08-2899-cv(L)

08-3016-cv(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CSX CORPORATION,

Plaintiff-Appellant-Cross-Appellee,

MICHAEL WARD,

Third-Party-Defendant,

—against—

THE CHILDREN'S INVESTMENT FUND MANAGEMENT (UK) LLP, THE CHILDREN'S INVESTMENT FUND MANAGEMENT (CAYMAN) LTD., THE CHILDREN'S INVESTMENT MASTER FUND, 3G CAPITAL PARTNERS LTD., 3G CAPITAL PARTNERS, L.P., 3G FUND, L.P., CHRISTOPHER HOHN, SNEHAL AMIN, and ALEXANDRE BEHRING, also known as Alexandre Behring Costa,

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

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

RESPONDING BRIEF FOR PLAINTIFF-APPELLANT-CROSS-APPELLEE CSX CORPORATION

CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, New York 10019
(212) 474-1000

Attorneys for Plaintiff-Appellant-Cross-Appellee CSX Corporation

July 18, 2008

Corporate Disclosure Statement

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

Table of Contents

Table of Authorities

Page(s)

Cases

Statutes & Rules

Other Authorities

Reference Conventions

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

"Section 13(d)": 15 U.S.C. § 78m(d)

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

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

Citation Conventions

Parties:

"CSX": CSX Corporation

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

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

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

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

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

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

Record Below:

"A-": Joint Appendix

"DX": Defendants' exhibits

"Staff Letter": June 4, 2008, Letter from B. Breheny, Deputy Director, Division of Corporation Finance of the SEC (the "Staff"), to Judge Kaplan

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

Pleadings:

"CSX Br.": Brief for Plaintiff-Appellant-Cross-Appellee CSX Corporation

"Defs. Br.": Opening Brief of Defendants-Appellees-Cross-Appellants

"Defs. Post-Trial Br.": Defendants' Corrected Post-Trial Reply Brief Relating to the Claims of CSX Corporation

"Defs. SEC Resp.": Defendants' Response to the SEC Amicus Letter

Jurisdictional Statement

CSX incorporates the jurisdictional statement set forth in its Appellant Brief.

Counter-Statement of Issues Presented

1. Whether the district court's findings of fact, that TCI and 3G formed an undisclosed group with respect to CSX securities no later than February 13, 2007, were "clearly erroneous".

2. Whether the district court's findings of fact, that defendants used swap arrangements for the purpose of preventing the vesting of beneficial ownership as part of a plan and scheme to evade the reporting requirements of the securities laws, were "clearly erroneous".

3. Whether the district court's findings of fact, that defendants had the ability significantly to influence the investment and voting of the shares referenced in the swaps held by their counterparties, were "clearly erroneous" and whether those findings are sufficient to support a finding that defendants had beneficial ownership over those shares for purposes of Rule 13d-3(a).

4. Whether the district court's findings of fact, that there was a substantial likelihood of future violations by defendants and irreparable harm, were "clearly erroneous" and whether defendants have shown that the district court abused its discretion in enjoining defendants.

Counter-Statement of the Case

CSX incorporates the statement of the case set forth in its Appellant Brief.

Counter-Statement of Facts

The facts of this case are set forth in detail in the district court's opinion and in CSX's Appellant Brief (CSX Br. 4-41), and are further described below.

Standard of Review

The district court's findings of fact may not be set aside unless "clearly erroneous". Fed. R. Civ. P. 52(a)(6); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985); *United States v. Coppola*, 85 F.3d 1015, 1019 (2d Cir. 1996).

The district court's credibility findings "demand[] even greater deference [than factual findings] for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said". *Anderson*, 470 U.S. at 575; *see also United States v. Beverly*, 5 F.3d 633, 642 (2d Cir. 1993).

CSX, as appellee, "is entitled to urge that [the Court] affirm the district court's decision on any basis submitted to that court and supported by the record, including the basis that the court should have made findings favorable to it". *Great Am. Audio Corp. v. Metacom, Inc.*, 938 F.2d 16, 19 (2d Cir. 1991).

The district court's injunction is reviewed for abuse of discretion. *Fair Hous. in Huntington Comm. Inc. v. Town of Huntington*, 316 F.3d 357, 364-65 (2d Cir. 2003).

Summary of the Argument

Defendants' appeal ignores the district court's findings of fact. Defendants do not try to show that the district court's findings of fact were "clearly erroneous". Nor could they. Those findings are supported by "overwhelming" evidence. This appeal represents a reprise of defendants' efforts to avoid responsibility for their misconduct; as the district court found, defendants "continue to maintain that their actions were blameless and, indeed, testified falsely in a number of respects, notably including incredible claims of failed recollection, to avoid responsibility for their actions". (A-5673.) Defendants obviously ignore these credibility findings. Defendants do not try to overcome the "even greater deference" afforded credibility findings. Nor could they. Those findings too were supported by "overwhelming" evidence. Defendants' failure to refute these credibility findings is particularly significant because the district court properly took defendants' false testimony and lack of credibility into account in finding "that the relevant facts are contrary to those asserted by [defendants]". *See United States v. Philatelic Leasing, Ltd.*, 601 F. Supp. 1554, 1565-66 (S.D.N.Y. 1985), *aff'd*, 794 F.2d 781 (2d Cir. 1986). "'[O]ne of the simplest [legal principles] in human experience' is

that when a litigating party resorts to 'falsehood or other fraud' in trying to establish a position, the court may conclude the position to be without merit and that the relevant facts are contrary to those asserted by the party". *Id.* Indeed, "the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies". *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952) (Hand, J.). "[D]ecisions as to whose testimony to credit and which . . . permissible inferences to draw are solely within the province of the trier of fact". *See Cifra v. G.E. Co.*, 252 F.3d 205, 213 (2d Cir. 2001).

Instead of challenging the findings of fact, defendants engage in overblown rhetoric. Thus:

- Far from being an example of how "the American legal profession is to a large extent devoted" to "structur[ing] transactions to avoid legal or regulatory burdens" (Defs. Br. 35-36 (quoting Judge Hand)), this case is about deliberate violations of the law's clear requirements. (A-5673.)
- Far from "trigger[ing] an earthquake in federal securities law and practice" (Defs. Br. 2), this case is about people who deliberately

crossed the line of legality and testified falsely about it (A-5561, A-5673).

- Far from leaving "shareholders in the dark about how to conform their conduct to the law" (Defs. Br. 4), this case involves shareholders who deliberately evaded the clear requirements of the law and lied about it, so much so that the district court entered an injunction to ensure that they were no longer able to operate "in the dark" and would "conform their conduct to the law" going forward (A-5626, A-5671-74).
- Far from being a situation where it is "hard to overstate the practical ramifications" of an approach that allegedly cuts down on communications among shareholders (Defs. Br. 3), this is a case where defendants deliberately failed to make the disclosures to *all* shareholders that the law required. (A-5673.) Indeed, defendants still object to the required legal disclosure precisely because it "would signal to the market that [they 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". (Defs. Br. 12.)
- Contrary to defendants' claim that the district court's group findings will "chill entirely legitimate and beneficial communications among

shareholders" like the information-sharing between and among defendants and their "friends and family" here (Defs. Br. 55), they have it backwards. The district court's group finding resulted from a straightforward application of law to plainly illegitimate conduct.[1] Defendants "secret[ly] accumulate[ed]"a position in CSX "in close coordination with each other" in violation of the "Williams Act, a statute that was enacted to ensure that other shareholders are informed of such accumulations and arrangements". (A-5561.)

- Far from being "the latest flare-up in the perennial conflict between entrenched corporate management and concerned shareholders seeking change" (Defs. Br. 1), this case involves defendants' possibly successful tactics to steal an election and subsequent unsuccessful cover-up. (A-5561, A-5634, A-5673-74.)

This rhetoric shows that although the devil can cite scriptures for his purpose, defendants have cited the wrong "scriptures". Judge Hand was not a fan of liars. Judge Hand's scripture would teach defendants that false denials, "uttered

[1] The cases that defendants cite address nothing more than the ability of shareholders "to discuss preliminarily the possibility of entering into agreements" before forming a group within the meaning of Rule 13d-5. *Lane Bryant, Inc. v. Hatleigh Corp.*, No. 80 Civ. 1617, 1980 WL 1412, at *1 (S.D.N.Y. June 9, 1980); *see also Pantry Pride, Inc. v. Rooney*, 598 F. Supp. 891, 900 (S.D.N.Y. 1984).

with such hesitation, discomfort, arrogance or defiance, as to give assurance that [they were] fabricating", and with a strong "motive to deny", gave "no alternative but to assume the truth of what [they] denie[d]." *Dyer*, 201 F.2d at 269. Indeed, defendants' citation of Judge Hand is ironic because in the argument before the district court, we argued that the Court of Judge Hand had not limited the powers of a court of equity to remedy defendants' dishonesty. If we may switch to the words of another New York jurist, although not from this Court, defendants did not even follow "the morals of the marketplace"—"honesty alone"—let alone "a punctilio of an honor the most sensitive". *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928) (Cardozo, J.).

Defendants' rhetoric cannot conceal the fact that defendants do not make any serious challenge to the district court's findings of fact. Where, as here, the trial court's findings of fact and credibility determinations are not challenged on appeal, the appellate court should view those facts as determinative. *Ronan Assocs., Inc. v. Local 94-94A-94B, Int'l Union of Operating Eng'rs, AFL-CIO*, 24 F.3d 447, 449 (2d Cir. 1994); *see also Sea-Land Serv., Inc. v. Aetna Ins. Co.*, 545 F.2d 1313, 1316 (2d Cir. 1976).

