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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July 18, 2008

CORPORATE DISCLOSURE STATEMENT

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

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

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

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

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

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

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

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

/s/ Christopher Landau
Christopher Landau, P.C.
Counsel for Defendants-Appellees-Cross-Appellants

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INTRODUCTION

CSX certainly has taken to heart the old adage that if the law is against you, argue the facts. That is largely all that CSX's brief does. For forty pages, it goes on with a recitation of supposed facts, larded with distortions, designed to paint a picture of defendants' allegedly "clandestine" efforts to seize control of the company. But that attempt to smear defendants as bad actors is irrelevant to the narrow legal question presented by CSX's appeal: whether the district court correctly held that it could not, as a matter of law, grant CSX the extraordinary and "far reaching" remedy of enjoining defendants from voting their CSX shares at the annual shareholders' meeting on June 25, 2008. SPA103, 115.[1]

That question, as the district court recognized, is answered by this Court's landmark decision in *Treadway Cos. v. Care Corp.*, 638 F.2d 357

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[1] Citations beginning with "SPA" reference documents in the Special Appendix. Citations beginning with "JA" reference documents in the Joint Appendix. "TCI" refers to defendants The Children's Investment Fund Management (UK) LLP, The Children's Investment Fund Management (Cayman) Ltd., The Children's Investment Master Fund, Christopher Hohn (TCI's managing partner), and Snehal Amin (a TCI partner). "3G" refers to defendants 3G Fund L.P., 3G Capital Partners L.P., 3G Capital Partners Ltd., and Alexandre Behring (3G's managing director).

(2d Cir. 1980). *Treadway* rejected the very relief CSX seeks here: an injunction "sterilizing" defendants' shares as a remedy for an allegedly belated disclosure under § 13(d) of the Williams Act. *See id.* at 380. As *Treadway* explained, § 13(d) serves the goal of providing shareholders with information, and that goal is "*fully satisfied* when the shareholders receive the information required to be filed." *Id.* (emphasis added). Once "the informative purpose of section 13(d) ha[s] ... been fulfilled," a plaintiff can no longer show irreparable injury from a § 13(d) violation, and hence there is "no basis for injunctive relief." *Id.* Here, the district court concluded that defendants' Schedule 13D filings provided all material information to shareholders in December 2007, fully *six months* before the disputed shareholder election. Accordingly, the court correctly held that CSX could not establish irreparable injury as a matter of law and rejected CSX's request to disenfranchise defendants.

CSX's various efforts to circumvent *Treadway* are unavailing. *First*, CSX's argument that share sterilization is an appropriate exercise of a court's general equitable powers is wrong, because irreparable injury has always been the *sine qua non* of injunctive relief, and *Treadway* teaches that a § 13(d) violation does not give rise to irreparable injury cognizable under that provision where, as here, all material information has been disclosed sufficiently in advance of a disputed election. *Second*, CSX's argument that share sterilization is necessary to "level the playing field" between incumbent management and dissident shareholders by altering the shareholder electorate is positively Orwellian, because the composition of the shareholder electorate is not a concern of § 13(d), and sterilizing defendants' shares would tilt the playing field dramatically in favor of incumbent management. And *third*, CSX's argument that share sterilization is necessary to deter "defendants and others" from "egregious" violations of § 13(d) is wrong both legally and factually, because such generalized "deterrence" provides no basis for injunctive relief as a matter of law, and in any event (as explained in defendants' opening brief in the cross-appeal) there is nothing remotely "egregious" about the alleged violations of § 13(d) at issue here.

The bottom line here is that CSX is essentially asking a panel of this Court to overrule *Treadway*, which it cannot and should not do. *Treadway* recognizes that the proper scope of relief under § 13(d) is limited to securing the statutory objective of providing shareholders with adequate information and that courts may not use their injunctive powers to tilt the playing field in a proxy contest in favor of incumbent management. The district court correctly concluded that CSX's request for the extraordinary remedy of share sterilization "sweeps too broadly" and is foreclosed by binding precedent. SPA109. Assuming that this Court reaches the remedial issue at all in light of defendants' cross-appeal on liability, this Court should affirm that conclusion.

STATEMENT OF JURISDICTION

The Jurisdictional Statement in CSX's brief is complete and correct.

STATEMENT OF THE ISSUE

Whether the district court correctly held that share "sterilization" is not a permissible remedy for a violation of § 13(d) where, as here, the plaintiff cannot establish irreparable injury cognizable under that provision because all material information required to be disclosed has been disclosed sufficiently in advance of a disputed election.

COUNTERSTATEMENT OF THE CASE AND THE FACTS

To avoid unnecessary duplication, defendants will not reproduce a complete statement of the case and description of the facts here. Instead, defendants respectfully refer the Court to their opening brief in the cross-appeal, which addresses the logically antecedent issue of liability. *See* Defs.' Br. 5-22. This counterstatement is limited to correcting some of the more glaring distortions in CSX's presentation of the facts and describing the very few facts relevant to the narrow legal issue presented by CSX's appeal.

In addition to generally casting aspersions on defendants, CSX's lengthy presentation of the facts is designed to create two impressions. *First*, CSX suggests that it was somehow an unwitting victim of a "clandestine effort to take control" that took the company and shareholders by surprise at the "eleventh hour" before the disputed election. CSX Br. 2, 62; *see also id.* at 5, 27. *Second*, CSX suggests that defendants used "favorably disposed" hedge funds that acted in concert with them to "stuff the ballot box" to achieve their "secret" scheme. *Id.* at 39. Both of these storylines are belied by the actual facts. CSX was not ambushed; it knew about the nature and extent of defendants' investments from the start. Nor did defendants act as Svengalis secretly manipulating some secret cohort of evil hedge funds. CSX's portrayal depends entirely on conveniently omitting myriad facts that contradict its distorted version of events.

It is undisputed that TCI first began investing in swaps referencing CSX common stock in October 2006. SPA18. As the district court found, TCI did not conceal these investments, but informed CSX of them as early as November 2006. SPA18-19, JA246, 447-48. In fact, buried toward the end of its presentation, CSX itself (apparently without intended irony) asserts a number of facts underscoring that it was aware of TCI's interest from the outset. Thus, CSX states that "[o]n October 23, 2006, [*i.e.*, within days of purchasing its first swaps] TCI demanded a meeting [with CSX], representing that TCI had approximately $100 million of CSX stock," CSX Br. 29, and "during December 2006, [TCI] began to investigate the possibility of a [leveraged buyout (LBO)]. ... TCI sent an LBO model to an investment bank ... and subsequently met with CSX's financial advisors to make the LBO proposal," *id.* Thus, CSX's own statements belie any suggestion that the company was taken by surprise at the "eleventh hour" by a "clandestine" and "secret" scheme.

