk in another transaction—*e.g.*, an offsetting swap or certain kinds of options or other financial instruments—or simply by purchasing the referenced asset in identical amounts to those referenced in the cash-settled swap. JA389, 566, 569, 1445, 1457, 1459. If that asset is stock, the bank then becomes the stock's beneficial owner with the right to vote the shares—unless it has lent out the shares for a fee on the voting record date, as often happens. JA548-49. Whether or how the bank votes any shares it may hold on the record date depends entirely on its own institutional policy or practice. JA566, SPA15.

In contrast, the long party to a swap—often an investment fund—gains economic exposure to the referenced asset without the need to amass the actual capital to fund or maintain a direct purchase of that asset. This can confer tax advantages over actual ownership, and can allow the investment fund to use greater leverage at a lower cost than if it (i) actually owned the asset or (ii) had to issue debt or borrow cash in order to finance its purchase of the asset. JA478-79, 493-94. Where the referenced asset is stock, the investment fund cannot vote the shares referenced by the swap because it does not actually own those shares;

indeed, the form ISDA contract explicitly *denies* the investment fund (i) the right to any assets used by a bank for hedging purposes, and (ii) the right to direct the disposition or voting of any hedged stock. JA480, 494, 5549.

Accordingly, at least until the district court's decision in this case, cash-settled swaps were not understood to trigger a disclosure requirement by an investment fund. Indeed, § 3A of the 1934 Act, 15 U.S.C. § 78c-1, expressly excludes equity-based swaps from the Act's definition of "security" and, with the sole exceptions of Sections 10 and 16 of the Act, prohibits the SEC from imposing reporting requirements on these instruments. Reporting swap holdings, of course, would signal to the market that an investor saw opportunities in a particular stock, would likely drive up the stock's price, and thus make it more difficult to establish a sizeable economic exposure at a low price. JA496-97, 3122-31, 5549.

B. TCI And 3G's Investments In CSX

As the district court recognized, SPA17, it is helpful to consider TCI and 3G's conduct separately before analyzing when they began to act as a "group for the purpose of acquiring, holding, voting, or disposing of" CSX stock. TCI and 3G announced on December 19, 2007, that they had formed such a group seven days earlier. SPA44.

1. TCI's Investment In CSX

TCI began to investigate the possibility of investing in the U.S. railroad industry during the second half of 2006. SPA18. It ultimately focused on CSX in particular because it believed that (i) the company's operations were less efficient than those of its competitors and (ii) the company had more long-term contracts that had not yet been repriced to current market prices than its competitors. *Id.*

TCI began to invest in CSX by entering into cash-settled swaps referencing 1.4 million shares of CSX common stock on October 20, 2006. Between then and April 2, 2007, TCI entered into swaps with seven different banks referencing over 61 million shares of CSX (approximately 14.1% of the shares outstanding). JA496-97; JA1352; JA4904-06. This use of cash-settled swaps by TCI was not unusual: in the ordinary course of its global operations, it invests in such swaps in numerous jurisdictions, including but not limited to the United States. JA1697. TCI's board minutes reflect numerous reasons why it enters into swaps instead of purchasing shares directly, including easier access to funding, ability to access closed markets such as India, which prohibit direct investments by foreign investors, avoidance of the United Kingdom stamp tax, potential tax benefits in multiple international jurisdictions, and, as explained in detail below, the fact that swaps have been understood not to trigger reporting requirements that would alert others that TCI was building a position. JA496-97, 1697. The use of different banks allowed TCI to spread its credit risk and avoid alerting other investors. JA496.

As the district court found, TCI did not conceal its swap investment, but rather informed CSX almost immediately of the size and nature of that investment and sought to meet with CSX management about the company's direction as early as November 2006. SPA18, JA247, 447-48. CSX, however, was unresponsive, in part on the very ground that TCI was not a shareholder. JA481-82, JA500-01.

Frustrated by CSX's refusal to meet, TCI decided it needed to become a shareholder. JA502, 1415-16. Accordingly, on March 2, 2007, TCI made a Hart-Scott-Rodino (HSR) filing expressing an intent to purchase an undetermined number of CSX common shares in an amount that would meet or exceed $500 million, and so notified CSX several days later. SPA24, JA4560.

On April 3, 2007, following the expiration of the 30-day HSR waiting period, TCI began buying CSX common stock on the open market. JA347, 482-83, 502, 3234. In order to maintain approximately constant economic exposure to CSX risk, TCI terminated its CSX swap positions roughly commensurately with its open-market purchases of CSX stock and never bought this stock from its swap counterparties. JA348, 482-83, 502, 3234-37, 4912. April and May 2007 are the only two months in which TCI purchased CSX stock. JA3232-39. By May 14, 2007, TCI had directly purchased roughly 4.1% of CSX's then-outstanding shares. JA503, 4912.

Meanwhile, after receiving notice of TCI's HSR filing, CSX disclosed in an SEC filing on April 18, 2007 that TCI held "a significant economic position through common stock ownership and *derivative contracts* tied to the value of CSX stock." JA4964 (emphasis added). The following month, TCI partner Amin gave a speech at a heavily attended industry conference about (1) TCI's investment in CSX, (2) TCI's theory that there was room to improve CSX's performance, and

(3) TCI's investment of over $1 billion in the U.S. railroad industry, the vast majority of which was in CSX. SPA26-27, JA503, 2108-25.

TCI also had multiple communications with CSX's advisors Evercore Partners and informed them that it directly owned 4% of CSX's common stock and was exposed to over 10% of CSX's outstanding shares through swaps. SPA27, JA485, 504-05. And TCI filed the first of four Schedule 13Fs with the SEC on May 15, 2007, disclosing (earlier than required) that it held 17,796,998 shares of CSX stock. Available at http://www.secinfo.com/drHG7.u1x8.htm#1stPage (last visited July 1, 2008). The upshot is that, by no later than May 15, 2007, it was a matter of public record that TCI held nearly 18 million shares of CSX common stock and had "significant" economic exposure to CSX through swaps.

Over the summer of 2007, TCI became concerned about the stability of investment banks as a result of the looming credit crisis, which caused significant market volatility beginning in June. JA505-06. Accordingly, as part of a firm-wide move of nearly all assets from investment banks to commercial banks, TCI began as of November 12, 2007 to terminate many of its swaps with certain broker-dealer counterparties and to enter into swaps with counterparties whose credit was backed by central banks—concentrating most of its CSX exposure specifically with Deutsche Bank and Citigroup. JA366, 486, 505-06.

2. 3G's Investment In CSX

3G's interest in investing in railroad companies in general and CSX in particular grew naturally out of the experience of its managing director, Alex Behring. JA515. From 1998 to 2004, Behring—a citizen of Brazil—was the CEO of America Latina Logistica (ALL), South America's largest independent railroad and logistics company. JA516. 3G began analyzing the investment potential of the North American railroad industry during 2005 (before TCI did so), and focused on CSX at the end of 2006 and beginning of 2007. SPA32. 3G believed CSX shares had upside potential that could be realized from increasing revenue and improving operations. JA518, 523.

3G began investing in CSX by purchasing 1.7 million shares of CSX common stock on February 9, 2007. SPA33. By February 16, it had acquired 8.3 million shares (approximately 1.9% of CSX shares outstanding). *Id.* 3G then sold 17,340 shares and stopped trading.

JA1356. In February, Behring sought a meeting with CSX's CEO, but the company was unresponsive. SPA33-35.

3G began buying CSX stock again on March 29, 2007, and by April 17, had acquired an additional 11.1 million shares, bringing its total holdings to approximately 4.4% of CSX's shares outstanding. SPA34, JA1356. In May 2007, 3G noted in a memorandum to its investors that CSX's 10-Q filing disclosed that TCI had made an HSR filing and held a substantial derivative position referencing CSX stock. JA4586.