So we now turn to the "legal" arguments defendants make to try to avoid liability and responsibility. Each of them is without merit.

First, defendants ignore the district court's lengthy opinion when they argue that the district court reasoned "backwards" from the ultimate formal group agreement entered into in December 2007. (Defs. Br. 59-60.) The district court looked to the totality of the circumstances, as required by *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115 (2d Cir. 2001), in making findings that TCI and 3G had agreed to act together with respect to CSX over 10 months before their disclosure. *See infra* Part I.

Second, defendants ignored the text of Rule 13d-3(b) in arguing that they cannot be found to be beneficial owners despite the overwhelming evidence, including the court's credibility findings, that supported the district court's finding that they acted with the "purpose or effect of . . . preventing the vesting of . . . beneficial ownership as part of a plan or scheme to evade the reporting requirements". Defendants incorrectly argue that Rule 13d-3(b) cannot apply to persons who are not already beneficial owners under Rule 13d-3(a). *See infra* Part II.

Third, defendants ignore the record evidence on what would support a finding that they were beneficial owners under Rule 13d-3(a). That record evidence disposes of 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 because "economic or business incentives, standing alone, are not sufficient

to create beneficial ownership under Rule 13d-3". (Defs. Br. 48.) The record here does not involve "standing alone". Defendants again fail to address the record before the district court that they had the ability significantly to influence the investment or voting of shares by their swap counterparties. *See infra* Part III.

Fourth, defendants again ignore the facts when they argue that the district court abused its discretion in enjoining them from further violations of the securities laws. The district court applied its broad discretion to issue the injunction based on unchallenged findings of fact, including defendants' false testimony and lack of credibility, that defendants knowingly and deliberately violated the law and that there was a substantial likelihood that they would do so again, causing irreparable harm. *See infra* Part IV.

Argument

I. DEFENDANTS CANNOT SHOW THAT THE DISTRICT COURT'S FINDINGS THAT THEY FORMED AN UNDISCLOSED GROUP WERE CLEARLY ERRONEOUS.

The district court applied well-established law to determine the formation of a "group". *See infra* Part I.A. Far from being "clearly erroneous", the district court's findings of fact are supported by "overwhelming" evidence. *See infra* Part I.B.

A. The District Court Applied Well-Established Law to Determine Group Formation.

Rule 13d-5 provides:

> "[w]hen 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 . . . , as of the date of such agreement, of all equity securities of that issuer beneficially owned by any such persons". 17 C.F.R. § 240.13d-5(b)(1); *see also* 15 U.S.C. § 78m(d)(3).

This enumeration of "acquiring", "holding", "voting", or "disposing of" the securities is disjunctive—the issue is whether two (or more) persons "combined to further a common objective with regard to one of those activities". *Roth v. Jennings*, 489 F.3d 499, 508 (2d Cir. 2007).

The formation of a group "may be formal or informal and may be proved by direct or circumstantial evidence". *Morales*, 249 F.3d at 124; *see also Roth*, 489 F.3d at 508; *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 286 F.3d 613, 617 (2d Cir. 2002). Circumstancial evidence is important because group formation is "'analogous to a charge of conspiracy' in that 'both assert that two or more persons reached an understanding, explicit or tacit, to act in concert to achieve a common goal.'" (A-5633 (quoting *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 95 F. Supp. 2d 169, 176 (S.D.N.Y. 2000), *aff'd*, 286 F.3d at 613).) "[C]onspiracies are by their very nature secretive operations that can hardly ever be proven by direct evidence". (A-5634 n.219 (quoting *Rounseville v.*

Zahl, 13 F.3d 625, 632 (2d Cir. 1994)).) Moreover, group formation may "be formal or informal" because the "Exchange Act is concerned with substance, not incantations and formalities" (A-5562)—the "existence of a group turns on 'whether there is sufficient direct or circumstantial evidence to support the inference of a formal or informal understanding between [members] for the purpose of acquiring, holding, or disposing of securities.'" (A-5633 (quoting *Hallwood*, 286 F.3d at 617).) Thus, group formation depends on actions "regardless of [] attempted disclaimers of the legal effect of such joint action". *Roth*, 489 F.3d at 511; *see also Morales*, 249 F.3d at 129.

"Whether the requisite agreement exists is a question of fact". *Morales*, 249 F.3d at 124. "Each [case] turns on its own facts". (A-5637.) "[A]ll of the facts and circumstances" must be taken into account. *Morales*, 249 F.3d at 127; *see Hallwood*, 286 F.3d at 618 (2d Cir. 2002). The totality of the circumstances relevant under this Court's decisions in *Morales*, *Wellman*, and *Roth* include: the relationships and communications between the persons, common objectives, coordinated communications to advance the common purposes, coordinated investment patterns, shared analyses, coordinated dealings with the issuer and

coordinated proxy efforts. *See, e.g.*, *Morales*, 249 F.3d at 125-28; *Wellman v. Dickinson*, 682 F.2d 355, 358-65 (2d Cir. 1982); *Roth*, 489 F.3d at 512.[2]

Defendants' efforts to evade the totality of "all of the facts and circumstances" (A-5620) analysis fail. *First*, the cases where the district court found that there was not, in fact, a group (Defs. Br. 55-60) are irrelevant here in light of the district court's detailed findings.[3] *Second*, defendants' argument that

---

[2] The agreement does not have to be "on any specific set of terms". *Wellman*, 682 F.2d at 363; *see Morales*, 249 F.3d at 124. Contrary to defendants' argument (Defs. Br. 60-61), there is no requirement of a specific "*quid pro quo*" pursuant to which "3G would vote any shares it acquired in conjunction with TCI". Defendants cite no authority for such a requirement. Nor could they. This Court requires only that TCI and 3G "combined in furtherance of a common objective". *Roth*, 489 F.3d at 508. Here, the undisputed evidence is that defendants planned a proxy contest from the outset and coordinated the votes with their "friends and family". *See infra* Part I.B.

[3] In *Pantry Pride*, 598 F. Supp. at 891, the court found only "preliminary" discussions that involved "lingering indecision and independent goals", which were "inconsistent with any agreement". *Id.* at 900. Similarly, in *Torchmark Corp. v. Bixby*, 708 F. Supp. 1070 (W.D. Mo. 1988), the court found that there was "*no* evidence proving any defendants entered into any expressed or implied agreement with respect to the disposition of their stock prior to the . . . Stockholders' Agreement" and "no evidence of . . . cooperation among the signatories in the submission of these signed statements". *Id.* at 1083 & n.17 (emphasis added). Likewise, in *K-N Energy, Inc. v. Gulf Interstate Co.*, 607 F. Supp. 756 (D. Colo. 1983), the court found no evidence of an agreement beyond the ongoing relationship between the persons and the only alleged pattern of purchases occurred over two years before the litigation. *Id.* at 766. Moreover, in *Hallwood*, Judge Kaplan made "factual finding[s]" that there was no group where each individual began accumulating shares years apart from one another, filed their own Schedule 13D statements over the course of 5 years, with evidence of only one "burst" of coordinated purchases during one week. 286 F.3d at 616-18.

there is a "*de minimis*" exception for coordinated purchases (Defs. Br. 61-62) is wrong.[4] Such an exception is inconsistent with *Morales*'s totality of the circumstances test. Not only is a coordinated pattern of purchases not a requirement (although it is overwhelmingly satisfied here[5]), but *Morales* itself shows that the pattern does not have to be absolutely coordinated. *Morales*, 249 F.3d at 127.[6]

---

[4] The cases defendants cite (Defs. Br. 61-62) do not even address *de minimis* purchases, let alone an exception for such purchases. These cases simply illustrate that the totality of the circumstances does not always show an undisclosed group. In *meVC Draper Fisher Jurvetson Fund I, Inc. v. Millenium Partners, L.P.*, 260 F. Supp. 2d 616 (S.D.N.Y. 2003), the court found no group where communications between the alleged group members were "sporadic at best" and "consisted of general statements in support of [defendant's] various efforts against MVC's board", and the only evidence of a "so-called pattern of alternating stock purchases" was the purchase by one defendant of "a mere 0.06%" of the company's stock and none by the other defendant. *Id.* at 631-33 & n.28. Similarly, in *Log On America, Inc. v. Promethean Asset Mgmt., L.L.C.*, 223 F. Supp. 2d 435, 448-49 (S.D.N.Y. 2001), the court declined to find a group based on allegations that defendants had done business together in the past and used the same law firm for representation where there were no other "interrelationships, contracts, alliances, meetings, agreements, coordinated activity, or understandings between or among any of the defendants".

[5] The district court found that TCI and 3G engaged in large-scale coordinated purchases between March 29 and April 18, 2007. (A-5596-97.)

[6] Defendants have also forgotten that group members "must hold beneficial ownership of the shares of the [issuer] prior to becoming a section 13(d) group member". *Rosenberg v. XM Ventures*, 274 F.3d 137, 146-47 (3d Cir. 2001) (citing *Morales*, 249 F.3d at 123, *Wellman*, 682 F.2d at 363).

B. The Record Overwhelmingly Supports the District Court's Findings of Fact of a Group Formation.

The district court analyzed the totality of the *Morales* and *Wellman* factors, "including the existing relationship, the admitted exchanges of views and information regarding CSX, 3G's striking patterns of share purchases immediately following meetings with Hohn and Amin, and the parallel proxy fight preparations" (A-5635-36). *See Morales*, 249 F.3d at 125-28; *Wellman*, 628 F.2d at 362-65. The district court held that this evidence "quite persuasively demonstrates that [defendants] formed a group many months before they filed the necessary disclosure statement". (A-5562.)