Indeed, in March 2007, TCI made a Hart-Scott-Rodino (HSR) filing notifying federal regulators of its intent to purchase CSX shares valued in excess of $500 million. TCI promptly notified CSX of that filing, and CSX, in turn, disclosed in an April 2007 10-Q filing that (1) TCI had made an HSR filing to acquire more than $500 million of CSX stock, and (2) TCI held "a significant economic position through common stock ownership and derivative contracts tied to the value of CSX stock." JA4964. TCI itself also disclosed its holdings of CSX shares by filing a Schedule 13F in May 2007 stating (earlier than legally required) that it held nearly 18 million shares of CSX stock. Available at http://www.secinfo.com/drHG7.u1x8.htm#1stPage (last visited July 18, 2008). Also in May 2007, TCI partner Amin gave a widely publicized speech at a major transportation industry conference in which he discussed TCI's interest in CSX and criticized the company's incumbent management. SPA26-27. Again, CSX's storyline of a "clandestine" and "secret" scheme does not fit the facts.

3G similarly disclosed its interest in CSX shortly after it began buying the company's stock. 3G made a first purchase of 1.7 million shares on February 9, 2007, and sought a meeting with CSX's CEO later that month. SPA33; *see also* JA4568-70. When that meeting was never scheduled, 3G subsequently disclosed its holdings to CSX in May 2007. JA4588. In June 2007, 3G made an HSR filing to alert federal regulators and CSX of its intent to acquire additional CSX shares, JA2153, and CSX disclosed in a July 2007 10-Q that 3G had made an HSR filing. Available at http://www.sec.gov/Archives/edgar/data/277948/000027794807000067/ documentq2.htm at 46 (last visited July 18, 2008).

Accordingly, defendants' interest in CSX was known not merely to the company itself, but also to regulators and the market, no later than the spring and summer of 2007. And because investors whose intent is passive are not required to make HSR filings, *see* 15 U.S.C. §18a(c)(9), defendants' filings by definition put CSX and the market on notice that defendants' investments in the company might be "active"—*i.e.*, non-passive—investments.

Then, on December 19, 2007, TCI and 3G publicly disclosed that they had formed a "group" to nominate CSX directors. SPA44. With all of this information available to it for months and months, CSX can hardly claim to have been waylaid at the "eleventh hour" before the June 25, 2008 shareholder election.

Equally meritless is the implication that defendants' "clandestine" activities altered CSX's shareholder electorate to include more hedge funds. *See, e.g.,* CSX Br. 39-40. The district court concluded that TCI had informed hedge funds it considered friendly of its interest in CSX, SPA22, but (as CSX itself has conceded) there is nothing unlawful about that. While hedge funds represented a growing portion of CSX's shareholder base in 2007, JA2658, CSX has no basis for its hyperbolic claim that defendants were thereby "stuff[ing] the ballot box," CSX Br. 55. Numerous other factors were at play. During the same period, CSX publicly disclosed defendants' HSR filings, JA4964; Amin spoke publicly about TCI's dissatisfaction with incumbent CSX management, SPA26-27; and, perhaps most importantly, CSX announced an increase in its share repurchase program by an additional one billion dollars, JA224-25. CSX's own proxy solicitor testified that the largest increase in hedge fund ownership correlated with TCI's HSR filing announcing that it intended to purchase over $500 million of CSX stock. JA466. The district court certainly made no finding that defendants' actions altered the shareholder electorate; to the contrary, the court stated only that "[d]efendants' actions *may* have contributed to creating a corporate electorate that is materially different today than it was before defendants made those purchases." SPA 109-10 (emphasis added); *see* *also* SPA113 (referring to "the alteration of the corporate electorate *arguably* effected by defendant's actions") (emphasis added).

As for the facts actually relevant to this appeal, as noted above, defendants filed a Schedule 13D in December 2007 disclosing that they had formed a group and intended to nominate directors. SPA44. The district court expressly found that neither the disclosure of the group's existence—which took place over six months *before* the June 25, 2008 shareholder vote—nor any of the group's subsequent proxy materials were materially misleading. SPA83-87, 89-90. The court thus concluded that shareholders had been provided all information required by § 13(d) well in advance of the June 25, 2008 election. SPA83. As a result, applying this Court's decision in *Treadway*, the district court correctly denied CSX's request for an injunction sterilizing defendants' shares. SPA111-13.

CSX then filed this appeal and sought emergency relief to disenfranchise defendants at the June 25 meeting. This Court denied such relief on June 20, 2008, but expedited the merits briefing schedule. The June 25 election thus took place as scheduled. Notwithstanding CSX's efforts to discredit defendants by trumpeting the district court's decision, the respected independent shareholder advisory firm RiskMetrics/ISS endorsed four of defendants' five nominees. *See* RiskMetrics Group, *M&A Edge Report: CSX Proxy Fight*, available at http://www.issproxy.com/governance_weekly/2008/131.html (last visited July 18, 2008); *cf.* CSX Br. 57 n.39 (relying on the ISS Report as a "public" document). Although CSX has taken the unusual step of announcing that the final results of the June 25 election might not be available until July 25, preliminary results announced by CSX on July 16, 2008 show that shareholders elected four of defendants' five nominees and approved their proposed bylaw amendments. *See* Addendum to CSX Form 8-K (7/16/08), available at http://www.sec.gov/Archives/edgar/data/277948/000095015708000519/ex99-1.htm.

SUMMARY OF ARGUMENT

This appeal begins and ends with the venerable rule that a plaintiff cannot obtain injunctive relief without establishing that such relief is necessary to prevent irreparable injury. Here, as the district court recognized, CSX could not establish any irreparable injury cognizable under § 13(d). Even if defendants' disclosures were untimely, there is no question that those disclosures took place more than *six months* before the contested shareholder election on June 25, 2008. Accordingly, there was ample time for CSX shareholders to digest the disclosed information, and hence no cognizable injury under § 13(d) that would warrant the extraordinary remedy of sterilizing defendants' shares.

