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)

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INTRODUCTION

CSX appears to believe that it can prevail on appeal by simply repeating the mantra that "[d]efendants' appeal ignores the district court's findings of fact." CSX Resp. Br. 3; *see also id.* at 1, 7, 9, 24, 48, 52. CSX is wrong. This appeal is about the *law*, not the *facts*. Even accepting all of the findings of fact, the judgment below cannot stand as a matter of law, and CSX cannot avoid engaging defendants on the law by simply harping on the facts. What CSX is doing, without any trace of subtlety, is trying to paint defendants as bad actors unworthy of prevailing on appeal. CSX even goes so far as to compare defendants to "the devil." *Id.* at 6.

But name-calling is no substitute for legal analysis, and the latter is in conspicuously short supply in CSX's brief. Beyond trying to reframe defendants' legal arguments in factual terms, CSX does not have much to say; indeed, most of its key responses to defendants' legal arguments are buried in footnotes. Because the district court erred as a matter of law by holding that defendants violated the Williams Act, this Court should reverse the judgment.

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.

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

CSX attempts to defend the district court's novel interpretation of Rule 13d-3(b) by attacking the SEC's contrary interpretation of its own Rule as "just wrong." CSX Resp. Br. 37. According to CSX, "Rule 13d-3(b) is *unambiguous*" and hence no deference to the SEC is warranted. *Id.* at 39 n.20 (emphasis added). But CSX's own *amici* do not agree with CSX's interpretation of the Rule, and defend the interpretation advanced by the SEC's Corporate Finance Division in the letter filed below. *See* Br. of Former SEC Commissioners & Officials & Professors as *Amici Curiae* ("*Amici* Profs. Br.") 19-23. Because CSX and its *amici* cannot agree on the scope of Rule 13d-3(b), their respective views are addressed in turn below.

1. CSX Misinterprets Rule 13d-3(b).

CSX argues that Rule 13d-3(b) covers any transaction with either the purpose or the effect of preventing the vesting of beneficial ownership. *See* CSX Resp. Br. 36. Thus, according to CSX, the question

whether the Rule applies here "is resolved by the district court's finding that defendants 'created and used the [swaps] with the … *effect* of preventing the vesting of beneficial ownership.'" *Id.* (quoting SPA76; emphasis added; ellipsis in original).

It is hard to overstate the radical implications of that proposition for both the law and the financial markets. All swaps that reference securities can be said to have the *effect* of preventing the vesting of beneficial ownership of those securities, because the long party to a swap does not buy the referenced securities. Not even the district court embraced such a sweeping interpretation of Rule 13d-3(b). Instead, the court held only that TCI violated the Rule because it "entered into the [swaps] rather than buying stock for the *purpose*, perhaps among others, of avoiding the disclosure requirements of Section 13(d) by preventing the vesting of beneficial ownership." SPA71-72 (emphasis added). The court thus implicitly recognized, as the SEC *amicus* letter explains, JA5550, that Rule 13d-3(b) is not a strict liability provision: there can be no "plan or scheme to evade the reporting requirements" of § 13(d) unless a party *intends* to do so.

But, as the SEC *amicus* letter points out, a desire to avoid the reporting requirements of § 13(d) is not sufficient to trigger liability under Rule 13d-3(b). *Id.* CSX's *amici* endorse that position. *See Amici* Profs. Br. 19 (stating that the SEC *amicus* letter is "plainly right" on this score). Rather, it is only where a party enters into a swap "with the intent to create the false appearance of non-ownership of a security" that the Rule is triggered. JA5550.

Thus, CSX goes well beyond the position not only of the SEC but also of the district court by arguing that "effect" alone, regardless of intent, is sufficient to trigger Rule 13d-3(b). CSX, however, argues that the SEC's interpretation of Rule 13d-3(b) is not entitled to deference because that Rule is "unambiguous" and the SEC has simply "misread" it. CSX Resp. Br. 38, 39 n.20. CSX is wrong.

As a threshold matter, it is odd for CSX to argue that Rule 13d-3(b) is "unambiguous," and that "this case is about deliberate violations of the law's *clear requirements*," *id.* at 4 (emphasis added), when CSX is advancing an interpretation of the Rule that neither the SEC nor the district court (nor, as far as defendants are aware, any other entity) has ever adopted. It is certainly reasonable for the SEC to have concluded

that "a plan or scheme to evade the reporting requirements" of § 13(d) requires *intent* to evade. JA5550. And it is equally reasonable for the SEC to have concluded that such evasive intent is not satisfied merely by a desire to avoid the reporting requirements of § 13(d), since it is entirely appropriate to arrange transactions to avoid legal or regulatory burdens. *See* Defs.' Br. 35.