The evidence in part was circumstantial "as in virtually all such cases". (A-5562.) Indeed, "[t]he likelihood that any agreement in this case would be proved, if at all, only circumstantially is perhaps greater than usual because the parties went to considerable lengths to cover their tracks". (A-5634.) Moreover, the district court took into account the repeated false testimony and lack of credibility of defendants and drew inferences in making its findings based on the totality of the circumstances. *See supra* at 3-4.

Defendants' response is only that the district court reached its group finding by reasoning "backwards" from the fact that a group ultimately was formed. (Defs. Br. 59-60.) Defendants are wrong. Even though the ultimate group formation can "shed light backwards in time" to support a finding of earlier group

formation, *Morales*, 249 F.3d at 127, that is not what the district court did. The record and the district court's credibility findings overwhelmingly support the court's finding that defendants formed a group no later than February 13, 2007. Indeed, the district court devoted dozens of pages of findings to show in detail the facts of defendants' group formation. (A-5573-600, 5632-37; *see* CSX Br. 13-41.)

In fact, TCI and 3G had a long-standing relationship; communicated regularly about CSX; shared a common objective to take control of CSX; coordinated their "parallel proxy fight preparations" in furtherance of that objective; and engaged in a "striking pattern" of coordinated share purchases. (A-5635-36.)

TCI and 3G had a preexisting relationship, and Hohn and Behring spoke at least once a month. (A-304-05.) Indeed, TCI and 3G were in constant contact throughout 2007. (*E.g.*, A-1004-05, A-303.) TCI and 3G exchanged and commented on each others' proprietary financial models and operations analyses of CSX (*e.g.*, A-362, A-303), eventually creating parallel models with activist scenarios for CSX (A-1944-45, A-2822-913).

TCI and 3G had a common objective from the outset, namely to take control of CSX. (A-5673-75.) The district court found that "TCI embarked on a course designed from the outset to bring about changes at CSX" (A-5574) and "was determined to force changes in CSX's policies and, if need be, to bring about a

change in control" (A-5581 n.49).[7] Likewise, 3G was "interest[ed] in a proxy fight right from the outset". (A-5588.)

To coordinate their efforts to take control, defendants, starting in February 2007, coordinated solicitation of support from friendly hedge funds by tipping them to their investments in CSX in "an effort to steer CSX shares into the hands of like-minded associates". (A-5578, A-5635.) 3G discussed CSX with "multiple funds" or "[t]ens" of funds during the course of 2007. (A-1021; *see also* A-1022, A-756-57.) The court found that "it is likely that TCI made similar approaches" to various hedge funds in addition to 3G. (A-5578.) The court rejected Hohn's testimony that "[w]e are very careful not to ever tip another investor as to whether we are going to increase our stake in a company or not, because that would disadvantage our investors". (A-5555.) In part because of the court's "assessment of Hohn's credibility", the court found that Hohn "suggested, in one way or another, that [other hedge funds] buy CSX shares and alerted them to the fact that CSX had become a TCI target".[8] (A-5578.) This solicitation was done to

[7] TCI and 3G coordinated their contacts with CSX. For example, on May 9, 2007, TCI contacted CSX to ascertain the outcome of a shareholder vote, taken at the annual meeting on May 2. (A-5582-83.) On the same day, 3G also contacted CSX to find out the results. (A-5590.)

[8] Likewise, the district court found that Hohn testified falsely that, "while he told another hedge fund that was not an investor in TCI . . . to buy CSX stock, he never recommended CSX to 3G, which is an investor in TCI". (A-5556.)

coordinate the *voting* of shares at the proxy contest they were planning together. (A-5578, A-5588.)

TCI acquired physical shares after making an HSR filing only "to place more pressure on the company and to lay the groundwork for a proxy fight". (A-5578.) Before 3G bought a single share, a 3G employee informed Behring that 3G had missed the deadline to submit board nominations for CSX's 2007 annual meeting, which demonstrates that interest. (A-5588.) The court found that 3G's denial of that interest was "not credible" (A-5588 n.77) and rejected Behring's testimony that the communication about the deadline was just "part of [the] normal due diligence on any investment [3G] make[s]". (A-5555.) On April 3, 2007, just as TCI began purchasing shares, 3G examined shareholder voting patterns with respect to the upcoming 2007 CSX annual meeting. (A-327-28.) The court rejected Behring's testimony that 3G was not yet "giving serious consideration to an activist scenario" at that time. (A-5555.)

TCI and 3G coordinated their purchases and sales.[9] As a result of their close relationship, Hohn and Behring spoke "in January and February" 2007 about TCI's

[9] The district court found that Hohn's testimony that TCI and 3G never discussed their respective purchases of CSX stock and Amin's testimony that he never discussed, in any of his meetings with Behring, the subject of buying or selling CSX stock or acquiring swap positions, were not credible. (A-5555, A-5556.).

investment in CSX. (A-340.) TCI began discussing with 3G at least the approximate size of TCI's investment in CSX. (A-5594, A-5596, A-343-44.) Shortly after the initial discussions, 3G went on a CSX stock purchasing spree, buying approximately 8.3 million shares. (A-5595.) The district court rejected Behring's testimony that he did not have conversations with Hohn at the time 3G began making purchases of CSX stock (A-5553), and Hohn's testimony that he never discussed with Behring whether TCI was going to purchase more shares of CSX. (A-5555.)

Shortly after 3G's initial purchases, Hohn called Behring to discuss the "excitement in the stock" resulting from 3G's unusual trading activity. (A-5595-96.) Hohn admitted he had a discussion with Behring, but denied it related to CSX. (A-5595.) The district court found that Hohn's denial "that his interest in discussing his 'friend alex' with Amin, or his conversation with Behring that occurred [on or about February 13, 2007] related to CDS [credit default swap] activity in CSX" was "not credible". (A-5595-96.) Hohn's testimony was "undermined by his deposition testimony, in which he claimed that he did not know that 'friend alex of Brazil'" was Behring.[10] (A-5595-96 & n.111.)

[10] The court rejected Hohn's further testimony that the first sentence of the February 13 email relating to the discussion between Hohn and Behring refers to CSX, but the second sentence ("I want to also discuss our friend alex of Brazil") does not. (A-5555.) Indeed, the court stated that "[w]hat makes the least sense of

Immediately after this discussion, 3G ceased purchasing CSX stock for more than a month. Thus, 3G agreed with TCI *not to acquire* any further CSX shares but rather to *hold* their positions steady.

TCI and 3G agreed to *increase* their holdings in CSX at a meeting on March 29, 2007. 3G began purchasing CSX stock again only after a meeting between Behring and Amin at which they discussed "the fundamental case for CSX". (A-5596-97, A-1940.) The district court found that Amin and Behring "both testified, unpersuasively, that they did not discuss [at this meeting] their respective holdings in CSX" and the fact that TCI was about to buy shares of CSX. (A-5596-97, A-5556.) Both Amin and Behring "claimed not to recall attending that meeting", although Behring finally admitted that he could have met with Amin, and Amin finally admitted that he had no reason to believe the meeting did not occur. (A-5596-97 & n.114.)

Immediately following that meeting, TCI and 3G *both acquired* CSX shares. Between March 29 and April 18, 2007, 3G purchased 11.1 million shares, and TCI increased its net exposure to CSX by approximately 4.6 million shares in addition to converting swaps referencing approximately 13 million shares into physical CSX shares. (A-5597, A-1356, A-3237.) Indeed, by April 18, 3G reached 4.43

---

that e-mail is [Hohn's] attempt to explain it away on this witness stand". (6/9/08 Hr'g 56:4-5.)

percent of CSX's then-outstanding shares, and TCI reached 4.02 percent in physical shares, each just below the reporting requirement threshold. (A-1352, A-1356.) This further *acquisition* of CSX stock was not coincidence; it was a result of the meeting between Amin and Behring on March 29 at which investment in CSX was explicitly discussed and agreed to.

At the end of the summer of 2007, as a result of shared concerns, TCI and 3G both *disposed* of some of their CSX shares. In late August and early September, TCI and 3G became concerned about the U.S. economy and the possibility of re-regulation in the rail industry, especially in light of the lack of available proxy strategy options to them at the time. (A-5583, A-5598.) As a result, they coordinated a sell-down of a portion of their positions. (A-5598.) TCI reduced its swap (and total) position in CSX by 1,971,000 shares. (A-3235.) Likewise, 3G sold a net 8,315,171 shares of CSX common stock. (A-5598, A-3237-38.) The district court rejected Behring's testimony that 3G's sales during this time were unrelated to TCI's doubts as to whether it would continue to hold its CSX shares and run a proxy fight. (A-5553.) The district court also rejected defendants' argument that TCI and 3G "diverged sharply in disposing of shares during the time they were supposedly acting as a group". (Defs. Br. 62.) The court held that this "ultimately is unpersuasive for at least two reasons". (A-5636.)

First:

> "[W]hat is most striking about this period is not that the two entities reduced their exposure asymmetrically. It is that 3G began increasing its exposure again less than a week after TCI decided to launch a proxy fight and on precisely the same day that Amin and Behring met – September 26, 2007. In other words, the parties shared misgivings in August-September when they were reducing their positions, but they got back on the track, so to speak, that they had been on previously by late September". (A-5636.)