There is great irony in CSX's argument that sterilization of defendants' shares is necessary to "level the playing field" here. By seeking to disenfranchise defendants, CSX is seeking to tilt the playing field dramatically in favor of its incumbent management. But that result would turn § 13(d) on its head by transforming that provision from a shareholder disclosure requirement into a weapon for incumbent management to stifle dissent. Nothing in the federal courts' general equitable powers allows such a perversion of the statutory scheme. Because § 13(d) is aimed at the goal of disclosure, any remedy must be tailored to that goal, not *other* goals like altering the shareholder electorate or generalized "deterrence." Once all material information has been disclosed with sufficient time for shareholders to digest it, the interests of § 13(d) have been served, and injunctive relief is neither necessary nor appropriate.

ARGUMENT

The District Court Correctly Held That Share "Sterilization" Is Not A Permissible Remedy For A Violation Of § 13(d) Where, As Here, The Plaintiff Cannot Establish Irreparable Injury Cognizable Under That Provision Because All Material Information Required To Be Disclosed Has Been Disclosed Sufficiently In Advance Of A Disputed Election.

This Court's landmark decision in *Treadway Cos. v. Care Corp.*, 638 F.2d 357 (2d Cir. 1980), controls this appeal. The district court correctly held that *Treadway* forecloses the extraordinary remedy of an injunction sterilizing defendants' shares in the CSX proxy contest, and hence denied such relief. SPA111-13. Each of CSX's arguments seeking to circumvent *Treadway* is unavailing.

A. *Treadway* Controls This Appeal.

Treadway addressed precisely the issue presented here—the availability of injunctive relief to preclude a defendant from voting shares as a remedy for an alleged violation of § 13(d). In addressing that question, this Court started from the premise that irreparable harm is the *sine qua non* of injunctive relief, and that such relief is therefore appropriate under § 13(d) "only on a showing of irreparable harm to the interests which that section seeks to protect." 638 F.2d at 380. Because § 13(d) seeks to protect the flow of material information to shareholders, "[t]hose interests are *fully satisfied* when the shareholders receive the information required to be filed." *Id.* (emphasis added; citing *General Aircraft Corp. v. Lampert*, 556 F.2d 90, 97 (1st Cir. 1977)).

In *Treadway*, the defendant had acquired shares while in violation of § 13(d), but (after eleven months of misleading public disclosures) ultimately made curative disclosures. *See* 638 F.2d at 370-71. This Court held that a four-and-one-half month gap between the curative disclosures and the shareholder meeting gave shareholders "ample time to digest [the] information." *Id.* at 380. As a result, the extraordinary injunctive remedy of sterilizing defendants' shares was neither necessary nor appropriate. Thus, *Treadway* teaches that a court may not enjoin defendants from voting their shares as a remedy for an untimely disclosure under § 13(d) as long as all material information required to be disclosed has been disclosed sufficiently in advance of a disputed vote.

This case is on all fours with *Treadway*. Here, defendants made their § 13(d) disclosures in December 2007, fully *six months* before the contested shareholder election on June 25, 2008. The district court, moreover, expressly found that the disclosures TCI and 3G made were not misleading in any material respect. SPA83-85. Because CSX shareholders thus had more than ample time to digest the information, *Treadway* (as the district court recognized, *see* SPA111-13) forecloses CSX's request for share sterilization.

CSX claims that, while *Treadway* "focused principally" on the "informative purpose" of § 13(d), the court did not suggest that was the *only* statutory purpose that would justify injunctive relief. *See* CSX Br. 48. But *Treadway* rejected *precisely* the share sterilization remedy CSX seeks here, reasoning that the interests that § 13(d) seeks to protect "are *fully satisfied* when the shareholders receive the information required to be filed," and that once "the informative purpose of section 13(d) ha[s] ... been fulfilled, ... there [is] *no basis* for injunctive relief." 638 F.2d at 380 (emphasis added). Needless to say, that reasoning refutes CSX's suggestion that disclosure does not "fully satisf[y]" the interests that § 13(d) seeks to protect and that courts remain free to award injunctive relief to serve *other* interests.

Indeed, courts in this circuit (like the district court below) have had little difficulty in interpreting *Treadway* to teach that "[w]here a corrective filing has been made, and where shareholders have had an adequate opportunity to digest that information, the need for further injunctive relief essentially ceases." *E.ON AG v. Acciona, S.A.*, No. 06-8720, 2007 WL 316874, at *10 (S.D.N.Y. Feb. 5, 2007); *see also ICN Pharms., Inc. v. Khan*, 2 F.3d 484, 489 (2d Cir. 1993) ("When … a corrective filing is made and adequate opportunity is provided for the information that it contains to be digested by shareholders, the corrective injunction should be terminated.") (citing *Treadway*, 638 F.2d at 380); *International Banknote Co. v. Muller*, 713 F. Supp. 612, 621 (S.D.N.Y. 1989) ("To the extent that the statement concerning the Committee's prior intent is inaccurate (and material), … proper relief on these facts would be a curative disclosure, not a preliminary injunction.") (citing *Treadway*, 638 F.2d at 380); *Pantry Pride, Inc. v. Rooney*, 598 F. Supp. 891, 900 (S.D.N.Y. 1984) ("[E]ven if plaintiff proved materially misleading statements or omissions …, proper relief on these facts would be a curative disclosure, not a preliminary injunction.") (citing, *inter alia*, *Treadway*, 638 F.2d at 380); *Raybestos-Manhattan, Inc. v. Hi-Shear Indus., Inc.*, 503 F. Supp. 1122, 1133 (E.D.N.Y. 1980) ("Assuming arguendo that these alleged deficiencies constitute violations of Section 13(d), plaintiff does not show the irreparable injury necessary for injunctive relief in light of the defendant's [curative disclosures].") (citing *Treadway*, 638 F.2d at 380); *Standard Metals Corp. v. Tomlin*, 503 F. Supp. 586, 601 (S.D.N.Y. 1980) ("In *Treadway*, the court held that injunctive relief is available under Section 13(d) only to the extent of insuring that the information currently provided is accurate."). As the district court pointed out, SPA113, CSX cannot cite a single case from any court in this circuit after *Treadway* endorsing share sterilization as a remedy for a belated § 13(d) disclosure.