CSX then argues that the SEC's interpretation of Rule 13d-3(b) would render that Rule superfluous, because Rule 13d-3(a) already captures all situations of beneficial ownership. CSX Resp. Br. 33-34, 40. As CSX's own *amici* explain, however, Rule 13d-3(b) was enacted "as a backstop" precisely because the drafters of Rule 13d-3(a) were "mindful of human ingenuity in structuring financial transactions," and wanted to ensure that Rule 13d-3(a) left no loopholes. *Amici* Profs. Br. 7; *see also* Defs.' Br. 38. Needless to say, a "backstop" anti-evasion provision does not *expand* the reach of the primary rule it is backstopping; rather, it ensures that parties cannot manipulate superficial forms to escape coverage under the primary rule. Whether a backstop provision actually ends up doing any work depends entirely on

the success of the primary rule in capturing all situations that it was meant to capture.

Given the breadth of Rule 13d-3(a), it would not be surprising if Rule 13d-3(b) had little, if any, work to do. "Beneficial ownership" is itself a concept of constructive ownership that looks beyond formal legal title to the practical indicia of control over stock. As CSX's own *amici* point out, the drafter of the 1934 Act testified before Congress that "beneficial owner" "'is the broadest term you can have.'" *Amici* Profs. Br. 26 n.10 (quoting *Stock Exchange Practices: Hearings Before the Senate Comm. on Banking and Currency*, 73rd Cong., 2d Sess. pt. 15, at 6556 (1934)). If one starts with "the broadest term you can have"—a term that inherently does the work of piercing through legal niceties—it should come as no great surprise that an anti-evasion provision may have limited, if any, practical effect.[1]

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[1] The example provided by the SEC at the time it promulgated Rule 13d-3(b) only confirms this point. In that example, party "X" attempted to "avoi[d] disclosure of his beneficial ownership" by causing ten institutions to purchase shares in a corporation and by executing an irrevocable proxy that would expire in time for X to vote the shares. *See* Adoption of Beneficial Ownership Disclosure Requirements, Exchange Act Release No. 34-13291, 42 Fed. Reg. 12342, 12347 (Mar. 3, 1977). While the SEC explained that X would be "deemed" a beneficial owner

(Continued…)

As defendants have explained, such a "belt and suspenders" approach is not uncommon in the law. *See* Defs.' Br. 38; *see also Ali v. Federal Bureau of Prisons*, 128 S. Ct. 831, 840 (2008) (noting that language is not superfluous where it may have been used "to remove any doubt" about an enactment's scope); *Fort Stewart Schs. v. FLRA*, 495 U.S. 641, 646 (1990) (noting that this "abundance of caution" approach is "venerable enough to have left its mark on legal Latin (*ex abundanti cautela*)"). CSX does not contest this point, but insists in a footnote that individual "word[s]" or even "phrase[s]" in a statute or rule may be redundant, but "not an entire subpart of [a] rule." CSX Resp. Br. 33 n.13. CSX provides no support for that purported distinction, because none exists. For the same reason that Congress and agencies occasionally may use overlapping or redundant words or phrases to prevent a regulatory gap, they may use overlapping or redundant

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of the shares under Rule 13d-3(b), it is plain from the hypothetical that X was also a beneficial owner under Rule 13d-3(a). CSX responds that this example addresses only the "divesting" part of the Rule, not the "preventing the vesting" part. *See* CSX Resp. Br. 34 n.14. But that response misses the point that the very example used by the SEC to illustrate the operation of Rule 13d-3(b) shows that the Rule overlaps largely, if not entirely, with Rule 13d-3(a).

subparts to achieve that same goal. The point here is that the general canon against superfluity cannot possibly bear the dispositive weight that CSX and the district court have sought to foist upon it.[2]

Indeed, as defendants explained in their opening brief, reading Rule 13d-3(b) to extend beyond beneficial ownership would take the Rule beyond the SEC's statutory authority under § 13(d). *See* Defs.' Br. 40-41. In the hierarchy of aids to construction, reading a rule to avoid making it *ultra vires* certainly ranks higher than merely avoiding concerns about possibly rendering one subpart redundant. The district court did not deny that its interpretation took Rule 13d-3(b) beyond the scope of § 13(d); to the contrary, the court insisted that "the SEC … has the power to treat as beneficial ownership a situation that would not fall within the statutory meaning of that term." SPA74. The court said

[2] CSX and its *amici* also argue that Rule 13d-3(b) must extend beyond beneficial ownership because it refers to arrangements that have the purpose or effect of, among other things, "preventing the vesting [of] ... beneficial ownership." *See* CSX Resp. Br. 34; *Amici* Profs. Br. 20-21. But that is simply a variation on the more general superfluity argument addressed in the text, and fails for the same reason: the general canon against superfluity provides no basis for rejecting the SEC's interpretation of its own Rule.

that the SEC could rely instead on its general authority to issue rules and regulations to implement the statute. SPA74-75.