As part of its ongoing efforts to secure a meeting with CSX management, 3G caused its broker, Morgan Stanley, to send CSX a letter on May 25, 2007 confirming that 3G owned approximately 19.4 million shares of CSX; thereby disclosing its holdings to CSX even though it had not crossed the 5% threshold dictated by the 1934 Act. JA4588. And in its monthly investor letter for June 2007, 3G expressed frustration with CSX management and noted the criticisms leveled against the company by TCI's Amin in his May 2007 industry conference speech. JA4589. In addition, 3G noted that another hedge fund, Atticus Capital, had increased its CSX stake and famed activist investor Carl Icahn had disclosed a stake in CSX. *Id.*

3G made an HSR filing on June 13, 2007 stating that it intended to acquire CSX shares worth over $500 million, and might acquire more than 50% of CSX's outstanding shares. SPA35. 3G subsequently confirmed these points to CSX in a letter, and CSX in turn disclosed 3G's HSR filing in its own SEC filing. *Id.*

3G subsequently purchased an additional 493,000 CSX shares on August 15, 2007 and then entered into cash-settled swaps referencing 1.7 million CSX shares on August 16. SPA35-36. After a serious retreat from its position in CSX in late August and early September 2007 (discussed below), 3G rebuilt its position in CSX via stock and swaps starting in late September, and amassed 5.2 million shares by October 15, 2007. By November 8, the last time 3G changed its economic position regarding CSX, it held 4.1% of shares outstanding and held swaps referencing an additional 0.8% of shares outstanding for an aggregate exposure to 4.9% of CSX shares. SPA37.

C. The Relationship Between TCI And 3G

In January 2007, Synergy, a fund managed by 3G with investments in TCI, received a notice from TCI disclosing a large investment in "U.S. Transportation." SPA38. 3G's Behring contacted

TCI shortly thereafter to learn whether this included holdings in the U.S. railroad industry, and was told that TCI had an interest in CSX. *Id.* TCI had accumulated 93% of its total investment exposure to CSX before 3G bought its first shares of CSX on February 9, 2007. JA4904-4911. TCI's Hohn spoke with 3G's Behring on February 13, 2007, and they discussed 3G's recent acquisitions of CSX stock. SPA39. But 3G was hardly alone in such discussions; TCI, as investors often do, discussed its view of the upside of its railroad investments with other funds such as Deccan Value Advisors, Lone Pine Capital, Seneca, Icahn, TCW, Austin Friars, and Atticus, SPA22-23, and indeed TCI even discussed the possibility of an LBO of CSX with Deutsche Bank, SPA23.

As noted above, 3G continued to make sizeable acquisitions of CSX common stock until February 16, then paused. JA1358. On March 29, 3G began purchasing CSX stock again and 3G's Behring met with TCI's Amin—something he did on a relatively frequent basis as an investor in TCI and as someone with significant experience in Brazil, a sector for which Amin had responsibility at TCI. SPA41 & n.114, JA484. Like TCI and many other investors who had heard Amin's speech about CSX, 3G contacted CSX to learn the results of shareholder voting in May 2007, SPA41.

Between August 24 and September 14, 2007, 3G sold continuously 8.2 million shares or 40% of its CSX holdings while, during roughly the same period, TCI terminated swaps in two individual August transactions, reducing its own position in CSX by only 4.07%. JA1352, 1356, 4904-11. Overall, the correlation between TCI trading and 3G trading between October 20, 2006 and October 20, 2007 was only 16%. JA4904-11. Since its August sales, TCI has maintained consistent exposure to CSX. JA1350-55, 4904-11. In contrast, 3G acquired more exposure to CSX from September 26, 2007 until November of that year. SPA43.

On December 12, 2007, TCI and 3G agreed to form a "group" for voting their CSX shares within the meaning of the 1934 Act. JA4662-66. One week later, the group filed a Schedule 13D disclosing the existence of such a "group" by stating that TCI and 3G had "entered into an agreement to coordinate certain of their efforts with regard [to] (i) the purchase and sale of [shares and other instruments] and (ii) the proposal of certain actions and/or transaction to [CSX]." SPA44 (also available at http://www.secinfo.com/drHG7.u3gd.htm (last visited July 1, 2008)). The group accurately disclosed that it collectively owned 8.3% of the shares outstanding of CSX and that TCI had cash-settled swap arrangements with eight counterparties giving it economic exposure to roughly 11% of CSX's outstanding shares. SPA44-45.

Pursuant to CSX's bylaws, the group filed a "Stockholder Notice of Intent to Nominate Persons for Election as Directors of CSX Corporation" on January 8, 2008. JA4672-841. Thus began the proxy battle that, as noted above, sparked this lawsuit.

SUMMARY OF ARGUMENT

This Court should reverse the final judgment and permanent injunction in CSX's favor for three reasons.

First, the district court erred by holding that TCI should be deemed the beneficial owner of CSX securities referenced by its cash-settled swaps. The district court did not deny that neither Congress, nor the SEC, nor the market has ever considered entry into cash-settled swaps to confer beneficial ownership of any securities referenced by those swaps. But the court then interpreted an SEC Rule to accomplish just that result, by holding that entering into cash-settled swaps is "deemed" to confer beneficial ownership of securities referenced by those swaps when motivated in whole or in part by a desire to avoid the 1934 Act's disclosure requirements. That novel interpretation of the Rule not only overturns settled expectations in the Nation's derivatives markets, but violates two bedrock rules of law: (1) courts owe great deference to an agency's interpretation of its own rules and regulations, and here the district court rejected the SEC's longstanding and consistent interpretation of its own rule, and (2) courts should construe agency rules and regulations to comport with, not transgress, their statutory authorization. As the SEC has explained, the Rule on which the district court relied applies only to sham transactions designed to create a false appearance of non-ownership, and does not extend to entirely legitimate transactions like cash-settled swaps, whatever their underlying motivations.

Second, the district court erred by concluding that defendants formed a disclosure-triggering "group for the purpose of acquiring, holding, voting, or disposing of" CSX securities no later than February 13, 2007. The key point here is that neither the 1934 Act nor the corresponding SEC Rule requires disclosure of just *any* "group" among investors; rather, the statute and Rule require disclosure only of a "group" formed for one or more of four specified purposes. Defendants appropriately disclosed that they formed a "group" for the purpose of "voting" their CSX shares on December 12, 2007. The district court concluded that they had actually formed a "group" ten months earlier, but made no findings to support the conclusion that any such "group" was established for any of the statutorily specified purposes. Essentially, the court reasoned backwards from the ultimate establishment of a disclosure-triggering "group" to attribute *prior* communications to such a "group." The law does not allow such retroactive characterization. And the district court's failure to make specific findings with respect to the establishment of a disclosure-triggering group no later than February 13, 2007 is no oversight: the record here does not permit, and indeed affirmatively negates, any such findings.

Third, the district court erred by entering a permanent injunction broadly prohibiting defendants from violating the disclosure requirements of the 1934 Act with respect to any future transaction. Permanent injunctive relief does not follow as a matter of course from any violation of the law; rather, the proponent of such extraordinary relief always bears the burden of proving the absence of an adequate remedy at law and the threat of irreparable injury. Here, CSX could not and did not show that defendants' alleged disclosure violations threatened any future irreparable injury that warranted permanent injunctive relief, especially given that these legal questions are at best novel and close, and the appropriate government regulators stand ready to enforce the laws. And in any event, the permanent injunction here is wildly overbroad on its face, because it is not even limited to the current CSX proxy fight, or even to CSX shares more generally. Accordingly, at the very least, this Court should vacate or modify the sweeping permanent injunction entered below.

STANDARDS OF REVIEW

This Court reviews a district court's legal decisions, such as its interpretation of a statute and agency rules and regulations, *de novo*. *See*, *e.g.*, *Hirschfeld v. Spanakos*, 104 F.3d 16, 19 (2d Cir. 1997). This Court reviews a district court's factual findings for clear error, *see*, *e.g.*, *Weissmann v. Freeman*, 868 F.2d 1313, 1317 (2d Cir. 1989), although findings "predicated upon an incorrect legal standard … are not binding on an appellate court," *id.* This Court reviews a district court's grant of a permanent injunction for abuse of discretion, *see*, *e.g.*, *Shain v. Ellison*, 356 F.3d 211, 214 (2d Cir. 2004), although a court necessarily abuses its discretion when it exercises that discretion based on an error of law, *see*, *e.g.*, *id.*

ARGUMENT

I. The District Court Erred By Holding That TCI Should Be Deemed The Beneficial Owner Of CSX Securities Referenced By Its Cash-Settled Swaps.