And *Treadway*'s influence is by no means limited to this circuit. The Fifth Circuit also relied on *Treadway* to reject a post-disclosure share sterilization remedy as a matter of law, explaining that "[t]he *sole* purpose of [§ 13(d)] is full and fair disclosure to investors." *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 715 (5th Cir. 1984) (emphasis in original); *see also Charming Shoppes Inc. v. Crescendo Partners II, L.P.*, Civ. No. 08-1156, __ F. Supp. 2d __, 2008 WL 1959689, at *2 n.3 (E.D. Pa. May 2, 2008) ("[T]he purpose of Section 13(d) is full disclosure .... It is inappropriate to grant preliminary injunctive relief for any omissions or inaccuracies that are later corrected.") (citing *Treadway*, 638 F.2d at 380); *Hubco, Inc. v. Rappaport*, 628 F. Supp. 345, 354 (D.N.J. 1985) ("Where an appropriate amendment to [an improper disclosure] has been made, the violation is usually considered cured.") (citing, *inter alia*, *Treadway*, 638 F.2d at 380); *Energy Ventures, Inc. v. Appalachian Co.*, 587 F. Supp. 734, 743 (D. Del. 1984) ("Once there has been compliance with Section 13(d) through a corrective filing, the purpose of the law has been fully served and there is no threat of continuing harm to the issuing corporation or its shareholders which would justify injunctive relief.") (citing, *inter alia*, *Treadway*, 638 F.2d at 380); *Ludlow Corp. v. Tyco Labs., Inc.*, 529 F. Supp. 62, 65-66 (D. Mass. 1981) (relying on *Treadway* to deny injunctive relief in light of curative disclosure).[2]

[2] *San Francisco Real Estate Investors v. Real Estate Investment Trust of Am.*, 701 F.2d 1000 (1st Cir. 1983), is not to the contrary. Although CSX's *amici* describe that decision as "explicitly endors[ing]" injunctive

Treadway, moreover, faithfully implemented the Supreme Court's decision in *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975). *Rondeau* explained that the purpose of § 13(d) is to "insure that public shareholders who are confronted by a cash tender offer for their stock" or a bid for control through a proxy contest will have "adequate information." *Id.* at 58. Based on this understanding of the purposes of the provision, the *Rondeau* Court rejected some claims of injury (such

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relief under § 13(d) beyond ensuring proper disclosure in adequate time for shareholders to digest, *see* Br. of *Amici* Washington Legal Foundation, National Ass'n of Manufacturers, and Business Roundtable (WLF Br.) 19, the First Circuit held no such thing. Indeed, the passage on which CSX's *amici* rely did not such thing. The First Circuit held only that it would leave in place a preliminary injunction blocking a tender offer "[b]ecause we are *uncertain* whether disclosure is, as yet, complete." 701 F.2d at 1010 (emphasis added). The court thus "remand[ed] to allow the district court to focus on whether ... sufficient disclosure has been made to equip [the target's] shareholders to make a decision." *Id.*

In addition, given that this case is about disclosure, there is at least some irony in the failure of the CSX *amici* to disclose their own links to the company in their brief. As a matter of public record, it appears that CSX is affiliated with both industry groups that sponsored the brief. CSX Chairman & CEO (and third party defendant here) Michael J. Ward is a member of Business Roundtable, *see* http://www.businessroundtable.org//aboutUs/Memberlist.aspx (last visited July 18, 2008), and CSX Executive Vice President–Sales & Marketing and Chief Commercial Officer Clarence Gooden is a member of the Board of Directors of the National Association of Manufacturers, *see* http://namissvr.nam.org/NAMISSvr/NAMBoardOfDirectors.aspx (last visited July 18, 2008).

as the harm to shareholders who may have sold stock during the period of a violation) as not the "type of harm" cognizable under § 13(d). Such shareholders might have an action for damages under § 18(a) of the Securities Exchange Act, the Court explained, but any harm they might have suffered is not cognizable under § 13(d). *Id.* at 60. The only concern of § 13(d) is providing information to shareholders facing a tender offer or other bid for control, and a cognizable injury under that provision, therefore, must be related to that informational purpose.[3]

CSX tries to suggest a loophole in *Rondeau* by pointing out that the case "did not address 'whether or under what circumstances a corporation could obtain a decree enjoining a shareholder who is *currently* in violation of § 13(d) from acquiring further shares,

[3] CSX's *amici* thus miss the point by suggesting that a share sterilization remedy is warranted under § 13(d) based upon speculation that defendants' alleged violation of that provision might have allowed them "to acquire CSX stock at a significantly reduced price." WLF Br. 17; *see also id.* at 25-26 ("[Defendants] used their deliberate noncompliance with the Williams Act as a means of secretly accumulating CSX stock at a price they could not have obtained had they complied with the Williams Act."). Even if such speculation had any factual basis, it has no legal relevance: as the Supreme Court made clear in *Rondeau*, the remedy for any such complaint lies in an action for money damages under § 18(a) by those who sold their stock at an artificially depressed price, not in expanded injunctive relief under § 13(d) for incumbent management.

exercising voting rights, or launching a takeover bid, *pending compliance with reporting requirements*." CSX Br. 45-46 (citing *Rondeau*, 422 U.S. at 59 & n.9) (emphasis added). That point is true, but irrelevant. Whether further remedies are warranted against defendants "currently" in violation of § 13(d) is immaterial where (as the district court found here, *see* SPA83-85) all material disclosures were made long before a disputed election.

CSX cannot cite a single case on point to respond directly to the holdings in *Treadway* and *Rondeau*. Thus, the only cases it cites for the proposition that "[c]ourts have enjoined voting on various occasions" are unceremoniously buried, without any discussion, at the end of a footnote on page 53 of its brief. *See* CSX Br. 53 n.37 (citing *Water & Wall Assocs., Inc. v. American Consumer Indus., Inc.*, Nos. 99-73 & 103-73, 1973 WL 383 (D.N.J. Apr. 19, 1973); *Twin Fair, Inc. v. Reger*, 394 F. Supp. 156 (W.D.N.Y. 1975); *Champion Parts Rebuilders, Inc. v. Cormier Corp.*, 661 F. Supp. 825 (N.D. Ill. 1987)). Even a cursory review of those cases confirms that this is exactly the prominence they deserve.