As defendants further explained, the court thereby erred: an agency may not invoke its general authority to implement a statute to extend the statute's substantive scope, and certainly a *court* may not invoke an agency's general authority to implement a statute to extend the statute's substantive scope. *See* Defs.' Br. 40-41. CSX's only response, again relegated to a footnote, is to characterize defendants' argument as "a mis-cite." CSX Resp. Br. 35 n.16. That characterization is incorrect. The district court expressly held that Rule 13d-3(b) covers situations that do not involve "beneficial ownership" within the meaning of § 13(d), and the correctness of that holding is one of the major issues in this appeal. *See* SPA75 ("Rule 13d-3(b) was promulgated to … prevent[] circumvention of Rule 13d-3 … where there is accumulation of securities by any means with a potential shift of corporate control, but *no beneficial ownership*.") (emphasis added); *see also id.* ("Rule 13d-3(b) … is a perfectly appropriate exercise of the Commission's authority even where it reaches arrangements that otherwise would *not amount to beneficial ownership*.") (emphasis

added). CSX may not wish to defend the decision below, but it cannot simply wish that decision away.[3]

Undaunted, CSX attacks the SEC for "rearrang[ing]" the Rule. CSX Resp. Br. 38. According to CSX, no "intent" can be required under Rule 13d-3(b) because that would render superfluous the word "effect." *See id.* The obvious answer to that argument is that the SEC did not "rearrange" anything, and CSX's interpretation would render superfluous the Rule's "as part of a plan or scheme to evade" language. CSX (like the district court) essentially collapses the two parts of the Rule into one by treating any transaction with the purpose or effect of preventing the vesting of beneficial ownership as *itself* a "plan or scheme to evade" disclosure requirements. At the very least, CSX is mistaken to suggest that the Rule is "unambiguous" on this score, CSX Resp. Br. 39 n.20, which means that the SEC's interpretation of its own

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[3] Because the district court, not the SEC, invoked the SEC's statutory authority, any invocation of *Chevron* deference is misplaced. *See* CSX Resp. Br. 35 n.16; *Amici* Profs. Br. 26. Such deference flows from the presumption that Congress delegated authority to construe ambiguous statutory provisions to the agency charged with implementing the statute. *See Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984). Where a court foists an interpretation on an agency, *Chevron* is not implicated.

Rule, rather than CSX's, is "controlling." *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

Finally, CSX misses the point in responding to defendants' argument that § 3A of the 1934 Act confirms that Rule 13d-3(b) should not be interpreted to cover swaps because § 3A expressly excludes swaps from the definition of "security." According to CSX, "the fact that a swap does not by itself constitute a 'security' for purposes of the Exchange Act is irrelevant," because "deeming" defendants to be beneficial owners of the securities referenced in their swaps does not make the swaps themselves "securities." CSX Resp. Br. 35; *see also* *Amici* Profs. Br. 27 (same). But the point here is that it would be odd, to say the least, for Congress to preclude the SEC from requiring disclosure of swaps directly, and then allow the SEC to require *de facto* disclosure of swaps by requiring disclosure of the referenced shares. Certainly, § 3A supports the SEC's interpretation of Rule 13d-3(b) generally not to require the disclosure of swaps, regardless of whether those swaps prevented the vesting of beneficial ownership. CSX has no answer to this point.

2. CSX's *Amici* Misapply Rule 13d-3(b).

CSX's *amici*[4] take a fundamentally different approach from CSX. Rather than arguing that the SEC's interpretation of the Rule is "just wrong," CSX Resp. Br. 37, they defend that interpretation, and try to reconcile the decision below with the SEC's guidance, *see Amici* Profs. Br. 19-23. The problem with that approach is that the decision below cannot be reconciled with the SEC's guidance.