The district court erred, as an initial matter, by holding that defendant TCI violated § 13(d) of the 1934 Act, 15 U.S.C. § 78m(d), when it did not file a disclosure statement within 10 days of entering into cash-settled swaps referencing more than 5% of CSX's shares. SPA68-76, 108. The court did not hold (and, consistent with the SEC's guidance, could not have held) that TCI's investment in these swaps rendered TCI an actual "beneficial owner" of the referenced shares under SEC Rule 13d-3(a), 17 C.F.R. § 240.13d-3(a). SPA68. Instead, the court ruled that, even assuming that TCI was *not* a "beneficial owner" of the referenced shares, it should be "*deemed* to be a beneficial owner" of those shares under SEC Rule 13d-3(b). SPA76 (emphasis added). In the court's view, the use of standard cash-settled swaps, when motivated at least in part by a desire to avoid the disclosure requirements of § 13(d), amounts to a "plan or scheme to evade" those requirements even where a person acquired "*no beneficial ownership*" of the referenced securities. SPA75 (emphasis added).

That radical and unprecedented interpretation of Rule 13d-3(b) should be reversed for two basic reasons. *First*, the district court impermissibly rejected the SEC's interpretation of its own Rule 13d-3(b), which limits the Rule's scope to sham transactions designed to conceal beneficial ownership of equity securities, not to conduct of parties who (like TCI) invest in entirely legitimate financial instruments other than equity securities (such as a myriad of derivatives or even debt) for a wide variety of reasons. *Second*, the district court impermissibly interpreted Rule 13d-3(b) to sweep well beyond the terms of the 1934 Act, the very statute the Rule is supposed to implement.

Once the district court's erroneous interpretation of Rule 13d-3(b) is reversed, and it is clear that § 13(d)'s disclosure requirements are triggered only by beneficial ownership of 5% or more of a company's stock, CSX cannot establish that TCI violated § 13(d). As the SEC has explained, standard cash-settled swaps do not grant either voting power or investment power over securities referenced in a cash-settled swap, and hence do not confer beneficial ownership over such securities. Because CSX failed to introduce any evidence that the swaps here were anything other than such standard cash-settled swaps, they did not give TCI beneficial ownership over the referenced securities under Rule 13d-3(a), and hence this claim fails as a matter of law.

A. Entering Into Cash-Settled Swaps Referencing More Than 5% Of A Company's Securities Does Not Trigger Rule 13d-3(b).

SEC Rule 13d-3(b) provides as follows:

> Any person who, directly or indirectly, [1] creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement, or device [2] with the purpose o[r] effect of divesting such person of beneficial ownership of a security or preventing the vesting of such beneficial ownership [3] as part of a plan or scheme to evade the reporting requirements of section 13(d) or (g) of the Act shall be deemed for purposes of such sections to be the beneficial owner of such security.

17 C.F.R. § 240.13d-3(b).

As the SEC's Corporation Finance Division explained in an *amicus* letter solicited by the district court, JA5469, standard cash-settled swaps referencing securities do not fall within the scope of Rule 13d-3(b) because such swaps do not confer beneficial ownership of the referenced securities. JA5548-51. That is true, as the *amicus* letter underscores, even if the swaps are motivated in whole or in part by a desire to avoid acquiring beneficial ownership in the first place. "[T]aking steps with the motive of avoiding reporting and disclosure," *i.e.*, structuring a transaction to avoid beneficial ownership, without more, "is not a violation of Section 13(d)." JA5550. Rather, the *amicus* letter explains, Rule 13d-3(b) applies to beneficial owners who attempt to *conceal* their beneficial ownership of securities through a sham transaction. *See id.* 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*." *Id.* (emphasis added). Unless the person is a beneficial owner in the first place, of course, the person cannot create a "*false* appearance of *non*-ownership." *Id.* (emphasis added). Indeed, the district court itself expressly acknowledged this point. SPA72 ("An appearance of non-ownership cannot be false unless one in fact is at least a beneficial owner.").

Nonetheless, the district court rejected as "unpersuasive" the *amicus* letter's interpretation of Rule 13d-3(b). SPA73. According to the court, entering into standard cash-settlement swaps referencing securities, at least when motivated in part by a desire to avoid beneficial ownership of such securities, represents "a plan or scheme to evade the reporting requirements of section 13(d)," and thus falls within the scope of Rule 13d-3(b)—even if those swaps "otherwise would not amount to beneficial ownership" of the referenced securities. SPA72-75; *see also id.* at 75 (construing Rule 13d-3(b) to apply to situations of "no beneficial ownership").

The district court erred by rejecting the *amicus* letter's interpretation of Rule 13d-3(b). As both the Supreme Court and this Court have explained time and again, agencies are entitled to especially great deference when interpreting their own rules and regulations. *See, e.g.*, *Long Island Care at Home v. Coke*, 127 S. Ct. 2339, 2348-49 (2007); *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Roth ex rel. Beacon Power Corp. v. Perseus, L.L.C.*, 522 F.3d 242, 247-48 (2d Cir. 2008); *Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768, 780 & n.7 (2d Cir. 2002). At least when formally presented to a court in a *amicus* filing, such an interpretation is "*controlling* unless plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (emphasis added; internal quotation omitted).

The district court, however, declined to apply that "deferential standard," *id.*, here. Rather, the court dismissed the *amicus* letter in a footnote as a mere "staff interpretation … entitled to no greater weight than flows from [its] persuasive qualities." SPA73 n.205 (citing *United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944); *Gryl ex rel. Shire Pharms. Group PLC v. Shire Pharms. Group PLC*, 298 F.3d 136, 145 (2d Cir. 2002)). But the cases cited by the court do not support its conclusion. *Mead* and *Skidmore* involved the distinct issue of deference to an agency's interpretation of a *statute*, not its own *regulations*. *See* 533 U.S. at 227-28; 323 U.S. at 140; *see also Taylor*, 313 F.3d at 780 n.7. And in *Gryl*, the court held only that deference to an agency's interpretation of its own regulations was unwarranted with respect to agency interpretations set forth in no-action letters *as opposed to amicus* filings with a court. *See* 298 F.3d at 145; *see also MONY Group, Inc. v. Highfields Capital Mgmt., L.P.*, 368 F.3d 138, 146 (2d Cir. 2004); *New York City Employees Ret. Sys. v. SEC*, 45 F.3d 7, 12-13 (2d Cir. 1995).

Although the cover letter from the SEC's General Counsel stated that "the schedule for submitting a response to the Court did not afford enough time for the Commission's staff to present this matter for a vote of the Commission," and "recognize[d] that these staff views are not entitled to the deference that would be accorded the views of the Commission itself," JA5535, that statement may reflect excessive modesty. Defendants are aware of no principle limiting judicial deference to an agency's interpretation of its own regulations only to pronouncements made by the agency itself, as opposed to by a duly authorized subdivision or staff of the agency. Thus, in *Long Island Care at Home,* the Supreme Court applied *Auer* deference to an informal Advisory Memorandum prepared for internal use within the Department of Labor, *see* 127 S. Ct. at 2349, and in *Taylor*, this Court applied *Auer* deference to "a policy letter" authored by the Office of Special Education Programs within the Department of Education, *see* 313 F.3d at 780 n.7. As the Supreme Court has explained:

> To be sure, the administrative interpretations proffered in this case were issued by the Federal Reserve staff rather than the Board. But to the extent that deference to administrative views is bottomed on respect for agency expertise, it is unrealistic to draw a radical distinction

> between opinions issued under the imprimatur of the Board and those submitted as official staff memoranda.

Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 n.9 (1980).