The first two cases were decided before *Rondeau* and *Treadway*, and are thus irrelevant given later clarifications in the law. *See Water & Wall*, 1973 WL 383, at *11; *Twin Fair,* 394 F. Supp. at 161. In fact, the later of those two cases expressly relied on the Seventh Circuit decision *reversed* by the Supreme Court in *Rondeau*. *See Twin Fair*, 394 F. Supp. at 160 (citing *Mosinee Paper Corp. v. Rondeau*, 500 F.2d 1011 (7th Cir. 1974), *rev'd*, 422 U.S. 49 (1975)). Those courts essentially presumed irreparable injury from a violation of § 13(d), in contravention of the subsequent teaching of *Rondeau* and *Treadway*. *See Twin Fair,* 394 F. Supp. at 161 ("As to possible irreparable injury flowing to [the plaintiff], this court is in accord with the view that having transgressed the Williams Act, [the defendants] have harmed [the plaintiff]."); *cf. Mosinee*, 500 F.2d at 1016-17 ("[W]e are of the view that having transgressed the Williams Act, [the defendant] has indeed harmed [the plaintiff]; that is, pursuant to section 13(d) [the plaintiff] as issuer was entitled to receive a timely filed Schedule 13D."), *rev'd*, 422 U.S. 49.

The third case cited by CSX is not only from an out-of-circuit district court unconstrained by *Treadway*, but also readily distinguishable. *See Champion Parts*, 661 F. Supp. at 853-54. The defendants there did not accurately disclose their holdings and intentions until *after* litigation had begun, by which time "Champion's shareholders … face[d] an illiquid market for Champion's shares." *Id.* at 834, 848. Here, materially accurate disclosures were made six months *before* the disputed election and there is no allegation that CSX stock is anything but highly liquid.

A final point concerning *Treadway* warrants mention. A footnote in that decision left open the possibility that corrective disclosure might not provide a full remedy for a § 13(d) violation and that "disenfranchisement" might be warranted in one circumstance—namely, a situation in which a defendant had already obtained a "degree of effective control" during the period of a § 13(d) violation. *See* 638 F.2d at 380 n.45. The *Treadway* Court "express[ed] no view" on that possibility, because it was not implicated by that case. *Id.* "[The defendant] never had 'a degree of effective control' over [the plaintiff]; [the plaintiff's] other shareholders, now fully informed about [the defendant's] intentions, remain free to accept or reject [the defendant's] overtures." *Id.*

The same is true here. Comparing the facts in *Treadway* to the facts here underscores that, if there was no "effective control" in *Treadway*, there certainly was no "effective control" here. In *Treadway*, the defendant had secured roughly 31% of the voting stock of the company at issue. *See id.* at 360. Under New Jersey law, one third of the voting shares could have blocked any proposed merger or consolidation. *See id.* at 365. The company at issue, moreover, was a small concern with relatively illiquid stock. Here, in contrast, even if voting control of all the stock referenced in the swaps were attributed to defendants (even though the district court expressly refused to find that they had such control, *see* SPA62-63), defendants together never had more than a 21% interest of any sort in CSX, and actually owned only 8.7% of the shares. CSX, moreover, is a highly liquid stock, with over 404 million shares outstanding and several million shares on average trading every day. *See* http://www.nyse.com/about/listed/lcddata.html?ticker=CSX (last visited July 18, 2008). As the ISS Report concluded in its analysis of this proxy contest, "we find little evidence that TCI/3G has sought control of CSX. Minority slate contests do not implicate control, especially where, as here, a majority of the dissident nominees are independent of the lead dissident." ISS Report, at 2. Considering all the facts and circumstances, there is no basis for a finding here (and the district court did not find here) that defendants obtained effective control over CSX during the period of the alleged § 13(d) violation.[4]

CSX does not appear to argue otherwise. To the contrary, CSX dismisses *Treadway*'s footnote 45 as irrelevant "dicta," and insists instead that "[t]he Court's power does *not* depend on defendants' having obtained a 'degree of effective control.'" CSX Br. 48-49 (emphasis added). To the extent that CSX subsequently shifts gears by suggesting that "market realities … demonstrate effective control" here, *id.* at 51, that suggestion is baseless. CSX appears to base that suggestion on the results of voting at the June 25 shareholder meeting. *See id.* Those results, however, do not reflect control accumulated by defendants in

[4] CSX errs by insisting that defendants interpret *Treadway* as creating a "bright line rule" establishing that ownership of 31% or fewer of a corporation's shares can *never* constitute effective control as a matter of law. CSX Br. 49. As defendants have explained, this argument "is a red herring." Opp. to Emergency Mot. of CSX Corp. for an Expedited Appeal 15 n.8. While there may be no bright-line rule, there is also no evidence that defendants here exercised any "effective control" over CSX during the period of the alleged § 13(d) violation.

the form of voting shares *before* the election, which is the only relevant concern; rather, they reflect the choices of *other shareholders* exercising their franchise and endorsing defendants' plans for the company. Election results do not establish pre-election "control." The bottom line here is that the district court could find no path to enjoin defendants from voting their shares in the June 25 election, SPA111-13, because no such path exists.

B. CSX's Efforts To Circumvent *Treadway* Are Unavailing.

CSX tries to circumvent *Treadway* on three grounds. *First*, CSX argues that share sterilization is a necessary and appropriate exercise of a court's general equitable powers to fashion appropriate relief in any case. *Second*, CSX argues that share sterilization is necessary to reconfigure the shareholder electorate and thereby "level the playing field" between incumbent management and dissident shareholders. And *third*, CSX argues that share sterilization is necessary to deter "defendants and others" from "egregious" violations of § 13(d). Each of those arguments is unavailing.

1. Share Sterilization Is Not A Permissible Remedy Under A Court's General Equitable Powers.

CSX first argues that federal courts possess general equitable powers to fashion appropriate relief in any case and that such powers encompass a share sterilization remedy. *See* CSX Br. 42-43 (citing, *inter alia*, *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992), and *J.I. Case v. Borak*, 377 U.S. 426 (1964)). Because "[n]othing in the Williams Act *forecloses* an injunction against voting shares obtained in violation of the Act," according to CSX, such injunctive relief is presumptively available. *Id.* at 43 (emphasis added).

That argument reveals a fundamental misunderstanding of the federal courts' general equitable powers. Contrary to CSX's apparent assumption, those powers are not unbounded, but rather are subject to traditional equitable limitations. *See, e.g.*, *Grupo Mexicano de Desarollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318, 332 (1999). One such limitation is the need for the plaintiff to establish that the injunctive relief requested is necessary to prevent an irreparable injury that cannot be adequately remedied at law. *See, e.g.*, *Rondeau*, 422 U.S. at 57. The problem for CSX is that it cannot establish that share sterilization is necessary to prevent any irreparable injury.