Second, "even assuming, for the sake of argument, that 3G's August-September sales were, in whole or in part, not within the mutual contemplation of the defendants, that would not necessarily foreclose a finding that they acted as a group". (A-5636.) "Co-conspirators and members of cartels act on their own from time to time". (A-5636.) "'It is not uncommon for members of a . . . conspiracy to cheat on one another occasionally, and evidence of cheating certainly does not, by itself, prevent [proof of] a conspiracy.'" (A-5636-37 n.222 (quoting *United States v. Beaver*, 515 F.3d 730, 739 (7th Cir. 2008)).)

On September 26, TCI and 3G agreed to *acquire more* shares. Shortly after informing TCI's proxy solicitor that they would go forward, TCI met with 3G to discuss CSX.[11] (A-5599, A-307-10, A-380.) "Although both parties den[ied] that

[11] The court found that the meeting took place despite Behring's testimony at deposition that he did not recall the "Amin" entry in his calendar on September 26, 2007. (A-5599, A-2771, A-768.) The district court did "not credit Amin's testimony that they never discussed buying or selling CSX stock" at this meeting (A-5599 n.123, A-5556.)

they discussed anything related to the purchase of CSX common stock, they both admitted that the topic of CSX likely arose and that each knew that the other had an investment position in the company". (A-5599.) Indeed, 3G acquired CSX shares as a result of its coordinated strategy with TCI agreed to at this meeting. Immediately following this meeting, despite having sold down a large portion of its position during the prior few weeks, 3G reversed course and began repurchasing CSX stock, accumulating a total of 16.8 million shares by October 15, 2007. (A-5599.)

To support the proxy solicitation efforts discussed on September 26, TCI and 3G conducted a simultaneous search for nominees to run a dissident slate for CSX's board. They met with their potential candidates on the same day, October 8, 2007, and they discussed those meetings during at least two subsequent meetings between TCI and 3G. (A-5599-600, A-2764, A-2773.) The district court rejected Behring's testimony that he and Hohn did not discuss these meetings with nominees for the CSX Board. (A-5554.)

After this and further coordinated proxy preparations, 3G *acquired* additional blocks of CSX shares for the purpose of *voting* those shares at the proxy contest they were planning all along. (*See* A-5592-93.)

The district court's findings were not based on looking back. Contrary to defendants' argument, forming a group does not depend on their November

negotiations being a sham. (A-5635-37.) Indeed, the court rejected defendants' "protestations" below that they "avoided forming a group by starting conversations by stating that they were not forming a group and by avoiding entry into a written agreement". (A-5562.) The district court instead analyzed the relevant factors and indicia of coordinated activity, and drew inferences based on defendants' lack of credibility. This included false testimony that defendants never discussed purchases or plans to purchase CSX stock at any of those meetings (A-5555, A-5599 n.123, A-5556, A-5596-97), and that 3G's purchases of CSX stock were unrelated to the meetings (A-5553).

This Court, in reviewing the district court's decision, "must examine the record to determine whether sufficient evidence supports an inference that such an agreement or understanding exists". *Morales*, 249 F.3d at 124. This record overwhelmingly supports the district court's findings of fact, which defendants have failed to show were clearly erroneous.[12]

---

[12] The district court found that the record "persuaded [the court] that TCI and 3G formed a group with respect to CSX securities earlier than they claim". (A-5637.) Defendants argue that the district court was required to "specify for which, if any, of the § 13(d) purpose(s) the alleged February 2007 'group' had been formed". (Defs. Br. 56-59.) Defendants cite no authority to require such a further finding. There is no requirement that courts use statutory incantations in their findings of fact. The district court's findings of fact are sufficient to provide the factual basis of the court's decision and are reviewed in the context of the record as a whole. *See, e.g.*, *Mobil Shipping & Transp. Co. v. Wonsild Liquid Carriers Ltd.*, 190 F.3d 64, 69 (2d Cir. 1999); *Marziliano v. Heckler*, 728 F.2d 151,

II. DEFENDANTS CANNOT SHOW THAT THE DISTRICT COURT'S FINDINGS THAT THEY EVADED DISCLOSURE BY USING SWAPS WERE CLEARLY ERRONEOUS.

The district court's findings of fact are supported by "overwhelming" evidence. *See infra* Part II.A. These findings demonstrate that defendants engaged in a plan and scheme to evade the securities laws under the plain language of Rule 13d-3(b). *See infra* Part II.B.

A. The Record Overwhelmingly Supports the District Court's Findings of Fact.

The district court found that defendants "intentionally entered into the [swaps] . . . and thus concealed precisely what Section 13(d) was intended to force into the open" (A-5629), namely to "alert the marketplace to every large, rapid aggregation or accumulation of securities . . . which might represent a potential shift in corporate control". *Treadway Cos., Inc. v. Care Corp.*, 638 F.2d 357, 380 (2d Cir. 1980).

The district court's findings on evasion have overwhelming support in the record:

---

156 (2d Cir. 1984). Since the district court expressly found that defendants knowingly "cross[ed] that line" in this case and tried "formalistic arguments" to avoid responsibility (A-5561), defendants "ha[ve] not been prejudiced". *Leighton v. One William St. Fund, Inc.*, 343 F.2d 565, 567 (2d Cir. 1965).

- TCI admitted that it used swaps to avoid disclosure. For example, TCI's Chief Financial Officer told its board that one of the reasons TCI generally uses swaps is "the ability to purchase without disclosure to the market or the company". (A-5625.)
- TCI admitted that one of its motivations for avoiding disclosure was to avoid paying a higher price for the shares of CSX, which would have been the product of front-running that it expected would occur if its interest in CSX were disclosed to the market generally. (A-5626.) "By concealing its activities, it may avoid other investors bidding up the referenced stock in anticipation of a tender offer or other corporate control contest and thus maximize [TCI's] profit potential". (A-5572.)
- TCI used swaps to acquire a position in CSX that, if held in the form of physical shares, would have triggered a disclosure requirement by December 6, 2006. (A-1238.) On March 30, 2007, before TCI ever began to convert its swaps into CSX shares, TCI owned swaps referencing 14.07 percent of the then-outstanding CSX shares. (A-5580, A-1238.) Thus, TCI created the false appearance of limited exposure to CSX, when it had economic exposure to approximately

15 percent of the outstanding shares of CSX via its stock and swaps. (A-5580.)

- Even when TCI began to acquire physical shares of CSX common stock in April 2007, TCI kept its physical shares below 5 percent so as to avoid the reporting requirements "until it was ready to disclose its position". (A-5626.) 3G did the same. (A-5590.)
- TCI "carefully distributed its swaps among eight counterparties so as to prevent any one of them from acquiring greater than 5 percent of CSX's shares and thus having to disclose its swap agreements with TCI". (A-5586.) TCI even built a margin of error into this concealment—it wanted to "keep the position diversified around each counterparty so no one goes above 4pc to start". (A-1729.) TCI monitored the counterparties to ensure that TCI's position remained opaque to the market (A-5625-26, A-385-86)—TCI "ask[ed] the brokers about their total CSX exposure" because TCI was "concerned about [the banks'] having to file [13D disclosures] at 5%" (A-1705), and discussed the counterparties' filing requirements and positions in CSX, with "[a]ll inquiries . . . on [a] no names basis" (A-1730).
- Even after TCI consolidated its swap position in Deutsche Bank and Citigroup in late 2007, it maintained *de minimis* positions with six

other counterparties, to conceal the identity of its primary counterparties and obscure its position in CSX. (A-5615-16.) "TCI left swaps in each of its six other counterparties to obscure the identities of its principal counterparties". (A-5615 n.170.) TCI "didn't want people to be able to identify who [its] large counterparties were" because if they were identified, that would leave TCI "more susceptible to front-running by other hedge funds or other investors". (A-387-88.)

The district court's control findings were also supported by overwhelming evidence:

- Defendants had control intent from the outset. (A-5673-75, A-5581 n.49, A-5588.)
- Defendants created the false appearance that their stake was different from that of a large shareholder, when in reality they used that stake to attempt to exert control over CSX as if it were a large shareholder. (*See* A-5580.)
- Defendants created the false appearance of passive intent, when in reality, defendants sought widespread change in CSX in almost every conceivable way: conduct an LBO (A-5575-76, A-5579-80) or extraordinary stock repurchase (A-457-58), "[s]eparate the [c]hairman

and CEO roles", "[r]efresh the [b]oard with new independent directors", "[a]llow shareholders to call special shareholder meetings", "[a]lign management compensation with shareholder interests", "[p]rovide a plan to improve operations", "[j]ustify the capital spending plan", "[p]romote open and constructive relations with labor, shippers and shareholders", and "freeze growth investment until the fate of any regulatory legislation becomes more apparent" (A-5585-86).

- Defendants engaged in efforts to influence CSX in a manner consistent with conduct typical of shareholders who hold positions in excess of 5 percent of a registrant's voting equity and are required to file pursuant to Section 13(d). (A-5574-87.) Defendants' investments "would be worthless or, at any rate, less valuable if CSX did not act as TCI thought appropriate. So TCI embarked on a course designed from the outset to bring about changes at CSX". (A-5574.) For example, TCI demanded meetings with management and the board, representing that TCI had a significant stake in the company. (A-5574-75.) TCI pressured the company to engage in a leveraged buyout ("LBO") (A-5575-76, A-5581) or an aggressive share repurchase program (A-5577).