In particular, the district court based its conclusion that defendants violated Rule 13d-3(b) on the ground that they "entered into

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[4] As a threshold matter, the credibility of the *amicus* brief is open to serious question. Two of the *amici*, Professors Grundfest and Hu, are paid consultants to CSX *in this very case*, and in that capacity drafted arguments presented to the SEC and the district court. *Amici* Profs. Br. i, n.1; *see also* Dist. Ct. Dkt. No. 76 (6/2/08), Ex. B. The *amicus* brief, including its non-exclusive six-factor "test" for analyzing Rule 13d-3(b), is drawn virtually verbatim from their paid work. *Compare Amici* Profs. Br. 3-4, 14-15 with JA5228-30. Their assurance that they have not been "separately compensated" for this brief, *Amici* Profs. Br. i, n.1, misses the point that they cannot possibly claim independence when making arguments bought and paid for by CSX. *See, e.g.*, *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2626 n.17 (2008) ("declin[ing] to rely on" research "funded in part" by a party). To make matters worse, the *amicus* brief announces, without elaboration, that not all *amici* necessarily agree with all arguments in the brief. *See Amici* Profs. Br. 2. That point alone renders the brief useless, since the Court has no way of knowing whether any *amicus* other than CSX's paid consultants actually supports any particular argument.

the [swaps] rather than buying stock for the *purpose*, perhaps among others, of avoiding the disclosure requirements of Section 13(d) by preventing the vesting of beneficial ownership." SPA71-72 (emphasis added). *Amici*, however, agree with the SEC (and defendants) that such a purpose does *not* violate the Rule. *See Amici* Profs. Br. 19.

Amici thus try to come up with another ground to defend the district court's conclusion that defendants violated Rule 13d-3(b). *Amici* propose a non-exclusive six-factor "test" that the district court never purported to apply and that provides no legal guidance whatsoever. *See id.* at 3-4, 14-15. *Amici* make no pretense that this "test" has any applicability beyond the facts of this case; it is nothing but an indeterminate *ad hoc* and *post hoc* attempt to justify the result below. *See id.* at 4 ("[W]e do not suggest that these six factors should be adopted as a formal legal test, or that each of these factors is a necessary element of a violation of Rule 13d-3(b)."); *see also id.* at 15 ("We need not address whether all such conditions must be satisfied …. And … it is not necessary to determine the boundaries of or the interactions among the conditions."). As the Supreme Court has explained, however, "a shifting and highly fact-oriented disposition of

the issue of [liability under the securities laws] … is not a satisfactory basis for a rule of liability imposed on the conduct of business transactions." *Central Bank of Denver N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) (internal quotation omitted). And because the district court did not apply *amici*'s "test," but rather held that a purpose of avoiding disclosure under § 13(d) is sufficient to trigger Rule 13d-3(b), *amici* have no basis for characterizing the decision below as "narrow" and limited to the facts of this case. *Amici* Profs. Br. 15.

Indeed, if anything, *amici*'s approach to Rule 13d-3(b) is closer to the position taken by defendants and the SEC than the position taken by CSX and the district court. Although *amici* insist that the Rule is not limited to beneficial owners of securities, *see id.* at 20-21, 25-26, they assert that TCI violated the Rule by creating the "illusion" that it did not have "effective control over the disposition and voting of a large block of CSX shares," *id.* at 23; *see also id.* at 9 ("[I]f the long party in the swap has effective access to the short party's voting rights when needed, as the District Court found to be the case here, the long party in effect has both economic ownership and voting power."). But if TCI had

"both economic ownership and voting power" over the shares referenced by its swaps, *id.*, it would have been a beneficial owner of those shares under Rule 13d-3(a).

Thus, in the final analysis, *amici*'s defense of the decision below hinges critically on the mistaken factual assumption that TCI had "effective control over the disposition and voting of a large block of CSX shares." *Amici* Profs. Br. 23. Notwithstanding *amici*'s assertion, the district court never "found" that "to be the case here." *Id.* at 9. To the contrary, the court expressly *declined* to find that TCI had control over the voting rights of any of its swap counterparties. *See* SPA62-63. *Amici*'s brief is thus wholly academic, because it is based on a mistaken factual premise.

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

In the alternative, CSX argues that this Court can affirm the district court's beneficial ownership ruling on the ground that TCI violated Rule 13d-3(a). *See* CSX Resp. Br. 41. The district court expressly declined to conclude that TCI had done so. *See* SPA68 ("The Court … does not rule on the legal question whether TCI is a beneficial

owner under Section 13d-3(a).”). CSX’s arguments on this score are unavailing.

As an initial matter, one point can quickly be eliminated. CSX and its *amici* spill much ink attacking “defendants’ argument that holders of cash-settled swaps are *per se* immune from a finding that they are the beneficial owners of the underlying shares.” CSX Resp. Br. 8; *see also Amici* Profs. Br. 10 (“[W]e disagree with Defendants’ categorical argument that an arrangement that involves cash-settled equity swaps cannot under any circumstances confer beneficial ownership under Rule 13d-3(a).”). Defendants never made any such argument. To the contrary, defendants noted only that swaps “generally” do not confer beneficial ownership “*absent a supplemental agreement, understanding, or arrangement*.” Defs.’ Br. 45 (emphasis added). Because no such “supplemental agreement, understanding, or arrangement” existed between TCI and its swap counterparties, TCI was not a beneficial owner of the shares referenced by the swaps.