CSX insists, however, that once a private right of action exists under a statute, courts are free to deploy "'all available remedies.'" CSX Br. 43 (quoting *Franklin*, 503 U.S. at 61, 66). But this Court has squarely rejected that sweeping interpretation of *Franklin* in the specific context of § 13(d). *See Hallwood Realty Partners L.P. v. Gotham Partners L.P.*, 286 F.3d 613 (2d Cir. 2002). There, in rejecting a money damages remedy for a violation of § 13(d), the Court emphasized that the "*Franklin* presumption ... is not absolute, and must not be applied irrespective of congressional intent and purposes." *Id.* at 621. A court's remedial authority, in other words, is constrained by the nature of the wrong to be remedied. Because § 13(d) is aimed at providing information to investors, a money damages remedy—which would do nothing to "increase[] the accurate information available to investors"—is unavailable. *Id.* Similarly here, a post-disclosure share sterilization remedy would not advance the informational interests underlying § 13(d), and hence such a remedy is neither necessary nor appropriate to prevent irreparable injury.

2. Share Sterilization Is Not A Permissible Remedy To Alter The Shareholder Electorate.

CSX next argues that defendants' conduct "materially altered the electorate," and that share sterilization is necessary to rejigger the electorate once again. *See* CSX Br. 54-55. Although CSX euphemistically dubs this argument "leveling the playing field" between incumbent management and dissident shareholders, *see id.*, it is readily apparent that incumbent CSX management is really seeking to tilt the playing field dramatically in its own favor. This argument also suffers from a host of flaws.

First and foremost, it is foreclosed by *Treadway*. The plaintiff there sought the precise remedy of share sterilization, and this Court categorically rejected that remedy where (as here) all material information required to be disclosed had been disclosed to shareholders sufficiently in advance of a disputed election. *See* 638 F.2d at 380. That decision would be a dead letter if, as CSX contends, sterilization is warranted to redress an "alteration of the shareholder electorate" notwithstanding full disclosure. Plaintiffs *in every case* could argue that sterilization is warranted because a § 13(d) violation altered the shareholder electorate. The lesson of *Treadway*, as noted above, is that such a remedy strays too far from the informational goals of § 13(d), which "are *fully satisfied* when the shareholders receive the information required to be filed." *Id.* (emphasis added); *see also Gearhart*, 741 F.2d at 715 ("The *sole* purpose of [§ 13(d)] is full and fair disclosure to investors.") (emphasis in original).

Again, *Rondeau* confirms this straightforward point. As explained above, *Rondeau* described the purpose of § 13(d) solely in terms of providing information to shareholders. 422 U.S. at 58. More important for present purposes, *Rondeau* also contemplated that some shareholders would buy or sell stock (and thus that the composition of the shareholder electorate would change) during the period of a § 13(d) violation. *See id.* at 59-60. The Court did not suggest, however, that any such change created an independent injury cognizable under § 13(d). Instead, shareholders who sold their shares have a remedy through an action for damages, while those who retained their shares have precisely the protection that § 13(d) provides: disclosure of information. *See id.* at 60. CSX's argument that "[d]eliberately undermining the shareholder franchise constitutes irreparable injury," CSX Br. 49, is nothing more than an attempt to resuscitate the theory dispatched in *Rondeau* that a violation of § 13(d) invariably inflicts irreparable injury, and justifies injunctive relief, as a matter of law.

Indeed, as this Court recognized in *Hallwood*, adding a remedy to § 13(d) beyond disclosure would "actually *frustrate* congressional purposes." 286 F.3d at 621 (emphasis in original). Congress' objective in passing § 13(d) was to allow shareholders to make informed decisions in contests for corporate control. As the legislative history explains, "[t]he purpose of section 13(d) is to require disclosure of information by persons who have acquired a substantial interest, or increased their interest in the equity securities of a company." S. Rep. No. 90-550, at 7 (1967), *as reprinted in* 1968 U.S.C.A.A.N. 2811, 2818. In achieving that purpose, Congress wanted to remain *neutral* as between management and dissident shareholders, and avoid "tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." *Id.* at 3, 1968 U.S.C.A.A.N. at 2813. To add a remedy for § 13(d) beyond disclosure would be to jettison such neutrality, and to give incumbent management a potent weapon for stifling dissident shareholders. *See generally Hallwood*, 286 F.3d at 621; *ICN*, 2 F.3d at 490.[5]

Thus, far from "leveling the playing field," the share sterilization remedy that CSX is seeking here would tilt the field dramatically in incumbent management's favor. The only persons who are "harmed" by the change in the composition of the electorate are incumbent managers. As the Supreme Court explained in *Rondeau*, shareholders who have sold their stock have protection in the form of an action for money damages and remaining shareholders have precisely the protection § 13(d) provides—information to allow them to make an informed decision. CSX's real concern, as it made clear in its request

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[5] In suggesting that *Hallwood* approved of an injunction designed to "level the playing field," *see* CSX Br. 43-44, CSX mischaracterizes that decision. In the quoted passage, the Court indicated only that injunctions "to enforce [the] duties created by [the] statute," 286 F.3d at 620—that is, to compel disclosures required by § 13(d)—would "increase[] the accurate information available to investors" and thereby further the objectives of the Act, *id.* at 621. *Hallwood* said nothing to suggest that share sterilization was a permissible remedy under § 13(d).

Similarly, CSX's suggestion that *ICN* "contemplates" a permanent ban against participation in a takeover or remedies such as disenfranchisement or divestiture under § 13(d), CSX Br. 47, distorts that decision. The *ICN* Court referred to such remedies only in discussing "illegal inside trading," not in the context of remedies for a § 13(d) violation. 2 F.3d at 491.

for emergency relief, is that "TCI and 3G's ability to have their voice heard is ... magnified" by their purchases during the period in which the district court found a violation. CSX Mot. for Emergency Relief (6/13/08), at 14. In other words, complaints about a "distortion" in the shareholder electorate are really just another way of complaining that incumbent management may be disadvantaged in blocking defendants' proposals for change.

But as other courts have explained, any such "disadvantage created to ... management's resistance to the takeover" provides no basis for injunctive relief under § 13(d). *Gearhart,* 741 F.2d at 715; *see also E.ON*, 2007 WL 316874, at *10 (where one competing bidder complained about changes in the shareholder base, its "actual concern [was] with the impact which [the other bidder's] substantial stock holdings will have on the tender offer battle" and provided no basis for relief because courts "must remain neutral and guard against invoking remedies that may have the effect of favoring one side or the other"). Thus, the district court here correctly concluded that "the alteration of the corporate electorate *arguably* effected by defendants' actions, *which did no more than increase [defendants'] likelihood of prevailing in the* *current contest*, cannot be regarded as irreparable injury that properly may be remedied by preventing the voting of stock." SPA113 (emphasis added).