- TCI told CSX that it "owned" 14 percent of CSX, that its swaps could be converted into direct ownership at any time, that there were "no limits" to what it would do if CSX did not acquiesce in TCI's demands, and that it intended to "go to war", to "seek to replace the entire Board as a means to change management", and to "get support from the shareholders in making the changes at CSX". (A-5575, A-5577, A-5580, A-5656 n.282, A-2190, A-2192.) The district court rejected Amin's testimony that he did not say the swaps could be "converted into direct ownership at any time" (A-5575 & n.25) and that he did not tell CSX in February 2007 that TCI "owned" 14 percent of CSX (A-5577 & n.36).
- TCI acquired physical shares after making an HSR filing only "to place more pressure on the company and to lay the groundwork for a proxy fight". (A-5578.) "Certainly there is no persuasive evidence that any economic factor that led TCI to choose swaps in the first place had changed". (A-5581.) Rather, it is "obvious" that "TCI by this time understood that a proxy fight likely would be required to gain control of or substantial influence over CSX", and knew that "[h]olding shares that it could vote directly had an advantage over swaps". (A-5581-82.)

- In April 2007, TCI contacted the CEO of Canadian National Railway Company to see whether "he would be interested in coming in as CEO of CSX". (A-5581.) The district court rejected Amin's testimony that TCI was not looking to have a new CEO for CSX at this time. (A-5556.)
- Defendants nominated a minority slate (only because the advice from their proxy solicitor was that they could not succeed with the control slate that they initially contemplated), but still intend to use that minority slate to obtain effective control. (A-5584, A-2190, A-2193.) "TCI told CSX that it would use this [minority slate] to influence the work of the board". (A-5656.)
- At the January 2008 negotiation between Hohn and Kelly (CSX's head director), Hohn's efforts "were not limited to seating directors on the board" (A-5602)—

> "he demanded that (1) he be able to interview the current directors, dictate which directors the Group's three nominees would replace, and determine which committees they would be seated on, (2) the roles of CEO and chairman be split, (3) the board's size not be increased without approval of the shareholders or 80 percent of the board, and (4) shareholders controlling 10 or 15 percent of the outstanding shares of voting stock be permitted to call a special meeting at any time and for any legally permissible purpose". (A-5602; *see* A-432-33, A-2616.)

- Amin testified that the reason he said in an email that it was "unfortunate[ ]" that Hohn articulated TCI's demands to CSX in writing (A-5602 n.135, A-4331) was because "things like this are better discussed in person" (A-391). The district court found that this testimony, "which borders on the absurd, is patently incredible". (A-5602 n.135; *see* A-5556.)
- Hohn threatened that he would create a dissident board and "make things unpleasant" for Kelly (A-5602); the CEO's future would be "bleak" (A-5602-03); and the Group's directors would decline to provide written consents and otherwise disrupt the operation of the Board (A-433). "The implicit premise underlying Mr. Hohn's threats was that his five nominees would vote together as a bloc". (A-433-34.)

B. The District Court's Findings of Fact Demonstrate that Defendants Were Beneficial Owners Under Rule 13d-3(b).

1. Rule 13d-3(b) Encompasses Defendants' Conduct.

Congress did not define "beneficial ownership" in enacting Section 13(d), but "inten[ded] . . . that the phrase be construed broadly" (A-5608); a "narrow construction of the term 'beneficial ownership' . . . conflicts with the legislative history of Section 13(d)(3)", *Wellman*, 682 F.2d at 365-66. Consistent with that intent, the SEC, pursuant to its broad authority to define terms used in the

Exchange Act, 15 U.S.C. § 78c(b), and the "power to make such rules and regulations as may be necessary or appropriate to implement the provisions of [the Act]", 15 U.S.C. § 78w(a), promulgated Rule 13d-3, "Determination of beneficial owner".

Rule 13d-3**(a)** defines beneficial ownership in terms of voting and investment power over a security. Specifically, Rule 13d-3(a) states,

> "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).

Rule 13d-3**(b)** was adopted to ensure that Rule 13d-3(a) would not be "circumvented by an arrangement to divest a person of beneficial ownership or to prevent the vesting of beneficial ownership as part of a plan or scheme to evade the reporting requirements of section 13(d)". Adoption of Beneficial Ownership Disclosure Requirements, Exchange Act Release No. 34-13291 ("SEC Release No. 34-13291"), 42 Fed. Reg. 12,342, 12,344 (Mar. 3, 1977). Rule 13d-3(b) provides,

> "Any person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement, or device with the purpose or effect of divesting such person of beneficial ownership of a security or preventing the vesting of such beneficial ownership 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).

Defendants' arguments that swaps are not covered by Rule 13d-3**(b)** because it encompasses only sham transactions that conceal ownership of a security already beneficially owned under Rule 13d-3**(a)** (Defs. Br. 29, 33-39) and that conferring beneficial ownership on swapholders exceeds the scope of Section 13(d) (Defs. Br. 36, 39-43) are wrong.

First, Rule 13d-3(a) and Rule 13d-3(b) are independent means of finding beneficial ownership for purposes of Section 13(d). They were not intended to be coextensive.[13] Rule 13d-3(b) by its terms covers instruments *not* covered by 13d-3(a). Rule 13d-3(b) states that a person will be deemed a beneficial owner of a security where he uses a device "with the purpose or effect of divesting . . . or preventing the vesting of such beneficial ownership". 17 C.F.R. § 240.13d-3(b).

[13] Contrary to defendants' argument (Defs. Br. 38), Rule 13d-3(b) was not enacted only as a "belt" to Rule 13d-3(a)'s "suspenders". Defendants state that "[o]ne need look no further than the venerable aiding and abetting statute" as an example of this common "belt and suspenders" approach. (Defs. Br. 38.) Defendants compare Rule 13d-3(b) to Congress's use of two synonyms, "aiding" and "abetting", where one word would suffice, to "err on the side of caution". (Defs. Br. 38.) The use of synonyms like "aiding" and "abetting" does not show that an 83-word subpart of a rule was intentionally drafted and adopted as a redundancy due to some "desire to remove all doubts". (*Id*. at 38-39.) Defendants' cases concern a redundant *word* or, perhaps, a *phrase*, not an entire subpart of rule. *See Gutierrez v. Ada*, 528 U.S. 250, 258 (2000) ("any election"); *Babbitt v. Sweet Home Chapter of Cmtys.*, 515 U.S. 687, 703 (1995) ("harm"); *M'Culloch v. Maryland*, 17 U.S. 316, 420 (1819) ("necessary and proper"). Indeed, the Court in *Babbitt* expressly rejected a reading of a word, "harm", that would render multiple sections of the Endangered Species Act redundant. 515 U.S. at 701.

Not only does "[p]reventing the vesting" mean that beneficial ownership was never acquired, but Rule 13d-3(b) does not even mention "sham transaction". Defendants made up a requirement not in the Rule.[14]

Second, defendants' argument that the Rule exceeds the SEC statutory authority because it would extend Section 13(d) to cover persons who are "concededly *not* [] beneficial owner[s]" (Defs. Br. 36) is just wrong.[15] Section 13(d) did not define beneficial ownership. The SEC promulgated Rule 13d-3 to do so. Rule 13d-3(b) is part of that definition. The argument that the Rule somehow

[14] Defendants argue that an example given by the SEC on the scope of Rule 13d-3(b) shows that the rule is limited to "sham transactions designed to conceal beneficial ownership of securities". (Defs. Br. 33.) Defendants described this example (SEC Release No. 34-13291, 42 Fed. Reg. at 12,347, Section IV, Ex. 8) as "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" through an irrevocable proxy that is set to lapse according to its terms shortly before the election. (Defs. Br. 33-34.) Not only are examples only examples, but this example expressly relates to only a portion of Rule 3(b): a scheme that "divest[s]" beneficial ownership. Defendants' argument that this is an exhaustive portrait of beneficial ownership again reads words, "preventing the vesting", out of Rule 13d-3(b).

[15] Indeed, defendants are arguing in effect that not just one but two parts of the Rule are *ultra vires.* Under defendants' "logic", holders of options could also not be deemed to be beneficial owners for purposes of Section 13(d) pursuant to Rule 13d-3(d)(1) because they do not have Rule 13d-3(a) beneficial ownership of the underlying security until the option is exercised.

goes beyond the scope of Section 13(d) represents a refusal to make sense.[16] Similarly, defendants' argument that application of Rule 13d-3(b) to swapholders conflicts with another provision of the Exchange Act, Section 3A, (Defs. Br. 42-43) is misplaced. The fact that a swap does not itself constitute a "security" for purposes of the Exchange Act is irrelevant.[17] Rule 13d-3(b) expressly applies to an instrument that is not a security, *i.e.* a "contract, arrangement, or device", 17 C.F.R. § 240.13d-3(b), that is used with the purpose or effect of divesting or preventing the vesting of beneficial ownership in a security. Indeed, the SEC's examples of beneficial ownership under Rule 13d-3(a) and Rule 13d-3(b) show

[16] Thus, the SEC acted well within the scope and in line with the congressional intent of Section 13(d). *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973). Defendants' argument that "[t]the district court acknowledged that its interpretation took Rule 13d-3(b) beyond the scope of § 13(d)" (Defs. Br. 40) is a mis-cite. The district court did no such thing. Although the court stated that the SEC had the power to define beneficial ownership more broadly than the statutory meaning of the term (A-5630), it did not hold that the SEC did in fact do so in adopting Rule 13d-3(b) (A-5632).