As noted above, CSX’s *amici* proceed under the mistaken impression that the district court “found” that TCI had control over its swap counterparties’ voting and investment decisions. *Amici* Profs. Br.

9. The court made no such finding, and could have made no such finding on this record. As the SEC explained in its *amicus* letter, "the terms 'voting power' and 'investment power' as used in the Rule … are based on the concept of the *actual authority* to vote or dispose or the *authority 'to direct'* the voting or disposition" of securities. JA5549 (emphasis added).

Not even CSX argues that TCI had actual power or authority to vote or dispose of, or to direct the voting or disposition of, shares held by its swap counterparties. Indeed, it is undisputed that the swaps themselves negated any such power. *See* SPA55. As to power to direct the counterparties' *voting* of shares, the district court was "not persuaded that there was any agreement or understanding" between TCI and any counterparty with respect to voting. SPA62. And as to power to direct the counterparties' *disposition* of shares, the district court found that TCI had no such power. *See* SPA58 ("[T]here is 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."). In the absence of any finding that TCI had the

legally requisite control over its counterparties' voting or disposition of their shares, there is no basis for this Court to conclude that TCI was a "beneficial owner" of the shares under Rule 13d-3(a). Accordingly, this Court is in no position to affirm the judgment on this ground. *See*, *e.g.*, *American Fed. Group, Ltd. v. Rothenberg*, 136 F.3d 897, 911-12 (2d Cir. 1998) (declining to affirm on alternative ground based on "findings and 'near-findings'" and "necessary inferences that the magistrate judge intimated might be drawn"; "to justify even partial affirmance on this alternative basis would require an improper incursion by this court into first-instance fact-finding").[5]

CSX thus seeks to lower the bar by urging a novel interpretation of Rule 13d-3(a), arguing that actual power to direct the voting or disposition of shares is unnecessary and that mere "economic influence" over a counterparty's voting or disposition of shares suffices to confer beneficial ownership under the Rule. *See* CSX Br. 41-44. In particular,

[5] Although the district court stated that it was a "close" question whether there was an agreement between TCI and one particular counterparty, Deutsche Bank, with respect to the voting of the referenced shares, the court declared that "it is unnecessary to make a finding on the point" and declined to do so. SPA62.

CSX contends that, because swap counterparties have an economic incentive to (and frequently do) hedge risk by buying and selling the shares referenced by a swap, TCI thereby "influenced" its counterparties to buy and sell shares when TCI entered into and unwound its swap agreements. *See id.*

That argument fails for the simple reason that any such "economic influence" is insufficient as a matter of law to confer beneficial ownership under Rule 13d-3(a). As an initial matter, the plain terms of Rule 13d-3(a) say nothing about "influence" of any sort. Instead, the Rule speaks of voting and investment "power": the person must have either "the power to vote" or "the power to dispose" of shares, or "the power to direct" another person's voting or disposition. Needless to say, the ability to "influence" another's decisions is a far cry from the power to "direct" another's decisions.

And the sort of "economic influence" that CSX invokes here, which flows from the short parties' independent decision to hedge risk by buying and selling the shares referenced by a swap, is even further afield. *See generally* ISDA/SIFMA *Amicus* Br. 14-25; MFA *Amicus* Br. 3-10. Indeed, the SEC's *amicus* letter could scarcely be clearer on the

point, insisting that "economic or business incentives," standing alone, "are *not* sufficient to create beneficial ownership under Rule 13d-3." JA5549 (emphasis added); *see also id.* (explaining that "the terms 'voting power' and 'investment power' as used in the Rule … are based on the concept of the actual authority to vote or dispose or the authority 'to direct' the voting or disposition," and that accordingly "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."). In other words, a long party's knowledge that a short party will likely buy or sell shares to hedge risk is not the same as "influencing" (much less "controlling") the short party's decision to do so. *See id.* As noted above, the SEC's interpretation of its own Rule is entitled to "controlling" weight. *Auer*, 519 U.S. at 461.