In the final analysis, to accept CSX's claim that changes in the shareholder electorate warrant interference by the courts to rejigger that electorate would "smack of that very 'tilting' that the Williams Act seeks to avoid, whereby the court, rather than the market forces and the combatting parties, determines the outcome of the struggle for corporate control." *Gearhart*, 741 F.2d at 718; *cf. Chromalloy Am. Corp. v. Sun Chem. Corp.*, 611 F.2d 240, 249 (8th Cir. 1979) ("Further injunctive relief, particularly a cooling-off period, would in the present case serve largely as a dilatory tool in the hands of current management, and for this reason was properly denied."); *Hubco*, 628 F. Supp. at 354 (warning against intrusive injunctive remedies to ensure that "courts will not be called upon to make rulings in the heat of battles for control, which inevitably upset the evenhandedness of the Williams Act as envisioned by Congress"). The proxy contest here was a fair fight. Each side presented its views to CSX shareholders and the market for months. The respected independent shareholder advisory firm RiskMetrics/ISS, which examined the parties' positions in detail and issued its analysis of the contest *after* the ruling below, recommended that shareholders elect four of defendants' five nominees. ISS Report, at 1; *see also id.* at 3 ("[I]n our experience covering proxy fights, we cannot recall an activist investor platform as detailed and nuanced as TCI/3G's."). CSX was hardly a wallflower in this proxy contest; to the contrary, the ISS Report expressed concern over "the troubling corporate governance implications of the company's aggressive proxy defense" as one of the reasons to vote for defendants' nominees. *Id.* at 1. In the end, "market forces and the combating parties" will "determine[] the outcome of the struggle for corporate control" at CSX, *Gearhart*, 741 F.2d at 718, and it is neither necessary nor appropriate for the courts to enter the fray.

Indeed, if courts were free to rejigger the shareholder electorate as a remedy for a § 13(d) violation, there would be no reason for them to stop at simply disenfranchising defendants. If the problem is the composition of the entire electorate—not merely defendants' own votes—then disenfranchising defendants alone does not solve the problem. Even CSX tacitly acknowledges as much by asserting that disenfranchising defendants would address their concerns about the electorate only "in part." CSX Br. 42. CSX presumably does not want to request an electorate-wide remedy, because any such request would highlight the Pandora's box opened up by its legal theory. But CSX's refusal to address the logical implications of its theory does not eliminate them. If courts were free to redress violations of § 13(d) by rejiggering the shareholder electorate, they would become enmeshed in myriad disputes about how to unravel stock transactions to recreate a supposedly "level playing field" that existed at some prior time.

Given that the whole point of CSX's appeal is to challenge the scope of injunctive relief available, CSX is remarkably vague about what it is actually seeking at this point. While CSX argues that "[a]n injunction against defendants' voting the illegally-obtained shares is necessary to promote the Williams Act," CSX Br. 42, CSX is well aware that those shares already have been voted. "An injunction against defendants' voting" their shares, *id.*, thus is no longer an option. But CSX never explains what specific relief it is actually seeking. In its concluding prayer for relief, CSX simply asks this Court to "reverse the district court's determination that it was foreclosed as a matter of law from enjoining the votes" of defendants' shares, *id.* at 60, without ever disclosing what it wants or expects the district court to do then.

CSX's vagueness on this critical point should, at the very least, raise a red flag. CSX undoubtedly would rather not have the Court consider too carefully the implications of the theory that changes in the shareholder electorate constitute a cognizable injury under § 13(d) warranting injunctive relief. But those implications should be clear. Every finding of a § 13(d) violation would potentially plunge courts into the unworkable task of attempting to unscramble a multitude of stock transactions in an effort to recreate some previous "correct" shareholder electorate. After all, in every case there will have been trading in the stock during the period of a violation. And even if a party were willing to forego complete relief restoring the *status quo ante* and were willing instead to accept a temporary sterilization of a defendant's shares (as CSX seems to suggest, *see, e.g.*, CSX Br. 42), that approach would only raise a host of further questions. If a defendant's shares are temporarily sterilized for one election until "the next go-around," CSX Br. 59, what limitations must the court place on *management* to ensure that management does not use the additional time to tilt the playing field unfairly in *its* favor (for example, by amending bylaws to add supermajority requirements)? Indeed, if the real harm warranting relief is the change in shareholder composition, how does a temporary suspension of voting rights directly address that harm at all?

All of these issues are far afield from the sole question that should be the subject of judicial inquiry under § 13(d)—whether shareholders have been provided the information required by the law in time to make informed decisions. If courts were dragged into the sort of micromanagement of unwinding elections or sterilizing votes that CSX's theory portends, § 13(d) will have been twisted into exactly what it is not: a tool for "management to draw the federal courts into factional intracorporate disputes." *Lampert*, 556 F.2d at 95.

3. Share Sterilization Is Not A Permissible Remedy To Deter "Defendants And Others."

Finally, CSX argues that share sterilization is necessary to deter "defendants and others" from "egregious" violations of § 13(d). CSX Br. 53. This theory also suffers from a series of fatal flaws.

First, CSX's deterrence justification rests almost entirely on dicta from a footnote in *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977), in which the Court suggested that injunctive relief beyond curative disclosure might be warranted under § 14(e) of the Williams Act as a deterrent in cases involving the "most flagrant sort of violations," *id.* at 40, n.26; *see also* CSX Br. 46. CSX cannot cite a single case from this circuit in which that dicta actually has been followed. And that is hardly surprising, because the dicta cannot be squared with the holdings of *Rondeau* and *Treadway* that shareholders' interest in adequate disclosure is the only interest that § 13(d) seeks to protect. Indeed, the district court below accurately explained that the clear holding in *Rondeau* foreclosed the deterrence justification suggested in the *Piper* footnote. *See* SPA114-15.