[17] Defendants' argument (Defs. Br. 42) that under Section 3A of the Exchange Act, "[t]he definition of 'security' in Section 3(a)(10) of [the Exchange Act] does not include any security-based swap agreement" (15 U.S.C. § 78c-1(b)(3)) is irrelevant. The exemption of security-based swap agreements from the definition of "security" has no bearing on defendants' reporting obligations under Section 13(d). Indeed, Section 3A by its terms applies to sections of the Exchange Act directed at "prophylactic measures against fraud, manipulation, or insider trading", 15 U.S.C. § 78c-1(b)(3); Section 13(d) was intended to provide investors with complete information about potential shifts in control.

that a non-security such as an irrevocable proxy can confer beneficial ownership under Rule 13d-3(b). *See* SEC Release No. 34-13291, 42 Fed. Reg. at 12,347, Section IV, Ex. 7-8.

At trial, the disputed issue related to the "purpose or effect" language of the Rule, as there was not any dispute on the other requirements. CSX's argument was that the "effect" of defendants' use of swaps was sufficient for a finding of evasion. We believe that this issue 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". (A-5632.)

Defendants, on the other hand, ignored the "effect" language and argued that "purpose" meant that defendants must be found to have had the sole or dominant purpose to evade their reporting requirements to support a finding of evasion, which they claimed could not be met because they had a "legitimate business purpose" for using swaps. (Defs. Post-Trial Br. 22-24.) The district court rejected defendants' argument, finding that "[a]t a minimum", defendants "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". (A-5627-28.)

The district court's findings of fact regarding evasion are more than sufficient to satisfy the plain meaning of Rule 13d-3(b). "[E]ach of the elements of

Rule 13d-3(b) is satisfied here" (A-5627): defendants "created and used" the swaps, which "undisputed[ly] . . . are contracts" (and non-securities) with "the purpose and effect" of "preventing the vesting of beneficial ownership of CSX shares" (securities) "as part of a plan or scheme to evade the reporting requirements of Section 13(d)". (A-5625-27, A-5632.) Defendants' conduct here—including their repeated false testimony—is precisely the type of conduct that falls within the scope of the anti-evasion provision of Rule 13d-3(b).

2. Defendants Had Beneficial Ownership of the Shares Even Under Their New Post-Trial Argument.

The district court solicited comments from the SEC on the issue of "what mental state is required to establish the existence of a plan or scheme within the meaning of Rule 13d-3(b)". (A-5549.) After the post-trial briefing was complete, the Staff submitted its comments. In those comments, the Staff invented a completely new standard for Rule 13d-3(b), which neither party had advanced at trial and which is just wrong.

The Staff rejected defendants' proposed bad faith and motive standard.[18] The Staff provided a totally new standard, which it acknowledged had never before been advanced by the SEC or the Staff.[19] (A-5550.) This standard then misread the Rule in two ways. *First*, the Staff in effect "rearranged" the Rule by asserting that because the "purpose or effect" language precedes the phrase "as part of scheme to evade", purpose or effect did not have any bearing on how the plan or scheme should be determined. The Staff thus read the "effect" out of the Rule; no "intent" is needed for "effect". Basic principles of statutory construction forbid rearranging or substitution of words in a statute or rule. An interpretation of a statute or rule must be rejected if it "impermissibly rearranges the statutory language". *Limtiaco v. Camacho*, 127 S. Ct. 1413, 1419 (2007). *Second*, the Staff went further in its evisceration of the "purpose or effect" requirement. It inserted words that appear nowhere in Section 13(d) or the Rule, "false appearance".

[18] The Staff made clear that a person need not act in bad faith with the sole or dominant purpose of evading disclosure in order to trigger Rule 13d-3(b). (A-5550.) Moreover, the letter indicates that the use of swaps is not *per se* immune from disclosure under Rule 13d-3(b). (A-5550-51.) The Staff expressly disclaimed that it was considering or commenting on the facts of this case. (A-5548.)

[19] The Staff's advancement of a completely new standard here for evasion may violate the notice and comment rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b); *see Riverkeeper, Inc. v. U.S. Envtl. Prot. Agency*, 475 F.3d 83, 117 (2d Cir. 2007).

It inserted the notion that "generally" there had to be an "intent to enter into an arrangement that creates a false appearance". (A-5550). Interpretations that add or substitute words into the statute or rule are improper; "[i]f Congress had intended to modify those words . . . it would have done so. For the court to add such modifiers would work a significant and unwarranted change in the meaning and consequence of the statute". *In re Coltex Loop Central Three Partners, L.P.*, 138 F.3d 39, 43 (2d Cir. 1998); *see also Aircraft Trading & Servs., Inc. v. Braniff, Inc.*, 819 F.2d 1227, 1231 (2d Cir. 1987). An interpretation of a statute or rule must be rejected where it conflicts with the plain language of the statute or rule. *See, e.g.*, *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 198-99 (2d Cir. 2004).[20]

[20] Defendants argue (Defs. Br. 30)—contrary to the position they took below (Defs. SEC Resp. 4-6)—that the district court erred by failing to follow the Staff Letter's "controlling" interpretation of Rule 13d-3(b). As defendants' cases establish, deference to agency interpretations applies only "[t]o the extent that there is ambiguity [in a statute or rule]". *Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 779-80 (2d Cir. 2002); *see also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 560 (1980). Rule 13d-3(b) is unambiguous and specifically defines the context in which a person will be deemed a beneficial owner and thus, the district court was not required to defer to the Staff. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000). Moreover, *Taylor* applied deference to an agency's "consistent interpretation". 313 F.3d at 779-80. Here, despite the fact that Rule 13d-3(b) was promulgated 30 years ago, this is the first interpretation of the Rule regarding the requisite mental state under Rule 13d-3(b), as the Staff itself recognized. (A-5550.) Moreover, the General Counsel of the SEC here informed the district court that he "recognize[d] that the[] staff views are not accorded the deference that would be accorded the views of the Commission itself". (A-5535.) *Ford Motor* does not support application of controlling deference to the Staff

Defendants now embrace the flaws of the Staff Letter to assert on appeal that Rule 13d-3(b) covers only "sham transactions" that conceal Rule 13d-3(a) beneficial ownership. (Defs. Br. 39.) Their argument that "[u]nless the person is a beneficial owner in the first place . . . the person cannot create a 'false appearance of non-ownership'" (Defs. Br. 29) fails because of the flaws we discussed above. Any interpretation that Rule 13d-3**(b)** can be satisfied only where Rule 13d-3**(a)** is already satisfied would render an entire independent subpart of the Rule duplicative and superfluous.[21]

In any event, even under the erroneous standard advanced by the Staff, the district court's findings show that defendants have "create[d] a false appearance". (A-5550-51.) The district court specifically found that defendants created a series of false appearances with respect to their stake in and intent concerning CSX. (A-5580, A-5585-86.)

Letter, because staff interpretations had been expressly accorded "special status" by the statute at issue there. 444 U.S. at 797 n.9.

[21] The district court properly declined to accept that erroneous position. A court is not required to accept an interpretation that is plainly erroneous or inconsistent with the regulation. *Leonard F. v. Israel Discount Bank of N.Y.*, 199 F.3d 99, 106 (2d Cir. 1999).

III. THIS COURT SHOULD AFFIRM THE JUDGMENT OF THE DISTRICT COURT BECAUSE DEFENDANTS WERE BENEFICIAL OWNERS UNDER RULE 13d-3(a) OF THE SHARES HELD BY SWAP COUNTERPARTIES.

The district court made numerous findings of fact and credibility determinations regarding defendants' ability to influence the investment and voting of the shares referenced by their swaps. *See infra* Part III.A. Based on these findings and the record as a whole, defendants had beneficial ownership of the shares referenced by the swaps under Rule 13d-3(a) and this Court can affirm the district court's judgment on this ground. *See infra* Part III.B.

A. Defendants Had Investment and Voting Power.

The term "beneficial ownership" includes the "ability to control or influence the voting or disposition of the securities". Interpretive Release Applicable to Insider Reporting and Trading, Exchange Act Release No. 34-18114, 46 Fed. Reg. 48147 (Oct. 1, 1981). This beneficial ownership "inquiry focuses on any relationship that, as a factual matter, confers on a person a significant ability to affect how voting power or investment power will be exercised". *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 250 (2d Cir. 1994), *cert. denied*, 513 U.S. 1077 (1995); *see also Calvary Holdings, Inc. v. Chandler*, 948 F.2d 59, 63 (1st Cir. 1991); (A-5611).

The district court found that "[o]n this record, TCI manifestly had the economic ability to cause its short counterparties to *buy* and *sell* the CSX shares".[22] (A-5620 (emphasis added).) Thus:

- "[T]he evidence is overwhelming that [TCI's swap] counterparties in fact hedged the short positions created by the [swaps] with TCI by purchasing shares of CSX common stock" and that "they did so on virtually a share-for-share basis and in each case on the day or the day following the commencement of each swap". (A-5612.)
- "[I]t was inevitable that they would hedge the TCI swaps by purchasing CSX shares" and "TCI knew that the banks would behave in this manner". (A-5612-13 (citing A-1239-44).) The court found that "Amin's testimony that TCI could not and did not assume that each counterparty would hedge the swaps by purchasing a corresponding number of physical shares simply is not credible". (A-5613 n.164; *see also* A-5556.)

[22] As such, defendants had the ability significantly to influence the investment by the counterparties. Rule 13d-3(a) defines beneficial ownership in terms of "investment power, which includes the power to dispose, or to direct the disposition of, such security".