The interpretation of Rule 13d-3(b) set forth in the *amicus* letter, which limits the scope of the Rule to sham transactions designed to conceal beneficial ownership of securities, is amply deserving of such deference—in fact, it represents the best possible interpretation of that Rule, and the SEC's consistent position since the Rule's promulgation in 1977. *See* Adoption of Beneficial Ownership Disclosure Requirements, Exchange Act Release No. 34-13291, 42 Fed. Reg. 12342, 12347 (Mar. 3, 1977). At that time, the SEC offered as an example of conduct covered by Rule 13d-3(b) a classic stock "parking" scheme, in which "X" attempted to conceal its actual ownership of shares of "Z Corporation" by "parking" his voting interest with a third party. *Id.* In that example, beneficial ownership existed, but was hidden: "X" acquired beneficial ownership of the shares when he caused ten institutions each to acquire 3% of the outstanding voting shares of "Z Corporation" on his behalf. *Id.* Then, "[a]s an attempted means of avoiding disclosure of his *beneficial ownership* of the Z shares," "X" gave an irrevocable proxy to "A." *Id.* (emphasis added). The SEC explained that "A" would be a beneficial owner of the Z shares, because of his power to vote the shares, and, "as indicated in Rule 13d-3(b), X is also deemed a beneficial owner of the same Z shares." *Id.* Thus, in this example, Rule 13d-3(b) clarifies that a beneficial owner of stock who attempts to conceal his ownership of the shares by transferring voting control remains a "beneficial owner" within the meaning of Rule 13d-3(b). The limited caselaw on this issue reaffirms this point. *See SEC v. Drexel Burnham Lambert Inc.*, 837 F. Supp. 587, 607 (S.D.N.Y. 1993) (construing Rule 13d-3(b) to mean that "[d]eliberate efforts to *conceal* legal ownership do not affect the determination of beneficial ownership") (emphasis added), *aff'd sub nom. SEC v. Posner*, 16 F.3d 520 (2d Cir. 1994).

As the *amicus* letter submitted below points out, the interpretation that Rule 13d-3(b) addresses only sham transactions also comports with the SEC's broader recognition that structuring a transaction to avoid falling within the terms of a rule is not, by itself, an unlawful "evasion" of the rule. JA5550 & n.4. That is true not only with respect to Rule 13d-3, but also with respect to other SEC rules. For example, Rule 144A, which exempts certain private securities offerings from registration, contains an "anti-abuse provision" with language similar to Rule 13d-3(b). *See* 17 C.F.R. § 240.144A, Note 3. As the SEC explained in an *amicus* letter submitted in *In re HealthSouth Corp. Sec. Litig.,* No. CV-03-BE-1500-S (N.D. Ala.), "there is nothing inherently nefarious about seeking to avoid Commission review or the possibility of … liability" stemming from a registered offering. Letter from Jacob H. Stillman, Solicitor, SEC, to The Hon. Karon O. Bowdre 9 (Nov. 28, 2006), *available at* http://www.sec.gov/litigation/briefs/2006/ healthsouthbrief.pdf. Rather, a transaction only becomes part of a "plan or scheme to evade" registration requirements when the "transaction is a *sham* designed to create the *illusion* that it should be exempt." *Id.* at 7-8 (emphasis added). Similarly, in Regulation S, the SEC limits unlawful "evasion" to "sham" transactions, as opposed to real transactions motivated in whole or in part by a desire to avoid the regulation. *Id.*

This is, of course, hardly a position unique to the SEC: to the contrary, as a general matter, it is perfectly fine to structure transactions to avoid legal or regulatory burdens. *See, e.g.*, *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934) (L. Hand, J.) ("Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes."). Indeed, the American legal profession is to a large extent devoted to doing just that.

The SEC's interpretation of Rule 13d-3(b) also has the virtue of keeping the Rule within the scope of its authorizing statute. Section 13(d) of the 1934 Act limits its disclosure requirements to "[a]ny person who, after acquiring directly or indirectly the *beneficial ownership* of any equity security … of a class registered [under the Act] … is directly or indirectly the *beneficial owner* of more than 5 per centum of such class." 15 U.S.C. § 78m(d)(1) (emphasis added). Unless and until a person is a "beneficial owner" of the relevant equity securities, in other words, the statutory disclosure requirements are not triggered. If Rule 13d-3(b) were interpreted to extend those requirements to a person who is concededly *not* a "beneficial owner" of such securities, that Rule would exceed the agency's statutory authority. Needless to say, an agency regulation should be interpreted, where possible, as consistent, rather than inconsistent, with its statutory authorization (and hence as valid rather than invalid). *See, e.g.*, *Carmichael v. The Payment Ctr., Inc.*, 336 F.3d 636, 640 (7th Cir. 2003); *Emery Mining Corp. v. Secretary* *of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984); *cf. Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring) ("[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.").

Notwithstanding all the above, the district court rejected the SEC's interpretation of Rule 13d-3(b) by invoking the "fundamental principle of statutory construction" that words should be read, insofar as possible, in a way that does not render them superfluous or redundant. SPA72. According to the court, Rule 13d-3(a) already covers any situation where a person has "beneficial ownership" of a security, so Rule 13d-3(b) must extend beyond such situations or it would be "superfluous." *Id.*; *see also id.* at 76; *id.* at 76 n.213 ("Rule 13d-3(a) as a whole appears quite plainly to reflect the Commission's intent to define the term ["beneficial ownership"] exhaustively for purposes of the statute.").

The court thereby saddled a familiar canon of construction with far more weight than it can bear. Such canons are helpful guideposts, not rigid or inflexible rules. *See, e.g.*, William N. Eskridge, Jr. *et al.*, *Cases & Materials on Legislation: Statutes & The Creation of Public Policy* 849 (4th ed. 2007). As noted above, the American legal profession is to a large extent devoted to designing transactions to avoid legal or regulatory burdens, and there is nothing inherently wrong with that. But lawmakers and regulators often respond by taking a "belt and suspenders" approach in which words and categories overlap. One need look no further than the venerable aiding and abetting statute, 18 U.S.C. § 2, for an example: that statute makes anyone who "aids, abets, counsels, commands, induces or procures" a federal crime punishable as a principal. Needless to say, it is hard to imagine "aiding" that is not also "abetting," or "inducing" that is not also "procuring." But Congress obviously chose to err on the side of caution to avoid the risk of leaving a legal loophole. And that is hardly an unusual situation. *See, e.g.*, *Gutierrez v. Ada*, 528 U.S. 250, 258 (2000) ("There is no question that the statute would be read as we read it even if the phrase were missing. But as one rule of construction among many, albeit an important one, the rule against redundancy does not necessarily have the strength to turn a tide of good cause to come out the other way."); *Babbitt v. Sweet Home Chapter of Communities*, 515 U.S. 687, 703 (1995) ("Any overlap

… is unexceptional, … and simply reflects the broad purpose of the Act.”); *cf. M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819) (“If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts.”) (Marshall, C.J.).

Given the complex and often-changing landscape of financial instruments, it is understandable that the SEC chose not only to define “beneficial ownership” broadly in Rule 13d-3(a), but to proscribe sham transactions meant to disguise beneficial ownership in Rule 13d-3(b). This point is illustrated by the example, described above, that the SEC provided at the time it promulgated Rule 13d-3(b): in that example, a beneficial owner tried to evade § 13(d) by transferring voting control to a surrogate. Although it is possible that the SEC could argue that this example would still be covered by Rule 13d-3(a), the existence of Rule 13d-3(b) frees the SEC from even having to make that argument. An agency’s desire to avoid a regulatory loophole certainly gives a court no license to stretch a rule beyond the scope given by the agency itself.

Nor, needless to say, does the canon against redundancy allow a court not only to reject an administrative agency’s interpretation of its own regulation, but also to interpret that regulation in a way that exceeds the agency's statutory authority. The district court acknowledged that its interpretation took Rule 13d-3(b) beyond the scope of § 13(d), but asserted that "the SEC, in the Court's view, has the power to treat as beneficial ownership a situation that would not fall within the statutory meaning of that term." SPA74. That is so, according to the court, because § 23(a) of the 1934 Act gives the SEC the residual "'power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter for which it is responsible.'" SPA74-75 (quoting 15 U.S.C. § 78w(a); brackets omitted).