CSX is unable to point to any judicial decisions or SEC rulings that have applied its sweeping "economic influence" theory. It is thus reduced to citing two stray statements, but neither one remotely validates that theory. CSX first points to *SEC v. Drexel Burnham*

Lambert Inc., 837 F. Supp. 587, 607 (S.D.N.Y. 1993), *aff'd sub nom. SEC v. Posner*, 16 F.3d 520 (2d Cir. 1994), where the court concluded that the defendants had violated § 13d by engaging in a stock parking scheme. As noted in defendants' opening brief, parking schemes involve the retention of *actual* disposition and voting power, and therefore do not turn on mere "economic influence." Defs.' Br. 33-34. CSX next points to a 1981 SEC Release, Exchange Act Release No. 34-18114, 46 Fed. Reg. 48,147 (Oct. 1, 1981), which addressed § 16 of the 1934 Act. In the course of addressing the meaning of beneficial ownership under § 16, the SEC stated in a footnote that beneficial ownership under Rule 13d-3(a) "emphasizes the ability to control or influence the voting or disposition of the securities." 46 Fed. Reg. at 48,147 n.17. This passing statement, made in the context of a § 16 discussion, cannot seriously be read as an endorsement of CSX's novel "economic influence" theory, especially given that the SEC expressly rejected that theory in this very case. In the final analysis, CSX's "economic influence" theory proves far too much, and would result in virtually all swaps conferring beneficial ownership of the referenced shares, in contravention of the SEC's

guidance (not to mention the position of CSX's own *amici*, *see Amici* Profs. Br. 8-13).[6]

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 sum and substance of CSX's response to defendants' challenge to the district court's "group" ruling is buried in a footnote. *See* CSX Resp. Br. 23 n.12. Only there does CSX address defendants' argument that the district court failed to find—because the record would not support a finding—that defendants "agreed to act together for the purpose of [1] acquiring, [2] holding, [3] voting or [4] disposing of equity securities," 17 C.F.R. § 240.13d-5(b)(1); *see also* 15 U.S.C. § 78m(d)(3),

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[6] It is worth noting that, although the district court stated that there was "*reason to believe* that TCI was in a *position* to influence the counterparties, especially Deutsche Bank, with respect to the exercise of their voting rights," SPA65 (emphasis added), the court made no finding that TCI in fact exercised any such "influence" over any voting decision. And for good reason: TCI's counterparties testified below that they did not plan to vote their shares to help defendants' slate in the disputed June 25 election. *See* JA548 (Kennedy); 605-06, 614 (Arnone). CSX does not even suggest that any counterparty deviated from those plans. Absent a showing that a counterparty in fact voted (or planned to vote) consistent with TCI's wishes, there is no basis to conclude that TCI had influence (much less the requisite "control") over that party's voting decisions.

no later than February 13, 2007. CSX's arguments on this score are unavailing.

According to CSX, "[t]here is no requirement that courts use statutory incantations in their findings of fact." CSX Resp. Br. 23 n.12. That is true, but irrelevant. Factual findings matter only insofar as they address legally relevant criteria. Here, the law requires a court to find an agreement to act together for one or more specified purposes. While a court need not use any particular "magic words" in setting forth its findings, it cannot conclude that defendants violated the law without finding that they agreed to act together for one or more of the specified purposes.

The cases cited by CSX are entirely consistent with this point. CSX Resp. Br. 23 n.12 (citing *Mobil Shipping & Transp. Co. v. Wonsild Liquid Carriers Ltd.*, 190 F.3d 64 (2d Cir. 1999); *Marziliano v. Heckler*, 728 F.2d 151, 156 (2d Cir. 1984); *Leighton v. One William St. Fund, Inc.*, 343 F.2d 565, 567 (2d Cir. 1965)). These cases stand only for the unremarkable proposition that a district court's failure to make specific findings is harmless if the factual predicate for such findings is undisputed and apparent from the record. *See Mobil*, 190 F.3d at 69;

Marziliano, 728 F.2d at 152; *Leighton*, 343 F.2d at 567. None of those cases remotely suggests that a court may conclude that a defendant violated the law without first resolving a dispute over legally relevant facts.

The district court here never did that. Rather, the court ruled only that defendants "formed a group *with respect to CSX securities*," SPA81 (emphasis added), and "formed a group *regarding CSX*," SPA89 (emphasis added), and had a "common objective," SPA77, no later than February 13, 2007. But it is meaningless to talk about defendants having formed such an amorphous "group"; the only legally relevant questions are whether and when defendants agreed to act together for one or more of the specified purposes. *See*, *e.g.*, *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 124 (2d Cir. 2001) ("[T]he alleged group members need … have combined to further a common objective *regarding one of the just-recited activities*.") (emphasis added); *Corenco Corp. v. Schiavone & Sons, Inc.*, 488 F.2d 207, 217 (2d Cir. 1973) ("[A]bsent an agreement between [defendants] a 'group' would not exist."). Because the district court did not, and could not, find that defendants "agree[d] to act together for the purpose of [1] acquiring,

[2] holding, [3] voting or [4] disposing of" CSX shares no later than February 13, 2007, 17 C.F.R. § 240.13d-5(b)(1); *see also* 15 U.S.C. § 78m(d)(3), its conclusion that defendants violated the law by failing to disclose such an agreement within ten days cannot stand.