- "TCI patently had the power to cause the counterparties to buy CSX. At the very least, it had the power to influence them to do so".[23] (A-5621.)
- "TCI had the practical ability to cause [counterparties] to sell simply by unwinding the swap transactions". (A-5621.) "With very minor exceptions, whenever TCI terminated a swap, the counterparty sold the same number of physical shares that were referenced in the unwound swap and it did so on the same day that the swap was terminated". (A-5614.) TCI "as a general rule . . . would assume" that the counterparties would sell upon termination of the swaps, and TCI knew it had the right to terminate the swaps at any time. (A-957.)
- Defendants' swaps enabled them to cause a pre-positioning of CSX's shares in a manner that materially facilitated their rapid and low-cost acquisition of a physical position upon the termination of the swaps.

[23] Defendants repeat their erroneous argument that swaps are "analogous" to futures, which they assert do not confer beneficial ownership according to an SEC Q&A. (Defs. Br. 46-47.) This "analog[y]" is misplaced because, as the district court noted (A-5621 n.189), it ignores the important differences between swaps and futures that bear directly upon the rationale for disclosure under Section 13(d). While swaps are privately negotiated contracts of which the "natural consequence" is to hedge with matching physical shares (6/9/08 Hr'g 27:20-23, A-5620-21), futures are standardized publicly traded contracts which are typically not hedged with physical shares. (A-1526-27.)

Defendants were able to concentrate large quantities of CSX stock in the hands of its counterparties and, "when it judge[d] the time to be right, unwind those swaps by acquiring the referenced shares from those counterparties in swiftly consummated private transactions". (A-5573.) They at least had the ability to "afford a ready supply of shares to the market at times and in circumstances effectively chosen and known principally by [them]". (A-5573.)

- This provided TCI with "a real advantage in converting its exposure from swaps to physical shares even if it does not unwind the swaps in kind". (A-5573.) In fact, TCI availed itself of this advantage and purchased large blocks of CSX shares at prices that were very close to the prices obtained by its counterparties on sales of matching shares. (A-1268-71; A-1550-55.)

Moreover, defendants' voting influence over their counterparties indicates beneficial ownership. The "relationship" and "understanding" here went beyond economic incentives.[24] The court found that, although less clear cut than

[24] The economic incentives are compelling. Through their swap arrangements, defendants effectively and foreseeably put the matching shares, and their corresponding voting rights, in the hands of the counterparties, as opposed to the hands of whoever else would have otherwise held the shares. Counterparties have significant economic incentives to vote shares in favor of defendants as they

investment power, "there nevertheless is 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". (A-5621.)

The district court found that "[a]s the likelihood of a proxy fight increased, TCI began to address the matter of its voting power" with respect to its swap counterparties. (A-5586.) TCI "could and at least to some extent did select counterparties by taking [its] business to institutions it thought would be most likely to vote with TCI in a proxy contest". (A-5618-19.)

To ensure the shares referenced by their swaps would be voted in the group's favor, TCI consolidated virtually its entire CSX swap position, representing approximately 11 percent of CSX's then-outstanding shares, in Deutsche Bank and Citigroup. (A-5586, A-1359.) As the district court found, "TCI was in a position to influence the counterparties, especially Deutsche Bank, with respect to the exercise of their voting rights". (A-5621.)[25]

In light of the "understanding" and "relationship" between TCI and Deutsche Bank, TCI concentrated a large portion of its swaps in Deutsche Bank

---

compete for defendants' business, including the lucrative prime brokerage business. (A-1275-76; A-1545-46.)

[25] Amin testified falsely about DX 96 insofar as he did not acknowledge that the voting scenario depicted in that exhibit was one of a number of different scenarios. (A-5556.)

with the expressed hope that Deutsche Bank would vote in its favor.[26] TCI chose Deutsche Bank in part because it thought it would be "helpful that a hedge fund within Deutsche Bank, Austin Friars Capital, also had a proprietary position in CSX". (A-5587.) TCI and Austin Friars had been "working together, at least to some degree, on the CSX project for some time". (A-5587.) TCI admitted that it engaged in active discussions with Austin Friars in an effort to obtain Deutsche Bank's vote with respect to the referenced shares under its swaps. (A-5615-16, A-5556.) TCI knew Deutsche Bank as a whole was "exceptionally receptive, to say the least, to TCI's goals and methods". (A-5587.) Deutsche Bank, one of TCI's prime brokers, actively helped TCI analyze an extraordinary recapitalization of CSX free of charge, presumably with the expectation of being retained for such a transaction. (A-1275-77, A-722.) Amin testified falsely that TCI did not put swaps in Deutsche Bank so that TCI could try to influence them to vote because of the influence of Austin Friars (A-5616 n.173, A-5556), while Hohn testified falsely

[26] TCI's influence on voting was not limited to Deutsche Bank. The remaining counterparties, whom TCI knew would hedge the swaps with physical shares, were also known by TCI to be sympathetic to its voting objectives. (A-5619.) And the very act of placing shares in the hands of the counterparties, some of whom had policies preventing the voting of those shares, took the shares out of the hands of parties who may have voted against TCI. (A-5619.) At the very least, although abstention "would not be as favorable a result as dictating a vote in its favor, it would be better than leaving the votes of those shares to chance". (A-5619.)

that TCI did not solicit Austin Friars' support for TCI's activism campaign (A-5556).

Moreover, surrounding the initial record date, Deutsche Bank recalled large numbers of CSX shares that it had lent out. (A-5615-17.) The court found that defendants' argument that this share movement was not connected to an arrangement between defendants and Deutsche Bank to vote the shares in the Group's favor "falls considerably short". (A-5617.) The court rejected TCI's argument that the receipt of dividends motivated this share movement. (A-5617-18.)

This is exactly the sort of "understanding" or "relationship" that Rule 3d-3(a) was intended to reach.

B. Defendants Failed to Disclose Their Beneficial Ownership of the Shares Referenced in Their Swaps.

The district court considered at length whether the swaps at issue here conferred beneficial ownership in defendants of the referenced shares under Rule 13d-3(a). (A-5611-27.) The court found that there were "persuasive arguments" and "substantial reasons" for concluding that defendants had beneficial ownership under Rule 13d-3**(a)** (A-5562, A-5620), but elected not to decide the issue because it found "overwhelming" evidence that defendants violated Rule 13d-3**(b)** (A-5624-25).

Since the record and the district court's findings of fact, including findings regarding defendants' credibility and repeated false testimony demonstrate that defendants had beneficial ownership of the shares referenced by their swaps under Rule 13d-3(a), this Court could affirm the district court's judgment based on Rule 13d-3**(a)**. *See Great Am. Audio*, 938 F.2d at 19.

Defendants' argument that such findings "represent a sea change in law and policy" that will "trigger[] an earthquake in federal securities law and practice" (Defs. Br. 2-3) is wrong. As the district court found, "the Cassandra-like predictions of dire consequences of holding that TCI has beneficial ownership under Rule 13d-3(a) have been exaggerated" (A-5623):

> "For one thing, there is no reason to believe that there are many situations in which the 5 percent reporting threshold under Section 13(d) would be triggered by such a ruling. The overwhelming majority of swap transactions would proceed as before without any additional Regulation 13D or G reporting requirements. The issue here, moreover, is novel and hardly settled. And markets can well adapt regardless of how it ultimately is resolved".[27] (A-5623.)

[27] The court rejected the "hypothesis that dire consequences will ensue from a determination of beneficial ownership" that was advanced by defendants' expert Frank Partnoy. (A-5623 n.192.) "Having considered Partnoy's positions and Marti Subrahmanyam's responses, the Court believes Partnoy's views are exaggerated and declines to accept them". (A-5623 n.192.) "Partnoy's views in this respect are unpersuasive because his failure to engage with the specific circumstances of this case renders his generalizations suspect". (A-5623 n.192.)

The district court further noted:

> "Indeed, the United Kingdom reportedly now requires disclosure of economic stakes greater than 1 percent in companies involved in takeovers and is considering requiring disclosure at the 3 percent level in other companies, levels lower than would be required to trigger Section 13(d), assuming that the [swaps] here fall within Rule 13d-3(a). Yet there is no reason to believe that the sky has fallen, or is likely to fall, in London".[28] (A-5623.)

IV. DEFENDANTS CANNOT SHOW THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN ENJOINING DEFENDANTS FROM FURTHER VIOLATIONS OF THE SECURITIES LAWS.

The district court found that:

- under "all the circumstances", there was "a substantial likelihood of future violations" (A-5673-74), and that defendants' violations of the securities laws were knowing, deliberate and will be repeated so long as it suits their interests and "they see a sufficient opportunity for profit in doing so" (A-5561);

[28] In November 2007, the securities regulatory body in the United Kingdom, the Financial Services Authority ("FSA"), noted that "[t]he experience of those regulators which have had [swap] disclosure regimes for some time does not suggest that disclosure of [swaps] has had a negative effect on market growth or liquidity", including in Hong Kong, which has an extensive disclosure regime. FSA, *Disclosure of Contracts for Difference, Consultation and draft Handbook text* ¶¶ 4.35, 4.29 (November 12, 2007), *available at* http://www.fsa.gov.uk/pubs/cp/cp07_20.pdf. Indeed, on July 2, 2008, the FSA announced its intention to adopt formal rules requiring public disclosure of swaps over 3 percent. *FSA, Policy Update on Disclosure of Contracts for Difference (CfDs)* at 2 (July 2, 2008), *available at* http://www.fsa.gov.uk/pubs/cp/cpo07_20_update.pdf.