The district court's invocation of the SEC's general rulemaking power is doubly misplaced here. *First*, a general power to *implement* a statute does not allow an agency to *expand* a statute. *See, e.g.*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-14 (1976). Because § 13(d) by its terms is limited to "beneficial ownership," the SEC could not "implement" that provision by extending it beyond "beneficial ownership." *See id.; Blau v. Lehman*, 368 U.S. 403, 410-13 (1962). *Second*, the SEC has not even *purported* to exercise the power the district court claimed for it. In other words, even if the district court were correct that "the SEC … has the power" to interpret the statute as the court did, SPA74, the fact remains that the agency declined to exercise any such power, and the district court had no authority to exercise discretionary regulatory power on the agency's behalf. *See, e.g.*, *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472-73 & n.12 (1977).

Indeed, the district court's concern with avoiding redundancy ironically led the district court to create its own redundancy. As the court acknowledged, Rule 13d-3(b) "by its plain terms is triggered when *three* elements are satisfied." SPA69 (emphasis added). There must be (1) an arrangement (2) with the purpose or effect of divesting or preventing the vesting of beneficial ownership over securities, (3) as part of "a plan or scheme to evade the reporting requirements" of § 13(d). 17 C.F.R. § 240.13d-3(b). By holding that any transaction structured in whole or in part to avoid the reporting requirements of § 13(d) by preventing the acquisition of beneficial ownership is *itself* "a plan or scheme to evade" those requirements, SPA71-72, the district court effectively collapsed the second and third requirements, and thereby wrote the "plan or scheme to evade" language out of the Rule. If arrangements "with the purpose o[r] effect of divesting … or preventing the vesting of" beneficial ownership over securities *are per se* a "plan or scheme to evade," then the Rule's separate reference to a "plan or scheme to evade" is superfluous.

In addition, the district court's novel interpretation of Rule 13d-3(b) would bring that Rule into significant tension, if not outright conflict, with yet another provision of the 1934 Act. Section 3A of the 1934 Act, which was added by the Gramm-Leach-Bliley Act of 2000, expressly *excludes* cash-settled swaps from the definition of "equity securities" that are subject to § 13(d) disclosure requirements. *See* 15 U.S.C. § 78c-1(b). Indeed, § 3A goes on broadly to preclude the SEC from requiring disclosure of cash-settled swaps:

> Except as provided in [§ 16(a)] with respect to reporting requirements, the Commission is prohibited from—
>
> (A) promulgating, interpreting, or enforcing rules; or
>
> (B) issuing orders of general applicability;
>
> under this title in a manner that imposes or specifies reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading with respect to any [cash-settled swap agreement].

15 U.S.C. § 78c-1(b)(3). Needless to say, the district court's interpretation of Rule 13d-3(b) would effectively usher in through the

back door the very regulation of swaps that § 3A expressly forbids from coming through the front door. If Congress did not want the SEC to be able to require disclosure of cash-settled swaps *per se*, it is hard to see how Congress would have wanted the SEC to be able to require disclosure of cash-settled swaps under the guise of requiring disclosure of the securities referenced by such swaps. And given that the SEC has not interpreted its own Rule 13d-3(b) to come so close to, if not actually to touch, the statutory "third rail" of § 3A, a court should not drag the SEC to that precarious spot against its will.

The upshot of the foregoing is that entering into cash-settled swaps referencing more than 5% of a company's securities, even when motivated in whole or in part by a desire to avoid § 13(d)'s disclosure requirements, does not trigger Rule 13d-3(b). By concluding otherwise, the district court rendered unlawful under the 1934 Act common practices that the SEC itself does not deem unlawful, and that the Act does not allow to be deemed unlawful. Accordingly, this Court should reverse the district court's novel, erroneous, and expectation-upsetting interpretation of Rule 13d-3(b).

B. Entering Into Cash-Settled Swaps Referencing More Than 5% Of A Company's Securities Does Not Trigger Rule 13d-3(a).

Once it is clear that Rule 13d-3(b) has no bearing in this case, the question then arises whether TCI's entering into cash-settled swaps referencing more than 5% of CSX's shares gave TCI "beneficial ownership" of those shares under Rule 13d-3(a). Because the district court relied on Rule 13d-3(b), it conspicuously declined to answer that question. SPA68. But, as the *amicus* letter submitted below again makes clear, JA5548-51, the answer to that question is no. Accordingly, to the extent that CSX may now seek to defend the district court's judgment on this alternative ground, any such effort is in vain.

As noted above, § 13(d) of the 1934 Act limits its disclosure requirements to "beneficial owners" of equity securities, *see* 15 U.S.C. § 78m(d)(1), but the statute does not define that term. The SEC filled that gap with Rule 13d-3(a), which defines a "beneficial owner" as follows:

> For the purposes of sections 13(d) and 13(g) of the Act a beneficial owner of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise has or shares:
>
> (1) Voting power which includes the power to vote, or to direct the voting of, such security and/or,

> (2) Investment power which includes the power to dispose, or to direct the disposition of, such security.

17 C.F.R. § 240.13d-3(a).

This Rule clarifies that "beneficial ownership," in the context of § 13(d), does not extend to purely economic interests in a security. *See, e.g.*, Adoption of Beneficial Ownership Disclosure Requirements, Exchange Act Release No. 34-13291, 42 Fed. Reg. 12342, 12348 (Mar. 3, 1977) (declining to include "traditional economic interests in securities, *i.e.*, the right to receive dividends and the right to receive proceeds upon sale" as "criteria for defining beneficial ownership for purposes of Regulation 13D-G"); *Transcon Lines v. A.G. Becker Inc.*, 470 F. Supp. 356, 374 (S.D.N.Y. 1979). In this case, that limitation translates into a general rule that, absent a supplemental agreement, understanding, or arrangement, the investor in a cash-settled swap does not acquire beneficial ownership of any referenced shares. Because no such agreement, understanding, or arrangement existed between TCI and its counterparties with respect to CSX shares referenced in its swaps, JA548-49, 562-65, TCI did not become a "beneficial owner" of those shares.

Cash-settled swaps, in which the investor takes a purely economic interest in a cash stream determined by reference to an asset like a stock, confer neither of the two defining characteristics of beneficial ownership described by the SEC in Rule 13d-3(a): the ability to exercise (i) actual voting or (ii) investment authority over the security. As the district court acknowledged, the holder of a cash-settled swap "does not have record ownership of the referenced shares," and therefore "does not have the right to vote them." SPA12. Nor does the holder of a cash-settled swap have the power "to dispose, or to direct the disposition of" the referenced shares, because the holder has no agreement or right to acquire the referenced stock.[3] In these respects, cash-settled swaps are analogous to cash-settled security futures which, per the SEC, do not

[3] The district court attempted to blur the distinction between cash-settled and share-settled swaps by musing (without citing any record evidence) that the terms of a swap contract "may be varied during their lives as long as the counterparties agree," so that, for example, a swap "that in its inception contemplates cash settlement may be settled in kind." SPA17; *see also* SPA57. Assuming that the parties to a particular swap agreed to convert a cash-settled swap into a share-settled swap, the holder of that swap would become a "beneficial owner" of the referenced stock under the analysis outlined above. But absent any evidence that a cash-settled swap was *in fact* modified so that it could or would be settled in kind (and there was no evidence of any such modification here), the district court's observation has no bearing here.

create disclosure-triggering beneficial ownership. *See* Commission Guidance on the Application of Certain Provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and Rules thereunder to Trading in Security Futures Products, Exchange Act Release No. 46101 (June 21, 2002).