Second, to the extent CSX tries to support its deterrence theory with language from *Rondeau* suggesting that the historic purpose of injunctive relief is "to deter, not to punish," *e.g.*, CSX Br. 46 (quoting *Rondeau*, 422 U.S. at 61-62); *see also id.* at 56, CSX is simply playing word games. The *Rondeau* Court clearly intended to distinguish between deterrence and punishment, even though punishment invariably has a deterrent effect by making an example of those subject to sanctions. In context, that distinction makes sense because what *Rondeau* meant by "deterrence" was simply *preventing* a future violation of the law *by the defendant* by means of an order requiring compliance with the law and making future violations punishable by contempt. In the relevant discussion, *Rondeau* relied principally on *Hecht Co. v. Bowles*, 321 U.S. 321 (1944), a case involving a statute that expressly called for the court, upon a finding of actions violating provisions of the law, to enter an injunction "enjoining such acts or practices" and "enforcing compliance with such provisions." 321 U.S. at 322 (internal quotation marks omitted). The only form of injunction even at issue in *Hecht*, therefore, was an order simply compelling the defendant's future compliance with the statute. The *Hecht* Court concluded that, despite the statute's mandatory language, a district court could decline to issue an injunction where all the facts indicated that the defendant would comply with the law and there was no need for an order requiring compliance to "deter" the defendant from future violations. 321 U.S. at 328-29. Thus, in drawing on the discussion from *Hecht*, the concept of "deterrence" that *Rondeau* was invoking was simply the use of an order that would require compliance with the law and thereby prevent future violations by the defendant.

This understanding is buttressed by the general principles courts have developed concerning the purposes of injunctive relief under the securities laws. As the Third Circuit has explained, the "well established standard developed by the courts to determine if an injunction should issue in a case involving securities violations ... is based on a determination of whether there is a reasonable likelihood that *the defendant*, if not enjoined, will again engage in the illegal conduct." *SEC v. Bonastia,* 614 F.2d 908, 912 (3d Cir. 1980) (emphasis added); *see also SEC v. Kelacorp Indus., Inc.*, 575 F.2d 692, 697 (9th Cir. 1978) ("The primary purpose of injunctive relief against violators of the federal securities laws is to deter future violations, not to punish the violators."). The "deterrence" of which the *Rondeau* Court was speaking was thus nothing more than specific prevention of future violations by the defendant (in other words, specific "deterrence" of the defendant) by an order requiring compliance with the law.

The stock sterilization remedy that CSX seeks here has nothing to do with that sort of order. To the contrary, what CSX seeks is *punishment*. It wants the *in terrorem* effect of a harsh sanction that will generally deter—as CSX itself puts it—"defendants *and others*" from violations of the securities laws by making an example of defendants. CSX Br. 53 (emphasis added). Nothing in *Rondeau* suggests that an injunction can issue under § 13(d) for such a purpose.

Third, even if the footnote in *Piper* were the law and generalized "deterrence" were a legitimate basis for injunctive relief, the *Piper* footnote reserves such a remedy to cases of the "most flagrant sort of violations." 430 U.S. at 40 n.26. This case does not remotely fall within that category. As defendants' opening brief in the cross-appeal makes clear, the district court's rulings here involved novel approaches on each ground of liability. *See* Defs.' Br. 26-64. Indeed, the district court itself recognized that treating defendants as beneficial owners of the shares referenced in their equity swaps would be a novel ruling and thus declined to adopt that rationale. SPA68. But it achieved essentially the same result by holding that defendants should be "deemed" beneficial owners of the referenced shares even though, as defendants have explained, it (i) based its decision on an interpretation of an SEC Rule inconsistent with the Commission's own interpretation of that Rule, *see* Defs.' Br. 30, and (ii) gave critical importance to the fact that defendants were motivated at least in part by a desire to avoid triggering reporting requirements even though such a motivation in itself is perfectly legitimate, *see id.* at 34. As for the district court's finding of an undisclosed "group," it was based solely on circumstantial evidence in an area of the law that notoriously involves difficult questions of line-drawing. SPA81; *see also* Defs.' Br. 58-59. CSX harps on the fact that defendants are "sophisticated" investors and therefore must have known the precise limits of the law. CSX Br. 56. But even the most sophisticated of investors cannot know that a district court will interpret the law in a way in which it has never been interpreted before by any court or the SEC.

Given that the legal questions underlying the district court's conclusion of liability are (to say the least) debatable, this case cannot meet the demanding standard set forth in the *Piper* footnote. After all, that footnote itself begins by warning that "[t]he *legal uncertainties* that inevitably pervade this area of the law call into question whether 'deterrence' of ... violations is a meaningful goal." 430 U.S. at 40 n.26 (emphasis added). That is why the footnote limits any role for deterrence in shaping a remedy to cases involving "the most flagrant sort of violations which *no reasonable person* could consider lawful." *Id.*

Whatever else may be said about this case, it certainly does not fall within that narrow category.

In this regard it is instructive once again to compare this case with *Treadway*. Here, the district court found that defendants' § 13(d) disclosures were *not* materially misleading. SPA81-85. In contrast, in *Treadway*, the defendant had repeatedly made materially misleading § 13(d) disclosures over the course of a year and the court found that its explanations for why it was acquiring stock were not credible. *See* 638 F.2d at 371-72, 380. No matter how many adverse findings from the district court CSX may pack into its brief, there can be no credible assertion that the alleged violations of § 13(d) at issue here are somehow worse in kind from that in *Treadway*, where this Court expressly held that a share sterilization remedy was inappropriate. *See* 638 F.2d at 380.[6]

[6] CSX's reliance on *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), and the "inherent authority" of the federal courts to protect the integrity of their proceedings, *see* CSX Br. 57-58, indicates nothing so much as desperation. The issue here involves the courts' authority to remedy a violation of § 13(d). *Chambers* and the courts' inherent powers to protect the integrity of their proceedings have nothing to do with that issue. To the extent that CSX seeks to suggest that sterilizing defendants' shares would be an appropriate *sanction* for litigation misconduct (apparently reflected in the district court's adverse

CONCLUSION

For the foregoing reasons, this Court (assuming it reaches the remedial issue at all) should affirm the district court's conclusion that share sterilization is not a permissible remedy in this case.

July 18, 2008 Respectfully submitted,

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credibility determinations), that suggestion is baseless. As an initial matter, CSX never made any such argument below, and hence waived it. *See, e.g.*, *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir. 1977). In any event, such an argument is untenable, because a court may not use its inherent authority to protect the integrity of its own proceedings to circumvent limitations on its substantive remedial authority. *See, e.g.*, *Carlisle v. United States*, 517 U.S. 416, 426 (1996).

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 9,104 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 18, 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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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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