- defendants' violations "were not products of ignorance". (A-5673.) "TCI deliberately evaded disclosure obligations" and that "defendants were more than cognizant of the obligation to file promptly upon forming a group and, in this Court's view, knew full well, or recklessly disregarded the substantial likelihood, that they had formed a group, this notwithstanding Hohn's incantations and the lack of a formal written agreement" (A-5673);
- there is "a substantial likelihood that the defendants would craft a new strategy for control without regard to their disclosure obligations" (A-5673-74);
- defendants "continue[d] to maintain that their actions were blameless and, indeed, testified falsely in a number of respects, notably including incredible claims of failed recollection, to avoid responsibility for their actions" (A-5673);
- defendants' flagrant and egregious violations, coupled with their willingness to cover up the truth, are "highly suggestive" that future violations will occur in the absence of the district court's injunction, *see United States v. Carson*, 52 F.3d 1173, 1184 (2d Cir. 1995);[29]

[29] The inquiry focuses on whether there is "'a reasonable likelihood' of future violations". *SEC v. Shapiro*, 494 F.2d 1301, 1308 (2d Cir. 1974); *see also*

- CSX "demonstrate[d] a threat of irreparable injury to the interests which Section 13(d) seeks to protect" in the absence of an injunction (A-5672, A-5674);
- "the legal remedy, if any, manifestly would be inadequate because it would be impossible to determine with any accuracy the price that the remaining shareholders could have realized if th[e] fact that defendants were in the process of obtaining working control" had been known to the market. (A-5674.) The remedy of "corrective disclosure could not remedy that harm because it would come too late". (A-5674.) In addition to coming "too late", corrective disclosure also may be "too little", as defendants' SEC filings in this case demonstrate. Defendants' belated filing of their Schedule 13D disclosed only what was "convenient" (A-5673), and was timed to "ambush" CSX (A-5572); and

---

Wininger v. SI Mgmt. L.P., 33 F. Supp. 2d 838, 847 (N.D. Cal. 1998) (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 635 (1953)). Moreover, a "district court has broad discretion to enjoin possible future violations of law where past violations have been shown . . . . Courts are free to assume that past misconduct is highly suggestive of the likelihood of future violations". *Carson*, 52 F.3d at 1183-84.

- defendants' Schedule 13D and their proxy statement on Schedule 14A "in fact w[ere] misleading", but the district court concluded that those failures to disclose were not material as a matter of law. (A-5639.)

Defendants do not even try to show that these findings were clearly erroneous. Rather, they conclusorily state that "CSX did not remotely prove that defendants' alleged disclosure violations threatened any future irreparable injury that warranted permanent injunctive relief". (Defs. Br. 65.) The district court specifically found, however, that such harm exists. (A-5674.) The incentives for TCI and 3G to accumulate shares to gain an advantage over other shareholders and management remain. While TCI and 3G have accumulated a significant stake in the company, the battle for control may not be over, given the indeterminate results of the June 25 shareholder election and TCI's threats to unseat the entire CSX board and replace management. TCI and 3G may continue to secretly amass CSX shares through the use of swaps, secure in the knowledge that they need only disclose this when confronted at some future point, without any other penalty. CSX shareholders would then find themselves with shares in a corporation where control had passed without the opportunity for them to sell their shares at a control premium. (A-5674.)

The district court had broad discretion to enter an injunction. Absent an express indication by Congress to the contrary, the "traditional presumption" is

that courts can use "all available remedies" in actions arising under Section 13(d). *See Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 72 (1992). There is "no authority . . . indicating that private plaintiffs may not obtain permanent injunctive relief [against future violations of the securities laws] to remedy securities violations". *Wininger v. SI Mgmt., L.P.*, 33 F. Supp. 2d 838, 847 (N.D. Cal. 1998); *see E.On AG v. Acciona, S.A.*, No. 06 Civ. 8720, 2007 WL 316874, at *9-10 (S.D.N.Y. Feb. 5, 2007).

Defendants cannot show that the district court abused its discretion. The district court issued the injunction after analyzing the likelihood of success on the merits, the irreparable harm in the absence of the injunction, and the lack of an adequate remedy at law. *See Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 57 (1975); *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006).

On the likelihood of success, the district court made findings of fact relating to the flagrant and egregious nature of defendants' violations.[30] The district court also considered the harm to the interests that Section 13(d) is meant to protect, *Treadway*, 638 F.2d at 380, namely truthful disclosure for the benefit of investors and maintenance of a level playing field that does not unduly advantage either

[30] Defendants' reliance on cases in which the court refused to enjoin "technical" violations that were not "flagrant or deliberate" is misplaced. *E.g. SEC v. Steadman*, 967 F.2d 636, 648 (D.C. Cir. 1992); *see also, e.g., SEC v. Bausch & Lomb, Inc.*, 565 F.2d 8, 18-19 (2d Cir. 1977).

incumbent management or its challenger, *ICN Pharms., Inc. v. Khan*, 2 F.3d 484, 490 (2d Cir. 1993). Defendants failed to show that the district court's findings of fact on likelihood of future violations, irreparable injury and lack of an adequate remedy of law (A-5673-74) were clearly erroneous.

Defendants' argument that injunctive relief, if any, should be limited to the present proxy contest (Defs. Br. 66-88) is just another way of saying that no injunctive relief should issue at all. An injunction against future violations limited to the present proxy contest that has already come to a vote is meaningless.[31] Moreover, the district court specifically found that the wrongs here likely will persist beyond the present proxy contest and even beyond CSX more generally. The 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. Without the district court's injunction against future violations, TCI and 3G will be free to replicate the same stealth attack and reap the benefits with no real consequences. Defendants' protestations that they are the victims of a "novel resolution of what are at best close calls of law" (Defs. Br. 65) are just another attempt by them to "avoid responsibility for their actions" (A-5673).

[31] Indeed, this is one of the reasons why an injunction against the voting of defendants' illegally-obtained shares in the present proxy contest is necessary here. (*See* CSX Br. 52-59.)

Defendants thus cannot show that the district court abused its discretion. As one of defendants' own cases explains, "[a] federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past". *N.L.R.B. v. Express Publ'g Co.*, 312 U.S. 426, 435 (1941).[32] Moreover, contrary to defendants' argument that "blanket" injunctions may be sought by the SEC, but not by a private litigant (Defs. Br. 67 n.5), there is "no authority . . . indicating that private plaintiffs may not obtain permanent injunctive relief [including against future violations of the securities laws] to remedy securities violations". *See Wininger*, 33 F. Supp. 2d at 847. Indeed, such injunctive relief has been issued against defendants in cases involving private plaintiffs just like here. *See, e.g.*, *E.On AG*, 2007 WL 316874, at *9-10.

[32] The other cases defendants cite (Defs. Br. 67) are also inapposite. *Liberty Nat'l Ins. Holding Co. v. Charter Co.*, 734 F.2d 545 (11th Cir. 1984), and *Lewis v. Casey*, 518 U.S. 343 (1996), did not even address the propriety of an injunction against future violations of the securities laws.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: July 18, 2008
New York, NY

Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP,

by

/s/ Rory O. Millson

Rory O. Millson
Francis P. Barron
David R. Marriott
Members of the Firm

825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for Plaintiff-Appellant-Cross-Appellee CSX Corporation

Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,283 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

July 18, 2008

CRAVATH, SWAINE & MOORE LLP,

by

/s/ Rory O. Millson

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CSX CORPORATION,

Plaintiff-Appellant-Cross-Appellee,
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.

Nos. 08-2899-CV (L),
08-3016-CV (XAP)

CERTIFICATE OF SERVICE

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

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

On the 18th day of July, 2008, I served the annexed **RESPONDING BRIEF FOR PLAINTIFF-APPELLANT-CROSS-APPELLEE CSX CORPORATION** upon

Howard O. Godnick, Esq.
Schulte Roth & Zabel LLP
919 Third Avenue
New York, New York 10022

Peter D. Doyle, Esq.
Kirkland & Ellis LLP
Citigroup Center
153 East 53rd Street
New York, NY 10022

by having two (2) true copies of the aforementioned RESPONDING BRIEF delivered to a courier for GLOBALINK, an overnight delivery service, for delivery the next day, to wit: Saturday, July 19, 2008.

Further, on the 18th day of July, 2008, I filed ten (10) copies of the RESPONDING BRIEF with the Clerk of the Court, United States Court of Appeals for the Second Circuit, United States Courthouse, 500 Pearl Street, New York, NY 10007, by delivering same to the above-named courier, for next business day delivery, to wit: Monday, July 21, 2008.

Dated: July 18, 2008
New York, NY

_____
Robert B. Zwillich

ANTI-VIRUS CERTIFICATION FORM

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

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

DOCKET NUMBER: 08-2899, 08-3016

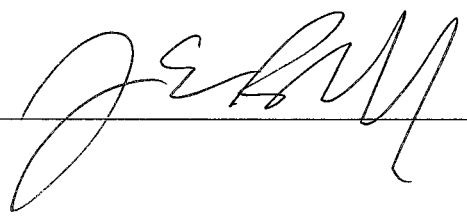
I, (please print your name) Jefferson E. Bell, certify that I have scanned for viruses the PDF version of the attached document that was submitted in this case as an email attachment to

- ☐ <agencycases@ca2.uscourts.gov>.
- ☐ <criminalcases@ca2.uscourts.gov>.
- ☑ <civilcases@ca2.uscourts.gov>.
- ☐ <newcases@ca2.uscourts.gov>.
- ☐ <prosecases@ca2.uscourts.gov>.

and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you used Symantec/Norton Anti-Virus Version 10.1.5

If you know, please print the version of revision and/or the anti-virus signature files _____

(Your Signature) 

Date: 07/18/2008