To be sure, the counterparty to a cash-settled swap may (and, as a practical matter, often does) hedge its exposure by purchasing shares of the referenced stock. SPA13. But such hedging does not make the swap investor the "beneficial owner" of the hedged stock. In fact, the standard ISDA swap agreement and various dealer supplements to that agreement *expressly disclaim* power to control the investment or voting of any hedged securities. In particular, those agreements do not give swap holders power to direct:

> (i) whether the derivatives dealer will hedge;
>
> (ii) if the dealer hedges, how it does so, with matched shares or another way;
>
> (iii) if the dealer hedges by acquiring matched shares, whether the counterparty will hold those shares on the record date for a shareholder meeting, or will lend instead the shares to others …;
>
> (iv) if the dealer hedges with matched shares and holds them on a record date, whether the counterparty will vote the shares at the shareholder meeting; or

(v) if the counterparty hedges with shares, holds those shares on the record date, and votes the shares, how the counterparty will vote.

JA5543.

That is why the *amicus* letter filed below concluded that, even assuming that counterparties to cash-settled swaps have "economic incentives" to "vote the [hedged] shares as the other party wishes or to dispose of the shares to the other party," such "economic or business incentives," standing alone, "are not sufficient to create beneficial ownership under Rule 13d-3." JA5549. Even though "such incentives may exist," the *amicus* letter reasons, "when the counterparty chooses to act … in circumstances where it is unconstrained by either legal rights held by the other party or by any understanding, arrangement, or restricting relationship with the other party, it is acting independently and in its own economic interests." *Id.* Thus, the "more reasonable interpretation of the terms 'voting power' and 'investment power' as used in the Rule, which are based on the concept of the actual authority to vote or dispose or the authority 'to direct' the voting or disposition, is that they are not satisfied merely by the presence of economic incentives." *Id.*

The conclusion that a holder of cash-settled swaps does not acquire beneficial ownership of any referenced shares in the absence of a supplemental agreement, understanding, or other arrangement also comports with the generally accepted view in the marketplace. "The standard advice from U.S. securities counsel to hedge funds and other investors is that a position in cash-settled equity swaps does not constitute beneficial ownership under Exchange Act § 13(d)." JA5478. In keeping with that advice, "investors customarily do not treat a long equity swap position … as creating a disclosure obligation under § 13(d)." *Id.*; *see also* Arnold S. Jacobs, *The Williams Act-Tender Offers & Stock Accumulations*, § 2.12 at 46 (2008) ("A person who is a party to a cash-settled swap does not beneficially own the securities subject to the swap if he does not have the right to vote or sell those securities either pursuant to the swap's contractual terms or pursuant to another understanding or arrangement with the counterparty to the swap.").

Indeed, investors who purchase swaps rather than shares make a calculated decision to forego the advantages of beneficial ownership:

> Investors who choose to hold equity swaps instead of shares understand what they are gaining, and what they are giving up. They are gaining a lower cost of financing; greater leverage …; and possible trading advantages which result

> from not disclosing their positions. They are giving up the voting rights that come from owning shares.

JA5479. Conversely, an investor who is interested in acquiring voting power (and the associated potential for corporate control) cannot achieve that objective solely by entering into cash-settled swaps. Because investors use "equity swaps in accordance with accepted market practices," and these practices are "understood to be based on reasonably well-settled law," the *amicus* letter submitted below observed that "interpreting an investor's beneficial ownership under Rule 13d-3 to include shares used in a counter-party's hedge, absent unusual circumstances, would be novel and would create significant uncertainties" for investors and the market. JA5551; *see also Ithaca (Custodians) Ltd. v. Perry Corp.*, [2004] 1 NZLR 731, 2003 NZLR LEXIS 76, at *57 (Court of Appeal, Wellington, Nov. 4, 2003) (same under New Zealand law).

Consistent with this guidance, the district court expressly refrained from concluding that TCI was a "beneficial owner" of the CSX shares referenced by its cash-settled swaps. SPA68. And the district court could not have done otherwise as a matter of law, because it also did not find that TCI entered into any explicit or implicit "understanding, arrangement or restricting relationship," JA5549, with any of its swap counterparties regarding the voting or investment of the referenced shares, SPA58, 62.

With respect to the "investment power" prong of the analysis, 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. Nor did it direct the banks to dispose of their hedge shares by any particular means." SPA58 (emphasis added).

And with respect to the "voting power" prong of the analysis, the district court also found "*no evidence* that TCI and any of its counterparties had explicit agreements that the banks would vote their hedge shares in a certain way," SPA59 (emphasis added), and was "not persuaded that there was any agreement or understanding between TCI and any of the … banks," other than Deutsche Bank, "with respect to the voting of their hedged shares," SPA62. The district court hesitated before it declined to find that TCI and Deutsche Bank entered into any implicit agreement regarding voting of the CSX shares, the facts that gave the district court pause show only that Deutsche Bank was motivated by precisely the type of "economic and business incentives" that the SEC says do not satisfy the voting or investment power requirements for beneficial ownership under Rule 13d-3.[4]

Accordingly, the district court erred by concluding that TCI violated Rule 13d-3(b), and did not conclude (and had no basis for concluding) that TCI violated Rule 13d-3(a) in the absence of any implicit or explicit agreement between TCI and its counterparties with respect to the referenced shares. Because TCI was not a "beneficial owner" of the CSX shares referenced by its cash-settled swaps, it did not violate either provision, and this Court should reverse the district court's contrary conclusion.

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[4] This evidence consists of (1) the district court's conclusion that TCI's Hohn believed that the fact that a Deutsche Bank proprietary hedge fund owned CSX shares might influence the way that Deutsche Bank voted its own shares, and (2) movements of shares into and out of Deutsche Bank around the record date for voting CSX stock. SPA60-61. Even assuming that there were some evidence of a linkage between the Deutsche Bank fund and Deutsche Bank's swap desk and securities lending operations (and the district court cited none), such evidence would demonstrate, at most, that TCI considered Deutsche Bank's internal economic incentives in deciding where to execute its swaps, not that TCI entered into any agreement or understanding with Deutsche Bank regarding the voting of CSX stock.

II. The District Court Erred By Concluding That Defendants Formed A Disclosure-Triggering "Group For The Purpose Of Acquiring, Holding, Voting, Or Disposing Of" CSX Securities No Later Than February 13, 2007.

The district court next erred by concluding that defendants formed a disclosure-triggering "group for the purpose of acquiring, holding, voting, or disposing of" CSX securities before December 12, 2007. That is the date on which TCI and 3G agreed to put together a minority slate of candidates for CSX's Board of Directors. After reaching that agreement, TCI and 3G promptly filed a Schedule 13D announcing that they had formed a "group" within the meaning of § 13(d) "to coordinate certain of their efforts with regard [to] (i) the purchase and sale of [shares and other instruments] and (ii) the proposal of certain actions and/or transaction to [CSX]." SPA44. The district court, however, concluded that the December 13D was untimely: in the court's view, TCI and 3G had formed a § 13(d) "group" no later than ten months earlier, by February 13, 2007, and should have filed their Schedule 13D at that point.

The district court thereby erred. Section 13(d) of the 1934 Act does not require disclosure of every communication or arrangement between shareholders, but only of arrangements between investors to act as a group *for certain specified purposes*: *viz.,* "acquiring, holding, voting, or disposing of" equity securities. 15 U.S.C. § 78m(d)(3). The SEC has confirmed this limited scope in its Rule 13d-5(b)(1), 17 C.F.R. § 240.13d-5(b)(1). But the district court here failed to make any finding that TCI and 3G formed a "group" for any of these specified purposes no later than February 13, 2007. And that omission is no oversight: the record in this case would not support any such finding. Accordingly, the district court's "group" finding cannot stand as a matter of law.

A. Section 13(d) Requires Disclosure Of A "Group" Formed For Certain Specified Purposes, But The District Court Made No Finding As To Which Of Those Purposes Were Implicated Here.

Section 13(d)(3) of the 1934 Act provides: "When two or more persons act as a partnership, limited partnership, syndicate, or other group *for the purpose of acquiring, holding, or disposing of securities of an issuer*, such a syndicate or group shall be deemed a 'person' for purposes of this subsection." 15 U.S.C. § 78m(d)(3) (emphasis added.) A "person" under the Act must disclose its holdings of an issuer's securities within 10 days of acquiring 5% or more of a class of those securities. 15 U.S.C. § 78m(d)(1). The SEC has implemented § 13(d)(3) via Rule 13d-5(b)(1), which states:

> When two or more persons agree to act together for the purpose of *acquiring*, *holding*, *voting* or *disposing of* equity securities of an issuer, the group formed thereby shall be deemed to have acquired beneficial ownership, for purposes of section 13(d) and (g) of the Act, as of the date of such agreement, of all equity securities of that issuer beneficially owned by such persons.