Nor can CSX defend that conclusion by simply echoing the district court's legally insufficient generalities about a "group." CSX Resp. Br. 8 ("TCI and 3G … agreed to act together *with respect to CSX*.") (emphasis added). And CSX cannot defend that conclusion by attempting to supply its *own* "findings" that defendants agreed to act together for one or more of the specified purposes. CSX is certainly entitled to its own views, but it is not entitled to pass off those views as the court's factual findings. It is telling that CSX cannot, and does not, cite any finding by the court in support of CSX's assertions that "3G agreed with TCI *not to acquire* any further CSX shares but rather to *hold* their positions steady," *id.* at 19, "TCI and 3G agreed to *increase* their holdings in CSX," *id.*, "TCI and 3G agreed to *acquire more* shares," *id.* at 21, and "3G acquired CSX shares as a result of its coordinated strategy with TCI," *id.* at 22 (emphasis in original). The district court made no such findings, and CSX cannot fill the void with its own facts.

At bottom, what CSX is trying to do here is to turn a "common objective" of TCI and 3G into an "agreement" between TCI and 3G to act together for certain specified purposes. CSX Resp. Br. 15. But a common objective is not the same thing as an agreement. Thus, the fact that the district stated that "'*TCI* embarked on a course designed from the outset to bring about changes at CSX'" and "*3G* was 'interested in a proxy fight right from the outset,'" CSX Resp. Br. 15-16 (quoting SPA18, 32) does not establish that TCI and 3G *agreed* to act together for one or more of the specified purposes. And the fact that both TCI and 3G contacted CSX on May 9, 2007 "to ascertain the outcome of a shareholder vote," CSX Resp. Br. 16 n.7, does not show an agreement between TCI and 3G to act together for one or more of the specified purposes. To the contrary, as the district court explained, *many* investors contacted CSX that day in light of the widely-publicized speech by TCI's Amin the previous day. *See* SPA26-27. Many of the facts that CSX highlights show general interest in CSX by numerous hedge funds, not an agreement between TCI and 3G. *See*, *e.g.*, CSX Resp. Br. 16-17 (noting that the district court found that TCI alerted other hedge funds to TCI's interest in CSX).

Another remarkable aspect of CSX's brief is its lack of attention to dates. Many of CSX's assertions involve conduct *after* February 13, 2007. *See*, *e.g.*, CSX Resp. Br. 17 (discussing conduct on April 3, 2007); *id*. at 19 (discussing conduct on March 29, 2007); *id*. (discussing conduct "[b]etween March 29 and April 18, 2007"); *id*. at 20 (discussing conduct "[a]t the end of the summer of 2007"); *id*. at 21 (discussing conduct "[o]n September 26, [2007]"). But obviously the district court's conclusion that TCI and 3G agreed to act together for one or more of the specified purposes no later than February 13, 2007 must be supported by conduct on or before that date. On that score, both the district court and CSX come up empty: there are no findings, and the record does not support a finding, that defendants agreed to act together for one or more of the specified purposes on or before February 13, 2007. But the dates are important: because CSX apparently seeks to "sterilize" the shares that defendants acquired while in violation of § 13(d), the date on which the alleged violation began matters critically to the number of shares affected by this appeal.[7]

[7] Depending on how this Court resolves the threshold beneficial ownership issue, the dates may become even more critical. Because the (Continued…)

Beyond trying to conjure up factual findings that do not exist, CSX focuses on knocking down straw-man arguments that defendants have not made. Thus, CSX insists that "[t]he formation of a group 'may be formal or informal and may be proved by direct or circumstantial evidence.'" CSX Resp. Br. 10 (quoting *Morales*, 249 F.3d at 124); *see also id.* ("Circumstancial [*sic*] evidence is important."). But defendants have never denied that a court may rely on circumstantial evidence, or look to "the totality of the circumstances," *id.* at 8, *see also id.* at 11-12, to find an agreement to act together for one or more of the specified purposes. The problem here is that the district court made no such finding. And defendants do not contend that there is a "requirement of