17 C.F.R. § 240.13d-5(b)(1) (emphasis added).

In construing § 13(d)(3) and Rule 13d-5(b)(1), courts have hewed carefully to their terms, so as not to chill entirely legitimate and beneficial communications among shareholders. Indeed, the SEC affirmatively encourages "discussions among shareholders" and "the exchange of views and opinions by shareholders." Securities Exchange Act Release No. 34-31326 (October 16, 1992). Thus, "Section 13(d) allows individuals broad freedom to discuss the possibilities of future agreements without filing under securities laws." *Pantry Pride v. Rooney*, 598 F. Supp. 891, 900 (S.D.N.Y. 1984). Indeed,

> Section 13(d) seems carefully drawn to permit parties seeking to acquire large amounts of shares in a public company to obtain information with relative freedom, to discuss preliminarily the possibility of entering into agreements and to operate with relative freedom until they get to the point where they do in fact decide to make arrangements which they must record under the securities laws. By requiring the existence of a "group," the law is designed to avoid discouraging and making risky that kind of preliminary activity.

Lane Bryant, Inc. v. Hatleigh Corp., No. 80-Civ. 1617, 1980 WL 1412, at *1 (S.D.N.Y. June 9, 1980); *see also, e.g., Hallwood Realty Partners,* L.P. *v. Gotham Partners, L.P.*, 286 F.3d 613, 617-18 (2d Cir. 2002); *MEVC Draper Fisher Jurvetson Fund I, Inc. v. Millennium Partners, L.P.*, 260 F. Supp. 2d 616, 633 (S.D.N.Y. 2003); *Log On Am. Inc. v. Promethean Asset Mgmt. L.L.C.*, 223 F. Supp. 2d 435, 441 (S.D.N.Y. 2001); *K-N Energy, Inc. v. Gulf Interstate Co.*, 607 F. Supp. 756, 765 (D. Colo. 1983).

Given the benefits of investor communications, this is an area where imprecision and vagueness are intolerable: investors should not be required to guess the point at which their obligation to file a Schedule 13D is triggered, and should not be subjected to retroactive second-guessing once they ultimately agree to form a "group" for one or more of the statutorily specified purposes. *Cf. Dirks v. SEC*, 463 U.S. 646, 664 (1983) ("[I]t is essential, … to have a guiding principle for those whose daily activities must be limited and instructed by the SEC's … rules."). To avoid confusion in the investor community, and to ensure that courts are focused on the conduct at which § 13(d) is directed, it is essential that when a court finds that a § 13(d) group has been formed, the court should be clear about why that finding has been made. At a minimum, this requires that the court be clear about which of the § 13(d) purposes the group has been formed to promote.

The decision below provides no such clarity. Instead, the district court ruled that TCI and 3G had formed a "group" "no later than February 13, 2007," SPA81, without ever tethering that ruling to the text of § 13(d) or SEC Rule 13d-5(b)(1). In particular, the court did not specify for which, if any, of the § 13(d) purpose(s) the alleged February 2007 "group" had been formed. Instead, the court generally stated that TCI and 3G had "formed a group *with respect to CSX securities*," SPA81 (emphasis added), "formed a group *regarding CSX*," SPA87 (emphasis added), and had a "common objective," SPA77.

Such general statements are legally insufficient. As noted above, § 13(d) requires disclosure only of a "group" that is formed *for one or more specified purposes*. *See, e.g., Roth v. Jennings*, 489 F.3d 499, 508 (2d Cir. 2007) ("[T]he actors need not have combined for all of the purposes listed in § 13(d)(3) .... 'All that is required is that the members of the group have combined to further a common objective *with regard to one of those activities*.'") (emphasis added); *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 124 (2d Cir. 2001) ("[T]he alleged group members need not be committed to 'acquiring, holding, voting, or disposing of equity securities' on certain specified terms, but rather they need only have combined to further a common objective *regarding one of the just-recited activities*.") (emphasis added); *Wellman v. Dickinson*, 682 F.2d 355, 365 (2d Cir. 1982) (finding of § 13(d) group upheld where district court found that defendants "formed a group *to dispose of the Becton shares under their control*") (emphasis added); *see also* Stephen M. Bainbridge, *Corporation Law & Economics* 656 (2002) ("Generally speaking, some kind of agreement is necessary before it can be said that a group exists. Not only must there be an agreement, but the agreement must go to certain types of conduct [specified in § 13(d)(3)]."). Nowhere in the decision below is there a statement or finding that TCI and 3G agreed to act together regarding one of the activities specified in § 13(d) or Rule 13d-5(b)(1): "acquiring, holding, voting, or disposing of equity securities."

Requiring such precision is not mere formalism. It is only by focusing on whether a group has been formed *for one of the purposes specified in § 13(d)* that a court, and ultimately market participants, can distinguish behavior restricted by § 13(d) from the type of open communication among investors that the SEC encourages. There is a fine line between the permissible practice of discussing one's investments (including tipping one's interest in a particular company) and working together for a common purpose. Failure to require that courts identify with specificity where the line has been crossed into § 13(d) group activity would create unnecessary and damaging ambiguity in an important sector of the national economy. *Cf. DuPont v. FTC*, 729 F.2d 128, 138-39 (2d Cir. 1984) (in antitrust law, inferences of a price-fixing agreement must stem from inferences of agreements to perform specific activities to fix prices, lest the Sherman Act's prohibition on conspiracies degenerate into an overbroad ban on mere consciously parallel conduct by similarly motivated parties); *see also Theatre Enters. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954).

With the district court having failed to specify what § 13(d) activity was the subject of the alleged February 13, 2007 group agreement, its reasoning seems to have been that because (a) TCI and 3G ultimately formed and disclosed a group in December 2007, and (b) the parties admittedly had been in contact and exchanging views about CSX since February 2007, then (c) the formation of the group ought to be traced back to those February 2007 communications. But as cases such as *Pantry Pride* and *Lane Bryant* make clear, such an approach is impermissible. The mere fact that two investors ultimately agree to form a group does not retroactively transform all of their prior interactions into § 13(d) disclosure-triggering events. "Congress did not intend for § 13(d) to serve merely as an eleventh-hour bludgeon for management embroiled in proxy contests." *MEVC*, 260 F. Supp. 2d at 633. That is just what the district court below did here.

B. The Record Does Not Support A Finding That TCI And 3G Formed A "Group" With Respect To Any Of The Specific Purposes Enumerated In § 13(d) No Later Than February 13, 2007.

It is no accident that the district court failed to make the necessary findings to support its conclusion that TCI and 3G formed a disclosure-triggering "group" no later than February 13, 2007: the record in this case would not support any such findings with respect to any of the specific purposes enumerated in § 13(d).

First, as to the § 13(d) purpose of *voting*, nothing in the district court's opinion remotely touches upon it. The court found only that a series of meetings took place between TCI and 3G, after which 3G purchased measurable blocks of CSX shares. SPA78-80. Yet despite invitations to do so by CSX, the court conspicuously declined to find that there was any *quid pro quo* according to which 3G would *vote* any shares it acquired in conjunction with TCI. The court cited only *Wellman*, which did not discuss voting, and stated "[g]roup members need not 'be committed to acquisition, holding, or disposition on any specific set of terms.'" SPA77 (quoting *Wellman*, 682 F.2d at 363). That provides no basis for any ruling about a "group" acting in concert to *vote* CSX shares.

Nor could there be a sustainable finding that the parties had an agreement before December 2007 to work together for the purpose of *acquiring, holding, or disposing of* shares.