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district court's conclusion that defendants formed a disclosure-triggering "group" no later than February 13, 2007 hinges on its antecedent conclusion that TCI was a beneficial owner of the shares referenced by its swaps, this Court could not possibly affirm the judgment if it reverses the beneficial ownership ruling. But for the district court's reliance on the shares referenced by TCI's swaps, defendants did not cross the 5% disclosure threshold until April 10, 2007, *see* JA1352, 1356 (showing that TCI and 3G together held 4.96% of CSX shares as of April 9, 2007, and 5.27% as of market close on April 10, 2007), and thus had no disclosure obligation until at least ten days later, *see* 17 C.F.R. § 240.13d-1(a). The upshot is that this Court must address the beneficial ownership issue regardless of how it resolves the "group" issue.

a specific '*quid pro quo*.'" *Id.* at 12 n.2. But there still must be an "agree[ment] to act together for the purpose of [1] acquiring, [2] holding, [3] voting or [4] disposing of equity securities," 17 C.F.R. § 240.13d-5(b)(1); *see also* 15 U.S.C. § 78m(d)(3). Nor do defendants contend "that there is a '*de minimis*' exception for coordinated purchases." CSX Resp. Br. 12-13. The point is only that courts have refused to infer the requisite coordination for § 13(d) purposes where defendants' overlap in trading has been minimal. *See* Defs.' Br. 61-62.

To the extent that CSX dismisses cases cited by defendants as "irrelevant here in light of the district court's detailed findings," CSX Resp. Br. 12 & n.3, CSX again misses the mark. Those cases are relevant here precisely because they show how other courts, in sharp contrast to the court below, have focused on the legally relevant questions of whether and when defendants agreed to act together for one or more of the specified purposes, not on the vague questions of whether and when defendants formed some kind of "group." Those cases also highlight the danger of basing a "group" ruling on communications regarding a shared interest in a company, given that it is desirable for investors to communicate about their investments. *See*

Defs.' Br. 55-56. There is a real danger that the amorphous "group" standard applied by the district court below will chill precisely such beneficial communications.

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, CSX defends the district court's sweeping injunction against any future violations of § 13(d) by defendants, in this or any other case, on the ground that "[t]he district court had broad discretion to enter an injunction." CSX Resp. Br. 52. Again, CSX is wrong.

As an initial matter, CSX has no answer to the bedrock principle that 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) (same). Under that principle, CSX lacks standing to seek, and the district court lacks power to grant, injunctive relief against conduct that might injure *other* persons not parties to this proceeding. *See, e.g.*, *Lewis*, 518 U.S. at 357-60; *Liberty*, 734 F.2d at 560 n.32. CSX's prediction that "[t]he same incentives that led defendants to violate

Section 13(d) here will apply with equal force in future proxy battles, *whether at CSX or their next target*," CSX Resp. Br. 54 (emphasis added), thus misses the mark. CSX makes no attempt to distinguish *Lewis* and *Liberty* other than to say that they "did not even address the propriety of an injunction against future violations *of the securities laws*," *id.* at 55 n.32 (emphasis added). Putting aside the fact that *Liberty* is indeed a securities case, the key point is that this issue involves the scope of the federal courts' equitable powers, not the securities laws. Thus, at a minimum, the injunction must be modified not to extend "beyond CSX." *Id.* at 54.

But the injunction is flawed even with respect to CSX, because CSX did not prove that defendants' alleged disclosure violations threatened any irreparable injury that warranted permanent injunctive relief. Indeed, the only "irreparable injury" identified by the district court was a potential monetary loss to CSX shareholders. *See* SPA118 (positing that if defendants were to commit future violations of § 13(d), and such violations enabled defendants to achieve control of CSX, then "[r]emaining shareholders … would find themselves with shares in a corporation with a controlling shareholder and thus deprived of the

opportunity to gain a control premium for their shares."). Even assuming *arguendo* that CSX has standing to invoke such an injury to its shareholders, *but see E.ON AG v. Acciona, S.A.*, No. 06-8720, 2007 WL 316874, at *10 (S.D.N.Y. Feb. 5, 2007) ("[The issuer] definitely does not have standing to bring an action for damages on behalf of shareholders."), the fact remains that damages under § 18(a) of the 1934 Act are an adequate remedy at law for the loss of a control premium, *see, e.g., Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 60 (1975). Contrary to the district court's assertion that it would be "impossible to determine [damages] with any accuracy," SPA118, the very premise of § 18(a) is that damages *can* be determined where sale price was affected by a false or misleading filing. Absent a showing of irreparable injury that cannot be remedied at law, the district court was not entitled to grant injunctive relief, and its injunction must fall. *See, e.g.*, *Rondeau*, 422 U.S. at 60.

CONCLUSION

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

July 30, 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 6,943 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 30, 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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