First, the district court found that the TCI-3G group was formed no later than February 2007, but as of that point TCI had already acquired swaps referencing 93% of its ultimate total exposure to CSX. Any concerted acquisition of shares thereafter by the putative group would accordingly have been *de minimis*. JA4904-11 (only a 16% correlation between 3G and TCI trades in 2007). Such a small correlation has in the past been held to be insufficient evidence of an agreement to "act together" under § 13(d). *See*, *e.g., MEVC*, 260 F. Supp. at 631; *Log On Am.*, 223 F. Supp. 2d at 441.

Second, not only were the parties not moving in lockstep with respect to acquiring shares; they also diverged sharply in disposing of shares during the time they were supposedly acting as a group. Specifically, 3G disposed of a substantial portion of its common stock holdings—about 40%—from August to September 2007, while TCI sold only 4.07% of its swap stake during that time. SPA80. With such inconsistencies in the parties' respective patterns of acquiring and disposing of (and thus, of holding) shares over the February-December time period, there is no basis for finding that a § 13(d) group existed for the purpose of any of those activities.

In mid-November 2007, counsel for 3G and TCI respectively began negotiations about the formation of a group with respect to the voting and disposition of CSX securities. JA215, 488-89, 510, 525. Those negotiations were by no means a sham (and the district court never found otherwise), and they culminated in such an agreement on December 12, 2007. JA4662-66. Even assuming *arguendo* that TCI had shared information earlier in the hope that 3G would eventually join ranks as an activist CSX shareholder, such unilateral tipping is not enough to form a group required to disclose under § 13(d). *See*, *e.g.*, *K-N Energy*, 607 F. Supp. at 767 ("[I]nformation sharing may suggest that [A] *hoped* that [B] would throw its support behind any actions taken by the others, but it provides no indication that [B] *agreed* to do so.") (emphasis in original). Even if likeminded shareholders like TCI and 3G shared information in both directions, and as a result of that information, behaved similarly (which, as illustrated by the events of late August and early September, they did not), this too would not require disclosure under the Williams Act. *See*, *e.g.*, *Pantry Pride*, 598 F. Supp. at 899-900; *K-N Energy*, 607 F. Supp. at 767; *Torchmark Corp. v. Bixby*, 708 F. Supp. 1070, 1083 (W.D. Mo. 1988) (fact that familially related defendants holding significant shares behaved similarly does not warrant finding that they acted as a group under § 13(d) until they later agreed to act in concert).

In light of the foregoing facts and law, the district court's failure to specify which of the § 13(d) activities constituted the purpose of the group was no oversight. The record simply does not support a finding that the parties formed a group *for any of the § 13(d) listed purposes* no later than February 13, 2007. Accordingly, the district court's § 13(d) group ruling should be reversed.

III. The District Court Erred By Entering A Permanent Injunction Broadly Prohibiting Defendants From Violating The Disclosure Requirements Of The 1934 Act With Respect To Any Future Transaction.

Finally, above and beyond its errors in concluding that defendants violated the disclosure requirements of the 1934 Act in the first place, the district court erred by entering a permanent injunction broadly prohibiting defendants from violating those requirements in the future. SPA118-119, 131. Accordingly, whatever the outcome of this appeal with respect to defendants' liability, at the very least this Court should vacate or modify the permanent injunction.

The key point here is that injunctive relief is an extraordinary remedy, and hence the exception, rather than the rule, in our legal system. To obtain such relief, a plaintiff must demonstrate, among other things, that it has no adequate remedy at law, and that injunctive relief is necessary to prevent irreparable injury. *See, e.g.*, *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 57, 61 (1975). It is certainly not the rule that every time a court adjudicates a violation of law, the court is free to permanently enjoin the defendant from violating that law in the future. *See, e.g.*, *id.* at 60-61; *see also NLRB v. Express Publ'g Co.*, 312 U.S. 426, 435-36 (1941) ("[T]he mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged."); *SEC v. Bausch & Lomb, Inc.*, 565 F.2d 8, 18 (2d Cir. 1977) ("[I]llegal activity, without more, does not automatically justify the issuance of an injunction.") (internal quotation omitted). Rather, permanent injunctions against future violations of law are warranted only insofar, and to the extent, that the plaintiff shows that "there exists some cognizable danger of recurrent violation." *Rondeau*, 422 U.S. at 59 (internal quotation omitted).

Here, CSX did not remotely prove that defendants' alleged disclosure violations threatened any future irreparable injury that warranted permanent injunctive relief. The district court's finding of "a substantial likelihood of future violations," SPA117, is based on the court's novel resolution of what are at best close calls of law, and hence provides no sound basis for such an extraordinary remedy. *See, e.g.,* *SEC v. Steadman*, 967 F.2d 636, 648 (D.C. Cir. 1992) ("The violations committed by the appellants in this case do not provide an adequate predicate for granting an injunction" because "[n]one of these violations was flagrant or deliberate, and most were 'merely technical in nature.'"). Especially given that (as the district court specifically found, SPA83-85) defendants made no materially misleading statements or omissions in their Schedules 13D, and the SEC stands ready to redress any future violations of the disclosure requirements of the 1934 Act, there is no need for a court to grant permanent injunctive relief against any future violation of those requirements. *See, e.g.*, *Rondeau*, 422 U.S. at 60-61. And because (as this case, if anything, shows) those requirements are not always crystal clear, but rather are highly susceptible to second-guessing and 20/20 hindsight, defendants should not be forced to labor under the peril not only of an ordinary sanction but also of a contempt sanction, especially in the context of an acrimonious proxy fight.

And in any event, the blanket permanent injunction entered here is wildly overbroad on its face. By its terms, it prohibits "[d]efendants, their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with any of the foregoing who receive actual notice of this injunction by personal service or otherwise … from violating Section 13(d) of the Securities Exchange Act of 1934 and Regulation 13D thereunder." SPA131 ¶ 1 (internal citations omitted). In other words, the injunction is not even limited to future violations of law *with respect to the current CSX proxy fight, or even with respect to CSX shares more generally*. The law, however, requires such a limitation. A court's power to award injunctive relief is "limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis v. Casey*, 518 U.S. 343, 357 (1996); *see also Liberty Nat'l Ins. Holding Co. v. Charter Co.*, 734 F.2d 545, 560 n.32 (11th Cir. 1984) ("Traditional equity principles are that the remedy should be no broader than that necessary to right the wrong.").[5] Because the injury

[5] Cases in which the SEC, as opposed to a private litigant, has sought and obtained a blanket injunction prohibiting a party from future violations of the securities laws, *see, e.g., SEC v. Patel*, 61 F.3d 137 (2d Cir. 1995), are inapposite. As the district court recognized, "when the SEC appears before the Court seeking an injunction against further violations, it appears not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws." SPA116 (internal quotation and ellipsis omitted). A private party like CSX does not stand in a similar position, and thus
(Continued…)

at issue here is limited to the context of the CSX proxy fight, SPA115-18, the permanent injunction must, at a minimum, be tailored to provide relief to CSX in that context, and the court may not use any such injury as a springboard to enjoin conduct that might yield *other* potential injuries not adjudicated in this proceeding. *See*, *e.g.*, *Express Publ'g*, 312 U.S. at 435-36. Accordingly, at the very least, this Court should vacate or modify the permanent injunction.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment and the permanent injunction.

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may not seek redress for potential violations of law that do not cause it any injury.

July 3, 2008 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). The text of this brief was prepared in Century Schoolbook 14 point font, and according to Microsoft Word's word count feature, consists of 13,980 words, excluding its tables of contents and authorities and certificates of compliance and service.

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2008, I caused two true and true and correct copies of the foregoing brief to be served by Federal Express, and one electronic copy of the foregoing brief to be served by e-mail, on the following counsel:

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ANTI-VIRUS CERTIFICATION FORM

Pursuant to Second Circuit Interim Local Rule 25(a)6, I hereby certify that I have scanned the PDF version of the attached document submitted in this case as an attachment to the e-mail to civilcases@ca2.uscourts.gov for any virus, using McAfee VirusScan Enterprise & Anti Spyware Module 8.5.0i, and that no virus was detected.

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